

complaint

Mr S complains that Clydesdale Bank Plc won't reimburse him for transactions he says he didn't make or otherwise authorise.

background

Mr S had a current account with Clydesdale Bank Plc. In May 2018, he was on a stag weekend with 11 others abroad. On 9 May 2018 prior to leaving, he bought some currency using his debit card. This was flagged as potentially fraudulent and he was sent a text message asking him to confirm if the transaction was genuine. Mr S confirmed it was. As a result of this, and in line with its usual processes, Clydesdale placed an anti-referral marker on the account which meant transactions wouldn't usually be flagged for around a further ten days.

On arrival at his destination, Mr S made a genuine transaction at the hotel he was staying at. Later that evening, he went out with the group for drinks. Mr S says that at some point in the evening, he lost his phone and his debit card, but he doesn't know when this happened. He admits to having had a few drinks that night and cannot recall the names of the venues he visited.

At around 00.40 local time, there was an ATM withdrawal that Mr S said he thought was him, but latterly he doesn't recall. There were then several further attempted ATM withdrawals about an hour later; a number of which were declined for exceeding the daily withdrawal limit of £500. There was a final ATM withdrawal of around £96 at 01:45 which Mr S has said was likely him. Three minutes later was the beginning of a series of transactions over the next 4-5 hours which were carried out in an adult entertainment venue. The last of these transactions was declined due to an incorrect PIN being used.

I have set out a table of the transactions in question and the transactions are shown in GBP (and so would have also been subject to exchange rate fees) and at the local time.

Time	Type	Description	transaction	Allowed	Disputed
11.13	Chip & PIN	Hotel	£12.29	Yes	No
00.40	Chip & PIN	ATM	£231.70	Yes	unclear
01.39	Chip & PIN	ATM	£283.63	No – limit exceeded	
01.41	Chip & PIN	ATM	£241	No – limit exceeded	
01.44	Chip & PIN	ATM	£144.81	No – limit exceeded	
01.45	Chip & PIN	ATM	£96.54	Yes	unclear
01.48	Contactless	Club	£9.13	Yes	Yes
02.09	Chip & PIN	Club	£141.44	Yes	Yes
02.16	Chip & PIN	Club	£50.19	Yes	Yes
02.31	Chip & PIN	Club	£54.75	Yes	Yes
02.46	Chip & PIN	Club	£401.52	Yes	Yes
03.25	Chip & PIN	Club	£301.14	Yes	Yes
04.25	Chip & PIN	Club	£501.90	Yes	Yes
04.58	Chip & PIN	Club	£547.53	Yes	Yes
05.35	Chip & PIN	Club	£538.40	Yes	Yes
05.59	Chip & PIN	Club	£702.66	Yes	Yes
07.05	Chip & PIN	Club	£657.03	No – incorrect PIN	

At 07:51 local time, Mr S's friend called Clydesdale. In this call, the friend explained that they couldn't find Mr S at all and were worried he'd been robbed, so asked if he provided details whether a hold could be placed on the account. Clydesdale explained a hold couldn't be placed on the card, but it could be stopped – which meant Mr S wouldn't be able to use the card at all. The friend provided Mr S's details so the account could be located, and the card was stopped as requested. The friend then said:

I understand you can't discuss transactions with me, I don't know if that is something you can have a look at for yourself, if there is anything unusual. There probably will be a couple of large transactions last night, of a couple of hundred pounds but just in case there's more frequent ones during the night 'cause there shouldn't be any transactions after, maybe, 2 or 3 in the morning. Erm, I wouldn't think anyway, he's been missing for quite a few hours now which is out of character for him; it's just not something he does.

Clydesdale confirmed it couldn't discuss any transactions with him, but also advised that if he was concerned the police should be contacted. The friend confirmed he was already thinking of doing that.

Later that day Mr S got in touch with Clydesdale. He went through the transactions he was disputing. During this call he confirmed the ATM withdrawal of £231.70 was likely him, but he disputed all of the transactions in the club, saying he had never heard of it. Clydesdale explained this looked like a restaurant or a bar, but it didn't ring any bells for Mr S. He queried why he would withdraw cash and then use his card; he also explained he had a pre-paid holiday card which he had been using. Mr S was asked about his security credentials and he explained he had never written his PIN down. The transaction of around £96 wasn't discussed during this call.

Later Mr S discussed the transactions with Clydesdale's fraud department. Mr S was told the transactions he was disputing were actually carried out in an adult entertainment venue and he was asked if he had been to that particular nightclub. Mr S said not. He explained he had been out for a few drinks, he had his cash card with him as well as some cash and at some point in the evening his debit card and phone were stolen. He explained he had used the same PIN for his cash card that he used for his debit card, but it was not written down anywhere. Later during the same call, Mr S admitted he had been in an adult entertainment venue but only for one or two drinks but he still hadn't heard of the club. Clydesdale said the PIN had been entered correctly and there were no balance enquiries, and as such it couldn't substantiate the claim as being fraud and so wouldn't be refunding the transactions.

Mr S complained about the outcome, as he was initially led to believe the transactions would be refunded, a replacement card wasn't requested when it should have been, and he wasn't happy with the service provided by one call handler. Clydesdale upheld the complaint about being misled about the outcome, the delay in the card being requested and the service provided and offered £20 compensation. Mr S appealed that and Clydesdale agreed it hadn't offered sufficient compensation and this was upped to £150 in total. It also said that a chargeback request to the merchant would be arranged and the fraud team would be back in contact once the outcome of that was known.

When Mr S didn't hear back, he complained again. Clydesdale upheld his complaint that he hadn't been told the outcome of the chargeback process (which wasn't successful). It offered £200 for the delay (so compensation now totalled £350). It also reimbursed the transaction of £141.44 (and the foreign purchase fee) that took place at 02:09 as it said it had made an

error during the chargeback process in relation to that transaction. It's my understanding Mr S hasn't accepted any of the compensation offers made.

Our investigator upheld Mr S's complaint. He concluded that Mr S had likely been 'shoulder surfed' at the ATM and following that a thief stole his card (and phone) and made the subsequent transactions. So he asked Clydesdale to reimburse the disputed transactions. Clydesdale is satisfied the transactions were carried out by Mr S and so disagreed. The matter has now been referred to me for review and determination.

Additional relevant information about events are as follows:

- Mr S acknowledged that a fair amount of alcohol had been consumed that night.
- Mr S says that he returned to the hotel with the group and it was then that he discovered his card and phone were missing.
- Mr S, however, also reports that one of the group had been assaulted that night when returning to the hotel with another, and he wasn't with them when this happened.
- Having discovered his card and phone were missing, Mr S says he retraced his steps while his friend called Clydesdale to cancel his card. Mr S hasn't been able to provide any explanation as to why what he is telling us now is very different to what the friend reported to Clydesdale when the card was cancelled.
- Mr S can't recall the name of the venues he went to that night (and he didn't give the names of any venues during the fraud calls). And although he admitted to being in an adult entertainment venue, he was sure this wasn't the club named as payee.
- The friend said there shouldn't have been any transactions after 03:00, and his call to Clydesdale was made at just after 07:00. When asked for his whereabouts during this time, Mr S said he wouldn't have been retracing his steps for this long. He also said the timings with the calls could be wrong as it may have been him who called and not his friend.
- During Clydesdale's consideration of the transactions, Mr S confirmed the first ATM was likely him. But during our consideration of his complaint, Mr S doesn't think he would have withdrawn that amount and it's more likely the last ATM transaction was carried out by him.

I issued my provisional decision on 29 March 2021 explaining why I wasn't minded to uphold this complaint and find that Clydesdale had already made a fair offer to resolve it.

Clydesdale has confirmed it has paid Mr S £350. Mr S explained to our investigator that he was unhappy with the outcome. In summary, he was told the bank would attempt a chargeback but this never happened. He also says the business wouldn't have been able say it was him as it wasn't; and he has never spent this sort of money and you couldn't spend this sort of money.

As both parties have responded to my provisional decision, I can proceed to issue my final decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have considered what the parties have said in response to my provisional decision. I was aware of the issues surrounding the chargeback process, as had already been summarised in the background above, and accounted for when finding the offer made by Clydesdale was fair, and so these points don't alter my provisional findings. As I haven't been persuaded to alter my provisional findings, and I make them final, as set out below.

When considering what's fair and reasonable, I am required to take into account relevant law and regulations; the regulator's rules, guidance and standards, the codes of practice; and, where relevant, what I consider to have been good industry practice at the relevant times.

The events complained of took place in May 2018, so of particular relevance to my decision are the Payment Services Regulations 2017 (PSRs) – which apply to transactions like the ones made from Mr S's account. I've considered the relevant provisions of the PSRs alongside the contractual terms and conditions of Mr S's account.

Taking those into account there are two key questions relevant to my consideration:

1. Were the transactions authorised by Mr S; and
2. If they weren't, did Mr S fail with intent or gross negligence to comply with his obligations under the PSRs, i.e. to comply with the terms and conditions of the account, and to keep the personalised security details and payment instruments safe?

If I find Mr S made, or otherwise authorised the transactions, I don't need to consider point 2 above.

The first transaction in question took place at 00.40 local time. Mr S has contradicted himself, saying both that this was him, and that he didn't think it was. I appreciate these transactions took place some years ago, and I understand Mr S had been drinking which might make exact recall difficult. But even when discussing the matter with Clydesdale later that day, Mr S was somewhat noncommittal. So it's hard to know whether Mr S truly disputes this transaction was carried out by himself.

What we do know is that the previous transaction to this was carried out at the hotel, which Mr S did recall. That was completed by Chip and PIN. The transaction at the ATM was also a Chip and PIN transaction. If this ATM transaction was carried out by a thief, it means the only place the PIN could have been discovered was from the transaction (as Mr S says it wasn't recorded elsewhere) which took place over 12 hours earlier. I consider such a delay to be highly unlikely behaviour for a thief; our experience is that a stolen card would be used as quickly and for as much as possible. If a thief were to wait, that risks the card holder becoming aware of the theft and cancelling the card. It seems more likely to me that it was Mr S who made that initial transaction. I say this because there were no balance enquiries made before this transaction and no incorrect PIN entries. And when discussing the transactions with Clydesdale a few hours later, Mr S said this was him. I place greater weight on what Mr S initially said to Clydesdale then, which was only a few hours later, than what he recollected to our investigator a few years later once the circumstances were in dispute.

About an hour later, there were three attempts to withdraw further funds. Each of these requests were declined as the daily withdrawal limit would have been exceeded. There was then a final, successful withdrawal of around £96 at 01:45. I have noted that each of the attempts reduced in amount – it would appear that whoever was trying to withdraw funds was trying to reach a request that would be allowed. This can sometimes indicate a card has been stolen as a thief wouldn't necessarily know a particular daily limit. But that isn't the only possible explanation. It's equally indicative of someone that has simply forgotten what has been withdrawn before, particularly when alcohol has been consumed. There is no indication that wrong PINs were attempted on these occasions.

Having considered this carefully, I'm persuaded this was also Mr S. I accept it is possible his card might have been stolen after the first ATM transaction and that he was 'shoulder surfed' to obtain the PIN credentials. But an opportunistic thief probably wouldn't wait for nearly an hour to use their ill-gotten gains, for reasons I have already explained. In reaching this conclusion, I have borne in mind that Mr S has said he thought this transaction was him, and that he did withdraw cash from an ATM at some point during the evening.

The next transaction was the first to take place in the club. This was a contactless transaction for around £9. Importantly this took place just three minutes after the last ATM transaction. This suggests to me the ATM was either in very close proximity to the club, or inside the venue itself. I have thought about whether it was at this point Mr S's card might have been stolen or his PIN gained by shoulder surfing. But I find it difficult to accept that an opportunistic thief could take just three minutes to watch Mr S use his card and enter his PIN, then somehow steal the card without Mr S realising *and* enter the venue *and* carry out the first transaction.

I would also question why a thief, having stolen a card and gained the PIN, would then 'spend' money in a venue rather than use the card for their own gain; there would be no financial benefit to the thief for the risk they took in stealing the card, as any money spent on it would go to the venue and not them. Given the sequence of events up to this stage, I think the most likely explanation is that it was Mr S.

All of the remaining transactions that Mr S disputes took place in the club. They are for varying amounts and over the course of 4-5 hours. I accept some of the amounts spent are for high amounts. But given that Mr S and his group were on a stag weekend, and that they had been drinking, it seems entirely plausible to me that these transactions were carried out by or on behalf of Mr S buying drinks for himself and the group. And Mr S does admit to being in an adult entertainment venue that night, albeit he can't recall the name.

This is supported by what Mr S's friend reported when he contacted the bank at 07:51 local time, to request the card be stopped. I know Mr S has recently speculated the times of the calls might be wrong, or it might have been him that called the bank. This speculation and lack of clear recollection calls into question what Mr S has told us to date. Nevertheless, I have listened to the call. And I'm satisfied it wasn't Mr S that spoke with the bank to cancel the card. Importantly during that call, his friend tells the bank that Mr S was spending on his card and that there '*will be a couple of large transactions last night, of a couple of hundred pounds*'. He also says there shouldn't be any transactions after 02:00-03:00. The amounts and time frames mentioned in this call match some of the transactions that Mr S disputes.

Mr S's friend was clearly very worried about him. And I have no reason to doubt what was said during that call, as evidence from the time is often more persuasive, especially if a witness is under pressure (so more likely to be truthful). I can find no plausible reason as to why the friend would (unhelpfully) say Mr S had been spending large sums, if he hadn't been.

I have considered that some of the transactions took place after 03:00. However, I have also noted that his friend reported that Mr S had been missing for '*quite a few hours now*'. It seems to me 'a few hours' conceivably covers the transactions which took place after 03:00 – which his friend wouldn't necessarily have known about had Mr S split from some or all of the group; he could have either stayed in the venue or returned to it at some point.

I have taken into account that Mr S says he was retracing his steps to look for his card and phone and that it was he who asked his friend to call Clydesdale. But he hasn't provided any explanation at all as to why his version of events is so very different to what his friend reported to the bank that morning. It seems unlikely that a friend would say he was missing if he wasn't. It seems to me that if I prefer Mr S's version of events over his friend's, then his friend lied to bank (for no apparent reason). But if I prefer what the friend said, then Mr S isn't being honest with us now (whereas he does have a motive for that, namely, the disputed transactions). Either way, it would appear that someone hasn't been honest about what happened.

All of the transactions were made using Mr S's card, and all but one transaction was carried out using Mr S's security credentials – the PIN. That means all of the transactions were authenticated. And for the reasons given, I'm satisfied those transactions were either carried out by Mr S, or someone he allowed to do so on his behalf. That means he consented to the transactions and so they were authorised, such that I don't find Clydesdale acted unfairly or unreasonably when holding him liable for them. It follows that I won't be asking Clydesdale to reimburse Mr S for any of the transactions in question.

Mr S has argued that he has never spent this sort of money and that you couldn't do so – but I think that very much depends on what is being bought. It seems entirely conceivable to me that such sums can be spent in an adult entertainment venue when with a large group of friends and so I don't find this argument persuasive.

Clydesdale had already offered Mr S a total of £350 for how this matter has been handled: for the wrong information given and delays. I found that to be a fair reflection of the inconvenience Mr S was put to when Clydesdale looked into the matter. Clydesdale now says that has been paid to Mr S, and as such I make no further award against it.

my final decision

For the reasons given, my final decision is that I don't uphold this complaint. The offer Clydesdale Bank Plc had made was fair, and I understand it has now been paid and so I don't require it to do anymore.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 27 May 2021.

Claire Hopkins
ombudsman