

The complaint

The trustees of a trust which I'll refer to as H, complain that Santander UK Plc allowed H's beneficiary to gain access to and withdraw the funds that were deposited in its account (the Account)

What happened

The background to the complaint is set out in my provisional decision dated 9 June 2023, which forms part of this decision.

I provisionally concluded that the complaint should be upheld in part, and that Santander should refund to H, the £109,114.12 that had been withdrawn from the Account in August 2021.

In addition, I also recommended that Santander pay £1,000 for the inconvenience caused to the trustees. However, on the question of the interest that Santander ought to pay on the withdrawn funds, I didn't think it would be fair to ask the bank to pay H 8% simple. So, I recommended the bank pays the rate that the Account would normally have attracted from the date the funds were withdrawn to the date of settlement.

In summary I said:

I start by acknowledging this has been a very difficult situation for the trustees. Mr L has explained that because of what has happened, family relationships have become broken. I am sorry to hear that.

Santander made an error to which they admitted. It is Santander's position that Mr F should never have been allowed to withdraw the funds from the Account. Given that acknowledgement, the question for me is what compensation is appropriate in the circumstances of the case.

Santander have put forward the following by way of redress:

- *Refund the £109,114.12 that was withdrawn from the Account.*
- *Pay interest on the amount at the rate earned on the Account from the date of withdrawal to the date of settlement.*
- *Pay £1,000 for the inconvenience this matter has caused to the trustees.*

I've thought about whether Santander's offer is a fair and reasonable settlement of this complaint. I am minded to conclude that it is and, I'll explain why.

Our aim is not to fine or to punish financial businesses. Rather when we recommend that a financial business pays compensation, it is essentially as Mr L has identified, to put the complainant back in the position that otherwise they'd have been in if the error complained about hadn't occurred.

With that principle in mind as I've noted above, the bank has offered to refund in full the amount Mr F withdrew. Indeed, this was what the trustees requested, and the bank has met that request. It means H has not suffered any financial loss.

I next consider the position of interest. Mr L believes the bank should also pay 8% on the amount.

Mr L is right that when it comes to the award of interest, we sometimes consider it is appropriate to award interest at 8% - the same as the courts.

In my view, it's fair and reasonable to do so in circumstances where we find that arising from a financial business' error, the complainant has been denied the ability to use the funds that are the subject matter of the complaint. Here, however, the position is different. I'll explain why.

The trustees have told us that the funds in the Account were never intended for immediate use. Rather, they were intended to remain invested in the Account earning interest until such time as they were to be used to settle the inheritance tax bill the trustees anticipated was likely to be due upon their death.

I have to be fair to the parties in the dispute that's been brought to this service. And it seems to me that the offer by Santander to pay the rate the Account was actually earning from the date of the withdrawal to the date of settlement is fair and reasonable.

Finally, I consider whether the £1,000 the investigator recommended, and the bank agreed to pay as compensation for inconvenience is reasonable. I believe it is.

Mr L has described the family tension that has resulted because of these events. And he has explained too the impact on the trustees' health. I think that a significant award is therefore merited and, for the reasons the investigator has already given, I'm at present satisfied the £1,000 he recommended is significant as well as being fair and reasonable in the circumstances of the case.

Mr L has told us the trustees had to take out an injunction against Mr F to prevent him from attending the farm. He's told us the trustees had to pay legal fees of around £6,000. Whilst I'm sorry to hear that the relationship between the trustees and Mr F deteriorated to such levels, so that the action they took became necessary, I'm not at present persuaded this was a foreseeable consequence of the bank's error. So, I'm not persuaded Santander should also cover the cost.

Santander accepted my provisional decision. But the trustees didn't. Both trustees, Mr L and Mrs G, have submitted separate and detailed further representations for me to consider. But I note that in large part, the trustees have each restated why they believe Santander acted wrongly in the circumstances of this case. In particular, as they see it, having regard to the bank's obligations under the Trustee Act 1925. They believe that had the bank observed those obligations, it would have willingly compensated the trustees for their loss and the extra time and money they spent on this case.

The trustees have also invited me to consider and comment on the nature of Santander's liability, especially, in circumstances where there's been a breach of the bank's mandate which they say has occurred here. They believe that in such circumstances the law imposes a strict liability on the bank – meaning they should have been compensated straight away.

I don't, however, intend to comment on those matters. And I'm afraid, nor do I intend to respond to each and every other point the trustees have made in their individual submission.

I mean no discourtesy towards the trustees, but my approach reflects the informal nature of our service. And in any case, and perhaps more importantly, there is no dispute that Santander acted wrongly in the circumstances of this case. In other words, they shouldn't have released the funds in the Account to Mr F. Strictly speaking therefore, it isn't necessary for me to determine the legal basis or otherwise of the bank's liability.

Against that background therefore, as I alluded to in my provisional decision, the issue for me to determine in light of Santander's acknowledgement is what would be fair and reasonable for the bank to do to put things right.

In advance of my final decision, Santander have now refunded the £109,114.12 that was withdrawn from the Account. In doing so they complied with the wishes of the trustees that the funds should be returned without further delay. Santander have also complied with the trustees further request regarding the account into which the money should be paid.

In light of that action, what's left for me to determine is whether, as the trustees believe the bank should also now pay 8% interest on the refunded amount as well as increasing the £1,000 it has agreed to pay for the distress and inconvenience caused to them. In that connection I've considered very carefully the trustees' representations as to why in relation to both these matters, the recommendation I set out in my provisional decision, don't go far enough.

Interest

Mr L said – in summary:

- Following their complaint to the Information Commissioner's Office (ICO) Santander and the trustees entered into a contract whereby the bank agreed it would reinstate the funds to the Account and pay 8% interest. As this rate is in line with the figure awarded not only by the court but also this service, it is fair.
- It is wrong to "down grade" the 8% interest rate on the basis, the Account was receiving a lower rate at the time. In doing so, we've made an assumption that the trustees would not have done better elsewhere. Whereas, the trustees had been taking steps, to reinvest money belonging to H as rates have increased – including for example, moving their ISA with Santander to another provider who'd been paying a better rate.

In separate representations Mrs G has made much the same point that by reducing the interest rate they are prepared to pay on the refunded amount, Santander are in breach of their contract with the trustees to pay interest at 8% on the withdrawn funds.

Mrs G also said, in summary that:

- Santander's contract with the trustees was to reimburse H with the £ 109,114.12 that was withdrawn from the Account and pay the lost interest at 8% from the agreed date of 28 September 2021. This was not considered in the ombudsman provisional decision. It is wrong therefore, for the ombudsman to interfere with a contract that existed between the parties. Especially because, a breach of such contract would result in a possible claim for damages against the bank which the ombudsman has no power to interfere with.
- In any case if at the outset Santander had recovered the money from Mr F using the relevant legislation, the bank would not have lost anything, and furthermore, would not now be required to pay interest at 8% for almost two years. Also, the trustees

would not have lost anything because they'd have been able to reinvest the funds in the Account at a better rate, or possibly move H's account to another Bank.

distress and inconvenience

In summary, the trustees have said:

- The £1,000 that's been recommended doesn't go far enough, not least because, on a 50:50 split, in Mrs G's case, for example, that equates to a share of £500 for 422 days of inconvenience. In other words, further calculated this amounts to: "£ 1.25 per day for "grief pain and suffering". That's in contrast to the circumstances in which previously the trustees were paid £200 by way of an apology for 14 days of delay on the bank's part.
- Santander's refusal to comply with relevant legislation and returned the withdrawn money to the trustees meant they had to write hundreds of letters to our service as well as undertaking many hours of legal research.
- The trustees should both be entitled to litigants in person costs for all their time writing letters and researching the law.

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 see no reason to depart from the conclusions I reached in my provisional decision. I'll explain why.

Interest

Santander wrote to our service in April 2023 to let us know they would like to settle this case by offering to reimburse in full the funds that had been withdrawn from the Account. There was no suggestion Santander had already settled directly with the trustees, supported by a binding contract.

Indeed, Mr L's own testimony would seem to support that conclusion. He told us that the Santander's employee with whom he'd been in contact did not want to deal with the trustees directly regarding the proposed settlement. He said he was told in conversations and letters that the matter is with our service to decide and give instructions to the bank.

In any event, on 2 May 2023, I wrote to Mr L confirming the bank's offer of settlement – which initially was only to refund the amount that had been withdrawn from the Account.

But in a subsequent e-mail, Santander addressed the question of the 8% interest saying:

"In addition to reimbursing the funds totalling £109,114.12, and 8% from the time that the complaint was declined, we would like to pay the £1000 that was previously agreed".

As Mr L confirmed in his testimony, I made the trustees aware of this clarification by the bank and asked whether the trustees were willing to accept the offer.

Mr L responded to say, among other things, that although Santander were offering to pay the trustees lost interest and compensation from the date they declined the complaint, which was 28 September 2021, nonetheless, in law the bank should structure the payment to the date the money was lost, which he identified as 13 August 2021.

I took the view that the bank's offer to pay 8% interest needed to be clarified. In particular, because Santander proposed paying this from the date, they'd declined the complaint. Whereas, typically, what I'd have expected to see in appropriate circumstances, was the date a complainant is denied use of the funds that are the subject matter of the complaint.

So, in that connection I wrote to the bank. To be clear I was making no finding on the merits of the trustees' complaint, merely seeking to clarify the terms on which the bank was making its offer. In the event the bank decided it was no longer prepared to pay the 8%.

It is not my role to assess whether there was a contract between the bank and the trustees. And furthermore, I have no powers to consider a complaint about the way Santander chose to respond to the trustees' complaint or to make an offer to settle it.

My role is to reach an outcome that I believe is fair and reasonable in all the circumstances of the complaint. What became clear was that Santander was no longer willing to pay the 8% they initially said they would. So, I considered whether it would be fair for me to require them to do so.

For the reasons I've given I do not think it would be fair. I do, however, believe the alternative offer is fair. And I say that because the trustees explained the purpose to which the funds in the Account were to be used. And they were to remain in the Account until such time as they were needed for that purpose.

Moreover, when they realised the funds had been withdrawn, to put things right, they required the bank to return the funds to the Account. I see no evidence to persuade me the trustees had reinvestment plans for the funds in the Account, let alone details of the rates they would likely receive by doing so. So, in my opinion the bank's offer to pay interest at the rate that would have been payable had the money stayed in the original account is fair and reasonable.

The trustees rightly point out, 8% is the rate of interest awarded by the court and indeed sometimes by this service. Importantly, however, this does depend on the circumstances of the case, and is typically appropriate where a complainant has been denied the use of the funds because of an error by a financial business. Where that occurs, we might consider it fair to award the same 8% rate.

We explain on our website, however, that if we think a different rate should be applied in light of the circumstances of the particular case we will do so. That is what I've done here.

I am required to reach my decision in light of what's fair and reasonable in the circumstances of the case. And in the circumstances of this case, I have not been persuaded that requiring the bank to pay the trustees a rate of 8% on the withdrawn funds is fair and reasonable when the rate of interest the Account attracted was significantly less. So, I do not find that Santander should pay the trustees 8% that they consider appropriate.

distress and inconvenience

When it comes to awards for distress and inconvenience, whilst it is true that ultimately it is a personal judgement, nonetheless, I base my opinion on what I believe to be fair, having regard to the impact of the error complained about on the complainants.

I do not doubt that on learning the funds had been withdrawn from the Account by Mr F this did cause distress to the trustees. Their attempts to put things right caused them inconvenience also.

The trustees have explained that they've written extensively to the bank and to this service about their complaint. That is understandable since this is a significant matter for them. And especially, as they've told us, Mrs G carried out extensive legal research regarding the bank's liability. Based therefore, on their understanding of the bank's legal obligations towards them, I can see why they were keen to put their case for return of the withdrawn funds comprehensively and repeatedly to the bank and this service. But we do not usually make awards for a complainant's time in bringing a complaint to our service.

I've based my award on the individual circumstances of this case rather than by reference to any awards Santander may have agreed to before.

In this case, and without wishing to downplay the background circumstances, I've nonetheless borne in mind that the funds that were withdrawn were set aside for future use – that is to settle inheritance tax on the death of the trustees. So, the trustees were not inconvenienced in the sense the funds were needed immediately but they had no access to them.

For the reasons set out in my provisional decision, I remain satisfied that an award of £1,000 for distress and inconvenience represents a significant but also a fair and reasonable award in the circumstances of this case.

Costs

I turn finally to the question of costs. We're not a court as the trustees are aware. Therefore, we do not make awards for costs in the way the courts do whether by reference to what's appropriate for litigants in person or otherwise. The trustees believed they were entitled to recover legal costs for obtaining an injunction against Mr F, costing to date over £5,000, although I note they did indicate they were willing to accept £32,000 to settle this part of their claim. I am not, however, persuaded Santander should be held responsible for those costs because I am not satisfied they were reasonably foreseeable by the bank as a consequence of its error.

Putting things right

Having now refunded, the £109,114.12 the bank allowed Mr F to withdraw from the Account, Santander should in addition pay interest on the refunded amount with the aim of putting the trustees in the position they would have been in if Santander had not allowed Mr F to withdraw the money. Santander should also pay £1,000 for distress and inconvenience caused to the trustees.

My final decision

My final decision is I uphold this complaint in part. Having already reimbursed the £109,114.12 that was withdrawn from the Account, in addition and in full and final settlement I recommend that Santander UK Plc pays the trustees:

- Interest on the £109,114.12 at the rate the Account would normally have received from the date this sum was withdrawn to the date the funds were returned to H; and
- £1,000 to the trustees for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 21 August 2023.

Asher Gordon
Ombudsman