

The complaint

Mr W complains Santander UK Plc didn't do enough to protect him when he fell victim to a scam.

What happened

Mr W has a credit card account with Santander – with a limit of just under £8,500 – and accounts with a bank elsewhere.

In September 2021 Mr W says he received a friend request on social media that he accepted. He says he started talking to the person he accepted and discovered that they had a lot in common. He says after a few weeks their talk turned to investing and cryptocurrency. Mr W says the person he accepted told him they'd made money investing in cryptocurrency and they asked him whether or not he'd be interested in trying. Mr W says he was, so he downloaded an app he was told to use and started buying cryptocurrency. He says he decided to invest more when he saw he was making a profit. He says he used his credit card to make two payments to a cryptocurrency wallet.

Mr W says he received another friend request on social media that was very similar and says he began to suspect that he might have been scammed as a result. He says he tried to withdraw the money he had invested and says he was told he'd had to pay a withdrawal tax of £10,000. He says that when he tried to make this payment from his account elsewhere his other bank blocked it. Mr W says he knew he'd fallen for a scam at this point. So, he contacted Santander to say he'd been scammed.

Santander looked into Mr W's claim and said that it couldn't refund him and that a chargeback claim wouldn't be successful. Mr W was unhappy with Santander's response and complained with the help of a representative. Santander looked into Mr W's complaint and said that it hadn't done anything wrong. Mr W was unhappy with Santander's response to his complaint and complained to our service.

One of our investigators looked into Mr W's complaint and said that they wouldn't have expected Santander to have intervened when he made the first payment because it wasn't unusual. Santander had, however, flagged the second payment and our investigator thought that this was appropriate as it was the second payment going to a cryptocurrency platform on consecutive days and took Mr W close to his credit limit. Our investigator didn't think Santander had given Mr W a detailed warning about the risks of investigating in cryptocurrency and, as such, didn't think it had done enough. Our investigator thought that Mr W should share some responsibility for his losses too, however, given that he'd gone ahead and sent the payments without having done any due diligence and had done so based on someone he didn't know contacting him out of the blue on social media. In addition, our investigator that Mr W hadn't told Santander the entire truth when it called him to find out more about the second payment he was making. So, they recommended that Santander refund 50% of the second payment.

Mr W's representatives accepted our investigator's recommendations, including their recommendation that liability be split on a 50 / 50 basis. Santander didn't. Santander said

that Mr W had made a payment to a wallet in his own name and that any losses he made occurred after that, so it shouldn't be held responsible for them, nor should it have had reason to intervene. Santander said that it had received clear and unequivocal instructions from Mr W – the payments were both authorised using his mobile banking and IP address and had been authenticated too. Santander said that our investigator's position was untenable given the Philipp decision. In short, Santander asked for Mr W's complaint to be referred to an ombudsman for decision. His complaint was, as a result, passed to me.

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.

No-one appears to be disputing the fact that Mr W has been the victim of a scam and that the scam payments happened after he'd bought cryptocurrency using his Santander credit card. I'll come to whether or not it's fair to hold Santander liable for that in a moment. Santander doesn't agree, however, that it should have intervened or could have done more in this case.

Having looked through his statements, I agree with our investigator that the first payment that Mr W made – just over £4,300 – wouldn't have seemed particularly unusual or suspicious to Santander. Mr W had a credit limit of just over £8,300 and it isn't uncommon for a credit card to be used for larger transactions from time to time. I also agree with our investigator that the second payment which was for just over £3,400 – given that it was made the following day – would or should have seemed unusual to Santander particularly given Mr W's normal usage. I say that because I can see Mr W used his credit card for regular everyday expenditure meaning he made lots of small payments with his card. I don't think this is necessarily in dispute in any event. I say that because Santander has told us – and I accept this – that it flagged the second payment Mr W tried to make as a result of which Mr W called Santander to find out why the payment has been blocked. So even Santander appears to accept that this payment was unusual and a cause for concern.

In this case I haven't been able to listen to the call between Mr W and Santander as the recording no longer exists. The information Santander has sent us does, however, include notes of the call which say that Mr W was told to do extensive due diligence checks before going ahead with his payment – the notes include a reference to the FCA's website. The notes also say that Mr W was asked what the payment was for and explained that he was investing in cryptocurrency and making a payment to a cryptocurrency wallet. Finally, the notes say that Mr W told Santander that he wasn't been asked to invest by a third party. Santander has pointed out that that wasn't true. I'll come back to that in a moment.

I accept that the notes Santander has sent us are likely an accurate summary of the call that took place. More importantly, I agree with our investigator that in a case like this I would have expected Santander to warn Mr W of the risks of investing in cryptocurrency given the prevalence of these types of scams at the time, but there's no evidence it did. Had Santander done so, I agree with our investigator that this would have led to Mr W discovering he was being scammed and would have stopped him going ahead with the second payment. I don't think that this is unreasonable given that Mr W's other bank was able to "break the spell" shortly afterwards and help him realise that he was being scammed.

Santander has said that it had a duty to execute Mr W's instructions as they were clear and left no room for interpretation. And it's also said that our investigator's position is completely untenable given the Philipp decision. That's a reference to *Philipp v Barclays Bank UK PLC*, so I'll go on and address that now.

what fairly and reasonably should Santander do?

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr W's account is that Mr W is responsible for payments Mr W has authorised himself. And, as 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.

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 at the time – a copy of which Santander has sent us – gave it rights (but not obligations) to:

1. Refuse any transaction that appears unusual compared to the customer's normal spending pattern or if it suspects fraud.
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 a transaction appeared unusual compared to a customer's normal spending pattern or 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.

I am mindful in reaching my conclusions about what Santander ought fairly and reasonably to have done that:

- FCA regulated banks are required to conduct their “business with due skill, care and diligence” (FCA Principle for Businesses 2) and to “pay due regard to the interests of its customers” (Principle 6).
- Banks have a longstanding regulatory duty “to take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime” (SYSC 3.2.6R of the Financial Conduct Authority Handbook, which has applied since 2001).
- Over the years, the FSA, and its successor the FCA, have published a series of publications setting out non-exhaustive examples of good and poor practice found when reviewing measures taken by banks to counter financial crime, including various iterations of the “Financial crime: a guide for firms”.
- Regulated banks are required to comply with legal and regulatory anti-money laundering and countering the financing of terrorism requirements. Those requirements include maintaining proportionate and risk-sensitive policies and procedures to identify, assess and manage money laundering risk – for example through customer due-diligence measures and the ongoing monitoring of the business relationship (including through the scrutiny of transactions undertaken throughout the course of the relationship).
- The October 2017, BSI Code, which a number of banks and trade associations were involved in the development of, recommended firms look to identify and help prevent transactions – particularly unusual or out of character transactions – that could involve fraud or be the result of a scam. Not all firms signed the BSI Code, but in my view the standards and expectations it referred to represented a fair articulation of what was, in my opinion, already good industry practice in October 2017 particularly around fraud prevention, and it remains a starting point for what I consider to be the minimum standards of good industry practice now.
- Santander has agreed to abide by the principles CRM Code. This sets out both standards for firms and situations where signatory firms will reimburse consumers. The CRM Code does not cover all authorised push payments (APP) in every circumstances (and it does not apply to the circumstances of this payment), but I consider the standards for firms around the identification of transactions presenting additional scam risks and the provision of effective warnings to consumers when that is the case, represent a fair articulation of what I consider to be good industry practice generally for payment service providers carrying out any APP transactions.

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 W's payments?

In this case, for the reasons I have explained, I'm satisfied Santander should have intervened.

if Santander had intervened ...

The key questions I have to decide is:

- whether or not that would have made a difference had Santander intervened; and
- in the event that it would have made a difference, whether or not Santander should be responsible for refunding all the payments Mr W made from the time that Santander should have intervened.

Mr W has told us that he carried out no independent due diligence before he started to invest. Had he done so, he would have discovered that the FCA had recently published a warning about the business where he ultimately invested his cryptocurrency. He's also told us – and I accept this – that when he tried to make a £10,000 payment from an account he holds elsewhere his bank warned him of the risks and that was enough to “break the spell”. In the circumstances, I agree with our investigator that had Santander provided Mr W with an appropriate warning when he called to find out why his second payment had been stopped he wouldn't have gone ahead with the payment as he would have realised he was being scammed. That means Santander missed an opportunity to prevent further loss to Mr W. So, I think it's fair it should refund some of those losses.

Putting things right

Mr W has accepted – given that there were a number of red flags that this was a scam – that in this case it's fair that both parties should share liability. I think that was the right thing to do. And he also accepted the 50% / 50% split as between Santander and Mr W recommended by our investigator. So, that's the award I'm going to make.

Having reviewed a copy of Mr W's statements, I'm satisfied that he continued to pay his minimum payment until he cleared his balance and that he didn't go over his credit limit. In other words, I'm satisfied that Santander won't have registered any adverse information on his credit file as a result of the scam payments. Santander has confirmed that it didn't do so. Because of that I'm satisfied Santander doesn't need to do anything else in addition to refunding Mr W 50% of the second payment.

My final decision

My final decision is that I'm upholding this complaint and require Santander UK Plc to refund 50% of the second payment Mr W made – in other words, 50% of £3,410.85 – by reworking his credit card account, including recalculating any interest he might have paid, in the usual way. In the event that Mr W ends up with a credit balance as a result of his credit card account being reworked, I require Santander UK Plc to refund that credit balance along with 8% simple interest from the date of the credit balance to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 1 March 2024.

Nicolas Atkinson
Ombudsman