

## **The complaint**

Ms E complains about Santander UK Plc.

She says that Santander didn't do enough to protect her when she became the victim of a scam and would like it to refund her the money she has lost.

## **What happened**

Ms E was scrolling through Facebook in April 2022 when she came across and advertisement for investing in cryptocurrency. Ms E was interested as she had received inheritance money which was not earning a decent return.

Ms E filled out a contact form and received a phone call from an individual who said he worked for 'K'.

After speaking with the individual on two occasions, Ms E was persuaded to invest. She made an initial payment of £6,381.20, which the individual told her didn't go through but actually did debit her account, and a second payment of £5,588.74, which the individual also told her had not gone through.

Ms E called Santander to ask why it wasn't allowing her to make the payments – but it confirmed that both payments had indeed left her account, and that it was very likely Ms E had been scammed.

Ms E then realised what had happened – and complained to Santander. She said that had Santander intervened, she would not have made the payments.

Santander didn't uphold her complaint, so she came to this Service. Our Investigator looked into things and thought that the complaint should be upheld – however, they also thought that the payment due to Ms E should be reduced by 50%.

Ms E agreed to this, but Santander did not – it mentioned the Supreme Court Judgement in the case of Philipp vs Barclays Bank Plc UK [2023] UKSC 25 which confirmed that where a bank receives 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. As they felt they received a clear instruction from Ms E to send funds, they did not agree that there was any room for interpretation from them. In addition, they reiterated Ms E's loss did not take place from her Santander account, so they should not be responsible for reimbursing her.

As an agreement could not be reached, the complaint has been passed to me to make a final 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.

Having done so, I've decided to partially uphold this complaint, for broadly the same reasons as our Investigator. I'll explain why.

It isn't in dispute here that Ms E has been the victim of a scam and has lost money as a result. However, even when it is clear that a scam has taken place, and an individual has been tricked out of their money, it doesn't necessarily follow that a business will need to refund the money that has been lost.

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

Broadly speaking, the starting position in law is that an account provider is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the terms and conditions of the account. And a customer will then be responsible for the transactions that they have authorised – which I am satisfied that Ms E did here.

And while Ms E didn't intend the money to go to scammers, the starting position in law is that Santander was obliged to follow her instruction and process the payments. Because of this, she is not automatically entitled to a refund.

The regulatory landscape, along with good industry practice, also sets out a requirement for account providers to protect their customers from fraud and financial harm. And this includes monitoring accounts to look out for activity that might suggest a customer was at risk of financial harm, intervening in unusual or out of character transactions and trying to prevent customers falling victims to scams.

So, I've also thought about whether Santander did enough to try to keep Ms E's account safe.

Having considered Ms E's account activity prior to the scam, I do think that the first payment Ms E made as part of the scam should have stuck out as unusual to Santander given the way she normally operated her account. While she had made some large transactions in the previous 12 months, these were transfers to her own accounts, whereas this payment was made by debit card to a company known to be linked to crypto – which is a higher risk transaction.

I think Santander should reasonably have flagged the first payment as suspicious. And I think it would have been proportionate for Santander to have intervened and asked Ms E questions about the payment before processing it.

In reaching my decision that Santander should have made further enquires prior to processing the payment, 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 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 fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

In this instance, I am satisfied that Santander should have intervened – and if it had, I am satisfied that the scam would have been revealed. Ms E spoke with Santander after the payments had been made to ask why another payment she was trying to make had been blocked – and during this call Santander quickly established that Ms E had been scammed. So, I think that it would have been able to do so at the point of the first payment too.

What's left to decide is whether Ms E should reasonably bear some responsibility for the losses as a result of any negligence in her actions and if it is therefore reasonable for me to make a reduction in the award based on this. Ms E has already accepted the findings in relation to this, so I won't repeat them again in detail here. In summary, I do agree that there should be a reduction in the redress to account for this, as there were warning signs that Ms E could have reacted to in order to avoid the scam, such as allowing third parties access to her device, and the fact that 'K' had a clear warning about it on the first page of a google search. So, I do agree that the redress should be reduced by 50%.

I have taken on board what Santander has said about the business Ms E made the payment to being the correct entity for Ms E to pursue her losses from – but I disagree. Santander

had an opportunity to prevent the loss at the point Ms E made her payment but it did not do so.

### **Putting things right**

Santander UK Plc should refund Ms E £5,984.97 – 50 % of her loss.

It should also pay Ms E 8% simple interest from the date the payments were made until settlement (less any lawfully deductible tax)

### **My final decision**

I uphold this complaint in part – Santander should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms E to accept or reject my decision before 3 May 2024.

Claire Pugh  
**Ombudsman**