

The complaint

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

What happened

Mr D has a current account with Santander and has done so for 15 years.

In November 2022 Mr D says he read a report on a well-known news website about bitcoin. He says he did some searches on the internet as the report got him interested in investing in cryptocurrency and that he found a company offering investment in cryptocurrency. He says the company's website looked authentic, so he contacted them.

Mr D says that he was contacted by someone claiming to be a broker and that they helped him set up a trading account. He said they told him he'd need to open an account with an e-money provider – who I'll refer to as "W" in the rest of this decision – and that he'd also need to download a piece of software called "AnyDesk". Mr D says he made a small investment – of just over £200 paid using his debit card – and for a month everything went quiet. He says he then tried to withdraw his money from the cryptocurrency wallet it was in but was unable to do so.

On 12 December 2022 Mr D says he received a phone call from someone saying that they were aware he was having problems withdrawing his funds, and that they could help him. The email they sent Mr D claimed that they were FCA approved. He arranged an appointment to speak to someone about recovering his funds. Mr D says he was told his small investment had grown and was now worth £4,500.

On 21 December 2022 Mr D says he received a call about recovering his funds and that he was told he'd need to set up an account to buy and sell cryptocurrency. He said he was told he'd have to buy and sell the same amount of cryptocurrency that was in his trading account. In other words, £4,500. Mr D says he transferred £4,500 from his Santander account into his account with W and then into his new account for buying and selling cryptocurrency. Mr D says he was told to make another payment later on that day to "mirror the previous transaction to do a reversal back for the money" and he did so. The following day he was told he'd need to make a further payment of £2,800 so that AML checks could be completed. This payment took Mr D's account into overdraft. Mr D says he was told that he'd need to make another reversal payment of £8,150 and at this point he became suspicious.

In January 2023 Mr D, with the help of a representative, complained to Santander saying that it hadn't done enough to protect him when he fell victim to a scam. Santander said that it couldn't be held responsible for the loss as the correct level of security and Mr D's personal credentials were used to complete the transactions. Santander also said that the payments had been made to an account in his own name, and that it was the transactions he completed after this that were part of the scam. Mr D's representatives complained to us.

One of our investigators looked into Mr D's complaint and said that they didn't think Santander had acted fairly. They thought that Santander should have intervened when Mr D

tried to make the first payment of £4,500 that he made on 21 December 2022 because that payment was more than double his normal account activity and was being sent to a payee that had only been set up the month before – the only other payment to this payee being for £20. Our investigator also thought that the scam would have come to light had Santander contacted Mr D. So, they said that they thought Santander had missed an opportunity to prevent further loss to Mr D. Our investigator, however, also thought that Mr D should share some liability for his losses as the returns on his investment were too good to be true and he'd carried out very little, if any, research. So, they recommended Santander refund £6,014.52 plus 8% simple interest from the date of payment to the date of settlement.

Mr D's representatives accepted our investigator's recommendations, including their recommendation that liability be split on a 50 / 50 basis. Santander didn't, saying that by the time the three large payments went out on 21 December 2022 the payee had been set out for enough time to be deemed a pre-existing mandate. Santander also said that it couldn't be expected to interfere in payments made via open banking – as these were – and that they were transfers to an e-money provider so the claim should lie with them. Our investigator didn't agree saying that Santander should fairly and reasonably have had systems in place to look out for out of character or unusual transactions, or other signs that might indicate that its customer was at risk of harm from fraud. Santander disagreed and asked for Mr D's complaint to be referred to an ombudsman for a decision. Santander also said that the position our investigator had taken was untenable given the Phillip decision. Mr D's 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 is disputing that Mr D has been the victim of a scam. Having looked through his statements, I agree with our investigator that the £4,500 payment he made on 21 December 2022 was unusual. I say that because I can see Mr D made regular payments out of his account – it was his current account and clearly he used it for his everyday spending as there are lots of payments on it – and almost all of the payments he makes are for under £100. Santander ought reasonably to have known – given that it had lots of information on Mr D's normal usage – that this transaction was, therefore, unusual for Mr D. So, I agree with our investigator that Santander should have intervened at this stage. The second payment that day – for another £4,500 to the same payee – was very unusual. Santander has made it clear it doesn't agree.

Santander has said that it had a duty to execute Mr D'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 D's account is that Mr D is responsible for payments Mr D 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 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.

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 D'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 D made from the time that Santander should have intervened.

Mr D has told us that he was told he had to make the £4,500 payment because he needed to buy and sell the same amount of cryptocurrency that was in his "trading account". That £4,500 in Mr D's trading account was, according to what Mr D was told, the amount to which his "investment" of approximately £200 from the previous month had grown. Had Santander called Mr D and got these details from him – and I've seen nothing to suggest he would have lied – it should have immediately identified the fact that Mr D was being scammed as the return was "too good to be true" and the purpose of the payment made no sense. More importantly, it had all the hallmarks of a "recovery scam". In short, I'm satisfied that had someone from Santander called Mr D the scam would have been uncovered and Mr D wouldn't have gone ahead with the payment. That means Santander missed an opportunity to prevent further loss to Miss B. So, I think it's fair it should refund [some of] those losses.

Putting things right

Mr D 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 D recommended by our investigator. So, that's the award I'm going to make.

My final decision

My final decision is that I'm upholding this complaint and requiring Santander UK Plc to refund £6,014.52 plus 8% simple interest from the date of payment to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 22 February 2024.

Nicolas Atkinson
Ombudsman