

complaint

This complaint relates to accounts that were held by the late Mr F, and is brought by the representatives of his estate. The representatives complain that Lloyds Bank PLC failed in its duty of care to prevent Mr F from being defrauded by a third party.

background

The representatives say that a fraudster had managed to get Mr F to sign a form to give him access to Mr F's accounts with Lloyds. They say that between 2005 and 2009 the fraudster used that access to systematically remove money from the accounts. The representatives explain that at the time Mr F was very elderly and was vulnerable, having suffered several strokes.

Mr F died in December 2009. The representatives believe that the fraudster had tricked Mr F into allowing him third party authority on the account, and concealed the fact that he had obtained a cash card of his own on Mr F's account. They say that the transactions made by the fraudster were quite different to how Mr F had previously conducted his accounts, and this should have alerted Lloyds to his wrongdoing.

They are not satisfied that Lloyds carried out proper steps to ensure that Mr F had validly given the third party mandate on his accounts, before putting the mandate in place – and also say that Lloyds went against its rules by allowing the fraudster to set up online banking on the accounts.

In particular, the representatives say that Mr F's stay in hospital at the time meant that he could not have attended a Lloyds' branch to sign the forms, and so they believe that Lloyds failed to comply with its own internal rules when applying the third party mandate to the accounts.

Following a prosecution, the fraudster pleaded guilty to theft and the court made a compensation order requiring him to repay £10,000. The representatives say this amount is only 20 per cent of the actual amount that was stolen, and only 40 per cent of the total that the fraudster pleaded guilty to taking. They say that Lloyds should make good the difference between the amount the estate has received under the compensation order and the total amount taken from the accounts.

Lloyds said that Mr F had given third party access to the fraudster, and did not accept that it was liable for any loss caused by that. But it accepted some administrative failings in the way it had dealt with the complaint and offered the representatives a total of £350 for that.

The representatives brought the complaint to this service. From the available evidence, our adjudicator did not feel able to uphold it. The representatives asked for an ombudsman's decision, and I summarise the main points they made:

- They have now been able to get a copy of the original mandate form, showing that it was completed and signed at the Lloyds branch on 28 November 2005. For that to have happened, Mr F would have had to go to the branch that day with the fraudster.
- They have also obtained medical evidence to show that Mr F was in hospital from 22 November 2005 and not discharged until 29 November 2005. So he could not have

attended the branch, and the fraudster must have talked Lloyds into ignoring the normal rules and improperly putting the mandate in place.

- In addition, the Lloyds branch where the mandate was registered is very near the fraudster's place of work, but a long drive from where Mr F lived and from the hospital where he was at the time. It makes no sense for the registration to have been made there, and this adds to the likelihood that the registration of the mandate was irregular.
- The mandate form states that Mr F is giving it because he is unable to get about following a stroke. So this is more proof that Mr F could not have gone to the branch and should also have raised questions as to his mental capacity, yet Lloyds did not follow that up before registering the mandate.
- It is irrelevant that the fraudster was trusted by Mr F. That trust is obvious, but should not protect Lloyds where it failed to follow correct process and did not keep Mr F's accounts secure.

This complaint has been passed to me for an ombudsman's decision.

my findings

Preliminary issues

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I was very sorry to read about the thefts from Mr F's account, and the difficulty the representatives have had in trying to resolve this matter. The fraudster was the original executor of Mr F's will, and the representatives had to go to court to have him passed over as executor and take his place. This, and the criminal case, took several years.

I have considered whether this complaint has been brought to our service too late. It relates to events which took place between 2005 and 2009, but our service can normally only consider complaints which are brought within six years of the events complained about. However, we can also consider a complaint brought later than that if it is brought within three years of when the complainant ought reasonably to have known that there was cause to complain. The thefts only came to light after Mr F died in December 2009 (it's not clear how soon after the death this happened), and the representatives first complained to our service in May 2013. This might have been within the three year period, but as that isn't clear I have also considered whether the delay in complaining might be the result of exceptional circumstances, as this would enable me to consider a late complaint. The representatives have said that they were waiting for the criminal case to conclude before pursuing another remedy, and the case ended in March 2013. I think that is a reasonable explanation and the circumstances are exceptional, so this complaint is not out of our jurisdiction.

I have also considered whether the fact that this complaint concerns matters which have already been dealt with by a court should mean that I should not consider it again. But I do not think that it does. The court was not considering the bank's liability. It was only dealing with the fraudster's.

I also take into account the facts that (1) the criminal courts apply a higher standard of proof than this service does, and (2) the courts are bound by rules of evidence, while this service is not. That means that while the prosecution and the court accepted the fraudster's plea of guilty on the basis that he only stole £25,000, I do not have to consider this complaint on that basis. That figure would have been arrived at after considering what could be proved beyond reasonable doubt, having regard to the criminal rules of evidence. But this service applies the civil standard of proof, and a review of the bank statements since December 2005 shows that considerably more than that figure was withdrawn from Mr F's account. I will therefore consider the bank's liability for the loss of all of this money.

Mr F's mental capacity and vulnerability

I have seen Mr F's medical records. But I do not have enough evidence to conclude that he lacked the mental capacity to make decisions, and indeed I am not qualified to do so. To decide that Mr F lacked capacity, I would need to see an expert report to that effect from a suitably qualified doctor, or a court order made under the Mental Capacity Act. So I won't consider that issue.

That does not prevent me from taking into account the fact that the bank had been told that Mr F had had a stroke, and that he was a vulnerable customer. But I have reviewed the bank's policy on dealing with vulnerable customers, and I can't see that Lloyds has breached it. (I have also considered the Financial Conduct Authority's paper on "Consumer Vulnerability," dated February 2015.)

The signing of the mandate form

It is not in dispute that the signature on the mandate form is Mr F's. The issue with the form is that it was not signed by him in the branch, which is the normal procedure. I accept that Mr F was in hospital on the date that the form was signed, as I've seen the hospital records which verify this.

I therefore approach this matter on the basis that the form was signed in hospital by the account holder and that he had the mental capacity to sign it.

The bank has written procedures for its staff to follow when dealing with an application to allow a third party access to an account. The procedures that were in force in 2005 are no longer available, because it is so long ago. But I think it's likely that they were not much different to the oldest procedures still available, and so I have referred to these. They are confidential for security reasons, so I won't disclose them or quote from them. But I can say that while the form should normally be signed in the branch, in exceptional circumstances it is permitted to hand the form out to be signed elsewhere and then returned to the branch. An example of exceptional circumstances given in the document is if the customer is in hospital.

It's not apparent from the form that this alternative procedure exists. The form is designed to be signed in branch, and there is nowhere on the form to indicate when or why the normal procedure has not been followed. That did make me wonder whether the procedure might have changed since 2005. But I have seen the new version of the form which is currently in use, and it's essentially the same as the form that was in use in 2005. It also does not provide a box to be ticked, or a space to be filled in, to show that the form was signed elsewhere than in the branch, or the reason for it.

The representatives have told us that the author of the bank's first final response letter told them on the phone that when the account holder can't attend the branch, a member of the bank's staff should meet him outside the branch. I accept that she told them that, but the written procedure does not mention this, and so I am unable to say that the bank failed to follow its mandatory procedures in dealing with this application.

I therefore find that the form was properly signed and processed, and that the fraudster was duly authorised to access the account on Mr F's behalf.

What was the third party authorised to do?

A third party is allowed to make cash withdrawals, transfer money between accounts, and write cheques. He is given a second bank card in his own name. He is not allowed to use online banking, and statements continue to be sent to the account holder.

There is evidence to show that online banking was set up on the account in 2008. I accept that this was done by the fraudster rather than by Mr F. However I can't see that any withdrawals or payments were made online. The fraudster may have used online banking to monitor the account balance, but he could also have done that at a cash machine using his bank card, so I don't think that any financial loss can be attributed to his unauthorised online banking.

Is the bank liable for the thefts?

The terms and conditions of the account say that the bank "will not be responsible for an act ... of anyone you or the law authorise to operate your account, if we did not know or suspect he or she was acting dishonestly towards you." I don't think that's an unreasonable term. (I have referred to the oldest terms I could obtain, which are dated November 2007. The quoted clause is 26.4. I think it's likely that the previous terms would have contained a similar clause.)

I therefore have to decide whether Lloyds knew or suspected that the fraudster was acting dishonestly towards Mr F during his lifetime. Of course I accept that he was acting dishonestly. And I agree with the representatives that the fact that Mr F trusted the fraudster is not relevant to any liability that Lloyds might have (beyond the fact that Mr F had authorised him to operate his accounts).

The way the accounts were used changed significantly after the third party mandate was authorised. There was a massive increase in spending. Besides Mr F's monthly direct debits to his local authority and utility providers, nearly £17,000 was spent from one account in the first month alone (December 2005). That should have prompted some questions if anyone at the bank had noticed it at the time. But no one did.

This is because banks are not able to routinely monitor all of the transactions on all of the accounts they look after. They do have automated systems in place which might flag particular transactions or spending patterns for review, but those won't necessarily pick up everything.

Also, some change in spending patterns is to be expected after a third party has been authorised to operate an account which the account holder has had difficulty in using. The point is to enable spending which hadn't previously been possible. So it's not inherently suspicious that the account was used more than it had been before.

So on balance, I do not think it would be fair and reasonable to hold Lloyds liable for the thefts carried out on Mr F's accounts.

my final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the representatives of Mr F's estate to accept or reject my decision before 22 June 2017.

Richard Wood
ombudsman