



Determination

19 February 2018

- **Business account**
 - **Credit provider**
- **Disputed ownership of account**
 - **Failure to follow instructions**
 - **Unauthorised transactions**
 - **Access denied to account**

DETERMINATION

Consumer: 123 Incorporated
Financial Services Provider (FSP): FSP
Date: 19 February 2018

Summary

1. I find that the consumer became aware in 2002 of the misnaming of the account into which its funds had been deposited with the FSP in 1999. Therefore, the time for the consumer to make a complaint about either:
 - (a) the original misnaming of the account, or
 - (b) the advice given by the FSP when the issue was raised with it by the consumer in 2002,has elapsed.
2. I find further that the question of ownership of the funds held by the FSP is in dispute and that this dispute is not fundamentally between the consumer and the FSP but between the consumer and a new association.
3. Alternatively, I further find that the dispute is more appropriately dealt with by a court and not CIO.
4. I find the actions of the FSP in freezing the funds in the disputed account until a resolution of the dispute over their ownership to be fair and reasonable in all the circumstances.
5. This Determination does not entirely adopt the reasons set out in our Review dated 16 March 2017 (**the Review**) but I do affirm its outcome. I attach a copy of the Review.
6. The complaint is not upheld.

Background to the complaint

7. The consumer is an incorporated association formed in 1999 by the amalgamation of several unincorporated non-profit associations for the purpose of managing community recreational facilities and activities.
8. The consumer was constituted under the *Associations Incorporation Act 1984* (NSW) which incorporation was continued by section 3 of Schedule 4 of the *Associations Incorporation Act 2009* (NSW).
9. One of the consumer's sub-committees was authorised to establish an account with funds from the consumer in 1999. This account was accounted for in the audit reports of the consumer as being one of its financial institution accounts.
10. The account was established in a name that was similar but not exactly the same as that of the consumer (**the account name**).

11. In 2002, members of the management committee of the consumer became aware that the account name was not the same as that of the consumer and raised the issue with an employee of the FSP.
12. The consumer alleges that the FSP said that it would not be economic to change the name as the change would incur fees and the name difference was not significant.
13. In late 2014, a dispute arose between members of the relevant sub-committee and the management committee of the consumer. It appears members of the sub-committee resolved to form a new separate association (**the new association**). The consumer resolved to establish a new sub-committee and in September 2015 representatives of the consumer met with the FSP to inform it that new signatories had been appointed to operate the account.
14. The FSP informed the consumer that the name of the new association exactly matches the account name and the signatories authorised to operate the account, originally nominated by the consumer, are representatives of the new association which now claimed the funds in the account. The FSP, therefore, informed the consumer that its representatives could not operate the account.
15. On 14 October 2015, the consumer made a complaint to the internal dispute resolution officer of the FSP setting out why it should be given access to the account and not the new association.
16. On 11 November 2015, the FSP informed the consumer that the account would remain frozen until its ownership has been resolved either by agreement or court order.

Key issues

17. The key issues to be decided in this Determination are:
 - (a) Has the time elapsed for the consumer to complain to CIO about:
 - (i) the original misnaming of the account; or
 - (ii) the advice given by the FSP when the issue was raised with it by the consumer in 2002?
 - (b) Can CIO determine the ownership of the funds in the account?
 - (c) Are the actions of the FSP fair and reasonable in the circumstances?

Relevant considerations

18. In making a Determination, I am required to have regard to:
 - (a) relevant legal requirements or rights provided by law to the consumer in relation to the subject matter of the complaint;
 - (b) applicable codes of practice;
 - (c) good practice in the financial services industry; and

(d) fairness in all the circumstances.¹

19. Both the consumer and the FSP have been given the opportunity to provide information in support of their respective positions. I am satisfied that all information provided by the parties has been exchanged between the parties, and that each party is aware of the issues raised in this complaint.

Findings and reasons for decision

20. Under CIO Rule 6.3(b), a consumer must make a complaint to the scheme before the earlier of either:

(a) six years from the date that they became aware (or should reasonably have become aware) of the loss they have suffered, or

(b) two years from when the FSP provided its final IDR response to the consumer.

21. The consumer knew that the account was misnamed in 2002. It raised the issue with the FSP at that time. Whether the FSP's response was appropriate or not, 15 years have passed since it was given.

22. I find that the time for the consumer to complain to CIO about either the

(a) the original misnaming of the account in 1999, or

(b) the advice given by the FSP when the issue was raised with it by the consumer in 2002,

has elapsed.

23. The consumer is an incorporated association and the signatories on its accounts held by the FSP are merely its agents. The jurisdiction of CIO over complaints arising from the provision of financial services applies to the consumer itself and is not affected by the signatories on accounts held by incorporated associations or, for that matter, bodies corporate.

24. Therefore, if the funds in dispute held by the FSP in the relevant account are the property of the consumer then CIO can deal with the consumer's complaints about the conduct of the FSP in 2015 and afterwards because:

(a) the FSP is, therefore, providing a financial service to the consumer, and

(b) that complaint is within time.

25. However, there is a dispute about the ownership of those funds. It is a dispute between the consumer and the new association. CIO determines disputes between its member FSPs and consumers.

26. Further, the outcome of that dispute will turn on questions of fact and law relating to:

(a) the origins of the original funds used to establish the account,

(b) the sources of funds into the account both from:

¹ CIO Rule 12.1 – 9th Edition. All references to CIO Rules in this Determination are references to the 9th Edition Rules.

- (i) 1999 to 2014 or whenever the new association was formed; and
- (ii) 2014 to the present, and
- (c) the relevant authorities, minutes of meetings and resolutions both establishing and for the continued operation of the account, for instance, the appointment of signatories.

27. CIO Rule 10.1(o) further says:

The scheme (CIO) will not deal with a complaint if, at the time of receiving the complaint or at any time during the CIO process, the scheme is satisfied that...

it is more appropriate that the complaint is dealt with in another forum such as a court, tribunal, OAIC or another EDR scheme.

28. I am satisfied that the dispute over ownership of the funds in the account is one which is more appropriately dealt with by a court or perhaps a community dispute mediation scheme, but not CIO.
29. As stated in paragraph 23 above, if the dispute over ownership of the funds in the account is resolved in favour of the consumer, then CIO may deal with a complaint about the conduct of the FSP in 2015 and thereafter.
30. In order to lend finality to this complaint, I find the actions of the FSP once it became aware of the circumstances of the dispute, in freezing access to the relevant account to both parties until that dispute is resolved, to be:
- (a) fair to both parties, and
 - (b) reasonable in the circumstances.

Determination

31. The complaint is not upheld.



Raj Venga
Ombudsman



Review

16 March 20107

- **Business account**
 - **Credit provider**
- **Disputed ownership of account**
 - **Failure to follow instructions**
 - **Unauthorised transactions**
 - **Access denied to account**

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16 March 2017

Dear Consumer

Complaint by Mr A on behalf of 123 Incorporated about FSP

We refer to your complaint about the FSP.

For the reasons set out below, we find that your complaint falls outside of our jurisdiction.

Complaint summary

This complaint concerns a business class account held with the FSP.

On behalf of 123 Incorporated, you say that:

1. the account was set up with an incorrect name in 1999,
2. in June 2015, the FSP failed to act on yours and Ms A's instructions to remove the signatories from the account and to freeze transactions on the account, and
3. the FSP should not have allowed the signatories on the account to carry out transactions on the account, as the account funds are held on behalf of 123 Incorporated, not 456 Incorporated.

To resolve your complaint, you want the FSP to:

1. acknowledge that the account was incorrectly named,
2. acknowledge that 123 Incorporated had requested the FSP to change the signatories on the account in June 2015, and that the FSP should not have allowed the existing signatories to conduct any transactions on the account, and
3. allow 123 Incorporated's newly appointed subcommittee access to the account, which contains the historic funds of its association.

The time within which to make a complaint about the account name being incorrect has elapsed

Our Rules and Guidelines set out what complaints we can deal with and our process for dealing with a complaint.

We will not deal with a complaint if we are satisfied that the time within which a complainant must make a complaint to the scheme, as prescribed by CIO Rule 6.3, has elapsed (CIO Rule 10.1(k) – 9th Edition).

Under CIO Rule 6.3(b), a consumer must make a complaint to the scheme the earlier of either:

1. six years from the date that they became aware (or should reasonably have become aware) of the loss they have suffered, or
2. two years from when the FSP provided its final IDR response to the consumer.

The FSP has provided us with a copy of the account opening form dated 27 September 1999. This form clearly shows the account name. The form also appoints three signatories, who each sign the form.

Accordingly, we consider that the association that had opened the account back in 1999 should reasonably have been aware at that time if the account name was incorrect. This occurred more than six years ago.

Consequently, we find that this claim falls outside of our jurisdiction (CIO Rule 36.1(a) – 9th Edition).

The financial service does not relate to the complainant

We will not deal with a complaint if we are satisfied that the person to whom the financial service directly relates is not the complainant (CIO Rule 10.1(j) – 9th Edition).

The procedures we follow are not the same as a court. Unlike a court, we do not have the power to take evidence under oath or to cross-examine the parties. This means that we deal with information supplied by the parties and not formal evidence (CIO Guideline 3.2 – 5th Edition).

The FSP has provided us with documentation detailing the current signatories on the account (who have been signatories on the account since April 2014 and therefore were the signatories at the time of the alleged events that are the subject of this complaint).ⁱ

Neither you or Ms A are signatories detailed on the account and you were not signatories on the account immediately prior to the current signatories being appointed to the account.

Accordingly, from the information supplied by the FSP we are satisfied that the financial service that is the subject of this complaint does not relate to you (CIO Rule 10.1(J) – 9th Edition).

Consequently, we find that your remaining claims fall outside of our jurisdiction (CIO Rule 36.1(a) – 9th Edition).

ⁱ The documentation provided by the FSP relates to an account that you are not a signatory on. Accordingly, CIO considers that this information is confidential information and cannot be provided to you as a third party: CIO Rule 33 – 9th Edition.