

The complaint

Mr and Mrs K are unhappy Santander UK Plc won't reimburse them for the money they lost when Mr K fell victim to a scam.

What happened

Mr and Mrs K are represented in this complaint by a solicitor, for simplicity I will refer to Mr and Mrs K throughout this decision, even when referencing what their representatives have said on their behalf.

Mr K saw an advert for a cryptocurrency investment platform, he says it appeared to be endorsed by well-known celebrities and that he saw some positive reviews for it. Mr K registered his interest and was then contacted by an individual who advised him to download some remote access software and to open an account with a cryptocurrency exchange which I'll call B. Mr K actually already held an account with B, which he had used previously for some small transactions, so he used this account.

Mr K made a small initial payment to the 'investment' and, when he could see some small returns, he invested more. Over the course of four days Mr K made payments to B totalling over £18,000 from his Santander account, and then on to the 'investment'. Unfortunately, and unknown to Mr K, the people he was dealing with were not legitimate, he was the victim of a scam.

Mr K believed he had made a profit, but when he asked to withdraw those profits he was told he would need to invest more before any withdrawal was allowed. Mr K did not do this, but the scammers were putting increasing pressure on him and, when Mr K attempted to contact the trading platform, he discovered that he was not dealing with a legitimate business, and had in fact been the victim of a scam.

Mr and Mrs K reported what had happened to Santander. But ultimately Santander said it did not think it should be held responsible for their loss, it said the payments had been made to another account in Mr K's name at B, before being passed on to the scammers. So, Santander felt that B should bear responsibility for the financial loss.

Mr and Mrs K were unhappy with Santander's response and so referred their complaint to our service.

One of our Investigators looked into what had happened, and ultimately, they felt that Santander should have stepped in to question Mr K about the fourth (and final) payment made. They felt that, if Santander had done so, then the scam would have been uncovered and Mr and Mrs K's further loss could have been prevented. However, the Investigator felt Mr and Mrs K should also share some responsibility for the loss here, as there were red flags that should have indicated to Mr K that something untoward might be going on.

So, overall, the Investigator recommended that Santander refund 50% of the fourth payment made to the scam, plus interest.

Santander did not accept the Investigator's findings. It maintained that a complaint should be raised against B as that is where the financial loss was from. It also did not feel that, even if it had intervened, there was any guarantee that it would have uncovered the scam as Mr K would have likely confirmed he was paying the funds to an account in his own name and that he had invested in cryptocurrency before. So, it says that it acted in line with industry standards when making the payments and says that stopping those payments would have been a breach of its duties.

Mr and Mrs K also did not accept the Investigator's findings. They felt that Santander should bear more responsibility for their loss.

As no agreement could be reached, the case has now been passed to me for a decision.

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 in all the circumstances of this complaint, I am required to take into account relevant: law and regulations; regulators' rules, guidance and industry standards; codes of practice; and, where appropriate, what I consider to have been good industry process at the time.

Having done so I've reached the same conclusions as our Investigator, and for the same reasons.

It's not disputed that Mr K authorised the payments that are the subject of this complaint. So as per the Payment Service Regulations 2017 (which are the relevant regulations in place here) that means Mr and Mrs K are responsible for them. That remains the case even though Mr K was the unfortunate victim of a scam.

In reaching my decision I have also taken into account the Supreme Court's decision in *Philipp v Barclays Bank UK PLC [2023] UKSC 25*.

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 relevant 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 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.

So, 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 payment service providers 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.
- Have been mindful of – amongst 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 customers, when deciding whether to intervene.

Taking the above into consideration, I need to decide whether Santander acted fairly and reasonably in its dealings with Mr and Mrs K, or whether it should have done more than it did.

I've looked carefully at the statements I've been provided for Mr and Mrs K's Santander account. And, in general, Mr and Mrs K did make regular transfers out of the account for relatively high amounts. Many of these were to other accounts in their own names – particularly to Mrs K – but there were also payments out of the account to third parties and a large cash withdrawal in the months preceding the scam.

The first payments Mr K made as a result of the scam were for £1,000, on 2 April 2021, and then for £270 on 3 April 2021. And, in the wider context of the account I don't think these would have appeared as sufficiently unusual to flag any concerns to Santander. The next

payment made, on 6 April 2021, was for £4,500. This was significantly higher than any previous payment Mr and Mrs K had made to an external account, but still, in the wider context of the payments Santander sees every day, not so high as to flag as suspicious on value alone. And this payment was a few days after the previous payments, so not, to my mind, indicative of a scam, or a clear sign that something untoward might be happening.

And while the payments were to an account with a cryptocurrency provider (which are reporting increasing instances of customers being scammed, including as a consequence of multi-stage scams often involving cryptocurrency), I think Santander would have been reassured by the fact that Mr K had made payments to this account before, so these were not payments to a new payee.

But when Mr K then made another, significantly higher, payment later that same day – for over £12,000 – I think this should have started to ring alarm bells for Santander. This was the second large payment in one day, the value of the payments was increasing, and the frequency of payments was also starting to ramp up.

In my view, this combination of circumstances ought fairly and reasonably to have led Santander to make additional enquiries before processing the payment, to establish the circumstances in which Mr K was making these uncharacteristically large payments over a relatively short space of time to a cryptocurrency account. A pattern of activity that could be consistent with certain types of scam, regardless of the fact that the account the payments were made to was in Mr K's name.

I've thought carefully about what would've happened had Santander insisted on direct contact with Mr K before processing this final payment. There's obviously a balance to strike, but Santander ought fairly and reasonably to have satisfied itself that Mr K hadn't fallen victim to a scam, and I'm persuaded it could've done this by asking a few open-ended questions of Mr K prior to processing any further payments.

Mr K doesn't appear to have been given a cover story to use by the scammer. So I think had Santander contacted Mr K to ask for some information about what he was doing, he would likely have explained what the payments were for and how he had come to make them. And I think it's more likely than not that what Mr K would have told Santander would have given it cause for concern, given its familiarity with the hallmarks of investment scams such as the one Mr K was the victim of.

If that had happened, and Santander had explained that Mr K was potentially the victim of a scam, and provided a relevant warning about what cryptocurrency investment scams can look like, I consider it likely that the spell of the scam would have been broken and that Mr K wouldn't have proceeded with this final payment. So I think Santander could have prevented the losses Mr and Mrs K incurred from the fourth payment.

I've taken account of Santander's comments that Mr and Mrs K's loss was from Mr K's account with B, and that it therefore feels B should be liable for that loss. But 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 B to our service and DISP does not empower me to instruct Mr K to make or refer a complaint about another business.

My role here is to consider the complaint in front of me. And, in doing so, I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is possible that Mr and Mrs K may have cause to complain about B's role here, I am not persuaded it would be fair to reduce the award in this complaint solely for that reason. Mr

and Mrs K are entitled to complain only about Santander, and I am satisfied that Santander could have prevented some of the losses they suffered if it had acted fairly and reasonably.

I have also noted Santander's comment that Mr K continued to make payments to B after the scam had been uncovered. But the account with B was his own account, Mr K has said these later payments were not related to the scam, and B had not been a party to the fraud perpetrated on Mr K. I don't consider that Mr K's decision to continue to use his account with B after the scam affects my findings in any way.

In reaching my conclusions about what is fair and reasonable in this case, I have also considered whether Mr and Mrs K should bear some responsibility for their loss. And, while there were some sophisticated aspects to this scam, I do think it would be reasonable to hold Mr and Mrs K partially responsible for their loss here. I say this because there were already negative reviews – identifying the investment scheme as a potential scam – visible online before Mr K made his first payments to the scam. I think those reviews would have been visible to Mr K when he was initially researching the company, and should have given him pause for thought. With this in mind I consider it reasonable for Mr and Mrs K to bear joint responsibility for the loss.

So, in summary, I consider when Mr K made the fourth transfer, Santander could have done more to protect him and Mrs K from the risk of financial harm. Had Santander contacted Mr K directly and asked some open questions about what was happening, I'm persuaded it is more likely than not the scam would have come to light, and Mr and Mrs K wouldn't have lost out on the further funds they went on to pay to the scammers.

The payment I am asking Santander to partially refund was from Mr and Mrs K's current account. So as Mr and Mrs K have been deprived of the use of this money for an extended period of time, and it's likely this money would have been used for day-to-day spending, I think it is fair that Santander pay interest at 8% on the 50% proportion of this payment it is refunding.

Putting things right

To resolve this complaint Santander should:

- Refund 50% of the final payment made to the scam – representing a refund of £6,411.50
- Pay 8% simple interest per annum on this amount from 6 April 2021 to the date of settlement.

My final decision

I uphold this complaint. Santander UK Plc should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to accept or reject my decision before 29 February 2024.

Sophie Mitchell
Ombudsman