

The complaint

Mr and Mrs S are unhappy that Santander UK Plc hasn't refunded them after they fell victim to an investment scam.

What happened

The background to this complaint is well-known to both parties and so I'll only summarise the key details here.

Mr and Mrs S were approached by a friend who was recommending an investment into cryptocurrency through a firm they'd been using. Neither Mr and Mrs S or their friend knew at the time that the firm was a front created by scammers.

Mr and Mrs S had been told they could double their money within around six months and so were keen to invest. They started to send money to the scammer in September 2020. The funds went from their Santander current account to a cryptocurrency wallet in their name. From there the money was sent on to the scammer.

Payment values were modest to start with, and some money was credited back to Mr and Mrs S' Santander account from their cryptocurrency wallet. In November 2020 Mr and Mrs S looked to send £15,674 from their Santander account. The bank flagged this payment up as suspicious and contacted Mr and Mrs S about it. A discussion was had about the purpose of the payment. Santander asked some questions, and the payment was released.

Mr and Mrs S continued to send money in this way – and to also receive money back from their wallet –for several months. It appeared they were making good returns on their investment. But their account suddenly showed huge losses, and this led to the scam being revealed.

By October 2021, taking into account what had debited and credited their account, Mr and Mrs S had lost £51,311.34. They reported the scam to Santander. It responded to say it wouldn't refund any of the loss. Its principal reason for saying so was that, because the payments had been made from Santander to a cryptocurrency wallet in Mr and Mrs S' name, the protections of the Contingent Reimbursement Model (CRM) Code didn't apply.

Mr and Mrs S brought their complaint to our service and one of our investigators recommended it be upheld. He agreed the CRM Code didn't apply to the payments made by Mr and Mrs S for the reasons Santander had given. But he pointed out Santander still ought to have been on the lookout for suspicious and unusual payments that might indicate a customer was at risk of financial harm through fraud.

He further noted Santander had in fact stepped in to question a payment (the £15,674) on that basis. But he found the intervention was poor, with the questioning being insufficient to identify the scam, and with relevant warnings about cryptocurrency scams not being delivered. He said that had Santander acted as it fairly and reasonably ought to have done the scam could have been avoided. He said, on that basis, it should bear some responsibility for Mr and Mrs S' loss.

Our investigator did acknowledge Mr and Mrs S' own actions and didn't believe they'd carried out sufficient due diligence on the investment opportunity to ensure it was legitimate. So he said liability for the loss ought to be shared.

Mr and Mrs S agreed. Santander did not. It said its principal responsibility was to execute the payment instructions Mr and Mrs S gave. It also said that it was unfair and inappropriate for it to shoulder any responsibility for the loss, given the money had gone to a legitimate cryptocurrency platform. It pointed out the loss had only truly come about once funds were sent on from there.

The case has been passed to me for a 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'm reaching the same outcome as our investigator and for broadly the same reasons.

The starting point at law is that Mr and Mrs S are responsible for all payments made from their account which are properly authorised. This position is set out in the Payment Service Regulations (2017) and is confirmed in their account terms and conditions. That remains true even where a customer has been the victim of a scam and has authorised payments under false pretences.

However, taking account of long-standing best practice and industry guidance, alongside Santander's own terms and conditions, I'm satisfied the bank ought, fairly and reasonably, to have been on the lookout for fraud and scams, with a view to preventing its customers suffering financial harm. That includes multi-stage fraud, where funds might be sent to another account in the customer's name before being lost.

This position is unchanged by the *Phillips v Barclays Bank UK PLC* judgement which Santander has referred to. Whilst Santander was under an implied duty at law to make Mr & Mrs S' payment promptly, it had a contractual right not to do so where fraud was suspected. Santander did of course exercise that right, which I'll come on to in a moment.

Santander should fairly and reasonably be aware of this particular type of fraud involving cryptocurrency scams. Along with its own experience, as a professional banker, the FCA has issued warnings and guidance about such scams. I'm satisfied Santander ought to have been monitoring Mr and Mrs S' account for this type of scam and that their losses, even from an externally held cryptocurrency wallet, were foreseeable and preventable.

Santander's own actions support that finding. It did step in to question a payment because of fraud concerns. The error here is that the intervention didn't go far enough.

The evidence of the interaction is somewhat limited as not all relevant call recordings are available. But it is possible to piece together what was more likely than not discussed from other sources.

What is clear is that Mr and Mrs S answered Santander honestly and openly when asked about the purpose of the payment. They said they were investing in cryptocurrency and with a firm they had little direct experience of, relying on the recommendation of a friend. It also became evident on the call that the firm behind the investment had limited signs of activity, especially within the UK.

What didn't happen, where it fairly and reasonably should have, was a series of probing questions to discover more about the investment. There was no questioning, for instance, of the proposed rate of return. Had Santander asked such a question I'm satisfied they would have been troubled by the answer – that Mr and Mrs S expected to double their money in just six months.

Santander also ought fairly and reasonably to have given detailed warnings about cryptocurrency investment scams, highlighting the key features, and drawing the parallels with Mr and Mrs S' own circumstances.

I'm persuaded that Mr and Mrs S would have been dissuaded against proceeding had Santander done what is fairly and reasonably expected of it in such circumstances. The loss then would have been averted at the point the £15,674 payment was being made.

I, like our investigator, also must consider Mr and Mrs S' own actions and whether they themselves acted reasonably in the circumstances. I don't intend to say much here as Mr and Mrs S have already accepted that they ought fairly and reasonably have done more at the time to ensure the investment was legitimate. They've also accepted that means they should bear some responsibility for their loss. I agree that's a fair and reasonable position and so the liability for the loss from the point Santander intervened is to be shared between both parties.

Putting things right

On Mr and Mrs S' acceptance Santander should:

- Refund 50% of Mr and Mrs S' loss from 9 November 2020 onward, minus any credits/returns received;
- Pay interest on that refund at 8% simple per year, calculated from the date of loss (given the loss could have been prevented) 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 Mrs S and Mr S to accept or reject my decision before 2 April 2024.

Ben Murray
Ombudsman