

The complaint

Miss I is unhappy that Santander UK Plc won't reimburse her for money she lost as a result of a scam.

Miss I is being represented by a claims management company but for ease of reading I'll only refer to Miss I below.

What happened

In June 2021 Miss I was researching investments online when she came across a trading platform. After entering her details on a website Miss I received a call from a merchant who I'll refer to as 'E'. Miss I was told to download a software program enabling the scammer to share screens and access her desktop. Miss I already had an account at a genuine cryptocurrency exchange and was asked to open another account with a second genuine crypto exchange. She made the first payment to the account she had already set up and the remaining payments to the new account she had opened at the request of the scammer.

In total Miss I made the following payments;

Date	Type of transaction	Amount	Total
21 June 2021	Card Payment	£1,000	£1,000
22 June 2021	Faster Payment	£1,051.06	£2,051.06
22 June 2021	Faster Payment	£2,925.31	£4,976.37
22 June 2021	Faster Payment	£526.29	£5,502.66
23 June 2021	Card Payment	£580.24	£6,082.90
23 June 2021	Faster Payment	£1,051.41	£7,134.31
23 June 2021	Faster Payment	£1,051.01	£8,185.32
23 June 2021	Faster Payment	£788.51	£8,973.83
23 June 2021	Faster Payment	£316.02	£9,289.85
23 June 2021	Faster Payment	£316.03	£9,605.88
23 June 2021	Faster Payment	£736.31	£10,342.19
26 July 2021	Faster Payment	£1,051.02	£11,393.21
26 July 2021	Faster Payment	£1,051.02	£12,444.23
26 July 2021	Faster Payment	£1,050.24	£13,494.47
26 July 2021	Faster Payment	£523.32	£14,017.79

After E continued to ask Miss I to invest more money she became suspicious and said she wouldn't invest anything more. She then lost contact with E. Miss I contacted Santander on 29 July 2021 to ask for her money back but Santander said that it had pre-warned her on 22 June 2021 that E wasn't regulated so it couldn't refund her money.

Miss I was later contacted in September and October 2021 by other third parties who claimed they could recover her money. Miss I sent funds to those third-parties but those payments aren't part of this complaint.

Miss I then made a complaint to Santander about the scam with E but it said it wasn't going to make a refund. It said the payment of £1,051.06 on 22 June 2021 had been stopped for further checks but after Miss I was made aware of E not being regulated, she was happy for the payment to be sent. Miss I remained unhappy so she brought her complaint to this service.

Our investigator felt the complaint should be upheld. They thought Santander ought to have done more when it stopped the first payment Miss I made on 22 June 2021 for £1,051.06. Although Santander's notes show that Miss I was told E wasn't regulated she wasn't satisfied Santander had done enough to warn Miss I about the dangers of investing in cryptocurrency via a third-party nor mentioned that there was a warning about E on the Financial Conduct Authorities' (FCA) website prior to the payments. The investigator thought that if Santander had made this information clear to Miss I then it's more than likely she wouldn't have continued with the payments.

The investigator added that Santander's 2020 terms and conditions gave it rights to refuse any payment instruction if it reasonably suspects it relates to fraud and to delay payments while fraud prevention checks take place. So, although Santander wasn't obliged to stop the payments the investigator said taking into account good industry practice and longstanding regulatory regulations Santander should've fairly and reasonably have been on the look-out for the possibility of fraud which Santander had confirmed it had done with the first payment on 22 June 2021.

So, the investigator recommended that Santander refund the payments Miss I made after and including the first £1,051.06 payment on 22 June 2021 as well as pay Miss I 8% simple interest per year on that amount from the date of each payment to the date of settlement.

Miss I accepted our investigator's recommendations but Santander didn't agree. It said Miss I's loss had occurred from her wallet at the cryptocurrency exchange and so it wasn't Santander's responsibility to provide the warnings to Miss I. It said Miss I had authorised the payments to be sent to an account in her own name and it didn't breach any duty of care it owed to Miss I. Santander referred to the Supreme Court's decision in *Philipp v Santander 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, 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.

I considered the complaint but disagreed slightly with the investigator's conclusions. I agreed that Santander should've done more when it spoke to Miss I on 22 June 2021 as the investigator had mentioned. But that Miss I should accept responsibility for her own actions here and that Santander could reasonably deduct 50% from the award here.

Miss I agreed with my recommendations but Santander didn't respond.

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, I'm required to take into account relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

I've read and considered the whole file. But I'll concentrate my comments on what I think is relevant. If I don't mention any specific point, it's not because I've failed to take it on board

and think about it, but because I don't think I need to comment on it to reach what I think is a fair and reasonable outcome.

Recovery

I've thought about whether Santander did enough to attempt to recover the money Miss I lost, as there are some instances where debit card transactions can be refunded through making a chargeback claim.

A chargeback wouldn't have been successful for the debit card payments to the account in Miss I's name at genuine crypto exchanges, as Miss I was able to move the money onto the scammers. So, Miss I duly received the service she paid for on her debit card. The money was subsequently lost from her other account when it was moved by the scammers. So, she couldn't claim that she didn't receive the goods or services paid for from her Santander account to the crypto exchanges.

As a result, I don't think Santander have acted unreasonably by failing to pursue a chargeback claim or try and recover Miss I's money here.

Considering Miss I's complaint under Santander's wider obligations

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Miss I's account is that she is responsible for payments she's authorised herself. And (as Santander has referenced) 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 – as Santander did in this case.

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.

Santander's December 2020 terms and conditions say at 6.6

We can refuse any Payment Instruction, if:

e) we reasonably suspect it relates to fraud or any other criminal act and under 6.9.3 it says A faster payment will normally reach the bank of the person you want to pay in the timescale set out provided that d) we do not suspect fraudulent activity on your account. (There may be a delay in processing the payment while fraud prevention checks take place. We may need to contact you if we suspect that a payment is fraudulent). If we contact you, this may be by phone and may include an automated message.

So, in accordance with Santander's own terms and conditions it could therefore refuse payments, or make enquiries, where it suspected fraud. 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 (and as Santander did in fact do in this case when Miss I made one of the payments).

The detailed reasoning for this has been set out in substantial detail in recent decisions to Santander, so I don't intend to repeat it here.

But, 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 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 (and Santander did in fact do in this case).
- 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 it processed Miss I's payments?

Santander has confirmed that this is exactly what it did on 22 June 2021. So, I'm satisfied that Santander reasonably stopped the first payment Miss I made that day – in line with best practice and industry guidelines.

However, I don't think Santander went far enough when it spoke to Miss I. This had all the hallmarks of a standard cryptocurrency scam that I would've reasonably expected trained fraud handlers at Santander to have been on the look-out for. I accept that according to the notes about that call Miss I was happy to accept the risk of E not being regulated. But if Santander had referred to the FCA's warning list it would've seen that the same merchant had a live FCA warning in place at the time of the payments. Under such circumstances I'd expect Santander to go further and make it clear to Miss I that she was being scammed and to refuse to make the payment – in line with its terms and conditions. And if it had done so, Miss I would have listened to a clear warning about E and the scam would've more likely than not been stopped at that point.

This service has asked Miss I to confirm if she received any withdrawals. At this stage she has said she didn't and has provided copies of the payments she made via one of the crypto exchanges. So, on balance, I'm satisfied that Miss I hasn't received any withdrawals at this stage and has no further confirmations of payments either into or out of her wallet at the crypto exchange to provide.

Should Miss I bear any responsibility for her losses?

I've thought about whether Miss I should bear any responsibility for her loss. In doing so, I've considered what the law says about contributory negligence, as well as what I consider to be fair and reasonable in all of the circumstances of this complaint.

I understand there were sophisticated aspects to this scam and that Miss I was given access to a trading platform, which seemed to demonstrate the success of her investment. I accept this would have seemed convincing to her.

Nevertheless, as I've set out, I have to conclude that she ought, fairly and reasonably, to have made further enquiries about the legitimacy of the scheme before making any payments. However, she willingly downloaded software giving free access to her banking and crypto wallets and didn't conduct thorough enough research into whether the merchant she was dealing with was in fact legitimate.

I'm satisfied that she reasonably should've been concerned by the repeated and seemingly unexpected demands for money – instead she appears to have paid money simply to gain access to her investment 'profits'. I've also considered that Miss I then fell victim to a later recovery scam where she was asked to send large amounts of her money to recover what she had previously lost.

So, I think Miss I did have a role to play in what happened here and I think that the amount Santander should pay to her in compensation should fairly and reasonably be reduced to reflect that role. Given Miss I's part in the scam unfolding, I think that a fair deduction is 50%.

Could Santander have done anything else to recover Miss I's money?

As the funds went to accounts in Miss I's name before being converted into cryptocurrency and sent to the fraudsters, they could not have been recovered by Santander.

Putting things right

Overall, having considered the matter carefully, I think Santander should refund 50% from the first payment on 22 June 2021. As I have set out above, in total there were various payments with a combined value of £13,017.79. So, Santander should pay Miss I £6,508.90. I think that Santander should also pay 8% simple interest per annum on that amount from the date of each payment to the date of settlement. Miss I has been deprived of the use of this money so I think 8% simple is a fair interest rate in those circumstances.

If Santander considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss I how much it's taken off. It should also give Miss I a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

My final decision is that I uphold this complaint. Santander UK Plc must pay Miss I £6,508.90 and add 8% simple interest per annum on that amount from the date of each transaction to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss I to accept or reject my decision before 20 May 2024.

Mark Dobson
Ombudsman