

The complaint

Mr G complains about Santander UK Plc.

He says Santander didn't do enough to protect him when he fell victim to a cryptocurrency investment scam and would like it to refund him the money he lost as a result.

What happened

Mr G came across a post from a former colleague on Instagram where they shared a supposed profit they had made from a crypto investment and tagged the financial advisor that was helping them.

Mr G was interested in increasing his income and began to follow the tagged 'advisor' on Instagram.

The next day, Mr G received a message asking if he was interested in bitcoin mining and explained how they could help him.

Mr G was impressed by the friendly and professional nature of the advisor and agreed to invest. He made two payments from his account with Santander of £3,000 on 29 June 2023 and £2,000 on 10 July 2023 to a crypto exchange.

The advisor tried to convince Mr G to invest a further £5,000 – but Mr G said he wanted to wait and see how his account was doing. He was also told that withdrawals took 24 hours to process.

The next day, Mr G tried to access his supposed account, but the website he was using had disappeared, and the advisor had cut contact. Mr G then contacted his former colleague who explained that her Instagram account had been hacked, and he realised he had been scammed.

Mr G complained to Santander about what had happened – he said it should have blocked the payments he was making as they were unusual for him and were going to a crypto exchange. He said if it had done so it could have prevented the loss as it would have alerted him to the scam. However, Santander didn't uphold his complaint.

Mr G then brought his complaint to this Service. Our Investigator looked into things and agreed that Santander should have intervened when Mr G made his first payment, and that it missed an opportunity to uncover the scam. But they also said that Mr G wasn't as careful as he should have been with his money - so responsibility should be shared between Mr G and Santander.

Mr G agreed to this, but Santander did not. It said that the Supreme Court Judgement in the case of Philipp vs Barclays Bank Plc UK [2023] UKSC 25, which it said 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 Mr G to send

funds, they did not agree that there was any room for interpretation from them. In addition, they reiterated that as Mr G's loss did not take place from his Santander account, but from his crypto wallet, they should not be responsible for reimbursing him.

As no agreement was reached, the complaint has been passed to me to make 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 done so, I've decided to uphold this complaint in part, for broadly the same reasons as our Investigator. I'll explain why.

In broad terms, the starting position at law is that banks and other payment service providers (PSP's) are expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations and the terms and conditions of the customer's account. And I have taken that into account when deciding what's fair and reasonable in this case.

Mr G authorised the payments in question here – so even though he was tricked into doing so and didn't intend for the money to end up in the hands of a scammer, he is presumed liable in the first instance.

But this isn't the end of the story. As a matter of good industry practice, Santander should also have taken proactive steps to identify and help prevent transactions – particularly unusual or uncharacteristic transactions – that could involve fraud or be the result of a scam. However, there is a balance to be struck: banks had (and have) obligations to be alert to fraud and scams and to act in their customers' best interests, but they can't reasonably be involved in every transaction

Taking into account the law, regulator's rules and guidance, relevant codes of practice and what I consider having 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, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

In this case, I need to decide whether Santander acted fairly and reasonably in its dealings with Mr G when he authorised payments from his account or whether it could and should have done more before processing them.

In reaching my decision, I have also considered the Supreme Court's decision in *Phillip 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.

However, Santander's terms and conditions also gave it rights (but not obligations) to not make a payment when it had reasons to believe that a payment could reasonably be connected to a fraud or scam and could delay payments where such activity was suspected, and it may undertake further checks before processing a payment.

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 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 instance, I'm satisfied that Santander should have had concerns from the first payment Mr G made – the amount was unusual given Mr G's account usage and was going to a known crypto provider, which Santander should have been aware carried a higher risk.

Therefore, I would have expected it to have got in touch and asked him about what he was doing and why. I don't think Mr G would have hidden what he was doing from Santander as there is nothing to suggest he was told to conceal what he was doing, so I think he would have told it that he had found the investment on Instagram, which would have been an immediate red flag to Santander, given its knowledge of how crypto scams work, and the scam would have been uncovered. It could then provide Mr G with a warning about crypto investment scams, and I don't think he would have ignored a warning from his trusted bank.

What's left to decide is whether Mr G should reasonably bear some responsibility for the losses as a result of any negligence in his actions and if it is therefore reasonable for me to make a reduction in the award based on this. Mr G has already accepted the investigators

findings in relation to this, so I won't repeat them again in detail here. In summary, I do agree that the responsibility for the loss should be shared between Mr G and Santander as I don't think Mr G was as careful as he should have been before making his payments and should have undertaken further checks such as contacting his former colleague directly before making the payment or undertaking a google search about the company he thought he was investing in which would have revealed very mixed reviews.

I have taken on board what Santander has said about the business Mr G made the payment to being the correct entity for Mr G to pursue his losses from – but I disagree. Santander had an opportunity to prevent the loss at the point Mr G made the first payment, but it did not do so.

Putting things right

Santander UK Plc should refund Mr G £2,500 – which is 50 % of his loss.

It should also pay Mr G 8% simple interest from the date the payments were made until settlement (less any lawfully deductible tax)

My final decision

I uphold this complaint in part. Santander UK Plc should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 13 September 2024.

Claire Pugh
Ombudsman