

The complaint

Mr M complains that Santander UK Plc (“Santander”) won’t refund over £36,000 that he lost to an investment scam beginning in July 2022.

What happened

The details of this complaint are well known to both parties, so I won’t repeat everything again here. In brief summary, Mr M fell victim to a scam after he came across an investment opportunity on social media. He registered his interest and was contacted by a scam broker (“P”) who encouraged him to invest.

Mr M was instructed to open an account with, and transfer his money to, an FCA-authorised Electronic Money Institution (“EMI”) – “W” – where he would then send the funds on to a cryptocurrency wallet and on to the scammer. He made the following payments using his Santander debit card:

1. 20/7/22 – £214 to traders-school.com
2. 10/8/22 - £2,006 to W
3. 12/8/22 - £2,006 to W
4. 12/8/22 - £1,003 to W
5. 23/8/22 - £2,507.50 to W
6. 23/8/22 - £1,504.50.50 to W
7. 23/8/22 - £1,705.10 to W
8. 8/9/22 - £8,024 to W
9. 20/9/22 - £5,015.50 to W
10. 10/10/22 - £5,015.50 to W
11. 11/10/22 - £7,622.80 to W

Mr M realised he’d been scammed after P continued to ask him for significant amount of money to withdraw his profits, despite having already paid over £17,000 in fees and taxes he was told to pay. He reported the fraud to Santander, but it said it wouldn’t refund the money Mr M lost to the scam as he’d authorised the payments, which had been made to another account in his own name. Unhappy with this, Mr M referred the matter to our service.

Our investigator upheld the complaint. He thought Santander ought reasonably to have recognised a risk of fraud and made further enquiries when Mr M made the £1,705.10 payment on 23 August 2022, as it was the third payment he was making to W on the same day. If it had done so, the investigator thought any further losses could’ve been prevented.

As a result, the investigator recommended that Santander reimburse the money Mr M lost from this point onwards. However, he also thought that Mr M should share 50% responsibility from the payment he made on 20 September 2022 onwards.

Mr M accepted the investigator's proposed outcome, but Santander disagreed. In summary, it said:

- It has acted in line with industry standards by following Mr M's instructions to transfer money, which was paid into an account in his own name, over which he had full access and control. It did not breach any duty of care owed to Mr M and its primary duty is to execute its customers' payment orders promptly.
- The point of loss did not occur from Mr M's Santander account; it occurred from his account with W, which is a regulated firm in its own right. He should therefore be pursuing his claim against W instead of Santander
- Mr M was using his debit card from a regular IP address in order to send funds to a money service provider. It sent an SMS to Mr M's registered mobile number asking him to confirm the activity on the card, which he did. In any event, even if it had spoken to Mr M, it cannot be predicted how any conversation would have gone. The questions asked would be proportionate to the situation and responses received from the customer, and there wouldn't have been enough here to reasonably detect that Mr M was at risk of financial harm.
- If it is to be held liable for any of the payments made as part of the scam, Mr M should also be held jointly liable due to his own contributory negligence.

As Santander didn't agree, the matter has been escalated to me to determine.

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 am required to take into account relevant: law and regulations; 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 (in this case, the Payment Services Regulations 2017) and the terms of Mr M's account is that he is responsible for payments he's 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 June 2022 terms and conditions gave it rights (but not obligations) to:

1. Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.
2. 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 fraud and have taken additional steps, or made additional checks, before processing payments in some circumstances – as in practice 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 all the considerations again here, though Santander will be able to review these through past decisions on our website if it wishes to do so.

In summary, 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?

It isn't in dispute that Mr M has fallen victim to a cruel scam here, nor that he authorised the disputed payments he made as part of the scam to his account with W (where his funds were then subsequently transferred to the scammer via his crypto wallet). The payments were made by debit card using his legitimate security credentials provided by Santander, but I've thought about whether the bank should have reasonably intervened in any of these payments.

Having considered the first six payments Mr M made as part of the scam, in light of Mr M's previous account history, I don't think there was anything particularly unusual or suspicious that ought to have concerned Santander at that point.

I appreciate the payments were being made to an EMI (which are reporting increasing instances of customers being scammed, including as a consequence of multi-stage scams often involving cryptocurrency). But the value and frequency of the first six payments would not, in my opinion, have appeared particularly out of character. They were not for significant amounts, and Mr M had sufficient funds in his account to make these payments.

However, I am satisfied Santander should've made further enquiries when Mr M came to make the £1,705.10 payment to W 23 August 2022 before allowing it to be processed. I say this because, by that point, it was the *third* payment being made to the same payee (W) on the same day. Santander will be aware that multiple escalating payments being made in quick succession can often be indicative of financial harm.

The amounts being sent to W by this point were rapidly escalating in value, cumulatively exceeding £5,000 in one day by the third payment. This was also out of character for the typical sort of spending associated with Mr M's account, as his statements show that he rarely makes payments for anything over and above £2,000, so this also ought to have been regarded as unusual.

In my view, this combination of circumstances ought fairly and reasonably to have led Santander to make additional enquiries before processing the payment to establish the circumstances in what had become a series of payments that were out of character.

Santander's fraud notes show that a payment was blocked on 23 August 2022. However, no attempt was made to contact Mr M to question him about it. Santander instead sent a text message asking Mr M to confirm that the payment was genuine, which he responded to confirm that it was, meaning he was then able to then make further payments.

However, given the risk that ought reasonably to have been apparent from the suspicious series of payments being made in quick succession, I don't think a text message asking Mr M to simply confirm the payment was genuine was a proportionate response to the heightened risk of financial harm presented in these circumstances.

In reaching my view that Santander ought fairly and reasonably to have made further enquiries, I consider Santander ought to have been mindful of the potential risk to Mr M of 'multi-stage' fraud – whereby victims are instructed to move funds through one or more legitimate accounts held in the customer's own name to a fraudster. The use of and risks to consumers of multi-stage fraud were well known to banks in August 2022. Whilst there may have been legitimate reasons why Mr M was making a series of payments in a short period to an e-money account, I am satisfied Santander ought to have recognised the enhanced scam risk.

I can see that Santander did decline a later payment that Mr M attempted to W on 11 October 2022, which was flagged as suspected fraud. It called Mr M to speak to him about it, but was unable to get through, and its notes suggest that a voicemail was left. Santander said that Mr M then attempted the payment again and it allowed it to go through, despite the fact that it had concerns about the payment and hadn't been able to speak to Mr M.

As a result, I'm not persuaded Santander has acted fairly and reasonably here. Given Santander had enough concern to call Mr M – and given it hadn't been able to get through to Mr M to discuss it – I don't think it was reasonable for the bank to then allow another payment to be made to the same payee before it had been able to satisfy itself that he wasn't at risk of financial harm. In any event, as I've set out above, I think Santander ought fairly and reasonably to have intervened and questioned Mr M sooner than this anyway.

If Santander had made further enquiries before the £1,705.10 payment, would that have prevented the losses Mr M incurred after that point?

Santander has said that it wouldn't be able to predict whether any conversation it could've had with Mr M would've uncovered the scam, and that any questions would be proportionate to the situation and the responses received from the customer. To be clear, I'm not suggesting Mr M should have been subject to an interrogation – merely, in the circumstances, a basic level of questioning designed to disturb or unearth a potential fraud and establish that Mr M was not at risk of financial harm.

I've thought carefully about whether the kind of questions that I believe ought fairly and reasonably to have been asked by Santander would have made a difference. And on the balance of probabilities, I think they would have. If Santander had contacted Mr M and asked him further questions and for more of the basic surrounding context of the payments he was making, I think it's likely he would have explained what he was doing. There's no indication that he had been coached by the scammer into misleading the bank, for example, so I think he would have likely explained that he was sending money to his EMI account as part of an investment opportunity.

As I've set out above, Santander ought to have had a good understanding of how 'multi-stage' fraud commonly works. It could have enquired as to how Mr M had found the investment opportunity and whether anyone else was involved. It could've discovered that he had found the investment opportunity on social media, which had supposedly been endorsed by a celebrity, and that a broker was advising him to transfer money to a newly opened EMI account before purchasing cryptocurrency, which he was being helped to do via remote access software.

These are all common hallmarks of investment scams. And this, coupled with the fact that Mr M was being asked to send multiple payments to his own EMI account to buy cryptocurrency before transferring it on again, ought reasonably to have alerted Santander that he was most likely being scammed. So, I think it missed an opportunity here to uncover the scam and prevent any further losses.

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

In reaching my decision about what is fair and reasonable, I have taken into account that Mr M transferred the money to an account in his own name, rather than directly to the fraudster, so he remained in control of his money after he made the payments from his Santander account, and it took further steps before the money was lost to the fraudsters.

But for the reasons I have set out above, I am satisfied that it would be fair to hold Santander responsible for Mr M's losses (subject to a deduction for his own contribution). As I have explained, the potential for multi-stage scams ought to have been well known to Santander and, as a matter of good practice, Santander should fairly and reasonably have been on the look-out for payments presenting an additional scam risk including those involving multi-stage scams. I'm satisfied Santander should fairly and reasonably have made further enquiries before the £1,705.10 payment and, if it had, it is more likely than not that the scam would have been exposed and Mr M would not have lost any more money. In those circumstances I am satisfied it is fair to hold Santander responsible for Mr M's loss.

I have also taken into account that the payments were made to a regulated business – W, and Mr M might potentially have a claim against W in respect of its actions (although W is not a party to this complaint and so I make no finding about its role here).

Whilst the dispute resolution rules (DISP) give me the power (but do not compel me) to require a financial business to pay a proportion of an award in circumstances where a consumer has made complaints against two financial businesses about connected circumstances, Mr M has not referred a complaint about W to me and DISP does not empower me to instruct Mr M to make or refer a complaint to me about another business.

I am required to consider the complaint in front of me. I have found that Santander did not act fairly and reasonably in the circumstances of this case. And whilst it is a possibility that Mr M may have cause to complain against W, I am not persuaded it would be fair to reduce the award solely for that reason. Mr M is entitled to choose to complain only about Santander and I am satisfied that Santander could have prevented the losses he suffered if it had acted fairly and reasonably.

Should Mr M bear any responsibility for his losses?

Santander has referred to Mr M's own contributory negligence, as it has said that he failed to carry out sufficient due diligence prior to investing.

There is a general principle that consumers must take responsibility for their decisions, and I am mindful of the law relating to contributory negligence and the impact a finding of contributory negligence may have to reduce the damages recoverable by a claimant in court proceedings.

I have duly considered whether Mr M should bear some responsibility by way of contributory negligence, and I'm currently minded to find that he should in the circumstances of this case, but only from the money he lost from 20 September 2022 onwards. I'll explain why.

I've considered the fact that Mr M may not have carried out sufficient due diligence about the investment, but I don't think it would be fair to make a deduction on that basis in these circumstances.

Mr M said that he found various success stories about the investment on the social media page he was looking at. He said he then Googled the broker and found their website to appear legitimate and professional. I've researched the name the scam broker had given

(P), which appears to be a legitimate financial advisory firm regulated in the US. So, it's clear that the scammers had cloned the details and credentials of a legitimate firm, which would've only led Mr M to believe the investment was legitimate if he had carried out further research.

There was also another company name ("Cryptoportfolio.pro") which the scammers were emailing Mr M from. However, while this company does indeed appear to be fraudulent, there was no negative information or warnings about it at the time Mr M chose to invest. So, again, even if he had carried out sufficient due diligence on this company as well, he would not have found anything that would've reasonably led him to believe it was a scam, which is why I don't consider it would be fair to reduce Mr M's compensation for failing to carry out sufficient research.

However, I'm mindful that, as the scam progressed, there were increasingly more signs that something wasn't right that ought to have alerted Mr M to the risk that he was likely being scammed.

When Mr M first requested to withdraw his funds, the scammer told him he would need to pay £8,024 in order to prove his "cash flow" for Block Chain. He made this payment on 8 September 2022. Following this, he was then told that he'd need to pay a further £17,652.80 in taxes before his funds would be released. I appreciate that for an inexperienced investor unfamiliar with cryptocurrency, it might seem plausible that certain fees might need to be paid in order to make withdrawals.

However, the amount he was later being told to pay in taxes was *significantly* more than he had actually invested. And given he had already had to make a large payment of £8,024 in order to withdraw his funds, I think this ought to have given him significant cause for concern when he was then being asked to make an even larger payment that he hadn't been told about previously. If Mr M had looked into this, he would've likely discovered that investors do not pay tax on their investments in the way he was being asked to, which could have revealed that he was likely being scammed.

So, I think Mr M did have a role to play in what happened from this point onwards and I think that the amount Santander should pay to him in compensation should fairly and reasonably be reduced to reflect that role. Given how serious I think Mr M's concerns about the legitimacy of the tax payment ought reasonably to have been, I think that a fair deduction is 50% from this point onwards.

Did Santander do enough to recover the funds?

Finally, I'm not persuaded there was anything more Santander could've done to recover the money Mr M lost. A chargeback claim on any of the payments would've had little prospect of succeeding given Mr M had paid money into his own account. I appreciate that the first payment did not go directly to Mr M's account with W. But I've not seen enough evidence to suggest that a chargeback would've likely succeeded for this payment either.

My final decision

For the reasons given above, I uphold this complaint and direct Santander UK Plc to:

- Refund 100% of the disputed payments made by Mr M from the £1,705.10 payment on 23 August 2022, up to and including the £8,024 payment made on 8 September 2022.
- Refund 50% of the disputed payments made from the £5,015.50 payment made on 20 September 2022 onwards.

- Pay 8% simple interest per year on this amount from the date of each payment until 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 28 March 2024.

Jack Ferris
Ombudsman