

Complaint

Mr B and Ms I complain that Santander UK Plc have held them liable for transactions they say they didn't make or otherwise authorise.

Background

In May 2022, Mr B was on holiday in Spain with close friends and family members. The trip was to celebrate his forthcoming marriage. On 9 May, his phone and wallet were stolen. He tells us that someone then used Apple Pay on his phone to make six transactions at around 4:30am. The following day, his phone and hotel room key were handed into his hotel without the wallet. He checked his phone and noticed the unauthorised transactions that had been made from his account and so he promptly notified Santander.

He had been out that evening socialising. At 1:15am, he used a cash machine to withdraw €200 from an account he holds with a different bank. At 02:04am, the same card he'd used for that ATM withdrawal was used to attempt two payments to a merchant in the town Mr B was staying in. The first of these was contactless, the second was authenticated by use of the correct PIN. Both attempted payments were declined by the other bank. At 02:07am, a payment was made to the same merchant from his Santander account. It was authenticated via Apple Pay using Mr B's missing mobile phone. Five payments were made. The total value of those payments (including fees charged for non-sterling transactions) was a little over £2,800.

Mr B says that he didn't make or otherwise authorise the payments. He complained to Santander, but it didn't agree to refund them. It said that *"a point of compromise couldn't be evidenced regarding the device used to make the transactions."* Mr B was unhappy with the response he received from Santander and so he referred his complaint to this service. It was looked at by an Investigator who didn't uphold it.

The Investigator concluded that the transactions were most likely made by Mr B or that he consented to someone else making them. He observed that the merchant that the payments were made to was consistent with a group on a stag do making payments to a late-night venue. He found it unlikely a third party fraudster would've made the payments because they'd have needed to obtain Mr B's phone and wallet, observe him using his phone passcode and the PIN to his other bank card. He also thought that it would be unlikely an opportunistic fraudster would discard his phone and bank card when they may still have value.

Mr B disagreed with the Investigator's opinion and so the complaint has been passed to me to consider and come to a final decision.

Findings

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

Under the Payment Services Regulations 2017, Santander is liable for unauthorised

transactions made from Mr B and Ms H's account. Mr B has said that he didn't authorise the transactions in dispute. I should be clear from the outset that I can't know with any certainty how these transactions were carried out. Where there is such uncertainty, I must decide the case on the balance of probabilities – in other words, is it more likely than not that Mr B authorised the transactions in question?

I've considered that point carefully and I'm not persuaded that the evidence allows me to find in Mr B's favour. If these payments were carried out by an opportunistic third party, the evidence suggests that both Mr B's phone and card fell into their hands at the same time. They had also managed to acquire both the PIN for the card and the passcode for the phone. As I understand it, the code for the device is not similar to the PIN for the card – so knowing one wouldn't allow someone to guess the other.

It isn't far-fetched to suggest that someone could've observed Mr B unlocking his phone at any point during the evening. Although his phone was configured to use Face ID, it also had a passcode as a back-up option. There's also a potential point of compromise for the PIN on his card with the other bank. Mr B did legitimately use the card to make a cash machine withdrawal at 1:15am. A fraudster could've observed him doing so.

Either of these things independently would be plausible, but I find it far-fetched to suggest that the same person or people could've done both, particularly given the security credentials for each were different. I agree with the Investigator's conclusion that it would be unlikely a fraudster would wait patiently for the opportunity to acquire both the device and the card at the same time.

I also find it surprising that, if Mr B's card and phone had fallen into the hands of a fraudster at around the time he made the cash machine withdrawal, the first use was nearly an hour later and to attempt a relatively low value contactless payment. It's also noteworthy that the only use of the card was two attempted low value payments to the same merchant. If the card had fallen into the hands of an opportunistic fraudster with full knowledge of the PIN, I'd expect to see evidence of further attempts at using that card to maximise the value of the theft.

There is unfortunately no definitive proof available to explain how these transactions were made. However, the available evidence doesn't support the argument that these payments were made by a third party without Mr B's consent. I therefore think it's reasonable for Santander to conclude that Mr B, or someone with his consent, made the disputed payments.

Final decision

For the reasons I've explained above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms H to accept or reject my decision before 29 September 2023.

James Kimmitt
Ombudsman