

The complaint

Ms T complains that Santander UK Plc did not refund a series of payments she lost to a scam.

What happened

Ms T saw an advert online about cryptocurrency and the returns that can be made on investments related to them. She searched online and found a company I'll call 'E' who she made contact with. Ms T began with small investments and was eventually introduced to a trader I'll call 'X'. Ms T spoke with X regularly and they built a rapport. X convinced her to increase her investments and eventually use the proceeds from a house sale in further investments. He also convinced her to lie to Santander in May 2022 about the purpose of a transfer because he said banks don't want people to make money on cryptocurrency investments.

At one point Ms T became concerned and asked for a withdrawal to prove the investment was genuine, and she was able to withdraw £799. However, at a later date when she needed a substantial amount of funds and attempted a withdrawal, she was given excuses as to why this was not possible. Ms T became concerned and showed a friend the communications between her and E and it was at that point she realised she had been scammed. Ms T had made the following payments:

date	amount	other
17/08/21	£180.71	
26/08/21	£1,500	
15/10/21	£9,937	
03/11/21	£36,700	
26/01/22	£6,000	
20/04/22	£20	
23/04/22	£799	Credit to Ms T
31/05/22	£21,746.16	
01/06/22	£64,579	
07/06/22	£21,771.47	
07/06/22	£21,771.47rm	

07/06/22	£21,770.58	
	£100	International fees

Ms T raised a scam claim with Santander, who took around seven months to provide a response. They said that the only payment covered under the Lending Standards Board's Contingent Reimbursement Model ("CRM"), which is a voluntary code that provides additional protection to victims of authorised push payment ("APP") scams, was the third payment totalling £9,937. This is because the other payments were either card payments, to an account in Ms T's own name or international payments, which aren't covered under the code.

Santander said they had not met their obligations under the code, as they had not provided an effective warning when Ms T made the payment. But they also felt Ms T did not have a reasonable basis to believe this was a legitimate investment, so they also felt she had not met her obligations under the code. Because of this, they reduced the redress by 50%, and paid her £4,968, plus an additional £50 as a gesture of goodwill for the delays in their investigation.

Ms T disagreed with the outcome and was unhappy with how Santander had dealt with her claim, so she referred the complaint to our service. Our investigator looked into it and did not agree with Santander's findings. Their view said that the third payment totalling £9,937 was unusual when compared to Ms T's genuine account activity, and this warranted more than an effective warning. They felt there should have been staff intervention and if this had happened, it's more likely the scam would have been revealed at that time. They felt that although Ms T was convinced to lie to Santander in May 2022, her relationship with X had only just begun in October 2021 when she made the £9,937 payment. So, they felt it's more likely she would have been honest at that point.

They recommended a refund of the transactions from 15 October 2021 onwards along with 8% simple interest, but they recognised that Ms T had also contributed to her losses. She had not looked into the investment in detail and had trusted what the scammers told her. She had allowed them to take control of her computer and did not question it when she was told to lie to the bank, which they felt should have been a red flag. So, they felt there should be a 50% reduction in the redress to account for this.

Ms T accepted the outcome but Santander did not. They referred to 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 T to send funds, they did not agree that there was any room for interpretation from them. In addition, they reiterated Ms T's loss did not take place from her Santander account, so they should not be responsible for reimbursing her and that Ms T had not been truthful when she sent the payment in May 2022.

As an informal agreement could not be reached the complaint has been passed to me for 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 carefully considered everything available to me, I agree with the Investigator for largely the same reasons and I'm recommending a partial uphold on this case.

Having reviewed the communications between Ms T and E, I'm satisfied she has been the victim of an elaborate and long-running scam and I'm sorry she's had to experience this.

Santander has reviewed the claim and offered a partial refund of the only transaction covered by the CRM Code. I agree that this is the only payment covered by the code, and that both Santander and Ms T did not meet their obligations under the code in relation to it. But I think the general APP rules and regulations also apply in this case. I'll explain why in more detail.

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.

It's not in dispute that Ms T authorised the payments outlined above, as she thought they were part of a genuine investment. So, while I recognise that she did not intend the money to go to scammers, the starting position in law is that Santander was obliged to follow Ms T's 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 T's account safe.

In doing this, I've reviewed Ms T's account statements and compared the scam payments to her genuine account activity. In doing so, I think the first two payments did not appear unusual or out of character in the circumstances as they were of a relatively low-value and Ms T had made transactions of similar amounts around the same time. However, the payment of £9,937 made on 15 October 2021 does stand out as unusual on Ms T's statement. This is a high-value payment and was significantly higher than most other transactions on the account. While Ms T had recently received a lump sum into the account, I still think the high-value payment to a new payee which was significantly higher than her usual spending warranted intervention by Santander.

Santander has accepted that it should have provided Ms T with an effective scam warning, but I think the risk the payment posed was significant and as a result there should have been a staff intervention prior to it being processed. Meaning there should have been a conversation between Ms T and a member of staff about the payment and what it was for.

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 December 2020 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 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.

In this case for the reasons I have explained, I am satisfied they should have intervened prior to processing the payment of £9,937. What's left to decide is whether the intervention would likely have revealed the scam.

I've taken on board Santander's comments that Ms T lied about the purpose of a payment related to the scam in May 2022 at the scammer's request. But this was almost seven months after the payment that I think Santander should have intervened on, so the situation was different at these two points in time. In October 2021, Ms T had only recently been introduced to X, who eventually convinced her to lie to Santander about the purpose of the payments. And Ms T has told us that it took around three months for X to have built a rapport with her and gained her trust. So, when she made the payment in October 2021, that level of trust had not yet been built. And I think this is evidenced by the fact Ms T truthfully selected

the payment reason in October 2021 as 'transfer to an investment'.

With all of this in mind, I think it's more likely Ms T would have been open and honest had Santander intervened in the third payment and asked questions about it. On balance, I think it's likely the scam would have been revealed had Santander questioned Ms T about the payment. These questions could have included how she found out about the investment, if a third party was involved, if she'd downloaded any software to give others access to her devices and if she'd carried out any research on the investment company or received any documentation relating to the investment.

Had Ms T been honest as I'm satisfied she would have been, I think this would likely have led to a tailored scam warning which I think at that time would have unravelled the scam for Ms T, as a later conversation with a friend did. So, I agree that Santander has therefore missed an opportunity to reveal the scam and should refund all of the payments related to it from 15 October 2021 onwards.

Our Investigator recommended a reduction in the redress of 50% to account for Ms T's contribution to the loss, which she has accepted. As all parties are in agreement here, I won't go into this again in detail. In summary, I agree that Ms T has not acted as a reasonable person would to protect herself against the loss she suffered. She invested with an organisation without receiving any clear information of how her funds would be used and didn't receive any documentation about the investment, she allowed a third party to control her device and she followed instructions to deceive her bank. So, I also accept that Ms T has contributed to the loss and a reduction in the redress is therefore reasonable in the circumstances.

I can see that Santander paid Ms T £50 in recognition of the delays in looking into her claim. While I think this is on the lower end of what I would have recommended, it is still within the general range of what I feel is fair.

Putting things right

Santander should refund all of the payments from 15 October 2021 onwards, including the fees Ms T incurred in making the payments. It can deduct the £799 that was credited to Ms T's account as part of the scam, as well as the £4,968 it has already paid. As discussed, it can reduce this redress by 50%.

I also think Santander should pay 8% simple interest from the date of the transactions to the date of payment. If Santander considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms T how much it's taken off. It should also give her a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

I uphold Ms T's complaint against Santander UK Plc in part and recommend redress is paid as outline above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms T to accept or reject my decision before 9 May 2024.

Rebecca Norris
Ombudsman