

The complaint

Mr C complains that Santander UK Plc ('Santander') won't refund all his loss after he fell victim to an investment scam.

What happened

Mr C is represented in this case but for ease I'll refer to Mr C throughout this decision.

Mr C says that his daughter passed away and left him money that she had asked him to invest. He started to look into bitcoin and saw a celebrity endorsed advert on social media for a company I'll refer to in this decision as P. The fact that celebrities endorsed the investment gave Mr C confidence and he thought P's website looked genuine, so he provided his contact details and received a call from someone who said he'd be Mr C's advisor.

Mr C decided to go ahead with the investment and made the transactions in the table below to a cryptocurrency exchange I'll refer to as G.

Date	Amount	notes	Account
26/08/21	£1,825		Current
07/09/21	£11		Everyday
07/09/21	£19,000	<i>Stopped and not made</i>	<i>Everyday</i>
07/09/21	£20,000	Intervention and released	Everyday
09/09/21	£50,000	Intervention and released	Everyday
06/10/21	£20,000		Everyday
06/10/21	£25,000		Everyday
11/10/21	£5,000		Everyday
15/10/21	£3,700		Everyday
25/11/21	£4,201		Current
11/01/22	£14,000		Current
Total	£143,737		

Mr C was provided with access to a trading platform via P's website which he thought looked professional. As he saw his profits rise on the platform Mr C decided to invest greater amounts. After the final payment of £14,000, Mr C says that his profits had reached £200,000. Mr C said he wanted to withdraw his funds but was advised that the money needed to stay in the account until the end of the year. At this stage Mr C again asked to withdraw his funds but was given various reasons why this couldn't happen, and he was asked to invest more. Ultimately, the representative of P stopped communicating with Mr C and he realised he was the victim of a scam. Mr C contacted Santander in January 2022 and

Mr C's representative sent a letter of complaint to Santander on 9 August 2022 saying that Santander failed to intervene at any point.

Santander considered Mr C's complaint under the Lending Standards Board's Contingent Reimbursement Model Code (CRM Code) and said that liability for the first two transactions in the table above should be shared between it and Mr C. This was because the conversation Santander had with Mr C when Santander blocked and then released the £20,000 transaction wasn't satisfactory, but Mr C also hadn't taken enough steps to ensure the investment was genuine. Santander held Mr C responsible for the remaining transactions as it said it supplied effective warnings. Santander was able to recover £61 which has been returned to Mr C.

Our investigation so far

The investigator who considered this complaint recommended that it be upheld in part. She said that Santander didn't do enough when it spoke to Mr C when he made the £20,000 payment and didn't provide an appropriate warning. But the investigator felt that Mr C should share the responsibility for his loss because he didn't complete any research before investing substantial sums of money.

Mr C accepted the investigator's findings but asked for interest to be paid at 8% rather than account rate as set out in the investigator's view. Santander didn't agree. I have summarised its reasons below:

- It blocked payments of £19,000 and £20,000 on 8 September 2021 and held a further enhanced scam conversation with Mr C. Santander provided a recording of the call and said that Mr C advised that he knew he wasn't making an FCA regulated investment. A further call took place on 9 September 2021 when the advisor had a thorough scam conversation with Mr C but he didn't mention celebrity endorsement.

After reviewing Mr C's complaint, I contacted Santander to explain why I thought the complaint should be upheld. I said that I didn't think the CRM Code applies in this case as the payments to the scammer weren't faster payments to UK GDP denominated accounts. I noted that Santander had accepted it didn't go far enough in its call with Mr C in respect of the £20,000 transaction and I agreed. I felt that if Santander had asked the kind of questions I think it should have the scam would have been uncovered and all scam payments prevented. But I agreed that Mr C didn't complete any research and that he should share his loss with Santander.

I have summarised below the main points Santander made in response:

- Mr C should pursue a claim against G rather than Santander.
- Santander raised points about conversations it had with Mr C in calls after the one on 7 September 2021.
- Santander said it hadn't breached any duty and referred to the Supreme Court case of *Philipp v Barclays Bank PLC*.

I responded to the points raised but Santander didn't agree and said it had no further points to raise, so I now issuing a 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.

In deciding what's fair and reasonable, I'm required to take into account relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Should Mr C's complaint be considered under the CRM Code?

The first thing I need to consider is whether the CRM Code applies. The CRM Code only applies to certain types of payment made, in pounds sterling, between accounts based in the U.K. As Mr C bought cryptocurrency which he sent to a fraudster the CRM Code doesn't apply.

Considering Mr C's complaint under Santander's wider obligations

Aside from the CRM Code, a bank still has wider obligations and a duty to protect its customers, as far as is reasonably possible, against the risk of financial harm from fraud and scams.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr C's account is that he is responsible for payments he's authorised himself. And (as Santander has referenced) the Supreme Court has recently reiterated in *Philipp v Barclays Bank UK PLC*, banks generally have a contractual duty to make payments in compliance with the customer's instructions – as Santander did in this case.

In that case, the Supreme Court considered the nature and extent of the contractual duties owed by banks when making payments. Among other things, it said, in summary:

The starting position is that it is an implied term of any current account contract that, where a customer has authorised and instructed a bank to make a payment, the bank must carry out the instruction promptly. It is not for the bank to concern itself with the wisdom or risk of its customer's payment decisions.

The express terms of the current account contract may modify or alter that position. For example, in *Philipp*, the contract permitted Barclays not to follow its consumer's instructions where it reasonably believed the payment instruction was the result of APP fraud; but the court said having the right to decline to carry out an instruction was not the same as being under a duty to do so.

Santander's December 2020 terms and conditions say at 6.6:

"We can refuse any Payment Instruction, if:

(e) we reasonably suspect it relates to fraud or any other criminal act".

So in accordance with Santander's own terms and conditions it could therefore refuse payments, or make enquiries, where it suspected fraud. Whilst the current account terms did not oblige Santander to make fraud checks, I do not consider any of these things (including the implied basic legal duty to make payments promptly) precluded Santander from making fraud checks before making a payment.

And, whilst Santander was not required or obliged under the contract to make checks, I am satisfied that, taking into account longstanding regulatory expectations and requirements and what I consider to have been good practice at the time, it should fairly and reasonably have been on the look-out for the possibility of APP fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do and as Santander did in this case.

The detailed reasoning for this has been set out in substantial detail in recent decisions to Santander, so I don't intend to repeat it here.

But, overall, taking into account the law, regulators 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 that its customers were at risk of fraud (among other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer.
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, or provided additional warnings, before processing a payment – as in practice all banks do.
- Have been mindful of – among other things – common scam scenarios, the evolving fraud landscape (including for example the use of multi-stage fraud by scammers) and the different risks these can present to consumers, when deciding whether to intervene.

Should Santander have fairly and reasonably made further enquiries before it processed Mr C's payments, and would that have prevented the loss?

Santander did in fact stop payments and contacted Mr C on a number of occasions due to its concerns about the transactions. So its arguments regarding the recent court case of Phillips v Barclays seem somewhat contradictory.

Santander also refunded some of Mr C's funds because it recognised that it should have done more in its first call with Mr C on 7 September 2021 when Santander blocked attempted payments of £20,000 and £19,000. During this call the payment of £20,000 was ultimately made.

I've listened to the call between Mr C and Santander on 7 September 2021. The Santander advisor checked that Mr C hadn't been told what to say and confirmed that Mr C wanted to transfer £20,000. He then read the following to Mr C:

"Criminals have been targeting investors recently, they pose as financial advisors or brokers and will appear helpful and guide you through the opening of the cryptocurrency account. Behind the scenes though they make sure they have access to the new account so once you've made the payment they'll lock you out and take full control of the money."

"The reason why we read this out is that it can be dangerous if third parties have advised you to take this up so this is something you've [inaudible] by yourself isn't it sir?"

When Mr C said "yeah" the advisor went on to say:

"So there's nobody advising you what to do and all that."

The advisor explained that as it was a cryptocurrency investment it wasn't FCA registered and provided a broader warning aimed at safe account scams. After going through some additional security questions and confirming the transaction couldn't be recalled the transaction was processed.

I agree that this transaction was highly unusual given the previous operation of Mr C's account. I also agree that the Santander advisor didn't do enough in this call. There was no discussion about how Mr C found out about the investment opportunity or about Mr C's understanding of it or which company it was with. For example, Mr C wasn't asked about the potential rate of return. The advisor also didn't ask Mr C whether anybody was helping him or advising him to make the payment. Whilst the point was raised, Mr C wasn't asked a direct question. And cryptocurrency investment scams of this nature weren't brought to life in such a way that Mr C might realise that something wasn't right.

I've thought about what's most likely to have happened if Santander had intervened as I consider it ought to have done. I'm satisfied that proportionate questions would quickly have led to the conclusion Mr C was likely being scammed and so further loss could have been prevented.

The fact that Mr C saw an advert on social media ought to have been a serious red flag to Santander. If questions had been asked about this, I consider it likely Mr C would have said the investment was celebrity endorsed and this is why he thought it must be genuine. One of the celebrities involved has been used as the face of fake investments and has publicly stated on a number of occasions that he doesn't endorse investments. I also think questions about the rate of return and the documentation Mr C received would have helped to establish if he was at risk of being scammed. Mr C's representative has said he wasn't advised of a specific rate of return but on the basis Mr C was led to believe four weeks later that his total investment had grown to £200,000 I think it's fair to say he was likely lured into the investment on the promise of unrealistic returns.

I also note from one of the calls that Mr C had been scammed in the past, so I think he'd have taken note if Santander shared its expertise and advised he was likely falling victim to a scam again, particularly given the amounts involved and the fact he has provided evidence his daughter passed funds to him to invest when she died. These funds were lost in the scam.

So, I consider that if Santander had probed enough when the first payment was made it's more likely than not the scam would have been uncovered and all of Mr C's further loss prevented. Santander has referred to the fact that it had further conversations with Mr C when he made more payments. Mr C attempted to transfer £20,000 and £19,000 on 8 September. The transactions were blocked, and Mr C spoke to a Santander advisor who went through some questions and warnings. But when the advisor asked for the payee account details, he didn't have them available and so a further call was required. This took place on 9 September 2021. During this call Mr C said he'd like to increase the payment to £50,000 to take advantage of a good price. I don't need to consider this call though, because had Santander asked the kind of probing questions I think it ought to have done on 7 September, the scam would have been uncovered and so no further payments would have been made.

It's unclear whether Mr C had an account in his name with G or whether he just exchanged cryptocurrency which he then transferred to a scammer. If the transactions went to an account in Mr C's own name I still consider Santander ought to have been mindful of the potential risk to Mr C of 'multi-stage' fraud – whereby victims are instructed to move funds through one or more legitimate accounts held in the customer's own name to a fraudster.

I have also taken into account that the payments were made to G, and Mr C might potentially have a claim against G in respect of its actions (although G is not a party to this complaint and so I make no finding about its role here). The dispute resolution rules (DISP) give me the power (but do not compel me) to require a financial business to pay a proportion of an award in circumstances where a consumer has made complaints against multiple financial

businesses about connected circumstances, Mr C has only complained about Santander. DISP does not empower me to instruct Mr C to make or refer a complaint about another business and I am required to consider the complaint in front of me.

Should Mr C bear any responsibility for his loss?

I've thought about whether Mr C should bear any responsibility for his loss. In doing so, I've considered what the law says about contributory negligence, as well as what I consider to be fair and reasonable in all the circumstances of this complaint.

The only evidence in respect of the scam that Mr C has provided is an email from the scammer with trading news and a link to information about cryptocurrency. I haven't been provided with any evidence of any other communications with the scammer or of the trading platform Mr C's representative has referred to. So I have very limited evidence to base my decision on. Mr C has said that he looked at P's website but didn't complete any other checks though. Given the amount he was investing I consider Mr C ought reasonably to have done more to reassure himself that the opportunity he was offered was genuine. Genuine investments aren't usually found on social media and although an exact rate of return hasn't been provided it seems likely the return offered wasn't realistic.

Overall, I'm not satisfied that a reasonable person would've proceeded without doing more investigation and checks to verify all the information they were given. So I'm persuaded that this complaint should be upheld and Santander should refund 50% of all transactions from the £20,000 payment on 7 September 2021 after deducting the £61 already recovered and returned to Mr C. Santander has already refunded £10,005.50 so this figure needs to be deducted from the award.

Putting things right

I uphold this complaint and require Santander UK Plc to put things right as set out below.

My final decision

For the reasons stated I uphold this complaint and require Santander UK Plc to:

- Refund £60,914.50; and
- Pay interest on the above amount at the rate of 8% simple per year from the date of each transaction to the date of settlement.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 25 March 2024.

Jay Hadfield
Ombudsman