

The complaint

Mr H complains about Santander UK Plc. He says that Santander didn't do enough to protect him when he became the victim of a scam and would like it to refund him the money he has lost.

What happened

In December 2021, Mr H was contacted by email by someone who said they worked for a company that specialised in recovering funds lost to scams. Mr H had made a small investment in cryptocurrency a few years prior – but the sum was small, and he had forgotten about it.

The individual told Mr H that the company he had invested in previously was a scam – however, his money had been saved as this new company had taken over and had increased in value – however he would need to provide identification in order to prove that the money was his.

Mr H duly provided identification documents and was then told that he needed to provide funds in order to hold a binary account which would be £250.

Mr H was then told that he needed to pay more money in order to access the funds and in total made payments of £2,068.65 in order to access the money he had been told was now worth \$46,854.85.

However, Mr H then became aware that this was actually a scam. He made a complaint to Santander as he said it should have done more to protect him.

Santander didn't uphold his complaint, so he brought it to this Service. Our Investigator looked into things and thought that the complaint should be upheld in part.

Mr H agreed, but Santander did not. It mentioned the Supreme Court Judgement in the case of Philipp vs Barclays Bank Plc UK [2023] UKSC 25 which confirmed that where a bank receives instruction from a customer which is clear and leaves no room for interpretation and the customer's account is in credit, the bank's primary duty is to execute the payment instruction. As they felt they received a clear instruction from Mr H to send funds to another account in his name, they did not agree that there was any room for interpretation from them. In addition, they reiterated Mr H's loss did not take place from her Santander account, so they should not be responsible for reimbursing him.

As an informal agreement could not be reached, the complaint has been passed to me to make a final 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.

Having done so, I've decided to uphold this complaint in part. I'll explain why.

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider having been good industry practice at the time.

In broad terms, the starting position at law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. And I have taken that into account when deciding what's fair and reasonable in this case.

However, taking into account the law, regulator's rules and guidance, relevant codes of practice and what I consider having 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 make 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.

In this case, I need to decide whether Santander acted fairly and reasonably in its dealings with Mr H when he authorised payments from his account or whether it could and should have done more before processing them.

In reaching my decision, I have taken into account the Supreme Court's decision in *Philipp v Barclays Bank UK PLC [2023] UKSC 25*.

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.

In this case, Santander's terms and conditions gave it rights (but not obligations) to:

1. Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.

2. Delay payments while fraud prevention checks take place and explained that it might need to contact the account holder if Santander suspects that a payment is fraudulent. It said contact could be by phone.

So, the starting position at law was that:

- Santander was under an implied duty at law to make payments promptly.
- It had a contractual right not to make payments where it suspected fraud.
- It had a contractual right to delay payments to make enquiries where it suspected fraud.
- It could therefore refuse payments, or make enquiries, where it suspected fraud, but it was not under a contractual duty to do either of those things.

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 fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

Having considered the payments that Mr H made, I don't think that *any* of the payments Mr H made required Santander to intervene. The individual payments were not large or significantly suspicious enough to warrant it.

However – it is clear that Santander *did* consider the payments as unusual or suspicious, as it contacted Mr H to discuss the £800 payment he made. So, I do need to consider whether its intervention was sufficient in protecting Mr H from financial harm as it is clear that Santander thought that he could be.

Santander has provided two calls that took place on 31 March 2022 - but it hasn't provided the initial call that took place.

During these calls, I don't think that Santander went far enough in questioning Mr H about what he was doing or asked enough questions about what was going on. Had it asked Mr H more questions, I think that it would have established that Mr H was paying a supposed company that was going to retrieve funds that he had lost to an earlier scam and had been told he was going to receive a significant amount of money in return. I've seen nothing to suggest that Mr H was told to lie about what he was doing – so I think that Santander would have recognised that this was very likely to be a scam and provided Mr H with a warning about this – and I don't think Mr H would have ignored such a warning.

So, I think it missed an opportunity to prevent the loss from this point.

Santander says that its notes from the earlier unavailable call show that Mr H had a discussion about scams in the earlier call and that he was directed to check the company he was paying on the Financial Conduct Authority (FCA) website. But I don't think the notes available show to a satisfactory level that it discussed what Mr H was doing in any great detail. And although he may have been directed to check if the business he was paying, there wouldn't have been any negative information about Moonpay (the crypto exchange) he was making the payments to as they are a legitimate business.

What's left to decide is whether Mr H should reasonably bear some responsibility for the losses as a result of any negligence in his actions and if it is therefore reasonable for me to make a reduction in the award based on this. I understand that Mr H has already accepted the findings in relation to this, so I won't repeat them again in detail here. But in summary, I do agree that there should be a reduction in the redress to account for this, as there were warning signs that Mr H could have reacted to in order to avoid the scam, such as previously haven fallen victim to a scam and that he continued to make further payments to the scammer even though he hadn't received the money he had been promised. So, I do agree that the redress should be reduced by 50%.

Putting things right

Santander UK Plc should refund Mr H 50% of the payments made from the intervention. I calculate this to be £809.22.

On top pf this Santander should also pay Mr H 8% simple interest on this amount from the date of the payments to date of settlement (less any lawfully deductible tax).

My final decision

I uphold this complaint in part. Santander UK Plc should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 7 May 2024.

Claire Pugh
Ombudsman