

The complaint

S complains that Santander UK Plc (Santander) is refusing to refund the amount it lost as the result of two scams.

S is being represented by a third party. To keep things simple, I will refer to S throughout my decision.

What happened

The background of this complaint is well known to all parties, so I won't repeat what happened in detail.

In summary, S was looking for an investment in Bitcoin and came across a business called Coinlife (X). S completed an online data capture form and received a call from X. X explained the investment opportunity and S made a small initial payment from an account held at another bank.

S made further payments from the Santander account on 19 and 22 November 2020 for a total of £18,400.

S was required to download the screen sharing application AnyDesk and was provided with login details to an online platform where the investment could be viewed. X was also in constant contact with S making the investment seem professional and legitimate.

Around the same time S also started to invest through a second business Profittrade (Y). Y contacted S and he opened an account with it as well. Initially S made a small payment into the investment, followed by larger payments from the Santander account.

When S tried to make a withdrawal from the investments S was met with obstacles including having to make further payments in relation to fees. It was clear at this stage that S had been scammed.

Below is a list of the payments made from S's account:

Date	Payee	Payment Method	Amount
19 November 2020	Binance	Debit Card	£4,000
22 November 2020	Binance	Debit Card	£4,400
22 November 2020	Binance	Debit Card	£5,000
22 November 2020	Binance	Debit Card	£5,000
27 November 2020	Binance	Debit Card	£5,000

Our Investigator considered S's complaint and thought it should be upheld in part. Santander disagreed, so this complaint has been passed to me to decide.

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.

It has not been disputed that S has fallen victim to a cruel scam. The evidence provided by both S and Santander sets out what happened. What is in dispute is whether Santander should refund the money S lost due to the scam.

Recovering the payments S made

S made payments into the scams via debit card. When payments are made by card the only recovery option Santander has is to request a chargeback.

The chargeback scheme is a voluntary scheme set up to resolve card payment disputes between merchants and cardholders. The card scheme operator ultimately helps settle disputes that can't be resolved between the merchant and the cardholder.

Such arbitration is subject to the rules of the scheme, meaning there are only limited grounds and limited forms of evidence that will be accepted for a chargeback to be considered valid, and potentially succeed. Time limits also apply.

S was dealing with X and Y, which were the businesses that instigated the scams. But S didn't make the debit card payments to X and Y directly, S paid a separate cryptocurrency exchange (Binance). This is important because Santander would only have been able to process chargeback claims against the merchant S paid (Binance), not another party (such as X or Y).

The service provided by Binance would have been to convert or facilitate conversion of S's payments into cryptocurrency. Therefore, Binance provided the service that was requested; that being the purchase of the cryptocurrency.

The fact that the cryptocurrency was later transferred elsewhere – to the scammer – doesn't give rise to a valid chargeback claim against the merchants S paid.

Should Santander have reasonably prevented the payments S made?

It has been accepted that S authorised the payments that were made from the account with Santander, albeit on X and Y's instruction. So, the starting point here is that S is responsible.

However, banks and other Payment Services Providers (PSPs) do have a duty to protect against the risk of financial loss due to fraud and/or to undertake due diligence on large transactions to guard against money laundering.

The question here is whether Santander should have been aware of the scams and stepped into question S about the payments that were being made. And if it had questioned S, would it have been able to prevent the scam taking place.

The first payments S made into the scam were not for such high values that I would have expected them to trigger Santander's fraud prevention systems. It was also not unusual for S to make more than one payment from the account on the same day. However, by the time S made a third payment on 22 November 2020 totalling £14,400 in a single day I think Santander's fraud prevention systems should have been triggered prompting it to step in and question S about the payments.

I haven't seen anything to suggest S was being coached by X and Y on what to say if the bank had asked questions about the payments. So, I think, that had Santander stepped in and questioned S it's likely it would have found that S was using brokers to help him invest

and had downloaded the application AnyDesk which is common in this type of scam.

Overall, I think it's likely the scam would have been uncovered and all further loss would have been prevented. So, Santander is responsible for the last two payments S made in relation to the scams.

Did S contribute to the loss?

Despite regulatory safeguards, there is a general principle that consumers must still take responsibility for their decisions (see s.1C(d) of our enabling statute, the Financial Services and Markets Act 2000).

In the circumstances, I do think it would be fair to reduce compensation by 50% on the basis that S should share blame for what happened. I think it's unlikely S carried out reasonable research on the investment businesses before deciding to make large payments to them. I say this because there was already a warning published on the FCA website about Y that would have shown in a simple online search if one had been carried out. If S had seen this warning, I think it's unlikely he would have continued to make any payments and could also have prevented the loss.

In addition to the points covered above Santander has stated that:

"Whilst the Supreme Court's binding decision in the Philipp v Barclays Bank plc case is in relation to faster payments we still believe the principles that sit behind that decision are applicable this case, that decision 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".

As explained above, the starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of S's account is that S is responsible for payments S authorised. 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 terms and conditions gave it rights (but not obligations) to:

1. Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.

2. Delay payments while fraud prevention checks take place and explained that it might need to contact the account holder if Santander suspects that a payment is fraudulent. It said contact could be by phone.

So, the starting position at law was that:

- Santander was under an implied duty at law to make payments promptly.
- It had a contractual right not to make payments where it suspected fraud.
- It had a contractual right to delay payments to make enquiries where it suspected fraud.
- It could therefore refuse payments, or make enquiries, where it suspected fraud, but it was not under a contractual duty to do either of those things.

Whilst the current account terms did not oblige Santander to make fraud checks, I do not consider any of these things (including the implied basic legal duty to make payments promptly) precluded Santander from making fraud checks before making a payment.

And, whilst Santander was not required or obliged under the contract to make checks, I am satisfied that, taking into account longstanding regulatory expectations and requirements and what I consider to have been good practice at the time, it should fairly and reasonably have been on the look-out for the possibility of this type of scam and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice all banks, including Santander, do.

So, these comments have not affected my decision to hold Santander responsible for the last two payments S made in relation to the scams from the Santander account.

Putting things right

To put things right I require Santander to refund the last two payments S made in relation to the scams less 50%. Santander should add 8% simple interest to the amount it pays S from the time the payments were made to the date of the settlement (less any lawfully deductible tax).

My final decision

I uphold this complaint and require Santander to put things right by doing what I've explained above.

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

Terry Woodham
Ombudsman