

The complaint

Miss L is unhappy Santander UK Plc won't reimburse her for the money she lost when she fell victim to a scam.

What happened

Miss L fell victim to a safe account scam. Miss L was contacted by an individual claiming to be from Santander, they called her from a number that appeared to belong to Santander and knew personal details about her. The caller told her that her accounts were at risk, that a £25,000 loan had been applied for in her name, and that she needed to move her money into an account with a third party (which I'll call R) and then from there on to new 'safe' accounts that were being set up for her. Unfortunately, and unknown to her at the time, Miss L was actually speaking with fraudsters.

Believing that she was genuinely dealing with Santander, Miss L ended up moving significant funds from her Santander account, to an account she set up with R (an FCA- authorised Electronic Money Institution – "EMI"), and then on to third parties. The funds were transferred out of Miss L's Santander account in three card payments, for £1,000 each, and two bank transfers, for £100 and £950.

Miss L realised she had been the victim of a scam when she spoke to Santander later that day. Santander logged the fraud but, ultimately, told Miss L that it wouldn't be reimbursing her for the payments she had made from her account.

Unhappy, Miss L referred the matter to our service. One of our Investigators looked into the complaint. Overall, they considered that while Miss L had authorised the payments (albeit as a result of a scam) Santander should have done more to intervene on the third card payment as, by then, they felt a pattern indicative of fraud had begun to emerge. They felt Santander should have contacted Miss L directly to question her about what was going on and, if it had done so, they felt it was more likely than not the scam would've unravelled, and the further loss would've been prevented. Our Investigator also considered that Miss L wasn't partly to blame and shouldn't bear any responsibility for her loss.

Our Investigator recommended Santander refund Miss L her losses from (and including) the third payment onwards. They also recommended Santander pay 8% interest on that amount.

Miss L accepted the Investigators findings, but Santander disagreed. It stated that the payments had been made to an account in Miss L's name and that she had control of. It felt Miss L's loss had been from her account with R, and so felt R 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. It said Miss L regularly made payments out of her account to new payee accounts in her own name and that the card payments had been made via a secure mobile payment platform. So it says that it acted in line with industry standards when making the payments, and says that stopping the payments would have been in 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 Miss L 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 Miss L is responsible for them. That remains the case even though Miss L 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 Miss L, or whether it should have done more than it did.

I've looked carefully at the statements I've been provided for Miss L's Santander accounts. The first three payments made as part of this scam were card payments, and I can see that Miss L's general pattern of spending was to make small card payments, generally under £100. But on 2 July 2022 she transferred a large proportion of the balance of her savings account into her current account, and then made three card payments of £1,000 each over the course of a few minutes.

I acknowledge that these were payments to Miss L's own account with R, but it does not appear that Santander would have known that at the time given that they were card payments. And I think that this uncharacteristic pattern of transferring money from savings and then making several large card payments in short succession should have flagged as potentially suspicious for Santander by the time of the third card payment. A common theme to safe account scams is that a scammer tries to gain as much money from their victims in as short a time as possible. So where there are multiple payments made in quick succession, it is a possible indication that the customer could be at risk of financial harm.

I've noted all that Santander has said about Miss L regularly making transfers to accounts in her own name, but these initial payments were not transfers, they were card payments. And, as I've noted above, and as is clear from Santander's correspondence with us, at the time of the payments it would not have known they were to an account in Miss L's name. I also note what Santander has said about the security of the mobile payment platform that Miss L used, but given that I think it should have been on the lookout for indications of scams – which would often mean that payments were authorised by the account holder – I don't think the use of a secure payment platform means that Santander could discount the other indicators that something untoward might be going on.

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

Miss L doesn't appear to have been given a cover story to use by the scammer. She also doesn't appear to have been told that Santander was in any way involved in the fraud she thought was being perpetrated on her accounts. So I think had Santander contacted Miss L to ask for some information about what she was doing, she would likely have explained what was happening or otherwise have given some indication that all was not as it should be. Santander could also have used that opportunity to explain the most common types of scams in more detail to Miss L.

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

I acknowledge that Santander says it did show a written warning when Miss L made the last two payments, as these were transfers rather than card payments. But I'm mindful that Miss L was in a highly pressured situation, and believed that she was genuinely speaking with Santander. The kind of warnings that Santander gave here were unlikely to have the required impact on Miss L given the level that she was being manipulated by the scammers, and her very real fear that her money would be at risk if she didn't do what they said.

And, in any case, as detailed above, I think Santander should have stepped in before these transfers and asked open questions about what was happening. And if it had done so, I don't think these later transfers would have happened.

I've taken account of Santander's comments that Miss L's loss was from her account with R, and that it therefore feels R 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, Miss L has not referred a complaint about R to our service, and DISP does not empower me to instruct Miss L 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 Miss L may have cause to complain about R's role here, I am not persuaded it would be fair to reduce the award in this complaint solely for that reason. Miss L is entitled to complain only about Santander, and I am satisfied that Santander could have prevented some of the losses she 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 Miss L should bear some responsibility for her loss. Miss L has provided evidence of the calls she received that appeared to be from a legitimate Santander phone number. So it seems Santander's phone number had been spoofed by the scammers. Given this background, and the enormous pressure Miss L was under to do what she was told by the scammers to 'keep her money safe', I can see why she took the actions she did. So I don't think she was partly to blame for what happened. It follows that I don't consider it fair to say Miss L should bear responsibility for some of the loss here.

So, in summary, I consider when Miss L made the second transfer, Santander could have done more to protect her from the risk of financial harm. Had Santander contacted Miss L 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 Miss L wouldn't have lost out on the £2,050 she went on to move out of her Santander account.

The money Miss L lost originated from her current account and savings accounts. So as she has been deprived of the use of this money for an extended period of time, and it's arguable that a large proportion of it would have been used for day to day spending, I think it is fair that in addition to refunding the payments detailed above, Santander pay interest on that amount at 8%.

Putting things right

To resolve this complaint Santander should:

- Refund £2,017.01 (this is the £2,050 represented by the last three payments, minus £32.99 that Miss L says she was able to recover).
- Pay 8% simple interest per annum on this amount, calculated from 2 July 2022 until this complaint is settled.

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 Miss L to accept or reject my decision before 15 February 2024.

Sophie Mitchell
Ombudsman