

The complaint

Mr M complains that Santander UK Plc (“Santander”) failed to refund transactions he didn’t recognise.

What happened

What Mr M says

Mr M received a message to speak with Santander after they noticed some unusual activity on his account. Mr M called them and said he was currently on a “stag-do” overseas with some friends.

Mr M discussed the situation with Santander and said that he couldn’t get into his online account to check it. Mr M said he’d transferred some funds (£1,000) into another account he operated with a different merchant I’ll refer to as R.

Mr M said that he paid £250 for his hotel costs but denied trying to send a further £500 to the same account. Mr M thought he’d paid the (£250) using his card but it was explained that this was a bank transfer to another bank account. He was a little unsure of the payment but eventually confirmed it was for hotel costs.

During the conversation Mr M confirmed he had been “*the worse for wear*” the previous night and he still had his phone and debit card linked to his account. He said no one else knew his logon details for his account. He was also asked about who he was with and said he “...*didn’t know them personally*” and had only met them last night.

It transpired that a significant amount of funds had been taken from Mr M’s account using both his card and Apple Pay (AP) that was set up on his phone. These payments were to various other merchants in the area including a club, Automated Teller Machines (ATM for cash withdrawal), supermarkets and payments to different accounts at R.

Mr M said that he had additional funds in his account from a recent loan he’d applied for although he had no intention of spending those funds. He said he was using his account held with R to pay for his expenses during the stag-do. Mr M denied making most of the payments linked to his Santander account.

After reviewing the situation, Santander declined to refund those transactions, believing that Mr M was responsible. Mr M complained, but Santander didn’t change their position. Mr M then brought his complaint to the Financial Ombudsman Service for an independent review.

What Santander says

Santander issued two alerts to Mr M after their fraud detection system noticed several unusual transactions on Mr M’s account. One was to block a payment and asked Mr M to get in touch with them. The other, which happened a few hours later asked Mr M to confirm a transaction. Santander’s systems recorded that Mr M’s phone sent back confirmation that the transaction was genuine, and it was allowed to proceed.

Santander spoke with Mr M and discussed what happened. Based on their information about the transactions – which showed they were made with Mr M's genuine card and personal identification number (PIN) and some used his AP, they declined to refund him. They also took into account that Mr M still had his phone and card, hadn't given them to anyone else and had made genuine transactions both before and after the disputed ones.

The investigation so far

An investigator was assigned to Mr M's complaint and asked both parties for information about the circumstances. Mr M was able to say that:

- The funds from the car loan were still in his account because he hadn't been able to transfer them out.
- He used his debit card at a cash point when he arrived in the resort and to make a payment at a hotel.
- Mr M said he then used AP to make purchases that evening.
- He confirmed sending £1,000 to his account held with R.
- Mr M provided details of his payments from his account with R.
- He said that at the time he first spoke with Santander, he wasn't aware of the additional unrecognised transactions because he couldn't access his online account.
- Mr M said the total amount he disputed was about £7,000.
- He received notification from another bank of an attempt to register AP with that card.
- Mr M thought that the cash withdrawal limit had been bypassed and wanted to understand how this had been allowed to happen.
- He reported the matter to the police in the UK.

Santander provided details of the account activity, including details of the online account usage and copies of the calls. In summary this showed that:

- Mr M's genuine card and PIN had been used to withdraw cash.
- A second transfer to the bank account (for the hotel costs) was blocked by Santander.
- A further request to confirm payments was made to Mr M and Santander received confirmation they were genuine.
- There was no evidence of a compromise of his account.
- Mr M's card was used to make payments using the internet (to R) and via contactless (AP) from the registered device.
- There was no evidence of another device being linked to Mr M's account.
- Mr M still had his phone and card after the event which he continued to use.

After reviewing the situation, the investigator didn't uphold the complaint. They commented that:

- Santander reached out to Mr M after larger than normal spending was identified and received confirmation that the payments were genuine.
- The payments were authorised using the card's chip and PIN.
- If a fraudster was responsible – they would have needed to gain possession of the card, obtain the PIN and mobile phone.
- Mr M logged on to his mobile banking when most of the disputed transactions had already occurred but didn't report them until the following morning.

Mr M disagreed and through his representatives commented that:

- The timings of the payments would show Mr M was elsewhere when compared to other evidence.
- Mr M's phone wasn't used for the AP payments, and it was suggested a cloned copy of the card was responsible.
- Mr M didn't receive any messages and was locked out of his online banking.
- The pattern of spending is abnormal.
- There was no cctv evidence considered.
- Santander owe Mr M a duty of care to prevent and detect fraudulent activity on his account.
- The pattern of transactions is suspicious, and Santander are wholly responsible for Mr M's financial loss.
- A further review of the complaint was requested.

As no agreement could be reached, the complaint has now been passed to me for a decision. As part of my investigation, I wanted to understand Mr M's experience during his night out in more detail. I asked for more information concerning what happened and how his card and phone came to be used to make the various disputed transactions. I also wanted to understand who the person was that Mr M referred to in his conversation with Santander?

Mr M, via his representatives stated that:

- Mr M was with friends during his night out and visited those locations identified on his bank statement from R (which he'd already provided).
- The assumption that Mr M's state meant he wasn't aware of the transactions being made is wrong because Mr M reported them then following day. He wouldn't have done this if he was responsible.
- Other persons were responsible for these transactions and Mr M's possession of the payment devices (phone and card) didn't mean he'd made them because they could have been cloned (card).

- Mr M's mental health was detrimentally impacted by the incident and the time taken to resolve the issue.

I asked some follow up questions which Mr M's representative was able to answer:

- Mr M didn't have any unusual interactions with anyone during his night out and only spoke with members of his own group, visiting local bars in the area.
- Mr M confirmed that the bank transfer (£250) was made to a hotel.
- Mr M continued to deny he was responsible for the disputed transactions, although it was stated that "*Although unlikely, this is not impossible, which is relevant in the circumstances in this case.*"

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.

Where there is a dispute about what happened, and the evidence is incomplete or contradictory, as it is here, I must reach my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in light of the available evidence.

My focus is on what I think the key issues are as our rules allow me to do this and it reflects the nature of our service as an informal alternative to the courts. So, if there's something I've not mentioned, it isn't because I've ignored it, it's because I'm satisfied that I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

The relevant law surrounding authorisations are the Payment Service Regulations 2017. The basic position is that Santander can hold Mr M liable for the disputed payments if the evidence suggests that it's more likely than not that he made them or authorised them.

Santander can only refuse to refund unauthorised payments if it can prove Mr M authorised the transactions, but Santander cannot say that the use of the card and PIN or the use of Apple Pay conclusively proves that the payments were authorised.

Unless Santander can show that consent has been given, it has no authority to make the payment or to debit Mr M's account and any such transaction must be regarded as unauthorised. To start with, I've seen the bank's technical evidence for the disputed transactions. It shows that the transactions were authenticated using the payment tools issued to Mr M. I'll now need to consider the information provided by both parties to determine whether there's sufficient evidence to hold Mr M responsible for the disputed transactions or not.

I think it's worth clarifying a few points before continuing with my assessment. There's been a suggestion that the card could have been cloned, providing an explanation for some of these transactions. The data supplied by Santander shows that the card's chip was read for the ATM withdrawal. What this means is that the genuine card's chip was present and recognised by Santander's systems. Whilst it is possible to clone a card's magnetic strip, this wasn't what the ATM "read" when it was used for the withdrawal. The cloning of the chip hasn't yet been evidenced for cards issued in the UK, so it's unlikely that a cloned card was used here. Far more likely that the genuine card was used in the ATM.

Mr M also raised the issue of how the ATM limit was breached, allowing multiple uses of his

card when he believed it shouldn't have been allowed. Having looked at the audit data, the uses of his card that Mr M thought were ATM transactions weren't recorded as such at the time. It appears they were used to make purchases rather than dispense cash, so the ATM limit wasn't exceeded. There is evidence that some attempts were declined due to the limit being exceeded.

Now, having looked at the evidence I was struck by the lack of detail of Mr M's night out. I asked on a few occasions for Mr M to provide as detailed description as he could. He's been able to say that he went out to some local bars, only used his card with R to make purchases at the bars and only spoke with his friends group he was with.

He denied meeting anyone else, but in his call to Santander, he said he was with someone else which is quite different to his later recollections. Mr M hasn't offered any explanation how these disputed transactions could have occurred, given that they were made by his own card and there's no evidence that AP was set up on any other device – so it's fair to assume the AP transactions were made using his own mobile phone.

I do recognise the larger than normal transactions made from his account which stands out when compared to his normal spending, but the occasion was slightly out of the usual as well (stag-do). The belief that Santander didn't protect his account isn't supported by the evidence. They blocked one payment and sent Mr M a message about others which they received confirmation back from his phone (despite Mr M's insistence he never received any message). All these payments were made using Mr M's genuine devices and followed the appropriate steps for Santander to recognise as transactions made by Mr M. Once they received confirmation from his phone, I don't think it was unreasonable for them to continue to release the funds as requested.

Mr M has said his night out followed the payments made from his account with R. That shows Mr M's last payment was about 11:00 pm at a bar. Mr M has said he made a bank transfer (which he thought was a card payment) to a named person which he says was his hotel and took place at around 11:42pm that night. This transfer was made using Mr M's mobile banking facility which indicates he had his phone at that point.

There was an attempt to send a further £500 to the same account (hotel) that was blocked by Santander. Mr M said originally he thought he'd paid for the hotel with his card – which would typically be how a payment is made. There is a large £200 plus payment to a hotel, but Mr M hasn't said this was where he was staying at the time. I appreciate Mr M is insistent that the £250 was for a hotel, but the direct payment to another bank account is a slightly unusual way to pay for a hotel and the additional £500 to the same "hotel" account seems an unusual payment to attempt to make. This payment was again made from Mr M's own device and was stopped directly by Santander. This payment is timed at just after midnight. Given Mr M said he made the earlier payment, it stands to reason that he was also responsible for the second one, although it's unclear why Mr M didn't follow up with Santander after they blocked it. Surely if it was to a genuine "hotel", then Mr M would want the second payment to be made?

Mr M reported to Santander that he wasn't responsible for multiple payments to other accounts with R and they are recorded as starting at 11:56. Payments are then recorded at an ATM and then a club before more attempts to transfer funds to R and make transactions at supermarkets.

So here, Mr M says he paid the hotel, then there are a number of disputed transactions before a further attempt to send money to the same hotel account. It would seem that Mr M had his phone, lost it, had it back to only lose it again before being finally returned to him without his knowledge – which I struggle to accept as a reasonable explanation for these

payments.

In order to carry out these transactions they would have required both the genuine card and PIN, Mr M's mobile phone and the necessary codes to open it for the AP. Mr M has said he never gave them to anyone else, so it's difficult to see how these items could have been taken, the PIN obtained and used before being returned to Mr M without his knowledge. It seems unlikely that a thief could have obtained these, and I'd wonder why they would then take the trouble (and risk) to return them to Mr M. There were also substantial funds left in the account, so I'd question why a thief would leave that unspent.

Mr M's representatives argued that cctv would show he wasn't responsible for the payments. There was no cctv gathered as part of Santander's investigation, although I don't think this was something they needed to do in this complaint based on the evidence Santander already held.

It's apparent to me that the evening was slightly different to that described by Mr M, particularly given his change in story about whether he met anyone else or not. I don't doubt that something else took place that evening, but given the following, I'm not inclined to think that Santander should have to refund him:

- There's a lack of viable explanation from Mr M about the use of his payment devices.
- Mr M paid for his hotel before the disputed transactions started, but records show a second payment was attempted to the "hotel" account after some of these disputed transactions had already been made.
- His insistence that no one else knew his payment information.
- The lack of clarity on his evening out.
- His condition at the time which he accepted was "*worse for wear*".
- He retained his card and phone.
- The response received by Santander from Mr M's phone despite his insistence he never received the fraud message.

I was sorry to hear of the difficulties he's faced since this event, but the evidence that I've considered leads me to the conclusion that, on the balance of probabilities, it was more likely than not that Mr M authorised or allowed his card detail and AP to be used to make the payments. So, taking everything into account, I think it is both fair and reasonable for Santander to hold Mr M responsible for these transactions.

I was also struck by his representatives comment, which recognised that the circumstances as described, were unlikely but not impossible. I think that's a fair description, but unfortunately I can't ask Santander to refund those payments on that basis.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 18 March 2024.

David Perry
Ombudsman