

## The complaint

Mr G is unhappy that Santander UK Plc hasn't refunded the £35,000 he lost after he was the victim of an investment scam.

## What happened

In July 2022 Mr G made two transactions totalling £35,000 to a cryptocurrency provider (I will refer to as N) having seen an advert on the website of a famous money saving expert. The cryptocurrency investment advert was further endorsed by a famous celebrity. The money was moved from there onto the scammer.

Santander felt all the relevant warnings were given and it called on both occasions to discuss the payments. Therefore, it didn't think it was responsible for his loss. Our investigator felt the initial transfer of £10,000 was unusual and was correctly identified by Santander at the time. However, she didn't think Santander did enough during the intervention call (or later calls) to expose the scam and the warnings given weren't effective. She also felt Mr G should share some responsibility for the loss so recommended Santander refund 50% of Mr G's losses along with interest. Mr G accepted the view, but Santander didn't agree. So, the case has come to me for a decision.

I issued my provisional decision on 8 September 2023. Mr G accepted that decision Santander did not. It said:

- Mr G made payments to N - a genuine electronic money institution. Mr G set up this payment himself via mobile banking.
- Mr G selected his payments reason - investment purposes - and the bank provided him with the following warning:
  - *If you've been cold-called or contacted out of the blue about an investment opportunity, this is highly likely to be a scam.*
  - *Please check the company details thoroughly, including on the Financial Conduct Authorities website ([fca.org.uk](https://www.fca.org.uk)), before transferring any money. If you're at all nervous, please cancel this payment and call us immediately.*
- Mr G was also shown Santander's dynamic warnings.
- It also had a discussion with Mr G on 22 July 2022 and I acknowledged in my provisional decision that some aspects of this call were good. It correctly established that the payment was going to a crypto currency provider, and it did mention fraud and scams. It explained to Mr G why the payment was stopped as there are lot of scams around cryptocurrency, and it asked whether Mr G had set it up himself. It then went on to discuss information on cryptocurrency on the FCA website and whether Mr G had researched it properly. It also highlighted about the lure of big returns and fake evidence regarding investment returns.
- The customer did say during a conversation with the bank, that he had studied about cryptocurrency, and he wanted to have a go.

- It established that the customer was comfortable with the checks that he had carried out and based on what the customer told Santander it did not suspect he was at risk of harm.
- The bank has a strict duty, to carry out the instruction promptly without concerning itself with the “wisdom or risks of the customer’s payment decisions”. Santander is sure that I will be fully aware of the Supreme Court’s binding decision in *Philipp v Barclays Bank plc.* which 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.”.
- In this case it carried out the customer’s payment instructions and there was no reason to believe anything else was happening.
- It feels that the calls were appropriate, based on the payment purpose selected and the responses the customer gave it. Santander is a payment service provider and has to be mindful that it cannot cover all crypto related scenarios all of the time. Not all crypto scams are celebrity endorsed and while this may have resonated with Mr G, it could well not resonate with the next customer. Every scam scenario is different and if the customer is not honest with the bank, then it can only act on the information that is provided.
- Santander is not the police: it is the customer’s bank. There is an expectation that responses from Mr G would be truthful. Even the customer in his own testimony, felt that Santander were asking excessive questions as he stated within the call “that your questions are worse than a police investigation”.
- It also needs to bear in mind that not every transaction to cryptocurrency is a scam and the bank does have to balance accordingly.
- It established during the calls by asking the relevant questions, who had opened the account and who had control and that the funds were paid into an account in Mr G’s own name. It doesn’t believe Santander breached any duty of care it owed to the customer.
- The bank was not aware that any of the individual payment instructions from the customer arose in the context of an attempt to misappropriate their funds.
- The ability to bring the scam to life can also rely on the responses and information that the customer provides the bank with. In my provisional decision - I referred to a hesitation from the customer during the bank’s call with Mr G on 30 July 2022. But it feels, there wasn’t enough of a hesitation to identify the need to question further.
- Santander feels that it needs to take into consideration, that listening to a call after the event, (when we know it is a scam) can make one perceive things differently.
- It firmly believes its customer should be pursuing his claim/complaint with N either independently or via this service. Therefore, any potential recourse should sit with them and not Santander. N should be accountable for any losses that have arisen from its accounts in the same way I am holding Santander responsible.
- It doesn’t feel that Santander should be accountable for the remaining 50% as the customer decided to transfer his funds to an investment because of a cold call, with very little research into the company he believed he was paying. No additional research was completed by the customer into crypto investments or checks on the Financial Conduct Authority to verify the company he was investing his funds into.

- While it says it empathises with Mr G, given that it doesn't feel that Santander is liable for the loss here, it does not agree to a £250 payment for distress and inconvenience when Santander have correctly executed these payments and in line with Mr G's instructions to the bank.
- The customer has willingly made these payments after wanting to invest his own money, sending funds from his own account to another account of his own. From the information available, it seems N have not reviewed the claim which Santander feels is imperative especially where the loss occurred from that said account and where Santander has no direct connection to the criminal payments or the actual loss.
- It feels the liability in this instance cannot sit with Santander as the customer authorised transfers of his own funds to his own account. It would welcome a final decision which clearly articulates which rules, regulations, and practices I am relying on and why when determining this case, including an understanding of my position in light of the Philipp judgement.

### **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.

I have considered Santander's response to my provisional decision. Having done so, I see no reason to depart from the conclusions set out in my provisional decision. I have concluded that the fair and reasonable outcome, in all the circumstances, would be to uphold this complaint in part.

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr G's account is that he is responsible for payments he's authorised himself. 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.

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.

Turning to Santander's own terms and conditions, from the time of the transactions under section 6.6 it says

*We can refuse any Payment Instruction, if:*

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

and under 6.9.3 it says

*..... A faster payment will normally reach the bank of the person you want to pay in the timescale set out .... provided that .... d) we do not suspect fraudulent activity on your account. (There may be a delay in processing the payment while fraud prevention checks take place. We may need to contact you if we suspect that a payment is fraudulent). If we contact you, this may be by phone and may include an automated message.*

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 fact do in this case when Mr G made several of the transfers).

The detailed reasoning for this has been set out in substantial detail in recent decisions to Santander, so I don't intend to repeat it 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 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 (and Santander did in fact do in this case on 22 July 2022 and 30 July 2022).
- Have 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.

*Should Santander have fairly and reasonably made further enquiries before it processed Mr G's payments and would that have prevented the loss?*

So I've considered whether Santander should have identified that Mr G was potentially at risk of fraud as a result of the payments he made, or otherwise done more to protect him. The first transaction was for £10,000 and Santander did in fact identify a scam risk and stopped the payment. So its arguments regarding the recent court case of Philipp v Barclays seem somewhat contradictory.

So, the bank was sufficiently concerned about the possibility of fraud to ask questions and warn of fraud and scams. Accordingly, it's just a question of whether it did enough in all the circumstances.

I appreciate Santander has sent the online warnings it says Mr G would have seen – but Santander was concerned enough to intervene further here and so I need to consider whether that intervention went far enough.

Listening to the first call on 22 July 2022, I do accept that aspects of the call are good. Santander had noticed the payment was being made to N (a cryptocurrency provider) and was calling to check whether Mr G had authorised the payment. The agent did establish the payment was going to a cryptocurrency provider and she did tell Mr G there are a lot of fraud and scams with cryptocurrency. The agent asked whether the account had been opened on anyone else's instructions or whether Mr G had been cold called. But here it appears that Mr G opened the account himself and he believed no one else had access to it (albeit that may not actually have been the case). Mr G considered he had initiated contact with the trader through the advert – rather than being cold called – so I don't think these questions would have resonated or that he intentionally misled Santander. There is also a lot of questioning about the genuine cryptocurrency provider – N - which was not the issue here.

Cryptocurrency is not regulated so referring to unregulated investments would also not necessarily have caused concern. I appreciate Mr G said he was prepared to 'take a punt' but investing in a genuine investment with a known risk/reward is different to the risk of losing all your money to a scammer with no prospects of any rewards at all.

Whilst there are some warnings that he may not be able to recover the money and the call handler mentions that victims of these types of scams are being incited by high returns and being helped by criminals to set up wallets - I don't think the call goes far enough. Whilst it does talk about the specific scam that Mr G fell victim to, and some basic questions are asked, I do think Santander could have probed more – for example it could have asked about where he'd first seen the opportunity and establishing whether a 'trader' was involved at all.

And if Santander had given Mr G some warnings about cryptocurrency scams including telling him that scam companies often contact their victims after they've reacted to an advert involving celebrities or often involve a third party 'trader'. I appreciate Santander cannot cover off every cryptocurrency scam scenario. But with further questioning, I think Santander would have been concerned and put on notice that Mr G was falling victim to a scam. I think this would have caused sufficient doubt in Mr G's mind not to proceed with the payment. As it did later, after watching a documentary on cryptocurrency scams. In other words, if Santander had carried out further or better questioning in line with the bank's duty of care, it seems probable that Mr G would have become credulous about the scam in time and stopped the payment in its tracks. The fraud would have failed; and Mr G would not have lost £10,000 or the £25,000 that followed.

As I've said above – I think if Santander had done more when Mr G made the first transfer, I don't think he would have made the second transfer of £25,000 either. But I have thought about the later calls and whether Santander did enough in those too. The first call regarding the £25,000 does not go far enough (and goes no further than the call on 22 July 2022). Santander itself acknowledged in a later call that the correct process wasn't followed, and this led to a subsequent call when Mr G was called into the branch on 30 July 2022.

Again, I do accept that the call on 30 July 2022 has aspects that are good. But there are aspects that appear to be read off a script and often in quite a hurried fashion with many closed questions. Santander suggests Mr G was dishonest when answering the question about whether he'd seen the opportunity on social media. But it's not clear whether Mr G saw the 'advert' on a social media platform. Santander's initial complaint handling call notes suggests he'd seen the opportunity on a website belonging to a famous money saving expert. I appreciate there are fake adverts like this around and many on social media but it's not clear whether that's where Mr G saw the advert.

Around 10 minutes into the call – I think the call handler had an opportunity to probe further - but he continues to read off the script. He asks whether Mr G has called the company directly? Mr G hesitates and explains *'it's though N'*. Rather than picking up on the hesitation and exploring how he'd come across N further - the call handler just asks him to answer, *'yes or no'*. I think this was a clear opportunity to go off script and probe Mr G about what he had just said. Mr G then starts to say... *'I've just spoken to a broker...'* and the call handler interrupts and says *we'll leave it at that*.

So Mr G mentions a broker and this is not explored any further. I appreciate the call handler goes onto say this could be a scam, but he doesn't say anything to bring to life for Mr G what cryptocurrency scams look or feel like. He doesn't explore through better opening questioning with Mr G - nor does he pick up on the cues Mr G gives here. Had the point about the broker been explored and Santander probed Mr G about how he'd come across the broker I think Mr G would have told Santander about the advert he'd seen. Santander could have warned about celebrity endorsed investment and fake traders and this would have caused sufficient doubt in Mr G's mind not to proceed with the payment.

And if Santander considers Mr G changed his narrative or had lied or was told to lie by the scammer – I don't think he did so intentionally. There are also signs here (and I accept that Santander might not have been aware at the time the transfers were made) that Mr G had vulnerabilities. It comes across during Santander's investigation. During a call on 10 August 2022 Mr G told Santander his 'memory fades'. And he seemed confused/unable to recall basic facts when Santander first started to investigate matters with him on 20 September 2022. Of course, it was known to Santander that Mr G was in his mid-70s and 'potentially' a vulnerable consumer – if only by virtue of his age.

Given this and its reasons to have multiple calls by this stage – it does seem Santander did have quite serious concerns.

*Should Santander be fairly and reasonably held responsible for Mr G's loss?*

In reaching my decision about what is fair and reasonable, I have taken into account that Mr G transferred the money to an account in his own name, rather than directly to the fraudster. But it's not entirely clear whether he remained fully in control of his money after he made the payments from his Santander account.

In any event, for the reasons I have set out above, I am satisfied that it would be fair to hold Santander responsible for Mr G's losses (subject to a deduction for his own contribution - which I will come on to). As I have explained, the potential for cryptocurrency scams ought to have been well known to Santander and as a matter of good practice Santander should fairly and reasonably have been on the look-out for payments presenting an additional scam risk including those involving cryptocurrency scams. I'm satisfied Santander should fairly and reasonably have probed further and, if it had, it is more likely than not that the scam would have been exposed and Mr G would not have lost his money. In those circumstances I am satisfied it is fair to hold Santander responsible for Mr G's loss.

The payments weren't made to a regulated business but even if Mr G potentially has a claim against N in respect of its actions - N 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 two financial businesses about connected circumstances, Mr G has not referred a complaint about N and DISP does not empower me to instruct Mr G to make or refer a complaint about another business (and I don't believe he'd be able to refer to a complaint about N to this service in any event).

I am required to consider the complaint in front of me. I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is a possibility that Mr G may have cause to complain against N, I am not persuaded it would be fair to reduce the award solely for that reason. Mr G is entitled to choose to complain only about Santander and I am satisfied that Santander could have prevented the losses he suffered if it had acted fairly and reasonably.

*Could Mr G have done more to mitigate his losses?*

I've thought carefully about what Santander's obligations were, as set out above. But another key issue is whether Mr G acted reasonably taking into account all the circumstances of the scam. So, I have also considered whether Mr G should share in the responsibility for his losses. I won't go into detail here as Mr G accepted the investigator's conclusions but for completeness I agree – broadly for the same reasons. The method of the communications he had with the scammer and lack of official documentation should have been a sign that things weren't quite right. By his own admission Mr G did say he didn't check things further.

On that basis, I think it's reasonable for Mr G to share the responsibility with Santander and reduce the refund on the payments by 50%.

I've also thought about whether Santander could have done more to help Mr G to recover the funds once it was made aware of the scam, but I don't think it could as the payment went to a legitimate cryptocurrency provider which carried out the service it was required to. So, I don't think Santander could reasonably have done more to recover the funds.

Finally, I've considered whether Santander should pay Mr G compensation for the distress and inconvenience he's experienced as a result of Santander's actions. In considering this, I've specifically thought about the impact of Santander's actions, rather than the impact of the crime itself. Santander's failure to sufficiently act has had an impact on Mr G, not least because he has been facing the very real possibility that he would not get his money back. As I've explained, Santander had an opportunity to prevent the scam and the loss. For these reasons, I'm satisfied that Santander should also pay Mr G £250 for distress and inconvenience.

### **Putting things right**

To put things right for Mr G Santander UK Plc should

- Reimburse 50% of Mr G's loss (so £17,500)
- As Mr G has been deprived of the use of this money – I consider it fairest Santander pay interest on the above refund calculated at 8% simple per year \* from the date the transactions were made to the date of settlement.
- Pay £250 for the distress and inconvenience caused.

\*If Santander UK Plc considers that it's required by HM Revenue & Customs to deduct income tax from the interest award, it should tell Mr G how much it's taken off. It should also provide a tax deduction certificate if Mr G asks for one, so the tax can be reclaimed from HM Revenue & Customs if appropriate.

Santander must pay the compensation within 28 days of the date on which we tell it Mr G accepts my final decision.

### **My final decision**

My final decision is that I uphold this complaint in part.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 28 February 2024.

Kathryn Milne  
**Ombudsman**