

## **The complaint**

Mr B and Ms D complain that Santander UK Plc ('Santander') won't refund the money they lost after falling victim to an investment scam.

## **What happened**

The account is held in Mr B and Ms D's name, but Mr B communicated with the scammer, so I'll mainly refer to him in this decision.

In December 2020, Mr B retired and received a lump sum from his pension. He saw advertisements and promotions relating to cryptocurrency investments but didn't feel he had the knowledge or experience to invest.

In November 2022, Mr B saw an advertisement on a social media website promoting cryptocurrency trading which was endorsed by high profile celebrities with a company I'll refer to as D. D provided a platform for those who wanted to trade themselves or provided brokers to train beginners who hadn't traded before.

Mr B says D's website looked legitimate and trusted online review websites said D had an average rating of four stars out of five. Mr B also saw testimonials he believed were from clients of D and says he didn't see any negative information about D.

Mr B completed an enquiry form on D's website and was contacted by an account manager. Mr B says the account manager was very professional and knowledgeable and explained how the trading would work.

Mr B communicated with the account manager for several days before deciding to invest. Mr B opened an account with D and was asked to provide identification so D could complete Know Your Customer (KYC) checks, which Mr B says added to his confidence that they were genuine.

Mr B was told to open accounts with several cryptocurrency exchanges and to download a screen sharing software so his account manager could help him make trades.

Initially, Mr B invested £852, which he paid from a credit card. Mr B says the funds instantly showed on his trading account with D, and the account manager showed Mr B what trades to make.

Mr B saw his profits increase at what he considered was a reasonable rate over several weeks.

In December 2022, the account manager urged Mr B to invest further due to market conditions which he said would almost guarantee a profit.

Mr B says he was hesitant at first and asked a number of questions, but the account manager answered all of the questions with ease.

After making a few payments, Mr B didn't have any further funds to invest and was persuaded to take out loans. Mr B says the account manager applied for the loans on his behalf using the screen sharing software he'd downloaded.

These are the payments that Mr B made from his Santander account. Most of the payments were made to cryptocurrency wallets in Mr B's name, with the money transferred from those wallets to wallets controlled by the scammer. One payment was made directly to an account controlled by the scammer.

Date	Pmt	Details of transaction	Amount
14.11.2022	1	Payment made from credit card	£852.00
8.12.2022	2	Payment to cryptocurrency wallet	£16,200.00
9.12.2022	3	Payment to money transfer service	£4,814.40
9.12.2022	4	Payment to cryptocurrency platform (including fee)	£17.01
20.12.2022	5	Payment to cryptocurrency wallet	£16,100.00
30.12.2022	6	Payment to cryptocurrency wallet	£16,050.00
30.12.2022	7	Payment to cryptocurrency wallet	£15,950.00
31.12.2022	8	Payment to cryptocurrency wallet	£12,300.00
5.1.2023	9	Payment to cryptocurrency wallet	£16,050.00
7.1.2023	10	Payment to cryptocurrency wallet	£5,000.00
16.1.2028	11	Payment to C	£508.00
17.1.2023	12	Payment to cryptocurrency wallet	£9,950.00
3.2.2023	13	Payment to cryptocurrency wallet	£8,200.00

In January 2023, Mr B says his investment had matured and he tried to withdraw the funds. But he was told that capital gains tax had to be paid before the funds could be withdrawn. The account manager told Mr B that the tax rules had changed and that if Mr B had the money paid out to his cryptocurrency wallet it was likely his account would be suspended. Mr B was convinced to send further payments in January and February 2023 to release his investment.

In February 2023, Mr B received five payments into his joint account from two separate payees, which the account manager told him were from D. However, one of the payees raised a fraud claim with their bank for a payment of £4,500. Mr B and Ms D's account was blocked as a result and the scam was uncovered.

The £4,500 was sent back to the payee who raised the fraud claim, however three payments totalling £15,400 (being £1,000, £4,700, £4,700 and £5,000) remained in Mr B's account.

Mr B and Ms D raised a fraud claim with Santander and asked that they refund their loss.

Santander say all of the payments except for payment 11 were made to accounts in Mr B's name, so the Contingent Reimbursement Model Code (CRM Code) doesn't apply. Santander refunded payment 11 for £508 and also recovered £50.15 from one of the cryptocurrency exchanges.

Mr B and Ms D weren't happy with Santander's response, so they brought a complaint to our service.

An investigator looked into their complaint and upheld it. The investigator felt the first payment was so unusual and out of character that Santander should've intervened. They said if Santander had called Mr B to discuss the purpose of the payment, the scam would've been uncovered, and Mr B and Ms D's loss prevented. However, the investigator felt Mr B didn't do enough checks and that a reasonable person would've had concerns about the

investment. So, the investigator felt it fair for Mr B and Ms D to share responsibility for their loss with Santander.

Mr B and Ms D disagreed with the investigator's opinion, saying Mr B had completed checks before investing and had found positive reviews about D online. Mr B and Ms D don't believe there should be a deduction for contributory negligence.

Santander also disagreed with the investigator's opinion, saying Mr B and Ms D should raise fraud claims with the cryptocurrency wallet providers. Santander also say it's not clear what Mr B would've told them if they called him about the payments, so it's possible Mr B and Ms D's loss wouldn't have been prevented. Santander also referred to the Supreme Court's decision in *Philipp v Barclays Bank UK PLC* [2023] UKSC 25, saying they had a duty to execute Mr B's payment instructions.

Both parties asked for an ombudsman to review the case.

Having reviewed the case, I reached the same overall outcome as the investigator. But I was going to recommend a different redress, so I issued a provisional decision, giving both parties a chance to respond before I issued a final decision.

### **My provisional decision**

In my provisional decision I said:

In broad terms, the starting position in law is that Santander are expected to process payments that a customer authorises it to make, in accordance with the terms and conditions of the customer's account and the Payment Services Regulations (PSR's).

The Contingent Reimbursement Model Code (CRM Code) doesn't apply to payments made to an account in the customer's own name. So, the only payment that would be covered by the CRM Code is payment 11, which Santander have already refunded in full.

As the other payments were made to cryptocurrency wallets held in Mr B's name and under his control, I can't apply the CRM Code to those payments.

But there is an obligation on Santander to be on the lookout for, and to protect its customers from, potentially falling victim to fraud or scams. This includes monitoring accounts and identifying suspicious activity that appears out of character. In situations where potential fraud is identified, I would expect Santander to intervene and attempt to prevent losses for the customer.

#### *The credit card payment Mr B made*

I'm not satisfied that Santander should've been concerned when Mr B made his credit card payment of £852. It was for a fairly low value, so I wouldn't have expected Santander to have had any concerns or to have intervened.

#### *Should Santander have intervened when Mr B made the other payments?*

The second payment that Mr B made was for over £16,000. I think this payment was so unusual and out of character that Santander should've identified a potential fraud risk and intervened. I would've expected that intervention to have involved them contacting Mr B and asking him questions about the payment he was making.

Santander say they provided Mr B with a dynamic warning, but I'm not satisfied that an onscreen warning is proportionate considering the size of the payment, and it being made to a new payee.

Having reviewed Mr B and Ms D's previous account activity, I can see that they rarely made payments in excess of £3,000. The only other payment of a similar size was made in September 2022 for £18,999, but this was a one-off payment and not representative of the usual activity on the joint account.

In reaching my decision that Santander should've intervened, I have 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. 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 December 2022 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 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 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 do.

Santander say Mr B and Ms D should raise a complaint with the cryptocurrency exchanges, as the loss happened from those accounts. But there isn't a requirement for Mr B and Ms D to raise a complaint about all parties involved in the payment journey. They're entitled to raise a complaint solely about Santander, and it's for our service to decide whether Santander can fairly be held liable for Mr B and Ms D's loss.

*Would intervention have made a difference?*

If Santander had called Mr B to discuss the payment, I would've expected them to ask open and probing questions to find out about the payment purpose.

The payment was being made to an account in Mr B's own name, but this was a new account he'd set up. Mr B would've confirmed that he had control over the account, but I think it's likely that questioning around what the payment was for would've identified that Mr B was making an investment.

If Santander had then asked follow on questions about the investment, I think it's more likely than not Mr B would've told them he'd found the investment on a social media website, that it was endorsed by high profile celebrities, and that it involved cryptocurrency.

I haven't seen anything to suggest that Mr B was given a cover story by the scammers. In a call with Mr B in February 2023, Santander asked questions about the credits into his account and as part of that conversation Mr B told them he was investing and that someone was helping him. So, I think it's more likely than not that Mr B would've been honest in answering Santander's questions.

I think the base information that is likely to have been presented to Santander has all the tell-tale hallmarks of a cryptocurrency investment scam, which Santander should've been well aware of in December 2022. And, had Santander given Mr B an appropriate warning bringing to life how these scams work and what they look like, I think that it's more likely than not Mr B wouldn't have proceeded with the payments.

Mr B couldn't afford to lose this money as it was part of his pension and was needed to fund his retirement. So, I think if Santander told him it was likely he was the victim of a scam he wouldn't have continued with the payments and his loss would've been prevented.

On that basis, I think it's fair for Santander to refund Mr B and Ms D for payments two to 10 and 12 to 13. I have excluded payment 11 as that has already been refunded.

However, I also have to consider whether Mr B and Mrs D should share liability for their loss.

*Should Mr B and Ms D share liability for their loss with Santander?*

Before investing, Mr B says he checked D's website and searched online for information about D. Mr B says there were positive reviews with an average of 4 stars out of 5 and positive testimonials from satisfied customers of D.

Having looked online, I can see that there were initially positive reviews of D, as well as two online articles which explained their services and talked positively about D as a trading platform. It wasn't until later negative reviews started appearing online.

I haven't seen anything to suggest that when Mr B started making his payments, that a reasonable person would've been concerned about the information available about D. Mr B wasn't promised unrealistic terms, he saw his initial deposit show on his trading account immediately and watched his profits increase by a reasonable amount.

However, I think Mr B should've done further research and checked the legitimacy of D prior to making payment nine.

I say this because Mr B was being asked to pay capital gains tax on his investment, to the investment company, without being able to withdraw any of his money first. I think a reasonable person would've been concerned about this.

I have also seen messages between Mr B and the account manager, and I can see that prior to making payment nine, Mr B was starting to have concerns. In the messages, Mr B says "to be honest, no I'm not great after reading what the person from C (a cryptocurrency exchange) said about scams. I've been panicking like mad and severely stressed, I can't get it out of my mind".

Also, Mr B voiced concerns to the account manager at having taken out loans and what would happen if they weren't repaid by his investments.

I think at this point, a reasonable person would've been concerned with being asked to pay a large amount of money in relation to tax, when it was being paid to the investment firm. As a result, I think Mr B should've done further checks.

If Mr B had done further research, I think it's more likely than he would've found the negative reviews that were being posted online about D, which suggested D were a scam.

On that basis, I think it's fair for Mr B and Ms D to share liability for their loss from payment nine onwards and ask Santander to refund 50% of those payments.

But I don't think a deduction is fair on payments two to eight, so I'll ask Santander to refund 100% of those payments.

### *Redress*

I recommend Santander refund 100% of payments two to eight (inclusive) which comes to £81,413.41, and 50% of payments nine to 10 and 12 to 13, which comes to £19,600. This is a total refund of £101,013.41.

But Santander can deduct from that refund the £50.15 they recovered from one of the beneficiary accounts, as well as the £14,400 which was paid into Mr B and Ms D's account. This means the net refund that Mr B and Ms D should receive is £86,563.26. Santander should also pay 8% simple interest per year on the net refund, calculated from the date the payments were made until the date of settlement.

My provisional decision was that I upheld the complaint.

### **Responses to my provisional decision**

Mr B and Ms D responded saying they had no further evidence to provide and accepted the outcome.

Santander replied and raised an additional credit that Mr B and Ms D received on 21 January 2023 £1,000, which they believe should be deducted from the redress. Santander disagreed with the outcome but provided no new evidence or arguments.

Having reviewed Mr B and Ms D's bank statement, I agreed with Santander that the credit for £1,000 should be taken into account and would reduce the net refund (before interest) to

£85,563.26. So I contacted Mr B and Ms D to let them and ask for any additional comments before issuing my decision.

Mr B and Ms D accepted the amended redress.

### **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 no new evidence or points have been raised in relation to the overall outcome I reached and the reasoning behind that outcome, I see no reason to reach a different answer to my provisional decision.

However, I agree that the additional credit of £1,000 should be deducted from the redress, as I'm not satisfied that Mr B and Ms D are entitled to those funds.

#### *In summary*

I'm not satisfied that Santander should've intervened when Mr B and Ms D made the first payment. But, the second payment, was so unusual and out of character I would've expected Santander to contact Mr B and Ms D and ask questions about the payment.

If Santander had intervened and asked appropriate questions on payment two, I think the scam would've been uncovered and Mr B and Ms D's loss could've been prevented. But I think Mr B and Ms D should've had concerns about what they were asked to do before they made payment nine.

If Mr B and Ms D had done more checks at that point, I think it's more likely than not they would've found information online which indicated they were victims of a scam. So, I think they should share responsibility for their loss with Santander from payment nine onwards.

Payment 11 was already refunded by Santander, so I don't need to make a finding on this payment. Also, Mr B and Ms D received £15,400 into their account, which I'm not satisfied they're entitled to. Santander were able to recover £50.15 from the beneficiary bank.

I'm satisfied that Santander should refund 100% of payments two to eight, and 50% of payments 10 and 12 to 13. This is a total of £101,013.41. Santander can deduct from that the funds they recovered as well as the £15,400. So, the net refund should be £85,563.26.

### **Putting things right**

To put things right I require Santander UK Plc to:

- Refund Mr B and Ms D £85,563.26.
- Pay 8% simple interest per year on that refund, calculated from the date of the
- payments until the date of settlement.\*

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

**My final decision**

My final decision is that I uphold this complaint and require Santander UK Plc to compensate Mr B and Ms D, as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms D to accept or reject my decision before 26 December 2024.

Lisa Lowe  
**Ombudsman**