

The complaint

Miss S complains Santander UK Plc didn't do enough to protect her when she fell victim to a scam.

What happened

Miss S has an account with Santander and, based on what she's told us, she's also a vulnerable person.

Miss S says she received a call from someone claiming to be from a well-known e-commerce company on 26 April 2023 asking her if she was trying to buy two mobile phones. In fact, she was talking to a scammer. Miss S says the person panicked and rushed her into opening up an account with an e-money provider – who I'll refer to as "R" in the rest of this decision – and transferring just over £2,500 into that account. Miss S says she transferred the money in three separate payments – two for £764.00 and one for £998.00. Miss S says she realised at that point that she was probably being scammed, so she went to her local branch.

Santander investigated and said that it hadn't done anything wrong as it had asked for the right security and personal credentials when completing the transaction. In addition, Santander said that the payments didn't fall under the Authorised Push Payment Contingent Reimbursement process because the transfers had gone to an account in her name. In the circumstances, Santander said that it wouldn't be able to refund Miss S. Miss S was unhappy with Santander's response and complained. Santander accepts that Miss S's dissatisfaction wasn't treated as a complaint at the time and was only treated as a complaint when Miss S chased matters up.

Santander investigated Miss S's complaint and wrote to her in July 2023 to say that its original decision wasn't wrong. But it did accept that it should have treated her dissatisfaction as a complaint much earlier. Santander offered £75 in compensation which it says it credited to Miss S's account for the inconvenience the poor service had caused. Miss S remained unhappy with Santander's response and complained to our service.

One of our investigators looked into Miss S's complaints and said that they thought Santander should have intervened when Miss S tried to make the third payment as the activity on her account was unusual and had all the hallmarks of a safe account scam. Had Santander done so, our investigator thought that the scam would have been uncovered. They also thought, however, that Miss S should bear some responsibility for what had happened as there were a number of red flags that this was a scam. They recommended splitting liability 75% / 25% as between Santander and Miss S. Our investigator also recommended an additional £150 in compensation given the impact Santander's earlier handling of the complaint had caused.

Santander didn't agree with our investigator's recommendations saying it had a duty to execute Miss S's instructions as they were clear and left no room for interpretation. In addition, Santander said that Miss S's money arrived safely in the account with R and that this account was in her name, and that it couldn't be held liable for what happened beyond that point. Santander accepted that it hadn't treated Miss S's dissatisfaction as a complaint

straightaway but didn't agree that any additional compensation was warranted. Santander said that it issued a final response on the same day that Miss S brought the fact that her complaint hadn't been logged properly to its attention. Santander asked for Miss S's complaint to be referred to an ombudsman for a decision. Her complaint was 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.

Last month I issued a provisional decision saying that I didn't think the payments Miss S had made out of her account were in themselves sufficiently unusual to trigger an intervention on Santander's part. I did, however, say that the payments from Miss S's savings account into her current account, in conjunction with everything else, could have been enough to justify an intervention. So, I also said what I thought would have happened had Santander intervened. In short, I was satisfied that the scam would have been uncovered and that the third payment wouldn't have gone out. I also said that I didn't think this was a case where liability should be split. So, I said that in the event that I ultimately decided Santander should have intervened that it should refund the whole of the third payment plus interest.

I invited both parties to respond and both did. Miss S thanked me for my provisional decision and had nothing further to add to support her case. Santander noted what I had said about the outgoing payments not being sufficiently unusual in themselves to trigger an intervention. And said that it's not unreasonable to assume that the movements from her savings account to her current account were Miss S getting her accounts in order. Santander also repeated points it had already mentioned previously and said my position was "completely untenable given the Phillip decision".

I've already summarised what I said in my provisional decision. But in this case I think it's helpful to set out what I said. So, this is what I said in my provisional decision:

"I agree with Santander, for many of the reasons it has given, that the third payment wasn't necessarily unusual. The payment was for just under £1,000 and although this was larger than the payments Miss S typically makes, it was a payment that had been authorised through her app and a payment that was going to an account in Miss S's own name as she'd confirmed when asked the purpose of the payment. And that information also matched the confirmation of payee received. The fact that the payment had been made less than 20 minutes after two other payments for just over £760 – taking the total paid out of the account to just over £2,500 – made it a little bit more unusual. But again, I agree with Santander that of itself this wasn't sufficiently unusual.

I can see that in the 20-minute period between the second and the third payment Miss S made seven transfers from her savings account into her current account – namely four transfers of £500 within two minutes followed by a transfer of £2,000 a minute later and £7,000 another minute later and then just over £150 another minute later – which emptied her savings account. That often happens in cases involving "safe account" scams and I can only assume that the fraudsters were going to try and get Miss S to transfer all of those funds next. But I don't think in this particular case that it would be fair to say – based on the outgoing payments only – that Santander should have intervened when Miss S attempted to make the third payment out of her account. I do, however, agree with our investigator that overall this pattern of payments on Miss S's account was unusual. It's a finely balanced case, and the payments from the savings account into the current account, in conjunction with everything else, could have been enough to justify an intervention. In the circumstances, and in case, once

both sides have had a chance to comment, I decide that Santander should have intervened, I think it's helpful to address the other arguments Santander has raised. So that's what I'll do next."

I then went on to discuss Philipp v Barclays. I said:

"Santander has said that it had a duty to execute Miss S's instructions as they were clear and left no room for interpretation. And it's also said that our investigator's position is completely untenable given the Philipp decision. That's a reference to Philipp v Barclays Bank UK PLC.

The starting point under the relevant regulations (in this case, the Payment Services Regulations 2017) and the terms of Miss S's account is that Miss S is responsible for payments Miss S has authorised herself. 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 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.”*

As I've already mentioned I said that I was satisfied that the scam would have come to light had Santander intervened. I said the following:

“The key questions I would have to decide in the event that I think Santander should have intervened 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 Miss S made from the time that Santander should have intervened.*

Miss S has told us that she received a call from someone claiming to be from a well-known e-commerce company asking her if she was trying to buy two mobile phones. She says they panicked and rushed her into opening a new account with an e-money provider and told her that she needed to transfer money into that account so a refund for the phones could be issued. She says she was also told to download a piece of software called AnyDesk – the person she was speaking to said that this was a piece of security software. In fact, it allows remote access to devices.

I'm satisfied that had someone from Santander called to ask Miss S why she was making the third payment she was trying to make that she would have explained what she was being asked to do and that the information I've mentioned above would have been more than enough for Santander to identify the fact that she was being scammed. Indeed, I've listened to the call between Santander's fraud department and Miss S – she went to a branch that day when she started to suspect something was wrong – and the agent Miss S spoke to was able to spot this was a scam straightaway. In short, I'm satisfied that it would have made a difference had Santander intervened when Miss S tried to make the third payment. That means that if I decide Santander should have intervened then I'd most likely decide that Santander missed an opportunity to prevent further loss to Miss B.

Miss S has accepted – given that there were a number of red flags that this was a

scam – that in this case it would be fair that both parties should share liability. And she also accepted the 75% / 25% split as between Santander and Miss S recommended by our investigator. In this particular case, I don't necessarily agree that this was the right thing to do. I say that because I accept that the call Miss S received caused her to panic, and I accept too that she's a vulnerable person and someone who can become anxious quickly. So, I don't think I would have expected her to spot the red flags – these types of scams are designed to make the victim panic and miss things that might ordinarily be more obvious. So, in the event that I decide that Santander missed an opportunity to prevent loss to Miss S, once both parties have had a chance to comment, I'd be minded not to say liability should be split. In other words, I'd be minded to say that Santander should refund the whole of the third payment.

Santander has accepted that it didn't handle Miss S's claim and complaint as well as it should have done and offered and paid £75 in compensation. Our investigator recommended an additional £150 in compensation given the impact this had on Miss S. Santander didn't agree, saying that it issued a final response as soon as it identified the fact that it hadn't treated Miss S's dissatisfaction as a complaint. I accept that Santander was quick to issue its final response once it realised she'd received poor service in branch. But I agree with our investigator – given what I've said about Miss S's vulnerabilities – that this had an impact on Miss S sufficient to warrant an additional £150 in compensation. So, that's the award I'm minded to make."

Santander said, in response to my suggestion that the movements from Miss S's savings account might be unusual, that it's not unreasonable to assume that the movements from her savings account to her current account were Miss S getting her accounts in order. As I said in my provisional decision:

"I can see that in the 20-minute period between the second and the third payment Miss S made seven transfers from her savings account into her current account – namely four transfers of £500 within two minutes followed by a transfer of £2,000 a minute later and £7,000 another minute later and then just over £150 another minute later – which emptied her savings account. That often happens in cases involving "safe account" scams and I can only assume that the fraudsters were going to try and get Miss S to transfer all of those funds next."

I don't agree with Santander that it's not unreasonable to assume this was "Miss S getting her accounts in order". She made seven transfers in a 20-minute period that emptied her savings account. And, as I've said, this often happens in cases involving "safe account" scams. I'd say that's an unreasonable assumption.

Having reflect on everything both parties have said, and accepting that this is a finely balanced case, I think on balance Santander should have intervened when Miss S tried to make the third payment for the reasons I've given. I also remain of the view that had it done so the scam would have been prevented.

Putting things right

Given what I've just said, I'm going to require Santander to refund the third payment – in other words, £998.00 – together with 8% interest from the date of payment to the date of settlement. In addition, I'm going to require Santander to pay the further £150 in compensation that our investigator recommended.

My final decision

My final decision is that I'm upholding this complaint and require Santander UK Plc to refund

the third payment – in other words, £998.00 – together with 8% simple interest from the date of payment to the date of settlement. In addition, I require Santander UK Plc to pay an additional £150 in compensation for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss S to accept or reject my decision before 21 March 2024.

Nicolas Atkinson
Ombudsman