

The complaint

Mr and Mrs A complain that Santander UK Plc hasn't refunded them after they fell victim to a cryptocurrency investment scam.

What happened

The background to this complaint is well-known to both parties and so I'll only provide summary detail here.

I'll mostly refer to Mr A through this decision, though it is a joint complaint with Mrs A. I'm doing so as it was him that was making the payments and speaking with Santander.

Mr A had been looking for investment options online and came across a website offering some attractive opportunities. Mr A submitted his details and was contacted by someone claiming to offer genuine investment advice. But they were in fact a scammer.

Mr A had previously lost some money to cryptocurrency investment and the scammer said he could help Mr A get that money back, as well as make returns on an investment into a new cryptocurrency.

Mr A was persuaded to invest and sent an initial payment of £500 to a cryptocurrency wallet in his name. This was on 2 February 2022. He then made a further payment of £2,500 the same day. On 3 February 2022 Mr A made further payments of £4,500, £4,100, £4,100, and £4,500.

Santander stopped some of these payments from leaving Mr and Mrs A's account. It blocked an attempt at payment for £4,500 on 2 February and two further attempts on 3 February 2022. Santander unblocked the account after each intervention, having discussed the payments with Mr A.

Once the money was in Mr A's cryptocurrency wallet it was moved on by the scammer. Mr A has said he'd downloaded AnyDesk at the scammer's instruction, allowing him remote access to his device. Mr A says it was the scammer that moved the money out of his cryptocurrency wallet, though he knew what was happening.

Mr A realised he'd been scammed when it became clear to him all his money had disappeared without trace and he was receiving nothing back from the scammer. He contacted Santander to report the scam, seeking a return of the money lost.

Santander investigated but said it wouldn't refund Mr and Mrs A. It said the payments had been properly authorised and so there was nothing it could do. Dissatisfied with that answer, Mr A brought his complaint to our service.

One of our investigators considered the complaint and recommended it be upheld. He said that whilst Mr A had authorised the payments, Santander hadn't acted fairly and reasonably to protect him and Mrs A from financial harm through fraud.

He noted Santander had intervened and questioned some of the payments. But he didn't believe the interventions were good enough as Santander didn't ask appropriate questions to flesh out and assess the potential scam risks, despite Mr A being upfront about making payments for cryptocurrency. The investigator noted the well-established scam risks associated with such payments, which Santander ought fairly and reasonably to have been aware of.

The investigator did also note that Mr A hadn't acted fairly and reasonably, given there was little evidence of him checking the person advising him on the investments was legitimate. On that basis he recommended responsibility for the loss be equally shared between Santander and Mr and Mrs A from the point at which Santander intervened.

Mr and Mrs A agreed but Santander didn't. It said it had done what it needed to to try and protect Mr and Mrs A, having ensured the payments were properly authorised and asking that they were genuine. It's said it wasn't responsible for carrying out detailed checks on payments, citing the Supreme Court's decision in *Philipp v Barclays Bank UK PLC*. And it said because the money was ultimately lost from Mr A's cryptocurrency wallet it wasn't responsible for it.

The complaint has been passed to me for a final decision as an agreement hasn't been reached.

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.

I'm reaching the same outcome as our investigator and for broadly the same reasons.

The starting point at law is that Mr and Mrs A are responsible for any payments made from their account that are properly authorised. This is confirmed by the Payment Service Regulations (2017) and echoed in the account terms and conditions.

There's no dispute that the payments were properly authorised, even though they were made as part of a scam. And the same would still be true even if it were the scammer making the payments, given Mr A knew what was happening at all times (insofar as he knew the payments were being made).

There are times when the Lending Standards Board's Contingent Reimbursement Model (CRM) Code might apply, affording a customer protection from scams like this. But it doesn't apply here as the funds were transferred to an account (the cryptocurrency wallet) in Mr A's name.

In reaching my decision, I have taken into account the Supreme Court's decision in *Philipp v Barclays Bank UK PLC [2023] UKSC 25*.

In that case, the Supreme Court considered the nature and extent of the contractual duties owed by banks when making payments. Among other things, it said, in summary:

- The starting position is that it is an implied term of any current account contract that, where a customer has authorised and instructed a bank to make a payment, the bank must carry out the instruction promptly. It is not for the bank to concern itself with the wisdom or risk of its customer's payment decisions.
- The express terms of the current account contract may modify or alter that position. For example, in *Philipp*, the contract permitted Barclays not to follow its consumer's instructions where it reasonably believed the payment instruction was the result of APP fraud; but the court said having the right to decline to carry out an instruction was not the same as being under a duty to do so.

In this case, Santander's November 2021 terms and conditions (in place at the time the payments were made) conferred on 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. Indeed, Santander did stop payments here in order to make such checks, clearly as a result of identifying them as bearing a risk of financial harm to Mr and Mrs A.

I can then see little persuasiveness in Santander's claims that it didn't need to question the payments. The fact that it did stop payments three times, for the purpose of trying to protect Mr and Mrs A (as confirmed in the calls), shows Santander can and does make such interventions. The failure on Santander's part here was that it didn't do enough during those interventions to prevent financial harm through fraud.

I don't need to make an assessment of just when Santander ought to have stepped in. The evidence reflects that position already. And the limited content of the calls reveals that Santander ought to have been concerned by the payment purpose. Mr A openly revealed that he was investing in cryptocurrency.

It's of course true that payments to cryptocurrency platforms can be legitimate. But it is also true that cryptocurrency scams are highly prevalent, and have been for several years. So Santander ought fairly and reasonably to have been alive to the risks of such payments and on the lookout for scams of this exact nature. That Mr A was making his third payment in quick succession, with the value of each payment having increased substantially, ought to have given Santander a greater cause for concern. That concern ought to have led to a much more detailed level of questioning and probing as to what Mr A was doing and how he'd come upon the investment opportunity. It's also the case that Mr A openly told Santander he was planning to make more payments toward his cryptocurrency account, and Santander ought to have questioned why he'd be making such a series of payments.

There's no evidence to suggest Mr A wouldn't have been honest with Santander when asked more questions. From the evidence we do have it's clear he was being open and very forthcoming with what his intentions were. And so it's fair and reasonable to conclude he would have taken the same approach in responding to proper questioning by Santander.

That questioning would then more likely than not have revealed more details that concerned the bank. Details that represented common features of cryptocurrency scams: Mr A had completed a form online and was subsequently contacted about investing; there was little trace of the firm supposedly giving the advice; he'd been told to download AnyDesk to assist

in the cryptocurrency transfers; he wasn't making the payments out of the wallet himself; he had no control of the funds once they'd left the wallet.

With this collection of concerning details, bearing so many of the hallmarks of a cryptocurrency scam, Santander ought to have gone on to give a tailored and persuasive warning to Mr A about proceeding. Such a warning ought to have included reference to those concerning features so that Mr A might understand the context. I'm satisfied Mr A would then have listened to Santander and decided not to proceed. Even if he didn't heed the warning at that stage, I find it would have been fair and reasonable for Santander to continue to block the account and have Mr A attend branch, with the possibility of then invoking the banking protocol. I say as much as it's difficult to see how Santander could have been satisfied all was above board and so allowed the payments through.

With the above in mind, I'm persuaded Santander didn't act fairly and reasonably in allowing the payments to leave Mr and Mrs A's account in the way that it did, and the loss could and should have been prevented.

Santander has argued that Mr and Mrs A's money wasn't lost as a result of it leaving the current account. Instead, it says the money was lost only when moved on from the cryptocurrency wallet. Whilst that might be the case, the loss was reasonably foreseeable to the bank. Santander ought to be aware of multi-stage fraud, including where cryptocurrency wallets are used. And the link of causation is still present, meaning the use of the cryptocurrency wallet doesn't lead to Santander bearing no responsibility. As the loss should have been prevented, it's fair and reasonable Santander compensate Mr and Mrs A for it.

I must also take account of Mr A's own actions and assess whether they were reasonable in the circumstances. I don't intend to go into detail here as the position has been accepted by all parties. Santander didn't believe Mr A had acted reasonably from the outset, given there seemed to have been little done to check the legitimacy of the investment or parties involved. Mr and Mrs A accepted that same position when our investigator issued his findings. And I'm of the same view. Given that position is accepted by all parties, my finding is that it is fair and reasonable for Mr and Mrs A to share responsibility for the loss with Santander.

There was no prospect of the loss being recovered from the cryptocurrency wallet as we know the funds were sent on immediately. There's nothing further for me to then consider in terms of recovery of funds.

Putting things right

On Mr and Mrs A's acceptance, Santander should:

- Refund 50% of the loss from the payment of £4,500 on 3 February 2022 onward;
- A deduction can be made for any funds returned or recovered;
- Pay simple interest at 8% per year, calculated from the date of loss to the date of settlement.

My final decision

I uphold this complaint against Santander UK Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr A to accept or reject my decision before 28 April 2024.

Ben Murray

Ombudsman