

The complaint

Mr and Mrs R are unhappy Santander UK Plc won't reimburse them for the money they lost when Mr R fell victim to a scam.

What happened

Mr and Mrs R are represented in this complaint by a solicitor, for simplicity I will refer to Mr and Mrs R throughout this decision, even when referencing what their representatives have said on their behalf.

Mr R was interested in investing in cryptocurrency. In July 2022 he was added to a group on a messaging platform which appeared to be made up of others who were also interested in investing. Individuals in this group said they were investing using a specific investment platform and encouraged Mr R to join, Mr R was told a special anniversary event meant he would get a 50% bonus with his first investment. Mr R says he searched for information about the trading platform and was satisfied it was legitimate, so he signed up for a trading account, which he would be funding using cryptocurrency. Unfortunately, and unknown to Mr R, the people he was dealing with were not legitimate, he was the victim of a scam.

Mr R made a small initial investment and, when he could see that he was making profits, went on to invest more, he made card payments to a third party – which I'll call 'N' – and transfers to an account he already held with a cryptocurrency exchange – which I'll call 'S'. Mr R thought he had made a significant profit by this stage, so he asked to withdraw it, but when he was asked to pay additional sums to facilitate this withdrawal, was still unable to access his profits, and was then asked for more money by the scammers, he realised that he had been the victim of a scam.

Given the amounts he had lost – both his initial investment and the 'profits' he thought he had made – Mr R looked into whether there was any way to recover his money. He identified a group of self-proclaimed 'ethical hackers' who said they could get his money back, for a fee. Unfortunately, these people do not appear to have been legitimate either, they were also scammers.

They claimed to have located his funds, but that he would need to set up an account with a third-party to get those funds back. To release the funds from this third party he was then told he would need to pay commission and transaction fees. He was then told that the third party had needed to route the funds through other accounts due to international sanctions, so he would need to pay more commission. Mr R did so, but still didn't get his money back, at this stage he realised he had been scammed again.

Mr and Mrs R reported what had happened to Santander. But ultimately Santander said it did not think it should be held responsible their loss, it said many of the payments had been made to another account in Mr R's name at S, before being passed on to the scammers. So, Santander felt that S should bear responsibility for the financial loss.

Mr and Mrs R were unhappy with Santander's response and so referred their complaint to our service.

One of our Investigators looked into what had happened, and ultimately, they felt that Santander should have stepped in to question Mr R about the second payment made. They felt that, if Santander had done so, then the scam would have been uncovered and Mr and Mrs R's further loss could have been prevented. However, the Investigator felt Mr and Mrs R should also share some responsibility for their loss here, as there were red flags that should have indicated to them that something untoward might be going on.

So, overall, the Investigator recommended that Santander refund 50% of the disputed payments from the second payment onwards, plus interest.

Mr and Mrs R accepted the Investigators findings, but Santander disagreed. It stated that many of the payments had been made to an account with S in Mr R's name and that he had control of, and so felt S (and N) should be liable for Mr R's loss. It noted that it had discussed two of the payments with Mr R, and that for one of those payments he had not been honest about the reason for the payment. And it didn't agree that there was anything concerning about the payments that should have flagged them as a potential scam risk. So, it says that it acted in line with industry standards when making the payments, and says that stopping those payments would have been a breach of its duties.

As no agreement could be reached, the case has now been passed to me for a decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In deciding what's fair and reasonable in all the circumstances of this complaint, I am required to take into account relevant: law and regulations; regulators' rules, guidance and industry standards; codes of practice; and, where appropriate, what I consider to have been good industry process at the time.

It's not disputed that Mr R authorised the payments that are the subject of this complaint. So as per the Payment Service Regulations 2017 (which are the relevant regulations in place here) that means Mr and Mrs R are responsible for them. That remains the case even though Mr R was the unfortunate victim of a scam.

In reaching my decision I have also 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 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.

So, 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 payment service providers are generally more familiar with than the average customer.
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.
- Have been mindful of – amongst 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 customers, when deciding whether to intervene.

Taking the above into consideration, I need to decide whether Santander acted fairly and reasonably in its dealings with Mr and Mrs R, or whether it should have done more than it did.

I've looked carefully at the statements I've been provided for Mr and Mrs R's Santander account. In general, the account was used for low value card payments, direct debits and bill payments. There was one very high value payment – for nearly £50,000 – but that was sent

to another of Mr R's accounts, and it was otherwise rare to see any outgoing payment over £3,000. There were also no card payments for more than £1,500 in the months prior to the scam.

The first payment Mr R made as a result of the scam was for £1,034, on 31 July 2022. And, in the wider context of his account I don't think this would have appeared as sufficiently unusual to flag any concerns to Santander. But the next payment made, that same day, was for £11,176.92. This was significantly higher than any previous card payment Mr and Mrs R had made, and was evidently to a cryptocurrency platform. So, while I acknowledge that Mr R had made some payments to cryptocurrency platforms before, I think the significant jump in value, the destination of the payment, and the fact that two payments were made in such a short period of time, should have put Santander on notice that something untoward might be happening.

In my view, this combination of circumstances ought fairly and reasonably to have led Santander to make additional enquiries before processing the payment, to establish the circumstances in which Mr and Mrs R were making such a large payment to a cryptocurrency platform.

I've thought carefully about what would've happened had Santander insisted on direct contact with Mr and Mrs R before processing any further payments. There's obviously a balance to strike, but Santander ought fairly and reasonably to have satisfied itself that Mr and Mrs R hadn't fallen victim to a scam, and I'm persuaded it could've done this by asking a few open-ended questions prior to processing any further payments.

I acknowledge that, when Santander did make contact with Mr R later on in the scam, he does not appear to have been entirely honest about what he was making payments for. Mr R told Santander at that stage that the £11,176.92 payment had been for gaming tokens, and that a later payment (for £3,000) was for car repairs. But I think even if Mr R had said this to Santander at the time of the £11,176.92 payment, then it should have been evident this was not a plausible explanation. The payment was to a cryptocurrency platform and that would have been obvious to Santander, so Mr R's explanation would not have made sense in the context of the payment, and I think this should have caused Santander concern.

So given the destination of the payment, I consider it would have been reasonable for Santander to explain some of the common features or cryptocurrency scams. And, had it done so I think such a warning would have resonated with Mr R given that the scam he was falling victim to bore many of the hallmarks commonly seen in cryptocurrency scams. With this in mind, I consider it likely that the spell of the scam would have been broken and that Mr R wouldn't have proceeded with the payments. I therefore think Santander could have prevented the losses Mr and Mrs R incurred from the second payment onwards.

I've taken account of Santander's comments that much of Mr and Mrs R's loss was from Mr R's account with S, and that it therefore feels S should be liable for that loss. But 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 R has not referred a complaint about S (or about N) to our service and DISP does not empower me to instruct Mr R to make or refer a complaint about another business.

My role here is to consider the complaint in front of me. And, in doing so, I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is possible that Mr R may have cause to complain about S and N's roles here, I am not persuaded it would be fair to reduce the award in this complaint solely for that reason. Mr R

is entitled to complain only about Santander, and I am satisfied that Santander could have prevented some of the losses he and Mrs R suffered if it had acted fairly and reasonably.

In reaching my conclusions about what is fair and reasonable in this case, I have also considered whether Mr and Mrs R should bear some responsibility for their loss. And, while there were some sophisticated aspects to this scam, I do think it would be reasonable to hold them partially responsible for their loss here. I say this because there were features of this scam – such as how Mr R was initially contacted, how he communicated with the scammers and the supposed profits and bonuses he was told about – which I think should have caused Mr and Mrs R concern, and led them to looking into the purported investment and recovery in more detail. With this in mind, I consider it reasonable for Mr and Mrs R to bear joint responsibility for their loss.

So, in summary, I consider when Mr R made the second payment, Santander could have done more to protect him and Mrs R from the risk of financial harm. Had Santander contacted Mr and Mrs R directly and asked some open questions about what was happening, I'm persuaded it is more likely than not the scam would have come to light, and Mr and Mrs R wouldn't have lost out on the further funds they went on to pay to the scammers. But I consider that Mr and Mrs R should also share some responsibility for their loss here.

Putting things right

To resolve this complaint Santander should:

- Refund 50% of the payments made to the scam from the second payment onwards (inclusive)
- Pay 8% simple interest per annum on that amount from the date of each payment to the date of settlement.

My final decision

I uphold this complaint. Santander UK Plc should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and Mr R to accept or reject my decision before 23 May 2024.

Sophie Mitchell
Ombudsman