

The complaint

Mr K complains that Santander won't refund over £19,000 he lost to an investment scam in September 2022.

What happened

The details of this complaint are well known to both parties so I won't repeat everything again here. In brief summary, Mr C fell victim to a cryptocurrency investment scam after he and his partner were contacted by a scam broker ("T") in June 2022. An account was set up in Mr K's name with an FCA-authorized Electronic Money Institution ("W") where he was directed to make payments to, before then sending the money on to the scammer. He made the following payments using his Santander debit card:

No.	Date	Amount	Payee	Payment type
1.	16/09/2022	£4,964.85	W	Debit card
2.	19/09/2022	£4,974.88	W	Debit card
3.	20/09/2022	£4,984.91	W	Debit card
4.	21/09/2022	£4,513.50	W	Debit card

Mr K was under the impression that his investments were performing well and that he was making good returns. However, he realised he had been scammed when he was asked to pay a significant sum in order to make a withdrawal from his investment account and found negative reviews online warning that T was operating a scam.

Mr K reported the fraud to Santander, but it said it wouldn't refund the money he lost as he'd authorised the payments, which went to another account in his name. Unhappy with this, he referred the matter to this service.

Our investigator upheld the complaint. He noted that Santander had initially blocked a payment being made to W for £9,879.55 on 16 September 2022 due to concerns of fraud, which ultimately didn't go through. However, Santander then allowed smaller payments for under £5,000 to go through. The investigator didn't think Santander should've allowed any further payments until it had spoken to Mr K and made further enquiries about the nature of the payments he was making. Had it done so, he thought the scam could have been prevented.

As a result, the investigator recommended that Santander reimburse the payments, albeit with a 50% deduction in recognition of Mr K's own contributory negligence for failing to recognise that the 'risk free' investment he thought he was making was too good to be true.

Santander disagreed. In summary, it said:

- It has acted in line with industry standards by following Mr K's instructions to transfer money, which was paid into an account in his own name, over which he had full access and control. It did not breach any duty of care owed to Mr K and its primary duty is to execute its customers' payment orders promptly.
- The point of loss did not occur from Mr K's Santander account; it occurred from his account with W, which is a regulated firm in its own right. He should therefore be pursuing his claim against W instead of Santander.
- Card payments are not processed via its online platform in the same way as bill payments, which makes it difficult for it to interject with warnings. In any event, it's normal process for card transactions was for a text message to be sent asking the customer to confirm the legitimacy of the transaction, which it did. No specific call would have taken place with an advisor unless the customer didn't recognise the transaction.
- Even if it had spoken to Mr K, it's likely he would've been told what to say by the scammer, and it's not clear if he would've been honest about the nature of the payment.

As Santander didn't agree, the matter has been escalated to me to determine.

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.

In deciding what's fair and reasonable, I am required to take into account relevant: law and regulations; regulators' 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 K's account is that he is responsible for payments he's authorised himself. And, as 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.

In this case, Santander's June 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 debit card 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 fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

Our service has issued previous final decisions setting out the relevant considerations we take into account when deciding what's fair and reasonable in the context of investment fraud cases. I don't consider it necessary to repeat all the considerations again here, though Santander will be able to review these through past decisions on our website if it wishes to do so.

In summary, 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.
- 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 processing Mr K's debit card payments?

It isn't in dispute that Mr K has fallen victim to a cruel scam here, nor that he authorised the disputed payments he made to his account with W (where his funds were subsequently transferred to the scammer). The payments were made by debit card using his legitimate security credentials provided by Santander, but I've thought about whether the bank should have reasonably intervened in any of these payments.

Santander has said that it wasn't on enquiry at any point that the transactions were unusual. However, Santander's notes show that it did in fact decline a payment of £9,879.55 that Mr K attempted on 16 September 2022 – which was the first payment he attempted to make to W as part of the scam. Its notes also suggest that its fraud monitoring systems blocked another payment to W on 21 September 2022. So, I don't accept that Santander was not on notice of the transactions being unusual, otherwise its system wouldn't have blocked these transactions.

Santander's fraud notes also show that it had enough cause for concern that it attempted to call Mr K four times on 16 September 2022 but couldn't get through, so it left a voicemail. Again, it would be unusual for a bank to try and call a customer about a card payment if it didn't have concerns or suspicions of fraud or a scam. Santander's notes eventually go on to say that "*All transactions confirmed valid*". Santander has said that a text message was sent to Mr K asking him to verify the legitimacy of the transaction after it was unable to reach him by telephone, although it hasn't been able to provide any evidence of such a text being sent.

In any event, the amount being sent to W on 16 September 2022 was out of character for the typical sort of debit card spending associated with Mr K's account, which was also going to an account he hadn't paid before. So, I am satisfied Santander ought to have identified from all the information available to it that there might be an increased risk associated with the payment, which it appears it did, given it blocked the payment and tried to call Mr K to discuss it further.

As a result, I don't think a text message asking Mr K to confirm the payment was genuine was a proportionate response to the heightened risk of financial harm presented in these circumstances. The £9,879.55 payment wasn't reattempted after it was confirmed as genuine, but a smaller payment of £4,964.85 was then allowed to go through just minutes later.

Given the concerns Santander had around the initial £9,879.55 payment – and given it hadn't been able to get through to Mr K to discuss it – I don't think it was reasonable for the bank to then allow a series of smaller payments to be made to the same payee. Santander will be aware that scammers often instruct their victims to send multiple smaller payments in order to avoid detection, particularly after a larger payment has already been declined. So, in light of this, I think Santander should've fairly and reasonably made further attempts to get in contact with Mr K, or it should've blocked any further payments from being made until Mr K had got in contact with the bank, so it could make further enquiries to establish the circumstances in which the payments were being made.

I appreciate that Mr K was paying an account in his own name, though it's not clear whether Santander would've been aware of this in the context of a debit card payment. But even if it was aware, I consider Santander ought to have been mindful of the potential risk to Mr K 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 September 2022.

Santander also submits that card payments are not processed via its online platform in the same way as bill payments, which makes it difficult for it to interject with warnings. I'm aware of the differences between authorised push payments and debit card payments, and that a payment service provider cannot 'pause' a card payment in the same way it can a push payment. But that does not mean that Santander cannot prevent potentially fraudulent card payments from being made, as there is nothing preventing the bank from stopping the card payment altogether if it suspects fraud, as it did with the initial payment of £9,879.55 that Mr K attempted.

So, the fact that the payments in question were made by debit card doesn't change my opinion in terms of what Santander could fairly and reasonably have been expected to do when it suspects a payment might be related to fraud or a scam.

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

Santander has said that it's not clear whether Mr K would've been honest about the nature of the payment if he was questioned, as he would've likely been told what to say by the scammer. However, Santander has not provided any evidence to substantiate its position in this regard. There is no evidence of Mr K having misled Santander, for example, and Mr K hasn't said that he'd been coached by the scammer. So, I don't think there's enough persuasive evidence to suggest that Mr K wouldn't have been truthful if he'd been questioned by Santander.

I've thought carefully about whether the kind of questions that I believe ought fairly and reasonably to have been asked by Santander would've made a difference. And on the balance of probabilities, I think they would have. If Santander had contacted Mr K and asked him further questions and for more of the basic surrounding context of the payments he was making, I think it's likely he would have explained what he was doing, i.e. that he was sending money to a newly opened account with W as part of a cryptocurrency investment.

As I've set out above, Santander ought to have had a good understanding of how 'multi-stage' fraud commonly works. It could have enquired as to how Mr K had found the investment opportunity and whether anyone else was involved. It could've discovered that he had found the investment opportunity on social media, which had supposedly been endorsed by a celebrity, and that a broker was advising him to transfer money to a newly opened EMI account before purchasing the cryptocurrency.

These are all common hallmarks of investment scams. And this, coupled with the fact that Mr K was being asked to send multiple payments to his own EMI account to buy cryptocurrency *before* transferring it on again, ought reasonably to have alerted Santander that he was most likely being scammed. So, I think it missed an opportunity here to uncover the scam and prevent any further losses.

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

In reaching my decision about what is fair and reasonable, I have taken into account that Mr K transferred the money to an account in his own name, rather than directly to the fraudster, so he remained in control of his money after he made the payments from his Santander account, and it took further steps before the money was lost to the fraudsters.

But for the reasons I have set out above, I am satisfied that it would be fair to hold Santander

responsible for Mr K's losses (subject to a deduction for his own contribution). As I have explained, the potential for multi-stage 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 multi-stage scams. I'm satisfied Santander should fairly and reasonably have made further enquiries after it blocked the initial £9,879.55 payment and, if it had, it is more likely than not that the scam would have been exposed and Mr K would not have lost any money. In those circumstances I am satisfied it is fair to hold Santander responsible for Mr K's loss.

I have also taken into account that the payments were made to a regulated business – W, and Mr K might potentially have a claim against W in respect of its actions (although W 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 K has not referred a complaint about W to me and DISP does not empower me to instruct him to make or refer a complaint to me about another business.

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 K may have cause to complain against W, I am not persuaded it would be fair to reduce the award solely for that reason. Mr K 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.

Should Mr K bear any responsibility for his losses?

There is a general principle that consumers must take responsibility for their decisions, and I am mindful of the law relating to contributory negligence and the impact a finding of contributory negligence may have to reduce the damages recoverable by a claimant in court proceedings.

I have duly considered whether Mr K should bear some responsibility by way of contributory negligence, and I'm satisfied he should in the circumstances of this case. I say this because I consider there to have been enough warning signs that he was being scammed, which Mr K does not appear to have reasonably acknowledged or acted upon.

This includes Mr K being told that his investment was 'insured', seemingly with anything upward of 1% of his investment being covered, which would be refunded within one day, meaning he believed that he was essentially making his investment risk free. However, even an inexperienced investor ought reasonably to know that an element of risk is always inherent in investing, and cannot be insured against, as the return on an investment is typically a reflection of the level of risk taken on.

I appreciate Mr K was issued with official looking documentation from an insurer, but I think this ought to have seemed too good to be true and led him to undertake further research into the broker, as well as cryptocurrency investments and whether they can even be insured. He would've likely found that they could not, and that there was no legitimate basis for what he was being promised by the broker. Among the positive reviews he found, he could've also discovered some of the negative reviews that were posted online about T (such as on Trust Pilot) from *before* he chose to invest, which warned that it was a scam (I can see there were at least two instances of people warning this prior to Mr K making his payments, for example). As a result, I'm satisfied Mr K should've had reasonable cause for concern, but it doesn't appear that he made adequate enquiries into the legitimacy of what he was being

told.

So, I think Mr K did have a role to play in what happened and I think that the amount Santander should pay to him in compensation should fairly and reasonably be reduced to reflect that role. Given how serious I think Mr K's concerns about the legitimacy of the investment ought reasonably to have been, I think that a fair deduction is 50%.

Conclusions

Overall, having considered the matter carefully, I think Santander should refund 50% of the all the payments Mr K made as part of the scam.

Santander should also pay 8% simple interest per annum on that amount from the date of each payment to 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 K how much it's taken off. It should also give Mr K a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons given above, I uphold this complaint and instruct Santander UK Plc to pay Mr K:

- 50% of the payments he made to W as part of the scam between 16 and 21 September 2022.
- 8% simple interest per year on this amount from the date of each payment to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 20 March 2024.

Jack Ferris
Ombudsman