

The complaint

Mr S is unhappy Santander UK Plc won't reimburse him for the money he lost when he fell victim to a scam.

What happened

Mr S is represented in this complaint by a solicitor, for simplicity I will refer to Mr S throughout this decision, even when referencing what his representatives have said on his behalf.

Mr S was browsing social media and saw an advert for a cryptocurrency investment platform, he says it appeared to be endorsed by well-known celebrities and that when he followed the link in the advert it took him to a professional looking website. Mr S registered his interest and was then contacted by an individual who said they were an account manager and who advised him to download some remote access software and to open an account with an Electronic Money Institution (EMI) which I'll call W. On 18 January 2023 Mr S then made an initial payment of £800 to W, and then passed these funds on to a cryptocurrency wallet. Mr R says he saw trades being carried out on his behalf, making reasonable profits. Unfortunately, and unknown to Mr S, the people he was dealing with were not legitimate, he was the victim of a scam.

On 26 January the scammers told Mr S that his trading account had been frozen, and that he would need to deposit more money to unlock it. He did so, and was then told the same thing had happened the next day and he would need to deposit further funds. Again, Mr S made the deposit as requested, and says he was then able to see his trading account again. On 1 February 2023 Mr S wanted to withdraw his profits, but he was told he would need to pay a withdrawal fee, which he then did. But the scammers then once again told him his account was frozen and he would need to make further deposits. When Mr S made these payments, and was still unable to access his profits, and was asked for more money by the scammers, he realised that he had been the victim of a scam.

Mr S reported what had happened to Santander. But ultimately Santander said it did not think it should be held responsible for Mr S' loss, it said the payments had been made to another account in Mr S' name at W, before being passed on to the scammers. So Santander felt that W should bear responsibility for the financial loss.

Mr S was unhappy with Santander's response and so referred his complaint to our service.

One of our Investigators looked into what had happened, and ultimately, they felt that Santander should have stepped in to question Mr S about the third payment made. They felt that, if Santander had done so, then the scam would have been uncovered and Mr S' further loss could have been prevented. However, the Investigator felt Mr S should also share some responsibility for his loss here, as there were red flags that should have indicated to him that something untoward might be going on.

So, overall, the Investigator recommended that Santander refund 50% of the disputed payments from the third payment onwards, plus interest.

Mr S accepted the Investigators findings, but Santander disagreed. It stated that the payments had been made to an account with W in Mr S' name and that he had control of, and so felt W should be liable for that loss. And it didn't agree that there was anything concerning about the payments that should have flagged them as a potential scam risk. So it says that it acted in line with industry standards when making the payments, and says that stopping those payments would have been a breach of its duties.

As no agreement could be reached, the case has now been passed to me for 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 in all the circumstances of this complaint, I am required to take into account relevant: law and regulations; regulators' rules, guidance and industry standards; codes of practice; and, where appropriate, what I consider to have been good industry process at the time.

Having done so I've reached the same conclusions as our Investigator, and for the same reasons.

It's not disputed that Mr S authorised the payments that are the subject of this complaint. So as per the Payment Service Regulations 2017 (which are the relevant regulations in place here) that means Mr S is responsible for them. That remains the case even though Mr S was the unfortunate victim of a scam.

In reaching my decision I have also 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 June 2022 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 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.

So, 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 payment service providers 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, 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.
- Have been mindful of – amongst 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 customers, when deciding whether to intervene.

Taking the above into consideration, I need to decide whether Santander acted fairly and reasonably in its dealings with Mr S, or whether it should have done more than it did.

I've looked carefully at the statements I've been provided for Mr S' Santander account. In general, Mr S' account was used for low value card payments, direct debits and bill payments – generally of no more than £350 – with the occasional higher amount withdrawn via ATM. The highest payment out of the account in the months prior to the scam was £600 withdrawn at an ATM.

The first payment Mr S made as a result of the scam was for £800, on 18 January. And, in the wider context of his account I don't think this would have appeared as sufficiently unusual to flag any concerns to Santander. The next payment made, on 26 January, was for £1,800. This was significantly higher than any previous payment Mr S had made, but still, in the wider context of the payments Santander sees every day, not so high as to flag as suspicious on value alone.

And while the payments involved a new payee and were to an account with an EMI (which are reporting increasing instances of customers being scammed, including as a consequence of multi-stage scams often involving cryptocurrency), I think Santander would have been reassured by the fact that:

- The payments were being made to an account in Mr S' name
- Mr S indicated he was transferring the money to his own account
- Mr S was not deterred by the 'safe account warning' Santander provided – an example of a common scam where a customer is tricked into making payments to an account they believe is in their own name.

In addition, over a week had passed between these first two payments, which may have also reassured Santander that they were legitimate payments rather than part of a multi-stage scam.

But when Mr S then made another, equally high payment just one day later, which was preceded by what appeared to be an informal loan being paid into his account, I think this should have started to ring alarm bells for Santander. This was the third large payment to a new payee, the value of the payments was increasing, and the frequency of payments was also starting to ramp up.

In my view, this combination of circumstances ought fairly and reasonably to have led Santander to make additional enquiries before processing the payment, to establish the circumstances in which Mr S was making these uncharacteristically large payments over a relatively short space of time to an account with an EMI. A pattern of activity that could be consistent with certain types of scam, regardless of the fact that the account the payments were made to was in Mr S' name.

I've thought carefully about what would've happened had Santander insisted on direct contact with Mr S before processing any further payments. There's obviously a balance to strike, but Santander ought fairly and reasonably to have satisfied itself that Mr S hadn't fallen victim to a scam, and I'm persuaded it could've done this by asking a few open-ended questions of Mr S prior to processing any further payments.

Mr S doesn't appear to have been given a cover story to use by the scammer. So I think had Santander contacted Mr S to ask for some information about what he was doing, he would likely have explained what the payments were for and how he had come to make them. And I think it's more likely than not that what Mr S would have told Santander would have given it cause for concern, given it's familiarity with the hallmarks of investment scams such as the one Mr S was the victim of.

If that had happened, and Santander had explained that Mr S was likely the victim of a scam, I consider it likely that the spell of the scam would have been broken and that Mr S wouldn't have proceeded with the payments. So I think Santander could have prevented the losses Mr S incurred from the third payment onwards.

I've taken account of Santander's comments that Mr S' loss was from his account with W, and that it therefore feels W should be liable for that loss. But whilst 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 two financial businesses about connected circumstances, Mr S has not referred a complaint about W to our service and DISP does not empower me to instruct Mr S to make or refer a complaint about another business.

My role here is to consider the complaint in front of me. And, in doing so, I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is possible that Mr S may have cause to complain about W's role here, I am not persuaded it would be fair to reduce the award in this complaint solely for that reason. Mr S is entitled to complain only about Santander, and I am satisfied that Santander could have prevented some of the losses he suffered if it had acted fairly and reasonably.

In reaching my conclusions about what is fair and reasonable in this case, I have also considered whether Mr S should bear some responsibility for his loss. And, while there were some sophisticated aspects to this scam, I do think it would be reasonable to hold Mr S partially responsible for his loss here. I say this because, by the time of the third payment to the scammers, Mr S had been told twice in two days that his trading account was frozen due to "an error" and that he would need to pay additional funds to unlock it. I think Mr S should reasonably have been concerned by this, but he doesn't appear to have questioned this with the scammers and he continued to make further payments, even when he was told the same error had occurred a few days later. With this in mind I consider it reasonable for Mr S to bear joint responsibility or his loss.

So, in summary, I consider when Mr S made the third transfer, Santander could have done more to protect him from the risk of financial harm. Had Santander contacted Mr S directly and asked some open questions about what was happening, I'm persuaded it is more likely than not the scam would have come to light, and Mr S wouldn't have lost out on the further funds he went on to pay to the scammers.

Of the payments I am asking Santander to refund, only one appears to have been funded by Mr S' own money – the payment for £635 on 3 February 2023. So as he has been deprived of the use of this money for an extended period of time, and it's likely this money would have been used for day to day spending, I think it is fair that Santander pay interest at 8% on the 50% proportion of this payment it is refunding. The other payments appear to have been funded by informal loans from Mr S friends and family, so I do not recommend that Santander pay any interest on those amounts.

Putting things right

To resolve this complaint Santander should:

- Refund 50% of the payments made to the scam from 27 January 2023 onwards (inclusive)
- Pay 8% simple interest per annum on the portion of this refund that relates to the payment for £635 from 3 February 2023 to the date of settlement.

My final decision

I uphold this complaint. Santander UK Plc should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 15 February 2024.

Sophie Mitchell
Ombudsman