

The complaint

Mr and Mrs E complain that Santander UK Plc (Santander) won't refund the money they lost as a result of separate scams.

They're being supported by a representative. To keep things simple, I'll refer to Mr E in this decision as he was the one involved with the payments and later correspondence

What happened

The background to this complaint is known to both parties, so I won't repeat all the details here. In summary, Mr E says:

- In February 2021, he came across a company called BitQZ, on a social media advert, promoting the use of automated crypto-currency trading. He filled in an online enquiry form and was called by someone claiming to be their representatives. He was told he needed open an account with Digital Currency Market (DCM) to start trading.
- An initial deposit of 200 Euros was paid to activate this new DCM trading account and an ID verification process was completed, adding to the legitimacy of the 'investment'. He was then called by someone claiming to be an analyst at DCM, going by the name of Roger Thompson (the scammer) and, using remote access, the scammer helped him to open an account with CEX.io (CEX), a legitimate crypto-exchange.
- A number of payments were sent from Mr E's Santander account to CEX and on to the scammer's wallet, again with the scammer's guidance, and he was initially able withdraw a small amount of money, leading him to believe he could access his funds.
- By March 2021, the scammer's fake platform showed he was making good profits and he again asked to withdraw funds. He was told £15,000 had been successfully withdrawn from DCM and deposited with CEX. But this time someone claiming to be from CEX then emailed him to say a '*cash-flow*' fee of £7,000 was needed for the money to be released.
- He realised he'd been scammed when, having paid this fee, the scammer insisted he had to pay the same amount again to release the funds and began sending threatening messages when he refused. This scam was first reported to Santander, on 10 March 2021, the same day that this '*cash-flow*' fee was paid.
- Some months later, in July 2021, he was contacted by a second scammer, going by the name of David Walker from Global Solution (GS). He presented himself as a 'recovery specialist' – and he was persuaded to make a further four payments as part of what he genuinely believed was a process to recover the funds he'd lost to the first scam. When contact was lost with this second scammer, he realised he'd been scammed once more.

I've listed below the payments I've considered as part of this complaint. The payments in *italics* relate to those made as part of the recovery scam.

| | Date | Payee | Amount | Payment type |
|---|-------------|--------------|---------------|---------------------|
| 1 | 14-Feb-21 | BITNGO | £181.01 | Card Payment |
| 2 | 17-Feb-21 | CEX.io | £2,030.26 | Card Payment |

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|----|-----------|-------------|-----------|--------------|
| 3 | 18-Feb-21 | From CEX.io | £188.31 | Credit |
| 4 | 18-Feb-21 | CEX.io | £2,030.26 | Card Payment |
| 5 | 24-Feb-21 | CEX.io | £2,030.26 | Card Payment |
| 6 | 25-Feb-21 | CEX.io | £1,015.13 | Card Payment |
| 7 | 10-Mar-21 | CEX.io | £7,105.88 | Card Payment |
| 8 | 29-Jul-21 | CEX.io | £74.47 | Card Payment |
| 9 | 19-Aug-21 | CEX.io | £75.11 | Card Payment |
| 10 | 19-Aug-21 | CEX.io | £669.99 | Card Payment |
| 11 | 19-Aug-21 | CEX.io | £101.52 | Card Payment |

A complaint and a chargeback claim were raised with Santander and declined. The matter was then referred to the Financial Ombudsman. Our Investigator considered it and upheld it.

For the first scam, she found payment 7 (above) was unusual enough for Santander to have intervened and that, if it had done so, it's likely this loss would have been prevented. She didn't apply a deduction for contributory negligence and recommended a full refund of that payment, plus interest. But she didn't think the payments made towards the recovery scam should be refunded. She thought it would be unfair to hold Santander liable for that loss as the second scam was too remote from the first and the payments were too low in value to have a triggered an intervention. Neither Mr E nor Santander accepted that outcome.

Mr E believes that because he was scammed, then all payments should be refunded. Santander, on the other hand, said in summary:

- It was not the point of loss. The losses happened from Mr E's account with CEX. Mr E should therefore be pursuing his complaint against CEX, instead of Santander.
- The payments (including payment 7) wouldn't have appeared unusual. They were made from a regular location/IP address data. There was no indication Mr E was at risk of financial harm.
- It can't predict how a 'detection' conversation would have gone if it had spoken to Mr E about the payment, as the questions asked would be proportionate to the situation and responses received. A conversation would have determined the funds were going to his own account with a legitimate company to which he'd transferred to and had withdrawn from previously. There was not enough to suggest Mr E was at risk of financial harm.
- It acted in line with industry standards whilst following Mr E's instructions to send money, which was paid into an account in his own name, over which he had full access and control. It didn't breach any duty of care owed to Mr E. Its primary duty is to execute a customer's payment order promptly in accordance with their instructions.
- The Supreme Court judgement in *Philipp vs Barclays Bank Plc* confirmed that where a bank receives a payment instruction from a customer which is clear and leaves no room for interpretation and 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". In this case, Mr E's account was in credit and the payments, sent to his own account, were executed in accordance with the bank's duty.

In more recent correspondence Santander shared some broader concerns about its liability for payments of this nature as summarised below:

- A proper consideration of the regulatory expectations and requirements, as well as good industry practice, shouldn't result in a conclusion that it's fair and reasonable to hold it

responsible for Mr E's losses.

- It acknowledges the application of PRIN but this must also take into account its legal obligations to Mr E, the applicable rules in the Financial Conduct Authority (FCA) handbook, and the method of payment used.
- SYSC 3.2.6R and other AML requirements all relate to the risk of Mr E using his account to launder funds, rather than forming the basis of a requirement to protect him from the risk of fraud. SYSC 3.2.6R is also qualified by reasonableness. There's no expectation that it should (or can) identify and prevent every payment that carries some risk of being associated with a scam.
- There's a need to strike a balance between taking reasonable measures to detect fraud and its legal obligations under the PSR 2017 and common law. It has systems and controls in place to mitigate the risk its customers are defrauded. These systems and controls reflect the expectations set by the CRM Code and BSI Code.
- The payments in question were debit card payments. They were 'pull' payments where the protocol of the transaction is managed by the merchant. The features of this payment methodology, which differ from faster payments, needs to be factored into whether it's fair and reasonable for Santander to reimburse the payments.
- Its fraud detection systems have to be carefully calibrated to ensure that legitimate card payments aren't interrupted to a disproportionate degree, taking into account the number of payments it processes to trusted beneficiaries (as was the case here).
- The fact the payments went to Mr E's account with another firm is central to deciding what is fair and reasonable in this case. There are genuine differences between the position of a card issuer whose customer is using their debit card to make payments to their own account and a business sending money directly to a fraudster. While it does have detection strategies in place for card payments, it must have regard for the level of risk this kind of payment presents.
- It accepts multi-stage fraud of this nature is on the rise. That doesn't mean it's fair to expect Santander to detect/intervene in 'own account' card payments to the degree it's been suggested. It's important to consider the role CEX had in this. CEX had the most relevant information on which to base a risk assessment of the payments than Santander did. It was far better placed to intervene meaningfully on the transactions.
- The difference in position has been consciously reflected in industry practice and in related reimbursement requirements. Both the CRM and upcoming PSR scheme have excluded payments of this nature and, it feels, a customer would have no legal basis on which to recover funds from it. The exclusion of this type of payment from both schemes is relevant and should be considered particularly as the PSR scheme was an opportunity for both the government and Payment Systems Regulator to extend protections to this type of fraud, if they felt it was the right thing to do.
- There are significant concerns regarding Mr E's actions based on what he was told by the scammers and a deduction of at least 50% should apply for contributory negligence.

As the case couldn't be resolved informally, it's 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.

In deciding what's fair and reasonable, I'm required to take into account relevant law and regulations; the 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 (the Payment Services Regulations 2017) and the terms of Mr E's account is that he's liable for payments he's authorised. And the Supreme Court recently reiterated in *Philipp v Barclays Bank UK PLC*, that 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's 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 December 2020 terms and conditions gave it rights (but not obligations) to:

- Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.
- 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 account terms didn't oblige Santander to make fraud checks, I don't 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'm satisfied, taking into account longstanding regulatory expectations and requirements and what I consider to have been good practice at the time, that 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. In practice, this is something that 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 them all again here, though Santander will be able to review these through past decisions on our website if it wishes to do so.

To summarise, however, 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 E's debit card payments?

It's not in dispute Mr E was scammed here. I've found little information about BitQZ to show it was a scam. But I'm satisfied, on the evidence, that DCM and GS were likely operating a scam, in view of the communication Mr E had with them, the negative reviews, and the warnings that have been published for both of these 'companies' by the FCA.

In terms of whether Santander should have intervened, I don't think the first five payments that were sent would have appeared as particularly unusual, given the amounts and the previous account activity, to the extent that they ought to have triggered Santander's fraud detection systems. But Mr E's spending did increase significantly when the £7,105 payment was made in March 2021 – and I'm satisfied, given its value in comparison to the previous spending and the information Santander had available, that it ought to have stepped in to protect Mr E from a heightened risk of fraud, by asking him appropriate questions about the nature of that transaction.

In reaching this view, I accept there's a balance to be struck and Santander can't fairly be expected to detect every payment that may be the result of a scam. But I don't think it got that balance right in this case. And I've considered what Santander has said about the payments being sent to Mr E's own accounts. But it's also necessary to consider that, by the time he started his payments, it ought to have had a good understanding of how these scams take place, including the potential of 'multi-stage' fraud where funds are first moved through one or more accounts in the customer's name before being sent to the scammer.

I'm also aware of the differences between 'push' and 'pull' payments and that a payment service provider cannot 'pause' a card payment in the same way it can a push payment. But that doesn't mean Santander can't prevent potentially fraudulent card payments from being made, as there's nothing preventing a bank from stopping a card payment altogether if it suspects fraud. So, the fact the payments in question were made by debit card doesn't

change my view 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 the payment, would that have prevented the loss Mr E incurred?

I've thought very carefully about how things would have likely unfolded if Santander had questioned Mr E directly about the nature of payment 7 – and I note Santander suggests such a discussion would simply have determined Mr E was again sending funds to his own account, with a legitimate firm, from which he'd been able to withdraw funds previously. It says there would have been no reason to believe something suspicious was happening.

In my view, however, if Santander had called Mr E to ask suitably probing questions about the situation, I think he'd have been upfront about what he was doing – and, on balance, the scam would have likely been unravelled. I've seen nothing to suggest he was coached by the scammer on what to say for his payments to go through without issue. And if Santander had spoken to Mr E about what was happening, it could have asked how he'd found the investment opportunity and if anyone else was involved. It could have discovered he'd found the opportunity on social media and that a 'broker' was advising him to send money to a newly opened account before buying cryptocurrency. It could have alerted him to a FCA notice that, by that time, had been published about DCM. It could have alerted him to the use of remote access and of the withdrawal tactics used to entice victims into paying more.

I'm not convinced Mr E would have gone ahead with sending a further £7,105 after a serious warning about what his particular situation looked like. I'm therefore satisfied Santander missed an opportunity here to uncover the scam and prevent this further loss.

With respect to the payments Mr E lost to the recovery scam, I'm mindful this began some months after the point of intervention I've identified for the first scam. I'm not satisfied the two scams were sufficiently interlinked such that it'd be fair to hold Santander responsible for these losses, on the basis that this second scam wouldn't have happened if it had intervened effectively on the first. And I don't think there was anything particularly suspicious about these payments that ought to have triggered another intervention.

I don't therefore consider that Santander should refund any payments that were lost as a result of the second scam in July and August 2021, as I think Mr E would've still likely fallen victim to this scam irrespective of whether Santander had intervened on payment 7. I'd also add that Santander did put Mr E on notice, in a call on 25 May 2021, that investment scams are often followed by recovery scams with false promises that lost funds could be retrieved.

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

I recognise Mr E transferred the money to an account in his own name, rather than directly to the fraudster, so he remained in control of that money after he made the payments from his Santander account, and it took further steps before the funds were lost to the fraudsters.

But, as I've explained, the potential for multi-stage scams ought to have been well known to Santander and, as a matter of good practice, it should fairly and reasonably have been on the look-out for payments presenting an additional scam risk including those involving multi-stage fraud. And because I think it should reasonably have made further enquiries on payment 7 – and, if it had, it's more likely than not Mr E wouldn't have lost that money – I'm satisfied Santander can fairly and reasonably be held responsible for that loss.

I also note Santander believes Mr E may have a complaint against CEX. But our Service can't consider a complaint against CEX. It's not authorised by the FCA to carry out regulated

activities. And even if it was, I have no power, under our rules, to compel a complainant to make a complaint about another business. I'm required to consider the complaint in front of me. I've found Santander should reasonably have done more to protect Mr E from financial harm and I'm satisfied it could have prevented some of his losses if it had done so.

As for Santander's comments that the CRM and upcoming PSR scheme have knowingly excluded payments of this nature, I'm not convinced it necessarily follows that it shouldn't now compensate Mr E in circumstances where it failed to act fairly and reasonably, as I've found was the case here. I'd also add that the PSR scheme is not yet in force and isn't relevant to my decision about what's fair and reasonable in this complaint.

Should Mr E bear any responsibility for his losses?

The concept of contributory negligence centres around whether or not a consumer should have done something to mitigate their losses or should share some responsibility for them.

Santander has said there are significant concerns regarding Mr E's actions based on what he was told by the scammer and a deduction of at least 50% should apply for contributory negligence. I note it hasn't specified what it was about what Mr E was told or about his actions that show he acted unreasonably such that he should be partially liable.

In any case, and in terms of whether Mr E carried out sufficient due diligence into the 'investment', my own research shows there was little information at the time of the disputed transactions to conclude BitQZ was a scam. I'm mindful a FCA warning was published about DCM on 22 February 2021 and I've seen a couple of negative reviews (warning of a scam) appeared from 27 February 2021. But I can't ignore these came into view shortly *after* Mr E had already recently begun to engage with DCM and that he'd also been provided with some correspondence to make him think he was dealing with a genuine FCA-authorized broker.

I think it's also important to note that this was a particularly elaborate scam. The returns he believed he was making wouldn't necessarily have appeared as unrealistic in the context of crypto-currency and he was able to make a withdrawal early on which would have given him some reassurance. He was then led to believe his next withdrawal request from DCM had in fact been successful. And, from his perspective, he wasn't tricked into making payment 7 by DCM – but by someone who was now claiming to work for CEX. Any further research into the authenticity of that company would have revealed a legitimate business.

Taking all of the above into account, and on balance, I don't think it'd be fair to hold Mr E partially liable for the loss of payment 7. I'm not convinced he acted unreasonably or that this loss would necessarily have been prevented if he'd carried more research – given the communication he received, the timing of events, the way the scam was conducted, the involvement of different 'brokers' at various stages, and the different mix of information that would have been available about the 'brokers' he thought he was dealing with.

Recovery

In general, a bank should attempt to recover lost funds once a scam has been reported. In this case, the card payments were sent to an exchange in Mr E's name before being sent to the scammer. It's unlikely Santander would have been able to facilitate a recovery of that money through a recall or a chargeback claim, as he'd received the service from CEX for which he'd paid.

My final decision

For the reasons given above, I uphold this complaint. To put things right, I direct Santander UK Plc to:

- Refund the card payment of £7,105.88 made on 10 March 2021.
- Pay 8% simple interest per year on this amount from the date of loss until the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E and Mrs E to accept or reject my decision before 9 April 2024.

Thomas Cardia
Ombudsman