

The complaint

Mr B complains about Santander UK Plc.

He says that Santander didn't do enough to protect him when he became the victim of a scam and would like it to refund him the money he has lost.

What happened

The details of the complaint are well known to both parties, so I won't repeat them in detail here.

In summary, Mr B was contacted via WhatsApp regarding an investment opportunity in cryptocurrency.

Mr B was onboarded by a seemingly professional representative that provided him with access to a professional looking portal where he could view his investments and deposits in real time.

Mr B was pleased that he was able to start off with a small investment and was also able to make a small withdrawal of £60, so he was reassured that it was a genuine opportunity. He made the following payments

Date	Payee	Payment type	Amount
16/04/2023	Banxa	Card	£100
16/04/2023	Moonpay	Card	£80.58
16/04/2023	Moonpay	Transfer	£80.58
18/04/2023	Coinbase	Transfer	£300
19/04/2023	Coinbase	Transfer	£8,750
22/04/2023	Moonpay	Card	£403.12
22/04/2023	Moonpay	Card	£282.18
		Total	£ 9,996.46

Unfortunately, Mr B had fallen victim to a scam – and the money he paid was lost.

Mr B complained to Santander, but it didn't uphold his complaint. Unhappy, he brought his complaint to this Service.

Our Investigator looked into things and thought that the complaint should be upheld in part, and that Santander should have intervened when Mr B made the payment for £8,750.

Santander didn't agree – in summary it said;

- The payment was made to a money service provider (Coinbase) that Mr B had used previously, and so the £8,750 payment would not be seen as unusual, and it had not been put on notice that the Coinbase mandate wasn't to be trusted

- The funds were moved to a crypto wallet in Mr B's own name and so the loss didn't occur from Santander

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.

Having done so, I've decided to uphold this complaint in part. I'll explain why.

In broad terms, the starting position at law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. And I have taken that into account when deciding what's fair and reasonable in this case.

Mr B authorised the payments in question here – so even though he was tricked into doing so and didn't intend for the money to end up in the hands of a scammer, he is presumed liable in the first instance.

But this isn't the end of the story. As a matter of good industry practice, Santander should also have taken proactive steps to identify and help prevent transactions – particularly unusual or uncharacteristic transactions – that could involve fraud or be the result of a scam. However, there is a balance to be struck: banks had (and have) obligations to be alert to fraud and scams and to act in their customers' best interests, but they can't reasonably be involved in every transaction

Taking into account the law, regulator's rules and guidance, relevant codes of practice and what I consider having 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, 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.

In this case, I need to decide whether Santander acted fairly and reasonably in its dealings with Mr B when he authorised payments from his account or whether it could and should have done more before processing them.

In reaching my decision, I have also considered 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 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 fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

Having looked at the payments in question here, I think that Santander should have got in touch with Mr B when he made the payment for £8,750, to check that everything was in order and ask with him about what he was doing – the intention being to uncover a potential scam and protect Mr B from financial harm. The size of the payment was unusual for Mr B's usual spending pattern – and was going to a crypto provider, which Santander should have been aware carries an elevated risk.

Had Santander got in touch with Mr B, and asked suitable probing questions about the payment, the scam would have become apparent. I haven't seen anything to suggest that Mr B was told to lie to Santander – or conceal what he was doing – so I think he would have answered its questions openly and honestly. Santander could then have then provided him with an appropriate and effective warning – and I don't think he would have ignored such a warning from his trusted bank.

I have taken into account that Santander say that Mr S had held his Coinbase crypto wallet for some time and had made earlier payments to crypto. But I don't think this makes a

difference here. The payment was much higher than any payment Mr B had made previously – for crypto or other uses, and I cannot see a payment to Coinbase in the account movement Santander provided in the nine months leading up to the scam taking place. And in any event, it isn't unusual for scammers to utilise existing crypto wallets as part of the scam.

I also don't agree with Santander about the loss not occurring from Mr B's account with it, and so Santander should not be liable for the loss. Santander should be aware that when a scam takes place, the funds are moved on very quickly from one crypto wallet to another – and as I've said above, I think it could have prevented this.

So, taking everything into account, I think that Santander could have prevented the loss from payment five.

The only thing left for me to consider is if Mr B should bear some responsibility for the loss here – and having thought about this carefully, I am not persuaded he should on this occasion.

Mr B had invested with IG on several occasions and had never had any issued before – he had also received credits from his previous investments which I think would have made him more confident in investing in crypto. I've also seen the website Mr B was directed to, which appeared professional and genuine (albeit the website has since closed down). And had Mr B conducted further research about the supposed investment, I don't think that he would have found anything negative about it online either – although since this time, there have been negative reviews posted online. In any event, Santander was the expert here, not Mr B, so I think that it would have been more aware of the risks than the average consumer.

Putting things right

Santander UK Plc should refund Mr B from and including payment five.

I calculate this to be £9,435.30.

On top of this, Santander UK Plc should also pay Mr B 8% simple interest from the date of the payments until it makes settlement (less any lawfully deductible tax).

My final decision

I uphold this complaint in part. Santander UK Plc should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 7 June 2024.

Claire Pugh
Ombudsman