



<u>Decision Ref:</u>	2020-0409
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Money Transfer (between accounts/between banks/3rd)
<u>Conduct(s) complained of:</u>	Failure to provide adequate security measures Failure to provide accurate account/balance information Maladministration
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to the Provider's administration and subsequent recall and investigation of cross border transfers made from the Complainant's account.

The Complainant's Case

The Complainant engaged in the purchase of shares and other investments through a third party entity. The third party entity was *"buying and selling American Shares on [the Complainant's] behalf from October 2016 until July 2017"*. The Complainant became suspicious of this third party entity in September 2017. The Complainant had, at the instruction of the third party entity, made transfers totalling *"\$406,333 over 18 transfers"* to an account in the name of another entity with a third party bank. The Complainant contacted the third party bank to raise his concerns on **4 October 2017**. The third party bank advised that *"this amount did not reach the account and advised [him] to immediately contact [the Provider] and initiate a recall of the funds"*.

The third party bank is situated in the United States.

The Complainant contacted the Provider on **5 October 2017**. He submits that he *“spoke to Ms N and explained the circumstances. She said that she would initiate a recall on all transfers immediately”*. On **9 October 2019** the Complainant contacted the Provider and was informed that *“one week after [the Complainant’s] last transfer the account was cleared”*.

The Complainant has submitted that both he and his legal representative have requested copies of correspondence between the Provider and the third party bank but did not receive a reply.

The Complainant submits that he is *“highly annoyed with [the Provider]”*, and that Mr R *“my account manager with [the Provider], was only assigned to my account during this case”*. The Complainant alleges that during a conversation in relation to the Complainant’s account, Mr R said *“we are not here to babysit you, your account is your own responsibility”*.

The Complainant believes that the Provider’s employee should have pursued the investigation until she actually spoke with the fraud unit of the third party bank. The Complainant states that *“for her to inform me that she tried to ring twice without getting through and then to give up is not good enough”*. The Complainant submits that he pays *“€15 bank fees for every transfer and would assume that this fee would ensure my money reach the beneficiary account”*.

The Complainant’s complaint is that the Provider failed to act effectively to address the Complainant’s concern about the payment transactions on his account, failed to ensure the transfer of monies from the Complainant’s account and communicate with him in this regard. Also, the Complainant’s complaint is that Ms N did not conduct a sufficiently thorough investigation of the Complainant’s issue, and that the Provider failed to provide the Complainant with a copy of the correspondence with the third party bank in respect of the transactions at issue.

The Complainant seeks *“a satisfactory resolution to this matter”*.

The Provider’s Case

In its Final Response Letter, dated **23 March 2018**, the Provider stated that the consent of the third party bank was required in order to release copy correspondence between it and the Provider, and that this consent had not been forthcoming.

The Provider noted that the third party bank’s response to it did not indicate that the transfer did not arrive in the account held with it.

The Provider suggested that the appropriate manner for the Complainant to deal with this was for the Complainant to instruct a solicitor to liaise with the third party bank on his behalf.

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In its submissions to this office dated **15 August 2019**, the Provider notes that numerous transfers were made from the Complainant's account to the account held with a third party bank, all of which were made as a result of valid instructions being given by the Complainant.

The Provider states that where a transfer of this nature is then disputed, it can seek to recall the funds transferred, however if this is unsuccessful then it is ultimately a matter between the payer and payee.

The Provider notes that, according to the information it has received from the third party bank, the payee account was closed on **20 September 2017**, some two weeks before the Complainant notified the Provider of his concerns.

The Provider submits that it made every effort to recall the funds the subject matter of the dispute, however where the third party payee bank is unable to effect the recall due in this case to there being insufficient funds in the account and/or the account having been closed there is nothing more that the Provider can do.

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 **19 October 2020**, outlining my preliminary determination 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, I set out below my final determination.

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This Office does not have jurisdiction to investigate allegations of fraudulent activity. Fraud is a criminal offence and this Office is not in a position to investigate or impose the appropriate sanctions in relation to such matters, nor is it established or equipped to deal with situations involving fraudulent activities. Any allegations of fraud are more appropriately dealt with by An Garda Síochána and/or a Court of Law.

Section 52 of the **Financial Services and Pensions Ombudsman Act, 2017** prescribes as follows:

“(1) The Ombudsman may decline to investigate, or discontinue an investigation of, a complaint where, in the opinion of the Ombudsman –

...

(d) there is or was available to the Complainant an alternative and satisfactory means of redress in relation to the conduct complained of...”

Therefore, this Office declined to investigate any complaint arising out of alleged criminal activity being committed on the Complainant’s account.

This Office can only investigate the complaint insofar as it concerns the Provider’s conduct and its asserted failure *“to ensure the transfer of monies from the Complainant’s account and communicate with him in this regard”*; that the Provider *“did not conduct a sufficiently thorough investigation of the Complainant’s issue”*; and that *“the Provider failed to provide to the Complainant a copy of correspondence with a third party bank in respect of the transactions at issue”*.

The Complainant was advised of the foregoing parameters for the investigation on **24 January 2019**.

The Complainant believed he had engaged a company to purchase shares and other investments on his behalf. From **14 November 2016** to **12 September 2017** the Complainant instructed the Provider to make 18 wire transfers from his account with the Provider to an account held with a bank in the United States (the Beneficiary Bank). The total value of the 18 transfers was \$445,700.15 (€406,333.059).

The Complainant gave instructions to the Provider to transfer these sums of money. There is no dispute in this regard.

The Provider has set out the following explanation of how a transfer is then carried out:

“From the time the customer confirms the payment on their internet banking platform a SWIFT message is generated and sent to the next bank in the chain.

SWIFT stands for Society of Worldwide Interbank Financial Telecommunication, it is a system that allows all banks that are signed up to the system to speak with each other. This is how banks send and receive payments safely.

Money doesn't physically move from one bank to another. A SWIFT message tells the receiving bank to put the money the Complainant sent into their customer's account.

This is done by both banks having an account with each other. Once two banks have an agreement, they can send and receive payments between each other.

In the case of these eighteen payments the Bank sent the SWIFT instruction to our USD agent who in turn sent the instruction onto the 3rd Party Bank for processing."

The Complainant became suspicious of this company that he had transferred the money to and that he believed was making investments on his behalf.

The phone calls furnished by the Provider do not detail what time/date they occurred.

Although the calls are of assistance to the investigation, the omission of dates and times make it very difficult to establish the exact timeline for the calls. In the circumstances, while it is evident from the content of some phone calls when they took place, for some other phone calls it is impossible to establish. This is unacceptable. The Provider should correctly record and label the call details.

The first call appears to be when the Complainant contacted the Provider on **5 October 2017**.

The Complainant explained the circumstances of the transfer, and that he had become aware through the internet over the past couple of weeks or month that what he believes to be a stockbroking firm that he was sending money to, appears to have been a sham company and it appears he had fallen victim to a fraud. The Complainant explained that he believed he had initiated a recall for the last transfer made.

In a subsequent phone call, the Complainant was advised to report the issue to An Garda Síochána, and that they had requested a recall [of unspecified transfers] from the third party bank. The Complainant explained that contact had been made on his behalf with the third party bank already and he had been informed that the recipient account was "inactive". He believed that this meant the money must be somewhere other than the recipient account, and that it was up to the Provider to find it. The Complainant was informed that steps were being taken to try to recall the funds.

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The transactions were made to a payee account outside of the EU, and so the European Communities (Payment Services) Regulations have no application. The Provider has set out what steps it takes in these circumstances (where a transfer to an account outside the EU is disputed and the customer seeks to recall it) as follows:

"[The Provider] will send an MT199 swift message (A MT199 swift message is a free format swift message which is used by financial institutions to send and receive information) to the Beneficiary Bank requesting them to recall the funds.

If the original payment had being [sic] sent through [the Provider's online banking platform] we would suggest that the remitter [i.e. the Complainant] contact the beneficiary [i.e. the company he made the payments to] directly and request them to return funds. There is no guarantee that the Bank can action the recall request, as the Receiver [i.e. the payee company] will have to authorise the Receiver's bank to debit the funds from his/her account."

The Complainant explained in another phone call that the Gardaí had told him that his bank needed to inform them of what had happened, as it appeared to them if a crime had occurred it was outside of their jurisdiction, involving as it did a third party account outside the State.

Emails were exchanged internally within the Provider during this period, and the Provider in its submission has furnished a more detailed record of the timeline with regard to what was being done by the Provider in response to the Complainant notifying it of the issue on 5 October 2017:

5 October 2017 – 9.36am recall requested on all transfers made by customer to third party bank account. 3 internal phone calls between 10:14am and 10:43am. 4 internal mails exchanged between 10:45am and 11:33am. Internal telephone call at 11:34am. Internal email at 11:38am. 12:22pm email and swift message sent to third party bank seeking recall of all transfers made to the third party bank account by the Complainant.

6 October 2017 – 4 internal emails between 10:44am and 1:45pm. Confirmation that no response yet received from third party bank. Provider contacts third party bank in UK by telephone at 1:59pm, Provider is told by third party bank to send email again so they can "take a look". Provider emails another contact in third party bank in UK at 2:06pm seeking assistance. 2:48pm third party bank telephones Provider seeking additional information, confirmed they were in contact with their team in the USA. 2:52pm further email to third party bank from Provider. 3.30pm third party bank confirms that "within a week of the last wire transfer deposit all funds were withdrawn and the account closed". 3.57pm Provider acknowledges this message.

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During this period, the Complainant continued to follow up by telephone. In a call that appears to have occurred on **6 October 2017**, the Complainant was informed that the third party bank had now informed the Provider that “within a week of the last deposit 12 September 2017 for \$17,617.23 the account had been closed”. This was based on information received by the Provider from the third party bank that day.

It is worth noting at this point that, in light of the fact that the recipient bank account had been closed (and cleared of funds) before the Complainant alerted the Provider to the suspected fraud, there was by this stage nothing that the Provider could do to recover the monies / reverse the transaction.

Once the account had been closed and funds withdrawn, sometime in the week after September 12, the only way the Complainant could recover the funds would be by somehow finding the recipient and recovering them directly from them presumably with the assistance of the police, in the jurisdiction concerned.

Notwithstanding this fact, on the next business day (**9 October 2017**) and throughout that week, the Provider continued to follow up with the third party bank and exchange internal emails/queries to see if the matter could be escalated or if anything further could be done. The third party bank confirmed that as far as it was concerned, its file was closed.

Having examined the timeline for the 48 hours to 1 week after the Complainant notified the Provider of the suspected fraud, I am not satisfied that the Provider could have reasonably been expected to do any more than it did to attempt to recover the funds. I am also satisfied that, no matter what the Provider did in this period, the Complainant's funds could not have been recovered, by the Provider, in any event as the recipient account had already been closed.

I am not in a position to accept and I have no evidence to support the proposition that any of the transfers “did not arrive” in the recipient account and were somehow suspended in the ether and therefore recoverable, or that the account was somehow otherwise “inactive”. This Office is not in a position to adjudicate upon the service provided or advice given to the Complainant by a third party bank in the United States.

The evidence indicates that the recipient account was cleared of funds around two weeks before the Complainant notified the Provider of the issue. From this point onwards, given that the disputed transactions could not be reversed, this complaint and investigation is focused on whether or not the Complainant was afforded acceptable customer service by the Provider.

The Complainant was contacted by telephone by the Provider's relationship manager Mr R. The Complainant reiterated the advice that he had received from the third party bank – that payments had not reached the account and the Complainant needed to take it up with the Provider.

The Complainant at this point raises a hypothetical scenario of the Provider making an error with a digit on the account. There is no evidence that did in fact occur. The transfers were effected in accordance with the Complainant's instructions, implemented by him through the online banking platform using his password and card reader. Apart from there being no evidence of such a Provider error, it would be an extraordinary coincidence if the final transfer (of many transfers) to the recipient account happened to involve some sort of error such as the one suggested by the Complainant. The overwhelming likelihood is that this transfer arrived in the recipient account as all of the others did, and formed part of the funds taken from the account when it was closed by the accountholder.

I accept that the Provider did everything that it could reasonably be expected to do to try to recover the disputed funds, and the third party bank closed its file at some point between 9 and 11 October 2017. In the circumstances, the Provider's hands were tied. Furthermore, this Office cannot investigate the third party bank.

The Complainant sought further information and documentation from the Provider in order to advance his complaint with the police. A practical difficulty is that the Provider is not privy to the third party account details, and there are some documents that the Provider would not be entitled to release directly to the Complainant. The Provider has elaborated on this difficulty as follows:

"The correspondence between the Provider and the 3rd Party Bank involved confidential communication from one Bank to another about the recall of a payment which contained material of a sensitive and confidential nature in relation to a monetary sum and not in relation to an individual.

Accordingly, the communication between both Banks is strictly confidential. The Legal basis for us requiring the consent of 3rd Party Bank is that there is a common law of duty of confidentiality in the Bank's opinion between the communications made from Bank to Bank. In the same way the Bank would have to obtain the consent of any other party to reveal details of a communication to another party, this is why the consent of the 3rd Party Bank is required in this instance.

The Provider has on several occasions sought the consent of the third party bank to be released. Such consent has not been furnished. The Provider accordingly takes the view that absent such consent it cannot release the correspondence".

I accept the above as being an accurate statement of the bank's duty of confidentiality. Whilst this Office has powers conferred on it by statute which can be used to require production of confidential materials, I am not satisfied that the documentation at issue here would advance this Complaint in any material fashion.

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It is my view that these difficulties can only be resolved with the intervention of the relevant policing authorities for whom, possibly, the documents will be relevant.

During the call with the relationship manager, the relationship manager rejects the suggestion that the Provider has made an error or should have supervised the transactions in a more active manner – specifically that the Provider should have asked the Complainant at some stage why he was sending large amounts of money to a foreign bank account.

I accept that it is not up to the Provider to supervise an account in this fashion. Indeed, it would be considered very intrusive if it were to attempt to do so. The Complainant and customers are entitled to transfer their money to accounts and parties of their choosing. One of the fundamental duties of a bank is to process the instructions of its customer. In this complaint, the Provider has done exactly that.

The above proposition is communicated to the Complainant by his relationship manager, he says *“we can’t be second guessing every large transaction”*.

As part of this complaint, the Complainant alleges that the Provider’s relationship manager told him *“we are not here to babysit you”*. I can find no evidence of this having been said to him.

The Complainant then makes a complaint about difficulties he had with the previous relationship manager failing to return calls (which are of no relevance to the disputed transactions), and that he feels the investigation was not properly conducted. He asks why he was not told *“on day 1”* that the third party account was closed and the money was gone. I am not satisfied that this is a fair criticism of the Provider, when one reviews the timeline of what actually happened from 5-11 October 2017.

The Complainant is clearly frustrated, and I can understand why he would be. He has lost a significant amount of money. However, I cannot hold the Provider responsible for his situation.

The Complainant’s complaint is that the Provider failed to act effectively to address the Complainant’s concern about the payment transactions on his account, failed to ensure the transfer of monies from the Complainant’s account and communicate with him in this regard. Also, the Complainant’s complaint is that Ms N did not conduct a sufficiently thorough investigation of the Complainant’s issue, and that the Provider failed to provide the Complainant with a copy of the correspondence with the third party bank in respect of the transactions at issue.

The party responsible for the Complainant’s predicament is the person or persons to whom the Complainant sent his money. The Provider’s role was initially to effect the transfers as the Complainant instructed it to, and to attempt to recall the funds after it was notified of an issue. Unfortunately, but not as a result of wrongful conduct on the part of the Provider, it was not possible to effect a recall.

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The complaints raised in this complaint regarding customer service issues, in my view, stem from frustration at the underlying transactions not being capable of being reversed / recalled. There are no grounds to uphold this complaint.

For the reasons outlined in this Decision, I do not uphold this complaint.

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**

16 November 2020

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.