

## The complaint

Mr T complains that Santander UK Plc hasn't refunded him after he fell victim to an investment scam.

## What happened

The background to this complaint is well-known to both parties, and I've discussed my findings with Santander and Mr T already. I won't then go into detail about what happened, instead summarising the key information.

Mr T found an investment opportunity online, believing it to be genuine. But he'd actually come across a fake service set up by a scammer. Not knowing that to be the case Mr T was persuaded to invest, believing he was purchasing cryptocurrency by paying a third-party.

Mr T made the following payments to that effect:

Date	Payment type	Amount
15 July 2022	International transfer	£1,780
2 August 2022	International transfer	£3,242.82
2 September 2022	International transfer	£5,709.26
13 September 2022	International transfer	£5,825
13 January 2023	Faster payment (to an account in Mr T's name)	£24,000

The final payment wasn't made to a third-party, but to another account provider, with the account being in Mr T's name. When that payment was made, Santander stopped it to ask Mr T some questions about the purpose. When Mr T said the money was going to another account in his name, Santander released it.

It's important to note here that the final payment was funded by a loan Mr T took out with Santander.

Mr T has explained he was able to access an online portal where he could track his investments. He realised something was wrong when this portal became inactive. He contacted Santander to report he'd been scammed.

Santander looked into what had happened and said it wouldn't refund Mr T. It said he'd authorised the payments himself and so was responsible for them. It said the Lending Standards Board's Contingent Reimbursement Model (CRM) Code didn't apply to the payments Mr T had made because they were either international transfers or were made to an account in his own name.

Santander went on to say it wouldn't consider a liability assessment based on intervention and warnings as the payments weren't covered by the Code.

Mr T brought his complaint to our service as he was unhappy with Santander's response. One of our investigator's considered all that had happened and didn't believe Santander had acted fairly and reasonably.

She said that, whilst Mr T had authorised the payments, they represented unusual account activity that Santander ought to have recognised as representing a risk of financial harm through fraud. Our investigator said that point was reached when Mr T made the payment of £8,825 on 13 September 2022. She said Santander ought to have stepped in to question what Mr T was doing because of that.

She was satisfied that intervention and proper questioning would have revealed the scam and prevented any further loss. On that basis she said Santander should bear some responsibility for Mr T's loss.

But she recognised Mr T hadn't acted reasonably in the circumstances as he'd done little to ensure he was engaging in genuine investment activity and with genuine parties. She noted his checks into the business he believed he was dealing with were limited to checking online reviews.

With all of that in mind she said Santander should compensate Mr T for his loss from the 13 September 2022 payment, but with Mr T also being accountable for 50% of that total.

Mr T accepted the investigator's findings, but Santander didn't. And so the complaint has been passed to me for a final decision.

I've already explained to both parties that I intended to uphold the complaint and that I'd also be including the earlier payment of £5,709.26 in the redress. I'm now confirming the outcome in this final 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.

I uphold Mr T's complaint against Santander and for broadly the same reasons as our investigator. As stated above, I will be including an additional payment in the redress.

Mr T authorised the payments that are the subject of this complaint and the starting point at law is he is liable for them. This is confirmed in the Payment Service Regulations (2017), and it remains true even though he made the payments as a result of a scam.

I have 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 June 2022 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 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'm also satisfied that Santander ought fairly and reasonably to be aware of multi-stage scams, where funds might first be sent to another account held by the customer. It appears at least the final payment made by Mr T went to an account in his own name (I'm not persuaded that is the case for the earlier international payments).

Such scams are commonplace, particularly with cryptocurrency investment. And so Santander ought fairly and reasonably to be able to foresee potential loss to such scams and be able to act to prevent them. Industry guidance, including publications and statements by the FCA, specifically directed at firms like Santander, has been in place for long enough for Santander to have adapted its processes and systems to pick up on these scams and to have tools in place to prevent them.

In this case, I'm satisfied Santander ought to have stepped in to question the payment made on 2 September 2022. I've explained my reasons for this to Santander already. To summarise the key features, presenting as a scam risk:

- That it was an international payment is a particularly strong factor
- It was the highest value payment out of his account for eight months
- Going back further than eight months there are no similar sized payments, so it represented unusual spending on the account.

Santander has argued that intervention would have made no difference, referring to the call it had with Mr T on 13 January 2023. I find that call to be of poor quality in terms of scam prevention and intervention. The questioning is incredibly limited and there's very little done to identify the purpose of the payment or to uncover any potential risks. Those are steps Santander ought to have fairly and reasonably taken on that call and didn't. They are also steps Santander ought fairly and reasonably to have taken sooner, for the 2 September 2022 payment, but didn't.

I've seen no persuasive evidence to suggest an appropriate intervention, with suitable probing questions asked of Mr T, would have failed to reveal more features of the scam. Santander ought to have been able to uncover key details about what Mr T was investing in, how he'd found the business involved, and what checks he'd carried out. All that information ought fairly and reasonably to have built a more and more concerning picture, given the

hallmarks of a scam that would have been identified. That, in turn, ought fairly and reasonably to have led to Santander providing scam education and warnings against proceeding to Mr T. I'm satisfied he would more likely than not have listened to Santander and stopped what he was doing, having had the nature of the scam he was in the middle of explained to him. His further loss would then have been prevented. As Santander failed to prevent the scam when it ought to have taken action, it's fair and reasonable for it to now compensate Mr T for his loss.

I have also taken account of Mr T's own actions. He has accepted he ought to bear some responsibility for his loss. I don't intend to go on to make a detailed finding here as the position has been agreed. Suffice to say my own findings are that Mr T ought to bear equal responsibility for the loss from the point Santander ought to have intervened. Mr T will bear sole responsibility for the payments before that.

As a final point, Santander has said the payees should be contacted and pursued for Mr T's money. It says both are genuine financial businesses and so ought to bear responsibility. But it is Santander Mr T has complained about and that has a case to answer. Furthermore, one of the payees (used for the international payments) appears to be a Japan based business consultancy, so I'm unclear as to what remit Santander believes this service has or how it might be responsible. For the second payee, I don't believe the business offers the services Santander thinks it does. I can't see it provides customer accounts itself, instead offering payment solutions to other businesses.

### **Putting things right**

On Mr T's acceptance Santander should:

- Refund £17,767.13 of Mr T's loss;
- Pay interest on that sum at 8% simple per year, calculated from the date of loss to the date of settlement.

### **My final decision**

I uphold this complaint against Santander UK Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 10 April 2024.

Ben Murray  
**Ombudsman**