

The complaint

Mr R is unhappy that Santander UK Plc won't reimburse him after he fell victim to a scam.

What happened

In September 2021 Mr R was introduced to an investment opportunity by someone he considered a friend. This friend said they had made profits by investing through a trading platform, I'll call this platform S. Mr R says they told him they had made good profits, and he was aware of other people who had made profits on their investments and been able to withdraw those profits.

Mr R agreed to invest and, after signing a contract, which was then countersigned by the individual who had started S – Mr B – Mr R made a payment of £10,000 to S for his investment. Mr R began to receive regular statements from S, which showed that his investment was making good profits. As a result, his mother, Mrs R, also became interested in investing, and in January 2022 she agreed for a payment of £10,000 to be made to S from the Santander account she held jointly with Mr R, that payment is the subject of a separate complaint with this service.

Initially, Mrs R also received statements showing that she was making profits on her investment. But Mr and Mrs R were then contacted by the police, who advised them that they were investigating S, and Mr and Mrs R realised they had been the victim of a scam.

On being advised of the circumstances Santander looked into things but said it was unable to complete a full investigation until the outcome of the police investigation was known, so it declined to refund Mr R's loss at that stage. Mr R was unhappy with this, so he referred his complaint to our service.

In its submissions to us Santander reiterated that it did not feel it could fully assess Mr R's claim until the outcome of the police investigation was known. But it nonetheless confirmed that it felt Mr R had not done reasonable checks to ensure that S was legitimate before making the payment, it also said that he had chosen an incorrect payment purpose, meaning it had been unable to provide him with an appropriate warning regarding the payment.

One of our Investigators looked into Mr R's concerns. They were satisfied Mr R had been the victim of a scam and that, as per the Lending Standards Board's Contingent Reimbursement Model Code (the CRM Code), they were entitled to a refund of their loss. This is because they considered Mr R had a reasonable basis for believing the investment was legitimate.

Santander disagreed with the Investigator's view. It maintained that the outcome of the police investigation was likely to affect its decision regarding reimbursement, and so felt it was reasonable to pause this case until that outcome was known – citing section R3(1)c of the CRM Code. It also noted that there was a possibility Mr R could recover some funds from S as a result of any investigations by the police. Lastly, Santander maintained that Mr R did not have a reasonable basis for believing the investment was legitimate given that he had based his decision to invest on what he was told by friends, rather than on any detailed research of his own.

As no agreement could be reached, the complaint has been passed to me to consider and come to 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.

In doing so, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.

In broad terms, the starting position at law is that a firm is expected to process payments and withdrawals that a customer authorises, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. However, where the customer made a payment because of the actions of a fraudster, it may sometimes be fair and reasonable for the bank to reimburse the consumer even though they authorised the payment.

The CRM code is of particular significance here. It requires its signatories to reimburse customers who are victims of scams like this one, unless some limited exceptions apply, and Santander is a signatory of the Code.

Santander has referred to R3(1)(c) of the CRM Code as a justification for pausing investigation into the case. That section of the Code says:

"If a case is subject to investigation by a statutory body and the outcome might reasonably inform the Firm's decision, the Firm may wait for the outcome of the investigation before making a decision."

I ultimately have to decide whether it is fair and reasonable for Santander not to have upheld Mr R's claim for reimbursement of his losses. I am aware there is an ongoing investigation, and there may be circumstances and cases where it is appropriate to wait for the outcome of external investigations. But that isn't necessarily so in every case, as it will often be possible to reach conclusions on the main issues on the basis of evidence already available. And I am conscious that any criminal proceedings that may ultimately take place have a higher standard of proof (beyond reasonable doubt) than I am required to apply (which is the balance of probabilities).

The Lending Standards Board has said that the CRM Code does not require proof beyond reasonable doubt that a scam has taken place before a reimbursement decision can be reached. Nor does it require a firm to prove the intent of the third party before a decision can be reached. So, in order to determine Mr R's complaint I have to ask myself whether I can be satisfied, on the balance of probabilities, that the available evidence indicates that it is more likely than not that Mr R was the victim of a scam rather than a failed investment.

I've reminded myself that Parliament has given ombudsmen the job of determining complaints quickly and with minimum formality. In view of this, I think that it would not be appropriate to wait to decide Mr R's complaint unless there is a reasonable basis to suggest that the outcome of any external investigation may have a material impact on my decision over and above the evidence that is already available.

Has Mr R been the victim of a scam, as defined in the CRM Code?

The relevant definition of a scam in accordance with the CRM Code is that the customer transferred funds to another person for what they believed were legitimate purposes but were in fact fraudulent.

The CRM Code also says it doesn't apply to private civil disputes, such as where a customer has paid a legitimate supplier for goods or services but has not received them, they are defective in some way, or the customer is otherwise dissatisfied with the supplier. So, it doesn't cover a genuine investment or a genuine business that subsequently failed.

So, in order to determine whether Mr R has been the victim of a scam as defined in the CRM Code I need to consider whether the purpose he intended for the payments was legitimate, whether the purposes he and S intended were broadly aligned and then, if they weren't, whether this was the result of dishonest deception on the part of S.

From what I've seen and what Mr R has told us, I'm satisfied he made the payment with the intention of investing in forex trading. He thought the funds would be used by S to trade and that he would receive returns on his investment. But I think the evidence I've seen suggests S didn't intend to act in line with the purpose for the payment it had agreed with Mr R.

In this case S instructed Mr R to make a payment to an account in S's name. Although I can't share the details for data protection reasons, the statements for the beneficiary account do not suggest that legitimate investment activity was being carried out by S at the time Mr R made the relevant transaction. Whilst there is evidence S initially did carry out trades, it doesn't necessarily follow that it was a legitimate enterprise. S and its linked companies were not authorised by the FCA to carry out trading, so its operations clearly lacked an important element of legitimacy; it was required to be authorised to do the activity it was carrying out and it wasn't. It went so far as to lie to some potential investors about it being in the process of getting FCA authorisation whilst it was 'trading' – the FCA doesn't allow businesses to carry on regulated activities without being authorised, so S wasn't being honest with potential investors.

Further concerns centre around the owner of S, Mr B (who was bankrupt at the time). From the paperwork provided to consumers, he appears to have "personally guaranteed" the investments (despite forex being a high-risk investment and him never being in a financial position to do so). He also signed contracts on behalf of S despite not officially being listed as the director of the business. He appears to have acted as a 'shadow director', when he would've been disqualified as a director in his own right due to his bankruptcy. Furthermore, S was listed as an 'IT consultancy' business on Companies' House and not a financial services firm.

So based on the above, along with the weight of testimony we have seen from other consumers who invested in S, I am satisfied that it is more likely S was not acting legitimately, since its intentions did not align with Mr R's intentions, and I am satisfied that S was dishonest in this regard. It follows that I'm satisfied Mr R was the victim of a scam.

Santander has also expressed concern that Mr R may be able to recover some of his losses from S when the police investigation concludes. And I agree that, if Santander has already paid a refund, it would not be reasonable for those recovered funds to be returned to Mr R. However, since Santander can ask him to undertake to transfer to it any rights they may have to recovery elsewhere, while I appreciate that may not be a straightforward process, I'm not persuaded that this is a reasonable barrier to it reimbursing Mr R in line with the CRM Code's provisions.

So, for the reasons explained above, I don't think it is necessary to wait for the outcome of the police investigation or any potential court case for me to reach a fair and reasonable decision regarding this complaint.

Having established that the payment is covered by the CRM Code, I've gone on to consider whether any of the relevant exceptions to reimbursement were applicable. The Code allows a firm to not reimburse a customer if it can establish that:

- The customer ignored an effective warning in relation to the payment being made; or
- The customer made the payment without a reasonable basis for believing that ... the person or business with whom they transacted was legitimate.

Santander says that one or more of the relevant exceptions are applicable in this case.

I'm satisfied that the first exception listed above isn't applicable here. I understand Mr R did see a warning when making the payment. But this warning related to the payment purpose 'anything else' which is what Mr R selected when making the payment, this warning was not relevant to the circumstances of the scam he was falling victim to so I don't think this could be considered an effective warning under the CRM Code.

I acknowledge what Santander has said about the payment purpose Mr R selected. It has noted that there was the option to select 'transfer to an investment' and that had Mr R done so he would have received a more relevant warning. But I do not think, from what I have seen, that Mr R selected the payment purpose he did in any effort to deceive Santander, he's said he wasn't told what to select by the scammer, and the purpose chosen, 'anything else', is vague enough that it could be chosen to cover any number of different types of payments.

So given that I'm satisfied Mr R was not shown an effective warning, and that this was not through any deceptive action on their part, I can't fairly say that he failed to take appropriate action in response to it and so this exception doesn't apply.

I'm also satisfied that Mr R made this payment with a reasonable basis for believing that the business with which he transacted was legitimate. He'd relied on a recommendation from a friend, who had told him they were receiving good returns on their investment. Mr R has said he was also aware of around 10-15 other people who had invested in the scheme and who had made profits on their investments, some of whom he believed had been able to withdraw those profits. And given that he signed a formal contract regarding the investment, he had no real reason to question whether S was legitimate. I'm not persuaded that there were any clear and unambiguous red flags that ought to have put Mr R on notice that he might be about to fall victim to a scam.

I appreciate that the returns he was expecting to receive were very high, but Mr R was not an experienced investor, and given that he believed others had received returns, and his apparently limited experience of investing, I don't think I can reasonably say this would have been as concerning to him as it would be to Santander – or to an investor who had more experience of forex trading. S also had the appearance of being a legitimate business, with employees, regular updates and signed contracts relating to the investment.

Santander has said that Mr R did no checks of his own on whether S was legitimate, but I don't think he would have necessarily known what to look out for if doing such checks. And at the time of his investment there were no clear warnings readily available that would have told him this was most likely a scam. As a result, I'm satisfied Mr R did have a reasonable basis for believing the investment was legitimate, and so consider that Santander should reimburse him under the Code.

So, in summary, I don't consider that Santander can reasonably rely on the exceptions it has detailed. It follows that I consider Santander should refund the payment made as part of this scam as per the CRM Code.

Putting things right

To resolve this complaint Santander should:

- Refund the payment made as a result of this scam; and
- Pay 8% interest on that amount from the date the claim was declined (22 February 2023) to the date of settlement.

My final decision

For the reasons I've explained, I uphold this complaint. Santander UK Plc should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 28 November 2024.

Sophie Mitchell
Ombudsman