

The complaint

Mr H is unhappy that Santander UK Plc (“Santander”) won’t refund all the money he’s lost as a result of a third-party scam.

What happened

The circumstances that led to this complaint are well known to both parties, so I won’t repeat them in detail here. But, in summary:

Mr H told us he saw an advert for cryptocurrency endorsed by a celebrity on a social media platform. Mr H says he clicked on a link and then received a call from an organisation I will refer to as G. G was a clone of a legitimate organisation. Between 17 March 2022 and 24 March 2022 Mr M made seven payments (summarised in the table below) to an account the scammers set up in Mr H’s name with an institution I will refer to as R. From R the money went to buy cryptocurrency.

transaction #	date	transfer amount	deposit	deposit source
1	17/03/2022	£2,000.00		
2	22/03/2022	£15,000.00		
3	23/03/2022	£6,000.00		
	24/03/2022		£20,000	loan L
4	24/03/2022	£10,500.00		
5	24/03/2022	£8,500.00		
6	24/03/2022	£1,000.00		
			£25,000	loan Z
7	26/03/2022	£25,000.00		

After the initial investments Mr H asked to withdraw his money but was told that proof of credit was needed. He says two loans credited his account and he received an email from a cryptocurrency financial service provider, where his money was supposedly held, promising the return of these funds.

Santander agreed to refund 50% of the transactions which came from Mr H’s own money as it felt it could have done more to stop some of the payments. It didn’t agree to refund any of the transactions that were funded by the two loans (loan L and loan Z) Mr H had taken out. So, it refunded him £11,500 (50% of the first three transactions). It would not refund in full as it considered Mr H had not been honest when Santander asked him about the payment purpose.

Our Investigator upheld the complaint in full. He considered the complaint under the Lending Standard Board Contingent Reimbursement Model (CRM) Code. He said Santander did not provide an effective warning and Mr H had a reasonable basis for belief. He also said that Mr H’s reason for making payments was in fact true (building of a wet room for his son) and he hadn’t been dishonest when telling Santander the purpose of the payment.

Santander did not agree. It said:

- Mr H should be pursuing the claim/complaint with R via this service. The loss was from the customer's account with them.
- Santander has acted in line with industry standards whilst following the customers instructions to transfer money. Mr H paid funds to an account in his own name, which he had full access to and control of. It doesn't believe Santander breached any duty of care. Santander's primary duty is to execute a customer's payment orders promptly in accordance with their instructions. The bank was not aware that any of the individual payment instructions from the customer arose in the context of an attempt to misappropriate his funds. 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. This is a strict duty, and the bank must carry out the instruction promptly without concerning itself with the "wisdom or risks of [the] customer's payment decisions".
- Mr H did not do enough to verify this investment. An advert endorsed by a celebrity combined with Mr H's own lack of investment experience did not give him a reasonable basis for belief.
- Mr H was transferring money to an account in his own name, where the confirmation of payee matched each time. So how would we expect Santander to identify that this was a risk or not a genuine transaction. If the customer had been asked to provide evidence of the building work, then the bank would still have released the funds. Whether the result was to build a wet room for his son or not, Mr H lied to Santander where the money was truly going.

Since coming to this service, Mr H has raised some issues regarding a replacement card and the service he received from Santander. But this did not form part of Santander's final response, investigation or submissions. Nor did our investigator investigate this matter. In order to avoid further delay on Mr H's scam complaint, Mr H will need to register a separate complaint with Santander on these issues, and it will need to investigate those issues and provide Mr H with a separate final response letter. Mr H will then be able to bring that complaint to this service if necessary.

I issued my provisional decision on 25 January 2024 explaining why I was coming to a different conclusion to the investigator. Santander did not respond. Mr H didn't agree; he said:

- Until my provisional decision he wasn't aware there was an account with R in his name and that he should be lodging a complaint with them.
- He has now had it confirmed that there was a R account in his name and they have not upheld his complaint.
- He has asked R for all the communication to try and ascertain who opened the account with R and who authorised the transactions.
- Why did R not act on the information Santander provided to R concerning fraud on his bank account?
- Was the information not processed in a timely manner by Santander to alert R to a fraud taking place.

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 thought about Mr H's response to my provisional decision. I don't feel I need to wait for the information from R to reach a decision in this case – as I don't think it will affect the outcome.

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 not to uphold this complaint. For completeness, I have set this out below and addressed Mr H's points within it to form my final decision.

In deciding what's fair and reasonable, 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.

Where the evidence is incomplete, inconclusive or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

Should Mr H's complaint be considered under the CRM Code?

The investigator considered the complaint under the CRM Code. But the CRM Code is quite explicit that it doesn't apply to all push payments.

The CRM Code only covers scam payments when the funds are being transferred to another person and not to a consumer's own account. In this case, Mr H sent the money to his own account held with another institution – R.

Mr H told us that he did not have an account with R and says he did not set one up or have access to one. But he says he is now aware the scammers used an account with R for his payments. He further explained that the scammers transferred the money from his Santander current account by remote access through his computer and that this happened more than once.

Mr H did acknowledge that he knew it was going to an account with R, and thought it was in his name as a *"client account, the same as solicitors sometimes use"*. However, Mr H insists he did not set this up nor have any information, logins, account access etc. He says if he previously told Santander that he had an account with R, it was because he believed what the scammers had told him, and the scammers had confirmed to him receipt of other transferred money to them already via this method of transfer.

There are some inconsistencies with what Mr H has said in relation to the account with R (including his most recent response to my provisional decision in which he says this was *the first time* he'd been made aware he had an account with R). Mr H says he was unaware until now that he held an account with R – he thought it was just part of the scam. However, I already considered in my provisional decision whether I thought it more likely than not that Mr H – at least knew about the account. To confirm within the emails Mr H sent to us on 23 March 2022 he said the scammer *'money transferred to R, tried to phone you. I will only be around my computer until 9:10'*.

I've noted R's response to Mr H and it doesn't seem to have any concerns about the account being subject of identity theft. From my own enquiries, R indicated to me that Mr H had to have some involvement in the account. I have already noted in my provisional decision that the account details were set up with the same email address and phone number we hold for Mr H. Whilst I haven't relied on what Mr H told Santander during the numerous calls (accepting that this may possibly have been part of what the scammer coached him to say), he repeatedly confirms to Santander several times between 23 March 2022 and 25 March 2022 that:

"I set another account up"

The payment is "myself to myself" "me to me"

"I've set up one for me"

"Transferring into another account that's mine"

"Trying to move to my other account Mr H (full name)"

"It's Mr H (name in full) and it's R"

And at one point he does confirm that the amount in question had transferred in – so it does seem at the very least Mr H did have some access to the account. He also confirms he set the account up himself. Whilst Mr H may now say this is what he was told to say by the scammers (and whilst I appreciate Mr H may have been tricked into opening the account with R) I think on the balance of probabilities Mr H would have had some awareness or involvement in some capacity with the account in his name - albeit the scammers may also have had some control over it as well.

I therefore consider the payments Mr H made (or allowed to be made) to R were payments to his own account. This means I don't think Santander is responsible for reimbursing him because of any obligation under the CRM Code.

Considering Mr H's complaint under Santander's wider obligations

Aside from the CRM Code, a bank still has wider obligations and a duty to protect its customers, as far as is reasonably possible, against the risk of financial harm from fraud and scams.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr H'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 H 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 23 and 24 March 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 H's payments?

Santander did in fact stop payments and contacted Mr H on a number of occasions due to its concerns about the transactions. So its arguments regarding the recent court case of Phillips v Barclays seem somewhat contradictory.

Furthermore, in its final response letter, it actually refunded some of Mr H's funds because it felt it *"could have done more to help stop some of the payments"*. It did choose to hold Mr H responsible for 50% of those losses and made a 50% deduction because it felt Mr H had not been truthful about the payment purpose. It also concluded it would not refund the payments that were funded by loans as it felt it was down to the lenders to write off these debts.

I'm not going to go into detail here as Santander did agree it could have done more – but I am satisfied Santander ought fairly and reasonably to have identified from the information available to it that there might be increased risk associated with the payments and, in those circumstances it should fairly and reasonably have gone further than it did when questioning Mr H about the transactions.

Whilst there may have been legitimate reasons why Mr H was making a series of payments in a short period to an e-money account in his own name, I am satisfied Santander ought to have recognised the enhanced scam risk. If Santander had made further enquiries – in particular during the call on 23 March 2022 before the £15,000 payment went through, it might have been able to prevent the losses Mr H incurred after that point.

In reaching my view that Santander ought fairly and reasonably to have made further enquiries, I consider Santander ought to have been mindful of the potential risk to Mr H of 'multi-stage' fraud – whereby victims are instructed to move funds through one or more legitimate accounts held in the customer's own name to a fraudster. The use of and risks to consumers of multi-stage fraud were well known to banks in 2022. And it seems that Santander recognised that particular risk here as it did intervene. It's just a question of whether it did enough.

As an aside, I don't agree with Santander's approach regarding the loans. I am not party to the decisions that determined the outcome to these (which held Mr H responsible for the loan repayments and so the debts have not been written off by those lenders). But once in receipt of the loan monies – this had become Mr H's own money and his responsibility to repay.

But, this isn't enough for me to say that Santander should refund Mr H the remaining money he's lost, I also need to be persuaded that sufficient intervention would have made a difference and prevented the payments from being made.

If Santander had made further enquiries before processing the payments, would that have prevented the losses Mr H incurred?

Of course, I can't know for sure what would have happened had Santander probed Mr H further than it did about these payments. So, I have to base my findings on the balance of probabilities – that is, what I think is more likely than not to have happened, taking into account what I know.

Having thought carefully about this, sadly I don't think any further intervention at this point is more likely than not to have made a difference and stopped Mr H from making the payments or led Santander to identifying Mr H was at risk from financial harm. I'll explain why.

I have taken into account that Mr H transferred the money to an account in his own name, rather than directly to the fraudster. It's not entirely clear whether Mr H remained fully in control of his money after he made the payments from his Santander account. But Mr H reassured Santander multiple times during the calls that took place between 23 March 2022 and 25 March 2022, that the money was going to his own account elsewhere. So, it didn't obviously look like fraud.

That said 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 multi-stage scams. The use of and risks to consumers of multi-stage fraud were well known to banks in 2022. So I'm satisfied Santander should fairly and reasonably have probed further than it did here.

But during the calls Mr H was also able to give explanations about the ultimate purpose of the money. I'm persuaded Mr H would have been able to give plausible answers to any questions that Santander could reasonably have been expected to ask. Had it probed him further about the nature of the building work, I think he would have been able to convincingly explain, that the payments were for building a wet room for his son, and he would even have been in a position to provide the plans he has provided this service with if Santander had asked for further details or proof of the work being carried out.

I appreciate Mr H was being coached by the scammer, but I think Mr H was prepared for the sort of questions Santander ought to be asking, which would have made it all the more difficult for Santander to uncover what was happening (ie that Mr H was falling victim to a cryptocurrency scam).

On balance, I'm persuaded the answers Mr H would have given would more likely than not have satisfied Santander that he wasn't at risk of financial harm. So I can't fairly or reasonably say that further intervention at this point would have made a difference. Given it was reassured by Mr H - I don't think it is for Santander to raise these concerns with the recipient bank. In fact, it would need Mr H's confirmation that this was a scam and his permission to contact the recipient bank in order to do so. Mr H did not confirm as such until much later on but as he was the account holder - Santander

This complaint is against Santander – so I can't consider the actions of R but to the bank even if it had questioned things further - this looked like a genuine transaction Mr H was making to his account elsewhere for building works he had plans for. Santander would not have been aware of what then happened from there or that the money was going to cryptocurrency.

Could Santander have done anything else to recover Mr H's money?

As the funds went to an account in Mr H's name before being converted into cryptocurrency and sent to the fraudsters, they could not have been recovered by Santander. Despite this, Santander did attempt to recover Mr H's funds from Mr H's own account with R. From Santander's records I can see it logged this around an hour after Mr H reported it to Santander on 28 March 2022 at 17:23. R returned £3.43 to Santander and, as I understand it, this was returned to Mr H. So it seems that R did respond to Santander's request to return remaining funds. And so I don't think Santander could have done anything further to try and recover Mr H's lost funds.

I realise Mr H is disappointed with my decision. I sympathise with his circumstances and I am sorry he has fallen victim to a scam and lost so much money. But having considered all the evidence and arguments, I don't think Santander can fairly be held liable for his losses.

My final decision

My final decision is that I do not uphold this complaint.

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

Kathryn Milne
Ombudsman