

## **The complaint**

Mr and Mrs R complains that Santander has declined to refund the money they lost in 2017 and 2018 to what now appears to have been an investment scam. They bring their complaint with the assistance of professional representation, but for readability, in what follows I will refer predominantly to Mr and Mrs R.

## **What happened**

In 2017, Mr and Mrs R made an initial investment in an unregulated property scheme (that I'll refer to as W). They made three subsequent investments to the scheme in January 2018 and November 2018. All payments were made by cheque from Mr and Mrs R's joint bank accounts held with Santander. These four cheques amounted to a total of just over £37,000.

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

Mr and Mrs R reported what had happened to Santander in 2022. They complained when the bank did not reimburse them. They said Santander had breached a duty of care by failing to question them about the cheques 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. Mr and Mrs R had authorised the cheques. It had no reason to block Mr and Mrs R's cheques or otherwise intervene before they were cleared.

Mr and Mrs R referred the matter to our service. Our Investigator didn't uphold their complaint. 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 Mr and Mrs R's payments.

While Santander noted a Police investigation into W is ongoing, the Investigator considered that the results would not affect the outcome of Mr and Mrs R's complaint about Santander – that depended on what Santander did or did not do at the time of the payments.

The Investigator thought Santander might have been at fault for not speaking to Mr and Mrs R prior to clearing the cheques. But even had Santander done so the Investigator didn't think Santander (or Mr and Mrs R) would have had sufficient grounds to conclude the investment was not legitimate, given what it could reasonably have uncovered at the time. The Investigator didn't think Santander could have prevented Mr and Mrs R's loss.

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

they have 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 Mr and Mrs R are responsible for transactions they've carried out themselves. Mr and Mrs R don't dispute that at the time, they intended to make these cheque payments, albeit in the belief they were investing in a legitimate scheme. Santander's primary duty here was to process their 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. Given the relatively lower value of the first cheque and the low velocity of the subsequent cheques, arguably it did not need to. The pattern would not obviously have indicated fraud.

But even if I were to accept that Santander ought to have intervened here and spoken to Mr and Mrs R about one or more of these payments prior to processing them, I consider it unlikely this would have prevented their 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 some years after Mr and Mrs R's four 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 Mr and Mrs R about their cheques back in 2017 or 2018.

And with that in mind, I don't think it would've been apparent at the time 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 Mr and Mrs R) to have specific concerns about this.

Mr and Mrs R have provided copies of investment literature I understand they 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 Mr and Mrs R 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 Mr and Mrs R (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 customers.

And while it is plausible to think that had Santander spoken to Mr and Mrs R it might have given them general information about investment scam risks, I don't think a proportionate response from the bank would have led Mr and Mrs R not to proceed of their own accord – again I simply don't think they'd have been able to uncover information that would have caused them to question what they'd been told about W, disbelieve the literature they'd received, or have significant doubts about proceeding with the payments they were planning to make.

Mr and Mrs R'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 Mr and Mrs R'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 Mr and Mrs R'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 Mr and Mrs R'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 Mr and Mrs R's submissions, I don't find that significant concerns would (or could) have been readily uncovered by either Santander or Mr and Mrs R 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 Mr and Mrs R not to proceed.

Finally, by the time Mr and Mrs R 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 Mr and Mrs R's money.

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

I appreciate this will not be the answer Mr and Mrs R would like me to give, and I am sorry to have to disappoint them. They have 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 Mr and Mrs R's complaint about Santander UK Bank Plc.

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

Stephen Dickie  
**Ombudsman**