

The complaint

Mr M complains Santander UK Plc didn't do enough to protect him when he fell victim to a scam.

What happened

Mr M has an account with Santander and a debit card.

Mr M says he was browsing the internet when a pop up appeared for a trading company. He says he hadn't been looking to invest at the time but gave his contact details.

Mr M says he was subsequently contacted and asked if he wanted to invest – and that he could start small and invest £250. He says he was told he could make returns which he now accepts were “too good to be true”. He says he only ended up agreeing to invest after the person who contacted him had called him consistently and persistently. Mr M says that he made payments of over £25,000 towards the investment he believed he was putting his money in – he says he believed he was investing in foreign exchange, gold, silver, wheat and oil – and that he was able to withdraw around £6,000 during the course of investing.

Mr M says he realised he'd fallen victim to a scam when the person he was speaking too kept on pressuring him for more and more money. He says he spent 2020 to 2022 trying to get his money back from the trading company – and sent over 120 emails to them without response. Having failed to get his money back, Mr M contacted Santander.

Santander looked into Mr M's claim and said for various reasons that it wasn't going to be able to refund him. Mr M complained to Santander and then to us.

One of our investigators looked into Mr M's complaint and said on balance that the company to whom the payments had been made was likely to be a scam. Our investigator also thought that the first four payments Mr M had made weren't particularly unusual or suspicious so there would have been no reason for Santander to intervene. They did, however, think that Santander should have intervened before letting Mr M's fifth payment go as it was the third such payment that day – and a pattern had begun to emerge of Mr M making multiple large payments in foreign currency. Our investigator said that there was no evidence Santander had contacted Mr M or warned him and that this was a missed opportunity to prevent further loss to him. In the circumstances, given that our investigator thought Mr M should share some responsibility too, our investigator recommended that Santander refund from the fifth payment onwards, less credits received, less 50% contributory negligence on Mr M's side plus 8% simple interest. Mr M accepted our investigator's recommendation. Santander didn't.

Santander said it flagged one of the payments Mr M had made in November 2019 and would have given him an investment scam warning at the time. Santander said that it didn't, therefore, think that it's fair that it should be held liable, adding that Mr M clearly had investments elsewhere too and must have known what checks to carry out but nevertheless carried on despite being promised returns that were too good to be true. Santander said that it didn't think Mr M would have stopped trading even if it had stepped in. Santander also said

that the payments appeared to have gone into an account in Mr M's own name and the fact that he'd been able to withdraw over £6,500 over a span on 10 months isn't consistent with what's normally seen when it comes to an investment scam. Santander also said it had received clear and unequivocal instructions from Mr M and that our investigator's position was inconsistent with the Philipp decision. In short, Santander asked for Mr M's complaint to be referred to an ombudsman for a decision. His complaint was, as a result, passed to me.

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.

Mr M made the payments he's complaining about more than four years ago, and he didn't complain to Santander for more than two years too. In addition, Mr M only just referred his complaint to us within six months of Santander's final response. That means in this particular case that it's been hard to build up a complete picture of what did and didn't happen as a lot of the evidence is now missing given the passage of time.

was this a scam or an investment gone wrong?

Despite the evidential difficulties that I've just mentioned, I agree with our investigator that this was likely a scam – rather than an investment gone wrong – notwithstanding the fact that Mr M was able to make some large withdrawals over the period in question. I say that because there's evidence that the company in question was operating in the UK without FCA authorisation – in other words, unlawfully given the services it was offering – and there's plenty of evidence that other people have been scammed out of their money by the company in question.

I agree too with our investigator that the first four payments Mr M had made weren't particularly unusual or suspicious so there would have been no reason for Santander to intervene. And that Santander should have intervened before letting Mr M's fifth payment go as it was the third such payment that day because a pattern had begun to emerge of Mr M making multiple large payments in foreign currency. And, more importantly, a pattern that was unusual and suspicious. So, I agree that Santander missed an opportunity to prevent further loss to Mr M.

Santander has said that it had a duty to execute Mr W's instructions as they were clear and left no room for interpretation. And it's also said that our investigator's position is inconsistent with the Philipp decision. That's a reference to Philipp v Barclays Bank UK PLC, so I'll go on and address that now.

what fairly and reasonably should Santander do?

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Mr M's account is that Mr M is responsible for payments Mr M has 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 terms and conditions at the time – a copy of which Santander has sent us – gave it rights (but not obligations) to:

1. Refuse any transaction if it reasonably suspects it relates to fraud or any criminal act.

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 a transaction appeared unusual compared to a customer's normal spending pattern or 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.

I am mindful in reaching my conclusions about what Santander ought fairly and reasonably to have done that:

- FCA regulated banks are required to conduct their "business with due skill, care and diligence" (FCA Principle for Businesses 2) and to "pay due regard to the interests of its customers" (Principle 6).
- Banks have a longstanding regulatory duty "to take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime" (SYSC 3.2.6R of the Financial Conduct Authority Handbook, which has applied since 2001).
- Over the years, the FSA, and its successor the FCA, have published a series of publications setting out non-exhaustive examples of good and poor practice found when reviewing measures taken by banks to counter financial crime, including various iterations of the "Financial crime: a guide for firms".
- Regulated banks are required to comply with legal and regulatory anti-money laundering

and countering the financing of terrorism requirements. Those requirements include maintaining proportionate and risk-sensitive policies and procedures to identify, assess and manage money laundering risk – for example through customer due-diligence measures and the ongoing monitoring of the business relationship (including through the scrutiny of transactions undertaken throughout the course of the relationship).

- The October 2017, BSI Code, which a number of banks and trade associations were involved in the development of, recommended firms look to identify and help prevent transactions – particularly unusual or out of character transactions – that could involve fraud or be the result of a scam. Not all firms signed the BSI Code, but in my view the standards and expectations it referred to represented a fair articulation of what was, in my opinion, already good industry practice in October 2017 particularly around fraud prevention, and it remains a starting point for what I consider to be the minimum standards of good industry practice now.
- Santander has agreed to abide by the principles CRM Code. This sets out both standards for firms and situations where signatory firms will reimburse consumers. The CRM Code does not cover all authorised push payments (APP) in every circumstances (and it does not apply to the circumstances of this payment), but I consider the standards for firms around the identification of transactions presenting additional scam risks and the provision of effective warnings to consumers when that is the case, represent a fair articulation of what I consider to be good industry practice generally for payment service providers carrying out any APP transactions.

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.
- 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 M's payments?

In this case, for the reasons I have explained, I'm satisfied Santander should have intervened.

if Santander had intervened ...

The key questions I have to decide is:

- whether or not that would have made a difference had Santander intervened; and
- in the event that it would have made a difference, whether or not Santander should be responsible for refunding all the payments Mr M made from the time that Santander should have intervened.

In this case – given all the red flags our investigator identified – I agree with our investigator that had Santander spoken to Mr M this scam would have come to light. Mr M has also accepted – given the red flags our investigator identified – that it isn't unfair or unreasonable to share liability in this case. So, I not only agree that Santander missed an opportunity to prevent further loss to Mr M, but also agree that in this case it's fair to share liability.

Putting things right

Santander should refund 50% of the losses Mr M made from the fifth payment onwards.

My final decision

My final decision is that I'm upholding this complaint and require Santander UK Plc to refund Mr M from the fifth payment he made – less any credits he received – having deducted 50% to take account of Mr M's contributory negligence. In addition, I'm going to require Santander UK Plc to pay 8% simple interest on these refunds from the date of payment to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 6 April 2024.

Nicolas Atkinson
Ombudsman