

## The complaint

Mr F is unhappy that Santander UK Plc won't reimburse him for money he lost as a result of a scam.

## What happened

On 1 December 2023 I issued my provisional findings on this complaint. I wanted to give both parties a chance to respond with any further evidence and/or arguments before I issued my final decision. That provisional decision forms part of this final decision and is copied below.

### *What happened*

*In April 2022, Mr F came across an advert promoting cryptocurrency investing on a well-known social media platform. Mr F clicked on the advert and provided his contact details by filling out a form.*

*Mr F was immediately contacted by someone claiming to be a cryptocurrency broker. Mr F says they took an initial £150 deposit. I understand this initial payment was made by debit card, but I've seen no evidence of this and Mr F's representatives have also indicated that the initial payment was for £250. Regardless of the amount of that payment, it does not form part of this complaint. Within half an hour of the payment being taken, Mr F says he was contacted by his 'account manager'. Unfortunately for Mr F, the investment opportunity wasn't genuine, and he was actually dealing with fraudsters.*

*Mr F says the caller asked about his background (which appears to include some experience of financial trading) and said that he knew some of the people who worked at the same company Mr F had previously worked at. Mr F didn't recognise the names. He put this down to the fact he hadn't worked at the company for some time, but he was nevertheless reassured by the fraudster's claims.*

*Mr F said that he initially tried to open an account with a legitimate cryptocurrency provider – "P", but he says that it closed his account and returned his funds. Mr F's Santander current account statements show that there were two payments to P around a week apart. The second of those payments, which was for £1,000, was returned to Mr F's Santander account on 8 May 2022.*

*According to Mr F's submissions, the fraudsters then suggested that he open an account with a FCA-authorised Electronic Money Institution ("EMI") – "S" that, at the relevant time, was linked to a legitimate cryptocurrency exchange – "B", before purchasing cryptocurrency and transferring to cryptocurrency wallets controlled by the fraudster. Mr F believed that by taking these actions he was depositing money into his trading account.*

*The caller said that his initial £150 had already been invested and provided Mr F with a link to a trading platform so that he could see how his investment was performing. He was given login details for the platform and could see the 'trades' which the fraudster claimed to be carrying out on his behalf.*

When Mr F made the first payment of £50 to what was a new payee (P), Santander asked him the reason for the payment. Mr F selected 'transfer to own account'. Santander's notes say that Mr F selected the same reason when he made the first payment to S and received the same warning. That warning is set out below:

"If you have been told that your account is at risk and to move money, this is a scam. What should I do? Could this be a "safe account" scam? If someone's contacted you, even Santander or the police, and said that your account is at risk and you need to transfer your money to a "safe account" or a new account in your name, this is a known scam. Please cancel this payment now and call us immediately."

It also appears that a 'Confirmation of Payee' ("CoP") check was performed on the first payments Mr F made to P and S. CoP is a system which checks the name of the payee provided against the name associated with the receiving account. Not all account types and firms have the ability to provide this confirmation. Santander say that neither P nor S are participants in the CoP scheme. As such, any Confirmation of Payee check would not have been able to confirm that the accounts at S and P were held in Mr F's name.

Mr F's testimony is that he downloaded remote access software so that the fraudsters could assist him when making the payments.

The payments Mr F made to the investment are set out below:

Date and time	Amount	Recipient
28 April 2022, 14:07	£50	P
6 May 2022	£48.05 credit	P
6 May 2022, 14:57	£1,000	P
8 May 2022	£1,000 credit	P
20 May 2022, 12:08	£100	S
30 May 2022, 16:31	£3,000	S
13 June 2022, 9:40	£3,001	S
16 June 2022, 13:21	£3,000	S
27 June 2022, 13:09	£3,000	S
28 June 2022, 13:19	£4,000	S
29 June 2022, 8:38	£4,000	S
29 June 2022, 9:08	£4,000	S
29 June 2022, 13:50	£4,000	S

Mr F was asked about withdrawing money but was advised that would 'hurt the leverage' he had on the account. It was recommended he wait before withdrawing any money and he was told that the account would be 'liquidated' at the end of June 2022 – at which point he'd receive all of his profits.

When the end of June 2022 came, Mr F's representatives say that he was told that he'd need to pay £4,000 in charges in order to release his funds and that Mr F made that payment but was told that it had not gone through and that he'd now missed the date by which to pay the funds. Correspondence provided by Mr F suggests he was told that he needed to make a 'mirror transaction' in order to release his funds. It's evident that Mr F contacted B about this request and was told that there was no such requirement and he was falling victim to a scam.

*Mr F informed the fraudster of this and they both persuaded him that he wasn't falling victim to a scam and threatened him with legal action if he didn't make the payments. In total Mr F made four payments of £4,000 over 28 and 29 June 2022.*

*Mr F realised he'd been the victim of fraud and reported the matter to Action Fraud and the police but only raised a claim with Santander, through a professional representative, in October 2022. I understand that these events have had a significant impact on his mental health.*

*Mr F asked Santander to consider reimbursing him. Santander considered Mr F's claim. Among other things, it said (correctly) that the Lending Standards Board's Contingent Reimbursement Model "CRM Code" (which might have otherwise required Santander to reimburse his losses) did not apply to the payments from Mr F's Santander account because they weren't made to 'another person' as the CRM Code requires.*

*Mr F referred the matter to our service. His complaint was considered by one of our Investigators. They thought Santander ought to have found the second £4,000 payment Mr F made to S on 29 June 2022 to be suspicious given the payments already made and it should have made further enquiries before making the payment. If Santander had made further enquiries the scam would have come to light and Mr F would not have incurred the losses he did from the second payment on 29 June 2022 as a result of the scam. However, they also thought that Mr F ought to bear some responsibility for the loss. They pointed out that B had already advised Mr F that he was likely falling victim to a scam by the time he was making the second payment on 29 June 2022. The Investigator thought that a fair deduction was 50%.*

*So, the Investigator recommended that Santander refund 50% of the payments Mr F made after and including the second £4,000 payment on 29 June 2022. They also recommended that Santander pay interest at the same rate that had applied to the account from which the money Mr F lost had originated (that rate was 1.5%).*

*Mr F accepted our Investigator's recommendations, but Santander didn't agree. In summary, Santander said:*

- *Mr F's loss did not take place from his Santander account, so it should not be responsible for reimbursing him.*
- *The recent Supreme Court judgement in the case of Philipp vs Barclays Bank Plc UK [2023] UKSC 25 confirmed that when 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'.*
- *Mr F's account was in credit and there is no dispute that he authorised the payments.*
- *He'd set up multiple payees in the past and, by 29 June 2022, had made nine previous payments to P and S.*
- *So the payment instruction was clear and without room for interpretation. There was no reason for it to be concerned about the payment.*

- *It was speculative to suggest that the scam would have come to light had there been an intervention at the point the Investigator suggested.*
- *It acted in line with industry standards when making the payments and cannot be held responsible for them.*

*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.*
- *Nor 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"<sup>1</sup>) places any duty on it either.*
- *The CRM Code now represents good industry practice, including the obligation for a firm 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*

*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.*

*For the reasons I shall set out below, I am minded to conclude Santander should have made further enquiries prior to processing the second £4,000 payment on 29 June 2022 and, if it had done so, the scam would have come to light and the losses Mr F incurred after that payment would have been prevented. But I am also satisfied that in the circumstances of this complaint, Mr F should bear some responsibility (50%) for the losses he suffered from that point.*

*I shall explain why.*

*The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr F's account is that he is responsible for payments he's authorised himself. And, as the Supreme Court has recently reiterated in Philipp v*

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

*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, it is my understanding that Santander's terms and conditions at the relevant time 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) and to "pay due regard to the interests of*

*its customers” (Principle 6) <sup>2</sup>.*

- *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”<sup>3</sup>.*
- *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:*

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<sup>2</sup> 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.

<sup>3</sup> 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.*

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

- 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 F's payments?

Whilst I have set out in detail in this provisional decision the circumstances which led Mr F to make the payments from his 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 Mr F 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.

I've first considered Mr F's account activity over the previous six months before the disputed payments, in order to understand how he typically operated his account. That history shows that Mr F made a number of large transfers during that period, though those payments seem to take place between Mr F's own savings accounts. There's no indication that the payments were made to anything other than bank accounts held in Mr F's name. Those payments included three payments of more than £10,000 in April 2022 and a payment of £9,000 in March 2022. I've taken this activity into account when deciding whether Santander ought to have found the payments in dispute to be unusual or suspicious.

It's also important to consider what Santander knew about these payments, specifically whether it knew that either the account at P or S was Mr F's own account and under his control.

As I've set out, there wasn't a positive confirmation of payee match for the payments to either P or S. Santander says it knew that the payments were going to accounts controlled by Mr F because he, when asked to select a payment reason, indicated that was the case. But Santander will be well aware that there are circumstances where a customer might indicate that an account is under their control, but that turns out not to be the case. It can't fairly and reasonably, entirely rely on what its customer has told it or always take its customer's selected payment purpose at face value.

I'm also aware that some cryptocurrency exchanges (and linked EMIs) will only allow payments to be received from bank accounts which are held in the same name as its customer's account. In this case, I understand the account S offered was integrated with services provided by B (the cryptocurrency exchange), though S also provides standalone EMI accounts. But Santander hasn't suggested it would have been aware of this at the time the payments were made. And, though it pointed to the fact that the payment references for

*the payments to S were given as B, it hasn't been clear about whether it took this into account when considering the risk those payments presented. But I would reasonably have expected it to be aware that the payments to P were related to cryptocurrency (online searches show the account number and sort code are associated with a well-known cryptocurrency exchange).*

*So, Santander did not know that the accounts Mr F paid were under his control – it had no confirmation of that. The payments also involved a recently set up payee and were payments that were either identifiably going to a cryptocurrency exchange or, in the case of the payments to S, were payments to an account with an Electronic Money Institution (which are reporting increasing instances of customers being scammed, including as a consequence of multi-stage scams often involving cryptocurrency).*

*But, I think Santander could also reasonably take some comfort (at least initially) from the fact that:*

- Mr F indicated when making the first payments to both P and S that he was transferring to his own account.*
- Mr F was not deterred by the 'safe account' warnings Santander provided – an example of a scam associated with payments to what the consumer believes is an account in their own name.*

*Turning to the individual payments, I don't think that Santander would have had any reason to believe that the £50 and £1,000 paid to P were connected to a scam. The first payment was very modest in size and the second payment didn't take place until over a week later. While the £1,000 payment may have been returned to Mr F (rather than withdrawn by him), I've seen nothing to suggest that Santander would have been aware of that at the time and, even if it was, I don't think the return of the payment should have given them cause for concern as there are numerous reasons why this could happen.*

*Mr F then waited almost two weeks to make the first deposit into his account at S from his Santander account. That deposit was for just £100. It was a further ten days before Mr F made his first deposit of any size - £3,000 on 30 May 2022.*

*There was a further 11 days before Mr F made another payment - £3,000 on 27 June 2022. I can't see that Santander would have been able to identify a concerning pattern here. The payments, while not insignificant in value, were spaced out in time and did not increase significantly in value or velocity. They also didn't stand out as being particularly unusual when compared to Mr F's previous account activity.*

*Those gaps between the payments may have provided some additional assurance to Santander that Mr F was making the payments in ordinary circumstances and to an account held in his own name, rather than as a step in a multi-stage scam. The payments would appear to have been – as Santander says – to what was becoming an established payee, although as with most payments it could not rule out the possibility of a scam entirely.*

*However, the frequency of the payments then began to increase, with daily payments between 27 June and 29 June 2022. I think this ought to have started to cause Santander some additional concern and by the second payment on 29 June 2022 it ought to have recognised the significantly heightened risk of fraud. The payments were now being made rapidly (the first and second payments on 29 June 2022 were made just half an hour apart) and the payments had increased in value. The cumulative value of the payments made over just a couple of days was over £15,000. And, while Mr F had made larger individual payments in the previous six months, I think these payments stood out due to their*



*frequency, the recipient and lack of obvious purpose.*

*I am satisfied Santander ought fairly and reasonably to have identified from the information available to it that there might be increased risk associated with the second £4,000 payment on 29 June 2022 and, in those circumstances, it should fairly and reasonably have made further enquiries.*

*I accept the second £4,000 payment on 29 June 2022 was being made to an account in Mr F's name (though, as noted, Santander would not have known this) and by that time he had made seven payments to the same account, an account which would, on the face of things, have appeared to Santander to have been an established account.*

*But, in my view this combination of circumstances that I've described ought fairly and reasonably to have led Santander to make additional enquiries before making the payment to establish the circumstances in which Mr F was making what had become an unusual series of payments involving a large amount of money in a short period to an account with an EMI.*

*This was a pattern of activity that could be consistent with certain types of scam, notwithstanding the likelihood that the payment was going to an account in Mr F's name.*

*In reaching my view that Santander ought fairly and reasonably to have made further enquiries, I consider Santander ought to have been mindful of the potential risk to Mr F 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 multi-stage fraud (and risks to consumers) were well known to banks in June 2022.*

*If Santander had made further enquiries before the second £4,000 payment on 29 June 2022, would that have prevented the losses Mr F incurred after that point?*

*Santander say that it is speculative to suggest that an intervention by it at the point the Investigator suggested would have prevented further loss. I disagree.*

*As I've set out, by 28 June 2022 Mr F was having serious doubts about the legitimacy of the scheme. He'd already been told by B that he was falling victim to a scam, but had seemingly been drawn back in by threats, persuasion and the hope of receiving his returns (rather than any strong belief in the legitimacy of the scheme).*

*I've also seen nothing to suggest that Mr F would have misled Santander and he seems to have contacted B about the fraudster's request for a 'mirror transaction' in order to verify that it was genuine. So, I think he would have been open about the reasons for making the payment. Given both the circumstances up to that point and those surrounding that particular payment, Santander would have been in a position to provide a very strong warning to Mr F – building on what B had already said and dispelling any reassurance provided by the fraudsters (particularly any suggestion that he would be liable to criminal prosecution – which was patently false).*

*I think that such a warning would have only reinforced his significant doubts about the scam (which had no doubt grown stronger since the previous day) and, taking into account the fact that the scam had lost any credibility at this point, I think an intervention by Santander would have prevented any further loss to Mr F.*

*Should Santander be fairly and reasonably held responsible for Mr F's loss?*

*In reaching my decision about what is fair and reasonable, I have taken into account that Mr*

*F transferred the money to an account in his own name, rather than directly to the fraudster, so he remained in control of his money after he made the payments from his 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 Mr F's losses (subject to a deduction for Mr F's own contribution). As I have explained, the potential for multi-stage scams ought to have been well known to Santander. As a matter of good practice it should fairly and reasonably have been on the look-out for payments presenting an additional scam risk including those involving multi-stage scams.*

*I'm satisfied Santander should fairly and reasonably have made further enquiries before the second payment on 29 June 2022 and, if it had, it is more likely than not that the scam would have been exposed and Mr F would not have lost any more money. In those circumstances I am satisfied it is fair to hold Santander responsible for Mr F's loss.*

*I have also taken into account that (most of) the payments were made to a regulated business – S, and Mr F might potentially have a claim against S in respect of its actions (although S 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, Mr F has not referred a complaint about S to me and DISP does not empower me to instruct Mr F 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 Mr F may have cause to complain against S, I am not persuaded it would be fair to reduce the award solely for that reason. Mr F is entitled to choose to complain only about Santander and I am satisfied that Santander could have prevented the losses he 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 Mr F. 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 Mr F in circumstances where it failed to act fairly and reasonably, as I have found was the case here.*

#### *Should Mr F bear any responsibility for his losses?*

*I've thought about whether Mr F should bear any responsibility for his 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 and that Mr F was given access to a trading platform, which seemed to demonstrate the success of his investment. I accept this would have seemed convincing to him.*

*Nevertheless, as I've set out, by the time he was making the second £4,000 payment on 29 June 2022, he'd already been told that he was likely falling victim to a scam and he had considerable doubts about the scheme. While I can understand that Mr F may have been desperate to recover his earlier investments at this point, I have to conclude that he ought,*

*fairly and reasonably, to have made further enquiries about the legitimacy of the scheme before making any more payments.*

*So, I think Mr F did have a role to play in what happened and I think that the amount Santander should pay to him in compensation should fairly and reasonably be reduced to reflect that role. Given how serious I think Mr F's concerns about the legitimacy of the investment ought reasonably to have been, I think that a fair deduction is 50%.*

*Could Santander have done anything else to recover Mr F's money?*

*As the funds went to an account in Mr F's name before being converted into cryptocurrency and sent to the fraudsters, they could not have been recovered by Santander. Despite this, Santander did attempt to recover Mr F's funds, but were told by P that they had already been returned and by S that those funds were no longer in its possession.*

*Conclusions*

*Overall, having considered the matter carefully, I think Santander should refund 50% from the second payment on 29 June 2022. As I have set out above, in total there were two payments with a combined value of £8,000. So, Santander should pay Mr F £4,000. I think that Santander should also pay 8% simple interest per annum on that amount from the date of each payment to the date of settlement. Mr F has been deprived of the use of this money for over a year and whilst the money was held in his savings account with another firm prior to the transfers, he may have used it in a variety of ways if it had remained available to him. I think 8% simple is a fair interest rate in those circumstances.*

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

*My provisional decision*

*My provisional finding is that I uphold this complaint and intend to instruct Santander UK Plc to pay Mr F:*

- *50% of the second and third disputed payments which took place on 29 June 2022 – a total of £4,000*
- *8% simple interest per annum on that amount from the date of each transaction to the date of settlement.*

Mr F accepted my provisional decision, but Santander did not. 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 Mr F's loss.
- While it acknowledges the application of PRIN it must also take into account its legal obligations to Mr F and the rules in the FCA handbook.
- SYSC 3.2.6R and other AML requirements all relate to the risk of Mr F using his account to launder funds, rather than forming the basis of a requirement to protect him 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. S 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 accepts that multi-stage fraud of this nature is on the rise, it can't be expected to detect this kind of fraud to the degree suggested in my provisional decision.
- S 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 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 Mr F that it might be appropriate to complain against S.
- If I decide that the complaint should be upheld, despite its further submissions, it agrees that there should be a deduction to the amount Mr F is reimbursed to take into account his role in what happened. It made some additional points to support this view and argues that Mr F's contributory negligence should mean that he should bear more than 50% of the loss.
- 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 Mr F and is not fair or reasonable, particularly considering that Mr F is also partly responsible for his losses. While it accepts that he might have used the money in a variety of ways, he 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 Mr F'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.

In my provisional decision, I acknowledged that the payments in dispute went to an account held in Mr F's own name at another FCA-authorised firm. But I explained that, based on the evidence I'd seen, Santander did not know this at the time, so it can't have taken this fact into account when deciding on the level of risk the payments presented. I then set out in some detail why I thought that the second payment on 29 June 2022 presented a heightened risk of fraud. In doing so, I weighed up what Santander did and did not know about the destination of the funds, as well as the characteristics of that payment and those that came before it. I did not suggest that Santander could or should detect and prevent every fraudulent payment and I acknowledge the balance it needs to strike between preventing fraud and not unduly inconveniencing customers.

Santander argue that a 50% deduction from the amount reimbursed to Mr F is insufficient. It argues that Mr F's lack of due diligence, lack of understanding of the investment and failure to mitigate his losses after having identified that he might be the victim of a scam mean that he should bear the majority of the loss. I disagree. Mr F is a layman and while, for the reasons I've explained, his 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 Mr F it might be appropriate to complain against another respondent. It does not compel me to do this and it certainly doesn't allow me to compel Mr F to refer a complaint about S instead of, or as well as, his complaint against Santander.

Finally in relation to interest, while Mr F 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 Mr F 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 Mr F:

- 50% of the second and third disputed payments which took place on 29 June 2022 – a total of £4,000
- 8% simple interest per annum on that amount from the date of each transaction to the date of settlement.

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

Rich Drury  
**Ombudsman**