

## The complaint

Mrs M complains that Santander UK Plc ('Santander') won't refund the money she lost in a scam.

## What happened

### *What Mrs M says*

Mrs M says that she saw a job advertised on the hospitality page of a social networking site and registered her interest. She was later contacted via a messaging app and advised that the role involved making hotel reservations for a company I'll refer to as K. There is a genuine travel company with the same name, but whilst Mrs M didn't know it at the time, she was dealing with scammers. Mrs M was told she would need to pay her own money to receive allocations of bookings.

Mrs M was required to set up a trading account with K where she could see the payments she had made and the commission she had earned. Mrs M was told she would need to buy and transfer cryptocurrency to receive bookings, which she bought through peer to peer traders and two companies which provide this service (A and S in the table below) and paid into her own cryptocurrency wallet with a company I'll call B.

Mrs M made the following transactions:

Trans no.	Date	Amount	Recipient
1	14/09/22	£142.96	Individual 1
2	15/09/22	£210	Individual 2
3	15/09/22	£250	S
4	16/09/22	£950	S
5	16/09/22	£1,608	S
6	16/09/22	£1,608 returned	S
7	19/09/22	£1,530	A
8	19/09/22	£100	A
9	21/09/22	£2,548	A
10	23/09/22	£5,000	A
11	24/09/22	£5,000	A
12	24/09/22	£1,777	A
<b>Total</b>		<b>£17,507.96</b>	

Mrs M was able to make a small withdrawal early on but when she wanted to withdraw more, she was told that she needed to pay more first. Mrs M had no further funds and was unable to borrow more so asked for the commission to be waived and her funds returned, but representatives of K refused to do so, and she realised she was the victim of a scam. Mrs M didn't contact Santander directly but engaged a representative who sent a letter of complaint in January 2023.

#### *What Santander say*

Santander said Mrs M authorised the transactions and the Lending Standards Board's Contingent Reimbursement Model Code (CRM Code) doesn't apply. This was because the payments were for cryptocurrency and all funds were deposited in Mrs M's own account with B and were lost from this account.

Mrs M was unhappy with Santander's response. She doesn't think Santander did enough to prevent her loss and has referred to the severe impact this has had on her finances and health.

#### *Our investigation so far*

The investigator who considered this complaint recommended that liability for Mrs M's loss from transaction number nine in the table above be split between her and Santander. This was because when Mrs M made the £2,548 payment on 21 September 2022 Santander spoke to her about it. During the call Santander didn't ask questions that would likely have uncovered the scam, like why she was making payments to B, even though the staff member thought what she was doing was unusual. The investigator thought that Mrs M should share responsibility for her loss because she didn't take enough steps to check the opportunity was genuine.

Mrs M accepted the investigator's findings, but Santander did not. In summary, it said:

- All the payments Mrs M made were to accounts in her own name with different firms and then on to B. Mrs M had access to and control of each of these accounts and should pursue claims against them.
- Its primary function was to facilitate Mrs M's payment requests in line with her instructions. Mrs M's account was in credit and her genuine credentials were used so the transactions were low risk.
- The loss wasn't from Mrs M's Santander account as the payments were made to other firms and then on to B. Even if further calls had taken place, Mrs M would have said she was happy to make the payments and funds were going to her own wallet.
- The companies Mrs M paid haven't been asked to give decisions and it is imperative this happens. Santander also asked why this service hasn't contacted other firms as part of our review.
- Santander referred to the Supreme Court judgement of *Philipp v Barclays Bank Plc*. In that case it was decided that where a bank receives a payment instruction from a customer which is clear and leaves no room for interpretation, if the customer's account is in credit, a bank's primary duty is to execute the payment instruction. The duty is strict, and the bank must carry out the instruction promptly and without concerning itself with the "*wisdom or risks of the customer's payment decisions*". Santander doesn't believe it breached any duty owed to Mrs M.
- It doesn't agree that when it spoke to Mrs M there was enough going on to suggest she was at risk of financial harm. Further questions would have been proportionate to the situation and responses received.

The complaint has been passed to me to decide.

## **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'm required to take into account relevant law and regulations; regulatory rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

Santander is a signatory of the CRM Code. The CRM Code doesn't apply in this case for a number of reasons, including the fact that the transaction from B to the scammer wasn't a faster payment between UK GDP denominated accounts (as required by the CRM Code).

In broad terms, the starting position in law is that Santander is expected to process payments that a customer authorises it to make, in accordance with the terms and conditions of the customer's account and the Payment Services Regulations (PSR's). And (as Santander has referenced) 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.

Santander's June 2022 terms and conditions gave it rights (but not obligations) to:

- Refuse any payment instruction if it reasonably suspects it relates to fraud or any other criminal act.
- 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, in accordance with Santander's own terms and conditions, it could therefore refuse payments, or make enquiries, where it suspected fraud. 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 (and as Santander did in fact do in this case when Mrs M made one of the transfers).

The detailed reasoning for this has been set out in substantial detail in recent decisions to Santander, so I don't intend to repeat it here.

But, 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 (and Santander did in fact do in this case on 19 and 21 September 2022).
- 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 done more before it processed Mrs M's payments, and would that have prevented the loss?*

I'm not persuaded Santander needed to do anything more when the early transactions were made. They were relatively low in value and wouldn't have concerned Santander.

I consider that by the time Mrs M made the first payment of £5,000 the transaction was so unusual and out of character that Santander ought reasonably to have intervened. Santander chose to stop transaction nine in the table above (for £2,548) though and spoke to Mrs M about it. So its arguments regarding the recent court case of Phillips v Barclays seem somewhat contradictory. I don't consider Santander would have blocked this transaction and spent a total of over an hour in calls to Mrs M if it didn't have concerns about it. So I've considered what was discussed in the calls to determine whether I think Santander did enough.

Mrs M tried to make a payment for £2,522 on 19 September 2022. Santander blocked the payment and Mrs M called to discuss it. She was asked the reason for the payment and said it was for "house stuff" from the internet. When asked what she was buying, Mrs M referred to buying a sofa. The Santander adviser said she had searched A and found that it provided cryptocurrency services and was based abroad, so she pressed Mrs M to explain why she hadn't been honest. Mrs M then explained the payment was for cryptocurrency and she had been dishonest because she was new to it. Mrs M's explanation of the true reason for the payment wasn't clear – she mentioned K, a hotel online and the need to invest some money. The adviser explained that she was very concerned that Mrs M was the victim of a scam and, after asking her further questions, refused to make the payment. Mrs M was told to expect a call back to discuss matters further.

On 22 September a member of Santander's fraud team spoke to Mrs M at length about the transaction and the purpose of the payment. The adviser gathered a lot of relevant information from Mrs M. He established that Mrs M had to make a hotel booking and when she did so she earned commission, but to get that commission she needed to invest her own funds in the form of cryptocurrency. The adviser asked about K and looked at K's website but didn't see anything to explain what Mrs M was doing. After more detailed questions, the adviser said he was still confused about how K was involved with B or how the investment part worked.

I'm persuaded the Santander fraud advisor worked hard to understand what Mrs M's payments were for but what she said didn't make sense and on a number of occasions he referred to the arrangement being very unusual. The adviser didn't make the payment during the call and I understand that a payment for a slightly different amount to the one attempted on 19 September was processed on 22 September 2022.

Whilst I'm satisfied the adviser asked Mrs M a lot of detailed questions, what she said in response still didn't make sense. It was clear Mrs M wasn't investing in cryptocurrency in the usual way and there was more going on here. There were all the hallmarks of a job based scam (Mrs M was earning commission based on tasks completed and was required to make cryptocurrency payments) but the Santander advisor didn't get to the bottom of this or explain what a scam of this nature looked and felt like. Because Mrs M was buying cryptocurrency, the emphasis was on investment. I consider that by the time of this scam Santander's fraud team ought reasonably to have been aware of job based scams and asked questions aimed to uncover a scam of this nature.

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 Mrs 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 customers of multi-stage fraud were well known to banks in 2022.

Overall, I'm satisfied Santander should fairly and reasonably have probed further and, if it had, it is more likely than not that the scam would have been exposed and Mrs M would not have lost any more money. In those circumstances I am satisfied it is fair to hold Santander partly responsible for Mrs M's loss from the £2,548 transaction onwards.

Santander has referred to complaints about other parties which may be responsible for Mrs M's loss. First of all, Santander is incorrect that all the payments from Mrs M's Santander account went to accounts in her own name at other firms. Mrs M bought cryptocurrency from peer to peer sellers and cryptocurrency providers. In any event, 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 multiple financial businesses about connected circumstances, Mrs M has only complained about Santander. DISP does not empower me to instruct Mrs M to make or refer a complaint about another business and I am required to consider the complaint in front of me.

*Should Mrs M bear any responsibility for her loss?*

I've thought about whether Mrs M should bear any responsibility for her loss. In doing so, I've considered what the law says about contributory negligence, as well as what I consider to be fair and reasonable in all of the circumstances of this complaint.

Mrs M has confirmed that she didn't complete any checks other than to look at K's website via a link provided by the scammer. Had she carried out basic checks or tried to verify what she was being told by scammers; I'm satisfied she would've had sufficient concerns not to

go ahead with the payments. So, I think she should share responsibility for her loss. I say this because:

- Mrs M first heard of the job/investment opportunity on social media. This isn't where most legitimate jobs are advertised.
- After expressing an interest in the role Mrs M received a message from an individual that supposedly worked for a named recruitment company. There was no evidence that this was the case, and when I researched the recruitment company, I found that it was an agency that deals with construction and building services. The job Mrs M thought she had related to travel so was completely unrelated.
- Mrs M believed she was being employed by K but there was no paperwork to set out the terms of her employment – which would be usual practice.
- The website address provided by the scammer wasn't that of the genuine company K.
- It's unclear why hotel reservations weren't made directly through K's website.
- I don't know of any jobs that require an employee to obtain and deposit cryptocurrency to get work and be paid. This is so unusual I consider it ought reasonably to have led to a greater degree of scrutiny.
- When Mrs M first spoke to Santander about a payment when it intervened, she didn't tell the truth and said she was buying things for her house. If the scammer told her to lie to her bank this should have been a serious red flag that something was wrong.
- Although I have reached the conclusion that Santander ought reasonably to have gone further when it intervened, I consider the concern Santander showed and the references to a scam ought reasonably to have led Miss M to be more cautious and complete some independent checks before making further transactions.

Overall, I'm satisfied that it wouldn't be fair to ask Santander to reimburse more than half of Mrs M's loss.

### **My final decision**

For the reasons stated, I uphold this complaint and require Santander UK Plc to:

- Refund 50% of transactions 9 to 13 (£7,162.50); and
- Pay interest on the above amount at the rate of 8% simple per year from the date of each transaction to the date of settlement.

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 has 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.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 26 March 2024.

Jay Hadfield  
**Ombudsman**

