

complaint

Mr D is unhappy that National Westminster Bank Plc (“NatWest”) won’t reimburse money he says was taken fraudulently from Mrs D’s account. Mr D brings this complaint in his capacity as the executor of Mrs D (his late-wife’s) estate.

background

In October 2017 Mrs D opened a current account with NatWest. Over the next two months or so a series of deposits were made to the account bringing the balance to around £44,000.

Mrs D gave her card and PIN to her husband, Mr D, as she said work commitments often meant she didn’t have time to make deposits and check the account. On 9 December 2017 Mr D made a deposit in branch of around £700 and then used the card and PIN at an ATM outside to make a balance enquiry. He says when he did this, after dispensing the balance enquiry slip the card was retained by the ATM. Mr D says he waited several minutes for the card to be returned but it wasn’t released, so he went back into branch to report the problem.

Mrs D says branch staff told him he would have to come back the following Monday, two days later, to retrieve the card as there was no-one to access the machine at that time. She also said staff refused to cancel the card because they said it was safe in the ATM.

Mrs D believed her card was taken from the ATM by someone who then used it, together with her PIN, to make one cash withdrawal and eight in store purchases all on the same day totalling £43,412.

On 10 December 2017, Mrs D reported transactions on her card had been carried out without her authorisation to NatWest. The card was cancelled and NatWest investigated Mrs D’s claims, but didn’t feel there was enough evidence to support her assertion that fraud had taken place. Following its investigation it also made the decision to close the account with notice in line with the terms and conditions.

NatWest said it made this decision because:

- Mrs D had breached the terms and conditions of the account by giving her card and PIN to another person.
- There was no evidence Mr D had gone into branch after he said the card was retained by the ATM to report this or that he was told he would need to come back the following Monday.
- Mr D says he waited for the card to be returned by the machine for around five minutes but the card was used again one minute and nine seconds after Mr D used it to make a balance enquiry and the ATM itself was used 90 seconds after his balance enquiry.
- It hadn’t been given a plausible explanation as to how the card was both retained by the machine and accessed by someone else who then used it so soon afterwards.
- The card and PIN were used correctly on the first attempt after Mrs D says it was stolen.
- The account was open for less than three months before the transactions took place.

Mrs D brought the complaint to our service as she didn’t feel NatWest had treated her fairly. Our investigator didn’t uphold the complaint as they didn’t feel there was enough evidence to

support fraud had taken place. They also noted inconsistencies in the story given to NatWest about a third party who had tried to distract Mr D while he was using the ATM.

Mrs D didn't accept the investigator's view. She said:

- NatWest should have had CCTV footage available which would've shown Mr D went into branch after the incident and would've shown suspicious activity at the ATM.
- NatWest should've contacted Mrs D as the transactions were made due to their high value and sought further authorisation before allowing them to go through.
- NatWest should've contacted the retailers where the money was spent to check the CCTV footage and investigate who was using the card.
- Mr D had never said someone at the ATM was trying to distract him, only that they were stood too close to him and at no point has he suggested someone took Mrs D's card from him.
- The age of the account was irrelevant.

As Mrs D didn't accept the investigator's findings she asked for the complaint to be considered by an ombudsman. After she made this request via her representative, Mrs D sadly passed away and the complaint has continued with authority from Mr D who had also been acting as one of her representatives throughout the complaint. It has now been passed to me to make a 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.

The regulations relevant to this complaint are the Payment Services Regulations 2009 (PSR's). I won't quote them directly here but, broadly speaking they set out when a customer is responsible for the transactions on their account – typically when they've been authorised by the consumer in some way. And where there's a dispute about whether a customer authorised a transaction there needs to be evidence to support the bank's case if it wishes to hold the customer liable.

In this case, Mrs D said she gave her card and PIN to Mr D so he could carry out certain transactions on her behalf. And I'm satisfied this means Mrs D authorised the transactions Mr D carried out using her card and PIN, even if they went beyond what she intended.

Mrs D said Mr D didn't carry out any of the disputed transactions and they must've been carried out by another party. But NatWest thinks it's likely they were carried out by Mr D and therefore authorised by Mrs D. My role is consider the information available and decide whether I think NatWest has acted fairly and reasonably in reaching the conclusion he more likely did carry them out and holding Mrs D liable for them.

Where evidence hasn't been available I've based my decision on what I think, on balance, is more likely to have happened. And in this case I think it's more likely than not Mrs D did authorise the transactions she's disputed. So I think NatWest has reasonably held her estate liable for them. I've taken the following into account when reaching my decision:

- Mrs D said her card was swallowed by the ATM. As someone has then been able to access it, along with her PIN, she suggested the ATM must've been tampered with. But records from the ATM Mr D used show it was used by a different customer 93

seconds after the balance enquiry he made. And records relating to Mrs D's account show her card and PIN were used at a different ATM, correctly on the first attempt, 69 seconds after Mr D made the balance enquiry. I don't think it's plausible someone had enough time to tamper with the machine, retrieve Mrs D's card and go to a different ATM on the same street. And the records from the first ATM show no error which isn't what I'd expect if it had been tampered with. So I don't think there is persuasive evidence this is how the card was accessed by a third party.

- I've considered the possibility a third party somehow saw Mrs D's PIN and took her card while Mr D was using the ATM, but based on everything I've seen I don't think this is the most likely explanation. When the incident was reported NatWest recorded that Mr D said someone behind him distracted him and he had to tell them to stand back. In a letter of complaint written to branch he described the person's appearance in detail and said they were acting suspiciously, referring to him as a 'scammer'. And when he first spoke to our service about the complaint on behalf of Mrs D he said someone behind him most likely used something to see Mrs D's PIN. Following the investigator's view, he asserted he had never suggested someone had tried to distract him to take the card, only that they were too close to him and he told them to stand back. And although the incident was some time ago, I think Mr D would likely have remembered at the time if something had happened that could've allowed a third party to steal the card directly from him. Overall, I don't think I've seen a plausible explanation as to how the card could've been stolen from Mr D without him noticing.
- There is some inconsistency in what happened after Mr D said the ATM withheld the card. In a complaint letter to NatWest Mrs D said Mr D waited for five minutes before watching other people use the ATM normally. In response to the investigator's view he's said he waited one or two minutes, before going into branch to report a problem. I think a reasonable person likely would wait a few minutes to see if the card was returned, but it doesn't seem plausible that he did do this given the card was used at another cashpoint within 69 seconds of him checking his balance. If he had waited and a third party had been involved in the way he and Mrs D suggests, it seems likely he would've seen that individual tampering with the machine and retrieving the card.
- I have some difficulty understanding why Mr D used the ATM outside the bank to check the balance of the account when he'd just made a cash deposit in branch and could've checked the balance at the same time.
- The bank's records don't reflect Mr D's assertion that he went into branch to report the card had been retained and was told to come back the following Monday or that he was told he couldn't cancel the card because it was "safe" in the ATM. And when asked, branch staff have no recollection of this. And NatWest has shown me this isn't generally the process it would follow when someone reports a card has been swallowed by an ATM. So I don't think I've seen sufficient evidence here that Mr D did ask for the card to be cancelled. But I also think, even if staff had refused to do this, it would've likely been possible for him to arrange for Mrs D to call and cancel it as she appears to have done the next day.

Mr D has commented the phone number to call in order to cancel the card was on the card. But I'm satisfied a reasonable person could've found this number by other means. And whilst I understand Mrs D was unhappy there is no CCTV footage available to prove whether he was in branch, NatWest isn't required to have CCTV footage available. In its absence, I've had to base my findings on the evidence available.

- Mr D has said he was in branch for over 90 minutes after the card was swallowed by the ATM while many of the disputed transactions were taking place which proves he didn't carry them out. But there's no supporting evidence that make me think this was the case. The branch staff do recall Mr D returning to branch after the transactions had been disputed and complaining about this but have no recollection of him having been there the day he says the ATM kept Mrs D's card. And I can't see any reason Mr D would've stayed in branch for over an hour to report the card had been swallowed. Especially as he's said staff refused to help him and told him to come back the following Monday.
- Mrs D opened the account less than three months before a substantial balance was spent in the series of transactions she's said weren't authorised by her. There's no general day to day spending on the account and I don't think Mrs D has been able to give a plausible reason for having opened the account. Whilst she said it relates to a mortgage she'd applied for with a lender also under the NatWest umbrella, I don't think she provided a persuasive explanation as to why these events were related. I've not been made aware of any reason she would need a current account with a linked bank in order to pay a lump sum off her mortgage. And Mr D told our service all the funds in her NatWest account were moved over from another current account so it's unclear why she wouldn't have been able to use this to pay the funds to the mortgage lender. And whilst in itself it's not necessarily a concern to open an account for this type of activity, when considered in the round with some of the other inconsistencies in the estate's version of events, I think NatWest was acting reasonably in taking this into consideration.
- NatWest has provided evidence that Mrs D has previously opened and closed a current account with another bank within three months. And again, although this in itself might not necessarily be a concern, I think it's reasonable NatWest took this into account when considering the complaint overall.
- Mrs D has said NatWest ought to have intervened when the disputed transactions were attempted and contacted Mrs D for additional authorisation before allowing them to go through. But there was no agreement or requirement between Mrs D and NatWest that meant it required further authorisation than her card and PIN. I would expect NatWest to have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among other things) in order to try and prevent financial harm. But I don't think Mrs D was a victim of a financial crime in this case. So whilst I am somewhat surprised to see that this sequence of high value transactions didn't prompt intervention from NatWest, I don't

think it failed to protect Mrs D as I think it's more likely than not that she authorised them.

- Mr D has said NatWest should've obtained and checked CCTV footage from each store where purchases were made. This isn't something I'd expect it to have done. And Mrs D has said NatWest told her she could obtain this evidence herself for consideration. So I'm satisfied she could've attempted to obtain this information herself and that she knew NatWest wasn't going to do this. But in any event, I think it had enough evidence without this to support the payments were more likely than not authorised by Mrs D. So I'm satisfied NatWest has reached a reasonable conclusion without it.

In this case I've thought about whether or not Mrs D was grossly negligently in breaching the terms and conditions and allowing Mr D to have access to her card and PIN. But as I've concluded she more likely than not authorised them, and think it's reasonable her estate is liable for them, there's no need for me to comment on this point further.

Overall, I think NatWest has sufficient evidence to support that Mrs D likely did authorise the transactions in question and should be liable for them. And although no longer part of this complaint as it's now being brought by her estate, I'm satisfied NatWest did have the right to close her account in line with the terms and conditions.

my final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D, as the executor of the late Mrs D's estate, to accept or reject my decision before 23 March 2021.

Faye Brownhill
ombudsman