DRN-4844452

The complaint

Ms M complains that Santander UK PLC says it won't refund her money she paid to what she now believes to have been a fraudulent investment.

She brings her complaint with the aid of a representative. In what follows I will mainly refer to Ms M for clarity, even where comments or submissions were made on her behalf by that representative.

What happened

Ms M holds an account with Santander. In September 2017, she made an investment of £20,000 by cheque payment. This was intended for a property development company. I'll refer to this company as G.

In essence this investment was a fixed duration loan to G. It was described as providing a fixed rate of return of 10% per year over the five-year duration of the loan. G would return both the capital and interest at maturity. This type of investment is sometimes referred to as a mini-bond.

By 2017, it appears that G had been trading for nearly a decade. However, around two years after Ms M invested, concerns began to arise about whether G would continue to repay its debt. Later G entered liquidation.

Ms M now believes that G was not operating legitimately, and was rather a "Ponzi scheme". In other words, that G was paying returns to investors from new investor's money rather than from any legitimate business activity (such as property development work).

Ms M reported the matter to Santander in 2023 as having been an Authorised Push Payment scam (an APP scam).

Santander looked into what had happened. In its final response, the bank noted that Ms M's payment had been made to a company that had failed and entered administration. It didn't think this had been an APP scam and said Ms M had a private civil dispute with G.

Ms M didn't accept this. She argues that Santander ought to have intervened prior to paying her cheque. She said that if it had done so the bank would have identified concerns about her proposed investment which in summary were that:

- This was not simply a failed investment in a legitimate company, it was operating as a Ponzi scheme;
- Returns of over 10% per year were exceptionally high;
- The investment wasn't a suitable one for Ms M;
- G was an overseas investment in property, not regulated by the FCA; and,

- This type of investment could only have been improperly promoted to her.

Our investigator considered the complaint. He thought that Santander should arguably have contacted Ms M about the cheque she'd written. He said it was for an unusually large sum relative to the prior history of her account usage. But he said he didn't think such a step would have made a difference – it wouldn't have prevented the payment (and the subsequent loss). He noted that the concerns raised by Ms M only publicly came to light in 2019, and that neither Santander or Ms M could have known of these in 2017 when Ms M made the payment. Neither she or the bank could reasonably have identified sufficient concerns about G being potentially fraudulent at the time the payment was made to have led to the payment being prevented.

Ms M didn't agree with the Investigator's findings. Amongst other things, Ms M has submitted an expert report to support her case. The Investigator explained this didn't change his opinion.

In light of this disagreement, I have been asked to make a final decision on Ms M's complaint.

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.

Ms M has made extensive submissions in support of this complaint. I'm very aware that I've summarised this complaint and the relevant submissions briefly, in much less detail than has been provided, and in my own words. No discourtesy is intended by this.

Instead, I've focussed on what I think is the heart of the matter here. As a consequence, if there's something I've not mentioned, it isn't because I've ignored it - I haven't. I'm satisfied I don't need to comment on every individual point or argument to be able to reach what I consider is the right outcome. Our rules allow me to do this, reflecting the informal nature of our service as a free alternative to the courts.

As such, the purpose of my decision isn't to address every single point raised. My role is to consider the evidence presented by the parties to this complaint, and reach what I think is an independent, fair and reasonable decision, based on what I find to be the facts of the case.

For the avoidance of doubt, in doing so, I have carefully reviewed everything submitted by Ms M, including the expert report.

Ms M explains that this expert report was originally prepared for another of her representative's clients. The report runs to 18 pages including the appendices.

Undoubtably as the consequence of having been prepared for a client other than Ms M, large parts of the report's content are not applicable to Ms M's complaint (for instance, the details and specifics quoted as being that other consumer's personal circumstances are not the same as those of Ms M).

That being said, the report does summarise some of the key considerations applicable to complaints about Authorised Push Payment fraud. In the interests of brevity, I will not repeat the content of the report here, but I have considered it fully in reaching my findings.

To expand further on what I have taken into consideration: in deciding what's fair and reasonable in all the circumstances of a complaint, 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.

Where the evidence is incomplete or missing, I am required to make my findings based on a balance of probabilities – in other words what I consider is most likely given the information available to me.

As a starting point, Ms M doesn't dispute that she wrote and signed the cheque, and intended to make the payment at the time.

That being said, where there was reason to believe that a payment (including a cheque) might be the result of fraud or a scam then I consider good industry practice would have been for Santander to have intervened before the payment transaction is concluded.

Here the payment was for a larger than typical amount for Ms M. It was being made to a payee that it doesn't appear she'd issued a cheque to before.

Of course, a legitimate payment could equally have been for a larger than usual sum and to a new payee – these factors need not necessarily mean a payment will result in loss to fraud or scam. Neither would it follow that such a cheque written by someone who was retired must necessarily be fraudulent or liable to cause loss through fraud.

I would need to find not only that the bank failed to intervene where it ought reasonably to have done so — but crucially I'd need to find that but for this failure the subsequent loss would have been avoided. That latter element concerns causation.

Specifically, I don't consider that a proportionate intervention by a bank in relation to a payment will always have the result of preventing the payment. Nor should it. In many instances the initial concerns that prompted the intervention will appear upon enquiry to be unwarranted. And if I find it more likely than not that such a proportionate intervention by the bank wouldn't have revealed the payment was part of a fraud or scam, then I couldn't fairly hold the bank liable for not having prevented it from being made.

In thinking about this, I've considered what a proportionate intervention by Santander at the relevant time could reasonably have constituted. I've then considered what I believe the most likely result of such an intervention would have been.

To reiterate, the bank's primary obligation was to carry out its customers' instructions without delay. It wasn't to concern itself with the wisdom or risks of the customers' payment decision.

In particular, Santander didn't have any specific obligations to step in when it received an instruction to make a payment (here a cheque for clearance) to protect its customers from potentially risky investments. The investment in G wasn't an investment the bank was recommending or even endorsing. The bank's role here was to make the payment it was instructed by Ms M to make. Ms M had already decided on that investment.

I find that Santander couldn't have considered the suitability or unsuitability of a third party investment product without itself assessing Ms M's circumstances, investment needs and financial goals. Taking such steps to assess suitability without an explicit request from Ms M (which there was not here) would have gone far beyond the scope of what I could reasonably expect of Santander in any proportionate response to a validly signed cheque presented for clearing.

That said, I think it would have been proportionate here for the bank, as a matter of good industry practice, to have taken steps to establish more information about this payment.

What matters here is what those steps might be expected to have uncovered at the time.

While there may now be significant concerns about the operation of G, and legitimacy of the investment, I must consider what Santander could reasonably have established in the course of proportionate enquiry to Ms M about her cheque payment back in September 2017. I cannot apply the benefit of hindsight to this finding.

Ms M points out that the rate of return being offered by G was high, and therefore a sign that should have prompted concern. I agree that the rate was high. I don't doubt this was part of the attraction of the investment for Ms M. I don't however think it was so high as to be considered too good to be true – either by Ms M or by Santander. In basic terms, the rate of return (the yield) on a loan or mini-bond will typically vary according to the perceived risk - most usually the default risk. Riskier investments need to offer a higher yield to compensate an investor for bearing the risk that the investment might fail. In other words, a higher than usual rate of return would be expected for a legitimate but risky investment.

But that investment risk isn't at all the same thing as the risk of fraud or scam that I'd expect Santander to have been alert for. And with this in mind, I don't consider a rate of return such as that offered by G would necessarily show an investment was fraudulent. It might more commonly reflect a legitimate investment risk. Neither do I consider the geographic location of the underlying company indicate that G was not legitimate. This mini-bond or loan note was issued by a company based in one the largest European economies – not something that in itself would give cause for any particular concerns.

Nor was the nature of the investment (large scale redevelopment of property) inherently something likely to prompt concern. On the face of it, I don't think this would have appeared fraudulent at the time. But I have noted the reference made by Ms M to another expert report, which alleges that G was a pyramid or Ponzi scheme and had been so operating for at least two years prior to 2017. However, having carefully reviewed that material, it does not appear these allegations (or the information upon which those allegations were based) was in the public domain or otherwise readily accessible at the time Ms M made the disputed cheque payment.

Rather, the report's conclusions appear to rest on a review G's internal correspondence - and specifically documents that were only uncovered during the liquidation process by someone with free access to G's private internal documents. As such this correspondence or documentation couldn't have been accessed by either Santander or Ms M at the time the disputed cheque payment was made.

In summary, I've considered everything else submitted and the arguments made, but while there may now be concerns about the legitimacy of G's business, everything I have seen indicates that these concerns began to surface in the public domain after the relevant payment was made by Ms M.

Ms M haven't provided details about who it was that first advised them to invest in G. However, this type of investment could be entered into without obtaining regulated financial advice and might be made available to clients of an unregulated adviser (if indeed that was the case).

Ms M refers to the regulator's guidance on UCIS (Unregulated Collective Investment Schemes). The FCA website provides a useful explanation of what a collective investment scheme is (a UCIS being an unregulated version of the same):

"collective investment scheme (CIS) - sometimes known as a 'pooled investment' - is a fund that usually has several people contribute to it. The fund manager of a CIS will invest

investors' money into one or more types of asset, such as stocks, bonds or property."

But the documents in this case (including the loan note agreement signed at the time) show this investment was a loan note – a debt instrument. At least purportedly, it was a loan being made directly to a property company to fund that company's activities – ostensibly it wasn't an investment in a fund (and I've not seen anything which leads me to think it was).

While I think this loan note was likely to share a similar level of investment risk with that posed by UCIS investments, legally this appears to have been a different type of investment. So, I can't agree that Santander would have readily identified it as a UCIS. As I've noted above, investment risk isn't the same thing as the risk of fraud or a scam. And while the FCA did later impose a ban on the mass marketing of speculative mini-bonds, that ban wasn't in place in September 2017 when Ms M made this cheque payment (the ban was announced in November 2019 and took effect from January 2020).

So, the status of the adviser and the investment weren't something that would necessarily have indicated G was fraudulent (or that the investment was a scam) at the time Ms M wrote her cheque for the payment. All considered, I don't think it would've been readily apparent in September 2017 that G might be fraudulent rather than simply a higher risk investment. I simply don't think Santander could readily have uncovered information – especially through proportionate enquiry in response to a payment - that would have led to significant doubts about the legitimacy of G at that point in time.

Neither do I think Ms M could have uncovered such information at the time – she was not at fault here. For similar reasons I don't think a general warning about investment scams would have made a difference – grounds for believing this to be a scam wouldn't have been uncovered by Ms M even if the possibility of such had been specifically drawn to her attention.

To recap, I can only reasonably expect any intervention or enquiries made by Santander to have been proportionate to the perceived level of risk of G being fraudulent. I don't think that proportionate enquiry in September 2017 would have led to either Santander or Ms M to knowledge of G being other than legitimate. With that in mind, and all considered, I'm not persuaded that Santander was at fault for clearing the cheque and allowing the payment to be made.

When Ms M later reported the matter to her bank, there would have been no reasonable prospect of recovering her funds from the beneficiary account. The payment had been made several years earlier, and from what I understand the beneficiary account had been closed prior to the date Ms M contacted Santander to report the matter. Further, by that point, G had already entered the process of liquidation - with the liquidator requesting creditors to register any claims on G's assets pending their distribution.

If Ms M has yet to register with the liquidator, that is something she may wish to do. Having carefully considered everything Ms M and Santander have submitted, I don't find Santander could have reasonably prevented the losses Ms M incurred here. Neither do I find the bank materially at fault otherwise.

In saying this, I don't underestimate the impact on Ms M of the loss of such a significant sum. However, it is simply the case that I don't consider I can fairly and reasonably hold Santander liable for that loss.

My final decision

For the reasons given above, my final decision is that I do not uphold Ms M's complaint about Santander UK Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 9 January 2025.

Stephen Dickie
Ombudsman