

The complaint

Mrs M complains that Santander UK Plc did not refund a series of payments she lost to a scam.

What happened

Mrs M found an advert on social media for cryptocurrency investing, which appeared to be endorsed by a celebrity. She decided to invest just \$200 to see how it went. She was contacted by an individual I'll call 'X' who said they could help her with her investment.

X asked her to download AnyDesk on her mobile phone and computer, which she did. They went on to set up accounts in her name with a third-party bank that I'll call 'W', as well as a cryptocurrency exchange. Mrs M initially sent £980 to the account with W, to prove she had access to funds and received a return of £979 the same day.

Following this, X contacted Mrs M regularly and gave reasons as to why additional payments were needed to withdraw her profits. And they said some payments had not been credited due to IT issues, so had to be resent. They finally said that they had to carry out a 'mirror' payment but assured Mrs M the funds would not actually leave her account, but they did anyway. The payments she made were as follows:

- 19/01/2023 - £164.63 via credit card
- 27/01/2023 - £980.00 to W
- **27/01/2023 - £979.00 credited into Mrs M's Santander account**
- 31/01/2023 - £9,900.00 to W
- 01/02/2023 - £9,900.00 to W
- 02/02/2023 – £9,800.00 to W
- 03/02/2023 - £9,768.00 to W
- 03/02/2023 - £20.00 to third-party account.

Mrs M's son realised what was happening and let her know that she had been scammed. They attempted to retrieve funds from W and the cryptocurrency exchange but could only retrieve £8.00. Mrs M raised a scam claim with Santander who attempted to recover the funds from the beneficiary banks but were unsuccessful. They also explained that as the funds had gone to an account in Mrs M's own name and had been sent on to another cryptocurrency wallet in her name before being sent to the scammer, the loss did not originate from Santander. So, they did not think they should be held liable for the loss.

Mrs M referred the complaint to our service and our investigator looked into it. They explained that because the payments went to an account in Mrs M's name, they were not covered by the Lending Standards Board's Contingent Reimbursement Model (CRM) Code, which provides additional protection to victims of authorised push payment (APP) scams.

Despite this, the Investigator felt Santander should have realised that Mrs M was at risk of financial harm due to the out of character payments and recommended a refund from the £9,900 payment on 1 February 2023 onwards, with 8% simple interest. They also felt Mrs M should bear some responsibility for the loss as she did not carry out any research or due

diligence before making payments to the investment. So, they recommended a reduction in the refund of 50%.

Santander disagreed with the recommendation. They mentioned the Supreme Court Judgement in the case of Philipp vs Barclays Bank Plc UK [2023] UKSC 25 which confirmed that where a bank receives instruction from a customer which is clear and leaves no room for interpretation and the customer's account is in credit, the bank's primary duty is to execute the payment instruction. As they felt they received a clear instruction from Mrs M to send funds to another account in her name, they did not agree that there was any room for interpretation from them. In addition, they reiterated Mrs M's loss did not take place from her Santander account, so they should not be responsible for reimbursing her.

As an informal agreement could not be reached, the complaint has been passed to me for a 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.

Having done so, I agree with the Investigator for largely the same reasons. I'll explain why in more detail. I'm satisfied that Mrs M has been the victim of a cruel scam. As has already been explained, the transactions in question do not fall under the protection of the CRM Code as they were either card payments or to accounts in Mrs M's own name. However, Santander still has a general duty of care to its customers.

Broadly speaking, the starting position in law is that an account provider is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the terms and conditions of the account. And a customer will then be responsible for the transactions that they have authorised.

Mrs M has said that she processed the initial payments but was unaware the final payment would actually debit her account. She also gave her authority for X to deal with the investments on her behalf as well as open accounts in her own name. She's said that she did not realise AnyDesk would allow X to control her devices, but she has also said that she saw the cursor moving on the screen while he was in control.

I'm satisfied that Mrs M did give her apparent authority for X to deal with some of her financial affairs, and that she had some awareness of his ability to take over her devices, though I accept not full awareness. With this in mind, it is difficult for me to agree that these were not authorised payments, whether directly carried out by Mrs M or not. On balance, I think it's more likely Mrs M gave her apparent authority for X to act on her behalf and carry out her financial affairs. So, I think these were therefore all authorised payments and should be treated as such.

While I recognise that Mrs M didn't intend the money to go to scammers, the starting position in law is that Santander was obliged to follow her instruction and process the payments. Because of this, she is not automatically entitled to a refund.

The regulatory landscape, along with good industry practice, also sets out a requirement for account providers to protect their customers from fraud and financial harm. And this includes monitoring accounts to look out for activity that might suggest a customer was at risk of financial harm, intervening in unusual or out of character transactions and trying to prevent customers falling victims to scams. So, I've also thought about whether Santander did enough to try to keep Mrs M's account safe.

I've reviewed Mrs M's account statements, and compared the transactions in question to the genuine account activity to see if they appear unusual or out of character. Mrs M has explained that around five months prior to the scam, she had received a large settlement into her account, and these funds were then moved to her savings account and to one of her sons. So there were some high value payments around September 2022, but these were an anomaly on the account. The majority of payments over £1,000 on the account in the months leading up to the scam were payments to Santander cards or transfers to her son who was an existing payee. However, there was a faster payment to a medical organisation of £10,710 on 17 January 2023, around the time the scam began.

With all of this in mind, I don't think the initial payments of £200 or £980 were of a high enough value to appear unusual on the account. And while the initial high value payment of £9,900 did reduce the balance of the account in half, as there had been some other high value payments around the same time I don't think this alone would have been enough to trigger that something was not right.

However, the second high value payment of £9,900 on 1 February 2023 did appear unusual when considered alongside the genuine account activity. I say this because ordinarily, Mrs M would credit her Santander account prior to making a large payment, meaning her current account balance generally stayed at around £20,000. However, following the payment on 1 February, the balance dropped to just £559.40, which was a significant difference.

I've also considered that these payments were carried out via open banking, which Mrs M does not appear to have used before. And while they were to an account in Mrs M's own name, this was still a new third-party account, which generally pose a higher risk than a long-standing account. Overall, I think the new payment method, the high value of the £9,900 payment, the fact a pattern was beginning to emerge to a new third-party account and that the balance of the account was left significantly lower than usual and had almost been cleared means Santander should reasonably have flagged the payment as suspicious. And I think it would have been proportionate for Santander to have intervened and asked Mrs M questions about the payment before processing it.

In reaching my decision that Santander should have made further enquires prior to processing the payment, 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:

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.

In this case for the reasons I have explained, I am satisfied they should have intervened. And if they had, I think the scam would have been revealed. I would have expected Santander to ask what the payment was for and at that point, Mrs M was paying £9,900, thinking the first payment of £9,900 had not been processed, and that this was needed to withdraw funds from the cryptocurrency investment. Which is a typical tactic used by scammers.

I think Santander should reasonably have asked Mrs M how she found the investment opportunity and I've seen nothing to suggest she would not have been truthful in her response. Mrs M found the investment on social media, and it was endorsed by a celebrity. Again, this is a well-known tactic of scammers as a way to legitimise the scam so I think Santander would have been on notice that Mrs M was at risk of financial harm. Finally, I think it then would have been reasonable for Santander to ask if Mrs M had downloaded AnyDesk to her devices, which I think she would have answered truthfully to. This is also a known method used by scammers to gain access to victim's devices, so I think it would have been clear that Mrs M was falling victim to a scam and Santander could have given a tailored scam warning as a result.

I think a tailored scam warning given by Santander would have broken the spell and revealed the scam to Mrs M. I can see that when Mrs M's son intervened following the final payment, the scam quickly unravelled and on balance I think the same would have happened if Santander had stepped in sooner. With this in mind, I think Mrs M should be reimbursed from the payment of £9,900 on 1 February 2023 onwards, and 8% simple interest should be added from the date of the transactions to the date of settlement.

What's left to decide is whether Mrs M should reasonably bear some responsibility for the losses as a result of any negligence in her actions and if it is therefore reasonable for me to make a reduction in the award based on this. I understand that Mrs M has already accepted the findings in relation to this, so I won't repeat them again in detail here. In summary, I do agree that there should be a reduction in the redress to account for this, as there were warning signs that Mrs M could have reacted to in order to avoid the scam, such as allowing

third parties to open bank account in her name. So, I do agree that the redress should be reduced by 50%.

Putting things right

Santander should refund the payment of £9,900 on 1 February and all other payments related to the scam following this. These are: £9,800, £9,768 and £20. They should apply 8% simple interest from the date of the transactions to the date of settlement and they can reduce the redress by 50%.

If Santander considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs M how much it's taken off. It should also give Mrs M a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

I uphold Mrs M's complaint in part and direct Santander UK Plc to pay the redress set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 3 May 2024.

Rebecca Norris
Ombudsman