

## The complaint

Mrs D complains that Santander UK Plc didn't do enough to protect her from the financial harm caused by an investment scam, or to help her recover the money once she'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.

Mrs D was looking for investment opportunities when she came across a company which I'll refer to as "T". She noted T had fairly good reviews on Trust Pilot and so she decided to go ahead.

She was asked to download AnyDesk remote access software and to first purchase cryptocurrency through a cryptocurrency exchange company and then load it onto an online wallet. Between 22 May 2023 and 11 September 2023, she made nine transfers from her Santander account to a payments app which I'll refer to as W totalling £24,700. She realised she'd been scammed when she tried to close her trading account and was told she'd have to pay £5,000 in taxes.

Mrs D complained to Santander arguing she was only given basic advice on how to avoid scams and she'd checked T on Trust Pilot. But Santander refused to refund any of the money she'd lost. It said she was given in depth scam warnings before she made the payments, and the transactions didn't flag as suspicious on its systems. It said she'd paid a genuine account in her own name before sending funds to the scammers' account, so it wouldn't be able to review the claim under the Contingent Reimbursement model ("CRM") Code.

Mrs D wasn't satisfied and so she complained to this service arguing that Santander didn't do enough to protect her. She said Santander asked whether she was comfortable sending the funds, which she didn't think was effective. She felt it should have questioned her about the payments and checked the recipient of the funds before allowing the payments to be processed and had it done so, she hadn't been old to lie, so her loss could have been avoided.

Santander said Mrs D made several payments via open banking on her registered mobile banking app and she accepted she'd authorised the payments. It said she selected 'transfer to family', and 'transfer to own account' and was sent scam warnings based on those payment reasons. It argued that she often moves money between her internal accounts, so it wasn't unusual for her to transfer funds to her external accounts in her own name.

It further explained that W's reviews were mixed and there was a review advising T was a scam company. Further, Mrs D had said she had a financial advisor, but it was unclear whether she'd received advice before going ahead with the payments.

Our investigator recommended that the complaint should be upheld. She didn't think the first four payments were concerning because they weren't particularly high-value, and they were spaced out over three months. But she thought Santander ought to have been concerned about payment five on 11 July 2023, which was for £3,300 because Mrs D had paid out £3,400 just three minutes before, making a total of £6,700. She was satisfied this was unusual when compared to Mrs D's usual spending and that Santander should have intervened.

Our investigator accepted Mrs D was shown scam warnings which were relevant to the payment reasons she'd selected, but she thought Santander should have blocked the payment and contacted her to question her. She said it should have asked her why she was making the payment, how she found out about the investment, whether there was a 'broker' or 'account manager' involved, what checks she'd done, whether she was told to lie to the bank, whether she had a trading account, whether she'd made any withdrawals and whether the investment opportunity was linked to a prominent individual or advertised on social media.

Had it done so she was satisfied Mrs D would have revealed that she found T online and that she was being guided by a broker who had told her to download AnyDesk and was telling her how much to invest. She would also have said that she hadn't withdrawn any funds, which would have been enough to alert Santander that she was probably being scammed. She concluded Santander had missed an opportunity to intervene and so she recommended it should refund the money she'd lost from the fifth payment onwards.

Finally, she didn't think Mrs D had acted unreasonably because the scam was sophisticated, and the trading platform appeared professional and made it appear her funds were making a profit. And Mrs D felt she'd carried out some due diligence, which included checking reviews online.

Santander has asked for the complaint to be reviewed by an Ombudsman. It maintains Mrs D should complain to W and that it had no direct connection to the payments or the actual loss.

It has argued that it's not reasonable to predict what might have happened if it had asked Mrs D about the payment, pointing out the account was in credit, the payments were made using her registered device via its Mobile Banking app from IP addresses used for genuine activity, and Mrs D regularly moved money in and out of accounts in her own name.

It said that by 24 August 2022, Mrs D had been successfully making payments to W for several months and had reported no issues, so there were no grounds to suspect the mandate wasn't trusted or that the payment was unusual or might be related to a scam.

Santander has also argued that the Supreme Court's decision in *Philipp v Barclays Bank plc* confirmed that where the bank receives a payment instruction from a customer which is clear and / or leaves no room for interpretation, if the customer's account is in credit, the bank's primary duty is to execute the payment instruction.

It has further argued that it has acted in line with industry standards whilst following Mrs D's instructions to transfer money. She paid funds to an account in her own name, which she had full access and control of. It wasn't aware that any of the individual payment instructions arose in the context of an attempt to misappropriate funds and she was paying her own account with another regulated entity such that there would have been little (if any) reason to question that the payment instruction was unclear and / or open to interpretation.

## 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.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mrs D's account is that Mrs D is responsible for payments Mrs D has authorised herself. And, as the Supreme Court has recently reiterated in *Philipp v Barclays Bank UK PLC*, banks generally have a contractual duty to make payments in compliance with the customer's instructions.

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.

In this case, Santander's terms and conditions at the time gave it rights (but not obligations) to:

1. Refuse any transaction that appears unusual compared to the customer's normal spending pattern or if it suspects fraud.
2. Delay payments while fraud prevention checks take place and explained that it might need to contact the account holder if Santander suspects that a payment is fraudulent. It said contact could be by phone.

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 a transaction appeared unusual compared to a customer's normal spending pattern or 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 APP fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

I am mindful in reaching my conclusions about what Santander ought fairly and reasonably to have done that:

- FCA regulated banks are required to conduct their “business with due skill, care and diligence” (FCA Principle for Businesses 2) and to “pay due regard to the interests of its customers” (Principle 6).
- Banks have a longstanding regulatory duty “to take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime” (SYSC 3.2.6R of the Financial Conduct Authority Handbook, which has applied since 2001).
- Over the years, the FSA, and its successor the FCA, have published a series of publications setting out non-exhaustive examples of good and poor practice found when reviewing measures taken by banks to counter financial crime, including various iterations of the “Financial crime: a guide for firms”.
- Regulated banks are required to comply with legal and regulatory anti-money laundering and countering the financing of terrorism requirements. Those requirements include maintaining proportionate and risk-sensitive policies and procedures to identify, assess and manage money laundering risk – for example through customer due-diligence measures and the ongoing monitoring of the business relationship (including through the scrutiny of transactions undertaken throughout the course of the relationship).
- The October 2017, BSI Code, which a number of banks and trade associations were involved in the development of, recommended firms look to identify and help prevent transactions – particularly unusual or out of character transactions – that could involve fraud or be the result of a scam. Not all firms signed the BSI Code, but in my view the standards and expectations it referred to represented a fair articulation of what was, in my opinion, already good industry practice in October 2017 particularly around fraud prevention, and it remains a starting point for what I consider to be the minimum standards of good industry practice now.
- Santander has agreed to abide by the principles CRM Code. This sets out both standards for firms and situations where signatory firms will reimburse consumers. The CRM Code does not cover all authorised push payments (APP) in every circumstances (and it does not apply to the circumstances of this payment), but I consider the standards for firms around the identification of transactions presenting additional scam risks and the provision of effective warnings to consumers when that is the case, represent a fair articulation of what I consider to be good industry practice generally for payment service providers carrying out any APP transactions.

Overall, taking into account the law, regulators rules and guidance, relevant codes of practice and what I consider to have 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, or provided additional warnings, before processing a payment – as in practice all banks do.

There's no dispute that this was a scam, but although Mrs D didn't intend her money to go to scammers, she 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 and these payments were part of a wider scam, so I need to consider whether it ought to have intervened to warn Mrs D when she 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 her from financial harm due to fraud.

Santander has explained that Mrs D was given a warning based on the payment reasons she gave, and I accept it was prevented from giving a more relevant warning because the payment reasons weren't suited to the circumstances of the payments. However, I've considered the nature of the payments in the context of whether they were unusual or uncharacteristic of how Mrs D normally ran her account and I don't think the warning it gave was proportionate to the risk.

All the payments were to a legitimate payments app, and I agree the first four payments were spread out over several weeks and weren't particularly high value, so Santander didn't need to intervene. But by the time Mrs D made payment five, the cumulative total for the day had risen to £6,700 and as this amount was unusual for the account, I think Santander should have intervened.

It should have contacted Mrs D and asked her why she was making the payments, whether there was a third party involved and if so how she'd met them, whether she'd downloaded remote access software, whether she'd been promised unrealistic returns, whether she'd made any withdrawals, whether she'd been coached to lie, whether she'd done any due diligence and whether she'd been advised to make an onwards payment from the cryptocurrency exchange.

Even though the payment reasons she gave weren't well suited to the circumstances, I haven't seen any evidence that Mrs D had been coached to lie and as there were red flags

present including the involvement of a third party who had told her to download AnyDesk and to make an onwards payment from the cryptocurrency exchange, I think Santander would have detected the scam. It should then have provided a tailored warning about cryptocurrency scams and advice on additional due diligence. And had it done so I think its likely Mrs D would have done some more research and realised the investment had the hallmarks of a cryptocurrency investment scam.

Because of this I'm satisfied that Santander's failure to intervene represented a missed opportunity to have prevented the scam and so it should refund the money she lost from the fifth payment onwards.

### *Contributory negligence*

I accept there's a general principle that consumers must take responsibility for their decisions and conduct suitable due diligence but, in the circumstances, I don't think Mrs D was to blame for the fact she didn't foresee the risk.

In recent years instances of individuals making large amounts of money by trading in cryptocurrency have been highly publicised to the extent that I don't think it was unreasonable for Mrs D to have believed what she was told by the broker in terms of the returns she was told were possible, notwithstanding the fact it was highly implausible.

Mrs D hadn't invested in cryptocurrency before and so this was an area with which she was unfamiliar. There's no evidence that she took any financial advice at the start of the scam and beyond looking checking for reviews, she wouldn't have known how to check the investment was genuine. This unfamiliarity was compounded by the sophisticated nature of the scam, the fact she trusted the scammer and the fact she believed the trading platform was genuine and was reflecting the fact her investments were doing well.

I accept she went ahead with the payments having had a generic warning from Santander, but this wasn't an effective warning and there's no evidence that she ignored any other more robust warnings or anything else which should reasonably have alerted her to the fact she was being scammed. So, I don't think she can fairly be held responsible for her own loss.

### *Compensation*

I've thought carefully about everything that has happened, and with all the circumstances of this complaint in mind, I don't think Santander needs to pay any compensation given that I don't think it acted unreasonably when it was made aware of the scam.

### *Recovery*

Mrs D has described that she paid an account in her own name and from there the funds were moved to an online wallet in the scammer's control, so I'm satisfied there was no prospect of a successful recovery.

### **My final decision**

My final decision is that Santander UK Plc should:

- refund the money Mrs D lost from the fifth payment onwards.
- pay 8% simple interest\*, per year, from the respective dates of loss to the date of settlement.

\*If Santander deducts tax in relation to the interest element of this award it should provide Mrs D with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 28 October 2024.

Carolyn Bonnell  
**Ombudsman**