An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0315
Sector:	Banking
Product / Service:	Current Account
Conduct(s) complained of:	Handling of fraudulent transactions Disputed transactions
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a request by the Complainant Company ("the Complainant") to recall payment transfers it had made to a company that transpired to be a fraudulent entity. The complaint is made on behalf of the Complainant Company ("the Complainant") by the Complainant's sole director. The director has confirmed that the monies were transferred from the Complainant's account by way of wire transfer to an investment

The Complainants' Case

The Complainant sets out that in **2018** it instructed the Provider to make three payments totalling €50,000 by *"wire transfer"*, to an "*Investment Company*". The payments were transferred as follows:

€20,000 on **24 October 2018**,
€15,000 on **31 October 2018**
€15,000 on **27 November 2018**.

In a letter of 23 October 2019 to this Office the Complainant says the Provider had phoned it in **October** and **November 2018** to confirm whether the payments were genuine, and that it confirmed to the Provider at those times that they were genuine, because at that time it did not know that the 'Investment Company' was a "*scam*".

The Complainant Company asks "*how was* [it] *to know the whole system was fraudulent?"*

According to the Complainant, when the 'Investment Company' did not withdraw its funds upon its request, it then discovered that it was *a "fraudulent company"* and that it had *"*[fallen] *victim to a Forex and CFDs scam Investment Company".* The Complainant states that the Investment Company "*would show trades online that was a scam, in reality no trades were made and* [its] *money was taken".*

The Complainant wrote to the Provider on **23 May 2019** and asked it to "*recall*" the payments. The Complainant sets out that, because no investment service was supplied to it, the Provider *"bears a responsibility for the breach of contract of misrepresentation by the retailer or trader"* … "*under the Consumer Credit Act 1974",* and by *"the payee"* under the *"rules"* of the "*Prudential Regulation Authority* [U.K.]*".* In the Complaint Form the Complainant says that the Provider responded to its recall request, on **19 June 2019**.

The Complainant's sole director asserts that in **2018,** he also personally transferred **€10,000** to the "Investment Firm" from a Personal Account held with another bank, which refunded this in full in **October 2019**. The Complainant queries why the Provider cannot refund the €50,000 in question, given that the same circumstances apply.

In the Complaint Form the Complainant Company sets out that warnings were issued by various financial regulators *"against allowing the instruction of payments"* to the Investment Company in question. The Complainant says that according to *"International SWIFT rules, before allowing a company or merchant to accept payments, there must be a physical inspection of the listed premises of the business"* and it contends that the Provider did not do this, because if it had, it would have found that there was no business at these premises.

In a letter to this office of **23 March 2020,** the Complainant says that the Investment Company appeared in the U.K. Financial Conduct Authority's warning list from **August 2018.** A copy of this warning has been submitted in evidence. The Complainant says that if the Provider had *"conducted simple checks such as validate that the destination bank account was that of a legitimate business"* it could have determined that it was a *"scam transaction"*. The Complainant states in that regard that

> *"most of the customers (like* [the Complainant Company]*) are innocent victims of sophisticated scam companies, the financial system must do a special effort to stop this phenomenon"*

The Complainant Company is unhappy that the Provider implemented its payment instruction in **October and November 2018**, without firstly conducting appropriate due diligence regarding the intended payee. It also says that in **2019**, the Provider failed to act quickly on the Complainant's instruction to recall the funds, and that it wrongfully refused to credit a refund to the Complainant Company's Account. The Complainant wants the Provider to:

> "*recall* [its] *funds, or otherwise credit* [its] *account, for the full amount of these payments, in the total amount of EUR 50,000".*

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The Provider's Case

The Provider in its Final Response Letter of **10 October 2019** says that it recalled the payments when requested, but unfortunately the beneficiary banks advised the Provider that there were no funds remaining.

The Provider disputes any suggestion that it failed to act promptly, and it also disputes that any of the legislation or rules invoked by the Complainant, are applicable to it.

Insofar as the Complainant contends that the Provider should have done more, to vet the transfer of funds the Complainant was seeking to make, the Provider disputes that it had any such obligation.

Further details of the Provider's position are contained below under the heading "***Analysis***".

The Complaint for Adjudication

The first element of the complaint is that the Provider implemented the Complainant Company's payment instruction in **October and November 2018**, without firstly conducting appropriate due diligence regarding the intended payee.

The second element of the complaint is that, in **2019**, the Provider failed to act quickly on the Complainant's instruction to recall the funds, and wrongfully refused to credit a refund to the Complainant Company's Account.

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 Company 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.

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A Preliminary Decision was issued to the parties on **29 July 2021**, 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Legislation

The Complainant sought to invoke ***Section 75*** of the ***Consumer Credit Act 1974*** (the 1974 Act) which is legislation of the United Kingdom, creating no obligations on the Provider in the delivery of its services to the Complainant Company, in Ireland.

I am conscious that the relevant section 75 headed ***Liability of creditor for breaches by supplier,*** prescribes as follows***:***

> *(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.*
>
> *(2) …*
>
> *(3) Subsection (1) does not apply to a claim –*
> *(a)under a non-commercial agreement*
> *(b)so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000 or …*

I note that the type of agreement referred to within this provision of the 1974 Act, is specified under section 12 of that Act as a regulated consumer credit agreement. I do not accept that the service sought by the Complainant from the Provider for the transfer of funds in October and November 2018, arose in the context of a regulated consumer credit agreement between them. Neither do I accept that this legislation has any bearing on the issues raised by this complaint. In my opinion, the Complainant Company's purported reliance on those provisions has been misconceived.

Terms and Conditions

The Provider relies on Section 7.9 of the terms and conditions governing the Provider's internet business banking facility which provides as follows:

> *You shall ensure that all payments instructions given by you to us are accurate and complete. Before confirming any payment instruction to us, you should make sure that the instruction which is relayed back to you for confirmation is the payment instruction which you intend to give.*

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> *We are entitled to rely on any payment instruction from you using* [the Provider's internet business banking facility] *and, for the avoidance of doubt, the processing by us of any such confirmed instruction shall be final and binding on you*.

Analysis

I note that the Complainant Company in this matter transferred a total of **€50,000** to a third party (referred to below as 'the Merchant Payee') between **24 October 2018** and **27 November 2018**. It seems that the Complainant Company's intended purpose for those funds was investing and trading in certain financial products; it refers to "Forex" and contracts for difference.

I note that the transfers were made by electronic transfer from the Complainant's account using the Provider's internet business banking facility. I also note that all relevant transactions to the Merchant Payee were properly authorised by the Complainant Company at the relevant times.

It is clear from the evidence that, in the course of processing the first transaction, the Provider telephoned the Complainant Company to ensure that it wished to proceed with the transaction, and to also warn of email scams. The Complainant Company advised however that it wished to proceed.

I note that the Complainant Company was then advised by the Provider as follows:

> *I do just have to say that under the terms and conditions of* [the internet business banking facility] *by authorising this payment your company will be fully liable for the amount. This means that if the payment turns out to be fraud*, [the Provider] *will not refund you*.

The Complainant Company states that it eventually became apparent (after its request to withdraw the funds was refused) that the Merchant Payee had not invested the money in accordance with the Complainant Company's expectations, and that it had fraudulently stolen those funds.

I note that at **16:11** on **21 May 2019**, some 6-7 months after the funds had been transferred, the Complainant emailed the Provider in the following terms:

> *Beginning 24th October 2018 until the 27th of November 2018, I fell victim to a Forex and CFDs scam company, several wire transfer transactions were instructed. In a total amount of: 50,000 EUR.*
>
> *I have enclosed copies of the statements for ease of reference.*
> *It is apparent that you cancel the transactions and refund me. I also have reasons to believe that my details have been misappropriated by a third party.*

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> *Since no investment service was supplied to me, I request a file to dispute regarding these transactions and I demand that you will send a recall of these payments.*
>
> *Under the Consumer Credit Act 1974 39 Part IV Section 75 the credit/debit card company is jointly and severally liable for any breach of contract or misrepresentation by the retailor or trader.*

This email was responded to the following day by the Provider's chargeback team indicating that a chargeback would not be possible. This was because the transaction had been made by way of wire transfer from a deposit account, rather than by using a credit card or debit card. I note that the response stated as follows:

> *"Chargebacks can only be raised through card dispute resolution schemes for transactions that have been processed on debit cards or credit cards.*
>
> *In addition, please be advised that Section 75 of the Consumer Credit Act 1978* [sic] *only applies to UK residents and we are unable to review your query as part of this also.*
> *…".*

Thereafter, I note that the Provider's e-fraud team telephoned the Complainant on **24 May 2019**. The Complainant explained the position following which the Provider advised that it would send a request to recall the payments, and that this would be done on a "*best efforts basis*".

The Complainant was also advised to contact An Garda Síochána. The Provider duly sought the recall of the funds but was advised on 29 and 30 May 2019 by the Merchant Payee's bank, in respect of each of the three transfers, that no funds were available in the beneficiary account for recall, and that the account had been closed.

I am satisfied on the evidence that the Provider responded promptly and appropriately to the notification provided by the Complainant that it had been the victim of fraud. It is not surprising that the matter was addressed in the first instance by the Provider's chargeback team because the Complainant's email of 21 May 2019 referenced "*credit/debit card*" transactions. Indeed, as referred to below, the Complainant seeks to invoke a number of statutes and rules that are properly relevant to card transactions, but which have no such relevance to wire transfers.

It is worth noting in that context, that the recall which the Complainant's director secured from a separate bank in respect of funds transferred from a personal account, and upon which reliance is placed in this complaint, appear to have been refunded by way of chargeback and therefore would appear to relate to a transfer completed with the use of a credit card or debit card, unlike the transactions of the Complainant Company, which are the subject of this investigation.

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In any event, it seems likely to me that the funds were removed from the Payee Merchant's receiving account, swiftly after the transfers were made in **October/November 2018.** I cannot accept the Complainant's contention, set out in his email to this Office of 23 March 2020, that the Provider could have "*complete*[d] *the recall process when I asked them to do so, but they did it too late*". (Similar reasoning is advanced in an email to this Office of 07 January 2021.)

In this regard, though it is regrettable that the Provider did not relay the content of the communications from the Merchant Payee's bank of 29 and 30 May 2019, to the Complainant Company until 19 June 2019, I am satisfied that there was no unreasonable delay on the part the Provider in originally seeking to recall the funds, when the Complainant asked for assistance. It seems to me, in any event, that it is likely that the funds had been removed from the Merchant Payee's bank account well in advance of the Complainant requesting a recall on **21 May 2019,** some 6-7 months after the transfer of funds had been made.

The essence of the Complainant's complaint is that the Provider should not have allowed it to proceed with the wire transfer payments in the first instance. The Complainant maintains that the Provider should reimburse it for its loss for the following reasons:

1. Section 75 of the Consumer Credit Act 1978.
2. Breach of contract and misrepresentation of the Merchant Payee.
3. No service or investment was provided to the Complainant.
4. The Merchant Payee featured on a number of warning lists at the time of the transactions.
5. SWIFT rules require a bank to carry out a physical inspection of a merchant payee's listed premises before allowing that merchant payee to accept payments. The Merchant Payee here had no physical presence at its purported premises.

Items 1, 2 and 3 above are strands of the same argument. The Complainant asserts that, pursuant to the Consumer Credit Act 1974, the Provider is responsible for the breach of contract and misrepresentation of the Merchant Payee in failing to provide the investment services the Complainant Company paid for. As the Provider has pointed out however, the Consumer Credit Act 1974 is UK legislation that it not enforceable in this jurisdiction.

Equally, the "*rules and bylaws*" of the UK regulator are not binding upon the Provider in its provision of services within this jurisdiction. Rather it is the Conduct of Business Rules of the Central Bank of Ireland, that are relevant.

With regard to item 4 above, the Complainant is essentially asserting that the Provider should have in some way vetted the entity to which the Complainant wished to send the funds and should have discovered that it was a fraudulent enterprise and thereafter warned the Complainant Company against proceeding with the transactions. This proposition, which is reiterated in the Complainant's emails to this Office of 23 March 2020 and 07 January 2021, is not accepted.

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I don't accept that it would be feasible for a financial service provider to vet every last payee to whom/to which its customers wish to voluntarily transfer funds. There is no evidence that the Provider had actual knowledge of the fraudulent nature of the enterprise but that it nevertheless failed to act. It would be unreasonable and impractical for a duty to be imposed on a bank to carry out the vetting envisaged by the Complainant.

The fact that the Merchant Payee may or may not have been the subject of "*numerous warnings issued by scam broker investigators, as well as by the FCA (the UK) and a few other regulators*" represents an inadequate basis in my opinion, on which to come to a conclusion that the Provider has a case to answer. The vetting that the Complainant Company urges should have been carried out by the Provider, was in fact vetting that it was open to the Complainant Company to have undertaken itself.

The final ground on which the Complainant relies is a purported failure on the part of the Provider to carry out a physical inspection of the Merchant Payee's premises, as the Complainant contends it was required to do under SWIFT rules. The Complainant Company has not identified the specific rule that it relies upon.

Furthermore, I am unable to identify any such relevant SWIFT rule. It seems to me however, that it may be that the Complainant is referring to Section 5.2.1.2 of the '*Visa Core Rules and Visa Product and Service Rules'* which provides as follows:

> ***5.2.1.2 Due Diligence Review of Prospective Merchant or Sponsored Merchant***
> *Before contracting with a prospective Merchant or Sponsored Merchant, an Acquirer or a Payment Facilitator must conduct an adequate due diligence review to ensure compliance with the Acquirer's obligation to submit only legal Transactions into VisaNet. In the Europe Region, an Acquirer must conduct a physical inspection of the business premises of the prospective Merchant to ensure that the prospective Merchant conducts the business that it has stated to the Acquirer. The Acquirer must also obtain a detailed business description from a prospective Mail/ Phone Merchant and Electronic Commerce Merchant.*

I am satisfied however that the Visa Core Rules are not relevant to this complaint as the conduct of the Provider which is at the source of the complaint, does not relate to debit card or credit card transactions.

Finally, I have noted the terms and conditions of the Complainant's account with the Provider and/or of the internet business banking facility. The Complainant has not identified any term or condition which it suggests that the Provider has breached. I have reviewed these terms and conditions and I am satisfied that there is no evidence that the Provider failed to comply with them.

Since the Preliminary Decision of this Office was issued, the Complainant Company has made further submissions. I note in that regard that (referring to the Fraudulent entity as "the Company") the Complainant says amongst other things, that:

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"The false representations and omissions made by the Company have a tendency or capacity to deceive consumers, such as myself, into unwittingly providing funds that fueled the Company's fraudulent scheme and therefore by their nature are jointly — immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers. As a result of the Company's deceptive trade practices, I was deceived into transferring my funds for investment returns that were never delivered. I will certainly never receive any monetary value for the investments considering the way the Company had their scheme rigged thus causing significant economic damage to me. The false statements of material facts and omissions as described above; and the fraudulent transaction(s) the Company perpetrated were unfair, unconscionable, and deceptive practices perpetrated which would have likely deceived any reasonable person under the circumstances. Scam victims have relatively little freedom of reactivity; under such circumstances, they respond immediately, instinctively, and invariably to the specific demands of the perpetrator. Being able to consciously refrain from reacting in such a way is extremely difficult and sometimes impossible. Unwittingly giving off signals that mark us as easy targets, is by no means the same as being grossly negligent, in view of the increasingly sophisticated scams, which continue to be a pervasive problem in society. Due to personal circumstances, I was particularly vulnerable during the victimisation period; I was also relatively financially illiterate and very inexperienced in the finance sector which made me a prime target for criminal enterprises in this field. Since this time, having lost all of my savings to these fraudulent companies, I have learnt an enormous amount about the scope of these criminal endeavours and also about how the financial services sector operates internationally.
….
This complex issue has caused substantial harm to me, and if not appropriately addressed, will cause substantial harm to others, we must therefore conduct an in-depth and comprehensive review of all of the contributing factors that have led to an outcome as horrendous as the one described herein."

There is no doubt that the Complainant Company was unfairly tricked by a third party, into transferring funds to what transpired to be a fraudulent entity. The Complainant refers in that context to "*Quincecare*" and says that:

"The duty in question is often referred to as the Quincecare duty, well established in the case of Barclays Bank plc v Quincecare Ltd. (the "Quincecare duty").

The Quincecare duty requires financial institutions to take reasonable care and skill when executing the instructions of a client. It is recognised as authoritative by leading academic texts. The duty arises in cases where it can be argued that an ordinary prudent staff member of a financial institution would have "a reasonable basis for suspicion that a particular payment instruction would result in the misappropriation of the funds of the client."

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The Complainant also refers in that respect to the English High Court case of *Fiona Lorraine Philipp v Barclays Bank UK Plc* [2021] EWHC 10 (Comm). Although not binding in this jurisdiction, this case is nevertheless of persuasive authority.

In that matter, the English High Court, in determining whether the Defendant bank could be held liable for a lack of due diligence in relation to an APP fraud suffered by the Plaintiff, considered two of the duties owed to the Plaintiff. The Court took the view that the bank had a primary contractual duty to act on the customer's instructions, and a subordinate duty to refrain from acting on those instructions in certain circumstances.

At [77] the Court quoted the subordinate duty as laid down in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363:

> *"The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that* ***a banker must refrain from executing an order if and for so long as the banker is "put on inquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds*** *of the company (see proposition (3) in* Lipkin Gorman v Karpnale Ltd (1986) [1992] 4 All ER 331 *at 349*. [1987] 1 WLR 987 *at 1006). And the external standard of the likely perception of the ordinary prudent banker is the governing one."*

[Emphasis added]

The English High Court held that the Defendant bank had not been 'put on inquiry' at the time of the transaction and, at [120], that "*a bank is not to be held liable where the doubt about the genuineness of the instruction is merely speculative*". The Court therefore rejected the Plaintiff's argument that the Quincecare duty should be extended to obligate the Defendant bank to establish anti-APP policies and procedures, in circumstances where this was not required by law or banking standards. It held at [130] that this would impose "*certain professional standards of detective and investigative work, including potential liaison with the police*" upon the bank.

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I note that this Quincecare principle has been cited in this jurisdiction with approval, in *Razaq v Allied Irish Banks Plc & Aslam* [2009] IEHC 176 at [68].

The essence of the Complainant Company's recent submissions is that the Provider ought to have done more, to protect the Complainant Company from its own desire to transfer the funds to the recipient in question. It says that:

> *"On the basis of various signs, [the Provider] should have assumed that something suspicious was going on and suspended transaction(s) until reasonable enquiries could be made to verify that the transaction(s) was/were properly executed."*

I don't accept this. There is no evidence available that the Provider was put on enquiry regarding these transactions, or that the identity of the recipient account had been in any manner "flagged". The Provider nevertheless, bearing in mind the amount sought to be initially transacted, questioned the Complainant at the outset as to whether indeed it wished to proceed, and warned the complainant Company as to the prevalence of email scams. The Complainant confirmed however that it wished to proceed.

Although the Complainant now suggests that "*it would be sensible for financial institutions to err on the side of caution*", in the absence of a reason to be put on enquiry, I don't accept this. Considerable frustration could be needlessly caused to customers, by such an approach to the authorised transfer of funds in the ordinary course of daily business; expeditious transactions are a normal expectation of customers of financial institutions. Moreover, as indicated in the decision of the Court, which the Complainant seeks to rely on, financial service providers are not obliged to adopt "*professional standards of detective and investigative work, including potential liaison with the police*".

Although the Complainant Company makes reference to various policy matters, and academic commentary of the issue of APP fraud, the role of this Office is to determine whether at the time of the events giving rise to this complaint, the Provider acted wrongfully. For the reasons outlined above, I do not accept that it did so.

Whilst the Complainant Company is at a very significant loss arising out of its transfer of funds in late 2018, to what appears to have been a fraudulent company, I do not accept that the Provider bears a liability to the Complainant Company regarding those transactions, which the Complainant confirmed it wished to proceed with, at that time.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider or conduct coming within the terms of ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** that could ground a finding in favour of the Complainant Company, I do not consider it appropriate to uphold the complaint.

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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
Deputy Financial Services and Pensions Ombudsman

13 September 2021

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.