14 October 2011

Dear Mrs Russell

Your complaint about Barclays Bank Plc

Provisional Decision

The ombudsman has carefully considered all the information and evidence submitted by you and Barclays about your complaint.

Subject to any further comments and evidence that we receive from either you or Barclays, the ombudsman intends to issue a Final Decision along the lines of the enclosed Provisional Decision – a copy of which I have also sent to Barclays.

I should therefore be grateful if you would let me have any final points by 14 November 2011. Alternatively, please confirm by then that you have already provided us with everything you want us to take into account. If there is any reason why you think you might be unable to reply fully by 14 November 2011, please let us know so that we can agree extra time. The ombudsman plans to issue the Final Decision after 14 November 2011, but may be able to do so earlier if we have heard from both parties.

Yours sincerely

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Ombudsman Assistant

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I have carefully considered all of the information and evidence submitted by Mrs Russell and Barclays Bank Plc in order to decide what is fair and reasonable in the circumstances of this complaint.

Subject to any further comments and evidence that I receive by 14 November 2011, I am minded to issue a Final Decision in the following terms.

complaint

Mrs Russell complains that Barclaycard is unfairly holding her liable for credit card transactions totalling just over £15,000 made fraudulently on her Barclaycard account.

background

Mrs Russell opened her Barclaycard account some years ago, at which time she was sent a plastic card with a number ending 0003 for use with the account, and a personal identification number (PIN) for use with the card. Over the years, renewal cards were issued routinely to Mrs Russell as each old card reached the end of its term of validity. In 2006, Mrs Russell was issued with a new PIN for the account.

The account was not used very much, and in recent times has primarily been used to pay the monthly bill for Mrs Russell’s mobile phone – by means of a continuous payment authority applied each month by the mobile phone company.

Barclaycard’s records for 28 June 2010 say that a call was made to report the Barclaycard as having been lost or stolen and requesting a replacement card. Barclaycard issued a replacement card ending 9002 (which I shall call the new card) which it says was delivered by courier on 1 July 2010, intended for Mrs Russell’s address but probably mistakenly put through the letterbox of Mrs Russell’s neighbour.

The transactions disputed by Mrs Russell began on 5 July 2010 and continued until 27 July 2010. By then, the balance on the account (including charges and interest) had risen to £15,066.64 against the credit limit of £10,000 shown on the statement dated 2 August 2010.

There were almost 70 disputed transactions including withdrawals made from cash machines, point of sale transactions from retail outlets such as supermarkets, sports wear shops and jewellers, and some payments to service providers such as a repair garage and a glass and mirror business.

On 4 August 2010, Barclaycard blocked the card due to suspicious activity.
Mrs Russell telephoned Barclaycard on receipt of the statement dated 2 August 2010 showing the disputed transactions. Communications followed between Mrs Russell, her solicitor, Barclaycard and a police officer (after Mrs Russell reported the transactions to the police).

Mrs Russell said that it was not she who had either requested the new card or made the transactions that the card was used for. She believed that a fraud had been perpetrated against her and she should not be liable for the transactions.

Barclaycard argued that Mrs Russell’s 2006 PIN (which Mrs Russell said was known only to her) had been used for the transactions with the new card and so it could not be certain that the spending had not been carried out by Mrs Russell or with her knowledge. It continued to hold her liable for the debt caused by the disputed transactions.

Mrs Russell referred her complaint to this service, where one of our adjudicators looked into what had happened. She considered that, whilst she did not doubt Mrs Russell’s integrity, she could not conclude – from the available evidence – that Barclaycard should reimburse the disputed transactions.

Mrs Russell did not agree with the adjudicator’s conclusions and asked for her complaint to be reviewed by an ombudsman, as she was entitled to do. She provided some further observations about what had happened, and reiterated some of the earlier points she had made which she felt had not been taken sufficient account of during our investigation of her complaint.

my provisional findings

Mrs Russell has explained that she remains very sceptical about the evidence Barclaycard has produced to support its stance that she is liable for this debt. She maintains that she had nothing to do with either the issue of the new card or the transactions that it was used to make, and does not consider that the evidence is sufficient to establish her liability.

She has also taken advice from University of Cambridge Computer Laboratory which sets out the likelihood of insider fraud at Barclaycard and Mrs Russell is particularly concerned as she believes that her age, gender and ethnicity make her more vulnerable than usual to this type of fraud.

I agree with Mrs Russell that, in disputed card transaction complaints, the possible involvement of a dishonest employee must be considered properly, alongside all the other possible scenarios. I am also mindful of the material that the University of Cambridge Computer Laboratory has produced about technical issues to do with card fraud.

During my review of this complaint, I have examined the statements and evidence that Mrs Russell and Barclaycard have provided. I have focused on the issues that I consider are central to the outcome of this complaint and, wherever appropriate, I have summarised the relevant law and the evidence so as to make it clear to the parties why I have reached this provisional decision.

I am satisfied, from the audit trail evidence that Barclaycard has provided, that all the disputed transactions were made using the new card – and not with the old card that Mrs Russell had in her possession, or some form of copy of it.
Mrs Russell has, throughout, been adamant that it was not she who requested that new card. Barclaycard has been less clear in its evidence on this point, offering different opinions about whether or not the person making the call sounded like Mrs Russell.

Although Barclaycard initially had a recording of the call in which the new card was requested, it would not allow Mrs Russell to have a copy of it – citing data protection as the reason why she could not have it, although I am not aware of any data protection rule that would have prevented Barclaycard from sharing that recording in the circumstances. Barclaycard then allowed the recording of the call to be destroyed after it had completed its investigation of Mrs Russell’s complaint, rather than retaining it in case Mrs Russell did not accept its conclusions.

Barclaycard has provided details of the security questions that it says were answered correctly by whoever requested the new card. Those questions were not, in my opinion, ones that only Mrs Russell could have answered. I doubt that a total stranger could have answered all the questions correctly, but someone with a reasonable degree of knowledge of Mrs Russell probably could.

In all the circumstances, I do not consider that I can reliably conclude, from the evidence, that Mrs Russell made the call requesting the issue of a new card on her account.

There is also some confusion about where the new card actually went. Barclaycard says the card was issued to Mrs Russell’s usual home address in Potter’s Bar. However, the photographic evidence produced by the courier which Barclaycard used to deliver the card appears to show that it was actually put through the letter box of a neighbouring house in the residential development where Mrs Russell lives.

Barclaycard seems eventually to have accepted that the card was indeed mis-delivered, but says it ‘had no reason to believe’ that the card was not then passed on to Mrs Russell. Mrs Russell says that she has knows these neighbours slightly, and has asked them about this, but was told that they did not recall receiving any post meant for her. Looking at all the evidence, I do not consider that I can reliably conclude that Mrs Russell received the card and I think it more likely that she did not.

The disputed transactions were made using cash machines in the London area, and various retail transactions made mainly (though not exclusively) in north and north east London. There were also several significant payments to a business called Direct Glazing in Potter’s Bar, apparently a framing and glazing business that sells mirrors and other glazed products.

Barclaycard has provided evidence from some of the retailers where the disputed transactions were made. Mrs Russell has provided evidence from an executive of the insurance company where she works, as well as evidence from a clinic which she attended for a medical procedure on a day when some of the disputed transactions were made. From the overall evidence I consider that I can find, with a good degree of confidence, that Mrs Russell did not make the disputed transactions herself.

The question of whether Mrs Russell authorised someone else to make the transactions must also be considered. On this point, Barclaycard says that it “cannot be certain” that Mrs Russell did not authorise the payments, since no new PIN had been issued on Mrs Russell’s Barclaycard account since 2006 and as Mrs Russell has consistently said that there is no way anyone else could have known her PIN.
Mrs Russell accepts that the transactions were not made, for example, by means of some form of electronic overriding of the need for a PIN. But she is not convinced by Barclaycard’s insistence that no new PIN was issued at or around the same time as the new card was requested. She suggests that a dishonest Barclaycard member of staff may have circumvented the normal process and ordered a new PIN to be dispatched to an associate, without leaving any trail of the PIN request on the records for her account.

But whoever made the transactions would need to have both the new PIN and the new card. It would not be enough to have just the PIN. So, in the scenario Mrs Russell suggests, the Barclaycard employee would certainly need to be in collusion with the courier company that Barclaycard used to deliver the new card, and probably also in collusion with someone at the administrative centre that issues card PINs, to avoid there being any record of the issue of the PIN. In all the circumstances, I am not persuaded that is probably what happened here.

So, I am satisfied from the evidence that whoever made the transactions did so with the aid of the PIN that was issued to Mrs Russell in 2006.

Mrs Russell did not generally have any need of the PIN for her Barclaycard, as she was not in the habit of using it for transactions that required a PIN. She has said that nobody else lived permanently with her at her home around the relevant time – though it should be kept in mind that the PIN did not have to be discovered at the same time that the new card was issued; it could have happened at any time since the PIN was issued in 2006.

Here is what Mrs Russell has said about the question of whether someone else could have obtained her PIN:

- In a fraud questionnaire completed for Barclaycard, the only question that Mrs Russell did not answer at all was the one that asked ‘If you keep a note of your PIN, where do you keep it in relation to your card? For example, do you keep both in the same wallet?’ In a different question, concerning foreign transactions, Mrs Russell has answered ‘N/A,’ rather than simply leaving a blank.

- In a fraud affidavit completed for Barclaycard, Mrs Russell answered ‘No’ to the question ‘Did you keep a separate record of your PIN?’

- In an email to the police Mrs Russell said ‘...there is no-one that could have obtained my pin number, as it is in a locked safe in my house...’

- During our investigation Mrs Russell initially told us that, if she had kept a record of the PIN then it would have been kept in her locked safe. She later clarified that, having checked her safe, there was no sign of any record of the PIN there – from which she concludes that she must not have kept a record of it.

Having carefully considered these statements, I am not persuaded that Mrs Russell can be entirely sure whether, and where, she kept a record of her PIN.

I have also considered what Mrs Russell has said concerning visitors to her home, including the information that Barclaycard has recorded in its notes of its conversations with Mrs Russell following the disputed transactions being reported.

My view is that Mrs Russell has been reluctant to fully explore the issue of whether someone close to her could have obtained the PIN. I do not believe that this is through dishonesty on
Mrs Russell’s part – rather, I think it likely that she has been overly-focused (understandably, but mistakenly in this case) on the possibility of insider fraud at Barclaycard. External fraud by a stranger is less difficult to contemplate than are the alternative explanations.

Taking everything into account, I do not believe that I can safely rule out another person having becoming aware of Mrs Russell’s PIN without her knowledge or without her consent. Though I am not persuaded that Mrs Russell was negligent (and indeed Barclaycard has said that it does not allege negligence) I think it probable in this case that someone else was able to discover the PIN at some point before the disputed transactions were made.

So, these are the findings I have made (on a balance of probabilities) on the evidence provided so far:

- the disputed transactions were made using the new card issued on Mrs Russell’s account following a telephone request in June 2010;
- that telephone request was not made by Mrs Russell;
- Mrs Russell did not receive the new card;
- the disputed transactions were not made by Mrs Russell; and
- someone else was able to discover the PIN that was used to make the disputed transactions.

The disputed transactions in this case were all made on a credit card account. Put very simply, the relevant consumer credit law says that Mrs Russell will only be liable for those transactions if she either made them herself or authorised someone else to make them.

Under the relevant payment services rules, Mrs Russell can be held liable if either she acted fraudulently or she deliberately or negligently failed to keep the card security details safe. But those rules do not reduce the higher level of protection provided to Mrs Russell in this case by the consumer credit law.

In addition, this is an extract from the Lending Code (a voluntary industry code of practice, to which Barclaycard subscribes) about unauthorised transactions:

*Unless the subscriber [here, Barclaycard] can show that the customer acted fraudulently or with gross negligence, their liability for their credit card being misused will be limited as follows:*

- If the card is used before the customer has received it, the customer will not have to pay anything.

Such voluntary codes cannot operate to reduce a consumer’s statutory rights, but they can supplement those rights with additional safeguards.

Given my findings, I cannot presently see that Barclaycard is able to hold Mrs Russell liable for these disputed transactions under either the relevant law or industry code.
provisional decision

My provisional decision is, therefore, that Barclaycard should:

- write off the disputed transactions and rework Mrs Russell’s Barclaycard for charges and interest as though the disputed transactions had not been made;
- remove any adverse credit information that it may have registered against Mrs Russell’s name in relation to the debt created by the disputed transactions; and
- pay Mrs Russell £500 in respect of the distress and inconvenience this matter has caused her.

I note that Mrs Russell has retained a solicitor to deal with the complaint on her behalf, which has incurred legal expenses. We do not generally award costs of this type to a successful complainant, since this service is designed to be accessible to consumers without the assistance of lawyers or other specialist representatives. I am not presently persuaded that I should make an exception here.

Mrs Russell and Barclaycard now have a further month in which to consider my provisional decision and to make any further representations that they would like me to take account of before I arrive at my final decision.

Michael Ingram
ombudsman