

The complaint

Mr T complains that Santander didn't do enough to protect him from the financial harm caused by an investment scam, or to help him recover the money once he'd reported the scam to it.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of some of the key events here.

Mr T was the victim of an investment scam. In January 2018, he was cold called by someone who said he worked for an investment company I'll refer to as "S". He had no investment experience, but he looked at the reviews of the company, which were all positive and satisfied him that he was dealing with a legitimate company. Further, the broker seemed professional and gave Mr T confidence that the investment was genuine.

The broker told Mr T he could make a return of 20% by investing in cryptocurrency and between 7 January 2018 and 16 July 2018, he made seven credit card payments to four different companies using his Santander credit card totalling £4802.27. During this period, he also made payments from accounts he held with Bank B and Bank H.

Mr T contacted Santander on 1 October 2019 stating that he'd fallen victim to a scam, but it refused to refund any of the money he'd lost. Unfortunately, he was then contacted by scammers claiming they could recover his lost funds. Believing this to be a genuine opportunity to recover his losses, Mr T made seven further payments from his Santander account using both his debit card and faster payments totalling £27,640. These payments were to cryptocurrency exchange companies I'll refer to as "J" and "C" to buy cryptocurrency which he then transferred to the scam recovery wallets to pay costs such as insurance, litigation fees and charges.

When he realised he'd been the victim of a recovery scam, Mr T complained to Santander with the assistance of a representative. But it refused to refund any of the money he'd lost. It said it had been unable to recover any funds from the beneficiary accounts and that Mr T should have verified who he was paying.

Mr T wasn't satisfied and so he complained to this service with the assistance of a representative who argued Santander had failed to protect him. They said he had no previous investment experience so the payments to cryptocurrency exchanges were unusual for the account. They also argued that Santander's failure to assist Mr T when he first complained in October 2019 meant he continued to send money to the scam when he was contacted by the scam recovery agents.

Our investigator didn't think the complaint should be upheld. He noted Santander had attempted to recover the faster payments, but he was satisfied there would have been no prospect of a successful recovery because the funds were sent via Mr T's own cryptocurrency account and moved on from there. He explained there would have been no prospect of a successful chargeback on the debit card payments as both payments went to

Mr T's own cryptocurrency account. He also noted Mr T didn't raise a s75 claim in respect of any of the credit card payments.

He explained there were no warnings on either the Investor Alerts Portal of the International Organization of Securities Commissions ("IOSCO") or the Financial Conduct Authority ("FCA") warning lists about the companies Mr T had paid between 7 January 2018 and 26 July 2018. And there was no evidence available online that any of the companies were fraudulent. So, he didn't accept Mr T had shown these payments were made to a scam. He also commented there was no evidence that the payments he made to J in 2020 were fraudulent.

He did accept however that Mr T had produced statements indicating the payments he made to C in 2020 were most likely fraudulent. He noted the £14,800 payment on 14 September 2022 had triggered a warning, but Mr T went ahead with that and further payments. He explained that during the calls that took place when Mr T tried to make that payment, he was asked what the payment was for, and he explained he was buying cryptocurrency and that it was a good time to buy. He was asked further questions about how long he'd had the cryptocurrency account, whether he had control of it and whether he'd been asked to lie to the bank. He was also asked whether there was a third party involved and if someone else had opened the account for him. He noted Mr T didn't tell Santander that he was looking to recover his funds from a previous investment scam. He also said he knew about the risks of investing in cryptocurrency and that it would be his fault if he lost his money.

The payment was referred for further checks and on 15 September 2022 Mr T was asked similar questions and warned *"if any third party has helped you or given you advice, just never deal with them, it will be a scam and would result in the loss of your money. If you're not sure, if someone's offering you advice, promising how you can make profits, just do a bit more research yourself, don't go off what someone is telling you."*

Our investigator felt Santander wasn't given the opportunity to ask more questions or to give tailored warnings about recovery scams because Mr T said he was investing in cryptocurrency. But he was satisfied it had provided advice about the involvement of third parties and because it didn't have the correct information it needed to be able to reasonably detect the scam, he didn't think there was anything else it could reasonably have done to prevent or detect the scam. He also said that, even if Santander had given more tailored warnings, Mr T would have gone ahead with the payment as he was determined to recover his losses from 2018 and 2020.

Mr T's representative has asked for the complaint to be reviewed by an Ombudsman. They've argued there was a supervisory notice relating to the first payee and that when Santander intervened, Mr T explained where the funds were going, but it didn't conduct any due diligence. Finally, the representative maintains the recovery scams could have been avoided with the correct advice by Santander in October 2019.

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 reached the same conclusion as our investigator. And for largely the same reasons. I'm sorry to hear that Mr T has been the victim of a cruel scam. I know he feels strongly about this complaint, and this will come as a disappointment to him, so I'll explain why.

The Contingent Reimbursement Model (“CRM”) Code requires firms to reimburse customers who have been the victims of Authorised Push Payment (‘APP’) scams, like the one Mr T says he’s fallen victim to, in all but a limited number of circumstances. But the CRM code doesn’t apply to credit or debit card payments and the faster payments were to accounts in Mr T’s own name, so the code doesn’t apply to those payments either.

I’ve thought about whether Santander could have done more to recover Mr T’s payments when he reported the scam to it. Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two ‘presentments’. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa’s arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. Santander) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mr T).

Mr T’s own testimony supports that he used cryptocurrency exchanges to facilitate some of the transfers. It’s only possible to make a chargeback claim to the merchant that received the disputed payments. It’s most likely the cryptocurrency exchanges would have been able to evidence they’d done what was asked of them. That is, in exchange for Mr T’s payments, they converted and sent an amount of cryptocurrency to the wallet address provided. So, any chargeback was destined fail, therefore I’m satisfied that Santander’s decision not to raise a chargeback request against the cryptocurrency exchange companies was fair. I also note Mr T didn’t raise a s75 claim in respect of any of the credit card payments.

I’m satisfied Mr T ‘authorised’ the payments for the purposes of the of the Payment Services Regulations 2017 (‘the Regulations’), in force at the time. So, although he didn’t intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Mr T is presumed liable for the loss in the first instance.

Were the payments fraudulent?

Not every complaint referred to us and categorised as an investment scam is in fact a scam. Some cases simply involve high-risk unregulated investments that resulted in disappointing returns or losses. Some of these investments may have been promoted using sales methods that were arguably unethical and/or misleading. However, while customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

At the time, the first payee was regulated by the Cyprus Securities and Exchange Commission (CySEC). It also had ‘passporting’ rights through the Financial Conduct Authority (FCA) – which meant it could offer its services to UK customers as recorded on FCA website. The services being offered may have been high risk and I accept it’s likely there were some questionable sales and marketing techniques. But that doesn’t mean it was operating a scam.

Further, the first four payments were to companies in respect of which there were no warnings on either the Investor Alerts Portal of the International Organization of Securities Commissions (“IOSCO”) or the Financial Conduct Authority (“FCA”) warning lists about the companies Mr T had paid between 7 January 2018 and 26 July 2018. And there was no evidence available online that any of the companies were fraudulent. So, I’m not satisfied Mr T has shown the first four payments were made to a scam.

Mr T has also failed to show that the two payments he made to J in 2020 were fraudulent. He has explained he closed the account he held with J and is no longer able to access the account statements. Because of this I can't conclude those payments were made to a scam.

There's no dispute the faster payments to C were fraudulent, but although Mr T didn't intend his money to go to scammers, he did authorise the disputed payments. Santander is expected to process payments and withdrawals that a customer authorises it to make, but where the customer has been the victim of a scam, it may sometimes be fair and reasonable for the bank to reimburse them even though they authorised the payment.

Prevention

I've thought about whether Santander could have done more to prevent the scam from occurring altogether. Santander ought to fairly and reasonably be alert to fraud and scams, so I need to consider whether it did enough when Mr T tried to make the payments. If there are unusual or suspicious payments on an account, I'd expect Santander to intervene with a view to protecting Mr T from financial harm due to fraud.

Santander's systems flagged the first payment to C which Mr T made in September. Mr T made nine payments before 15 September 2022, none of which triggered a warning. I've explained above that Mr T hasn't produced evidence that those payments were fraudulent, but even if I did accept they were made to a scam, I don't think Santander needed to intervene. This is because even though the payments were to new payees, none of them were for particularly large amounts and there were no warnings about the payees at the time of the payments. So, I don't think Santander needed to be concerned.

I've listened to the calls that took place when Mr T was trying to make the payment of £14,800 on 15 September 2022 and I'm satisfied Santander did enough during those calls. Across the three calls, Mr T was asked why he was making the payment, whether he'd been told to lie, how he learned about the investment, whether there was a third party involved, whether anyone had access to his device or his account and whether he'd been able to make any withdrawals. He was also given advice about due diligence and warned about cryptocurrency scams.

Unfortunately, the answers Mr T gave meant Santander was unable to detect that he was being scammed. This is because, even though he'd been contacted by recovery agents who told him they'd be able to recover his lost funds, he simply said he'd been investing in cryptocurrency. He didn't tell the call handler he'd initially been cold called or that he'd been assisted by a broker, and, critically, he didn't mention the fact he'd already lost money. Had Mr T told Santander he was trying to recover lost funds it would have been able to warn him he was being scammed. But because he didn't disclose the full circumstances, the scam wasn't detected, and he wasn't given tailored scam advice.

I'm satisfied Mr T was asked suitably probing questions and that his failure to be completely open about the circumstances of the payment meant that Santander was unable to protect him. And I don't think there was anything else it could reasonably have done to prevent Mr T's loss.

He made four further payments to the scam in October, but as the payments were all to the same payee and were for lower amounts than the payment dated 15 September 2022, they wouldn't have seemed suspicious or unusual and so there would have been no reason for Santander to have intervened.

Mr T's representative has argued that Santander failed to warn Mr T about recovery scams in 2019 when he told it he'd been scammed. But I've listened to the call he had with Bank H

on 3 October 2019, and he was advised to contact Action Fraud which he failed to do, so I don't accept similar advice from Santander would have changed the outcome.

Compensation

Mr T isn't entitled to any compensation.

Recovery

I don't think there was a realistic prospect of a successful recovery because Mr T paid accounts in his own name and moved the funds onwards from there.

Overall, I'm satisfied Santander took the correct steps prior to the funds being released – as well as the steps it took after being notified of the potential fraud. I'm sorry to hear Mr T has lost money and the effect this has had on him. But for the reasons I've explained, I don't think Santander is to blame for this and so I can't fairly tell it to do anything further to resolve this complaint.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 26 June 2024.

Carolyn Bonnell
Ombudsman