

The complaint

Mrs C and Mr C complain that Santander UK Plc is refusing to refund them the amount they lost as the result of a scam.

Mrs and Mr C are being represented by a third party. To keep things simple, I will refer to Mrs and Mr C 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, Mr C found a cryptocurrency investment advertisement on Facebook for a company claiming to be called Blockchain(X) that appeared to be endorsed by a well-known and trusted celebrity. X offered investments with low initial deposits of around \$200.

Mr C carried out an online search on X and found it to be a legitimate business. So, Mr C clicked on the Facebook link and completed a data capture form with his personal information.

Mr C then received a call from X and the investment opportunity was explained in more detail. X was very professional and appeared to be legitimate which made Mr C feel comfortable making an initial investment.

After making the initial payment Mr C was provided with login information that gave him access to what appeared to be a legitimate trading platform. Mr C then received further calls from another representative of X who appeared to have in depth knowledge of the investment opportunities.

As part of the investment process Mr C downloaded the remote access software AnyDesk and opened a Wirex account.

X persuaded Mr C to make further payments with the promise of higher returns. By 3 June 2023 Mr C could see he had made a substantial profit and decided to make a withdrawal. Before he could withdraw his funds, Mr C was told he would have to make further payments in relation to liquidity and then even further payments in relation to the money laundering process.

Despite making all the payments requested by X Mr C never received the withdrawal and it was clear he had fallen victim to a scam.

The following is a list of payments Mr C made in relation to the scam:

<u>Date</u>	<u>Payee</u>	<u>Payment Method</u>	<u>Amount</u>
3 April 2023	Is*traders Education	Credit Card	£162.04
13 April 2023	Wirex4134	Debit Card	£458.96
13 April 2023	Wirex4134	Debit Card	£611.94

2 June 2023	Wirex4134	Debit Card	£1,121.89
2 June 2023	Wirex4134	Debit Card	£509.95
3 June 2023	Wirexapp.com	Debit Card	£1,835.82
5 June 2023	Wirexapp.com	Debit Card	£1,019.90
5 June 2023	Wirexapp.com	Debit Card	£917.91
5 June 2023	Wirexapp.com	Debit Card	£1,121.89

Our Investigator considered Mrs C and Mr C'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.

I am satisfied that Mr C has fallen victim to a cruel scam. The evidence provided by both Mrs C and Mr C and Santander sets out what happened. What is in dispute is whether Santander should refund the money Mrs C and Mr C lost due to the scam.

Mr C made payments into the scam via his debit and credit cards. When payments are made by card Santander can seek recovery of that payment by requesting 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.

Mr C was dealing with the scammer, which was the business that instigated the scam. But Mr C didn't make the card payments to the scammer directly, he paid a separate business (Wirex). This is important because Santander was only able to process chargeback claims against the merchant he paid (Wirex), not another party.

The service provided by Wirex would have been to convert or facilitate conversion of Mr C'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 Mr C paid. As Wirex provided the requested service to Mr C any chargeback attempt would likely fail.

Should Santander have reasonably prevented the payments Mr C made?

It has been accepted that Mr C authorised the payments that were made from his account with Santander, albeit on X's instruction. So, the starting point here is that Mr C 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 Mr C made the payments. And if it had intervened, would it have been able to prevent the scam taking place.

The payments Mr C made in relation to the scam were not individually of a significant value and were made to a legitimate business. So, I wouldn't expect each individual payment on its own to have triggered Santander's fraud prevention systems.

However, by the time Mr C made the last payment into the scam on 5 June 2023 he had made three payments to the same place within just a few minutes totalling more than £3,000. I think this should have caused Santander concerns and it should have stepped in when Mr C made the last payment.

I haven't seen anything to suggest Mr C would not have given honest answers to Santander's questions had it intervened when he made the last payment, and considering the circumstances surrounding the payments I think, with Santander's experience it's likely the scam would have been uncovered and the final payment would not have been made.

Santander is therefore responsible for the last payment Mr C made in relation to the scam.

Did Mr C contribute to his 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 don't think it would be fair to say Mr C contributed to the loss. I say this because Mr C had no previous experience in this type of investment and was lulled into a false sense of security by a scammer that went to great lengths to appear to be legitimate.

In addition to the points covered above Santander has stated:

"...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 we executed the payments in accordance with the bank's duty to the customer.

Furthermore, the payments were being sent to the customer's own account with another regulated entity such that there would have been little (if any) reason to question that the payment instruction was unclear and / or open to interpretation."

As explained above, the starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mrs C and Mr C's account is that Mr C is responsible for payments Mr C 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 last payment Mr C made in relation to the scam from the Santander account.

Putting things right

To put things right I require Santander UK Plc to refund Mr C the last payment he made in relation to the scam plus 8% simple interest from the date the payment was made to the date Santander UK Plc 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 C and Mr C to accept or reject my decision before 7 June 2024.

Terry Woodham
Ombudsman