

The complaint

Mr J is unhappy Santander will not refund the money he lost as the result of a purchase scam.

What happened

Both parties are familiar with the details of the scam so I will not repeat them here in full. In summary, Mr J paid three cheques totalling £8,285 for solar panels and windows in October 2022. But when he tried to cancel his order during the contractual cooling off period the company failed to respond to his request and the sales representative he'd met 'disappeared'.

Mr J raised a fraud claim with Santander on 1 December 2022. It rejected it saying he had authorised the payments. It did try to recover any funds from the beneficiary's account but no money remained by then.

Our investigator did not uphold Mr J's complaint. She found any intervention from the bank would not have prevented the fraud as at the time the cheques were presented there was no indication that this was a scam. And the bank had done what we would expect to try to recover the money once Mr J reported the fraud.

Unhappy with this assessment, Mr J asked for an ombudsman's review. I reached the same conclusion as the investigator but as I made an additional finding I issued a provisional decision to allow both parties to submit any new information. An extract follows and forms part of this final decision.

Extract from my provisional decision

The first question I need to consider in any case involving a purchase scam is to determine, so far as is reasonably possible, whether the complainant has in fact been scammed, rather than it being a civil dispute about the goods or services ordered. This is important because banks (and other payment service providers) only have a duty to protect customers from the risk of financial loss due to fraud. This duty to intervene isn't triggered where payments are made to purchase goods or services that are say a bad bargain, defective in some way or not received.

I've carefully considered the available information about the company Mr J contracted with. And I think it is more likely than not that Mr J was scammed and that the contractors he hired had a planned intention to scam him. But that doesn't mean that Mr J's automatically entitled to a refund.

A cheque is a written order from a customer (the drawer), instructing their bank to pay a specified sum of money to a named beneficiary (the payee). Cheques aren't legal tender but are legal documents and their use is governed by the Bills of Exchange Act 1882 and the Cheques Acts of 1957 and 1992. They aren't considered a payment service under the previous or present Payment Services Regulations (PSR), so the provisions of those regulations don't apply to this type of payment instrument. And nor do the principles of the

Contingent Reimbursement Model (CRM) code.

A bank's principal duty is to obey its customer's payment mandate under the terms and conditions of the account (and of course the customer's ancillary contract with the third-party payee, e.g., a retailer, creditor, supplier, etc.). This position has long been recognised in common law. So, if a bank fails to comply with a validly executed payment order, it could be held liable for damages – as could the drawer – where the payment method used is a cheque.

What that means is the starting position is that a bank is expected to process payments and withdrawals that a customer instructs it to make without undue delay. So, presented with a cheque drawn in accordance with the terms of the account, a bank must honour the payment unless there are legal, regulatory or contractual grounds which may, in exceptional circumstances, allow refusal of a payment instruction.

Here, it is accepted that the payment mandates were validly executed (authorised) as Mr J signed and issued the cheques to the named payee. At the time, he intended to pay the company and there was no mistake made in the execution of the payments. So, under the terms and conditions of the account, Mr J is presumed liable for the losses in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and what I consider good industry practice at the time, I consider that Santander ought to have been monitoring accounts to counter various risks; having systems in place to identify unusual transactions or other indicators that its customer was at risk of fraud; and, in some situations, making additional checks before processing payments or declining them altogether to protect its customer from possible financial harm from fraud. And I've seen nothing to persuade me that a bank should be less vigilant, or fail to carry out due diligence, just because the payment is by cheque.

That said, unlike electronic payments (including plastic card transactions), a cheque can't be screened at the point of payment (which happens at the time of the writing and issuing of the cheque). A drawer's bank (in this case Santander) would only become aware of the request for payment once the cheques are paid in by the payee and sent for clearing by the receiving bank. The cheques issued by Mr J would have been cleared through the Image Clearing System (ICS).

Under this new system, instead of sending the paper cheque, the payee's bank sends a digital image of the cheque to the drawer's bank. This allows cheques to clear in two working days instead of six. So, there's a limited window of opportunity for a bank to interrupt and investigate a potentially fraudulent cheque payment.

The investigator did not make a finding about whether or not Santander ought to have identified the payments as out of character. I intend to and to do so I've considered the operation of Mr J's account in the seven months leading up to the three cheque payments in question. I can't see any other cheque payments from the account during that period. In my view, this change in typical payment method represented unusual spending activity on the account. I consider that Santander ought reasonably to have had cause for concern and I think it could and should have carried out a few more checks to satisfy itself that everything was okay.

But that isn't the end of the matter. Causation is a critical determinative factor in every scam case. It isn't enough that a bank failed to act unfairly or unreasonably; its acts or omissions must be the immediate and effective cause of losses that were reasonably foreseeable at the time of the breach.

And I agree with the investigator's view that had Santander intervened effectively with a proportionate level of questioning about the payments it would not have prevented the scam.

I say this as at the time the cheques were paid in and sent for clearing I cannot see there there would have been any identifiable concerns. The company was a legitimate listed company. Mr J had paid an initial deposit and then further payments after a surveyor had visited his home. He had a contract that detailed the work that was to be done and it seems there was no publicly available adverse information about the company at that time. And Mr J's order was not generated from a cold call or an unsolicited home visit, he had been proactively looking for a supplier. So I don't think the answers Mr J would have given would have indicated to Santander that he was at risk of financial harm and led it to provide a fraud warning or to stop the payments altogether.

It follows I can't fairly hold Santander liable for Mr J's losses.

I've then considered whether Santander did enough to recover Mr J's funds once it he raised a fraud claim in December 2022. Banks are expected to assist their customers in recovering misappropriated or misdirected funds when put on notice. I can see Santander contact the beneficiary bank around 75 minutes after Mr J reported the fraud. The beneficiary bank later confirmed no funds remained, but I find Santander acted as we would expect.

I'm sorry Mr J lost a significant amount of money. But for the reasons I've explained, I don't think Santander, who had no involvement in the scam itself, can be fairly held liable for his losses.

Both parties responded with further comments.

In summary, Mr J asked if we have found the payments were out of character why didn't the bank? He said it seems Santander investigated the scam in isolation and impeded the overall investigation by thwarting attempts to discover the recipient's bank details. He asked for guidance on the next steps he can take to reclaim his losses.

Santander set out its role in processing the cheques, explaining there was no opportunity for it to have intervened. And it said that any intervention would not have prevented the scam as at the time Mr J believed he was paying a genuine company.

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.

I have carefully reviewed the additional comments from both parties but they do not change my conclusion and I am not upholding Mr J's complaint. I will explain why.

Mr J said the bank should have identified the payments as out of character. And I set out in my provisional decision why I thought it ought to have. The bank replied explaining why it had limited opportunity due to the payment processing for cheques. I acknowledge the differences in cheque processing to, say, faster payments. But as I noted in my provisional decision, this doesn't change the bank's obligation to, in some situations, make additional checks before processing payments or declining them altogether to protect its customer from possible financial harm from fraud. There's nothing to persuade me that a bank should be less vigilant, or fail to carry out due diligence, just because the payment is by cheque.

However I need not comment further on this point as I am still of the view that had Santander

carried out further and proportionate checks it would not have prevented the scam.

As I explained in the provisional decision this is because I cannot see there would have been any identifiable concerns. The company was a legitimate listed company. Mr J had paid an initial deposit and then further payments after a surveyor had visited his home. He had a contract that detailed the work that was to be done and it seems there was no publicly available adverse information about the company at that time. And Mr J's order was not generated from a cold call or an unsolicited home visit, he had been proactively looking for a supplier. So I don't think the answers Mr J would have given would have indicated to Santander that he was at risk of financial harm. So even if it had identified the payments as unusual, the subsequent intervention would most likely not have prevented the scam.

Mr J also raised that Santander did not do enough to assist him afterwards. But from the evidence I have seen it contacted the beneficiary bank around 75 minutes after he reported the scam. So I find it acted as we would expect in trying to recover the money. I note Mr J feels Santander investigated the scam in isolation and did not share details with the beneficiary bank, but my interpretation of the response letter from the third party was that it was unable to share information about the beneficiary *with Mr J* due to data protection, and that would be the same if there was a fraud investigation. I have seen no evidence Santander withheld information from the recipient's bank that prevented the recovery of the money.

Mr J asked for guidance on what more he can do to try and recover his losses. I can only comment here on the merits of his complaint against Santander. But he might be able to pursue his complaint through the courts if he does not accept my decision.

As I said previously, I'm sorry Mr J lost a significant amount of money. But for the reasons I've explained, I don't think Santander, who had no involvement in the scam itself, can be fairly held liable for his losses.

My final decision

I am not upholding Mr J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 20 September 2023.

Rebecca Connelley
Ombudsman