

The complaint

Mr D is unhappy that Santander UK Plc refuses to refund the £30,000 he says he's lost to a scam.

What happened

The circumstances that led to this complaint are well known to both parties, so I won't repeat them in detail here. But, in summary:

- In May 2017 Mr D received advice from an individual who, he later discovered, wasn't authorised to give investment advice. He was shown brochures and videos which persuaded him to invest into an overseas property development (which I will call T). He expected to get annual returns/income of at least 7% and have the use of the accommodation for two weeks each year. He paid for the investment using two cheques (for £10,000 and £20,000) drawn on his Santander current account. Between June 2017 and August 2019 he received returns of almost £4,000. But when the income stopped arriving, and demands were still being made for him to pay annual expenses, he concluded that he'd been scammed and raised a complaint with Santander. He says he was unable to pursue a complaint against the adviser because their company had been wound up and it was not an FCA-regulated firm.
- Santander refused to reimburse Mr D. The bank said he'd authorised the payments and cheques aren't covered by the Contingent Reimbursement Model Code (the Code). So Mr D asked us to look into the matter.
- Our investigator thought the second cheque payment was significantly unusual and/or out of character given the way Mr D had operated his account in the past. But he didn't think there was a sufficient window of opportunity for the bank to have questioned him about it before the cheque was paid. So he didn't recommend that Santander should refund the money. But Mr D (via his representative) disagreed, so the complaint has come to me.

I issued a provisional decision last month setting out why I was minded to reach the same overall outcome as the investigator, but giving some additional reasoning. I have reproduced my provisional findings below.

There are various, long-standing obligations for banks to be alert to fraud and scams and to act in their customers' best interests and the method of payment doesn't affect the banks' obligations. But these responsibilities are based on there having been a fraud or scam. So, my first consideration must be whether Mr D was actually scammed.

Not every complaint referred to us as an investment scam is actually a scam. Some cases simply involve high-risk (and, often, unregulated) investments that resulted in disappointing returns or losses. And some investments may have been promoted using sales methods that were, arguably, unethical and/or misleading. But while a consumer who has lost out might regard such acts or omissions as fraudulent, they don't always meet the high legal threshold or burden of proof for fraud. Which, under The Fraud Act 2006, is to dishonestly make a

false representation and/or failing to disclose information with the intention of making a gain or of causing loss to another or exposing another to the risk of loss.

I've seen a number of complaints about investment scams. Quite often it's relatively clear from the available evidence that the consumer has been scammed. But Mr D's case is a little different in that he made payments to a company which is still active. And I've seen nothing which supports Mr D's assertion that this company – or the administrative company that has been responsible for collecting fees for the investment – is currently, or has been in the past, under investigation by the financial services industry regulator (the FCA). Similarly, neither company is mentioned on the FCA's or the International Organization of Securities Commissions' (IOSCO's) alerts or warning lists.

I also note Mr D received regular returns – representing approximately 13% of his £30,000 investment – for nine months after he invested his money. In my experience, it's unusual for scammers to pay this sort of return.

The bank account into which Mr D's cheques were paid is held by one of the UK's largest banking groups. When Santander attempted to reclaim Mr D's money, that bank told Santander the account was long-standing, and it had no concerns about its operation.

With the above in mind, I'm not currently convinced it's fair to conclude that Mr D was scammed.

But, even if I'm wrong about that, I still can't fairly instruct Santander to refund Mr D's £30,000. While I agree with the investigator that the second cheque (at least) was out of character and should have prompted intervention from the bank, I don't think that intervention would have made a difference. I say this, not least, because:

- The type of investment Mr D entered into is unregulated and poses a high risk, but not all overseas property scheme like this one are scams. It was not the bank's role to protect Mr D against the risk of a bad bargain or to give investment advice.*
- As noted above, I've seen nothing in the public domain, at the time Mr D wrote the cheques, that ought to have indicated he was falling victim to an investment scam.*
- Mr D says he wouldn't have invested if Santander had checked the FCA's register and told him the adviser who'd recommended the investment wasn't regulated. But I'm not persuaded by this argument. Mr D says he was advised to invest by the same person who had recently given him advice about his pension and he later found out that the adviser wasn't authorised by the FCA. But he's also provided a Suitability Report from January 2017 which gives advice about what to do with his pension. This report appears to have been written by an individual at a company which was an appointed representative of an FCA-approved firm. And, importantly, that individual and firm is different to the one Mr D has named as having given the advice about the property investment. The Suitability Report also confirms that the firm was authorised by the FCA. It's not currently clear to me how or why Mr D would have become involved with another adviser in order to be given the advice about the property investment. But I think, having received advice already from a regulated adviser, Mr D ought to have had some awareness of the importance of dealing with an authorised adviser. And, perhaps, that adviser was unwilling to give advice about an unregulated investment, so Mr D sought guidance elsewhere.*
- It's difficult to conclude that Mr D was an entirely naïve investor at the point when he chose to put money into this property scheme. As I've already noted, he had recently*

received pensions advice from a regulated adviser and the Suitability Report indicates, amongst other things, that he was keen to take a more active role in the management of his pension fund.

Mr D's representative made no additional comments in response to my provisional decision. And Santander agreed with my provisional findings.

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.

Having done so, and as neither party has sent any new evidence or arguments for me to consider, I see no reason to depart from the conclusions set out in my provisional decision and reproduced above.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 16 October 2023.

Ruth Hersey
Ombudsman