

## **complaint**

Mr M complains on behalf of his mother, Mrs M, that AIB Group (UK) Plc blocked access to her account, and about some related issues.

## **background**

Mrs M is an elderly lady in her eighties. She lives in Northern Ireland with some of her adult children. In 2016 she executed an enduring power of attorney (EPA) in which she named two of her children as her attorneys (neither of them was Mr M).

In May 2017 an application was made to the Office of Care and Protection (OCP) (which is part of the High Court of Northern Ireland) to register the EPA. This was contested by Mr M and another of Mrs M's children. As a result of discussions held in the course of the hearing, the application was withdrawn, and the EPA was cancelled. Since then there has not been another power of attorney or controllership order.

Also in May, Mrs M visited a branch of AIB to make a large withdrawal. Mr M says that during the visit, and another visit in June, she was seen by members of AIB staff who were satisfied that she had mental capacity. In the June visit, Mrs M gave written authority for Mr M and another of her sons (one of the former attorneys) to have third party access to operate her account for her.

Four and a half months later, in October 2017, a solicitors' firm obtained a court order from the OCP authorising AIB to pay its costs for the May hearing from Mrs M's bank account. The result was that AIB immediately blocked Mrs M's account. This automatically terminated the third party mandate. Mrs M did not discover that her account had been blocked until two days later, when she tried to use her bank card and it did not work. Mr M complains on her behalf that AIB did not notify Mrs M that the account had been blocked.

In November AIB, having taken advice from its legal department, paid the solicitors' firm, but decided not to lift the block on the account until it was provided with a letter from Mrs M's doctor verifying that she still had mental capacity. AIB told one of her sons (not Mr M but the other person named on the third party mandate), who in turn told the solicitor. The solicitor asked AIB to unblock the account, and emphasised that there was no EPA in place, but AIB said that the doctor's letter was still required.

In December, Mr M complained to AIB. AIB still insisted on seeing a doctor's letter before it would unblock the account, but offered to allow Mr M to withdraw £200 from the account to meet Mrs M's reasonable living expenses (if he provided a letter signed by her requesting this). Mr M declined that offer, which he describes as "patronising and pathetic," and in May 2018 he brought this complaint to our Service. Mrs M has signed our complaint form nominating Mr M as her representative.

As well as complaining that AIB didn't notify Mrs M about the block, Mr M argues the following points:

- AIB had no reason to doubt Mrs M's capacity, since it had already seen her in May and June and not raised any concerns at the time. He said her capacity had never been in issue during the court proceedings. There was no longer an EPA in place.
- Mrs M's doctor was not willing to write a letter about Mrs M's capacity, as Mr M says this is not the role of a doctor. AIB was therefore asking the impossible. But even if

the doctor could provide the letter, Mrs M was not willing to obtain it because she feels that she shouldn't have to jump through hoops to access her own money.

- A member of AIB staff was rude to Mr M in a phone call on 14 December 2017.

AIB says that it was concerned about Mrs M's capacity because it is not necessary to obtain a court order to cancel an EPA – they can be cancelled at will. Instead, someone had spent over £700 on instructing solicitors to appear at a court hearing about the EPA. It was AIB's policy in such circumstances to ask for a doctor's letter to confirm whether a customer has capacity or not, and to block their account in the meantime. It has offered to pay for the cost of getting a letter. It said it had communicated with Mrs M's family and their solicitor about the block in November and December 2017. Its staff member denied that she had been rude to Mr M on the phone, but she offered her apologies, personally and on behalf of AIB, if she had said anything to upset Mr M.

Our adjudicator did not uphold this complaint. He thought there was nothing with AIB asking for a doctor's letter, as it was only doing so in order to protect a vulnerable customer. The inconvenience to Mrs M was mitigated by AIB's offer to let her have £200 at a time to meet her living expenses. The bank had discussed the block with the family's solicitors in November 2017, and had tried to contact Mrs M directly in December (but had not heard back from her in person). No recording of the phone call was available, but other members of staff had overheard the call and hadn't thought their colleague had been rude.

Mr M did not accept that decision, and he asked for this complaint to be reconsidered by an ombudsman. The case was initially assigned to another ombudsman, who wrote a provisional decision upholding this complaint. She thought that AIB had never had reasonable grounds for suspecting that Mrs M lacked capacity, since there was nothing in the court order from May 2017 to suggest anything of the sort. The EPA had been ended on the day of the court hearing in May, and had not replaced it with a new order. AIB hadn't even known there ever was an EPA until October, long after it was cancelled, when there was no longer any reason to think capacity was an issue. So she said she was minded to order AIB to allow Mrs M, and also Mr M on her behalf, to have access to her account. She did not have power to award compensation to Mr M (because he was only Mrs M's representative, not an eligible complainant in his own right), but she was minded to award compensation to Mrs M, and she invited submissions about how much this should be.

Because her opinion was different to the adjudicator's, the ombudsman wrote a provisional decision, in line with our normal practice. (Both parties made further submissions, but I have already summarised them above, rather than describing everything in strict chronological order.) In June 2019, due to the long time that this case had been with our Service and having regard to Mrs M's advanced age, this case was re-assigned to me (with the original ombudsman's consent) so I could write a final decision without further delay. I have read the full case file, and I also discussed this case with the original ombudsman, but the responsibility for this final decision is entirely mine.

### **my findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I only uphold the complaint about AIB failing to notify Mrs M that it had blocked her account. I do not uphold the rest of this complaint. I will explain why.

I will deal first with the part I am upholding. The account was blocked in October; Mrs M found out two days later when she tried to use her card; and the email exchange AIB seeks to rely on in its defence happened in November. That was too late, and so were AIB's attempts to contact Mrs M directly in December. Mr M's point is that his mother – or at least her sons who were named on the third party mandate – should have been told about the block on the same day, precisely to avoid her finding out the hard way, and I agree with him. That caused her some inconvenience and it no doubt was annoying, and I think an apology would not be enough in this instance. I think that some financial compensation is warranted, and that £50 is fair.

I can deal with the phone call briefly. The call recording is no longer available (they are not kept indefinitely), and so the only evidence is, on one hand, what Mr M has told us, and on the other hand, what the AIB staff members have told us. I have no reason to think that either side is lying, and it is more likely that each side is telling us their honest recollection of what was said and how they perceived the call. When one side says that a call was rude and sarcastic, and the other denies it, only one can be correct, but I do not think I have enough evidence to fairly arrive at a conclusion about which side that is. So I make no finding about this issue either way. It must follow that, by default, I cannot uphold that complaint.

But the crux of this complaint is the block on the account, and AIB's continued insistence, to this day, on a doctor's letter to confirm Mrs M's mental capacity.

Since there is so much overlap between these two issues, I have considered them together. But I have considered them from two angles: firstly, was AIB's original decision to block the account and ask for a letter in October 2017 reasonable? And secondly, is it reasonable of AIB to maintain this position now? That second question doesn't just mean "is it *still* reasonable?" (if it was reasonable in the first place), but also – if it wasn't reasonable to begin with – has anything happened since then to make it evolve into a reasonable stance to take later on?

I have had regard to the principles in section 1 of the Mental Capacity (Northern Ireland) Act 2016,<sup>1</sup> in particular the principle that Mrs M must be assumed to have capacity unless it is established that she does not. But balanced against that is AIB's duty of care to its customers, especially vulnerable customers, and to protect their accounts. While the statutory principle clearly must carry great weight, I think it is fair and reasonable to find that AIB's duty to keep its customers' accounts safe and secure is paramount – especially at a time when fraud against bank accounts is increasing.

The dangers AIB is trying to guard against, in cases where capacity is in question, are:

- To protect Mrs M from herself,
- To protect her from fraudsters who might try to take advantage of her,
- To ensure that she is still willing to allow her sons to operate her account under a third party mandate.

These are reasonable and important goals. I have upheld complaints in the past from customers who alleged that their banks did not take enough precautions to protect their money – including complaints which involved money being withdrawn by the customer's own

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<sup>1</sup> Actually that law isn't in force yet. But I still think it is fair and reasonable to have regard to what it says, since it reflects the latest thinking of the Northern Ireland Assembly, and also because similar principles were enacted by Parliament in section 1 of the Mental Capacity Act 2005 (which is in force, albeit only in England and Wales).

children. So it is only fair that I should not interfere with a bank's efforts to protect an account except in a case where this is quite obviously unnecessary. Therefore I have started from the position that whatever a bank does to safeguard an account is reasonable unless and until I am satisfied that it has gone much too far. I think a bank should be permitted considerable latitude in exercising its discretion in such a case.

The first thing to think about is what first caused AIB to suspect that Mrs M's capacity might be in doubt. It is not in dispute that this was the court order in October 2017 authorising payment of the solicitors. I have read it. The preamble recites that an EPA was executed by Mrs M in 2016 and cancelled in May 2017. It does not say anything else of relevance to her capacity. In particular, it is silent about whether she has capacity or not, and it does not say why the EPA was cancelled, or whether it was cancelled by the court or by Mrs M, or what was said at the hearing, or why there was a hearing. So I agree with my fellow ombudsman's view that there is no *direct* evidence calling Mrs M's capacity into question.

However, the mere fact that there was a court hearing about the EPA at all seems to me to be a reasonable basis for AIB drawing an inference that somebody, at some time, thought that Mrs M was or might be losing mental capacity. That is because, according to the website of the Northern Ireland Department of Justice, "You can cancel or amend the Enduring Power of Attorney at any time while you are mentally capable."<sup>2</sup> It goes on to say:

"If your attorney(s) have reason in the future to believe that you are becoming mentally incapable of managing your affairs they will have to apply to the High Court (Office of Care and Protection) for registration of this power."<sup>2</sup>

So if Mrs M had only wanted to cancel her EPA, she could have done so without the need for a court hearing, and without anyone spending over £700 on lawyers. The fact that there was an OCP hearing implies that there was a question about her capacity, since the usual reason for such a hearing is to register an EPA, which becomes necessary – and is only necessary – when capacity is lost.

I am reinforced in that opinion by the fact that Mr M has told us that the purpose of the hearing was indeed to register the EPA.

Registration was contested between Mrs M's children. This suggests that there was, at least at the time, a dispute between them about whether she had capacity or not. Mr M insists that this was never an issue, but AIB has no way of verifying that, and neither do I. It might well be the case that the court was satisfied that she did have capacity, but I have not seen anything to confirm that that is the case, and neither has AIB. All that we know is that the EPA was cancelled on the day of the hearing. But we do not know if that happened as the result of the court making any findings of fact about Mrs M's capacity, or if it was just a consent order made after the children all agreed on an informal way forward, or if the court made any formal order at all at the time.

Given those circumstances, I think AIB was entitled to be concerned. I don't think it matters that AIB's branch staff had no concerns about her capacity when she visited in May and June, because AIB didn't know about the OCP proceedings at the time, and also because capacity can come and go. A person can be lucid one day and not the next. (This is recognised in the legislation I have mentioned above.<sup>3</sup>)

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<sup>2</sup> See <https://www.justice-ni.gov.uk/articles/information-enduring-powers-attorney-epa>

<sup>3</sup> Section 2(2) of the 2005 Act and section 3(2) of the 2016 Act.

The next question is what should AIB have done about it? AIB's process is to ask for a doctor's letter about the customer's capacity, and to block their accounts until it gets one. AIB followed its process, and that would normally be enough for me to reject a complaint, but not this time, because Mr M has argued that getting a doctor to write a letter about a patient's capacity is impossible. He says it is not part of a doctor's role to do that. It cannot be a defence to a complaint for a bank to follow a procedure that demands that its customers do the impossible. So I have had to consider Mr M's argument.

The website of the Medical Defence Union says: "Assessing capacity is part and parcel of being a doctor."<sup>4</sup> So I am not persuaded that getting a doctor's letter was impossible, or that it was an unreasonable thing to ask. Until that was done, AIB was entitled to block the account.

But even if I had taken a different view about AIB's actions in 2017, I think that events since then have only reinforced the grounds for AIB's prudence. I think that for a number of reasons.

Firstly, AIB offered to allow Mr M to withdraw £200 to meet Mrs M's living expenses. (Mr M recalls this slightly differently: he says it was for Christmas. But AIB's final response letter in December 2017 clearly states that the initial offer, and its repeated offer made again in the letter, was £200 for her "reasonable living expenses.") Mr M declined that offer, for reasons of principle which no doubt make sense to him. But while that offer has always remained open, Mr M has continued to refuse it, and to insist that the account be unblocked without any evidence of his mother's capacity, for over a year and a half. By "evidence of capacity," I mean either a doctor's letter as requested or, if he believed that it was not possible to obtain one, then evidence of any finding of capacity made by the OCP in May 2017, or arranging a home visit by the OCP. None of these things has ever been provided – and not even a satisfactory phone call between AIB and Mrs M, which brings me to my second point.

Mrs M never spoke to AIB on the phone herself after the account was blocked, until 2019, more than a year after the block. She may well have her own reasons for this, as Mr M has told us, and those reasons might seem like perfectly good reasons to her. But the longer AIB went without hearing from her directly, the more suspicious it seemed, and I can easily understand why. If an elderly customer's son seeks to take control of her account without her knowledge or consent – I am not suggesting that Mr M has sought to do that (and neither has AIB), but it is something that sometimes happens, particularly to the elderly – then they are naturally reluctant to allow direct communication between the customer and the bank. AIB is right to be vigilant for that sort of behaviour. It may not be any of Mr M's doing and may be entirely his mother's choice, but AIB has no way of knowing that, and neither do I.

When AIB finally did speak to Mr M on the phone on 30 January 2019, the call was not satisfactory. The member of staff who spoke to her recalls that Mrs M asked her why she was calling, and when the staff member explained that it was about a complaint to do with her account, Mrs M said "I don't understand it." After that she returned the phone to her son. There might well have been an entirely innocent explanation for that, but if there was, it was not explained to AIB. So I can't blame AIB for persisting in its stance. I expect Mr M might feel that that is unduly risk-averse of AIB, but as I have explained already, banks are entitled to be cautious about the security of their customers' accounts, including when they are approached by a customer's close relative.

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<sup>4</sup> See <https://www.themdu.com/guidance-and-advice/guides/assessing-capacity?Region=NI>

I can't dismiss AIB's concern about that matter, mainly because it is founded on good grounds, but also because no-one at the Financial Ombudsman Service has spoken with Mrs M either. The only contact we've had from her at all is her signature on our complaint form. Of course, that might be entirely her own choice and nothing to do with Mr M, but still.

So rather than standing on principle and refusing to budge, I strongly recommend that Mr M and Mrs M obtain the evidence AIB requires, and that in the meantime they avail themselves of AIB's offer to allow them to withdraw £200 a month for her living expenses.

Before I conclude, I will address one final point: my jurisdiction to consider this complaint. Under the rules, only Mrs M is eligible to bring this complaint. Mr M is representing her with her authority, given by her signature on our complaint form. Since doubt has been expressed about her mental capacity, I am obliged to consider whether she had capacity, at the time of signing our complaint form, to authorise her son to represent her and to bring this complaint on her behalf.

For the purposes of deciding this question, I think the applicable law is the English law, the Mental Capacity Act 2005, since the Financial Ombudsman Service is based in England. Section 1(2) says "A person must be assumed to have capacity unless it is established that he lacks capacity." I have not seen enough evidence to displace the statutory presumption of capacity, and so I find that Mrs M's signature on our complaint form is effective. I therefore find that she intended to bring this complaint and to permit her son to do so for her. So I have power to consider this complaint.

To be clear, that is not the same thing as saying that AIB should have reached the same conclusion. AIB has not made a finding about Mrs M's capacity either way, and nor should it be expected to. That is why it has asked for a doctor to do that. The conclusion I have reached about AIB was that it had, and still has, sufficient reason to question Mrs M's capacity and to ask for a doctor's letter, and to suspend her account in the meantime.

### **my final decision**

So my decision is that I uphold this complaint in part. I order AIB Group (UK) Plc to pay Mrs M £50 as compensation for not telling her it had blocked her account until well after it happened. I do not uphold the rest of this complaint, and I make no other orders.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 20 July 2019. Mr M may do so on her behalf.

If she does not accept it, then the parties will not be bound by it. If we do not hear from either of them, then we will presume that she rejects it.

Richard Wood  
**ombudsman**