

## **complaint**

Mr P complains that TSB Bank plc (TSB) refuses to refund around £39,000 that he says was taken from his bank account by “an acquaintance” without his authority. Mr P wants TSB to refund his losses and explain why they didn’t spot and prevent the fraudulent spending. He’s also unhappy TSB closed his account.

## **background**

Mr P inherited almost £100,000 from a close relative and deposited this in his TSB current account. A little over three weeks later Mr P contacted TSB to report fraud on his account amounting to around £39,000.

When he reported the fraud he told TSB that he still had his debit card, and he was unable to say how someone else knew his PIN. He later told TSB that a known third party had stolen his card from his home but later returned it. But he still couldn’t say how that third party had known his PIN. TSB declined to refund him; they felt the spending had been authorised by Mr P.

TSB responded to Mr P’s complaint and maintained the decision not to offer him a refund. They said:

- there was no explanation for how the PIN had been compromised;
- the disputed spending did not look like the activity of a third party fraudster;
- one of the merchants was owned by someone known to Mr P and yet Mr P hadn’t approached them for CCTV footage of the fraudster; and
- they had taken the decision to close his account after a risk review.

When TSB sent us their file they said they thought Mr P had made or otherwise authorised the transactions he claimed were fraudulent.

## **What Mr P told us**

Mr P initially told our investigator that after his close relative died he was vulnerable, and had people around him who he now realises he shouldn’t have had in his house. He said he’d been out for drinks one evening and invited a group of people, including the third party, back to his house. He described the third party as someone he “knew of” rather than a friend. The following morning he couldn’t find his debit card. Later he checked his account and realised the balance was much lower than he expected. He said he called the bank to report the transactions, and then rang the third party, and asked him if he had his card. The third party told Mr P he’d picked it up “accidentally”. Mr P’s recollection was that the next day the card was returned through his letter box.

Mr P couldn’t say how the third party had known his PIN, but he said it was possible he’d seen it over his shoulder, perhaps when he entered it at a cash machine during the evening out. He said he didn’t have his PIN written down anywhere. He explained that he hadn’t mentioned this third party when he first contacted TSB because he was scared. He told us that the third party has a history of violence and criminal convictions. He also said that when he contacted TSB he didn’t know that the third party had his card.

Our investigator asked Mr P about his recollection of the events a number of times. Over the course of these conversations Mr P made some changes to his story. He said the following:

- he recalled withdrawing cash during the evening out but thought it was a “small amount” – he estimated this happened between 11pm and midnight;
- he couldn't remember when they'd left the pub or when the third party left his house, but said he would usually stay in the pub until about 11pm and that he would have asked the group to leave his house around 2am;
- he thinks he would have put his card down on a table when he got home;
- he didn't initially think he'd made a transaction to a takeaway delivery company that happened late on the evening out - he's never ordered food from the takeaway delivery company used and it's not something he would usually do;
- he later said he thinks he might have given one of the group his card to order the food and that he probably agreed because he was drunk and taken advantage of;
- he passed out after the evening at the pub;
- he woke up the following morning around 10.30-11.00am and noticed his card was missing straightaway;
- when he couldn't find his card he “panicked” but he wasn't too worried because he didn't think anyone would use it, and he wasn't expecting anyone to take money out;
- he found out how to get in touch with the third party through social media contacts;
- at the point when he rang the third party to see if he had his card he didn't realise there had been any transactions;
- he had an “inkling” the third party had his card but didn't know for sure that's who'd done the spending until he visited one of the merchants and they described the third party;
- one of the merchants where some disputed transactions took place was owned by someone Mr P knew;
- he became aware of the transactions when he went to withdraw cash and saw that he only had “a couple of hundred” pounds left;
- he couldn't remember exactly when the card had been returned through his letter box but said he probably did have the card before he telephoned TSB because it was by using the card in a cash machine he'd discovered his reduced balance;
- it was when he went to withdraw £250 that he noticed the transactions; and
- he'd had papers lying about the house which would probably have shown he'd recently inherited money.

Throughout our investigation Mr P was very keen that CCTV be obtained from the various merchants where the disputed transactions took place. He asked us to think about whether he would have been pushing for that evidence if it he'd done the spending himself. Unfortunately, CCTV has not been available to us. However, although CCTV can be helpful in corroborating a story and identifying whether or not it was the card holder who made the transactions, it wouldn't usually provide a conclusive answer as to whether the transactions were authorised.

### **Our investigator's view and Mr P's response**

Our investigator didn't uphold Mr P's complaint. He said it had been very difficult to reach a view on whether or not Mr P had authorised the disputed spending. But overall he thought Mr P's story about the third party was plausible and the transactions were more likely than not unauthorised. However, he said that TSB were still entitled to hold Mr P liable for the losses because he'd failed with *gross negligence* to meet his obligation to tell TSB about his lost card “without undue delay”.

He also said that TSB hadn't done anything wrong by not alerting Mr P to the spending. He pointed out that Mr P had been making large payments from the account in the preceding

days. And when TSB had blocked the purchase of a watch (from a merchant where a disputed transaction later took place) Mr P had confirmed it as genuine.

Mr P didn't agree with the investigator's view. He accepted that his version of events had not always been clear and that he'd forgotten some of the timings. He said he thought he'd called TSB to report the transactions late afternoon on the day after the evening out.

He also said he'd been suffering "distress and trauma" after his close relative's death, and that going to the pub and having people back to his house was not "a crime". He said he'd been naive to trust the people he was socialising with, but he didn't agree he'd been grossly negligent. Mr P said TSB should have done more to protect his funds. He asked for an Ombudsman to review the case afresh.

### **my provisional decision**

I issued a provisional decision on 7 February 2020. In that decision I acknowledged that when considering what is fair and reasonable, I am required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. I'll set out the relevant considerations below.

Of particular relevance to my decision about what is fair and reasonable in the circumstances of this complaint, are the Payment Services Regulations 2009 (the PSR 2009) which apply to transactions like the ones Mr P disputes. Among other things the PSR 2009 include the following:

Regulation 55 of the PSR 2009 explains:

- (1) A payment transaction is to be regarded as having been authorised by the payer for the purposes of this Part only if the payer has given its consent to —*
  - (a) the execution of the payment transaction; ...*
  
- (2) Such consent— ...*
  - (b) must be given in the form, and in accordance with the procedure, agreed between the payer and its payment service provider.*

Regulation 62 of the PSR 2009 explains:

- (2) The payer is liable for all losses incurred in respect of an unauthorised payment transaction where the payer—*
  - (a) has acted fraudulently; or*
  - (b) has with intent or gross negligence failed to comply with regulation 57.*

Regulation 57 sets out the obligations of a payment service user. It says:

- (1) A payment service user to whom a payment instrument has been issued must—*
  - (a) use the payment instrument in accordance with the terms and conditions governing its issue and use; and*
  - (b) notify the payment service provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument.*

*(2) The payment service user must on receiving a payment instrument take all reasonable steps to keep its personalised security features safe.*

### *Gross negligence*

Whether a customer has acted with "gross negligence" is something that can only be assessed on a case by case basis taking into account all the circumstances. The term is not defined in the PSR 2009 or in the Payment Services Directive. However, recital 72 of the second Payment Services Directive provides as follows:

*"In order to assess possible negligence or gross negligence on the part of the payment service user account should be taken of all of the circumstances. The evidence and degree of alleged negligence should generally be evaluated according to national law. However while the concept of negligence implies a breach of a duty of care, gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness, for example keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties..."*

Reflecting this, the FCA, in its document setting out its role under the Payment Services Regulations 2017, says: *"... we interpret "gross negligence" to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness."*

Although not specific to this case, the FCA's interpretation is of value as a relevant consideration in the absence of contemporaneous interpretive guidance, and because it informs the meaning of a concept that had been in place for some time in the Banking Code.

Negligence is often referred to as a failure to exercise reasonable care. And, as I have described above, the use of 'gross negligence', rather than mere 'negligence', suggests a lack of care that goes significantly beyond ordinary negligence or carelessness. So, if I find the disputed transactions were unauthorised, I have to consider whether Mr P's actions fell so far below the standard of a reasonable person that he failed with *gross negligence* to meet his obligations as a payment service user or to comply with his account's terms and conditions.

### *The terms and conditions of Mr P's account*

The following sections of TSB's Personal Banking terms and conditions are relevant to this complaint:

*4.6 You must tell us as soon as you can (see the contact details section) if you:  
... (c) think any cards or Security Details have been lost, stolen, damaged or are being misused; ...*

*17.3 We may end this agreement (or any account or service under it):  
(a) by writing to you and giving you 2 months' notice; ...*

Having set out the relevant considerations in my provisional decision, in summary, I made the following findings:

- I said there were three key questions relevant to my consideration about what is fair and reasonable in the circumstances:

*Did Mr P give his consent to the disputed transactions?*

*Did Mr P fail with intent or gross negligence to meet his obligations as a payment service user or to comply with his account's terms and conditions?*

*What's fair and reasonable in the circumstances of the complaint?*

- I used what Mr P had told us and the evidence provided by TSB to compile an approximate timeline of how the events unfolded. I noted that Mr P had changed his story (in particular the order of events), but as he said he had his card back when he discovered the transactions (and that is supported by TSB's fraud notes), I said it follows that he must have suspected and contacted the third party, received his card back, noticed his reduced balance, and *then* called TSB.
- I provisionally found that Mr P either made the transactions himself or authorised the use of his card and PIN by a known third party. I said this for the following reasons:
  - Mr P had his card when he reported the transactions to TSB – if a third party had stolen the card from Mr P there would have been no reason for them to identify themselves as the thief and then return the card to him;
  - Although it's possible that a third party observed Mr P entering his PIN during the evening out, I thought it unlikely they'd have committed it to memory in the expectation they'd be invited back to his house and have the chance to take the card later;
  - Mr P's version of events seemed inaccurate based on the transaction timings – the decrease in chip and PIN activity in the pub and a transaction to an off licence later on 5 July suggested that Mr P didn't stay in the pub until 11pm;
  - The pattern of transactions on the day after the evening out is unusual for a fraudster who you'd expect to try to maximise their gain before the card is reported lost or stolen – the spending took place across the course of a whole day at merchants in areas surrounding Mr P's home;
  - The disputed transactions were a combination of high value transactions and more day-to-day spending of the kind that might be expected from the genuine card holder;
  - The available balance of the account was not fully used before the card was returned to Mr P;
  - He's said he noticed his card was missing at around 10.30am on 6 July (the day after the evening out) but there is no evidence he reported anything to TSB until after 6pm on 7 July;
  - He didn't report his card lost even though he suspected it had been taken by a third party who he only "knew of" and who he says he knew had a history of criminality – he had no reason to trust that the third party wouldn't use the card;
  - When his card was returned he still waited to check whether the third party had used it until late the following day;
  - Mr P has not been able to explain why he suspected the third party, rather than any other member of the group, of having his card;
  - One of the merchants where the disputed transactions took place was owned by someone Mr P knew yet he took no steps to secure that merchant's CCTV of the third party completing the transactions;
  - He said he didn't know the third party had done the spending until he visited one of the merchants and they described the third party – I said this seems like an odd detail to add to the story when Mr P supposedly suspected the third party of

having his card, the third party admitted he'd picked it up "accidentally", and after that contact the card was returned to Mr P – I found it implausible that in these circumstances Mr P would have been in any doubt about who'd had his card on 6 July and made the transactions;

- One of the merchants contacted by our service (the merchant where £22,000 was spent) said that their usual practice is to require photo ID of the card holder before accepting a card payment for over £5,000 – this suggests that Mr P would have needed to be present when transactions at that merchant were made; and
  - Mr P said that when he discovered the disputed transactions he had only "a couple of hundred" pounds left in his account, but I thought the balance when he checked it would have been somewhere between £3,000 and £7,000 depending on which transactions were pending at that point.
- Taking all these factors into account I provisionally found that Mr P's story of what happened to his card wasn't credible. Although I accepted there's a possibility that the third party observed Mr P entering his PIN sometime during the evening out, left his house in the early hours of 6 July with his card, carried out almost £39,000 worth of transactions, and then admitted to Mr P that he'd had his card and returned it, I didn't think that's what had happened here.
  - I acknowledged it's possible that Mr P allowed the third party to use his card and PIN for a specified transaction or type of transaction, and that the third party then exceeded Mr P's actual authority while he had the card. That might explain why Mr P has been prepared to report what happened to Action Fraud and name the third party involved. But I said that doesn't mean the transactions the third party made were unauthorised for the purposes of the PSR 2009.
  - Although I provisionally concluded that Mr P made or otherwise authorised the transactions he disputes, I acknowledged this was a finely balanced decision and went on to consider whether he failed with intent or gross negligence to meet his obligations as a payment service user.
  - I said I think a reasonable payment service user who woke to find their card missing after a night drinking with "acquaintances", one of whom they knew to have criminal convictions, would report to their bank that they'd lost their card almost immediately. The risk that someone might be able to make use of their card would have been obvious.
  - I said I didn't think it was reasonable for Mr P to think his PIN was safe – he might not have been able to identify a clear point of compromise, but he knew he'd been in close proximity with people he didn't know well all evening, and now his card was missing. He also knew he had a balance of around £46,000 available. I said he should have recognised his funds were at risk.
  - I said Mr P's decision not to report his card lost or stolen to TSB was significantly careless, and his inaction fell so far below the standard I would expect of a reasonable person in a similar position that I think it amounted to *gross negligence*.
  - So I provisionally found that even if I did think the transactions were unauthorised, I'd still be of the view that TSB would be entitled to hold Mr P liable for the losses.

- With regards to Mr P's complaint that TBS didn't spot and block the activity on his account on 6 July, I acknowledged that it's good industry practice for banks to have in place measures to detect and prevent fraud and financial abuse. Activity such as a sudden increase in spending, changes to the operation of an account, and large value payments could be signs of suspicious transactions which should be verified as genuine with the customer. However, I didn't agree with Mr P that TSB should have recognised the account activity on 6 July as suspicious.
- Given recent account activity, the fact that the high value transactions were all within an area surrounding Mr P's home, and the fact that they were interspersed with more day-to-day spending, I didn't think it unreasonable that TSB didn't block the account on this occasion.
- With regards to the closure of Mr P's account I provisionally found that TSB acted reasonably. They were entitled to view Mr P's custom as a risk, and to mitigate that risk by closing his account. I noted that Mr P was given plenty of notice of TSB's intention (60 days) so that he could make alternative arrangements. This step was also provided for in the terms and conditions of the account.

### responses to my provisional findings

In response to my provisional decision neither party had any comments. However, in response to a request for clarification about the timings of the transactions, TSB confirmed that the card transaction audit they'd previously sent us was in Greenwich Mean Time, not British Summer Time (BST – the time applicable to when these events happened).

TSB also supplied a different version of the card audit report (using BST). This version included the timings of the cash machine transactions, and some additional information about declined transactions and balance enquiries. This information had not been made available before due to technical issues.

Using this information I've updated the timeline I included in my provisional decision.

### timeline of events

Date	Time (BST)	Activity	Amount
16 June – 29 June	/	Mr P made several large value transactions to merchants and payees.	£8,800 - £10,000 x3
29 June	/	TSB blocked Mr P's account in response to his attempted purchase of a watch – Mr P confirmed the transaction genuine and the block was lifted.	£2,900
5 July	6.36pm	Transaction in pub.	£7.00
	7.09pm	Cash withdrawn from cash machine opposite the pub.	£100
	8.36pm	Transaction in pub.	£39.30
	8.42pm	Transaction in pub.	£8.70
	9.09pm	Transaction to an off licence 0.5 miles from pub.	£25
	10.44-46pm	Three failed attempts to withdraw £200 from cash machine opposite the pub.	/
	10.46pm	Cash withdrawn from cash machine opposite the pub.	£150

	11.30pm	Transaction to takeaway delivery company.	£14.49
6 July	12:42am	Cash withdrawn from cash machine a short walk from Mr P's home.	£200
	3:49am	Failed attempt to withdraw £150 from cash machine opposite the pub.	/
	4.04am	Transaction to petrol garage a short drive from Mr P's home.	£31.54
	4.08am	Balance enquiry and cash withdrawn from cash machine at petrol garage.	£60
	12.06 – 07pm	Failed attempts to withdraw £250 and £150 from same cash machine at petrol garage.	
	12.08pm	Transaction to petrol garage a short drive from Mr P's home.	£9.69
	12:25pm	Balance enquiry at a cash machine near shopping centre a short drive from Mr P's home.	
	12.45pm – 7.01pm	28 card transactions to various merchants including petrol garages, sports retailers, pawnbrokers, jewellers, a high-end men's clothing retailer, supermarkets, newsagents, a health-food shop, a chemist, a mobile phone retailer, a beautician and a pub.	£17.10 - £22,000
	8.20pm	Failed attempt to withdraw £150 from cash machine a short drive from Mr P's home, and two declined point of sale transactions for £5.87 each.	
	10.21pm	Failed point of sale transaction for £12.87 at petrol garage a short drive from Mr P's home.	
	unknown	Mr P contacts the third party and confirms suspicion that he has his card.	/
	unknown	Mr P's card was returned to him.	/
	10.58pm	Mr P speaks to a TSB agent via telephone banking and makes a payment to a friend.	£200
7 July	12.03am	Cash withdrawn from cash machine in area local to Mr P's home.	£250
	12.24am	Transaction to a fast food restaurant a short walk from Mr P's home.	£6.79
	8.25am – 4.31 pm	Mr P makes five card transactions to various merchants including supermarkets, a fast-food outlet, and a pawnbroker.	£13.57 - £1,800
	5.58pm	Balance enquiry and failed attempt to withdraw £250 from cash machine a 20-minute drive from Mr P's house.	/
	6.02pm	Mr P speaks to a TSB agent via telephone banking.	/
	6.56pm	Mr P speaks to a TSB agent via telephone banking makes a payment to a friend.	£300
	7.23pm	Notes of Mr P's call attached to fraud claims system.	/

TSB explained in response to my enquiries that the failed cash withdrawal attempts were due to the daily withdrawal limit being reached. There is no evidence of incorrect PIN attempts.

## **my findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I do not uphold Mr P's complaint.

For all the reasons set out in my provisional decision, which I have summarised above, I still think it's more likely than not that Mr P either made the disputed transactions himself or authorised someone else to make them. And even if the transactions weren't authorised, I don't think TSB are wrong to hold Mr P liable because he failed in such a significant way by not reporting his card lost when he had the opportunity to do so.

Mr P has not provided any evidence that would lead me to change my provisional conclusion that he made or otherwise authorised the disputed transactions. Although the card audit report recently provided by TSB does support Mr P's story that he left the pub on 5 July at around 11pm and withdrew cash on the way home, I don't think this makes the rest of his story any more credible.

It is possible that the third party observed Mr P entering his PIN between 6.36pm and 10.46pm, memorised it, left Mr P's house in the early hours of 6 July with his card, carried out almost £39,000 worth of transactions, and then admitted to Mr P that he'd had his card and returned it. But I still don't think that's what's happened here.

I remain of the view that a third party would have no reason to identify themselves and return the card in the way Mr P describes. I also think it's likely a third party would want to maximise their use of the card before detection, but the pattern of transactions here is casual and takes place across the course of a day at locations close to Mr P's home.

It's possible that after leaving Mr P's house the third party failed in their attempt to withdraw £150, decided to try a point of sale transaction, was successful, checked the balance and then withdrew £60 as a 'test'. But I don't think it's likely a fraudster would then have left it eight hours before trying to use the card again.

I also think Mr P's actions when he woke on the morning of 6 July suggest he knew where his card was. If it had genuinely been taken by the third party without Mr P's consent I think he would have reported it much sooner.

Given that Mr P didn't report his card missing until long after the disputed spending, I think it's possible that Mr P gave the third party his card and PIN for some reason, but the third party then exceeded Mr P's actual authority while he had the card. If that's what happened and Mr P placed his trust in someone who went further than what was agreed, I can see why he'd be prepared to name, report and identify them on CCTV. But I'm afraid that doesn't mean the transactions the third party made were unauthorised for the purposes of the PSR 2009.

As I said in my provisional decision, because I've found Mr P made or otherwise authorised the transactions he disputes, I don't really need to consider what the position on liability would be if they were unauthorised.

However, if I'm wrong about how Mr P was involved here and the transactions weren't permitted by him, I still wouldn't be asking TSB to refund him. This is because despite

knowing that his card was lost, and most likely in the possession of a mere acquaintance with a history of criminality, Mr P waited until after 6pm on 7 July to report anything untoward to the bank. Had he reported his card missing at around 11am on 6 July all but about £92.00 of spending by the third party could have been stopped.

In these circumstances I find that Mr P had a serious disregard for an obvious risk, and his inaction amounted to a grossly negligent failure to meet his obligations as a payment service user.

In conclusion, on the balance of the evidence, I think it's more likely than not that Mr P made or otherwise authorised the transactions that he disputes, and also failed to report that his card was lost in a reasonable timeframe. On that basis, I find TSB's refusal to refund Mr P fair and reasonable.

### **my final decision**

My final decision is that I do not uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 30 April 2020.

Beth Wilcox  
**ombudsman**