



<b><u>Decision Ref:</u></b>	2018-0074
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Cheques
<b><u>Conduct(s) complained of:</u></b>	Failure to process instructions Refusals (banking)
<b><u>Outcome:</u></b>	Rejected

### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

#### **Background**

This complaint concerns a cheque which had been issued to the Complainant and presented by him to the Provider to be encashed.

The complaint is that the Provider unreasonably refused to encash a cheque which had been issued to the Complainant, and failed to provide him with a valid explanation for same.

#### **The Complainant's Case**

The Complainant submits that a branch of the Provider refused to cash a cheque which had been issued to him. The Complainant states that *"The cheque had me as the payee, was not crossed and that particular branch held the account of the payer"*. The Complainant submits that he was informed that he needed to have an account with the Provider before the cheque could be cashed. The Complainant states that *"As I am a foreign national based [abroad], I do not have an Irish bank account. It would appear that the bank was not complying with its legal obligation i.e. Bills of Exchange Act, 1882 Section 73 – A cheque is a bill of exchange drawn on a banker payable on demand"*.

#### **The Provider's Case**

The Provider submits that it has a cheque encashment policy prohibiting encashment of cheques for non customers and this is why the Complainant's request was not processed. The Provider states that *"we apologise for any inconvenience this may have caused you"*

*however, you might note that you can present your cheque through your local Bank [abroad] and they can send it 'on collection' to us for payment".*

The Provider also states that *"In relation to your query regarding Section 73 of the Bills of Exchange Act, 1882, please note that this does not confer any legal obligations on any Bank to cash any/all cheques presented"*.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 22 May 2018 outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Submissions from the Complainant were received by the Financial Services and Pensions Ombudsman on 4 June 2018 and 2 July 2018 and a submission from the Provider was received by the Financial Services and Pensions Ombudsman, on 12 June 2018. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional submissions. I have considered the contents of these additional submissions. However, these submissions do not alter the outcome of my Decision and my final determination is set out below.

The issue to be determined is whether the Provider unreasonably refused to encash a cheque which had been issued to the Complainant, and failed to provide him with a valid explanation for same.

The Complainant submits that his first request to the Provider was that the cheque be lodged to his credit card account. The Complainant submits that when he was told that this

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would not be possible, he then requested that the cheque be cashed. The Complainant submits that this request was declined as he did not have an account with the Provider. The Complainant states *"As luck would have it, my father has an account with the bank, and when I asked if I could lodge the cheque to his account, that was an acceptable solution"*.

The Complainant states that *"the Bills of Exchange Act, 1882 Section 73 states: A cheque is a bill of exchange drawn on a banker payable on demand. It seems clear to me that the term 'payable on demand' represents a requirement on the part of the bank to honour a valid cheque"*. The Complainant also states, *"I understand [another financial service provider] does cash cheques in similar circumstances"*.

Section 73 of the Bills of Exchange Act, 1882 provides that:

*"73. A cheque is a bill of exchange drawn on a banker payable on demand.*

*Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."*

The Provider submits that in February 2016, the Complainant attended its branch with a cheque drawn on that branch. The Provider submits that the cheque was payable to the Complainant, was uncrossed and was in the amount of €737.75. The Provider submits that while the Complainant was in the Teller queue, its Retail Manager approached him to enquire if she could assist him. The Provider states that the Complainant *"advised that he wanted to cash a cheque. She enquired if the Complainant was a customer of the Bank and he advised he was not and did not have a bank account in Ireland. The Retail Manager brought the Complainant out of the queue and into a private room to advise him that the Bank does not cash cheques for non-customers and in an effort to assist him, explained the options available to him"*. The Provider submits that these options were as follows:

- "1. She offered to contact the drawer of the cheque who was a customer of the branch to see if he would be willing to exchange the cheque for cash for the Complainant.*
- 2. She recognised the Complainant as possibly being a relative of a longstanding customer and checked with the Complainant whether this was the case. He confirmed he was. As the cheque was not crossed, the Retail Manager suggested that in agreement with the relative, the cheque could be endorsed by the Complainant and lodged to his relative's account and the relative could withdraw the funds and give them to the Complainant.*
- 3. When he returned [abroad], the Complainant could present the cheque to his own Bank who would most likely send the cheque on a collection basis to Ireland which may incur fees for the Complainant."*

The Provider goes on to state that *"At this point the Complainant referred to the Bills of Exchange Act 1882 and enquired if the Bank's refusal to cash the cheque was based on Central Bank policy or [Provider] policy and he was informed that it was [Provider] policy. The Retail Manager explained that the Bank has a cheque encashment policy whereby it does not cash cheques for non-customers"*. The Provider submits that having considered the

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options outlined to him, the Complainant, having a relative who held an account in its branch, decided to opt for option 2. The Provider submits that on 16 February 2016 the cheque was lodged to the Complainant's relative's account, and on 18 February 2016 the proceeds of the cheque were withdrawn by the account holder which the Complainant has confirmed were provided to him by the account holder.

In response, the Complainant states that the following is his recollection of what transpired with regards the options that were presented:

- “1. It was suggested that I request the drawer of the cheques to exchange the cheque for cash*
- 2. That I open an account with the bank*
- 3. Lodge the cheque to my [account abroad]*

*There were a number of reasons that I did not wish to impose on the drawer of the cheque to provide the equivalent cash particularly under the circumstance that the payment was received.*

*It was agreed that it was not a realistic solution to open an account, particularly as it was to facilitate one transaction only.*

*Foreign transaction fees are usually substantial, so it wasn't an economic proposition to lodge the cheque to my [account abroad].*

*It was not a case of the Retail Manager recognising me as a relative of an account holder. It was I that highlighted that my father had an account with the branch when I asked if it was possible for me to lodge the cheque into his account. The Retail manager agreed to accept this solution.*

*It was fortuitous that my father had an account at the branch and was willing to travel to the bank and to withdraw the relevant cash. If this had not been the case, I would have found myself in a very difficult predicament.”*

The Provider states that *“The Retail Manager has advised that the options set out in the Bank's submission are her best recollection of the events at that time, bearing in mind that they took place 18 months ago. We acknowledge that they differ in some aspects from the Complainant's recollection”*.

The Provider submits that Section 73 of the Bills of Exchange Act 1882 is a statutory definition and does not confer any legal obligation on the bank to cash or lodge a cheque.

In response the Complainant states that *“I accept it is ‘not in fact a legal direction for lodging of cheques’, but I do suggest it is a direction to the bank to cash a cheque”*. The Complainant states that *“It seems clear to me that the term ‘payable on demand’ represents a requirement on the part of the bank to honour a valid cheque”*. The Complainant also states that *“... my investigation to determine [what] exactly is a Statute I have come up with ‘... is a piece of legislation that is more specific and applies to particular circumstances and specific*

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*people...’ whereas ‘a law is a system of regulations that are made to govern people, to help them in their conduct according to the norms of the society. ... Laws are more general in nature, and they are not complicated’.* The Complainant goes on to state that *“a statute is the most specific form of law and unless it has been superseded by subsequent legislation must be complied with”*.

The Provider submits that a piece of legislation is also referred to as a Statute, and the Bills of Exchange Act 1882 is a Statute. The Provider states that *“Most pieces of legislation define words or terms to help make them understandable when someone is reading an Act and also to help distinguish a word/term if it might be similar to other words/terms”*. The Provider submits that the Bills of Exchange Act 1882 sets out the following under Section 73:

*“PART III*

*Cheques on a Banker*

*Cheque defined. 73. A cheque is a bill of exchange drawn on a banker payable on demand.”*

The Provider submits that it clearly notes in the margin of the Act that this is a definition as to what a cheque is. The Provider submits that the purpose of Section 73 of the Bills of Exchange Act 1882 is to define what constitutes a cheque and to distinguish a cheque from other forms of bills of exchange.

The Provider states that the online Oxford Dictionary sets out that a ‘definition’ is:

*“An exact statement or description of the nature, scope, or meaning of something.”*

The Provider states that *“In simple terms, Section 73 is merely a legal description of what a cheque is... it does not confer any legal obligation on any Bank to cash or lodge a cheque”*.

The Provider submits that it is obliged under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the 2010 Act) to identify and verify its customers prior to carrying out an occasional transaction with, for, or on behalf of the customer or assisting the customer to carry out an occasional transaction. The Provider states that it is *“required by the Act to verify a person’s identity and residential address before providing a service... This means that we have a legal obligation to know who we are dealing with, and that we can evidence who/what service we carried out. The Bank, both from an internal policy and external legal obligation perspective, is within its right to not provide banking services (e.g. cashing cheques) to a non-customer. Cheque encashment is not specifically referred to in the Act, nor are other banking services. It is implicit with the terms “transaction” and “service”*.

The Provider submits that its cheque encashment policy complies with its obligations under Section 33(1)(b) of the 2010 Act in relation to customer due diligence. Provision 33 of the 2010 Act provides, among other things, the following:

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*“33.—(1) A designated person shall apply the measures specified in subsections (2) and, where applicable, (4), in relation to a customer of the designated person—  
(a) prior to establishing a business relationship with the customer,  
(b) prior to carrying out an occasional transaction with, for or on behalf of the customer or assisting the customer to carry out an occasional transaction,*

*...*

*(2) The measures that shall be applied by a designated person under subsection (1) are as follows:*

*(a) identifying the customer, and verifying the customer’s identity on the basis of documents (whether or not in electronic form), or information, that the designated person has reasonable grounds to believe can be relied upon to confirm the identity of the customer, including—*

*(i) documents from a government source (whether or not a State government source), or*

*(ii) any prescribed class of documents, or any prescribed combination of classes of documents;*

*(b) identifying any beneficial owner connected with the customer or service concerned, and taking measures reasonably warranted by the risk of money laundering or terrorist financing—*

*(i) to verify the beneficial owner’s identity to the extent necessary to ensure that the person has reasonable grounds to be satisfied that the person knows who the beneficial owner is, and*

*(ii) in the case of a legal entity or legal arrangement of a kind referred to in section 26, 27, 28 or 30, to understand the ownership and control structure of the entity or arrangement concerned.*

*(3) Nothing in subsection (2)(a)(i) or (ii) limits the kinds of documents or information that a designated person may have reasonable grounds to believe can be relied upon to confirm the identity of a customer.*

*...*

*(8) A designated person who is unable to apply the measures specified in subsection (2) or (4) in relation to a customer, as a result of any failure on the part of the customer to provide the designated person with documents or information required under this section—*

*(a) shall not provide the service or carry out the transaction sought by that customer for so long as the failure remains unrectified, and*

*(b) shall discontinue the business relationship (if any) with the customer.”*

Section 24 of the 2010 provides the following definitions:

*“business relationship”, in relation to a designated person and a customer of the person, means a business, professional or commercial relationship between the person and the customer that the person expects to be ongoing;”*

*“occasional transaction”, in relation to a customer of a designated person, means a single transaction, or a series of transactions that are or appear to be linked to each other, where—*

- (a) the designated person does not have a business relationship with the customer, and*
- (b) the total amount of money paid by the customer in the single transaction or series is greater than €15,000;”*

The Provider states that *“The Act allows a risk-based approach to be applied to customers and to services, as warranted by the risk of money laundering and terrorist financing. This means that we have discretion and flexibility to apply procedures based on our assessment of the risks involved”*. The Provider refers to Section 54(2)(a) of the 2010 Act in this regard. I note that Section 54 of the 2010 Act provides the following:

*“54.—(1) A designated person shall adopt policies and procedures, in relation to the designated person’s business, to prevent and detect the commission of money laundering and terrorist financing.*

*(2) In particular, a designated person shall adopt policies and procedures to be followed by persons involved in the conduct of the designated person’s business, that specify the designated person’s obligations under this Part, including—*

*(a) the assessment and management of risks of money laundering or terrorist financing, and*

*(b) internal controls, including internal reporting procedures for the purposes of Chapter 4.*

*(3) The policies and procedures referred to in subsection (2) include policies and procedures dealing with—*

*(a) the identification and scrutiny of complex or large transactions, unusual patterns of transactions that have no apparent economic or visible lawful purpose and any other activity that the designated person has reasonable grounds to regard as particularly likely, by its nature, to be related to money laundering or terrorist financing, and*

*(b) measures to be taken to prevent the use for money laundering or terrorist financing of transactions or products that could favour or facilitate anonymity.*

*(4) The designated person shall also adopt policies and procedures in relation to the monitoring and management of compliance with, and the internal communication of, the policies and procedures referred to in subsection (2).”*

The Provider submits that its cheque encashment policy was introduced to ensure that it was compliant with the 2010 Act. The Provider has submitted a copy of its cheque encashment policy, which I note states the following:

***“Cashing Cheques General***

- [The Provider] will not cash cheques for non [Provider] customers (see exceptions below)*
- [The Provider] will cash uncrossed (i.e. open) [Provider] cheques for [Provider] customers (individuals) in any branch of [the Provider], provided the individual presenting is the payee on the cheque. The customer must be identified in line with the Customer I.D. policy*

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- All Third Party cheques including [Provider] cheques must be lodged. Third party cheques payable to an individual must be endorsed by the named payee and lodged to an account. The endorsement of the customer lodging the cheque is not necessary...
- All technicalities must be checked including verification of the drawer's signature which can be verified on screen, from the account mandate or with the parent branch.

**Exception:**

Cheques issued by the Department of Social Protection ("Social Welfare Cheques"):

...

A summary of the Bank's cheque encashment policy is set out in the table below:

<b>Payee of Cheque</b>	<b>Uncrossed Cheque Drawn on [Provider]</b>	<b>All other Bank Cheques (Non [Provider] paper)</b>	<b>Social Welfare Cheques</b>
<b>[Provider] Customer</b>	Cash for the named payee – in line with Customer I.D. Policy	Do Not Cash – Cheque must be lodged	Cash – in line with Customer I.D. Policy
<b>Non [Provider] Customer</b>	Do Not Cash – Refer Customer to their own Bank	Do Not Cash – Refer Customer to own Bank	Cash – Only if drawn on [Provider] – in line with Customer I.D. Policy

The Provider has submitted its leaflet outlining its encashment policy dated 16 November 2012, which it submits is available in its branches. I note that this states, among other things, the following:

***"I am not [a Provider] Customer but was always able to cash my [Provider] cheque in the [Provider] branch the cheque was drawn on, how will this change impact me?"***

*Unfortunately we will no longer be able to facilitate the cashing of such cheques. However, should you wish to open [a Provider] account our Customer Service team would be happy to discuss this with you."*

The Provider submits that as set out in Provision 5.4 of its Terms and Conditions for Current, Demand Deposit and Masterplan Accounts, it is not obliged to cash cheques for customers who hold an account with it. I note that Provision 5.4 provides the following:

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*"5.4 We are not obliged to cash cheques if the owner of a cheque drawn on your Account presents it for payment at your branch or any other of our branches, we will not be obliged to make payment otherwise than to a bank account of the owner"*

Provision 21.6 of the terms and conditions provides:

*"21.6 Notwithstanding any other provision in these Conditions, we may take whatever action we consider appropriate to meet our obligations, either in Ireland or elsewhere in the world, relating to the prevention of fraud, money laundering or terrorism and to the provision of financial and other services to persons who may be subject to sanctions. This action may include, but is not limited to, investigating and intercepting payments into and out of your Account and making enquiries to establish whether a person is subject to sanctions. This may result in a delay or failure to execute instructions received from you or in the receipt of cleared funds. You acknowledge and agree that, to the extent permitted by law, we shall not be liable for any loss, damage or other liability suffered by you or any third party which arises as a result of taking such action".*

The Complainant states that *"I consider myself to be a customer of the bank on the basis that I had in my possession an instrument of the bank provided to me by an account holder of the bank. The bank suggests otherwise"*.

In response, the Provider states the following:

*"An account holder is someone who has signed up to an agreement with the Bank to open and operate a particular type of account, e.g. they comply with Anti Money Laundering requirements and open a current account and are bound by the current account terms and conditions.*

*A customer is someone who has complied with the Bank's Anti Money Laundering requirements and who avails of a product or service from the Bank, has signed up to an agreement with the Bank and is bound by the respective terms and conditions."*

The Provider submits that the Complainant is neither an account holder nor its customer. The Provider states that it *"does not agree with the Complainant's assertion that he considers himself to be a customer of the Bank on the basis that he had in his possession a cheque, drawn on an account held with the Bank"*.

*"The Law and Practice in Ireland relating to Cheques and Analogous Instruments"* sets out that:

*"... a person becomes a customer of a banker as soon as the banker agrees to accede to his or her request to open an account in his name... in establishing the banker-customer relationship, it is the existence of an account which is important, and not the length of time it has been opened, or the scale of the operations on it.*

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*In the absence of a bank account, the provision of causal banking services or facilities by a banker, e.g. cashing cheques..., will not, of itself, be sufficient to create a banker-customer relationship, and the person availing of such services or facilities will not become a customer by virtue of his so doing.”<sup>1</sup>*

Consequently, having regard to the above, while the Complainant was seeking a banking service from the Provider, that is, the encashment of a cheque, I must accept the Provider’s submission that the Complainant was not its customer.

This Office will not interfere with a financial service provider’s policies or security measures, other than to ensure that the conduct complained of is not in breach of relevant codes/regulations/legislation and does not treat the Complainant unfairly or in a manner that is unreasonable, unjust, oppressive or improperly discriminatory. There is no evidence before me to suggest that the Provider treated the Complainant unfairly or unreasonably. Furthermore, I can find no evidence that the Provider was discriminating against the Complainant or that its behaviour was oppressive in refusing to cash a cheque which had been issued to him.

I note that Section 73 of the Bills of Exchange Act 1882 defines a cheque as “*a cheque is a bill of exchange drawn on a Banker payable on demand*”, and does not, therefore, create a legal obligation on the Provider to cash all cheques presented. That said, I note that Sections 10, 45 and 47 of the Bills of Exchange Act 1882 sets out, among other things, the following:

*“10.—(1.) A bill is payable on demand—*

*(a.) Which is expressed to be payable on demand, or at sight, or on presentation;  
or*

*(b.) In which no time for payment was expressed.*

*(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.”*

*“45. Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.*

*A bill is duly presented for payment which is presented in accordance with the following rules:—*

*...*

*(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.*

*...*

*(3.) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as herein-after defined, either to the person designated by the bill as payer,*

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<sup>1</sup> The Law and Practice in Ireland and Analogous Instruments – E. Rory O’Connor [1993] pg 163 - 164

*or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.*

*(4.) A bill is presented at the proper place:—*

*(a.) Where a place of payment is specified in the bill and the bill is there presented.*

*(b.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.*

*(c.) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.*

*(d.) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.*

*...”*

*“47.—(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.*

*(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.”*

Notwithstanding this, with regard to the service that the Complainant was seeking, that is, the encashment of a cheque which had been issued to him, the Bills of Exchange Act 1882 cannot be taken in isolation. Further obligations have subsequently been imposed on the Provider. I note that the Provider's manner of fulfilling its obligations under the 2010 Act and the Cheques Act 1959 are manifested in its policy. I must accept that the Provider was entitled to put the policy regarding the encashment of cheques in place to meet its obligations pursuant to the 2010 Act and the Cheques Act 1959. I can find no wrongdoing on the Provider's part in this regard.

Consequently, it is my Legally Binding Decision that this complaint is not upheld.

**Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

13 July 2018

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.