

The complaint

Mrs R complains that Santander UK Plc hasn't protected her from money being misappropriated from her account.

Mrs R's son is her attorney under an Enduring Power of Attorney who has consented to Mrs R being represented in this complaint by Ms C (her daughter).

What happened

The background to this complaint is well known to the parties, so I won't repeat everything here. In brief summary, Ms C has explained that Mrs R has five children; and Mrs R's youngest daughter, Ms M, who had been living with Mrs R for several years, had taken charge of her finances given Mrs R's fragility and her late husband's health. Mrs R's late husband sadly passed away in December 2019. Then in October 2021 Mrs R was admitted to hospital having suffered a stroke. Whilst Mrs R was in hospital, she gave permission to another one of her daughters, Mrs R2, to go to the cashpoint for her to withdraw some money. Mrs R2 found Mrs R's account to be overdrawn. Ms C has said it was consequently discovered that Mrs R's youngest daughter, Ms M – who had been managing Mrs R's finances – had been siphoning money from Mrs R's account to her own (Ms M's) account and otherwise making transactions Mrs R wouldn't have approved of. There are 272 disputed transactions which total £208,065.45 and span December 2016 to October 2021.

Ms C consequently, on Mrs R's behalf, got in touch with Santander about this. Ultimately, they couldn't reach agreement about things, and Mrs R's complaint about Santander was referred to us. As our Investigator couldn't resolve the matter informally, the case has been passed to me for a decision.

My provisional decision

I sent Mrs R's representative and Santander a provisional decision on 27 February 2024, explaining why I was minded to uphold this complaint in part and to direct Santander to pay Mrs R £74,771.38 plus 8% simple interest.

In response, Mrs R's representative said Mrs R was prepared to accept my provisional decision. But Santander disagreed with my provisional decision. Further information was then submitted to us by Mrs R's representative and the police.

I then emailed Mrs R's representative and Santander on 24 May 2024 explaining that I'd considered everything that had been said and provided in response to my provisional decision – and why I was still intending to reach materially the same conclusions as in my provisional decision, apart from that Santander should also pay Mrs R £750 for distress and inconvenience (on top of the £74,771.38 plus 8% simple interest already set out).

Santander subsequently offered to settle the matter with Mrs R by paying a lesser amount than this which understandably wasn't accepted by Mrs R. And now that both parties have had fair opportunity to provide any final comments, I'm ready to explain my 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 reached materially the same conclusions, and for materially the same reasons, as I've previously explained to the parties in my provisional decision and subsequent clarification emails I sent to the parties. I've explained my conclusions and reasons below.

I'm very aware I've summarised this complaint briefly, in less detail than has been provided, and in my own words. No courtesy is intended by this. Instead, I've focused on what I think is the heart of the matter here. 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 think is the right outcome. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts.

Why it isn't unfair for Santander to treat these transactions as authorised

Generally, unless Mrs R authorised a transaction, Santander had no authority to debit her account. A payment out of Mrs R's account can only be authorised if she consented to it. So, it's not enough for Santander to show how the transactions were *authenticated*. To decide Mrs R authorised the transactions, I'd also need to be persuaded that Mrs R most likely *consented* to the transactions.

With this in mind, I understand Mrs R gave authorisation to Ms M to access her online banking and make payments. I'm satisfied therefore that any transactions made by Ms M are most likely to have been *authenticated* using security information Mrs R knowingly gave her for the purposes of managing her finances which would include making payments.

With regards to *consent*, it's important to highlight here that under The Payment Services Regulations ("the PSRs") this doesn't depend on Mrs R having been fully aware of the details of each payment. If Ms M made the payments within the bounds of the *actual* authority that Mrs R gave her, Mrs R would be bound by her acts. But Mrs R can also be bound by the acts of Ms M which *appear* to have been made with Mrs R's authority. This is called *apparent authority*, such that if Mrs R permitted Ms M to *appear* as if she had her authority to make payments, those payments could be deemed as authorised (and consented to), even where Mrs R didn't know about or ask Ms M to make *all* the payments at the time.

The information I've seen suggests Mrs R thinks she did *not* give Ms M *actual* authority to make the disputed transactions. But even if I accepted this was correct, Mrs R appears to have clearly given Ms M authority to manage her finances and make transactions. And in the absence of evidence persuading me otherwise, I think that if Ms M made the disputed transactions, this was in circumstances where Mrs R had permitted Ms M to appear as if she had Mrs R's authority to make the transactions, such that *apparent authority* was given. Given what I've said about this, this means I can't say Santander ought reasonably to be required to refund the transactions as unauthorised.

Ought reasonably Santander to have prevented the transactions or some of them?

Where I can't be sure about something, I need to make my decision based on the balance of probabilities – in other words, based on what I think most likely happened, taking into account the available information. Having done so – bearing in mind the submissions from Mrs R's representative, the surrounding circumstances of police involvement, the information

received from the police, and the amount of payments (in number and total size) made to Ms M above and beyond those made to Mrs R's other children, I think it's most likely that Ms M did misappropriate funds from Mrs R's account. However, Santander would generally be expected to process transactions a customer authorises it to make. And Mrs R is presumed liable for the loss in the first instance, in circumstances where she authorised the transactions. That said, as a matter of good industry practice Santander should have taken proactive steps to identify and help prevent transactions – particularly sufficiently unusual or uncharacteristic transactions – that could involve fraud or be the result of a scam. However, there are many payments made by customers each day and it's not realistic or reasonable to expect Santander to stop and check every payment instruction. There's a balance to be struck between identifying transactions that could potentially be fraudulent, and minimising disruption to legitimate transactions (allowing customers ready access to their funds).

Bearing this in mind, I've considered whether I think Santander acted fairly and reasonably in its dealings with Mrs R in processing the disputed transactions as it did.

Santander has questioned the legal and regulatory basis on which it could be held responsible for Mrs R's loss in this respect. But, as I've previously explained to Santander, as a matter of good industry practice Santander should have taken proactive steps to identify and help prevent transactions – particularly sufficiently unusual or uncharacteristic transactions – that could involve fraud or be the result of a scam. My fellow ombudsmen and I have referenced the relevant rules, codes of practice and good industry practice at the time in many previous decisions published on our website. We've also sent some recent decisions to Santander addressing the recent Supreme Court judgement in the case *Philipp v Barclays Bank Plc UK [2023] UKSC 25*. And bearing all of this in mind, whilst Santander would not have been required or obliged under the contract to make checks, I'm satisfied that, taking into account longstanding regulatory expectations and requirements, and what I consider to have been good practice at the time, Santander should *fairly and reasonably* have been on the lookout for the possibility of fraud and taken additional steps, or made additional checks, before processing transactions in some circumstances.

In assessing whether a particular payment instruction, or a sequence of payment instructions, were unusual enough to warrant intervention, I'd reasonably expect Santander to take into account what it knew about Mrs R (she turned 82 in 2016) and her previous account activity.

I've reviewed Mrs R's account activity dating back to 2014, and I note that it was extremely unusual for payments greater than £1,000 to be made. In fact, prior to the disputed payments, I can only see three payments for £1,000 or more. That's two payments for £15,240 in February 2016; and there's one payment for £1,000 in November 2016. Mrs R's account had maintained a healthy balance of not less than £37,000. Given this, I don't think I can reasonably say the first four disputed payments ought to have looked suspicious. The largest of these was a £5,000 transfer to Ms M made in January 2017. And bearing in mind the size of this payment (compared to, for example, the previous payments of £15,240 in February 2016), I don't think this ought reasonably to have sufficiently stood out to Santander as warranting intervention.

However, in March and April 2017 Mrs R sent funds totalling £155,000 to her children: £15,000 to each of her five children on 29 March 2017; £6,000 to each of her children on 7 April 2017; and £10,000 to each of her children on 18 April 2017. There's no doubt in my mind, given the value of these payments and Mrs R's potential vulnerability due to her age, that Santander reasonably ought to have intervened on 29 March 2017 and called Mrs R to check everything was in order (before executing the payment requests). That day Mrs R instructed payments totalling £75,000 (£15,000 to five different beneficiaries). But I understand there's no dispute that these payments were gifts from Mrs R for her children.

I've seen nothing that persuades me, if Santander had intervened at this point as I think it should have, that it would have discovered anything other than this, with the payments ultimately being executed and Santander being reassured everything was in order (at least for now).

Between May 2017 and 7 June 2019, I understand that there were a further 63 disputed transfers to Ms M totalling £92,050. Compared to the gifts Mrs R gave her children in March and April 2017, the total amount of these might reasonably not have stood out to Santander. But given the frequency of these payments to Ms M (and not the other children), I think they might reasonably have been taken to indicate at least some level of risk. But the balance of the account was still being maintained above £20,000 prior to 22 April 2019, so I can understand if Santander might have thought at that stage that everything still seemed okay.

Why I think Santander reasonably ought to have intervened on 7 June 2019 and why this most likely would have made a difference and prevented the payments from that point onwards

However, between 22 April 2019 and 7 June 2019 the balance was then spent down from over £20,000 to being around £280 overdrawn – whereas, as I've said, the account had previously been maintained as being above (usually substantially above) £20,000 in credit. I think by this stage given the account activity (including the frequency of payments to Ms M in May 2019, and taking into account what Santander ought reasonably to have known by that point – that Mrs R was vulnerable and had given gifts to her children *whilst maintaining a healthy balance*) that Santander really ought to have realised, on 7 June 2019, when the payment instruction that day would take Mrs R's account overdrawn (which was totally uncharacteristic and concerning), that there was a real risk of something untoward, and intervention was appropriate, so it should have called and spoken to Mrs R again to check everything was in order.

I've thought really carefully about what I think would then most likely have happened, if Santander had intervened appropriately on 7 June 2019, as I think it should have done. Perhaps, if Santander had intervened *before* this point, Ms M could have worked the call such that Mrs R wouldn't have been concerned and things would have continued. But I think by the time Santander ought to have intervened – on 7 June 2019 – and told Mrs R about its concerns and what her current account balance was, it's most likely Mrs R would have been concerned also, and she would have had words with Ms M (perhaps after discussing the matter with her other children) such that any further disputed transactions to Ms M most likely wouldn't have continued. I acknowledge its possible at this point that Mrs R would have insisted on Santander talking things through with Ms M, not her. But I think Santander's concern about things reasonably ought to have extended far enough at this point to ensure it did its best to make Mrs R aware of the number of payments leaving her account to Ms M and her dwindling balance, now overdrawn. Bearing in mind all the circumstances of this case, including, as I understand matters, that Ms C has said the disputed payments were discovered in 2021 when another one of Mrs R's daughters reported to Mrs R that her account was overdrawn, I'm satisfied this is probably what would have happened on 7 June 2019, if Santander had done what it should have done.

Santander has said that Mrs R's representative appears to accept that certain transactions in the relevant period were genuine. And Santander says I didn't address in my provisional decision the fact Mrs R sold her house in February 2021 with the proceeds being paid into her Santander account – with movements clearly showing that each of her other children received £20,000 in March 2021 from these proceeds. However, the four lots of £20,000 paid to Mrs R's other children in March and April 2021 weren't addressed in my provisional decision because, as I explained to Santander in my subsequent email, the £23,000 also paid to Ms M at that time isn't included in the list of disputed transactions. Santander also

said this indicates Mrs R was in control of her account and where her funds were going at that point. But I don't agree. Instead, this indicates to me that Mrs R specifically decided to pay these amounts to her children. But that doesn't mean the excess payments to Ms M weren't misappropriations. I don't think the payments to Mrs R's other children changes things. The transactional data suggests:

- In March and April 2017 Mrs R sent funds totalling £31,000 to each of her children (totalling £155,000), as explained above and in my provisional decision.
- In March and April 2021 Mrs R sent funds totalling £20,000 to each of her children apart from Ms M who received £23,000, as explained above and in my subsequent email to Santander.

Aside from this, the only funds sent to Mrs R's children (apart from Ms M) appear to be as follows:

- Mrs R's attorney under an Enduring Power of Attorney: £3,600 in total spread over ten payments spanning July 2017 to February 2020.
- Ms C: £3,645 in total spread over ten payments spanning December 2015 to March 2021.
- Mrs F: £687 in total spread over 12 payments spanning September 2016 to May 2020.
- Mrs R2: £1,325 in total spread over three payments spanning May 2017 to July 2020.

But the payments to Ms M (excluding gifts) total £196,845.17 over 223 payments spanning December 2016 to October 2021.

Putting things right

I can't know whether *all* the *disputed* payments were misappropriations from Mrs R's account. And I think in terms of the cash withdrawals, I have no sufficiently persuasive evidence convincing me these weren't for Mrs R. And with regards to the payments to Virgin Money, I have seen no sufficiently persuasive evidence convincing me Mrs R wouldn't have approved of these at the time. So – whilst I've said above that I think, if Santander had done what it reasonably should have, any further disputed payments to Ms M from 7 June 2019 would have been avoided – I'm not persuaded it would be fair for me to tell Santander to refund to Mrs R any of the disputed cash withdrawals or payments to Virgin Money.

But with regards to the bank transfers to Ms M, as I've said, I think it's most likely that Ms M did misappropriate funds from Mrs R's account. Santander has said Mrs R's late husband may have authorised the payments from June 2019 to his sad passing in December 2019, but bearing in mind what I've said above, I don't find this persuasive. But, as I've said previously, I can't know if *all* of these *disputed* payments were misappropriations. After all, Ms M was living with Mrs R, managing her finances, and making payments for her. But I do note that despite Mrs R making a number of sizeable payments to all five of her children, the payments to Ms M were totally disproportionate in number and total size. And I understand that any payments made to Ms M as a gift at the same time as her other children have already been excluded from the list of disputed transactions. So, I'm persuaded that most of the disputed payments to Ms M were most likely misappropriations, although probably not all of them. This isn't an exact science, I can't be sure about things, and this is an unusual case. But in this case, bearing in mind everything I've said, I think a fair outcome would be for Santander to refund to Mrs R 75% of the disputed bank transfers made to Ms M from 7 June 2019 onwards. These transfers total £99,695.17. So, Santander should refund to Mrs R £74,771.38 (75% of £99,695.17). Santander should also pay Mrs R interest on this

amount calculated at 8% simple per year from the date of each payment to the date of settlement.

I've thought carefully, in light of the submissions received since my provisional decision, whether this remains fair, and for the reasons I've explained, I'm persuaded that it does.

I've thought about whether Mrs R should bear some responsibility for this loss by way of contributory negligence (which might justify a reduction in compensation). However, whilst Mrs R appears to have clearly given Ms M authority to manage her finances and make payments, I think she most likely did so because she, not unreasonably, trusted Ms M to do so properly. This wasn't a stranger she gave authority to, but her own daughter. So, whilst there may be cases where a reduction in compensation due to contributory negligence is appropriate, I don't think this is one of them.

I've also thought about whether the matter of recovery of the funds ought to make a difference to appropriate redress here. I don't need to consider this in relation to the disputed payments made on and after 7 June 2019 because I've already explained what I think is appropriate redress with regards to them. However, when I think Santander ought to have been able to stop things on 7 June 2019, it's possible some of the previous disputed payments (prior to 7 June 2019) to Ms M might have been recoverable from Ms M's bank. I said in my provisional decision that although we'd asked Ms M's bank for information around this, it hadn't been forthcoming. And that I also noted that on 7 June 2019, if things had been stopped, this might very well have been dealt with more as a family dispute, in terms of any payments already made to Ms M. And overall, I wasn't sufficiently persuaded that on 7 June 2019 either that Mrs R would have instructed Santander to seek to recover from Ms M's bank any previous payments made to Ms M under the grounds of fraud, or that, even if she had done, any of the previous payments (before 7 June 2019) would have at that stage been recoverable from that account. We've since received information from Ms M's bank which hasn't led me to change my mind about this.

I'm also satisfied Santander should pay Mrs R £750 for distress and inconvenience. The root cause of things was Ms M and her misappropriations from the account. But there's no doubt that Santander didn't and hasn't dealt with this matter at all well, and that it has caused Mrs R a material amount of distress and inconvenience she otherwise need not have suffered. This is to reflect that I think if Santander had done what it should have done in June 2019, Mrs R would have been saved a material amount of distress.

My final decision

For the reasons explained, I uphold this complaint in part and I direct Santander UK Plc to pay Mrs R:

- £74,771.38; plus
- interest on this amount calculated at 8% simple per year from the date of each payment to the date of settlement (if Santander deducts tax from this interest, it should send Mrs R the appropriate tax deduction certificate); plus
- £750 for distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 17 July 2024.

Neil Bridge
Ombudsman