

The complaint

Mr O complains that Santander UK Plc (Santander) is refusing to refund him the amount he lost as the result of a scam.

Mr O is being represented by a third party. To keep things simple, I will refer to Mr O throughout my decision.

What happened

The background of this complaint is well known to all parties, so I won't repeat what happened in detail.

In summary, around the end of 2020 when looking on Facebook Mr O found an advertisement for a company called PGI Global (X) that was offering trading opportunities in Bitcoin. Mr O clicked on the link for the company and completed an online data capture form with his contact information.

X then called Mr O and explained the opportunity to him. X appeared to be very professional and knowledgeable giving Mr O no reason to suspect the investment was not genuine. Mr O also carried out his own online research into X which gave him the impression the company was legitimate.

Comfortable the investment was genuine Mr O opened an account as directed by X and started to make payments from another of his accounts held elsewhere. Several months into the investment Mr O started to make further payments from his Santander account.

Having made a profit Mr O attempted to make a withdrawal from the investment. X gave several reasons for delays before the trading platform disappeared and Mr O was no longer able to contact X. It was clear at this stage that Mr O had fallen victim to a scam.

Mr O made the following payments into the scam from his Santander account:

| <u>Date</u> | <u>Payee</u> | <u>Payment Method</u> | <u>Amount</u> |
|---------------|--------------|-----------------------|---------------|
| 15 April 2021 | Coinbase | Debit Card | £811.30 |
| 16 April 2021 | Coinbase | Debit Card | £481.74 |
| 20 April 2021 | Moonpay | Debit Card | £61.26 |
| 20 April 2021 | Coinbase | Debit Card | £3,756.13 |
| 20 April 2021 | Coinbase | Debit Card | £4,900.00 |

Our Investigator considered Mr O's complaint and thought it should be upheld in part. Santander disagreed, so this complaint has been passed to be decided.

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.

It has not been disputed that Mr O has fallen victim to a cruel scam. The evidence provided by both Mr O and Santander sets out what happened. What is in dispute is whether Santander should refund all the money Mr O lost due to the scam.

Recovering the payments Mr O made

Mr O made payments into the scam via his debit card. When payments are made by card the only recovery option Santander has is to request a chargeback.

The chargeback scheme is a voluntary scheme set up to resolve card payment disputes between merchants and cardholders. The card scheme operator ultimately helps settle disputes that can't be resolved between the merchant and the cardholder.

Such arbitration is subject to the rules of the scheme, meaning there are only limited grounds and limited forms of evidence that will be accepted for a chargeback to be considered valid, and potentially succeed. Time limits also apply.

Mr O was dealing with X, which was the business that instigated the scam. But Mr O didn't make the debit card payments to X directly, he paid separate cryptocurrency exchanges. This is important because Santander would only have been able to process chargeback claims against the merchants he paid, not another party (such as X).

The service provided by X would have been to convert or facilitate conversion of Mr O's payments into cryptocurrency. Therefore, they provided the service that was requested; that being the purchase of the cryptocurrency.

The fact that the cryptocurrency was later transferred elsewhere – to the scammer – doesn't give rise to a valid chargeback claim against the merchants Mr O paid.

Should Santander have reasonably prevented the payments Mr O made?

It has been accepted that Mr O authorised the payments that were made from his account with Santander, albeit on X's instruction. So, the starting point here is that Mr O is responsible.

However, banks and other Payment Services Providers (PSPs) do have a duty to protect against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering.

The question here is whether Santander should have intervened when Mr O was making the payments. And if it had intervened, would it have been able to prevent the scam taking place.

The payments Mr O made in relation to the scam were relatively low in value and were being made to a genuine business. So, I don't think it was unreasonable that the first payments did not cause Santander any concerns.

However, by the time Mr O made the last payment into the scam of £4,900 on 20 April 2021 he was making a third payment of the same day, with a total value of over £8,000 being sent in just a single day. I think the final payment of £4,900 should have triggered Santander's fraud prevention systems, and it should have intervened.

The scam Mr O was experiencing had hallmarks of common scams Santander would have been aware of at the time. So, I think had it intervened it is likely it would have uncovered the scam and prevented any further loss. Santander is therefore responsible for Mr O's loss from the final payment made into the scam of £4,900.

Did Mr O contribute to his loss?

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000).

In the circumstances I don't think it would be fair to say Mr O contributed to the loss. I say this because Mr O carried out his own research into the investment which appeared to check out. He was then lulled into a false sense of security by a business that went to great lengths to appear to be legitimate.

Santander has argued that the funds Mr O lost to the scam were sent from his Santander account to a crypto wallet in his name, before being sent to the scammer. So, the scam occurred when the funds were sent from his crypto wallet and not when they left his Santander account.

This hasn't changed my decision. Santander are aware of its responsibilities as described above in relation to protecting its customers from financial loss. This includes when a customer's account is used in an unusual way. Santander is also aware of our longstanding approach to this type of complaint.

In addition to the points covered above Santander has stated that:

"Whilst the Supreme Court's binding decision in the Philipp v Barclays Bank plc case is in relation to faster payments we still believe the principles that sit behind that decision are applicable this case, that decision confirmed that where the bank receives a payment instruction from a customer which is clear and / or leaves no room for interpretation, if the customer's account is in credit, the bank's primary duty is to execute the payment instruction. This is a strict duty and the bank must carry out the instruction promptly without concerning itself with the "wisdom or risks of the customer's payment decisions"

As explained above, the starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr O's account is that Mr O is responsible for payments he authorised. 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 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 this type of scam and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

So, these comments have not affected my decision to hold Santander responsible for the last payment Mr O made in relation to the scam from his Santander account.

Putting things right

To put things right I require Santander to refund the last payment Mr O made in relation to the scam for the value of £4,900. Santander should add 8% simple interest to the amount it pays Mr O from the time the payment was made to the date of the settlement (less any lawfully deductible tax).

My final decision

I uphold this complaint and require Santander to put things right by doing what I've explained above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 20 May 2024.

Terry Woodham
Ombudsman