

## **complaint**

Mr S has complained Barclays Bank UK PLC won't refund transactions he didn't authorise.

## **background**

In 2013 Mr S opened a business current account with Barclays. A cheque for nearly £169,000 was deposited within a couple of weeks. This was money Mr S had received from an inheritance. His intention was to use this for a house deposit. He'd been given advice by a mortgage broker who he'd been led to believe was affiliated with Barclays.

The proposed house purchase didn't proceed as Mr S had hoped. There was difficulty in getting a mortgage but he continued to deal with the same mortgage broker (who I'll call Mrs M). In early 2015 Mr S got a letter from the police who were investigating fraud allegations against Mrs M. In a search of her home, the police had found banking details – including correspondence, bank cards and other detail – in Mr S's name.

Mr S discovered from July to November 2013 Mrs M had gradually withdrawn £166,617.40 from his Barclays account. The money had either been withdrawn by debit card from cash machines or by online banking transfers to Mrs M's own account. It appeared from police and subsequent bankruptcy proceedings on behalf of Mrs M that she admitted stealing Mr S's money, along with other supposed mortgage clients.

Claims for repayment of the money were made direct to Mrs M. Evidence showed a small amount had been repaid to the account up to mid-2014 but no further payments were received. Mrs M's solicitors confirmed repayment of the outstanding nearly £167,000 would be made by end-2015. This didn't take place despite negotiations between the legal firms involved.

As Mr S wasn't able to recoup his lost funds from Mrs M, his solicitors asked Barclays to refund him. Barclays firstly needed authority to deal with Mr S's legal representatives. Then in 2019 Barclays apologised for not treating this as a fraud claim. They needed to speak to Mr S and this hadn't occurred. They paid £450 into his business account ending in 8329 in compensation. Mr S brought his complaint to the ombudsman service.

Our investigator reviewed the evidence. Some of this was limited because of the time that had passed. For example, Barclays had nothing to show where cards, the PINsentry device or online banking passwords had been sent in 2013. These had enabled Mrs M to use Mr S's account. They believed Mr S must have given these to Mrs M. Barclays was able to confirm that Mrs M (under both her married and unmarried names) had never been employed by them so they had no responsibility as her employer.

Our investigator believed it was most likely Mr S had provided all the mechanisms needed to access his account to Mrs M. He therefore wouldn't uphold Mr S's complaint.

Mr S didn't agree with this outcome. Mr S has asked an ombudsman to consider his complaint.

I completed a provisional decision on 8 March 2021. I didn't believe the evidence showed Mr S either authorised the disputed transactions or had acted with gross negligence or intent. I told both parties I was going to ask Barclays to pay the full amount I was able to under our rules.

Mr S accepted the outcome. No response was received from Barclays.

I now have all I need to complete 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.

Having done so, I've reached the same conclusion I did in my provisional decision. As I received no dissenting comments, my findings follow to explain why I've reached the decision I have.

Where there is a dispute about what happened, I have based my decision on the balance of probabilities. In other words, on what I consider is most likely to have happened in the light of the evidence.

Clearly in this complaint, I have had to make decisions on balance as some detailed information is missing. It's not unusual in cases like this that banks haven't retained all the records that could have helped in determining the facts. There is no requirement on banks to retain all account records for an unlimited time period so I can't fault Barclays on this aspect.

When considering what is fair and reasonable, I'm 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.

The Payment Services Regulations (PSRs) are the relevant law here. These came into effect in November 2009. These primarily require banks to refund customers if they didn't make or authorise payments themselves. Certain other circumstances can apply. But when we look at whether a bank has acted fairly in rejecting someone's fraud complaint, one of the things we consider is whether the customer made the transactions themselves or allowed them to be made. If they did, then we generally wouldn't ask the bank to refund them.

One of the additional things we consider is whether the customer, Mr S in this case, has acted with gross negligence as that would mean no refund may be given even though Mr S hadn't authorised the individual transactions.

I'm not going to cover all the points raised in detail. The view of 21 July 2020 explains the regulations which guide how we review these cases, as well as covering all the transactions involved in this complaint. Our investigator's subsequent emails with Mr S also touch on questions Mr S raised after seeing the initial view.

No discourtesy is intended by me not covering all issues. Instead, I've focussed on what I think are the key matters here and which impact the decision I'm making. This simply reflects the informal nature of our service as a free alternative to the courts.

There are two main aspects to this complaint. Did Mr S authorise Mrs M to use his business account? If not did he act in a grossly negligent manner by allowing her access to the account herself?

I've covered both issues in coming to my provisional decision.

*were the payments authorised by Mr S?*

Firstly I'm surprised Barclays disputes whether Mr S authorised Mrs M to use his account and spend £167,000 which he'd intended for a house purchase. I can't see any logic in him doing this. But I am aware that this case is not straightforward and the evidence on occasion contradicts itself.

Mr S set up this account on Mrs M's advice in June 2013. No party has suggested Mr S wasn't present when this was done in branch. One thing I feel is worth querying is why the account was set up as a business account? So far I've not been able to get a satisfactory answer. Mr S wasn't operating as a business as far as I can tell. Barclays' account opening information doesn't help on this issue. This does suggest there may have been some discussion in branch at the role being played by Mrs M.

I'm satisfied Mr S was present at the time the account was opened. I think it's more than likely the correct address was taken for the accounts.

From recent discussions with his solicitor, I believe Mr S was surprised to find out that two business current accounts were opened at the same time. Both accounts came with a matching savings account. I'm not sure why this was but may well have been a specific pricing offer on these types of accounts. I can see letters from Barclays in September 2014 talk about free banking coming to an end.

I'm surprised Mr S finds this unusual. I'm pretty sure Mr S would have had to sign the relevant account opening documentation. I think he'd have found it odd if that hadn't been the case.

Mr S is adamant that he never received paper bank statements from the start of the account opening. I agree with Barclays that it's odd Mr S never wanted to see any firm confirmation where his money was. But I accept he – to all intents and purposes – believed his money was safe and remained in his account so didn't feel any need to check.

However there was a substantial time lag between June 2013 and Mr S being notified by the police that something was up in January 2015. It seems throughout this period Mrs M may well have been stringing Mr S along and delaying him from buying a house as she knew at that stage her misuse of his funds would be noticed.

I'm satisfied by Barclays' evidence they have no knowledge of Mrs M (under any related name) ever working for them. But taking into account the police investigation into Mrs M's activities (including being charged with fraud), I think it's most likely Mrs M had conned clients – and not just Mr S – out of their money.

The trail of correspondence between the police, Mr S, his solicitors and Mrs M's solicitors evidence the difficulties here.

Mr S's solicitors have confirmed:

*"When [Mr S] attended the branch in January 2015, he was informed that a telephone number of 07XXX XXX120 was registered against the bank accounts. This was not a telephone number that [Mr S] had provided at account opening stage nor a telephone number that he recognised. Further, the bank subsequently informed [Mr S] that the email*

*address registered against the bank account was: rxxxxsxxxxxx@yahoo.com. This is not (and never has been) [Mr S's] email address. [Mr S] did not give Barclays Bank this email address. Again, it is assumed that [Mrs M] did so. These facts are also recorded in the Witness Statement filed ..., by [Mr S] in April 2016."*

I can see no reason why these changes would have occurred to Mr S's account – which all parties accept took place – with his authority. So taking into account what we know about Mrs M's activities, I think it's likely she made these changes to the account. This also suggests to me there is a clear possibility she could have arranged for bank security information to be shared with her.

In February 2015, Mr S made it clear to Mrs M's solicitors:

*"All the funds have been removed, without our permission from this account and as a consequence we now have to delay moving on with our lives. We have been patient and cooperative but still we are still none the wiser as to why funds were removed without permission."*

In March 2015, Mrs M's solicitors stated:

*"We note that your client accepts that he instructed ours to act in relation to a property purchase, and made a transfer in our client's favour of £167,000. Our client has, of course, acknowledged receipt. Our client is prepared, in principle, to provide security for the outstanding monies. However, we are now instructed that our client will make repayment on or before 30 April 2015"*

By this stage Mrs M wasn't able to make any payments to Mr S as her assets were considered to be subject to the Proceeds of Crime Act. Her solicitors did confirm Mr S *"should be assured that our client remains committed to satisfying any liability due"*.

I note her solicitors state *"made a transfer in our client's favour"* but I don't believe this is what happened. The money was in Mr S's named account and accessed by Mrs M without his authority.

I've also looked at the nature of the withdrawals Mrs M made. There were cash withdrawals and reasonably low-value online banking transfers to her own account. This suggests firstly Mrs M wasn't taking out large sums which may have alerted Barclays to what was going on. But that also she knew she had a few months in which to take money out of the account without alerting Mr S either. I can also see Mrs M repaid a small amount of money to Mr S. I don't anticipate she'd have done that if Mr S had authorised these transactions.

I believe this evidence shows Mr S didn't authorise Mrs M to use the money in his account.

*did Mr S act with gross negligence or intent?*

I have gone on to consider gross negligence and intent. These are two separate issues.

Barclays might be able, in some cases, to hold a consumer liable for transactions they didn't make or authorise – if they've failed with *"gross negligence"* to comply with their *"obligations"* (generally under the terms and conditions of the account) as a payment service user, and that has allowed the disputed transactions to take place.

Banks, like Barclays will be aware that the Financial Conduct Authority guidance on gross negligence states:

*“...we interpret “gross negligence” to be a higher than the standard negligence under common law. The customer needs to have shown a very significant degree of carelessness.”*

The test I use in this circumstance is what would a reasonable person do? Do I believe it's likely a reasonable person would have acted significantly carelessly with their account security details that would allow a third party to access their account? I've seen nothing here why that should be the case.

A business might be able, in some cases, to hold a consumer liable for transactions they didn't make or authorise – if they've failed with *“intent”* to comply with their *“obligations”* as a payment service user, and that has allowed the disputed transactions to take place. Intent is not defined in the PSRs. So we apply the natural meaning of intent – that being; something you want and plan to do, a deliberate act.

When reviewing whether Mr S failed to comply with his obligations *“with intent”*, I have considered whether he deliberately failed to comply with his obligation to take all reasonable steps to keep his card and PIN, or other security credentials, safe? I can't see why this would be likely.

Finally, for Barclays to claim – as I believe they have here – that Mr S has failed with intent or gross negligence to comply with their obligations, the business must provide supporting evidence. In this case the FCA guidance states:

*“The burden of proof lies with the payment service provider and if a claim that a transaction is unauthorised is rejected, the rejection must be supported by sufficient evidence to prove that the customer is guilty of fraud, gross negligence or intentional breach and the reason for the rejection must be explained to the customer.”*

I can't see this has happened here. Nor has Barclays provided evidence to our service despite me prompting them on this expectation. So, for example, they cannot show where Mr S's security credentials were sent.

Overall based on the evidence I don't believe Mr S authorised the transactions. Nor do I think he acted with gross negligence or intent. I will be asking Barclays to repay the money for the disputed transactions.

#### *redress*

Our service can only make awards up to a specific financial limit. Based on the time period Mr S referred his complaint to us – May 2019 – and when the money from his account was used in an unauthorised manner – 2013; the limit that applies here is £160,000. I am aware that the value of the money Mr S disputes is £167,617.40. Therefore it's worth clarifying what this means.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest that I consider appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

This recommendation is not part of my determination or award. Barclays doesn't have to do what I recommend. It's unlikely that Mr S can accept my decision and go to court to ask for the balance.

I gave Barclays an opportunity to confirm whether they would repay Mr S in full but received no response.

I'm aware that Mr S has run up legal costs in trying to recoup his money from Mrs M. However he always had the chance to pursue a complaint against Barclays. As our investigator confirmed early on, we don't generally award legal costs unless there are specific reasons to do so. There's no requirement to appoint legal representation when pursuing a complaint through our service. I believe Mr S has accepted this position.

### **my final decision**

Final decision and award: I am upholding this complaint. I think that fair compensation is £166,617.40 plus 8% simple interest a year. My final decision is that Barclays Bank UK PLC:

- should pay Mr S £160,000; and
- add 8% simple interest a year on £166,617.40 from the dates the money debited Mr S's account until the date of settlement.

Recommendation: I think fair compensation is more than £160,000, so I recommend that Barclays Bank UK PLC pays Mr S the balance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 May 2021.

Sandra Quinn  
**ombudsman**