

The complaint

Ms Y complains that Santander UK Plc won't reimburse money she lost to a scam.

What happened

On 6 December 2023 I issued my provisional decision on this complaint. I wanted to give both parties a chance to respond with any further evidence or arguments before I issued my final decision. That provisional decision forms part of this final decision and is copied below.

What happened

Ms Y saw an advert on a popular social media website. It was promoting a company that I'll call R. Ms Y said that the company had a 'registration number' which she checked using an online search. She says that the search appeared to confirm the legitimacy of the firm, so she contacted it.

She spoke to an 'advisor' who promised that if she invested £250 they could 'practically guarantee' that she'd have £1,000 before the end of the week. It appears that Ms Y agreed to make that payment (though presumably it took place from another bank account as I can find no record of it) and, as promised, her initial investment increased significantly in value.

On 4 August 2022, Ms Y was assigned a financial advisor ("S"). S sent a link to Ms Y to the website of a U.S. financial regulator. That appeared to show that S was an experienced financial professional. As far as I can establish, that page was genuine, but S was impersonating the financial professional.

Ms Y was then advised to set up an account with an FCA-authorised Electronic Money Institution ("EMI") – "W" so that she could transfer money to R by first converting it into U.S. Dollars and then cryptocurrency. Ms Y says that she also looked up W online and was reassured by what she found. She was also advised to set up an account with a genuine cryptocurrency platform – "B", though it's not clear if that happened until later.

S contacted her again a few days later and explained that there was an opportunity to invest. Ms Y says the opportunity was in an oil company, but that at least £3,000 would need to be invested for her to be eligible for the investment. Records of the conversation between Ms Y and S show that, in fact, S claimed that if Ms Y invested '5,000' she'd be able to turn it into '50,000' by the end of the week (it's unclear which currency S was referring to).

Ms Y expressed some caution and explained that she didn't want to lose the money if she invested it. S appears to have reassured her by saying 'we have insurance on the funds' and 'it can't go down'. Ms Y was also offered a separate investment in a well-known space travel company. Again, S said that Ms Y couldn't lose. Ms Y said that the document she'd been sent in relation to the space travel company 'makes no sense to me' and that she'd 'check with her other half'.

Ms Y eventually agreed to invest £5,000. On 9 August 2022, Santander flagged the £5,000 payment to Ms Y's account at W for a security check. I'll discuss that call in more detail later

in my decision, but the advisor asked, among other things, whether Ms Y had downloaded any software or been asked to move money to a 'safe account'. Ms Y said that she hadn't and, after the advisor was able to confirm that the payment was going to an account held in her own name, the payment was allowed to go ahead.

S talked Ms Y through the process of setting up various cryptocurrency accounts. Ms Y appears to have had some difficulty doing this and returned card payments to various exchanges are visible on her W account statement. Ms Y was eventually able to transfer money to her trading account at R. It appears this was principally achieved by sending payments from her account at W to individuals who were selling cryptocurrency on B's cryptocurrency exchange (though it's not clear the extent to which Ms Y was aware of this). It wasn't until 15 August 2022 – nine days after transferring money to W that she was able to move her money to the trading platform.

Her initial investment appeared to be very successful. There seems to be a slight inconsistency between Ms Y's account to our service and the records of the conversation she had with Y, but by 17 August 2022, Ms Y believed she was in a position to withdraw at least \$60,000, while still leaving \$50,000 in her account. It appears that S continued to carry out 'trades', such that by 18 August 2022 Ms Y was expecting to receive \$100,000.

S contacted Ms Y and explained that, in order to withdraw her money, she'd need to pay S' 'fees' – 10% of the amount she wanted to withdraw. Ms Y says that these fees were all explained in the contract (though I haven't seen that document). S appears to have claimed that W would also need to take a commission of 10%. So, Ms Y began a series of payments to her account at W in order to pay these fees (one of which was subsequently withdrawn back to her Santander account due to Ms Y being told by S that payment limits had been reached on her account at W). It's not entirely clear what each payment relates to. Around this time, Ms Y expressed some doubts about the scheme, she said: 'I just hope I get to Friday and it's not a scam... my partner is getting twitchy'.

S claimed that Ms Y's money had been released to her account at W. But another company contacted Ms Y – "C". C is actually a genuine cryptocurrency exchange, but was being impersonated by the fraudsters and misrepresented to suggest it had some sort of regulatory function in relation to cryptocurrency. C said that, due to money laundering concerns, Ms Y would need to make a payment to 'prove her identity'. She'd receive this money back, as well as her profits, C claimed. Ms Y made a payment of £20,000 and waited for her money to be released. This time the fraudsters told her that the payment she'd already made was only to release \$50,000 (not the full \$100,000). She asked for the \$50,000 but was told that wouldn't be possible and that she'd have to release all the money in one go. So, she paid another £20,000. It also appears that she was told a £10,000 payment made from her account at W hadn't been successful and that she'd need to make the same payment again.

After making these payments, Ms Y waited for her money, but then received a call from someone pretending to be the Financial Conduct Authority ("FCA"). They claimed that they now held her money and she'd need to pay a fee to release it. Eventually Ms Y agreed to pay a further £20,000, this time funded by a loan provided by a third-party loan provider. When more requests for money followed, Ms Y contacted the genuine FCA and the scam came to light.

A table of the payments Ms Y made from her Santander account is below.

Date	Amount	Recipient
09 August 2022	£20.06	W (card payment)
09 August 2022	£20	W

09 August 2022	£5,000	W
15 August 2022	£420	W
15 August 2022	£250	W
17 August 2022	£3,000	W
17 August 2022	£5,000	W
18 August 2022	£6,500	W
18 August 2022	£6,500	W
18 August 2022	£6,500.08	Credit from W
18 August 2022	£5,000	W
19 August 2022	£4,000	W
19 August 2022	£1,000	W
19 August 2022	£20,000	W
22 August 2022	£20,000	W
22 August 2022	£200	W
22 August 2022	£10,000	W
22 August 2022	£20,000	Loan credit received
22 August 2022	£20,000	W
Total	£100,410.06	

The payments made from Ms Y's accounts at W (she had three – a Euro, U.S. Dollar and sterling account) were varied in nature. As mentioned, it appears that some of the payments may have been made to people selling cryptocurrency on a cryptocurrency exchange. There were also card payments to various other cryptocurrency trading platforms, most of which were returned. Some payments were made in pounds sterling and others in U.S. Dollars.

Ms Y reported the matter to Santander. It said that it wasn't responsible for her loss and she should take the matter up with W. Ms Y did report the matter to W, but it declined to reimburse her. It did, however, identify that £116 remained in her account, which it returned to Santander. Ms Y didn't think that Santander had done enough when it questioned her about the payment and contrasted that call with an earlier intervention in relation to an unrelated payment which, she says, was significantly more thorough. Ms Y has told our service that the matter has had a significant impact on her both financially and emotionally, with the amount she lost having largely come from an inheritance left by her late father.

Ms Y referred the matter to our service and one of our Investigators upheld the complaint in part. They thought that Santander failed to ask sufficiently probing questions in its call on 9 August 2022 and, had there been a better intervention by it, the scam would have most likely come to light and further loss would have been prevented. They also considered whether Ms Y should bear some responsibility for the loss. They thought that Ms Y had acted reasonably, given her skills and experience, up until the payments made on 22 August 2022 as, by that point, Ms Y was taking out lending and ought to have been concerned about the fees she was being asked to pay. The Investigator thought that Ms Y should have made further enquiries at this point.

So the Investigator recommended that Santander reimburse the payments made between 9 and 19 August 2022 in full and 50% of the payments made on 22 August 2022 (including the payment funded by the loan capital). They also recommended that Santander pay 50% of the loan fee charged by the third-party lender. The Investigator recommended that interest be paid at various rates, depending on the source of the funds and they included an award for interest on the repayments Ms Y made towards the loan.

Ms Y didn't provide any further submissions, but Santander didn't agree. In summary, it said:

- *It strongly believes that the intervention call was sufficient as its advisor mentioned investments. It struck the right balance between making enquiries and not being intrusive.*
- *Ms Y had already made a payment to the same account prior to the call.*
- *There would have been no reason for it to discuss the possibility of cryptocurrency scams or cloning.*
- *It questioned why the complaint wasn't being brought against W – an FCA authorised firm.*
- *The recent Supreme Court judgement in the case of Philipp vs Barclays Bank Plc UK [2023] UKSC 25 confirmed that where a bank receives a payment instruction from a customer which is clear and leaves no room for interpretation and 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'.*
- *Ms Y's account was in credit and there is no dispute that she authorised the payments.*
- *So the payment instruction was clear and without room for interpretation. There was no reason for it to be concerned about the payment.*

In addition to the specific points above, Santander have shared some broader concerns about its liability for payments of this nature. I've summarised those arguments below.

- *There was no legal duty on it to protect customers from financial harm from fraud.*
- *Neither do any of the rules, standards and guidance issued by the Financial Conduct Authority place such a duty on it.*
- *It does not accept that the British Standards Institute PAS 17271 ("the BSI Code"¹) places any duty on it either.*
- *The CRM Code now represents good industry practice, including the obligation to provide warnings and, where appropriate, intervene when it identifies a scam risk. But the CRM Code specifically excludes this type of payment, as will the forthcoming mandatory reimbursement scheme the Payment Systems Regulator ("the PSR") is currently consulting on.*
- *So, asking it to reimburse payments that fall outside of those schemes goes beyond what could be considered good industry practice and regulatory expectations.*

The case has now been passed to me to consider afresh.

What I've provisionally decided – and why

¹ British Standards Institute's 'Protecting Customers from Financial harm as a result of fraud and financial abuse – Code of Practice'

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 a complaint, I am required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Having done so, I have reached a different provisional conclusion to the Investigator about what is fair and reasonable in all the circumstances of this complaint and about what Santander should do to put things right.

For the reasons I shall set out below, I am minded to conclude:

- *Having identified the £5,000 payment on 9 August 2022 represented heightened risk of fraud, Santander's intervention in relation to it wasn't sufficient, despite the fact it was able to establish that Ms Y was paying an account in her own name at W.*
- *Had it properly attempted to establish the circumstances surrounding the payment, as I think it ought to have done, I think, on the balance of probabilities, the scam would have come to light and further loss to Ms Y would have been prevented.*
- *But I am also satisfied that in the circumstances of this complaint, Ms Y should bear some responsibility (50%) for the losses she suffered after and including the £5,000 payment on 9 August 2022.*

I shall explain why.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Ms Y's is that she is responsible for payments she's authorised herself. 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 (and as Santander did in fact do in this case when Ms Y made the payment on 9 August 2022).

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) and to “pay due regard to the interests of its customers” (Principle 6)².*
- *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”³.*

² Since 31 July 2023 under the FCA’s new Consumer Duty package of measures, banks and other regulated firms must act to deliver good outcomes for customers (Principle 12), but the circumstances of this complaint pre-date the Consumer Duty and so it does not apply.

³ For example, both the FSA’s Financial Crime Guide at 4.2.5G and the FCA’s 2015 “Financial crime: a guide for firms” gave examples of good practice in relation to investment fraud saying:

“A bank regularly assesses the risk to itself and its customers of losses from fraud, including investment fraud, in accordance with their established risk management framework. The risk assessment does not only cover situations where the bank could cover losses, but also where customers could lose and not be reimbursed by the bank. Resource allocation and mitigation measures are informed by this assessment.

A bank contacts customers if it suspects a payment is being made to an investment fraudster.

- *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 is also a signatory of the 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 set of circumstances (and it does not apply to the circumstances of these payments), 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 (and Santander did in fact do in this case on 9 August 2022).*
- *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 Ms Y's payments?

A bank has transaction monitoring rules designed to detect specific types of investment fraud. Investment fraud subject matter experts help set these rules."

Whilst I have set out in detail in this provisional decision the circumstances which led Ms Y to make the payments from her Santander current account and the process by which that money ultimately fell into the hands of the fraudster, I am mindful that Santander had much less information available to it upon which to assess whether any of the payments presented an increased risk that Ms Y might be the victim of a scam.

So, I have considered the steps Santander ought fairly and reasonably to have taken into account with only the more limited information it had.

Santander did intervene when Ms Y attempted to make the second payment to W. It clearly identified a risk in relation to that payment, despite the fact that it was going to an account in Ms Y's own name at W (a fact that was likely known to Santander before that call and was confirmed during it).

I don't, therefore, need to consider whether Santander ought to have found that payment to be sufficiently concerning that it needed to speak to its customer before allowing the payment to go ahead. Instead, I need to consider whether, taking into account the limited information Santander knew about this payment, the warnings that it gave during that conversation were proportionate to the risk the payment presented.

In doing so, I've taken into account that Ms Y was making the second transfer to a new payee that day. The second payment had increased significantly in value from the first and it was also the largest payment that Ms Y had made in the previous six months. On the other hand, as mentioned, Santander very likely knew even before the call that the payment was going to an account in Ms Y's own name and, though there had been two payments that day, a concerning pattern hadn't yet developed (as, in my view, it did later).

So, at the point this payment was made, I think Santander had some reasons to be concerned about it, but wouldn't have reasonably thought that there was a very heightened risk of financial harm to Ms Y. I also need to take into account that Santander needs to strike a balance between countering the risk of fraud and not unduly inconveniencing customers making genuine transactions. And, I wouldn't expect it to interrogate its customer.

Bearing all that in mind, I've listened to the call which took place on 9 August 2022 after the £5,000 payment was flagged for a security check. Ms Y offered that the payment was going to her own account at W but she was not directly asked about the circumstances surrounding the payment. The advisor explained that there was a scam risk associated with the payment. He talked through some common scams – including briefly touching on investment scams. In relation to investment scams, he explained that the bank had seen cases where customers were being encouraged to invest and to pay money into accounts that they don't have any control over and can't withdraw from. He also asked Ms Y whether she had been asked to download any software, she said that she hadn't. Ms Y also confirmed, in response to questions by the advisor, that she had set up the account herself and had done so of her own accord.

The closest the advisor came to trying to understand the wider circumstances surrounding the payment was by asking Ms Y whether the payment was 'just going to your own account'. But I think that question was both leading and ambiguous (I don't think it would be clear to Ms Y what the advisor was, presumably, trying to elicit).

While I accept this is a finely balanced point, I think the advisor failed to establish the circumstances surrounding the payment. And, while Ms Y might have been more forthcoming in some of her responses (though, as I'll come onto I don't think she was dishonest), the advisor did not ask her to explain why she was moving money to her account at W (a question which would be relevant both for the investment scam she was falling victim

to, and any other scam she might have been falling victim to).

The call was a missed opportunity to narrow down the scam risk and provide a warning which was specific, as far as possible, to the actual risk. Instead, the advisor provided a high-level warning for a number of different scams which, in the case of investment scams, failed to highlight some of the key features of such a scam. I think this was an error on Santander's part. While Santander argues that it couldn't have been expected to know that the payment was related to an investment, I don't think it made any real attempt to establish whether it was or not. And, despite the fact the payment was going to Ms Y's own account, I think Santander ought to have been mindful of the potential risk to Ms Y of 'multi-stage' fraud – whereby victims are instructed to move funds through one or more legitimate accounts held in the customer's own name to a fraudster. The use of and risks to consumers of multistage fraud were well known to banks in August 2022.

Overall, I don't think Santander's warning during this call was sufficient, so I'll go onto consider whether a better warning would have uncovered the scam and prevented further loss to Ms Y.

It's important to also note that, while I consider the issue of whether Santander's intervention went far enough on 9 August 2022 to be a finely balanced point, even if I had concluded that it went far enough (which, for the reasons I've explained, I don't think it did), I'd still expect Santander to have been monitoring Ms Y's account and, when she began a very unusual series of transactions from 17 August 2022, I'd have reasonably expected it to have intervened again, given the heightened risk of fraud, to establish the circumstances surrounding the payments Ms Y was making.

If Santander had attempted to establish the circumstances surrounding the £5,000 payment on 9 August 2022, would that have prevented the losses Ms Y incurred after that point?

My impression is that Ms Y was not entirely forthcoming with the reason for the £5,000 payment, but neither did she decline to answer a direct question about the circumstances surrounding it. I've also seen nothing in the conversation between her and S that suggests she was asked to mislead the bank or that S had any control over the account at W – either directly or through remote access software.

I also recognise that there were aspects of this scam that Ms Y found convincing – particularly the cloning of a genuine firm and her account manager's listing on an official website. I've taken into account that she may have been unwilling to give up a potentially profitable investment.

Nevertheless, even before the £5,000 payment, Ms Y expressed caution. She was concerned about losing that amount of money. She expressed a degree of scepticism about how such large returns could be made in a short time. She also questioned where S was based and said that she wanted to speak to her partner before going ahead. These comments taken together give me the impression that Ms Y was not entirely confident about the investment and was looking for reassurance.

So, I think that had Santander done what I think it ought to have done – attempted to establish the circumstances surrounding the payment – I think, on the balance of probabilities, that Ms Y would have revealed the true purpose of the payment.

Had that happened, I think Santander would have been in a position to provide a very strong warning to Ms Y. The circumstances of the scam bore all the hallmarks of a cryptocurrency investment scam – the provision of a trading platform, an account manager and a small initial deposit which increased significantly in value in a short space of time. And, at this

point, Ms Y had been promised a 1000% return in just a few days. With that information revealed, Santander would have known that Ms Y was falling victim to a scam and, faced with such a stark warning, I don't think Ms Y would have continued with the payment.

Should Santander be fairly and reasonably held responsible for Ms Y's loss?

In reaching my decision about what is fair and reasonable, I have taken into account that Ms Y transferred the money to an account in her own name, rather than directly to the fraudster, so she remained in control of her money after she made the payments from her Santander account, and it took further steps before the money was lost to the fraudsters.

But for the reasons I have set out above, I am satisfied that it would be fair to hold Santander responsible for Ms Y's losses (subject to a deduction for Ms Y's own contribution). As I have explained, the potential for multi-stage scams ought to have been well known to Santander and as a matter of good practice Santander should fairly and reasonably have been on the look-out for payments presenting an additional scam risk including those involving multistage scams. I'm satisfied Santander should fairly and reasonably have made further enquiries when it discussed the £5,000 payment on 9 August 2022 and, if it had, it is more likely than not that the scam would have been exposed and Ms Y would not have lost any more money. In those circumstances I am satisfied it is fair to hold Santander responsible for Ms Y's loss.

I have also taken into account that the payments were made to a regulated business – W, and Ms Y might potentially have a claim against W in respect of its actions (although W is not a party to this complaint and so I make no finding about its role here).

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, Ms Y has not referred a complaint about W to me and DISP does not empower me to instruct Ms Y to make or refer a complaint to me about another business.

I am required to consider the complaint in front of me. I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is a possibility that Ms Y may have cause to complain against W, I am not persuaded it would be fair to reduce the award solely for that reason. Ms Y is entitled to choose to complain only about Santander and I am satisfied that Santander could have prevented the losses she suffered if it had acted fairly and reasonably.

I have also taken into account Santander's comments about the PSR's proposed mandatory reimbursement scheme, which – as currently proposed – would not require Santander to reimburse Ms Y. The PSR's proposals are not yet in force and are not relevant to my decision about what is fair and reasonable in this complaint. But I do not consider the fact that the PSR does not propose to make it compulsory for payment service providers to reimburse consumers who transfer money to an account in their own name as part of a multi-stage fraud, means that Santander should not compensate Ms Y in circumstances when it failed to act fairly and reasonably, as I have found was the case here.

Should Ms Y bear any responsibility for her losses?

I've thought about whether Ms Y should bear any responsibility for her loss. In doing so, I've considered what the law says about contributory negligence, as well as what I consider to be fair and reasonable in all of the circumstances of this complaint.

I understand there were sophisticated aspects to this scam. Ms Y believed that the investment was given access to a trading platform, which I accept might have seemed

convincing to her. She says she was able to see that the fraudulent investment firm was authorised (though it's not clear where Ms Y checked this information, given that she doesn't appear to have known what the FCA was until S explained this to her) and she was able to look up the credentials of her account manager on an official website.

But, as I've already set out, it's clear Ms Y was both hesitant and a bit sceptical about the investment. Most worryingly, in my view, S claimed that she could turn £5,000 into £50,000 in just a few days. That's an astronomical return and one that apparently carried no risk. I think Ms Y recognised at the time that this kind of trading is a gamble and, I'm afraid, I don't think S' explanation that they had insurance (presumably to cover losses) was particularly plausible. As I've set out, it's also clear she (and her partner) had doubts about the scheme before she made the £5,000 payment. Those doubts only increased as time went on. I recognise that Ms Y deferred to S as the expert in this matter and was somewhat bamboozled by her apparent expertise, but I think Ms Y ought to have recognised that the return promised by S before the £5,000 payment was simply too good to be true. And, as time went on, the scam became less plausible and it's my impression that Ms Y was simply making payments in the increasingly desperate hope of recovering the money she'd already sent. While this is understandable in the circumstances and I recognise the cruelty of the fraudster's methods, I think Ms Y, fairly and reasonably, had a significant role to play in what happened.

So, I think that there should be a deduction in the amount that Santander reimburse Ms Y and I think that deduction should be 50%

Could Santander have done anything else to recover Ms Y's money?

As almost all of the funds went to an account in Ms Y's name before being essentially converted into cryptocurrency and sent to the fraudsters, it could not have been recovered by Santander. But it appears that Santander was able to recover £116 that remained in her account at W. That amount was returned to her account on 25 January 2023. As this amount relates to the payments which I've provisionally decided Santander should reimburse, this amount should be deducted from the overall loss.

Conclusions

Overall, having considered the matter carefully, I think Santander should refund 50% of the outstanding loss (that is the total amount lost from these payments minus the amount recovered) caused to Ms Y from and including the £5,000 payment on 9 August 2022. As I have set out above, in total those payments amounted to £100,370, so Santander should pay Ms Y 50% of £100,254 which is £50,127.

I think that Santander should also pay 8% simple interest per annum on £40,127 – that is the amount of the reimbursement that relates to Ms Y's own money. Ms Y has been deprived of the use of this money for over a year and whilst I understand the money was held in her savings account prior to the transfers, she may have used it in a variety of ways if it had remained available to her. I think 8% simple is a fair interest rate in those circumstances.

In relation to the loan, as far as I can see, Ms Y was only charged a total of £346.73 in interest by the loan company. As I'm asking Santander to reimburse £10,000 of the payment funded by the loan, I think that it is fair and reasonable that Santander should pay half of this amount - £173.37. That figure is broadly the cost to her of being without the money. If the loan company has charged additional interest, Ms Y should make me aware of this in advance of my final decision.

Unlike the Investigator, I make no award in relation to either the loan fees charged on the

£20,000 loan or the repayments Ms Y made. Santander didn't have any role in granting that loan, so I don't think it can fairly be held responsible for the loan fee. And, in relation to the repayments, I think 8% simple interest on the £40,127 is, overall, fair compensation, given the inevitable uncertainty about how Ms Y may have used this money.

If Santander considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms Y how much it's taken off. It should also give Ms Y a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My provisional decision

I am provisionally minded to uphold in part this complaint and instruct Santander UK Plc to pay Ms Y:

- *50% of the outstanding loss to Ms Y as a result of the payments made after and including the £5,000 payment on 9 August 2022 – a total of £50,127.*
- *8% simple interest per year on 50% of each payment, apart from the final £20,000 payment, from the date of each payment to the date of settlement.*
- *50% of the interest Ms Y incurred on the £20,000 loan – £173.37.*

Ms Y didn't have any further comments on my provisional decision, but Santander didn't agree. In summary it said:

- Proper consideration of regulatory expectations and requirements, as well as good industry practice, should not result in a conclusion that it is fair and reasonable to hold it responsible for Ms Y's loss.
- While it acknowledges the application of PRIN it must also take into account its legal obligations to Ms Y and the rules in the FCA handbook.
- SYSC 3.2.6R and other AML requirements all relate to the risk of Ms Y using her account to launder funds, rather than forming the basis of a requirement to protect her from the risk of fraud.
- SYSC 3.2.6R is also qualified by reasonableness and there is no expectation that it should or could identify and prevent every payment that carries risk of being associated with a scam.
- My provisional decision fails to take into account:
 - a) The need to strike a balance between taking reasonable measures to detect fraud and its legal obligations under the PSR 2017 and common law.
 - b) Its fraud detection systems, in line with the BSI Code and CRM Code, are designed to mitigate the risk of fraud, there is no expectation on it to detect and prevent every transaction that turns out to be fraudulent.
 - c) The fact that its fraud detection systems have to be carefully calibrated to ensure that payments are not interrupted to a 'disproportionate degree', taking into account the number of payments it processes, particularly 'own account' transfers.
 - d) The fact that the payment went to another FCA authorised firm, which is key to deciding what is fair and reasonable in this case. W is subject to the same FCA principles, AML requirements and good industry practice as Santander is.
- There are 'genuine differences' between the bank sending funds to a customer's own account and a firm sending money directly to a fraudster. It processes very significant volumes of own account transfers and only a very small proportion turn out to be

fraudulent. And, while it does have strategies to prevent this kind of fraud, it must have regard for the level of risk this kind of payment presents.

- While it acknowledges that it has 'detection strategies' for own account transfers (which did identify the payment which took place on 9 August 2022), any intervention must be proportionate and it reiterates that the level of questioning that took place was appropriate.
- It accepts that multi-stage fraud of this nature is on the rise, but it can't be expected to detect this kind of fraud to the degree suggested in my provisional decision.
- W had far more information on which to base a risk assessment of the payments than it did, so it was far better placed to meaningfully intervene in the transactions.
- It is unclear whether a complaint has been raised about W and it would like to know whether W detected any of the payments and/or provided warnings.
- It again reiterates that both the CRM and upcoming PSR scheme have consciously excluded payments of this nature and, it feels, a customer would have no legal basis on which to recover funds from it. It argues that the exclusion of this type of payment from both schemes is relevant and should be taken into account, particularly as the PSR scheme was an opportunity for both the government and Payment Systems Regulator to extend protections to this type of fraud, if they felt it was the right thing to do.
- It's unclear why I haven't exercised my discretion under DISP 3.5.2 to inform Ms Y that it might be appropriate to complain against W.
- If I decide that the complaint should be upheld, despite its further submissions, it agrees that there should be a deduction to the amount Ms Y is reimbursed to take into account her role in what happened. It has made some additional points to support this view and argues that Ms W's contributory negligence should mean that the deduction should be more than the 50% I provisionally decided.
- The interest award I recommended does not reflect available interest rates at the time of the scam or the position taken by the courts in relation to interest. The award represents a windfall to Ms Y. While it accepts that she might have used the money in a variety of ways, she would not have been able to obtain the recommended interest rate through any standard savings product.

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 reaching my final decision, I've carefully considered Santander's further submissions. While I may not have commented on each point individually, I've taken everything it has said into account when reaching my final decision. Having done so, those submissions do not persuade me to depart from my provisional decision.

I've explained in some detail in my provisional decision why I thought that Santander should, fairly and reasonably, be responsible for Ms Y's loss. In setting out why I thought Santander could be responsible for authorised payments in circumstances such as these, I referred to law and regulations, regulators' rules, guidance and standards, codes of practice, what I consider to be good industry practice and what I consider to be fair and reasonable in the circumstances of this complaint. I understand that Santander disagrees that, individually, or taken together, any of those considerations fairly leads to a conclusion that it should be held responsible for the loss. It's clear we have a different view on this point but I don't think there's anything I can usefully add to what I've already said.

While I acknowledge that Santander's security systems need to strike a reasonable balance between detecting fraud and not unduly inconveniencing its customers, it's not in dispute here that Santander identified the 9 August 2022 payment as being suspicious enough to contact its customer. I've set out above why I think, taking into account that Santander knew the payment was going to Ms Y's own account, that conversation didn't go far enough to establish the circumstances surrounding the payment. Santander haven't made any new substantive submissions specifically about that conversation. So my view on this point remains unchanged.

Santander argue that a 50% deduction from the amount reimbursed to Ms Y is insufficient. It argues that the returns, Ms Y's suspicions and doubts and her lack of understanding mean that she should bear the majority of the loss. I disagree. Ms Y is a layman and while, for the reasons I've explained, her role in what happened should be taken into account, that role must be weighed up against the bank's failure, in relation to a matter within its expertise, to prevent the fraud. While I acknowledge that deciding relative blameworthiness is not an easy task, Santander have not persuaded me to depart from my provisional finding on this point.

DISP 3.5.2, only gives me the powers to inform Ms Y it might be appropriate to complain against another respondent (and I suspect she's well aware that she could complain about W). It does not compel me to do this and it certainly doesn't allow me to compel Ms Y to refer a complaint about W instead of, or as well as, her complaint against Santander. Our service contacted W as part of its investigation into this complaint and it confirmed that it did not flag any of the payments for security checks. Ms Y raised a claim with W, but does not appear to have made a complaint.

Finally in relation to interest, while Ms Y may not have been able to obtain a savings account with a similar rate of interest at the point these payments were made, my interest award takes into account the overall impact of being deprived of those funds and that Ms Y may have utilised the money in ways other than saving it.

So, for the reasons I've explained, I see no reason to depart from my provisional findings, as set out above.

My final decision

I uphold in part this complaint about Santander UK Plc and instruct it to pay Ms Y:

- 50% of the outstanding loss as a result of the payments made after and including the £5,000 payment on 9 August 2022 – a total of £50,127.
- 8% simple interest per year on 50% of each of those payments, apart from the final £20,000 payment, from the date of each payment to the date of settlement.
- 50% of the interest Ms Y incurred on the £20,000 loan – £173.37.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms Y to accept or reject my decision before 7 February 2024.

Rich Drury
Ombudsman