

**CASE JUDGMENT:
ENGLAND & WALES**

CASE CITATION:

Shojibur Rahman v Barclays Bank PLC

NAME AND LEVEL OF THE COURT:

Clerkenwell & Shoreditch County Court

CASE NUMBER:

1YE00364

JUDGE:

Her Honour District Judge Millard

DATE OF JUDGMENT:

24 October 2012

COUNSEL FOR THE CLAIMANT:

**Ahmed Miah, Temple Court
Chambers**

SOLICITORS FOR THE DEFENDANT:

TLT LLP

COUNSEL FOR THE DEFENDANT:

Oliver Kalfon, Enterprise Chambers

Bank card; PIN; electronic signature; verification of customer; negligence of the bank; negligence of the customer; fraud; burden of proof; events taking place before the Payment Services Regulations 2009 in force

1. The claimant was a customer of the defendant bank at its King's Cross branch. On 14 November 2008, £20,400 was transferred by telephone from the claimant's Bonus Saver account to his current account leaving less than £100 in the Saver account. Immediately before the transfer there was some £2,300 in the claimant's current account. Between 14 and 20 November inclusive a number of transactions took place using the claimant's debit card for his current account to make withdrawals from cash machines or purchases, the largest of which was the purchase of a Rolex watch for £14,420 from Watches of Switzerland. The transactions totalled £23,915.76. Claimant denies that he initiated or authorised any of these transactions. The defendant bank has declined to re-credit to the account. The claimant's claim is therefore for the amount of the withdrawals, consequential loss and interest.
2. Since the discovery of the disputed transactions, the claimant has been consistent in his version of what happened and he has vigorously pursued his claim against the bank taking it as far as he could through the bank's internal procedures, reporting the matter to the police, asking his MP for assistance and making a complaint to the Financial Ombudsman Service.
3. In essence, he said that he received a phone call shortly after 3 pm on Thursday 13 November 2008 while he was working (he is a bus driver). At that point, his bus was briefly stopped so he was able to answer the call. A man calling himself Stuart said that he was calling from Barclays' fraud department and that Mr Rahman's debit card was being used at Argos in Camden. Mr Rahman confirmed that he was not using the card and told Stuart to cancel the card immediately. Stuart told him this would be done. During this phone call, he checked his wallet where he always kept his debit card and discovered it was missing. He subsequently received more telephone calls from the same number which he was unable to answer because he was driving. He then received a text message containing a reference number and asking him to call the same number from which the earlier telephone calls had been received (0870 3832274). When he finished his shift at about 4 pm, he telephoned the number, spoke to Stuart again who assured him that everything was okay and that card had been cancelled.
4. Nothing further happened until the following night (Friday 14 November) when he decided to telephone the defendant's dedicated lost and stolen telephone number at about 10:30 pm to enquire what was happening. After being put on hold and transferred several times, he spoke to a person called Matthew. He was told about several transactions which had taken place on his account that day including the transfer from the Bonus Saver account. He told Matthew that he had not authorised any of them. He said he told Matthew to freeze his account and cancel

his debit card which Matthew agreed to do.

5. Mr Rahman says that he tried to go to his branch the following day (Saturday 15 November) but it and the branches in Camden and Kentish Town were closed so it was not until Monday 17 November that he was able to go to his branch and discuss the matter. He discovered that his card had not in fact been cancelled on 14 November. His personal banking manager ensured that the card was stopped at 9.55 that day.
6. The defendant bank declined to refund the money as they considered that Mr Rahman must have been negligent at the very least and disclosed his PIN number to someone else. They came to this conclusion because their records showed that the debit card used was the actual debit card issued to Mr Rahman (and not a clone). Also, the PIN was correctly entered at the first attempt for all the transactions. In addition, the person who used the card at Watches of Switzerland had correctly answered some identity verification questions. The telephone transfer of £20,400 from the bonus Saver account to the current account could only have been completed if either caller had correctly entered on the telephone keypad the sort code, account number, pass code and registration key. Alternatively, if the transfer had not been done automatically but by speaking to a member of Barclays' staff, the caller would have had to answer correctly some identity verification questions.
7. It was not until earlier this year that it occurred to the defendant that this case had some of the key features of a scam known as Operation O. According to the evidence of Mr Holmes, the defendant's Investigations Intelligence Manager, the pattern for this fraud is that the bank's customer receives a call from someone purporting to be from the bank's fraud department saying that the customer's account has been subject to fraudulent activity. The customer is told that in order to cancel their card or to investigate the bank will require the customer's card, corresponding PIN and other personal information. The customer is told a courier will be sent to collect their card and the relevant information from them. The card is collected and delivered to an address in the Grays Inn area. The fraudster waits by the address for the courier to arrive and takes possession of the card and other information.
8. The defendant considers that Mr Rahman may be a victim of this fraud because the telephone number used to telephone him on 13 November and which he used to call back has been associated with Operation O cases on 18 occasions. On 28 occasions the caller has identified himself as Stuart. Quite often, the card is first used at Lloyds TSB ATM at 344 Grays Inn Road and this happened in Mr Rahman's case also.
9. The defendant knew that the firm Addison Lee had been used by the fraudsters in some of the cases to collect the cards. They made enquiries of Addison Lee and have produced a witness statement from Linda Ibrahim (who also gave evidence). She did not have any personal dealings but checked Addison Lee's computer system which shows that at 9:45 am on 14 November, a booking was made for a direct bike immediate pickup from the claimant's address at Flat 21 Sandfield Cromer Street WC1H 8DU and deliver to 280 Grays Inn Road WC1X 8EB. The caller gave his name as Stuart Catterwell and a mobile telephone number of 07542 847431. The computer records showed that the item was recorded as having been delivered at 10:17 am and the fee was paid in cash by the recipient.
10. Mr Rahman denied that he had given any personal or security information to Stuart over the telephone on 13 November. He was adamant that he had not been asked to send his card, PIN number or any other information by courier to Barclays. He also denied that any envelope had been collected from him or from his address on 14 November. He confirmed that he was at home at around 10 am when the package would have been collected.
11. I have come to the conclusion that Mr Rahman is not telling the whole truth about the content of his telephone conversations with Stuart on 13 November or the events of the morning of 14 November.
12. If, as Mr Rahman maintains, his debit card had already been obtained by fraudsters before he received the telephone call from Stuart, it is difficult to understand what possible purpose the fraudsters could have had in telephoning him solely to alert him to the fact that his card was missing and was being (or about to be) misused. It seems to me much more likely that the purpose of the telephone calls was to obtain the card and information to enable it to be used.
13. Despite Mr Rahman's denial that any package was collected from his home on the morning of 14 November, I accept the information extracted from Addison Lee's computer system is accurate. There is no reason for Ms Ibrahim or anyone at Addison

Lee to lie about this. Again, it is impossible to see what benefit it would be to the fraudsters to make this booking and pay the courier if not to collect Mr Rahman's card and other information.

14. Mr Rahman speculated that his debit card had not been returned to him when he last used it at his branch on 23 September 2008 to transfer money from his current account to his Bonus Saver account. He confirmed that other items which he had handed over (driving licence and passport) were returned. However flustered he may have been by the bank clerk trying to persuade him to take out a loan which he did not need, it seems unlikely that he would not have realised soon after he left the bank that he did not have his debit card (even though he rarely used it). It also seems unlikely that a bank employee or anyone else intending to misuse the card would wait so long before trying to withdraw any money or that they would telephone him to alert him to the fact that his card was missing immediately before they started to use it. There is no evidence to suggest that this fraud has been committed with the help of a Barclay's employee.
15. I find on the balance of probabilities that Mr Rahman's debit card was not missing from his wallet on 13 November but was given by him to the courier on the morning of 14 November. I also find that during his telephone calls with Stuart on 13 November and/or in the documents or information included with the card given to the courier on 14 November, Mr Rahman disclosed enough sensitive information to enable the fraudsters to use the card and to know he had a Bonus Savings account and roughly how much was in it.
16. I find the claimant's conduct on 13 and 14 November 2008 which led to the disputed transactions was not dishonest or fraudulent because he was tricked into handing over his debit card and information needed by the fraudsters to use it (although his subsequent behaviour in concealing the full truth when dealing with the bank, financial ombudsman and the court was dishonest). However, I find that he did not use reasonable care on 13 and 14 November 2008. He had no way of knowing that the call from Stuart was genuine or that the telephone number used belonged to the defendant. It would have been a simple matter for him to telephone the defendant's dedicated lost or stolen card number (which he did late on 14 November) or contact his local branch before handing over his card and other information to the courier.
17. The terms and conditions applying to the account require the customer to tell the bank as soon as reasonably possible if the card and/or card details are lost or stolen or if the customer thinks they have been misused or that the PIN number has become known to another person or if there is any other risk of an unauthorised use of the card (clause 6). Clause 7 of the terms and conditions absolves the customer from liability for any unauthorised transaction after the customer has notified the bank of the loss, theft or misuse of the card or the PIN becoming known to any other person unless the customer has acted fraudulently or without reasonable care. The customer is also made liable for any transactions before the card is reported lost or stolen or misused if the customer has acted fraudulently or without reasonable care.
18. I understand the defendant accepts the Banking Code (March 2008 edition) also applies to this case. Clause 12.11 provides that if the customer acts without reasonable care and this causes losses, the customer may be responsible for them. Clause 12.12 provides if someone else uses the card before notification to the bank that it has been lost or stolen or someone else knows the PIN the most the customer will have to pay is £50 unless the bank can show that the customer has acted fraudulently or without reasonable care.
19. Therefore, if the test to be applied is that in the defendant's terms and condition and the Banking Code (failure to use reasonable care), the claimant would be responsible for losses which occurred before the defendant was notified.
20. However, the claimant argues that the correct test is that set out in the Payment Services Regulations 2009 (the Regulations) which came into force on 1 November 2009. Regulation 60 provides that where a service user denies having authorised an executed payment transaction or claims that the payment transaction has not been correctly executed, it is for the payment service provider to prove the payment transaction was authenticated, accurately recorded, entered into the payment service provider's accounts and not affected by a technical breakdown or some other deficiency. Authenticated means the use of any procedure by which a payment service provider is able to verify the use of a specified payment instrument including personalised security features. The use of a payment instrument recorded by the payment service provider is not in itself necessarily sufficient to prove either that the payment transaction was authorised

by the payer or that the payer acted fraudulently or failed with intent or gross negligence to comply with regulation 57.

21. Regulation 57 requires the customer to use the payment instrument in accordance with the terms and conditions governing its use and to notify the provider in the agreed manner and without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument. It also provides that the customer must take all reasonable steps to keep its personalised security features safe.
22. The first issue with regard to the Regulations is whether they apply to this case at all because they did not come into force until nearly a year after the disputed transactions and after the defendant has decided to hold Mr Rahman liable for the losses because they were carried out with the claimant's card and PIN. The first written notification of this decision is dated 23 December 2008. It was re-confirmed on 16 March 2009 in the defendant's Final Response (indicating the complaints procedure has been exhausted and Mr Rahman could then refer to the Financial Ombudsman Service). The claimant maintains that the defendant must have made decisions about the matter after 1 November 2009 (by continuing to defend the referral to the Financial Ombudsman Service and these proceedings) and that any decision made after 1 November 2009 engages the Regulations.
23. The Regulations themselves do not contain any transitional provisions or specifically state that only transactions after 1 November 2009 are governed by them. Equally, they do not state that transactions before 1 November 2009 are covered if there is a decision made after that date.
24. Both counsel agree that the basic legal principle is that legislation is not retrospective unless it specifically so provides. In the absence of any specific provision in the Regulations or authority on the point, I take the view that the Regulations cannot apply to these transactions because they occurred before the Regulations came into force. I am not convinced by the claimant's assertion that a decision made the bank after 1 November 2009 is sufficient to activate the Regulations. There is no justification for this in the Regulations themselves. It would be strange for Regulations not to apply for a period but then suddenly to be effective because the bank had made a decision. In any event, in this case it could be said that the defendant has not made a decision but has simply been defending the decisions it made before 1 November 2009. Therefore, I find that the Regulations do not apply to this case.
25. The claimant is therefore responsible for losses which occurred before the defendant was notified but this raises two further issues. The first is when the defendant was notified (late on the evening of the 14 November as the claimant states or early on 17 November as the defendant's records show). There is also the issue of whether the defendant itself breached its terms and conditions or was negligent in permitting the telephone transfer £14,200 from the bonus Saver account to the current account on 14 November and then authorising the purchase of the Rolex watch from Watches of Switzerland.
26. With respect to the first issue, the defendant maintains that it was not notified of the situation until the claimant called into his local branch early on 17 November. The claimant maintains that he notified the defendant late on the evening of 14 November by telephoning its dedicated telephone number for lost and stolen cards.
27. The defendant says that it has no record whatsoever of a telephone call from the claimant on 14 November. The claimant has produced his itemised telephone records showing that a call was made from his telephone to the defendant's dedicated lost and stolen cards number on 14 November at 23:41 and the call lasted 38:51 minutes. There seems no reason not to accept that the claimant's telephone bill shows that the call was in fact made. It lasted a long time. It is not suggested by the defendants that callers at that time were put on hold for such a long period before speaking to a call operator. In the absence of any evidence from the defendant as to the content of this conversation, I find that the claimant's evidence with regard to this telephone call is probably correct and that he did speak to somebody at the lost and stolen card department. It is understandable that he would phone to find out what is happening. It is difficult to believe that he did not make it clear that he did not authorise the transactions and that his debit card should be cancelled.
28. I find that the defendant should have cancelled the claimant's debit card by 00.20 on 15 November 2008 and the bank should re-credit to Mr Rahman's account any debits made using his card after that time.

29. However, by that time £17,385.48 had been taken from the current account. The fraudsters were only able to obtain so much because £14,200 was transferred from the Bonus Saver account to the current account on 14 November by telephone. The claimant asserts that the defendant should not have permitted the transfer.
30. Mr Rahman denies he has ever registered for telephone banking although the defendant's records show that he registered on 27 May 2006 (9 days after opening his Bonus Saver account). It was suggested by the defendant's Investigations Intelligence Manager, Mr Holmes, that it was possible that this as been arranged while Mr Rahman was in the branch on other matters and he may not have realised that he was registered. In any event, it seems to be accepted that he had not used telephone banking before 14 November. On balance, I accept that Mr Rahman was registered for telephone banking in 2006. It was not set up as part of the scam of November 2008.
31. Unfortunately, the defendant has not been able to produce any information as to the precise way in which the transfer was effected. Its records show it was over the telephone but not whether this was by speaking to someone at a call centre or automatically by keying in the sort code, account number, passcode and registration key. If the latter method was used, then I would find on the balance of probabilities that the transfer was made possible only because the claimant disclosed the necessary information to the fraudsters. If the former method was used, the claimant would argue that the defendant's employee did not exercise sufficient care in checking the identity of the caller particularly as he has no history of dealing with such transfers over the telephone, he has always gone into the branch.
32. As we do not know whether the fraudsters spoke to the defendant's employee over the telephone, we do not know what identity verification questions he was asked and whether he answered them correctly. Verifying the identity of callers is such a routine matter for banks, it seems unlikely that this was not done. Bearing in mind that this was a transfer from one account in the name of the claimant to another account in his name, there is no reason for the bank's employee to be as suspicious as he might be if the payment were to a third party.
33. The defendant has been able to produce information as to the questions which were asked of the fraudster in the Watches of Switzerland shop. The defendant's internal report shows that the fraudster was asked first all how long the account had been open. The answer was 10 years or something. That answer would not be accepted as it is quite vague. (The account was in fact opened some 3 years earlier in August 2005). The next question was where his account holding branch was and this was answered correctly. He was also asked whom he shared the account with and the again this was answered correctly (i.e. no one). He was asked how long he had been at his current address. The answer was "all my life" which the report notes is quite vague (I do not have any evidence as to the correct answer for this question). The fraudster said that he was buying a wedding present for his brother. As has been pointed out on behalf of the claimant, the two answers which were correct (i.e. that the account was in his sole name and that the holding branch was King's Cross) may have been gleaned from the debit card itself which contains the sort code and gave no indication that there was any other person named on the account. Equally, the information could have been disclosed by Mr Rahman in his telephone calls with Stuart or in the information he handed over to the courier. It is of relevance that these questions were asked in the context of the genuine card being used and the PIN being entered correctly first time and was for an amount which was covered by an apparently authorised recent large transfer from the Bonus Saver account.
34. The claimant has also pointed to the fact that the pattern of use of his accounts from 14 November was different from his usual pattern. Although he had transferred large sums from his Bonus Saver account before, this had been done by attendance at the bank rather than by telephone. There were several ATM balance enquiries whereas he rarely used ATMs. In fact he rarely used his debit card at all but it was used frequently in the period in question, generally for comparatively small sums in High Street shops. However, customers do change their spending patterns on occasion such as when on holiday or for a particular reason. They also become irate (and it causes them embarrassment and inconvenience) if their card is blocked when they try to use it for a genuine transaction. Looking at the record of transactions on 14 November, I am not satisfied that the defendant should have suspected unauthorised use on that date.
35. Taking into account the context in which these two

transactions (transfer from the Bonus Saver account and payment to Watches of Switzerland) were made and the fact that we do not know precisely what information the claimant disclosed to the fraudster, I do not find that the defendant has breached contractual obligations or the Banking Code 2008 or that it has been negligent. Therefore, the claimant is liable for the all losses until 00:20 on 15 November 2008 but the defendant should reimburse him for debits after that time.

36. I hope the parties will be able to agree the calculation of the relevant figure and interest. I do not know whether there will be any issues regarding costs but the parties should endeavour to agree those also.
37. This judgment will be formally handed down at 9.30 on Monday 12 November 2012.
38. It will not be necessary for the parties to attend if they have agreed the wording of the order and send it to court in advance. If they cannot agree, it would be helpful if the parties would notify each other and me by email of the issues they wish to raise by noon on Friday 9 November 2012. If the hearing is likely to need more than 30 minutes (or will not exceed that time but one or both advocates is unable to attend on 12 November) please let me know as soon as possible and I will re-arrange the date.

District Judge Millard
24 October 2012

Commentary

By Stephen Mason and Nicholas Bohm

It appears from the judgment that Mr Rahman was the subject of ‘courier fraud’, given that the judge concluded (para 11) that Mr Rahman was not telling the truth (see also para 16) – although it was accepted that he had telephoned the bank (para 27), and to this extent the bank were found to be liable for losses that occurred after the telephone call was made.

The digital data

The judge accepted that the data extracted from Addison Lee’s computer system was accurate (para 13). The reasoning, which must be right, was that there was no motive for Ms Ibrahim or anyone at Addison Lee to lie

about the evidence. The conclusion was aided by the difficulty in seeing how the fraudsters would benefit from booking and paying the courier *unless* it was to collect Mr Rahman’s card and other information.

A more serious issue relating to electronic evidence was the failure of the bank to prove the precise way in which the transfer of monies between accounts was effected. This was a serious lacuna in the bank’s evidence, and demonstrates the difficulties of poor digital systems that fail to record events effectively.

Less convincing is the dismissal of the argument that the bank ought to have noticed the unusual transactions on the account. It is not clear whether Mr Rahman’s lawyer effectively examined the evidence, or if cogent arguments were put before the judge on this issue.

Verification of identity

The judge made some very helpful comments relating to the verification of identity (para 33) that bear careful consideration.¹

Payment Services Regulations

The judge concluded that the Payment Services Regulations 2009 were not relevant because they were not in force at the material time, and there was no indication that the Regulations had a retrospective effect. This must also be right, although whether the Regulations were in force or not does not alter the fact that the burden of proof was on the bank to prove that Mr Rahman carried out the transactions or that he was negligent.

Burden of proof

The weakest point seems to be the transfer from the savings account to the current account by some variety of telephone banking. It is arguable that the judge failed to direct herself clearly that the burden of proof was on the bank to show that the transfer was authorised, and that in view of the inability of the bank to give details of how the transaction was authorised, the judge ought to have held that the bank had failed to discharge the burden of proof. In effect the judge relied on an assumption that the bank probably did the right thing, and ought not to have done so.

There seems to have been no attempt to introduce any technical evidence to show how the debit card transactions might have been made without the use of the correct PIN. If so, it seems unlikely that the Court of Appeal would admit new material on this point, since it could have been adduced before the judge.

¹ Nicholas Bohm and Stephen Mason, ‘Identity and its verification’ *Computer Law*

& *Security Review*, Volume 26, Number 1, (January 2010), 43 – 51.