

complaint

Ms C and others are executors for the late Mrs C's estate. They bring a complaint against Santander UK Plc as it won't refund money Mrs C lost when she fell victim to an investment scam.

I'll only refer to Ms C throughout, (and call her 'the representative' to avoid any confusion), as she is the lead party bringing the complaint and whom we have been corresponding with on behalf of the estate.

background

In March 2015, Santander became alerted to Mrs C potentially being the victim of an investment scam when it was asked by police for information. As a result it opened a fraud investigation and contacted Mrs C about transactions she had been making. It also arranged for police to visit her. I understand that Mrs C didn't have any concerns about payments she had made, but as the police were still concerned, they contacted a family member.

In June 2015 a power of attorney was registered on Mrs C's accounts with Santander. She sadly died in July 2015 and Santander was notified of her death in the following September. Around this time, following a police investigation, two people were charged in connection with a wine investment fraud. It transpires Mrs C was one of the investors that had been defrauded. As a result of the investigation and subsequent court action, the estate received back £124,064.78.

In 2017, the representative complained to Santander about payments made by Mrs C from her accounts. She didn't think Santander had treated Mrs C fairly by allowing the payments to be made. Santander was satisfied it had spoken with Mrs C on each occasion as it was concerned about the payment requests, but that they were ultimately completed on her insistence. It also referred to the police involvement in 2015. It therefore didn't believe it had acted outside of the terms and conditions of the accounts or failed in its duties or obligations.

The representative asked us to look into the matter. She said Mrs C had been disabled and suffering with a brain injury and so wasn't mentally capable of understanding the risks of the transactions she was making. She also complained this had been going on since 2009, and so any police action in 2015 was too late.

It was unclear to our investigator which transactions the estate was saying should never have been allowed. As the representative had provided information about two wine companies that Mrs C had invested into, which had turned out to be fraudulent, the investigator concentrated on those which were to wine companies. And she upheld the complaint as she felt the payments were highly suspicious and out of character; and as Santander said it had been concerned, it should have done more to raise its concerns sooner. The investigator recommended to Santander that it reimburse the estate.

Santander disagreed and has asked for the matter to be referred to an ombudsman.

The transactions

Unfortunately, Mrs C died soon after family members had been made aware she might have been the victim of fraud. And the estate hasn't provided a list of the transactions which it thinks should be reimbursed – this is the starting position I would expect for any complaint of

this nature. It also appears that Mrs C received payments from businesses that we know were defrauding investors. So it would appear that some of Mrs C's investments may have been genuine. The representative has acknowledged recently that there were some genuine and some fraudulent investments, but she cannot distinguish which or provide any more information than she already has.

This has made this case quite difficult. Mrs C held a number of accounts with Santander. It has provided us with a transaction list from when the accounts were opened, to closure. They show she was making and receiving regular and numerous sizeable transactions, including in relation to investments. For example, in August 2012, Mrs C received around £255,000 as a result of share dealing. And she attempted to pay out a cheque for a similar amount just a few days later. This is by no means the only example; Mrs C was regularly in receipt of and making payments from anywhere between a few hundred pounds to many thousands of pounds. And these included share dividends, proceeds from investment businesses and others.

The representative has provided some information about two wine investment companies – Blakeney Bridge Wine Ltd which was discovered to be part of an investment scam involving a number of companies and wound up on the direction of the High Court in November 2015; and Clarex Wines whose perpetrators were imprisoned in 2017. But these are the only companies that we have been provided any information about.

In the absence of a specific list of transactions from the estate, or any other evidence that other transactions made by Mrs C were made as a result of an investment scam, it's fair that I only consider those transactions which were made to the two specific wine investment companies mentioned. I know the investigator also included another wine investment company, but my research has shown that company was genuine, albeit that it went into administration – scammers were targeting customers of the company rather than the company itself being a scam. I therefore haven't included this.

Below is a table containing details of the payments which I will consider. This table includes the transactions from all of Mrs C's accounts held with Santander.

Date	Debit amount	Credit amount	To/from	Method
28/05/2012	£3,810		Blakeney Bridge	card
03/09/2012	£165,000		Blakeney Bridge	transfer
31/10/2012	£20,000		Blakeney Bridge	transfer
30/11/2012	£9,000		Blakeney Bridge	transfer
31/01/2013	£23,000		Clarex Wines	transfer
06/02/2013	£34,000		Clarex Wines	transfer
16/02/2013	£8,000		Clarex Wines	transfer
22/02/2013		£2,000	Clarex Wines	transfer
26/04/2013		£5,000	Clarex Wines	transfer
28/05/2013		£18,000	Clarex Wines	transfer
11/06/2013	£30,000		Clarex Wines	transfer
20/06/2013	£109,000		Clarex Wines	transfer
26/06/2013	£100,000		Clarex Wines	transfer
01/07/2013		£30,000	Clarex Wines	transfer
09/09/2013		£3,000	Clarex Wines	transfer
12/06/2014	£9,900		Blakeney Bridge	card
10/07/2014	£3,750		Blakeney Bridge	card
10/07/2014	£1,000		Blakeney Bridge	card

I issued my provisional findings on 21 May 2021, explaining why I wasn't minded to uphold the complaint.

I said:

Mrs C received back £58,000 from her investments with Clarex Wine. The estate also received back £124,064.78 following the court action in relation to the same business. Mrs C invested a total of £516,460 with both businesses. As funds totalling £182,064.78 have been paid to Mrs C or her estate already, that leaves £334,395.22 for me to consider.

The representative has complained that Mrs C has been scammed since 2009, and that she was disabled and had a brain injury which meant she was not equipped mentally to know the difference between a sound financial investment and fraud. However, Santander has provided evidence to show the earliest an account was open with it was 2011. So if the representative is right, it would appear some of her concerns relate to a period before Santander's involvement, so is not something I can comment on here. And although Mrs C was disabled, I haven't been presented with any persuasive evidence that she was mentally incapable of handling her finances. Wine is a genuine investment area. The representative has provided some correspondence between Mrs C and the bonded warehouse (where I understand wine was stored and transferred between accounts and such like). Mrs C's instructions and queries were clear, concise, and coherent such that it would appear Mrs C was capable of handling her affairs. Not only that, her accounts also show that she held numerous different types of investment, such as shares in single companies and other portfolios. Contrary to the representative's assertions it would appear Mrs C had quite a sophisticated investment portfolio and the experience that came with that.

Although these transactions took place sometime ago now, between 2012 and 2014, fraud and scams were and continue to be ever more sophisticated. Even the most savvy of investors, and the most experienced of people, from all walks of life and professions fall victim to such scams. But that of itself doesn't mean the person scammed isn't mentally equipped to make investment decisions more generally or would necessarily have been able to spot a scam here. In the absence of persuasive evidence otherwise, I proceed on the basis that Mrs C was of sound mind and able to handle her own financial affairs.

There isn't any dispute that Mrs C authorised the payments out of her account to the scammers. She was deceived into believing she was making legitimate investments into various different wines. She received correspondence such as invoices, confirmation of wine being bought and sold for her portfolio and even money back into her account. These all likely led to an air of authenticity about what was taking place.

The payments from Mrs C were 'authorised' even though she was the victim of a scam. She either used her security credentials to make card payments, or she went to branch. So, although she didn't intend to get scammed, under the Payment Services Regulations 2009 (which apply to these transactions) and the general terms and conditions of bank accounts, Mrs C is presumed liable in the first instance.

Taking into account the law, regulators' rules and guidance, any 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 (amongst 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, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.*

I am aware that Santander considers too high a standard has been applied to what is expected of it in terms of raising concerns and preventing a consumer from coming to financial harm. I am also aware of the recent Philipp v Barclays Bank plc judgment where the judge took a different view about the so-called Quincecare duty on a bank to protect customers from the risk of financial harm due to fraud. I'm not suggesting the Quincecare duty applies to this case. And notwithstanding what the judge said, we have a duty to resolve complaints based on what we think is fair and reasonable in all the circumstances of the case, taking into account not just the law, but also regulators' rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time.

Mrs C's first payment to a scammer was in May 2012 for £3,810. Prior to this she had paid a cheque out of her accounts for £30,000. She had also received sizeable transactions into her accounts. I'm therefore not persuaded there is anything uncharacteristic or unusual about this payment, such that I would have expected it to trigger any fraud alerts before her instruction to make the payment was followed.

The next payment to a scammer was for £165,000. I think the reasonable person would agree that was objectively a large transaction. However, that doesn't necessarily mean it's uncharacteristic for this particular consumer. Mrs C had received a payment into her account from an investment, of over £255,000, just a few days before. And she had attempted sending a cheque for the same amount shortly after. And a cheque for £104,000 did debit her account just a few days after the transaction in question. The table above shows the other transactions made. A review of Mrs C's transactions across the three accounts these payments were made from, shows that she was regularly receiving and sending payments of many thousands of pounds, for amounts of both more and less than the transactions listed above. It therefore doesn't seem to me that the transactions were necessarily unusual or uncharacteristic such that I would have expected Santander to intervene.

Nevertheless, Santander has argued that it did intervene on all the of transactions carried out in branch (those listed as transfers). So I have considered whether it did enough; and if it didn't, whether things would have happened differently, such that it ought to reimburse the estate.

Santander doesn't have any notes of the discussions it had with Mrs C when making the transactions in branch. This is unfortunate, but not surprising given the length of time since the transactions took place. What it has told us is based on its usual processes and procedures – what should have happened – and recollections from a previous branch manager who had often dealt with Mrs C. We're told that a series of questions would have

been asked about the transactions and a scam warning given, with the results from those questions being a 'pay' or 'no pay' outcome. If the outcome was 'no pay' the process was to contact its fraud contact centre, who would then have further discussions with the account holder – recordings of the calls aren't available. The manager's recollections are that Mrs C was questioned on each occasion and that she was largely met with a 'no pay' response but that as she was insistent on making the transactions they went ahead.

Without records of the discussions it's very difficult to know whether any warnings given were sufficient or whether the bank should have gone further. But even if I thought the bank ought to have done more, I don't think this would have stopped the transactions being made. I say this because generally a warning in relation to investment scams would be to discuss matters with a financial adviser and to carry out research - including with the Financial Conduct Authority - to ensure the investment was legitimate before going ahead with any transactions.

As I have mentioned before, wine is a legitimate investment area. I understand from the communication between the bonded warehouse and Mrs C that she had a broker who was advising her on her wine investments. I don't know if that person was a financial adviser (and so authorised by the regulator for financial advice) or simply a wine broker. But she nevertheless had someone she was discussing the wine investments with. And as the investments were for wine, which is an unregulated investment, they wouldn't have appeared on the Financial Conduct Authority's website. Both businesses were registered on Companies House, and aside from an article about high prices by Blakeney Bridge in 2013, I haven't been able to locate any information on-line that would indicate Mrs C would have been able to uncover the businesses were fraudulent. So even if Santander had warned Mrs C that she might be being scammed and that she ought to speak with someone and carry out research, I'm not persuaded that would have uncovered the potential for fraud, such that she would have been deterred from making payment. In saying this, I'm mindful that the police were corresponding with her as early as November 2013 about her investments with Clarex Wines and that some of her wine had been restrained while an investigation was ongoing. Yet despite knowing the police were investigating some of her investments, Mrs C continued to make wine investments with Blakeney Bridge (albeit for much smaller sums). And when the police contacted her in 2015, she remained unconcerned about her investments.

Given Santander's concerns at the time of the transactions, I have thought very carefully about whether it would have been justified in refusing to follow Mrs C's instructions to send money, following its attempted interventions. This would be a significant step for any bank given its regulatory obligations as a payment services provider not to delay instructions unduly. And I've borne in mind that even if Santander ought to have done more, a bank could be held legally liable for losses – including investment losses - in refusing to allow a customer access to their money. I think if Santander had refused to allow the transactions, that would likely have prompted a complaint or some other contact from Mrs C insisting payment be made. So even if Santander had taken such drastic action, I think Mrs C would probably have taken steps to make sure payments were executed in accordance with her legal mandate.

It follows that I'm not currently minded to find Santander should reimburse any of the transactions to the estate – I'm not persuaded further intervention by Santander at the material times would have resulted in Mrs C uncovering the potential scams and so ceasing to make payments.

Santander has confirmed it has nothing further to add. The representative doesn't accept the outcome and disagrees with the findings. In summary, she has said:

- Mrs C wasn't an experienced investor; she inherited her portfolio and until the death of her financial adviser in 2009, the portfolio was managed by him. Mrs C didn't get a new financial adviser and she had no experience in making investments.
- Mrs C was brain damaged as a result of an accident many years ago, making her completely incompetent of making rational decisions. In support of this, she has provided some medical information from 2015. That information shows Mrs C lacked capacity to make decisions about her health, and the medical professional doubted she had capacity to manage her finances.
- The representative believes Santander is guilty of wilful neglect and the fact there are no notes of the discussions between the bank is extremely worrying, completely unacceptable and goes to prove the lack of checks done. She considers not enough was done to support a vulnerable client who clearly showed signs of mental instability through her erratic dealings with the bank.
- It is incorrect to assume Mrs C would have found another way to pay the scammers if the bank had refused her requests and believes Mrs C's husband would have been alerted to the seriousness of the situation and intervened; the bank didn't notify anyone and her family were kept in the dark.

Further to the information provided, we asked more questions of the representative:

- The medical information suggested it was Mrs C and her husband that had made a wine investment. The representative has confirmed it was only Mrs C making the investments.
- We asked what provision the representative and/or the family had put in place to manage Mrs C's finances if she had been deemed incapable of handling her own affairs. The representative has said there was an attempt to get Mrs C sectioned under the Mental Health Act in 2013/2014, which was unsuccessful and so they managed her with medication instead. She also explained that no provisions were put in place as Mrs C's mental capacity hadn't necessarily been brought to her attention; but she was on a list of concern at the GP. She has also explained they had no idea Mrs C had the amount of funds she did and were only made aware of this when the Fraud Squad turned up at the house. The representative added that Mrs C was extremely hostile to them assisting in her affairs and it wasn't until she was very ill that she agreed to a power of attorney.
- Mrs C's husband had been in the bank with her, but the bank wouldn't discuss anything with him as it was confidential.

The representative has questioned a comment within my decision that '...the estate hasn't provided a list of transactions which it thinks should be reimbursed', as she believes it was obvious the transactions in question are detailed in the bank account copies and believes this is enough.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I understand the representative feels very strongly about this complaint. And I would like to reassure her and the other executors that I have considered the further information provided

very carefully. But having done so, I've not been persuaded to alter my provisional findings. As I have set out my provisional findings above, rather than repeat those here I have focussed on responding to the representative's points.

Firstly, I turn to the representative's question about a comment I made about the list of transactions. In any complaint of this nature we would expect those bringing the complaint to know which transactions they are disputing as being the result of a scam. Here, Mrs C held several accounts with Santander over several years, with many hundreds if not thousands of transactions having been made. As an impartial party it isn't for us to second guess which transactions are genuine and which Mrs C was duped into making. And the representative acknowledged herself that some transactions were genuine but couldn't provide information on which – this is borne out to some extent by Mrs C receiving funds back as a result of some of the wine investments she made. But we don't know which were genuine – it could have been the transaction for £165,000 or £9,000 or any combination of the transactions listed above. It wouldn't be fair or reasonable for us to investigate genuine transactions as potentially fraudulent if there is no potential case to answer. A person making an allegation does have the initial burden of proving there is a case to answer on the balance of probabilities. An accused wrongdoer does not have to do all the legwork (to disprove the allegations); and nor does the tribunal, whose role is just to adjudicate independently and impartially on the evidence and arguments which the parties choose to present.

Nevertheless we do understand that where a complaint has been brought on behalf of another, or on behalf of an estate, such detail may be more difficult to provide. And so I put together the above list based on the information provided about two wine investment businesses that had been involved in criminal proceedings. That was arguably going further than strictly required – but felt the fair and reasonable thing to do in the circumstances. Along with the investigator, I felt this was a fair place to start given what we know about them. Neither the representative nor Santander has disputed that list as being a fair list of transactions to investigate and decide on, and so, in the absence of anything better, the list remains my basis for deciding this case.

The representative has provided information and evidence in support of Mrs C not being mentally capable of handling her financial affairs. Although I accept the medical information provided shows that in May 2015 a consultant very much doubted Mrs C had the capacity to manage her finances, this is nearly a year after the last transaction in dispute was made. And although the representative has said they had earlier attempted to help Mrs C but it wasn't accepted or successful, she has also explained that no provisions were put in place to help with Mrs C's finances as her mental capacity hadn't been brought to the representative's attention. I do question if close family members weren't fully aware of Mrs C's mental state or weren't concerned enough to put provisions in place to manage her affairs and finances (a court order could have been obtained if necessary) how a corporate body such as Santander ought to have known or realised Mrs C may not have been fully aware of what she was doing, such that it ought to have put additional provisions in place.

The representative has referred to Mrs C's erratic dealings with the bank. I presume she is referring to the transactions themselves as she hasn't put forward anything else, and I accept that with the benefit of hindsight the representative sees these as erratic. But as I found before, Mrs C was receiving and sending large sums to and from her accounts on a very regular basis. I'm not persuaded the transactions themselves are erratic or are evidence in and of themselves of a lack of mental capacity.

I understand why the representative is worried about the lack of notes of any of the discussions Santander had in branch with Mrs C about the transactions. That is understandable given the nature of what happened. But I disagree that is proof of a lack of checks actually taking place. Businesses aren't required to keep information or records indefinitely; that would be contrary to data protection requirements. And Mrs C ceased to be a customer in 2015. That Santander no longer has records doesn't mean the checks weren't done – although I accept that is a possibility – it just means there are no longer any records.

I can only fairly ask Santander to reimburse transactions if I find it should have done more to alert Mrs C to possible fraud *and* that would have resulted in the fraud being uncovered and/or the transactions not taking place. As set out in my provisional findings, even had I found Santander should have done more, I wasn't persuaded that would have resulted in the transactions not taking place.

Having considered the further information provided in response to my provisional decision, I'm still not persuaded the fraud would have been uncovered or that the transactions wouldn't have been carried out. Firstly, and as set out previously, the information that was available about the two wine investment businesses didn't point to either of them being illegitimate in any way, for the reasons already given. The representative hasn't provided any information to contradict that or to show it would have become apparent. And secondly both the medical information and the representative's submissions since my provisional decision suggest Mrs C was very strong-willed and unlikely to have listened to advice not to proceed (the representative has said Mrs C was extremely hostile to being helped with her affairs). This accords with Santander's submissions about its branch staff's interactions with Mrs C. Given that, I consider it highly unlikely that Mrs C would have decided not to proceed with the transactions, even if I found Santander ought to have provided more or better warnings.

Finally, the representative believes if Santander had refused to carry out the transactions Mrs C's husband would have been alerted to the seriousness of the situation and intervened, but the bank didn't notify anyone and kept the family in dark. Again I fully appreciate and understand the points the representative is making. But unless Mrs C had provided express permission for Santander to discuss her accounts with family members, it wouldn't have been lawfully able to notify the family of any concerns – to have done so would have breached data protection obligations. And I'm not quite sure how Mrs C's husband would have been alerted to what was happening simply from Santander refusing to carry out some or all of the transactions; the accounts were solely Mrs C's and the representative has said that she was extremely hostile to anyone helping with her affairs, so I'm not persuaded Mrs C would necessarily have turned to her husband or extended family in that situation.

I have thought about this case very carefully, and I understand and accept this has been difficult for all concerned. But I remain unpersuaded that further intervention by Santander at material times would have resulted in Mrs C (or the bank) uncovering the potential scams or deciding not to make (or allow) the transactions in question. It follows that I won't be asking Santander to reimburse any of them.

my final decision

For the reasons given, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the executors to Mrs C's estate to accept or reject my decision before 2 August 2021.

Claire Hopkins

ombudsman