

## **The complaint**

Mr T complains that Santander UK Plc did not help recover the money paid to a scam investment company.

## **What happened**

Mr T was contacted by a company called UFX.com who sold him an investment opportunity. He had no previous trading experience but was interested in earning an additional income. From December 2015 to June 2019 Mr T made payments totalling £130,943.83 from his current account with Santander and £29,530.51 from his credit card account - also with Santander. He received credits of £8,635.99 into his current account and £347.76 into his credit card account. The total loss he incurred is therefore £151,490.59.

Mr T states he discovered the UFX platform didn't actually exist and he was scammed. He said he was initially permitted to withdraw money from his trading account but then UFX would later make excuses as to why he couldn't make withdrawals.

Mr T feels Santander should repay this loss because it didn't do enough to assist him with processing chargeback claims or section 75 claims (in relation to his credit card account). He also feels it should have spotted the unusual nature of his payments and done more to prevent the fraud.

Santander doesn't agree it should repay Mr T's losses. It acknowledges it incorrectly advised that a chargeback claim wouldn't be an option for him when he initially asked for help in August 2019. It later noted that some of the transactions Mr T complained about were 'in time' for a chargeback claim to have been processed. It asked Mr T for additional information to see if a claim could have likely succeeded. When Santander didn't receive the specific information it required, it concluded a chargeback claim would not have succeeded but paid Mr T £100 compensation for initially providing incorrect information.

One of our investigators initially upheld Mr T's complaint but after reviewing further information didn't agree the complaint should be upheld.

Mr T asked for an ombudsman to review the complaint and it has therefore been passed to me.

## **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.

Banks and other Payment Services Providers ("PSPs") do have a duty to protect customers against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering. But when simply executing authorised payments, they do not have to protect customers against the risk of bad bargains or give investment advice – and the Financial Conduct Authority ("FCA") has confirmed that a fraud warning would not constitute unauthorised investment advice.

So, the first question to resolve is whether this particular trader was a fraudster.

*were the disputed payments fraudulent?*

Not every complaint referred to us and categorised as a binary options or forex scam is in fact a scam. Some cases simply involve high-risk investments that resulted in disappointing returns or losses.

Certain high-risk investment traders may have promoted these products using sales methods that were arguably unethical and/or misleading. However, whilst customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud; i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself, or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

In simpler terms, some merchants may have used sales and promotional methods that could be seen to be unfair by consumers considering the losses they've incurred – but this does not always amount to *fraud*.

When considering this for Mr T's case, I've paid particular attention to the official organisations that publish warnings about merchants that operate in the UK and abroad. I've searched the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO"), the international body that brings together the world's securities regulators. And the FCA (as the UK regulator) also has its own warning list, which is in place to share alerts and insight about merchants that have been identified as potentially being fraudulent.

Upon checking both of these, it's my understanding that UFX had no adverse information reported about them at the time Mr T authorised his payments. What I have noted was that they were registered with the FCA at the time of Mr T's payments. I've seen that Mr T suggested the company he was dealing with was not the genuine UFX but he has not provided any evidence of this.

I have seen that the FCA cancelled UFX's registration on 11 June 2020 and explained after this date, UFX could no longer provide investment services to UK customers. But this information was not available at the time of Mr T's disputed payments.

I must therefore take into account that there's strong evidence here – particularly because there are no regulator warnings that were published at the material time that UFX hadn't been identified as a fraudulent company when these payments were made.

What's more, I've also looked at other third-party evidence, to determine whether UFX may fairly and reasonably be regarded as fraudulently seeking gains at the expense of others. I have seen some negative reviews about UFX, including delays with processing withdrawal requests and customers losing money. But I cannot ignore that, while this could be seen as circumstantial evidence that helps build an overall picture of UFX – this is not in itself sufficient evidence of fraud.

I must follow the evidence and, essentially, I have no credible evidence to persuade me with any degree of certainty that UFX was operating a scam and the evidence I have seen suggests that UFX were indeed regulated at the time it offered services to Mr T. So, taking everything into consideration, I'm not persuaded that UFX was in fact a fraudulent company.

Having concluded that this was not a fraudulent company and was potentially a bad bargain or poor investment advice, I need to consider the following:

1. Did Santander deal with Mr T's chargeback or section 75 claims fairly?
2. If so, were any of the disputed transactions still so unusual or uncharacteristic for Mr T and/or his account that Santander fraud alerts ought reasonably to have triggered some sort of intervention?
3. If triggered, would Santander's intervention have made a difference and prevented or reduced the loss?
4. And if so, was Mr T partly to blame for what happened such that it would be fair and reasonable to reduce compensation proportionately?

### *Chargeback*

Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed or be deemed a 'valid claim'. Our role in such cases is not to second-guess Visa's arbitration decisions or scheme rules, but to determine whether the regulated card issuer (i.e. Santander) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder.

Having considered Visa's rules, the possible chargeback 'reason codes' did cover binary-options/investment trading at the time of some of Mr T's payments. Prior to 14 October 2017, Visa allowed for chargeback claims to be processed if the cardholder (Mr T) could provide written evidence from the merchant (UFX) guaranteeing an amount of profit/returns they were due to receive. I've noted Mr T hasn't presented such evidence and therefore any transactions prior to this date would not have had any prospect of success if chargeback claims had been processed.

Visa expanded its rules to cover situations whereby binary options/investment traders prevented cardholders from withdrawing their available balances from 14 October 2017.

However, Reason Code 53 (later re-coded by Visa to 13.5) required Santander to present dated evidence that Mr T had an available balance (in the form of a screenshot or confirmation from the merchant) and that he tried to withdraw sums equal to, or less than, his available balances on the same day.

Mr T provided an email dated 18 April 2016 where he wrote the following to UFX:

*'If you can ensure \$2000 is withdrawn into my visa account card ending 4812 by Friday (not my credit card!) - I requested a withdrawal last Friday so should be possible? Then I will trade the balance \$5000+ if you return it to my trading account'*

It's important to note that Visa's applicable 'reason code' 13.5 only took effect on transactions on or after 14 October 2017. This email therefore did not meet Visa's rule requirements at the time Mr T requested a chargeback claim in August 2019. Visa also has time limits up to a maximum of 540 days from the date of the transaction. Within this time limit, a claim would need to be made within 120 days of the date the cardholder expected to receive the service. In any event, I've seen that Mr T received credits of just over £1,400 into his current account a couple of days after his withdrawal request. So it would appear this request was actioned.

I've noted Mr T's concerns about the poor performance of his investment platform, along with the level of risk involved in his trades. But there were no options to pursue concerns of this nature through the chargeback scheme. And therefore, I'm satisfied Mr T did not present the required evidence of the card scheme rules and so, chargeback wouldn't have been an option for him. I've noted Santander paid £100 compensation to recognise providing incorrect information to Mr T about his chargeback options and I think this was fair and reasonable under the circumstances.

## Section 75

Section 75 of the Consumer Credit Act 1974 gives a debtor the right to pursue a 'like claim' for breach of contract and/or misrepresentation against a creditor as he would have against the supplier of goods or services.

For a claim of misrepresentation to be successful it's necessary to show not just a false statement of fact but also that the statement induced Mr T into entering into an agreement. Mr T hasn't presented any evidence that would suggest UFX made promises that induced him into entering into an agreement with them. Nor that they breached any contract he had with them.

Mr T provided an email exchange between him and UFX on 6 September 2016 where the UFX agent says 'Have a look at the next BIG move on the GOLD'. To which Mr T replies:

*'I am taking a break from trading for a while. Picking up a nice new Audi tomorrow to help soften the blow of my losses.....When I return I will be looking to gain and not lose. Low risk and not high risk.....The challenge will be for you to help me match those gains over the rest of the month. A fairly lightweight strategy but amounts should build up over time if we are careful'.*

It's clear from Mr T's email exchange that he suffered losses but continued to pay money onto his UFX platform. While he suggested he wanted high risk and not low risk, I've not seen any evidence that UFX guaranteed this or made promises in respect of his credit card payments that were broken. It follows that I don't find Mr T has established a claim for misrepresentation or breach of contract under section 75.

### unusual or uncharacteristic activity

Santander is aware of our general position on a PSPs' safeguarding and due-diligence duties to protect customers from the risk of financial harm due to fraud. We have published many decisions on our website setting out these principles and quoting the relevant rules and regulations. It is unnecessary to rehearse them again here in detail.

It is common ground that the disputed payments were 'authorised' by Mr W for the purposes of the Payment Services Regulations 2009 and 2017 ('the Regulations'), in force at the time. This is because they were made by Mr T using the legitimate security credentials provided to him by Santander. These must be regarded as 'authorised payments' even though Mr T feels he was the victim of a scam. So, although he did not intend the money to go to scammers, under the Regulations, and under the terms and conditions of his account, Mr T is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I consider Santander should fairly and reasonably:

- Have been monitoring accounts—and any payments made or received—to counter various risks, including anti-money-laundering, countering the financing of terrorism, and preventing fraud and scams;
- Have had systems in place to look out for unusual transactions or other signs that might indicate its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks and building societies are generally more familiar with than the average customer; and
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

Mr T feels that his transaction on 28 December 2015 of £10,068.53 was unusual in relation to his normal day to day spending. I would agree and I am satisfied there were enough ‘triggers’ in this case to have alerted a responsible regulated firm such as Santander that Mr T’s account was being subjected to unusual and uncharacteristic activity. There were reasonable grounds to suspect a fraud or scam, and therefore justify an intervention (such as phoning him in order to ask discreet questions about the nature and purpose of the payment).

As long ago as June 2012, the FCA’s predecessor indicated—in its consultation paper entitled *Banks’ Defences Against Investment Fraud: detecting perpetrators and protecting victims*—that it was good industry practice for firms to build up an updated watch-list of types of scams and potential perpetrators; and regularly to share “*timely and detailed intelligence*” with other banks, UK and overseas regulators, the police, etc. Whilst the regulator gave no specific timings, it is not unreasonable in my view to expect a large firm to update its watch-list and communicate internally to staff within, say, one month of an alert being posted by the FCA or IOSCO. In my judgment, such alerts should automatically trigger alarm-bells—and lead to the payment being paused—pending further enquiries (and a possible scam warning) to the payer.

But in Mr T’s case, in December 2015, there were no warnings from the FCA or IOSCO that indicated UFX were scammers. And rather the evidence does suggest they were registered with the FCA. If Santander had intervened and carried out further checks to ensure Mr T was not the victim of a scam, I would have expected it to direct Mr T to check the firm was registered with the FCA and carry out his own due diligence.

Mr T has presented evidence that he carried out further checks prior to making his payment on 28 December 2015, including checking UFX’s FCA registration status. Whilst the email chain provided by Mr T suggested he couldn’t locate UFX’s registration status, the agent for UFX advised they were registered with the FCA. I’ve also noted that the firm name, parent company name and the firm’s FCA reference number contained on the emails provided by Mr T match the details held on the FCA’s website. The payments on Mr T’s bank statements were also sent to ‘UFX’. There’s no indication that Mr T was not dealing with the legitimate UFX despite his suggestion that he was tricked into believing he was.

It’s clear Mr T carried out his own due diligence checks and satisfied himself of UFX’s registration status prior to sending further large payments to them. It would be expecting too much of Santander to play amateur detective and carry out extensive checks into the individual history of a merchant who on the face of it, appeared to have the required regulation to offer the services they provided Mr T with. And I’m not persuaded any warning

given by Santander at the time of his payment on 28 December 2015, would have led to Mr T doing anything differently. Not least because he went on to have a relationship with UFX over several years despite losing significant sums of money with them.

In other words, I am satisfied that a warning from Santander in December 2015 probably would have made no difference to Mr T. Any failings by Santander were not the dominant, effective *cause* of his losses; they were just part of the background history or occasion that led up to them.

In light of my conclusions above on causation, it is unnecessary for me to go on to consider whether Mr B was himself partly to blame for what happened (contributory negligence). Indeed, I have already concluded that he was responsible for his own investment or gambling decisions, and that such choices were the proximate cause of his losses.

UFX is now a trading name of Reliantco Investments and have been since 2018. They are regulated by Cyprus Securities Exchange Commission (CySEC) and they held passporting rights through the FCA (which meant they could offer services to UK customers) until June 2020 when the FCA cancelled their rights. The FCA published a notice about UFX advising the following:

*'UK consumers who are not satisfied with any aspect of the handling of their trading accounts should first complain to the firm directly.*

*The firm must acknowledge receipt of your complaint within five days and then provide a material response within two months, telling you whether the complaint has been successfully resolved or why they need more time to look in to it (up to a maximum of three months from the day of complaint).*

*If you are not happy with the firm's response, or they fail to respond, you can ask the Cyprus Financial Ombudsman to consider your complaint.'*

It follows that Mr T may have the option of pursuing his complaint about UFX directly with them (I've noted their website is still in operation) and CySEC if he hasn't already done so.

### **My final decision**

For the reasons set out above, I am not persuaded that Santander UK Plc acted unfairly or unreasonably with regard to Mr T's disputed transactions to UFX, so I am unable to uphold this complaint or make any award against the bank.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 26 November 2021.

Dolores Njemanze  
**Ombudsman**