

The complaint

Miss S complains that Santander UK Plc won't refund the money she lost, after she fell victim to an investment scam.

What happened

I issued my provisional decision on this complaint on 5 March 2024. The background and circumstances of the case and the reasons why I was minded to uphold the complaint in part were set out in that decision. I have reproduced the provisional decision in italics below:

The background to this complaint is well known to both parties, so I won't repeat it in detail here. But in summary, I understand it to be as follows.

In July 2022, when looking online Miss S saw a prominent celebrity broadcaster successfully invest in cryptocurrency and make a return in a few minutes. Miss S clicked a link and was then contacted by who she believed to be an account manager ("B"). B told Miss S that she could make 50% profit by investing and that her money would be safe due to a 'stop loss' insurance policy, for which she was provided with paperwork. Believing everything to be genuine Miss S decided to invest.

She allowed B remote access to her device and was advised to set up an account with a FCA-authorized Electronic Money Institution ("W"), where she directed her payments to before then sending the money on to the fraudsters.

Miss S made the following payments to W using her Santander debit card;

<i>21 July 2022</i>	<i>£1,003</i>
<i>18 August 2022</i>	<i>£1,504.50</i>
<i>15 September 2022</i>	<i>£4,914.70</i>
<i>16 September 2022</i>	<i>£5.02</i>
<i>16 September 2022</i>	<i>£4,864.55</i>

Miss S has said she realised she'd been scammed after her partner, who had also been duped by the fraudsters, was asked to pay £12,000 in charges in order to withdraw his money.

Miss S raised the matter with Santander, but it issued its final response to Miss S in December 2022, not upholding her complaint. In summary, it didn't think Miss S had lost money due to a mistake on its part.

Unhappy with Santander's response, Miss S brought her complaint to this service. One of our Investigator's looked into things and thought the complaint should be upheld in part and that Santander should refund Miss S the final three payments she made. In summary, she said this because she could see Santander had initially stopped the transaction Miss S had made on 15 September 2022, for £4,914.70. However, in the absence of call recordings, our Investigator wasn't satisfied with the effectiveness of the intervention.

It was our Investigator's view that if there had been an effective intervention, then the scam could have been prevented from this point. Our Investigator also considered whether Miss S should bear some responsibility, but didn't think she should.

Santander didn't agree with our Investigator's view. In summary it said;

- *Given the loss was from W, it believed Miss S should be pursuing her claim through them as they are a regulated firm in their own right.*
- *There was nothing to suggest to it that this was a scam and it had executed the payments in accordance with the bank's duty to the customer.*
- *It believed the principles behind the Supreme Court judgement in the case of Philipp vs Barclays Bank Plc UK were applicable to this case. In that where the bank receives a payment 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. 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'.*
- *It has acted in line with industry standards by following Miss S' instructions to transfer money, which was paid into an account in her own name, over which she had full access and control. It did not breach any duty of care owed to Miss S and its primary duty is to execute its customers' payment orders promptly.*
- *It felt Miss S should accept liability as she decided to transfer her funds to an investment with very little research into the company she believed to be paying. It said there was adverse media regarding the investment that was available at the time the payments were made.*
- *The payments were made by debit card and this particular payment methodology and its features, which differ from a faster payment, does not seem to have been factored into consideration of the standard being imposed on Santander in determining that it is fair and reasonable to reimburse the customer in this case.*

As agreement couldn't be reached the complaint has been passed to me for a decision.

What I've provisionally 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, I am required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Miss S's account is that she is responsible for payments she's authorised herself. 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 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 debit card 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.

Our service has issued previous final decisions setting out the relevant considerations we take into account when deciding what's fair and reasonable in the context of investment fraud cases. I don't consider it necessary to repeat all the considerations again here, though Santander will be able to review these through past decisions on our website if it wishes to do so.

In summary, 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 banks 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, or provided additional warnings, before processing a payment – as in practice all banks do.
- Have been mindful of – among 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 consumers, when deciding whether to intervene.

Should Santander have fairly and reasonably made further enquiries before processing Miss S' debit card payments?

It isn't in dispute that Miss S has fallen victim to a cruel scam here, nor that she authorised the disputed payments she made to her account with W (where her funds were subsequently transferred to the fraudster). The payments were made by debit card using her legitimate security credentials provided by Santander, but I've thought about whether the bank should have reasonably intervened in any of these payments.

I need to take into account that Santander needs to strike a balance between countering the risk of fraud and not unduly inconveniencing customers making genuine transactions. When considering Miss S's typical account activity, I don't think the first two payments Miss S made would have appeared as otherwise uncharacteristic or concerning. In the months leading up to the scam Miss S had made payments for similar amounts and I don't think these payments presented an obvious fraud risk.

Santander did intervene when Miss S attempted to make the third payment, for £4,914.70 on 15 September 2022, it blocked it pending contact with its customer. So I'm persuaded it clearly identified a risk in relation to that payment. I don't, therefore, need to consider whether Santander ought to have found that payment to be sufficiently concerning that it needed to speak to its customer before allowing the payment to go ahead.

From what I've seen Santander did speak to Miss S before allowing this payment to be progressed, but unfortunately that call is no longer available and there are no contemporaneous notes to show that a robust conversation took place. So I can't know for sure what was discussed. But this lack of evidence, in and of itself, isn't enough for me to say that Santander should refund Miss S the money she lost, I need to be persuaded that sufficient intervention would have made a difference and prevented the payments from being made.

I'm mindful that in its submissions Santander said that the payment methodology (here the payments were made by debit card) and its features, which differ from faster payments, didn't seem to have been factored into consideration in our Investigator's view. I'm aware of the differences between authorised push payments and debit card payments. But that does not mean that Santander cannot prevent potentially fraudulent card payments from being made, as there is nothing preventing the bank from stopping the card payment altogether if it suspects fraud, as it did with the payment of £4,914.70 that Miss S attempted.

So, the fact that the payments in question were made by debit card doesn't change my opinion in terms of what Santander could fairly and reasonably have been expected to do when it suspects a payment might be related to fraud or a scam.

If Santander had made further enquiries before processing the payment for £4,914.70, would that have prevented the losses Miss S incurred?

I can't know for sure what was discussed nor what would have happened if Santander had intervened more than it did. So I have to base my findings on the balance of probability – that is, what I think is more likely than not to have happened, taking into account what I know.

If Santander had questioned Miss S further about this payment, I've no reason to doubt she would have spoken freely about the purpose, after all she wasn't being coached by the fraudster to provide a cover story which can sometimes, but not always, be the case with these type of scams.

I've thought carefully about whether the kind of questions that I believe ought fairly, reasonably and proportionally to have been asked by Santander would've made a difference. And on the balance of probabilities, I think they would have. If Santander had asked around the basic surrounding context of the payment Miss S was making, I think it's likely she would have explained what she was doing, i.e. that she was sending money to a newly opened account with W as part of a cryptocurrency investment.

I wouldn't expect Santander to have just accepted the reason for the payment at face value before releasing the funds. As I've set out above, Santander ought to have had a good understanding of how 'multi-stage' fraud commonly works. It could have enquired as to how Miss S had found the investment opportunity and whether anyone else was involved.

Had it done so, as I think it ought to have done, it could've discovered that she had found the investment opportunity online, which had supposedly been endorsed by a celebrity, and that a broker, who had remote access to her device, was advising her to transfer money to a newly opened EMI account before purchasing the cryptocurrency. Alongside this it could have established that the broker had told her she could realise a return of 50% and that the investment was 'safe' as losses were insured.

These are all common hallmarks of investment scams. And this, coupled with the fact that Miss S was being asked to send multiple payments to her own EMI account to buy cryptocurrency before transferring it on again, ought reasonably to have alerted Santander that she was most likely being scammed. So, I think it missed an opportunity here to uncover the scam and prevent any further losses.

Should Santander be fairly and reasonably held responsible for Miss S' loss?

In reaching my decision about what is fair and reasonable, I have taken into account that Miss S transferred the money to an account in her own name, rather than directly to the fraudster, so she remained in control of her money after she made the payments from her Santander account, and it took further steps before the money was lost to the fraudsters.

But for the reasons I have set out above, I am satisfied that it would be fair to hold Santander responsible for Miss S' losses (subject to any deductions that I'll comment on below). As I have explained, the potential for multi-stage scams ought to have been well known to Santander and, as a matter of good practice, Santander should fairly and reasonably have been on the look-out for payments presenting an additional scam risk including those involving multi-stage scams. I'm satisfied Santander should fairly and reasonably have

made further enquiries after it blocked the £4,914.70 payment and, if it had, it is more likely than not that the scam would have been exposed and Miss S would not have lost the money from this payment or from the subsequent payments. I'm satisfied it is fair to hold Santander responsible, at least in part, for Miss S' loss.

I have also taken into account that the payments were made to a regulated business – W, and Miss S might potentially have a claim against W in respect of its actions (although W is not a party to this complaint and so I make no finding about its role here).

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, Miss S has not referred a complaint about W to me and DISP does not empower me to instruct her to make or refer a complaint to me about another business.

I am required to consider the complaint in front of me. I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is a possibility that Miss S may have cause to complain against W, I am not persuaded it would be fair to reduce the award solely for that reason. Miss S is entitled to choose to complain only about Santander and I am satisfied that Santander could have prevented the losses she suffered if it had acted fairly and reasonably.

Should Miss S bear any responsibility for her losses?

There is a general principle that consumers must take responsibility for their decisions, and I am mindful of the law relating to contributory negligence and the impact a finding of contributory negligence may have to reduce the damages recoverable by a claimant in court proceedings.

I have duly considered whether Miss S should bear some responsibility by way of contributory negligence, and I'm satisfied she should in the circumstances of this case. I say this because I consider there to have been enough warning signs that she was being scammed, which Miss S does not appear to have reasonably acknowledged or acted upon.

Miss S has said B indicated that the profit would hit 50%. I think those levels of return ought to have stood out to Miss S as being improbable, to the point of simply being too good to be true. I don't think delivering such a profit is plausible and I'm not persuaded Miss S was provided with a persuasive answer as to how this could be possible.

Alongside this, Miss S was being told that her investment was 'insured', seemingly with anything upward of 1% of her investment being covered, which would be refunded as a cash lump sum within one day, meaning she believed that she was essentially making her investment risk free. However, even an inexperienced investor ought reasonably to know that an element of risk is always inherent in investing, and cannot be insured against, as the return on an investment is typically a reflection of the level of risk taken on.

I appreciate Miss S was issued with official looking documentation from an insurer, but I think this also ought to have seemed too good to be true and led her to undertake further research into the broker, as well as cryptocurrency investments and whether they can even be insured. She would've likely found that they could not, and that there was no legitimate basis for what she was being promised by B. I'm also mindful that at the time Miss S made these payments negative reviews had been posted online about the investment (such as on Trust Pilot), which warned that this was a scam (I can see there were at least two instances of people warning this prior to Miss S making her payments, for example). As a result, I'm satisfied Miss S should've had reasonable cause for concern, but it doesn't appear that she

made adequate enquiries into the legitimacy of what she was being told.

I might understand how in isolation any one of these things may not have prevented Miss S from proceeding. But when taken collectively I think there were sufficient red flags here that reasonably ought to have led Miss S to have acted far more cautiously than she did. So, I think Miss S did have a role to play in what happened and I think that the amount Santander should pay to her in compensation should fairly and reasonably be reduced to reflect that role. Given how serious I think Miss S's concerns about the legitimacy of the investment ought reasonably to have been, I think that a fair deduction is 50%.

Recovery

Finally, I've thought about whether Santander could've done more to recover the funds after Miss S reported the fraud, as in some circumstances money spent on a debit card can be recovered via the bank raising a chargeback dispute. However, a chargeback is a voluntary scheme run by card providers. That process is subject to the rules of the scheme and we wouldn't expect a bank to pursue matters to final arbitration if there was no prospect of success.

In these circumstances, Miss S used her debit card to pay a legitimate EMI before the funds were subsequently transferred on to the fraudster. So, she's unlikely to be able to make a successful chargeback claim, because the service would be considered provided. Therefore, I don't think Santander has missed any opportunity to recover the money Miss S lost.

Putting things right

Overall, having considered the matter carefully and for the reasons explained, I'm minded to say that Santander UK Plc should;

- *refund Miss S 50% of the money she paid to W as part of the scam on 15 and 16 September 2022, being £4,892.14 (50% of £9784.27).*

In my provisional decision I asked both parties to send me any further evidence or arguments that they wanted me to consider by 5 March 2024.

Santander responded and said it was happy to settle the case as outlined within the provisional decision. Miss S confirmed she had received my provisional decision but wanted to raise some further points for consideration. In summary;

- Miss S said Santander did stop her payment on 15 September 2024, but she said no call took place. She added there was no explanation given in the summary as to why they stopped the payment, but then allowed the payment to be made from another Santander account.
- She accepted the comments around her taking some responsibility, but wanted it to be reconsidered that she'd carried out research and had seen positive comments.
- She did call the Insurers and was passed through various departments which isn't unusual for large companies.

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 come to the same conclusion I reached in my provisional decision and

for the same reasons.

I appreciate Miss S says a call on 15 September 2022 didn't take place. But in its submissions Santander has said that it tried to call Miss S on 15 September 2022 and was unsuccessful, but its records suggest there was a follow up, outbound security call, where the block that had been placed on the payment was lifted. I appreciate that there is some conflicting recollections here. However I have found, in any event, that Santander ought to have done more than it did and ought to have made further enquiries with Miss S at this point. And that such an intervention would, I'm persuaded, have prevented the scam. Given that Santander has not contested this position, which finds in favour of Miss S, I don't think it's necessary to explore this point any further.

I thank Miss S for sending through her further submissions. I do appreciate that there were some elements of what happened, that made her believe things were genuine. But for reasons already explained in my provisional decision, I think there was enough going on that ought reasonably to have caused Miss S to be concerned that things weren't as they seemed. In the circumstances of this case, the rate of returns being promised and an Insurance policy that insured against loss, with a cash pay-out within one day of a claim, ought reasonably to have stood out as being implausible to the point of being too good to be true.

As such and as previously explained, I think liability should be shared from the payment Miss S made on 15 September 2022.

Putting things right

For reasons explained above, Santander UK Plc should now;

- Refund Miss S 50% of the money she paid to W as part of the scam on 15 and 16 September 2022, being £4,892.14 (50% of £9784.27).

My final decision

My final decision is that I uphold this complaint in part.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss S to accept or reject my decision before 21 May 2024.

Stephen Wise
Ombudsman