

The complaint

Mr W has complained that Santander UK Plc won't refund the money he lost after falling victim to a scam.

What happened

Mr W was added to a group on a social media messaging service. It was run by scammers posing as an investment firm. They persuaded Mr W to send them around £40,000 over a large number of payments between July and December 2023.

Mr W did this by making card payments and transfers to his account at a cryptocurrency exchange, then sending the crypto onto the scammers.

Mr W had to pay various fees to withdraw his investment but was unable to withdraw. He realised he'd been scammed. Santander didn't think it was liable for Mr W's loss.

Our Investigator looked into things independently and partially upheld the complaint. Santander didn't agree, so the complaint's been passed to me to decide.

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.

There's no dispute that Mr W authorised the payments involved, even if he didn't intend for the money to go to scammers. So under the Payment Services Regulations and the terms of his account, Mr W is liable for the loss in the first instance. But the matter doesn't end there.

Taking into account the law, regulator's rules and guidance, relevant codes of practice, and what I consider to have been good industry practice at the time, I consider that Santander should have fairly and reasonably:

- Monitored accounts and payments to counter risks such as fraud and scams;
- Had systems in place to look out for particularly unusual transactions or other signs its customers were at risk of fraud;
- In some circumstances, taken further steps or made further checks before a payment went out, or even blocked it, to help protect customers – irrespective of the type of payment involved.

I can see that Santander did intervene at the point of the £2,800 payment on 31 August 2023, and I agree that it should have done. While the payments were authorised, by that point Mr W had tried to spend a notably large amount in a relatively short space of time. This was significantly larger than his usual spending – I've reviewed Mr W's account activity in the months leading up to the scam, and I can't see any comparable spend. This payment would drain his balance and put him well into his overdraft. And the recipient was a crypto site. By this point, the Financial Conduct Authority (FCA) and Action Fraud had published warnings about cryptocurrency scams, there was wide media coverage, and leading firms had restricted such payments, so Santander should've had a good understanding of the risk of these scams and how they work. I think that by that point, the payments involved stood out as being remarkable, and so it was right for Santander to intervene.

In reaching my decision that Santander should have made further enquiries, I've taken into account the Supreme Court's decision in *Philipp 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. In summary, among other things, it said:

- 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 gave it rights (but not obligations) to:

1. Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.
2. Delay payments while fraud prevention checks take place, with the potential need to contact the accountholder if Santander suspects that a payment is fraudulent. Such contact could be by phone.

So the starting position in 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, even if it was not under a contractual duty to do either of those things.

While the account's terms did not oblige Santander to do fraud checks, I do not consider that any of these things (including the implied basic duty to make payments promptly) precluded Santander from making fraud checks before making a payment.

And while Santander was not required or obliged under the contract to make checks, I am satisfied that, taking into account longstanding regulatory expectations and requirements, its duty to avoid foreseeable harm for its customer, and what I consider to have been good practice at the time, it should've *fairly and reasonably* been on the lookout for the possibility of fraud, and should have taken additional steps – or made additional checks – before processing payments in some circumstances, such as in the circumstances of this case.

So for the reasons I've explained, I find that Santander should have intervened here.

While Santander did intervene and speak to Mr W, it only asked him a few closed questions, which mostly did not relate to scams and were instead about e.g. whether he'd authorised the payments, and his contact details. I find that its intervention was not sufficient in this particular case.

Had Santander asked reasonable, proportionate questions, I think it's most likely that it could have uncovered the scam and stopped any further loss. I've seen nothing to suggest Mr W would not have been honest about why he was spending this money – he just thought he was investing, and I can't see that the scammers told him to lie if questioned. The matter bore multiple hallmarks of a relatively prominent type of scam – for example, being cold contacted on social media, being offered unrealistic returns, its unregulated nature, requiring various fees to be paid before withdrawals were allowed, no proper documentation being given, the use of cryptocurrency, the existing public warnings about the company, and so on. So had Santander asked reasonable, proportionate questions, I think it would've most likely been able to identify what was happening and prevent it. And I've found no reason why Mr W would not have listened to Santander – it is a well-known name in banking.

Santander argued that it should not be held liable, because the payments went to an account in Mr W's name. But Santander should've fairly and reasonably been on the lookout for potentially fraudulent payments, and should've been trying to avoid causing foreseeable harm to its customer, even if the payments were going to another account in the customer's name. There are prominent scams which involve paying an account in one's own name. And identifying and preventing such scam payments would still have the effect of preventing a loss to its customer. So Santander can still be held liable for a loss which resulted from its failure to intervene effectively – which is what I've found to have most likely been the case here. And we cannot compel Mr W to complain about the other firm.

So I think that Santander bears some liability for the loss from the £2,800 payment onwards.

I've also thought carefully about Mr W's role in what happened. While I appreciate that the scammers were impersonating a genuine company, I'm afraid I think Mr W ought to have had more concerns along the way about what he was being told and asked to do. For example, the returns on offer were not realistic, he was cold contacted on social media, he wasn't given any proper documentation, he doesn't seem to have reasonably looked into the matter, and a quick internet search should've revealed existing public warnings about the scammers' company being a scam. So I don't think I can fairly hold Santander solely liable for the loss. I think Mr W should also share liability for that loss.

Lastly, I've considered whether Santander could've reasonably done more to recover the funds once it was told about the scam. But as Mr W sent the money to his own account at the crypto exchange and then onto the scammers, it wasn't possible to get the funds back. As these were payments to his own crypto account, they were not covered by the CRM Code for scams. And there was no chargeback reason which would've been appropriate here, so there was not a realistic prospect of success for a chargeback for the card payments. So I don't think Santander could've reasonably recovered the funds.

Putting things right

Santander UK Plc should:

- Refund 50% of the loss from the £2,800 payment on 31 August 2023 onwards; and-
- Add simple interest at the rate of 8% simple per year onto the refund, payable from the date each partially-refunded payment debited until the date of the refund.

If Santander considers that it's required by HM Revenue & Customs (HMRC) to deduct tax from that simple interest, it should tell Mr W how much tax it's taken off. It should also give Mr W a tax deduction certificate if he asks for one. Mr W may be able to reclaim the tax from HMRC if he doesn't normally pay tax.

My final decision

For the reasons I've explained, I uphold Mr W's complaint in part, and direct Santander UK Plc to put things right by doing what I've said above.

If Mr W accepts the final decision, Santander UK Plc must pay him within 28 days of the date our service notifies it of the acceptance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 28 February 2025.

Adam Charles
Ombudsman