

## The complaint

Mr E, through a representative, complains that Santander UK Plc won't refund his losses after he fell victim to an investment scam.

## What happened

As both parties are familiar with the details of the scam I won't repeat them here in full. In summary, Mr E made three faster payments to an account in his name at a cryptocurrency exchange as set out below:

payment	date	value
1	17/07/2020	£500
2	17/07/2020	£500
3	19/09/2020	£6,967

From there he moved the money on to the scammers at company C. He believed he was investing in a crypto trading opportunity he had found on Facebook. He was given access to a web page to track his investment and when it reached over £111,000 he tried to withdraw the funds. When company C told him he couldn't at that time as it was changing its payment process he realised he had been scammed. He is seeking a full refund and £300 compensation.

Our investigator upheld Mr E's complaint in part in relation to payment 3. They noted Santander had intervened before payment 3 was processed (after declining a payment for £7,000 on 15 September 2020 and blocking Mr E's account). Mr E contacted Santander's fraud team on 19 September 2020 and after that discussion the block was lifted allowing payment 3 to be made. But our investigator felt had the bank asked the right questions the scam would have been uncovered, whilst acknowledging that there is no transcript or call recording available. He concluded that Santander should refund payment 3 to Mr E.

Mr E accepted this assessment. Santander did not. It said, in summary, it was not the point of loss – that was the crypto exchange and Mr E should be trying to recover his losses from that firm. Also, Mr E should bear some responsibility for his losses due to contributory negligence as his checks prior to investing were inadequate. It added that is not reasonable for this service to make assumptions about how the conversation between its fraud team and Mr E would have gone. Mr E was not transferring the money direct to the scammers, rather to a legitimate, regulated cryptocurrency exchange.

I reached a different decision about how things should be put right so I issued a provisional decision. An extract follows and forms part of this final decision.

### *Extract from my provisional decision*

*There's no dispute that Mr E made and authorised the payments. Mr E knew who he was paying, and the reason why. At the stage he was making these payments, he believed he was transferring funds to his cryptocurrency account to then use to trade online. I don't*

*dispute Mr E was scammed and he wasn't making payments for the reason he thought he was, but I remain satisfied the transactions were authorised under the Payment Services Regulations 2017.*

*And (as Santander has referenced) 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 – as Santander did in this case.*

*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.*

*Santander's terms and conditions in place at the time for Mr E's account said at 6.6:*

*"We can refuse any Payment Instruction, if:*

*(e) we reasonably suspect it relates to fraud or any other criminal act;"*

*So in accordance with Santander's own terms and conditions it could therefore refuse payments, or make enquiries, where it suspected fraud. 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 and as Santander did in this case.*

*The detailed reasoning for this has been set out in substantial detail in previous decisions to Santander, so I don't intend to repeat it all here.*

*But, 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 payments made or received to counter various risks, including fraud and scams, money laundering, and the financing of terrorism.*
- had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which financial institutions are generally more familiar with than the average customer.*

- *in some circumstances, irrespective of the payment channel used, taken additional steps or made additional checks before processing a payment, or in some cases declined to make a payment altogether, to help protect its customers from the possibility of financial harm.*
- *been mindful of – among other things – common scam scenarios, the evolving fraud landscape (including for example the use of multi-stage fraud by scammers) and the different risks these can present to consumers, when deciding whether to intervene.*

*In this case, I need to consider whether Santander acted fairly and reasonably in its dealings with Mr E when he made the transfers, or whether it could and should have done more before processing them.*

*Did Santander act fairly and reasonably in Mr E's case?*

*The parties are no longer in dispute that Santander acted fairly and reasonably when it processed payments 1 and 2. It then made a direct intervention on 15 September 2020 when Mr E tried to make a payment of £7,000 to the same beneficiary account. This is as I would expect. It does mean its arguments regarding the recent court case of Phillips v Barclays are somewhat contradictory to its actions. But that aside, as it couldn't make contact with Mr E it blocked his account until 19 September 2020 when it spoke to Mr E to understand that attempted payment. This allowed Mr E to then make payment 3.*

*Typically in such circumstances we would then assess the intervention to decide if Santander asked a proportionate level of questions to understand the basic context of the payment. Unfortunately there is no call recording or transcript available in this case. This means I need to reach my conclusion based on the balance of probabilities – in other words, based on what is most likely given the available evidence and the wider circumstances.*

*Santander has been able to provide the script it should have followed, although I acknowledge we do not know with certainty how Mr E responded. On balance, I think it is most likely Santander would have uncovered the scam had it followed the script it has submitted. I say this as it would likely have learnt Mr E had found the opportunity on Facebook and been contacted by a fellow 'investor' initially. Mr E would not have been able to confirm that he had completed an adequate level of due diligence on company C if the bank had probed about his research. It follows I think Santander would have provided a tailored investment scam warning and I have no grounds to think Mr E would have ignored this.*

*Santander argues it was not the point of loss and Mr E first moved the money into another account in his own name. However, just because a payment is to an account in the customer's own name that does not mean it bears no risk, and I would still expect Santander to identify payments that indicate potential fraud, even if those payments were made to another account belonging to their customer. As indeed it did. As it knows this because this kind of payment journey – where payments are made from an account with one bank, to accounts in the same consumer's name at other banks or e-money providers, and then on to trade in cryptocurrency – is increasingly a feature of several types of scam. And I would expect Santander to have an awareness of how these scams operate and be aware of what it should be looking out for to help protect its customers. So I do think it is reasonable that Santander bear some of the responsibility for what has happened here, even though it was not the last firm in the chain.*

*I have also taken into account that the payments were made to a regulated cryptocurrency exchange, and Mr E might potentially have a claim against it in respect of its actions, as Santander argues (although the exchange is not a party to this complaint and so I make no*

*finding about its role here). Whilst the dispute resolution rules (DISP) give me the power (but do not compel me) to require a financial business to pay a proportion of an award in circumstances where a consumer has made complaints against multiple financial businesses about connected circumstances, Mr E has only complained about Santander. DISP does not empower me to instruct Mr E to make or refer a complaint about another business and I am required to consider the complaint in front of me.*

*It follows I find Santander can be held liable for payment 3.*

*Should Mr E bear some responsibility for the overall loss?*

*I've considered carefully whether Mr E should hold some responsibility for his loss by way of contributory negligence. I have limited evidence from the time of the scam showing the contact between the scammers and Mr E. But on balance, I think Mr E should be held responsible in part. There are two key reasons for this. Mr E was willing to invest based on a recommendation and contact from Facebook when there had been multiple warnings in the media about such scams. And in this context, Mr E carried out minimal checks on the investment opportunity. Whilst there were some positive online reviews at the time, more crucially and carrying more weight, an FCA warning was published about company C on 11 December 2019.*

*Given the amount he was investing I think Mr E ought reasonably to have done more to reassure himself that the opportunity was genuine. Legitimate investments aren't usually found on social media, with contact initiated by other investors rather than the firm itself. Overall, I'm not satisfied that it was reasonable for Mr E to proceed without doing more to verify all the information he was given.*

*I am therefore instructing Santander to refund only 50% of Mr E's loss from payment 3.*

*Did Santander do what it should to try to recover Mr E's money?*

*In this case, Mr E sent the money to his own account held elsewhere and from there onto the scammer. So there was no prospect of Santander being able to recover the funds from the firm it had sent the payments to. It follows I do not find any failings on its part in this regard.*

*Finally, Mr E told us that he was a vulnerable customer at the time of the scam. But as Santander was not on notice of his vulnerabilities until his representative raised this complaint I cannot fairly expect it to have made any reasonable adjustments. And without the call recording from 19 September 2020 I cannot know if Santander missed the opportunity to identify his ongoing vulnerability.*

*Both parties responded accepting my provisional 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.*

*As neither party sent in any comments or new information for me to consider, I have no reason to change the findings or outcome set out above.*

*It follows Santander must refund 50% of payment 3 to Mr E, with interest.*

## **Putting things right**

Santander should:

- Refund 50% of £6,967 (so £3,483.50); and
- Pay interest on the above amount at the rate of 8% simple per year from the date of payment 3 to the date of settlement.\*

I have found no grounds to make the additional compensatory award of £300 that Mr E asked for.

\*If Santander considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr E how much it has taken off. It should also give Mr E a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

## **My final decision**

I am upholding Mr E's complaint in part.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 23 December 2024.

Rebecca Connelley  
**Ombudsman**