

## The complaint

Mrs B complains that Santander UK Plc (Santander) is refusing to refund her the amount she lost as the result of a scam.

Mrs B is being represented by a third party. To keep things simple, I will refer to Mrs B throughout my decision.

## What happened

The background of this complaint is well known to all parties, so I won't repeat what happened in detail.

In summary, Mrs B found an advert online for a company called FX admirals (X). Interested in the advertisement Mrs B completed an online data caption form with her personal details and received a call back.

X explained an investment to Mrs B, and she started to invest making a small initial payment, followed by more of higher values over the following month. Mrs B was required to download the remote access software AnyDesk so that X could help her with the investment process.

Santander stopped a payment Mrs B attempted to make in relation to her investment on 20 June 2023 and prompted Mrs B to review the payment before progressing with it. Mrs B tells us that when she told X the payment had been stopped by Santander X suggested she should lie to Santander about the payment reason, and she realised she had fallen victim to a scam.

Mrs B made the following payments in relation to the scam:

<u>Date</u>	<u>Payee</u>	<u>Payment Method</u>	<u>Amount</u>
16 May 2023	Wirex	Debit Card	£51.00
19 May 2023	Mrs B Wirex	Transfer	£4,985.00
23 May 2023	Mrs B Wirex	Transfer	£4,980.00
23 May 2023	Mrs B Wirex	Transfer	£3,120.00
13 June 2023	Mrs B Wirex	Transfer	£5,500.00
13 June 2023	Mrs B Wirex	Transfer	£4,460.00
13 June 2023	Mrs B Wirex	Transfer	£2,250.00
15 June 2023	Wirex	Debit Card	£1,932.72
15 June 2023	Wirex	Debit Card	£1,652.24
15 June 2023	Wirex	Debit Card	£1,540.05
15 June 2023	Mrs B Wirex	Transfer	£5,000.00
16 June 2023	Wirex	Debit Card	£2,014.31
16 June 2023	Wirex	Debit Card	£2,034.71
16 June 2023	Tap.global	Debit Card	£1,000.00
19 June 2023	Mrs B Wirex	Transfer	£8,500.00

Our Investigator considered Mrs B's complaint and thought it should be upheld in part. Santander disagreed, so this complaint has been passed to me to decide.

### **What I've decided – and why**

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

It has not been disputed that Mrs B has fallen victim to a cruel scam. The evidence provided by both Mr B and Santander sets out what happened. What is in dispute is whether Santander should refund the money Mrs B lost due to the scam.

#### *Recovering the payments Mrs B made*

Mrs B made payments into the scam via her debit card and by transfer. When payments are made by card the only recovery option Santander has is to request a chargeback.

The chargeback scheme is a voluntary scheme set up to resolve card payment disputes between merchants and cardholders. The card scheme operator ultimately helps settle disputes that can't be resolved between the merchant and the cardholder.

Such arbitration is subject to the rules of the scheme, meaning there are only limited grounds and limited forms of evidence that will be accepted for a chargeback to be considered valid, and potentially succeed. Time limits also apply.

Mrs B was dealing with X, which was the business that instigated the scam. But Mrs B didn't make the debit card payments to X directly, she paid a separate currency exchange Wirex. This is important because Santander would only have been able to process chargeback claims against the merchant she paid (Wirex), not another party (such as X).

The service provided by Wirex would have been to convert or facilitate conversion of Mrs B's payments. Therefore, Wirex provided the service that was requested.

The fact that the currency was later transferred elsewhere – to the scammer – doesn't give rise to a valid chargeback claim against the merchant Mrs B paid.

Santander had limited recovery options available to it for the payments Mrs B made by transfer. Santander could have contacted Wirex to see if any funds remained in the account, but the account was in Mrs B's name, so if any funds did remain, they would be in Mrs B's control.

With the above in mind, I'm satisfied Santander had no reasonable options available to it to recover the payments Mrs B made in relation to the scam.

#### *Should Santander have reasonably prevented the payments Mrs B made?*

It has been accepted that Mrs B authorised the payments that were made from her account with Santander, albeit on X's instruction. So, the starting point here is that Mrs B is responsible.

However, banks and other Payment Services Providers (PSPs) do have a duty to protect against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering.

The question here is whether Santander should have been aware of the scam and

intervened when Mrs B made the payments. And if it had intervened, would it have been able to prevent the scam taking place.

Santander did intervene on two occasions and spoke to Mrs B.

The first intervention call that took place was when Mrs B attempted to make a payment for £5,000 to her Wirex account on 15 June 2023. The payment was initially stopped by Santander, but after Santander confirmed it was Mrs B attempting the payment it was released. Mrs B was not questioned about the payment or given any type of scam warning.

The second time Santander intervened was on 20 June 2023 when Mrs B attempted a payment to Tap Global. Santander spoke to Mrs B several times and Mrs B gave incorrect information about the reason for her payment. Mrs B explained she was making the payment to receive higher interest rates on her savings. However once Santander probed further Mrs B told it she was being offered an unrealistic interest rate of 10% payable monthly. Santander warned Mrs B that the payment appeared to be cryptocurrency related and that she should look at the company in more detail before making the payment.

Following this call Mrs B tells us she spoke to X and X told her she should lie to Santander to get the payment processed. At this point she realised she had been scammed and didn't make any further payments.

Mrs B made substantial payments in relation to the scam that arguably should have caused Santander to intervene but up until the 15 June 2023 all the payments were to a Wirex account in Mrs B's name. I think it's likely that had Santander intervened when Mrs B made these payments, she would have given the same story, that she was moving her money to gain a higher interest rate. I don't think this would have caused Santander concern or prompted it to delve deeper into what the payments were for. So, I don't think an intervention with these earlier payments would have made a difference.

When Santander intervened for the first time on the 15 June 2023 it was in relation to a payment Mrs B was making to her Wirex account. However, before she attempted this payment, she had already had a payment declined to the company Tap Global, the same company that caused Santander concern on the 20 June 2023 when the scam was uncovered. This payment was declined due to fraud concerns.

Given the concerns around the payment for Tap Global on the same day Santander stopped the £5,000 payment I think it would have been reasonable for Santander to have had a more detailed conversation with Mrs B about the payments she was attempting to make, and for it to have given her a warning about the potential of the payments she was attempting being a scam.

As such a conversation did take place on 20 June 2023 and the scam was uncovered, I think Santander missed an opportunity to prevent the scam earlier and it is therefore responsible for the payments Mrs B made in relation to the scam from the payment she made of £5,000 on 15 June 2023 onwards.

*Did Mrs B contribute to her loss?*

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000).

In the circumstances, I do think it would be fair to reduce compensation by 50% on the basis that Mrs B should share blame for what happened. I don't think Mrs B carried out enough

research about X before deciding to make substantial payments to it. There were warnings online at the time about X being a cloned firm. It is also clear from the call that took place on 20 June 2023 that Mrs B gave dishonest information to Santander about the payment she was attempting to make.

In addition to the points covered above Santander has stated that:

*“you will also be aware the Supreme Court’s binding decision in Philipp v Barclays Bank plc. which confirmed that where the bank receives a payment instruction from a customer which is clear and / or leaves no room for interpretation, if 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”. In this case the customer’s account was in credit so they were able to make the payments from their account and they were executed in accordance with the bank’s duty to the customer. As previously mentioned, the payments were being sent to the customer’s own account so there would have been little (if any) reason to question that the payment instruction was unclear and / or open to interpretation. The current FOS position suggests that the bank ought to have acted in breach of its strict legal duty to the customer by refusing to make the payment. This position is completely untenable given the Philipp decision.”*

As explained above, the starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mrs B’s account is that Mrs B is responsible for payments Mrs B authorised. 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 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 this type of scam and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

So, these comments have not affected my decision to hold Santander responsible for the payments Mrs B made in relation to the scam from the payment of £5,000 on 15 June 2023 less 50%.

### **Putting things right**

To put things right Santander UK Plc should refund the payments Mrs B made in relation to the scam from the payment she made on 15 June 2023 for £5,000 onwards less any withdrawals she made and less 50% for contributory negligence.

Santander UK Plc should add 8% simple interest to the amount it pays Mrs B from the date the payments were made to the date it makes the refund (less any lawfully deductible tax).

### **My final decision**

I uphold this complaint and require Santander UK Plc to put things right by doing what I've outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 14 June 2024.

Terry Woodham  
**Ombudsman**