

The complaint

M, a limited company, complains that ClearBank Limited trading as Tide did not refund a series of transactions it says it did not authorise.

What happened

Mr B has raised the complaint on behalf of M, so I will mostly refer to him throughout this decision. Mr B was out in the early hours of 5 November 2022 when his mobile phone was snatched from his hand while it was unlocked. He reported the theft to the police and ordered a new SIM card for a replacement phone.

It wasn't until the following day that he realised unauthorised transactions had occurred on M's account. These totalled £1,287.05 and they were carried out via ApplePay. Mr B raised these disputed transactions with Tide who looked into his complaint. They eventually issued a final response in which they explained there was no way for a fraudster to access Mr B's ApplePay without knowing the personal identification number (PIN). So they felt it was more likely M had acted with gross negligence when this information was available to the fraudster.

Mr B referred M's complaint to our service and our Investigator looked into it. They felt that, based on the information available to them, it's more likely Mr B did not carry out or otherwise authorise the transactions as he reported the theft to the police, ordered a new SIM card for his phone, the 'find my phone' for the stolen device was turned off minutes after the theft and there was evidence that the Apple ID password was changed. And they didn't think there was enough evidence to show M was grossly negligent.

Tide responded to the view disagreeing with the findings. They said they had not seen evidence of the 'find my phone' being disabled, the SIM being ordered or the Apple ID password being changed and they based their decision on what was available to them at the time. On balance, they felt Mr B had not made the necessary effort to keep his device's security safe to prevent unauthorised access and they did not think they should be held liable for this.

As an informal agreement could not be reached, the complaint has been passed to me for a final decision.

What I've decided – and why

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 agree with the Investigator for largely the same reasons and I uphold this complaint in full. I'll explain why in more detail.

Generally, Tide is able to hold M liable for the disputed transactions if the evidence suggests

it's more likely than not that it made or authorised them itself. This position is confirmed in the Payment Service Regulations 2017 (PSRs) and the terms and conditions of the account.

From what I've seen, the payments were made using M's genuine card details via ApplePay. While this is important, it isn't enough on its own to say M is liable for the transactions. Tide also has to show it's more likely than not that M itself made or otherwise authorised the transactions.

In this case, Mr B's mobile phone was stolen while it was unlocked, so an individual had access to the contents of it, albeit with some security restrictions. And this included restricted access to his ApplePay wallet which can be used to make purchases.

Tide has said that as the payments were verified using ApplePay, and there was no explanation as to how the security on this could have been bypassed, they did not agree to refund the disputed amounts.

It should be noted that it is not for the customer to prove how a third party has accessed their account. Instead, it is for the bank to show how or why a consumer consented to payments being made. I note Tide has said that it was not provided with evidence outlined by our Investigator when it made it's initial assessment. Namely evidence showing the 'find my phone' feature of Mr B's phone was disabled shortly after the theft, that he ordered a new SIM card on 5 November 2022 and that the password for his Apple ID was changed at around 5am on 5 November 2022.

However, I can see that in the in-app chat when Mr B reported the disputed transactions to Tide, as part of the follow up correspondence, he mentioned that he received an e-mail from Apple ID after the theft saying his ID had been updated. He was not asked for evidence of this or given the opportunity to provide further evidence around this. There were significant gaps in communication between Mr B and Tide as they did not respond to his comments or questions. On balance, I don't think Tide gave Mr B a fair opportunity to provide the relevant evidence or guided him in what was needed.

The payments themselves were highly unusual, with four cash withdrawals using ApplePay made within one minute of each other, totalling £1,000. Other transactions were attempted when no funds remained, which indicated the individual carrying out the transactions was not aware of the balance in the account. The cash withdrawals carried out by ApplePay occurred after the Apple ID password was changed, and one disputed transaction carried out beforehand was with contactless pay, meaning no PIN was required.

Having considered the unusual nature of the transactions, paired with the evidence provided by Mr B backing up his claim that his phone was stolen and the password for his Apple ID was changed after the theft, I think it's more likely he did not carry out or otherwise authorise the transactions himself.

Tide has said that Mr B did not make the necessary effort to keep his device's security safe. I note the PIN for his device would be needed to amend his Apple ID password. But it has not provided any reason as to how or why it feels Mr B was negligent in keeping his information secure. The bar for gross negligence is high, and in this case I've seen nothing to indicate that Mr B, on behalf of M, has met that bar. He has said he does not write down his PIN and he did not share this with anyone. There is the possibility that an individual has 'shoulder surfed' Mr B and observed him entering his PIN to unlock his phone and this is how they have gained access. Ultimately, I've not seen enough to be convinced that Mr B has acted with gross negligence in this case.

Having carefully considered everything available to me, I think it's more likely Mr B, on behalf

of M, did not carry out or otherwise authorise the transactions in question. And I don't think M has acted with gross negligence. So, I direct Tide to refund the transactions totalling £1,287.05, along with 8% simple interest from the date of the transactions to the date of settlement. I can see M received £150 credit from Tide while the complaint was being raised, so it's possible this was compensation for the lack of contact from them. As M is a limited company and a separate legal entity, it cannot suffer distress, so I would not generally recommend compensation in this case. Tide should also ensure it removes any adverse information recorded on M's credit file if applicable.

Putting things right

ClearBank Limited should refund M the £1,287.05 and add 8% simple interest from the date of the transactions to the date of settlement.

If ClearBank Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell M how much it's taken off. It should also give M a tax deduction certificate if it asks for one, so it can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

I uphold M's complaint and direct ClearBank Limited to pay the redress outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 22 March 2024.

Rebecca Norris
Ombudsman