



<u>Decision Ref:</u>	2018-0105
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Delayed or inadequate communication Dissatisfaction with customer service Failure to process instructions in a timely manner Misrepresentation (at point of sale or after)
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage application and concerns the Bank's failure or refusal to allow the Complainants to avail of a cashback offer the Bank was offering to mortgage applicants.

The Complainants' Case

The Complainants applied for mortgage with the Bank. The Bank had introduced an offer to certain mortgage applicants of a payment of €2,000 towards professional fees, which was available to those customers who drew down their mortgage loans between 3 October 2016 and 31 December 2016. The Complainants state that they met with a Mortgage Consultant of the Bank in Cork in April 2016. They state that during this consultation they informed the Bank's Mortgage Consultant that they were going to be changing their car and getting a car loan and asked how this would affect their mortgage application. They state that the Bank's Mortgage Consultant told them that once they received their mortgage approval in principle they could "do what [they] like".

The Complainants state that in November 2016, they took out a car loan in order to purchase a replacement motor vehicle. The Complainants were already joint deposit account holders with the Bank, and they state that the deposit for the purchase of the replacement vehicle was paid out of that joint account and the direct debit payments for the car loan were also set up to come from that account.

The Complainants state that they had been approved by the Bank for a mortgage of €220,000. In December 2016, they instructed their solicitor to draw down mortgage funds in the lesser amount of €164,000. They state that following this, they received a phone call from the Bank's Mortgage Consultant who informed them that their new car loan had shown up on a credit report and asked for the loan documents to be sent to him. They state from that date, there were a number of phone calls, emails and requests from the Bank asking for more information. Ultimately, a new loan offer was reissued in January 2017 and the funds were released to the Complainants by way of drawdown at that time.

The Complainants state that they asked the Bank regarding the €2,000 cashback offer and they were told that they were not eligible for this, as they had not drawn down their funds by 31 December 2016. The Complainants state that the reason they missed the cut off date for drawdown of the funds, was due to the fact that the Bank's Mortgage Consultant had provided them with incorrect information as to the consequences of taking out the car finance before drawdown of the funds. They state that had they been given the correct information, they would have waited until after drawdown in order to replace the car and that the consequent delay in receiving a new loan offer and drawing down the funds, was as a result of this misinformation and accordingly was the Bank's fault.

The Complainants' case is that the Bank acted unreasonably in deciding that the Complainants are ineligible for the cashback offer; they contend that the reason for the delay in drawdown was as a result of the Bank providing them with incorrect information. The Complainants are looking for the Bank to honour the cashback offer and pay them €2,000 towards their professional fees. In addition the Complainants are seeking compensation of €1,000 for stress and anxiety and €750 towards rent that they had to pay the landlord arising out of the delay which they say the Bank caused, in processing the mortgage application.

The Bank's Case

The Bank disputes any wrongdoing. The Bank also disputes that its Mortgage Consultant verbally told the Complainants that once they had received approval in principle on the mortgage that they could do what they liked and that any additional borrowings would have no bearing on the mortgage application. The Bank states that the terms and conditions for the mortgage clearly set out that they had an obligation to disclose all borrowings so that the Bank could accurately assess their affordability for the mortgage loan. In addition, the Bank states that the Complainants did not disclose on their mortgage application form, any intention to apply for, or take out any further loans.

The Bank states that once it became aware of the car loan, it was entitled to reassess the Complainants' ability to afford the mortgage loan and that any delay that this caused in drawing down the monies, was as a result of the Complainants' failure to disclose the car loan. The Bank states that as the offer for the €2,000 cashback expired on 31 December 2016 and the Complainants did not drawdown on their mortgage until January 2017, the offer had expired and the Complainants were no longer eligible to avail of it.

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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.

A Preliminary Decision was issued to the parties on 13 July 2018, 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, the final determination of this office is set out below.

In **April 2016**, the Complainants applied to the Bank for a mortgage for the purchase of a new home. The Complainants completed the Bank's home loan application form and signed it on 14 April 2016. On **29 July 2016**, the Bank sent the Complainants a loan offer in the amount of €164,000. That loan offer expired and, on **10 October 2016**, the Complainants' solicitor wrote to the Bank advising it that the Complainants were likely to want to draw down on the loan funds in the first or second week of December 2016. Accordingly, a fresh amended letter of offer was issued to the Complainants by the Bank on **26 October 2016**, in the amount of €164,000.

Amongst other things, the home loan application form which the Complainants completed in April 2016, asked the following question:

"Are you aware of any known future changes to your circumstances which may affect your ability to repay the proposed mortgage?"

The Complainants answered "No"

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On page 7 of the application form there was a section entitled "ADDITIONAL INFORMATION SECTION" which required the Complainants to provide information including details of any other assets or liabilities. In response to this, the Complainants gave details of a savings account with another Bank.

In relation to the home loan application form of 14 April 2016, I am satisfied that the answers the Complainants gave in response to the two matters outlined above were true and accurate. The first question simply asked whether the Complainants were aware of future changes to their circumstances which may affect their ability to repay the proposed mortgage. There is no evidence to suggest that the Complainants answered that question inaccurately. They may well have had an intention to take out a car loan but equally could have held a bona fide belief that this would not affect their ability to repay the proposed mortgage. If the Bank wanted to know whether the Complainants intended taking out any future loans, then it should have asked that specific question. Secondly, the Complainants very clearly correctly answered the additional information section on page 7 of the application form, as they had not taken out the car loan in question at that time.

Therefore, I am not satisfied that the Complainants had an obligation in April 2016 to indicate that they had a future intention to take out a car loan in those sections of the application form, particularly where they were not asked that specific question.

It is necessary to then examine the terms and conditions of the loan offer and the €2,000 cashback offer.

The day before the second loan offer of 26 October 2016 issued, the Complainants entered into a 4 year car finance agreement with another credit institution in the amount of €20,718.98. A copy of that agreement has been furnished to this office which is signed and dated by the Complainants on 25 October 2016.

The Complainants state that when they met with the Bank's Mortgage Consultant in April 2016, they told him that they were intending to take out a car loan in order to purchase a replacement motor vehicle. They state that the Bank's Mortgage Consultant assured them that "*once you receive your approval in principle, you can do what you like*". This allegation is strongly refuted by the Bank. In addition, the Mortgage Consultant in question, Mr Hxx, has provided a statement dated 8 February 2018, firmly denying having told the Complainants that they could do what they liked in reference to any further finance that the Complainants planned on taking out.

In relation to this particular aspect of the complaint or dispute, there is clearly a stark conflict of fact as to the parties' respective understanding of what was said at this meeting between the Complainants and the Bank's Mortgage Consultant. It is not possible for me to determine, on balance, who is right and who is wrong in this respect. Both parties are firm in their recollections, which however, are in conflict and the audio evidence of telephone calls between the parties in the period November 2016 - January 2017, does little to resolve that conflict.

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However, I am satisfied that whatever may or may not have been said in this meeting in April 2016, that discussion was superseded by the subsequent events, including the issue of a new loan offer letter to the Complainants on 26 October 2016. Therefore, the precise terms of the conversation that took place between the Complainants and the Bank's Mortgage Consultant in April 2016, is not determinative of this complaint. I am cognisant indeed in that regard of the Court's views in **Ulster Bank v Deane** [2012] IEHC 248 in which it was said that, because of the parol evidence rule, borrowers could not refer to discussions prior to formal documentation being executed, for the purposes of arguing that what was in the signed documentation did not reflect the agreement of the parties.

The Court noted that:

" claims to have been told by representatives of the Bank that the loans offered were long-term loans and that he was told this, prior to signing the two contracts described as the First Facility and the Second Facility. The defendants have not produced any written documentation to support this claim. It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the 'parol evidence' rule. See Macklin v. Graecen & Co. [1983] I.R. 61, and O'Neill v. Ryan [1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement."

I note that Clause 12.1 of the "amended Letter of Offer" dated **26 October 2016** provided as follows:

12.1 The Borrower warrants to the Lender that:

- (i) All information supplied by the Borrower to the Lender is true, accurate and complete in all material respects and is not misleading; and*
- (ii) the Borrower has made full disclosure to the Lender of all information relating to the Borrower and the Property as is material or ought to be made known to any Lender proposing to lend money to the Borrower.*

The car finance agreement entered into on the previous day by the Complainants, had not however been made known to the Bank at that time. Therefore the information supplied to the Bank by the Complainants (the borrowers) was no longer complete and accurate as warranted by Clause 12.1, when the Complainants signed their agreement to this new loan offer, in the presence of their solicitor on 16 November 2016.

I am satisfied that the new car loan, which was for a value in excess of €20,000, was information that the Complainants should have disclosed to the Bank, when they received the new loan offer dated 26 October 2016, as the new debt or liability was information that

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was material to the borrowing arrangement, and consequently, it ought to have been made known to the Bank, as warranted by the above provisions at Clause 12.1. I note that the Amended Letter of Offer was sent to the Complainants' solicitor, and the Complainants were advised by the Bank to contact their solicitor to arrange completion of the loan. In addition, the form of acceptance at page 25 of the letter of offer, advised the Complainants to seek their solicitor's advice in relation to the letter of offer and the general conditions.

Furthermore, the letter of offer of 26 October 2016, at page 26, provides at number 1 of the special conditions attaching to the loan offer:

1. This letter of offer replaces all previous letters of offer in relation to this proposed transaction which are hereby rescinded (or as the case may be cancelled).

Accordingly, at the date when the October letter of loan offer, incorporating the above terms and conditions, was sent to the Complainants, they had taken out an additional loan which the Bank was unaware of. Therefore, when the Complainants sought to draw down the funds and the Bank noted from the ICB the additional finance that the Complainants now had in place, it was reasonable in my view, for the Bank to find it necessary to re-assess the mortgage application in light of the new information it had just received; it appears to me that this re-assessment or re-evaluation was carried out in a reasonable period resulting in the loan proceeds ultimately being drawn down in January 2017.

According to the terms of the offer for the €2,000 cashback, only those mortgage applicants who drew down their mortgage funds between 3 October 2016 and 31 December 2016 were eligible. The Complainants did not drawdown the mortgage funds until January 2017 and therefore were ineligible under the terms and conditions of the Bank's offer. I am satisfied, for the reasons set out above, that the Bank acted reasonably in reassessing the Complainants' mortgage application at the time when it did. Ultimately, this gave rise to a delay, because of the Bank's discovery of the Complainants' new borrowing which they had entered into, the day before the new loan offer issued in October 2016, as a result of which the Complainants were then unable to drawdown the mortgage funds by 31 December 2017, and therefore they became ineligible to receive the €2,000 cash back. I take the view however, on the evidence before me that the conduct of the Bank was not wrongful and for all of the foregoing reasons, the complaint is not upheld.

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
DIRECTOR OF INVESTIGATION, ADJUDICATION
AND LEGAL SERVICES**

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8 August 2018

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.