



<b><u>Decision Ref:</u></b>	2022-0295
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Money Transfer (between accounts/between banks/3rd
<b><u>Conduct(s) complained of:</u></b>	Disputed transactions Handling of fraudulent transactions
<b><u>Outcome:</u></b>	Rejected

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

In **November 2017**, the Complainants were in the process of completing the purchase of their first house. They were required to pay the balance of the amount due to complete the purchase, into their solicitor's client account, to enable the solicitor to complete the purchase on their behalf.

The respondent Provider to this complaint is the recipient bank, providing the account into which the Complainants' funds were transferred, consequent on their transaction in November 2017.

#### **The Complainants' Case**

In their complaint form and submissions, the Complainants explain that they received an email, which they understood to be from their solicitor, and which gave them instructions regarding the account into which they should transfer the monies due to complete the house purchase.

They explain that they went to the branch of the First Complainant's bank (which is not the respondent Provider to this complaint) where he held his current account and, on **Thursday 17 November 2016**, he completed a SEPA transfer form in favour of the account identified by IBAN in the email that they understood had come from their solicitor. The

First Complainant's bank duly processed the transfer of funds in line with the SEPA instruction.

It is agreed between the parties that the Complainants did not know at the time when the transfer was processed, that the email account of their solicitor had been 'hacked' and that the email received by the Complainants, that purported to come from their solicitor with the instructions regarding the transfer of funds, had in fact, been sent by a fraudster. The account details given to the Complainants in that email were of an account with the respondent Provider, and this account was used by the fraudster to perpetrate the fraud against the Complainants.

The funds, having been transferred, reached the fraudster's account, held with the Provider on **Tuesday 22 November 2016**. The following day, **23 November 2016**, a member of the Provider's staff noticed what is described as "*suspicious activity*" on that account and consulted with the Provider's fraud team regarding that suspicious activity.

By that time, the balance in the account into which the funds had been transferred had been reduced to €40 549.99 (Forty thousand, five hundred and forty-nine Euro and ninety-nine cent). The Provider placed a 'hold' on those remaining funds in the account, and that amount was subsequently returned to the Complainants' account with his own paying bank, on **6 December 2016**.

The amount in dispute, which the Complainants say should also have been refunded to them by the Provider, either wholly or in part, is **€30,117.21** (Thirty thousand, one hundred and seventeen Euro and twenty-one cent).

The Complainants assert that the Provider failed to recognise the transfer into an account held with it, where the identity of the payee did not match the identity on the transfer form. They say that the Provider's delay in identifying the suspicious activity allowed some €30,117.71 of the Complainants' funds to be dissipated.

The Complainants also say that the Provider is at least partly responsible for the loss they have suffered, because they argue that it did not have adequate or sufficiently robust controls in place to guard against the opening of an account, the purpose of which was its use in the perpetration of a fraud.

The Complainants also argue, in the alternative, that the Provider did not properly apply the controls it had in place, so that the fraudster was permitted to open the account and to use it for the purposes of perpetrating the fraud. They argue that there must have been failures in relation to the Provider's anti-money-laundering and/or 'knowing the customer' processes, for the account in question to have been opened in the first place.

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In their submissions, the Complainants argue that at the very least the Provider is partly responsible for the loss sustained by them and when asked how they would like the complaint against the Provider to be resolved, they stated that:

*“[w]e would be extremely grateful if between both banks could each give €15,058.60 as goodwill. €30,117.21 total.”*

### **The Provider’s Case**

In its submissions, the Provider makes several arguments as to why it should not be held liable for any part of the loss sustained by the Complainants, arising out of this transaction.

First, it asserts that in its role as the receiving bank, it is under no obligation to cross-check the payee’s name with the IBAN. It submits that this should be done by the payer at the time of the execution of the payment. It submits that its only obligation in relation to a transaction, such as in this instance, is to credit the funds to the account associated with the IBAN supplied by the payer, to the paying bank, and to do so within the required timeframe which, in this instance, it submits it did.

The Provider has also drawn attention to its obligations, as receiving bank, under the provisions of the **Payment Services Regulations 2009** (the “**2009 Regulations**”) and it argues that it has fully complied with those obligations.

Secondly, the Provider submits that it was the vigilance and prompt action of one of its employees, that led to the recovery of **€40,549.99** (Forty thousand, five hundred and forty-nine euro and ninety-nine cent) for the Complainants.

It explains that, after noticing the suspicious activity on the account in question, an employee contacted the Provider’s fraud prevention unit where, after examination of the account activity, an employee of the Provider took what is described as, “*the unusual step*”, of freezing the account into which the funds had been transferred and, thereby, prevented the further dissipation of funds from that account by the fraudster.

The Provider argues that it did everything within its power to mitigate a fraud already in train, over which it submits it had no other control. It also submits that once the fraud was detected, and once the balance remaining of the funds transacted had been returned, it made the report required under section 19 of the Criminal Justice Act to An Garda Síochána, on **9 December 2016**.

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Thirdly, and while not originally addressed by the Provider in its Final Response Letter to the First Complainant dated **20 December 2016**, in its later submissions, specifically on **11 January 2018**, the Provider argues that in relation to the transaction concerned with this complaint,

*“[The Provider] in this instance is not the Complainants’ payment service provider and did not execute the transaction.”*

The Provider submits that this role was fulfilled by the Complainants’ own paying bank. In view of the fundamental nature of this argument raised by the Provider, this is addressed below.

### **The Complaint for Adjudication**

The complaint is that the Provider wrongfully failed to refund all or part of the amount of the monies, lost by the Complainants arising from the transferred funds; the Complainants argue that this loss was caused or contributed to by the suggested failures on the part of the Provider. They say in that regard, that its systems, processes, and procedures were not adequate and sufficiently robust so as to prevent the opening of the account used to perpetrate the fraud, or to identify the discrepancy between the IBAN and the payee name in the instrument used to execute the transfer of funds.

### **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 Complainants were 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.

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A Preliminary Decision was issued to the parties on **5 August 2022**, 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. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The Provider points out that, although the Second Complainant may have had a banking relationship with it at the time when the transaction in question took place, nevertheless, in the context of that particular transaction, the Provider was not the provider of a payment service to either of the Complainants. Consequently, it says that it was not a financial service provider in the context of the governing legislation of the Office of the Financial Services and Pensions Ombudsman, namely the ***Financial Services and Pensions Ombudsman Act 2017, as amended (the “FSPO Act”)***.

The Provider argues that because it was not the Complainants’ payment service provider in respect of the transaction in question, its only responsibility was to the person or persons who held the account with the Provider into which the funds were paid (its customer/s) and, as a result, its legal and regulatory obligations lay with its responsibilities only to its own accountholder/s.

The Complainants, however, maintain that the Second Complainant at the relevant time held an account with the Provider and, as a customer of the Provider, the Provider should be considered by this Office to be a provider of a financial service to the Second Complainant, in the context of this complaint. The **FSPO Act** governs the functions of this Office in the investigation of complaints against financial service providers. Within the **FSPO Act, section 44(1)** sets out the circumstances in which a complainant may make a complaint to this Office, as follows:

*“44. (1) Subject to section 51(2), a complainant may make a complaint to the Ombudsman in relation to the following:*

*(a) the conduct of a financial service provider involving—*

- (i) the provision of a financial service by the financial service provider,*
- (ii) an offer by the financial service provider to provide such a service, or*
- (iii) a failure by the financial service provider to provide a particular financial service requested by the complainant;”*

[my underlining for emphasis]

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**Schedule 1** of the **2009 Regulations** sets out the definition of a payment service under the Regulations which, insofar as the present complaint is concerned is as follows:

*“3. Execution of payment transactions, including transfers of funds on a payment account with the user’s payment service provider or with another payment service provider:*

...

*(c) execution of credit transfers, including standing orders.”*

In addition, a “complainant” is defined within the **FSPO Act**, to be:

*“a person who makes a complaint under section 44(1) that is—*

- (a) a consumer,*
- (b) an actual or potential beneficiary,*
- (c) a person acting on behalf of an actual or potential beneficiary, or*
- (d) a person of a class specified in regulations made by the Minister under section 4;”*

It should also be noted that “consumer”, within the meaning of the FSPO Act, in relation to a financial service, is defined as follows:

*““consumer”, in relation to a financial service, means—*

- (a) (i) a natural person, not acting in the course of business,*
- (ii) a sole trader, partnership, trust club or charity (not being a body corporate), with an annual turnover in its previous financial year (within the meaning of section 288 of the Act of 2014) of €3 million or less, or*
- (iii) an incorporated body that—*

...

*that—*

- (A) is a customer of a financial service provider,*
  - (B) is a person or body to whom a financial service provider has offered to provide a financial service, or*
  - (C) has sought the provision of a financial service*
- ....”

[my underlining for emphasis]

In relation to this complaint, it is not disputed that at the relevant time, the Second Complainant had a banking relationship with the Provider.

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However, the Provider argues that in the context of the disputed transaction, no such banking relationship came into play.

I agree. Having reviewed the submissions by the parties, I am satisfied that, notwithstanding that the Second Complainant was coincidentally a customer of the Provider, because she held an account with it, her account with the Provider was not in any way concerned with the transaction at issue.

This complaint does not in any way concern the Second Complainant's account with the Provider. In respect of the transfer of funds that gives rise to this complaint, that transfer was neither sent from nor to, the second Complainant's account with the Provider. This instruction to transfer the funds was not given by the Complainants to the Provider, but rather those instructions were given to the First Complainant's bank using one of that bank's SEPA Transfer forms.

I am satisfied in those circumstances, that with reference to the particular transfer of funds at issue, neither Complainant availed of, nor were provided with, a payment service from the Provider, as defined in the 2009 Regulations.

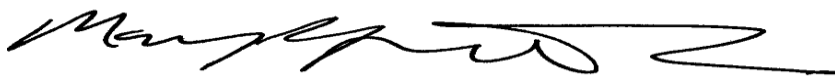
While I can sympathise with the Complainants regarding the considerable financial loss which they suffered arising from the fraud perpetrated against them, I accept the Provider's contention that it has no case to answer to the Complainants, as they were not the provider's customers, for the purpose of this transaction. For that reason, there is no basis to upon which the Complainants' complaint against the above financial service provider regarding the transfer of funds, can be upheld pursuant to s60 of the **FSPO Act**

It is, however, worth noting that the Provider's employee's swift actions happily resulted in some of the monies transferred by the Complainants being recovered and this was certainly a very welcome development. In the absence of such a swift intervention, it seems likely that the full amount of the transferred funds, would have been lost by the Complainants

### **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.



**MARYROSE MCGOVERN**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)**

29 August 2022

## **PUBLICATION**

### **Complaints about the conduct of financial service providers**

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.

### **Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.