

The complaint

Mrs D complains that Santander has declined to refund the money she lost in 2018 to what now appears to have been an investment scam. She brings her complaint with the assistance of professional representation, but for readability, in what follows I will refer predominantly to Mrs D.

What happened

In 2018, Mrs D invested in an unregulated property scheme (that I'll refer to as W). She invested from her Santander account through two cheques issued in March 2018, amounting to a total of £50,000. Mrs D explains she wrote the first cheque when she visited an adviser's office in the City of London, having followed up on an earlier email.

While Mrs D received some interest or dividend payments initially, these later halted. W has since entered liquidation and Mrs D has highlighted significant concerns that it may have been operating fraudulently.

Mrs D reported what had happened to Santander in 2022. She complained when it did not reimburse her. She said Santander had breached a duty of care by failing to question her about the cheques she'd written and, had Santander done so, it would have come to light the investment was not legitimate, and the loss would have been prevented.

Santander says it is not responsible for the loss. Mrs D had authorised the cheques. It had no reason to block Mrs D's cheques or otherwise intervene before they were cleared. These payments had been made before the APP scam code (the Contingent Reimbursement Model code or CRM Code) had been introduced, and the code doesn't apply to cheque payments. That meant the code simply didn't apply to Mrs D's payments.

Mrs D referred the matter to our service and one of our Investigators didn't uphold her complaint. The Investigator thought Santander arguably should have spoken to Mrs D about these payments – given they were for relatively large values compared to her normal account usage. But even had Santander done so she didn't think Santander (or Mrs D) would have had sufficient grounds to conclude the investment was not legitimate, given what it could reasonably have uncovered at the time. She didn't think Santander could have prevented Mrs D's loss.

Mrs D maintained that had Santander intervened it would have been able to identify several concerning aspects of the investment, and therefore should have warned her this was a scam. And even without giving Mrs D financial advice, the bank could nevertheless have given her relevant warnings. Had it done so, this would have meant she wouldn't have gone ahead with the cheque payments and would have avoided the loss she has now sustained.

As no agreement could be reached, the case was 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.

In deciding what's fair and reasonable in all the circumstances of a complaint, I'm required to take into account relevant: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the time.

The starting position in law is that Mrs D is responsible for transactions she's carried out herself. Mrs D doesn't dispute that at the time, she intended to make these cheque payments, albeit in the belief she was investing in a legitimate scheme. Santander's primary duty here was to process her instructions without delay.

However, taking into account regulators' rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time, I'd expect Santander to have been on the lookout for out of character or unusual transactions, as well as other indications that its customer might be at risk of financial harm from fraud or scam.

I consider it to be appropriate for a customer's previous account activity, among other factors, to be taken into account when deciding whether a cheque payment does, or does not, present a sufficiently heightened risk that it would justify an intervention before the cheque is cleared.

Here, Santander did not intervene. Arguably it did not need to. While each payment was for a relatively large amount, Santander has evidenced several other debits and credits for sums in excess of £10,000 on her account within the previous twelve months.

But even if I were to accept that Santander ought to have intervened here and spoken to Mrs D about one or more of these payments prior to processing them, I consider it unlikely this would have prevented her loss. While there are now significant concerns about the legitimacy of W's business, these first began to surface in the period surrounding W's liquidation, and therefore several years after Mrs D's two cheque payments.

I cannot rely on the benefit of hindsight – I must consider what Santander could reasonably have established in the course of proportionate enquiry to Mrs D about her cheques back in March or April 2018.

And with that in mind, I don't think it would've been apparent in early 2018 that W was likely fraudulent rather than simply a risky investment. I'm not persuaded sufficient information was readily and publicly available at the time which would have caused Santander (or Mrs D) to have specific concerns about this.

Mrs D has provided copies of investment literature I understand she received at the time. This appears professional and not obviously anything other than legitimate. It gave an explanation of the risks involved, recommended investors should seek independent financial advice prior to making an investment decision and indicated that the financial promotion had been approved by an FCA regulated firm. On the face of it, I don't think there was enough here for Santander to have reasonably suspected W was other than it seemed – even if had insisted on seeing the material, which I do not think it saw at the time

It is possible of course that the investment might have represented a greater degree of risk than was suitable for Mrs D to take. But Santander didn't have any obligation to step in to protect its customers from potentially risky investments. Taking steps to assess suitability without an explicit request from Mrs D (which there was not) would have gone far beyond the scope of what I could reasonably expect of it in any proportionate response to what, on the face of it, were legitimate payment requests from its customer.

And while it is plausible to think that had Santander spoken to Mrs D it might have given her general information about investment scam risks, I don't think a proportionate response from the bank would have led Mrs D not to proceed of her own accord – again I simply don't think she'd have been able to uncover information that would have caused her to question what she'd been told about W, disbelieve the literature she'd received, or have significant doubts about proceeding with the payments she was planning to make. She'd visited the offices in person which I consider would likely have played a part in her belief this was legitimate.

Mrs D's representatives have also stated that information has been obtained indicating that Santander had previously held an account for W. They state this had been closed, and that this meant the bank should have known Mrs D's payment to W at another bank might be fraudulent. I've considered this argument, but it doesn't alter my findings.

Firstly, W appears to have been able to open an account with a different bank (the account that received Mrs D's cheques). Had a previous account with Santander been closed through suspicions of fraud, that would seem extremely unlikely, and on balance I find that implausible.

And more importantly, even if this could be established to the contrary, I don't consider Santander could realistically be expected to have uncovered that connection in the course of a proportionate intervention in relation to either of Mrs D's cheques. That would have required a level of forensic investigation beyond what I consider would be reasonable to expect of good industry practice at the time, and out of proportion to the level of risk it could have identified.

In short, while I've carefully reviewed all of Mrs D's submissions, I don't find that significant concerns would (or could) have been readily uncovered by either Santander or Mrs D at the relevant time. I can only reasonably expect any enquiries by Santander to have been proportionate to what the perceived level of risk could have been at the time (not as it seems now). All considered, I don't think it likely that Santander could have prevented these payments from being made, or otherwise caused Mrs D not to proceed.

Finally, by the time Mrs D reported the matter to Santander, I understand that the receiving bank account was no longer active and so no funds would have remained for recovery at that point. So it simply was not possible for Santander to have retrieved Mrs D's money.

Having carefully considered everything Mrs D and Santander have submitted, I don't find Santander could have reasonably prevented Mrs D's loss here. Neither do I find it materially at fault otherwise.

I appreciate this will not be the answer Mrs D would like me to give, and I am sorry to have to disappoint her. She has lost a significant sum. But it is simply the case that I don't consider I can fairly and reasonably hold Santander liable for that loss.

My final decision

For the reasons given above, my final decision is that I do not uphold Mrs D's complaint about Santander UK Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 27 October 2023.

Stephen Dickie
Ombudsman