



Financial Services Ombudsman Scheme

Summary of the determination dated 19th April 2018 in respect of a complaint made to the Scheme regarding a lost cheque

The Complaint

The Complainant was opening an account with the Bank and had a number of telephone conversations which culminated in an account opening application being completed and returned by the Complainant via the postal system.

An application form was forwarded to the Bank by post plus two cheques. During a telephone call to the Bank, it transpired that the cheques had been mislaid. The Complainant was adamant that the cheques had been enclosed but despite an extensive search by the Bank on the same day, neither could be found. One of the cheques was replaced quite quickly, but the second one took some time and considerable cost to replace as it was an international banker's draft, subject to Spanish law, which meant that replacement was not a simple matter as it would have been in the United Kingdom.

During the process to get the banker's draft re-issued, additional lawyers bills were incurred, plus travel costs for trips to Spain, by the Complainant, to sign documents. The Complainant states that the cheques were enclosed and were lost after they arrived at the Bank's address. He seeks recovery of his costs and loss of interest, which he believes was caused by the Supplier. The total claim is Euros 18,079.17 calculated as follows:

Lawyer's fees	7,018.00
Notary Public	1,196.72
Loss of interest at 1%	8,764.45
Travel Costs	1,100.00

Summary of Banks response

The Bank maintains that the cheques were not attached to the application form and therefore they are not responsible for the cost of replacement or loss of interest.

Furthermore the application form has a number of boxes to be marked which act as a checklist prior to submitting the application. Whilst most of the questions are routine; one part deals with the 'initial deposit and regular payment method'. The applicant is requested to mark with an 'X' one of the following options:-

1. I enclose a cheque/bankers draft made payable to the account holder.
2. Please transfer (from Lloyds bank plc accounts only).
3. Please mark 'X' if you will be arranging to transfer your initial deposit once the account is opened and you have received your new account details.

The Complainant marked option 3 stating the funds would be transferred. Later in the form the initial deposit is stated as being "approx. Euros 900K".

Whilst they were of the opinion that there were no cheques accompanying the application, the Bank offered to make a payment to cover the costs of stopping and replacing the cheques. However, at the time the compensation was offered it was thought that stopping and replacing the two cheques would have incurred minimal fees.

Findings

The adjudicator considered two aspects of the complaint:-

1. The Bank had been negligent in losing the cheques.
2. A verbal contract was agreed that the Bank would cover the costs incurred to replace the cheques.

Negligence

The Complainant was unable to prove that the Bank was negligent as he could not prove that the cheques were posted with the application form to a standard required by law. The application form indicated that the account was to be funded by bank transfer rather than by cheque therefore the Bank was not put on notice that it was possible that cheques had become detached from the application form. In addition, the Complainant refers to the initial deposit on the application form as approximately Euros 900K. Had cheques been enclosed, the Bank may have reasonably expected that they would have been listed here rather than an approximate figure being given. Whilst ticking this box may have been an error, it is not unreasonable for the Bank to rely on this information.

The Adjudicator found that negligence by the Bank cannot be demonstrated.

Verbal Contract for Compensation

A key element of any contract is consensus. In essence this means that, where two parties enter into an agreement or contract, both parties must have the same understanding of the terms of that agreement or contract.

In this case the Bank offered to cover the cost of replacement cheques without appreciating that under Spanish law these costs could be substantial. In addition it is not clear whether the Complainant realised, at the time the offer was made, what would be the full cost of replacing the cheques. Had he known the difficulties in obtaining a replacement draft, it is illogical that he would have attempted this method of payment, preferring a Bank transfer.

The Adjudicator was satisfied that consensus had not been reached as it is clear that both parties were probably of the understanding that costs would be minimal and not the Euros 9,314.72 of direct costs which were actually incurred.

If the Complainant had realised that the costs were to be substantial, this should have been brought to the attention of the Bank. In effect by checking that the Bank understood that they were not agreeing to compensate a nominal sum, they may have established consensus and therefore made the offer a legally binding contract which the Complainant was entitled to rely upon.

The Adjudicator concluded that the verbal contract is not enforceable under current legislation.

Award

The complaint was not upheld and consequently no award was made.