

## **The complaint**

Mrs H complains that Santander UK Plc won't reimburse her after she lost money to an investment – that she now considers to have been a scam.

## **What happened**

Mrs H has explained that she was introduced to an investment opportunity, that I'll refer to as S, by a friend of hers. Her friend had already invested with the firm, was making good profits and had already successfully withdrawn funds totalling her initial investment into the firm.

On this recommendation, Mrs H was interested in also investing. As the minimum investment required was £10,000 Mrs H and her friend agreed to invest jointly. Upon receiving an investment contract, in September 2021, Mrs H therefore made an initial payment of £5,000 by faster payment to an account in S's name.

Mrs H has explained that the investment appeared to be doing well and therefore, pleased with the profits she was seeing on her investment, in December 2021 she decided to invest a further £10,000 by herself. Again this was a faster payment made to S's account.

Mrs H has explained that in June 2022, she received an email from S, advising that two key members of the business had left, after which the weekly statements she had been receiving on her investment stopped and email contact with S went unanswered. Mrs H has said she emailed S requesting to close her account and for all funds to be returned to her Santander account, but she received no response. She later received an email from the Police, advising S was being investigated.

Mrs H complained to Santander, but Santander said that it was in contact with external sources regarding this matter and no exact timescales could be given for the review.

Our investigator upheld the complaint. He said on balance this was a scam and covered by the Contingent Reimbursement Model (CRM) Code and that none of the exclusions applied – so Santander should reimburse Mrs H in full.

Santander said, to summarise, that it was premature to reach a decision on whether these payments fell within scope of the CRM Code while there is an active and ongoing police investigation. It questioned what evidence our service had received from the bank and argued that it wouldn't be fair to rely on evidence that wasn't available to it.

Santander also considered that even if the Code could be applied, the investigator has failed to consider Mrs H's own contribution to the losses she suffered, where it considers red flags were apparent from the start.

Santander has also said that when making the first payment towards the scam, Mrs H was asked to provide the account details for S and received a 'confirmation of payee' notification that the payee name and account details matched. It says Mrs S was then asked the purpose of the payment and she selected 'investment'. On this basis it says Mrs H would've seen the following warning:

*'Could this be an investment scam?*

*Anyone cold calling with an investment opportunity are likely to be criminals. If you are suspicious, please stop now.*

*If someone is pressuring you, please stop now.'*

As Santander didn't agree with the investigator's view, the complaint has been referred to me for a final 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.

It's important to highlight that with cases like this, in deciding whether there was in fact a scam, I need to weigh up the available evidence and make my decision about what I think is likely to have happened on the balance of probabilities – in other words what I think is more likely than not to have happened in the circumstances.

When considering what is fair and reasonable, I'm also required to take into account: relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

In broad terms, the starting position in law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. However, where the customer made the payment as a consequence of the actions of a fraudster, it may sometimes be fair and reasonable for the bank to reimburse the customer even though they authorised the payment.

Santander is a signatory of the Lending Standards Board's Contingent Reimbursement Model (the CRM Code). This requires firms to reimburse customers who have been the victim of certain types of scams, in all but a limited number of circumstances. But customers are only covered by the CRM Code where they have been the victim of an authorised push payment (APP) scam – as defined within the CRM Code. So if I am not persuaded that there was a scam then I will not have a basis to uphold the complaint.

### ***Can Santander delay making a decision under the CRM Code?***

In its more recent submissions, Santander has referred to exception R3(1)(c) as a reason for us to not yet reach an outcome on this complaint. This exception states that firms should make a decision as to whether or not to reimburse a customer without undue delay but that, if a case is subject to investigation by a statutory body and the outcome might reasonably inform the firm's decision, it may wait for the outcome of the investigation before making a decision.

While this exception provides a reason why firms *may* delay providing a claim outcome under the CRM Code, it doesn't impact that customer's right to refer the complaint to our service – and similarly it doesn't impact our service's ability to provide a complaint outcome when we consider we have sufficient evidence to do so. I've therefore gone on to consider below whether we do have enough evidence to proceed at this time on Mrs H's complaint.

### ***Is it appropriate to determine Mrs H's complaint now?***

I ultimately have to decide whether it is fair and reasonable for Santander not to have yet given an answer on Mrs H's claim for reimbursement of her losses. I am aware there is an ongoing investigation, and there may be circumstances and cases where it is appropriate to wait for the outcome of external investigations. But that isn't necessarily so in every case, as it will often be possible to reach conclusions on the main issues on the basis of evidence already available. And I am conscious that any criminal proceedings that may ultimately take place have a higher standard of proof (beyond reasonable doubt) than I am required to apply (which – as explained above – is the balance of probabilities).

The Lending Standards Board has said that the CRM Code does not require proof beyond reasonable doubt that a scam has taken place before a reimbursement decision can be reached. Nor does it require a firm to prove the intent of the third party before a decision can be reached. So in order to determine Mrs H's complaint I have to ask myself whether I can be satisfied, on the balance of probabilities, that the available evidence indicates that it is more likely than not that Mrs H was the victim of a scam rather than a failed investment.

I've reminded myself that Parliament has given ombudsmen the job of determining complaints quickly and with minimum formality. In view of this, I think that it would not be appropriate to wait to decide Mrs H's complaint unless there is a reasonable basis to suggest that the outcome of any external investigation may have a material impact on my decision over and above the evidence that is already available.

Santander has raised concerns that, at present, it is unclear if any funds remain in the account where Mrs H's payments were made to and if there are, this may impact the extent of her losses and complicate the recovery position.

I don't know how likely it is that any funds will be recovered as part of ongoing proceedings. But I agree that, if Santander has already paid a refund, it would not be fair or reasonable for those recovered funds to be returned to Mrs H as well. Santander can ask Mrs H to undertake to transfer to it any rights she may have to recovery elsewhere, so I'm not persuaded that this is a reasonable barrier to it reimbursing her in line with the CRM Code's provisions.

For the reasons I discuss further below, I don't think it's necessary to wait until the outcome of the police investigation or potential related court case for me to reach a fair and reasonable decision.

*Has Mrs H been the victim of a scam, as defined in the CRM Code?*

The relevant definition of a scam in accordance with the CRM Code is that the customer transferred funds to another person for what they believed were legitimate purposes but were in fact fraudulent.

The CRM Code also says it doesn't apply to private civil disputes, such as where a customer has paid a legitimate supplier for goods or services but has not received them, they are defective in some way, or the customer is otherwise dissatisfied with the supplier.

So, it doesn't cover a genuine investment or a genuine business that subsequently failed.

So in order to determine whether Mrs H has been the victim of a scam as defined in the CRM Code I need to consider whether the purpose she intended for the payments was legitimate, whether the purposes she and S intended were broadly aligned and then, if they weren't, whether this was the result of dishonest deception on the part of S.

From what I've seen and what Mrs H has told us, I'm satisfied Mrs H made the payments with the intention of investing in forex trading. She thought her funds would be used by S to trade and that she would receive returns on her investment.

But I think the evidence I've seen suggests S didn't intend to act in line with the purpose for the payments it had agreed with Mrs H.

Mrs H made her payments to an account held in S's name. I've reviewed beneficiary statements for this account and while I can't share the details for data protection reasons, the statements do not suggest that legitimate investment activity was being carried out by S at the time Mrs H made the relevant transactions. Whilst there is evidence S initially did carry out trades, it doesn't necessarily follow that it was a legitimate enterprise. S and its linked companies were not authorised by the FCA to carry out trading, so its operations clearly lacked an important element of legitimacy; it was required to be authorised to do the activity it was carrying out and it wasn't.

Similarly to this point, Santander has questioned how our service can reach a view on whether its customers were the victims of scams until it can be established what specific payments were made towards trades. However, for the reasons I've explained above (and other points I'll go on to cover) the overall position here is that this wasn't a legitimate investment – and Mrs H's (and other investors' funds) weren't being traded in the manner they believed they were. So, in essence, regardless of where Mrs H's 'specific' payment went, the overall firm and its investment model here was illegitimate - and Mrs H had been deceived on this point.

Further concerns centre around the owner of S (who was bankrupt at the time). From the paperwork provided to consumers, he appears to have "personally guaranteed" the investments (despite forex being a high-risk investment and him never being in a financial position to do so). He also signed contracts on behalf of S despite not officially being listed as the director of the business. He appears to have acted as a 'shadow director', when he would've been disqualified as a director in his own right due to his bankruptcy. Furthermore, S was listed as an 'IT consultancy' business on Companies' House and not a financial services firm.

I've also noted that, when highlighting its concerns about Mrs H's own contributions towards her losses, Santander has also raised several elements of the scam that ought to have caused concern to Mrs H. It's referred to version of contracts it's seen, supplied by other investors, wherein customers were told to not disclose to their banks that this payment was for an investment, to avoid their accounts being frozen due to S's lack of regulation. While this wording is not included within Mrs H's own contract, it seems Santander is also aware of various behaviours of S's that indicate the 'investment' was in fact a scam.

So based on the above, along with the weight of testimony we have seen from other consumers who invested in S, I am satisfied that it is more likely S was not acting legitimately, since its intentions did not align with Mrs H's intentions, and I am satisfied that S was dishonest in this regard. It follows that I'm satisfied Mrs H was the victim of a scam.

*Is Mrs H entitled to a refund under the CRM code?*

Santander is a signatory of the CRM Code, which requires firms to reimburse customers who have been the victims of Authorised Push Payment (APP) scams like this, in all but a limited number of circumstances and it is for Santander to establish that a customer failed to meet one of the listed exceptions set out in the CRM Code.

Under the CRM Code, a bank may choose not to reimburse a customer if it can establish that\*:

- The customer ignored what the CRM Code refers to as an “Effective Warning” by failing to take appropriate action in response to such an effective warning
- The customer made payments without having a reasonable basis for believing that: the payee was the person the Customer was expecting to pay; the payment was for genuine goods or services; and/or the person or business with whom they transacted was legitimate

*\*Further exceptions outlined in the CRM Code do not apply to this case.*

*Did Santander meet its obligations under the CRM Code and did Mrs H ignore an effective warning?*

I've considered the warning referenced earlier in my decision, that Santander has said it provided to Mrs H. However I don't consider it to be 'effective' under the CRM Code. For a warning to be considered effective, the Code requires it to be (among other things) impactful, clear and provide the customer with the potential consequences of proceeding. I don't think this warning met these criteria – it doesn't cover most of the key hallmarks we see in these scams, and there's no explanation of what may happen to Mrs H's funds, should this turn out to be a scam.

Therefore I'm not satisfied that Santander can rely on this exception of the Code as a reason to not reimburse Mrs H.

*Did Mrs H have a reasonable basis for belief?*

I've considered Santander's assertion that Mrs H proceeded with this scam, despite red flags from the start and whether she acted reasonably in light of the circumstances. Santander has raised that prior to sending the investment funds, Mrs H failed to conduct any of her own research, and proceeded on the basis of her friend's recommendation. However, I think this recommendation carries a lot of weight – not only had Mrs H's friend vouched for the investment, but from the statements of her friend's that I've seen, by the time Mrs H invested, not only had Mrs H's friend appeared to have made money on her investment, but she'd made the entirety of her initial deposit back and successfully withdrawn this and was willing to further invest alongside Mrs H. I can understand why Mrs H would've found this compelling – and while it is of course always prudent to conduct your own research, I can understand why Mrs H would not have had concerns of this being a scam, based on her friend having received all funds back already and still apparently making money.

I've also thought about the perceived returns Mrs H was receiving on her first investment, before she made her second payment towards the scam. I accept these returns were high, and can appreciate why they would appear unrealistic in some circumstances. But again, Mrs H had seen clear evidence from someone she trusted that the returns *could* be believed, as they had already been received from her friend. So I can understand why this would've allayed any doubts she may otherwise have had.

Santander has raised concerns about copies of contracts it's seen from other victims of this scam, that contain advice to mislead banks and set out that the firm is not regulated. However, this was not the case in Mrs H's own contract. While the contract lacked professional finesse – for example it wasn't on headed paper – I don't think this alone ought to have caused Mrs H to really doubt what she was involving herself with – considering the other elements of the scam that supported it being legitimate at the time.

Overall, for the reasons I've explained above, I think it is fair for our service to consider Mrs H's complaint based on the evidence currently available and having done so, I think it is fair and reasonable for Santander to fully reimburse her under the CRM Code.

### **My final decision**

My final decision is that I uphold Mrs H's complaint against Santander UK Plc and I direct it to:

- Refund Mrs H in full both payments she made towards the scam (totalling £15,000)
- Apply 8% simple interest, from the time it declined Mrs H's claim under the CRM Code until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 2 December 2024.

Kirsty Upton  
**Ombudsman**