An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0137
Sector:	Banking
Product / Service:	Loans
Conduct(s) complained of:	Maladministration Delayed or inadequate communication
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint is brought by the Complainant Company which believes that the Provider Bank did not exercise sufficient due diligence/care in relation to a loan facility – the whole sum of which was transferred by the Bank to a Third Party (Third Party finance services company). It is alleged that this Third Party finance services company took the money fraudulently and never put it towards the agreed purpose. It is stated that this alleged fraudulent element of the claim as against the Third Party finance services company is subject to a criminal investigation. This alleged fraud does not form part of the investigation by this Office.

The complaint is that the Bank failed to act reasonably or correctly in relation to the transfer of monies to the Third Party finance services company.

The Complainant's Case

The Complainant Company directors state that they have a very successful business background having founded their Company offering services of pharmaceutical nature. The business was established in 2000. Patents in relation to the Company's products are in place to protect this intellectual property. The Complainant Company states however, that these Patents cannot be exploited without the sourcing of major external investment (of the order of 25million+) which the company has failed to secure. The Complainant Company states that due to the failure to secure this investment the company is now effectively "mothballed".

Background to July 2011. Transaction

The original loan of €840,000 was granted to the Complainant Company in July 2011 by the Bank and was secured by personal guarantees of the directors supported by collateral in the directors' personal names. The purpose of the loan was as a security deposit in respect of a putative investment of €25million+ into the Complainant Company. The Complainant Company states that in the event, it transpired that an elaborate fraud was perpetrated against the Complainant Company. The Complainant Company states that no investment was forthcoming and the security deposit that was funded by the Bank loan proceeds was paid to third parties and never recovered and the parties to whom the fees were paid are the subject of a police investigation.

The Complainant Company states that the Bank was intimately involved in the detail of this transaction as evidenced by:

1. The Bank received and studied the executed Application-Agreement dated 14th July 2011 between the Complainant Company and the Third Party financial services company. The Complainant Company states that this fact is clear from an email dated 15th July 2011 sent by the Bank's branch manager, to the then Financial Controller in the Complainant Company.

   "The issue our Head Office has is that the arrangement fee for similar type facilities are paid on drawdown and not upfront. We also note that the account in LGT is in the name of "[the Third Party financial services company] Escrow" with reference [the Complainant Company] Project and not in the joint names of [the Complainant Company] and [the Third Party financial services company]. How this protect [the Complainant Company's] interest in the Escrow account bearing in mind points 4 and points 8 of the agreement form. As regards [the Third Party financial services company] what previous deals have they been involved with and what references have you got.

   In essence the Bank do not understand or see the logic in the manner this packaged especially with funds been sent to sole account of [the financial services company]". [Sic]

2. The Bank received a copy of the payment request letter from the Third Party financial services company dated 13th July 2011. This fact is also clear from an email dated 15th July, 2011 sent by the Bank to the Complainant Company.

3. The Bank asked detailed questions following their perusal of both the executed Application Agreement and the payment request letter from the Third Party financial services company to the Complainant Company dated 13 July 2011.

   These questions are listed in an email dated 15th July 2011 and were part of the process by which the Bank satisfied itself as to the nature of the transaction being proposed.

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4. The Application-Agreement dated 14th July, 2011 which the Bank received, studied in detail, and which formed the basis of its agreeing to proceed with the transaction included (clause 1) that the loan proceeds of €840,000 was to be placed at a "Notary firm (escrow account)".

5. The payment request letter from the Third Party financial services company, which the Bank received and subsequently acted on included that the €840,000 loan proceeds should be paid to an account name "[Third Party financial services company] Escrow, reference Project [the Complainant Company]".

6. The Complainant Company states that it is clear from an email dated 22 July 2011 from the Complainant Company to the Bank that the Bank completed the Bank's International Payment Application Form and presented it to Complainant Company directors for signing at its branch on 22nd July 2011. The Complainant Company say that notwithstanding points 4 and 5 above the Bank omitted any reference to the "Notary firm (escrow account)" and the account name "[Third Party financial services company] Escrow, reference Project [Complainant Company]" from the payment instruction form which it completed in handwriting and presented for signature to the directors of the Complainant Company on 22nd July 2011.

It is the Complainant Company's position that in signing the payment instruction form presented to them by the Bank it was the clear understanding of both Company directors, that the monies would be paid to an escrow account in accordance with the documents that the Bank had already received and assimilated.

Loan History

The Complainant Company states that its directors have provided collateral as well as lodged money in reduction of the original loan of €840,000 to the Complainant Company as follows:

Original Loan €840,000

Capital reduction Director 1 - 25/04/2012 €225,000

Capital reduction Director 2 - 3/06/2015 €400,000

Net debt excluding interest charged/accrued €215,000

Remaining collateral held by the Bank from Director 2 €100,000.

Unsecured €115,000

The Complainant Company states that the original loan less the foregoing lodgements made to the date of the submission, but before interest charged/accrued is €215,000, as shown above. The Complainant Company says that this compares with a balance on the loan as per the statement held by it (as at 22 June 2015) of €354,392.98. The Complainant Company states that in addition, the Complainant Company lodged €4,263.35 to cover interest on 7th September 2011 and €8,526.70 on 22nd December 2011. The Complainant Company states

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that the difference between the then loan balance and the €215,000 shown above plus the interest lodgements in September and December 2011 comes to a total of €152,183.03. This represents interest charged since date of drawdown on the loan, up to mid 2015.

Summary

The Complainant Company's position is that the Bank was meticulous in their examination of the proposed transaction. This included reviewing the key contract documents as well as the payment request from the beneficiary of the funds transfer. The Complainant Company states that despite this, the Bank completed the payment instruction form without inclusion of the basic protections that they had been made aware of, presented this payment instruction for signing at their branch, and transferred the funds to the alleged perpetrators of a crime.

The Complainant Company submits that the foregoing events were traumatic for its directors as well as being fundamentally damaging to the position of the Complainant Company. The Complainant Company says that not alone were they defrauded, but the fortunes of the Company has not recovered. The Complainant Company states that it is not currently trading and has not done so since it was the victim of the foregoing alleged fraud. The Complainant Company says that furthermore, it has not been in a position to raise adequate capital since that date, and has had to forego opportunities to develop and exploit the undoubted potential of its Patents.

The Complainant Company submits that the promoters have been impeded by this very unfortunate event in developing their new business in which €13M+ has been invested to date and the potential of creating up to 150 highly skilled jobs in a region plagued by high unemployment.

The Complainant Company states that the Company and its directors have acted in good faith throughout all these difficult circumstances. The directors have continued to fund the operating costs of the Company from their limited and evaporating personal resources.

The Complainant Company say that the Company and its directors strongly believe that the Bank also carries culpability for the transaction through which the company was allegedly defrauded in July 2011. It says the Bank was unequivocally involved in the detail of the transaction, and prepared and presented a payment instruction for execution by the Complainant Company that ignored the escrow related protections included in the documents that had been presented to the Bank and which the Bank had examined in detail in the process of deciding to agree to proceed with the transaction.

The Complainant Company state that the directors are scientists and the fact is that they relied on the Bank as the financial institution that had shown meticulous interest in the detail of the transaction up to that point.

The Complainant Company submits that in view of the circumstances surrounding the transaction as detailed in their submission, it requests that the Bank should:

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1. Waive the substantial interest charges of €152,183.03 that have been applied as well as interest that continues to accrue on this loan to include refunding the interest that has already been paid.

2. Write off the residual debt remaining on this loan and release all collateral held for the debt. The Bank had rejected this request in its letter dated 3rd September 2015.

The Complainant Company states that it and its directors have been seeking to reach a compromise settlement on this matter since October 2012 but without any success.

The Provider's Case

The Bank rejects any allegation, either through inference or otherwise of fraud, impropriety or negligence on the Bank's part in response of the Complainant Company's transaction with the Third Party finance services company. Furthermore, the Bank rejects any suggestion either implied or otherwise that it owed the Complainant Company a duty of care in respect of their interaction with the Third Party finance services company. The Bank says that additionally, the Bank was not party to the said transaction and did not give advice in relation to same.

It is the Bank's position that it holds the form used to transfer the drawdown of debt of €840,000 from the Bank to the stated foreign bank account. The Bank submits that this form was signed by the Directors of the Complainant Company, it outlines the instructions on where to transfer the funds. Therefore, the Bank's position is that it correctly followed the direct instructions of the Complainant Company when transferring the funds.

Evidence

General Terms and Conditions governing Business Lending

> *"Drawdown*
> *3.9 In order to draw down loan account facilities the Borrower must comply with all pre-drawdown conditions stated in the Letter of Sanction and may also be required to complete drawdown instructions and a direct debiting instruction".*

Application Agreement between the Third Party Financial Services Company and the Complainant Company dated 8th July 2011 (copy in Bank's submission and dated 14th July 2011 on the Complainant Company's submission):

> *"1. That upon execution of this Agreement, customer shall pay to [the Third Party financial services company] the sum of the Processing Fee / Deposit 840,000 (Eight Hundred and Forty Thousand Euros) as and for a packaging and submission fee to be paid by wire transfer. Said fee will be placed at a Notary firm (escrow account). It is mutually agreed that the fee payable to [financial services company] at the time of application, as provided for herein, shall be 100% (one hundred percent) refundable in the event that [financial services company] fails to supply customer with an*

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irrevocable Loan Guarantee Commitment Letter to issue collateral instruments, as per Exhibit "A" attached herein and made part of this Agreement, within 91 (ninety one) banking days for any reason, except for those reasons which would constitute a breach on the part of the Customer as set forth in Paragraph 4 (four) of this Agreement".

Attachment A
"The Letter of Intent, from [Third Party financial services company] usually has a thirty day period before expiration. Therefore, it will be necessary for the Managing Director and one other director of [the Complainant Company] to meet a representative of [the Third Party financial services company] to sign the Agreement and pay the Processing Fee / Deposit to [the Third Party financial services company] by wire transfer. Said fee will be placed at a Notary firm (escrow account) and payable on or before the expiration date of the Letter of Intent".

13th July 2011 – Third Party Financial services company to the Complainant Company

"We are very pleased that the contract has been signed and we are much very looking forward on arranging the loan for you as soon as possible. We have had contact with the bank and we are able to move ahead quickly. In order to start the process this week, the 3% deposit needs to be wired to the escrow account of the bank. In the past we have worked together with the LGT bank, as they are very efficient and quick concerning escrow accounts.

We would advise you to proceed with this bank. For any questions concerning the escrow account you can contact … the deposit can be wired to the following bank account…
IBAN number :…
BIC (SWIFT): ..
Name: [financial services company] Escrow
Reference: Project [Complainant Company]…

As stated in the contract, the money is placed on an escrow account where it cannot be touched. [The financial services company] will start selecting and reserving the right bonds. This "package of bonds" will be presented to your early next week. When the bonds have received your approval, they will be acquired and the working capital fund and sinking capital fund will be arranged". [Sic]

Undated letter from Third Party Financial Services Company to the Complainant Company

"As agreed during our phonecall yesterday and the e-mail I received after that I would like to request to transfer the amount of EUR 840,000 (Eight Hundred Fourty Thousand EURO) to the following account of [financial services company]". [Sic]

The IBAN and BIC were the same as were set out in the letter dated 13th July 2011 and those set out by the Complainant Company on the International Payment Application Form.

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15th July 2011 – Complainant Company to Bank

"Please find attached working illustrating the leveraged nature of the structures debt deal that is being put in place. … We hope to get the T&C for the escrow account to you this afternoon". [Sic]

15th July 2011 – Bank to Complainant Company

"The issue our Head Office has is that the arrangement fee for similar type facilities are paid on drawdown and not upfront. We also note that the account in LGT is in the name of "[the Third Party financial services company] Escrow" with reference [the Complainant Company] Project and not in the joint names of [the Complainant Company] and [the Third Party financial services company]. How this protect [the Complainant Company's] interest in the Escrow account bearing in mind points 4 and points 8 of the agreement form. As regards [the Third Party financial services company] what previous deals have they been involved with and what references have you got.

In essence the Bank do not understand or see the logic in the manner this packaged especially with funds been sent to sole account of [the financial services company]". [Sic]

17th July 2011 – Third Party Financial services Company to the Complainant Company

"There are some circumstances influencing this process and urging to move ahead:
…
I ask you therefore to pay the fee as agreed to start the formal application. Only in doing so I am able to keep my position towards the bank that will provide us with a made to measure bond"

21st July 2011 – Bank to the Complainant Company setting out the loan offer:

"The Special Conditions for this credit facility are:
IN VIEW OF THE REQUIREMENT TO MAKE AN UP FRONT PAYMENT TO THE BROKER. THE BANK REQUIRES DIRECTORS TO CONFIRM IN WRITING. THAT THEY HAVE RECEIVED INDEPENDENT LEGAL AND FINANCIAL ADVICE ON THE TRANSACTION WITH [FINANCIAL SERVICES COMPANY] AND ARE AWARE OF THE IMPLICATIONS OF SAME AND SATISFIED TO PROCEED". [Sic] (As per original submissions)

The Complainant Company directors duly signed their acceptance of the terms and conditions attaching to the loan offer, as follows:

"The terms and conditions applicable to the facility in this letter of sanction are accepted by me/us"

This was signed and dated 21st July 2011.

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22nd July 2011 – Complainant Company to Bank

> *"We would like to activate the deposit transfer today (beneficiary details attached) Can you arrange for necessary transfer documentation to be ready for signing this morning".*

22nd July 2011 – The signed International Payment Application Form is dated stamped 22nd July 2011.

The **IBAN** and **BIC** were the same as were set out in the letter dated 13th July 2011. The **IBAN (International Bank Account Number) is** used to uniquely identify a customer's bank account. The **BIC is the Bank Identifier Code.**

A Letter of Waiver of Independent Legal Advice on the Guarantees was signed and dated 22nd July 2011:

> *"I confirm that, having duly considered the matter, I have decided NOT to avail of such invitation or opportunity as I am acquainted with the nature of the transaction and the effect of the Letter of Guarantee on my rights".*

26th July 2011 – Complainant Company's Resolution passed at a meeting of the Directors of the Company:

> *"That the Company does accept the offer of the facility amounting to EUR 840,000 made by [the Bank] to the Company subject to the terms and conditions referred to in the letter of sanction dated 26th July 2011"*
>
> Acknowledgment of Directors
>
> *"The Company acknowledge that there is a requirement to make an up front payment to the broker [Third Party financial services company]. The company [the Complainant Company] has sought and received independent legal advice on this matter and are fully aware of the implications and are satisfied to proceed"*

The above is signed by the Directors of the Complainant Company and dated 26th July 2011.

Guarantees in respect of the monies lent were signed and dated 26th July 2011.

7th October 2011 – Complainant Company to Third Party financial services company – seeking return of €840,000 fee paid in July 2011.

> *"Can you please transfer our deposit to the following bank account:*
> *..*
> *Once you have the signatory details from the lending bank .. we can have them mandated on the Escrow account (subject to normal ID requirements)"*

8th October 2011 – Complainant Company

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"Our lending bank (for the deposit) has asked for proof that the deposit is still required. Can you please send me a current bank statement for [Escrow 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 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 23rd May 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.

A submission dated **8th June 2018** was received from the Complainant and this was exchanged with the Provider on **8th June 2018**. In advance of the Providers response to that submission, this office sought additional evidence from the Provider on **21st June 2018**. The evidence sought was in relation to the Provider's internal credit submission seeking approval to grant the loan to the Complainant Company. The Provider's submissions and response to the Complainant's submission of **8th June 2018** were received on **4th July 2018**. These submissions and responses were exchanged with the Complainant on **5th July 2018**. The Complainant's response to the Provider's submissions were received on **12th July 2018**. This submission was exchanged with the Provider and it responded to same with a submission dated **13th July 2018**. An opportunity was made available to the Complainant for any additional observations arising from the said additional submission, without a response.

The Provider's internal credit submission seeking approval to grant the loan to the Complainant Company, consisted of the Lender's Report, Borrowing Summary Detail, Repayment Capacity and Credit Unit Decision Notes.

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The Complainant's additional submissions contained their belief that the Provider acted in contravention of its responsibilities and contrary to the position as set out in their Lender's Report and Credit Unit Decision Notes.

I have considered the contents of all of the submissions for the purpose of setting out the final determination of this office below. The additional submissions from the parties have not altered my decision in relation to this complaint.

The issue for investigation and adjudication is whether the Bank acted correctly and reasonably in relation to the transfer of the proceeds of the loan to the Complainant Company to the Third Party financial services company.

The Bank explains that in July 2011, it provided €840,000 of bridging finance to the Complainant Company towards 'brokers fee' with a view to raising c€28m of long term financing, to build the Complainant Company's remaining 3 units, to be sourced by the financial services company who were, as the Bank says it understands, acting as a Broker and organising finance from large European banks with this finance. This facility was secured by 3 Guarantees and supported by additional security.

The Bank states that the Third Party financial services company did not provide this financing and did not return the €840,000 and the Bank says it understands that this is now the subject of a fraud investigation. The Bank acknowledges that this issue has significantly delayed the Complainant Company in beginning trading, and continues today to be a primary issue for the Complainant Company, in particular in relation to restructuring its Bank debt.

The Bank states that it outlined to the Financial Controller of the Complainant Company on 15 July 2011, that it had a number of concerns on the structure of the proposed transaction and queried the following;

a. That brokerage/arrangement fees are normally paid on draw down and not upfront as proposed by the Third Party financial services company.

b. That the payment account in the Third Party financial services company's bank was not in the joint names of the Third Party financial services company and the Complainant Company and that this did not protect the Complainant Company in terms of points 4 & 8 of their agreement dated 13.7.11

c. What experience or references that the Complainant Company had sought from the Third Party financial services company.

The Bank says that given the above concerns the Bank suggested an alternative and safer form of payment of the €840,000 to the Third Party financial services company by suggesting a Bank Guarantee by way of a Letter of Credit type facility from the Bank's Trade Finance department. The Bank submits that this payment method would have provided the Complainant Company with greater protection as the Guarantee would only have been paid on confirmation that the Third Party financial services company had complied with their part of the transaction i.e. in raising the €28m. The Bank says that this alternative payment

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option was not acceptable to the Third Party financial services company and therefore the Complainant Company sought that the funds be paid upfront via a Bank loan to the Complainant Company. The Bank's position is that as a direct result of these concerns the Bank insisted that the Complainant Company seek independent legal advice on the transaction as a condition of the loan sanction. The Bank states that the Complainant Company provided confirmation to the Bank dated 26 July 2011. That: *"the Company has sought and received independent legal advice on this matter and are fully aware of the implications and are satisfied to proceed".*

The Bank says that it then allowed drawdown to occur following the receipt of two sets of payment details from the Complainant Company which were then signed off by two Directors of the Complainant Company on the standard Bank transfer form. The Bank says that in April 2012 the Guarantors, following discussions with the Bank, made a lump sum reduction against the Complainant Company's bank debt of €225,000.

The Bank states that the case was transferred from the Bank's Retail banking to a separate division with a Relationship Manager taking over in December 2013, prior to which retail banking had attempted to restructure the Complainant's debt with a Letter of Offer issued in relation to same, but these were rejected by the Complainant Company as they felt the interest margin offered was too high.

The Bank says that engagement with its separate division was forthcoming only after a number of information request letters were issued to the Complainant Company and the Guarantors.

The Bank says that in May 2014 meetings were held with the Complainant Company to discuss a possible restructure of the Complainant Company's debts. The Bank states that it then put a proposal to the Complainant Company in relation to its bank debts which would have resulted in all debt being repaid with new security to be provided by the Complainant Company to make up the security shortfall of c€259,000.

The Bank submits that in July 2014 a counter proposal was received from the Complainant Company which in summary did not make up the security and repayment shortfall. This was not deemed acceptable to the Bank and was declined. The Bank says that the Complainant Company then sent an appeal to the Credit Appeals Office (CAO) regarding the decline. The CAO reviewed the case and agreed a position with both the Bank's Credit department and the Complainant Company and recommended that both parties re-engage. The Bank says that the Credit Appeals Office's recommendation included the Complainant Company repaying all the bank debt along with a market rate of interest on this debt until it is repaid in full.

The Bank submits that following re-engagement and numerous detailed discussions and meetings over the following months with conditions and amendments being agreed to by

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both the Complainant Company and its Credit Department, agreement on a restructure was reached by the Bank and the Complainant Company. Following credit approval within the Bank in relation to this, a revised letter of offer was issued to the Complainant Company on 13th May 2015 which provided: €500,000 debt reduction immediately, "€252,000 of residual debt to be extended for 12 months on interest roll up followed by further period of 12 months on interest only payments. Balance to be repaid in full or refinanced at end of the 24 month period. Additional security in the form of a charge on an account which was to have €252,000 of liened cash placed in it.

The Bank states that upon receipt of the letters of offer, the Complainant Company and its Advisor, then began raising issues around the original bridging loan of €840,000 issued by the Bank to the Complainant Company at their request and drawdown of same in 2011, namely the fact that they felt the Bank had failed in their duty of care at the time of the alleged Third Party fraud in 2011 and that it paid the monies drawn in 2011 with the wrong reference details on the payment.

The Bank says that this was logged as a complaint and investigated which concluded with a meeting with the Complainant Company to discuss these issues which the Regional Head of the Bank attended. The Bank states that subsequently it issued a response to the complaint, stating that based on its investigation the claim was not upheld however the Complainant Company had the right to appeal to the Financial Services Ombudsman ("FSO"). The Bank states that at this time the Guarantors at the Bank's request, and in line with the Bank's proposed restructure outlined in Letter of Offer dated May 2015, made a lump sum reduction against the Complainant Company's bank debt of €400,000 from personal resources.

The Bank states that in response to its complaint response letter to the Complainant Company, the Complainant Company then in July 2015 re-issued a second more detailed complaint which had the same core issues as the first, but now also included a request that the Bank write off all accrued interest on the Complainant Company loan from date of drawdown and write off the remaining capital as the Complainant Company felt the Bank must take some responsibility for the alleged fraud. The Bank submits however, that a further investigation was undertaken and again it was found that these claims could not be upheld due to l) a condition precedent in the letter of loan offer dated 21st July 2011, that the Complainant Company had to obtain independent legal advice prior to drawdown, which was provided and 2) the customers signed the paylink form confirming what account the funds were due to be sent to and the details matched the account details and reference provided by the Complainant Company to the Bank at the time.

The Bank states that it should also be noted at this time that the Company highlighted to the Complainant Company that it was more usual to make these types of payments to the financial services company after the payment had been received, and that in this regard a more secure way of making this payment would be through a Letter of Credit from the Bank's Trade Finance department which would have guaranteed that the Bank would pay the finance services company €840,000 only after receipt by the Complainant Company of

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the c€26m of financing the finance services company had stated they would deliver to the Complainant Company. The Bank's position is that this option was not used by the Complainant Company as it is understood by the Bank that the finance services company declined this method of payment, and following legal advice, the Complainant Company was satisfied to proceed with the deal and pay €840,000 upfront to finance services company. The Bank says that in addition, while it had received a number of the documents the Complainant Company had listed in its complaint, the Bank was not a party to any of them.

The Bank states that it drafted the response letter to this second complaint after reviewing the file and the letter was issued in September 2015 thereby closing the second complaint. Thereafter a meeting was organised between the Bank and the Complainant Company, which was attended by the Area Head within the Bank. At this meeting Bank's position was once again outlined and was advised by the Complainant Company Advisor that it was raising this now as a complaint to the FSO.

Analysis

The issue for adjudication is whether the Bank correctly processed the Complainant Company's €840,000 transfer request to the Third Party financial services company's appointed bank, in July 2011. The bank account details that were supplied by the Third Party financial services company were stated to be applicable to an Escrow Account.

An escrow account is a financial account where a bank or other entity holds and regulates payment of the funds required for two parties involved in a given transaction. It helps make transactions more secure by keeping the payment in a secure escrow account which is only released when all of the terms of an agreement are met.

In the above regard the following is noted

- The Bank received a copy of the executed Application-Agreement between the Complainant Company and the Third Party financial services company.

- The Bank received a copy of the payment request letters from the Third Party financial service company, one dated 13th July 2011, and another that was undated.

- The Bank questioned the content of the agreement following its receipt of both the executed Application-Agreement and the payment request letters from the Third Party financial services company to the Complainant. The safeguards for the Complainant Company in respect of the transaction being proposed was questioned by the Bank. The transaction agreement included (clause 1) that the loan proceeds of €840,000 were to be placed at a "Notary firm (escrow account)".

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- The payment request letter from the Third Party financial services company dated 13th July 2011 (which the Bank received from the Complainant Company) included that (1) the €840,000 loan proceeds should be paid to an account in a **Liechtenstein** Bank (2) **IBAN (IBAN (International Bank Account Number)** used to uniquely identify a customer's bank account and **BIC (Bank Identifier Code)** details **and (3) that the** name of the account was *"[*Third Party *Financial services company] Escrow, reference Project [Complainant Company]".*

- The concerns that the Bank had about the executed application agreement were set out for the Complainant Company in an e-mail dated 15th July 2011, as follows:

  "The issue our Head Office has is that the arrangement fee for similar type facilities are paid on drawdown and not upfront. We also note that the account in LGT is in the name of "[the Third Party financial services company] Escrow" with reference [the Complainant Company] Project and not in the joint names of [the Complainant Company] and [the Third Party financial services company]. How this protect [the Complainant Company's] interest in the Escrow account bearing in mind points 4 and points 8 of the agreement form. As regards [the Third Party financial services company] what previous deals have they been involved with and what references have you got.

  In essence the Bank do not understand or see the logic in the manner this packaged especially with funds been sent to sole account of [the financial services company]". [Sic]

- To counteract the above concerns the Bank suggested an alternative, and what it considered to be a safer form of payment of the €840,000 to the Third Party financial services company. The Bank suggested a Bank Guarantee by way of a Letter of Credit type facility from the Bank's Trade Finance department. The Bank submits that this payment method would have provided the Complainant Company with greater protection as the Guarantee would only have been paid on confirmation that the Third Party financial services company had complied with their part of the transaction i.e. in raising the €28m. The Bank says that this alternative payment option was not acceptable to the Third Party financial services company and therefore the Complainant Company sought that the funds be paid upfront via a Bank loan to the Complainant Company.

- There appears to have been an urgency on behalf of the Third Party financial services company to have the agreed payment made by the Complainant Company, to progress matters. On 17th July 2011, Third Party the financial services company wrote to the Complainant Company, stating that:

  > *"There are some circumstances influencing this process and urging to move ahead: …*

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I ask you therefore to pay the fee as agreed to start the formal application. Only in doing so I am able to keep my position towards the bank that will provide us with a made to measure bond"

- The Bank then wrote to the Complainant Company on 21st July 2011 – setting out the loan offer with special conditions that reflected the Bank's concerns on the "up front payment" requirement. The Bank's loan offer letter included the following:

"The Special Conditions for this credit facility are:
IN VIEW OF THE REQUIREMENT TO MAKE AN UP FRONT PAYMENT TO THE BROKER. THE BANK REQUIRES DIRECTORS TO CONFIRM IN WRITING. THAT THEY HAVE RECEIVED INDEPENDENT LEGAL AND FINANCIAL ADVICE ON THE TRANSACTION WITH [FINANCIAL SERVICES COMPANY] AND ARE AWARE OF THE IMPLICATIONS OF SAME AND SATISFIED TO PROCEED". [Sic]

The Complainant Company directors duly signed their acceptance of the terms and conditions attaching to the loan offer, as follows:

"The terms and conditions applicable to the facility in this letter of sanction are accepted by me/us"

This was signed and dated 21st July 2011.

- Then on 22nd July 2011 the Complainant Company wrote to the Bank stating that:

"We would like to activate the deposit transfer today (beneficiary details attached) Can you arrange for necessary transfer documentation to be ready for signing this morning".

- The Bank completed the International Payment Application Form and presented it to the Directors of the Complainant Company for signing on 22 July 2011. The IBAN and BIC references referred to in correspondences from the Third Party financial services company were inserted on the Application Form. The account name "[Third Party financial services company] Escrow, reference Project [Complainant Company]" was not inserted on the Application Form by the Bank or by the Complainant Company.

- The Complainant Company argues that in signing the payment instruction form presented to them by the Bank it was the clear understanding of the directors of the Complainant Company that the monies would be paid to an escrow account in accordance with the documents that the Bank had already received and assimilated. The Complainants signed the International Payment Application Form and it is date stamped 22nd July 2011. Above the signatures the following is declared / requested by the Complainant Company's directors: *"Please carry out the above international payment instruction on my/our behalf .."*

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- On 26th July 2011, the Complainant Company's directors passed the following Resolution and signed an acknowledgment as to the Bank's security requirement:

  Resolution passed at a meeting of the Directors of the Company

  "That the Company does accept the offer of the facility amounting to EUR 840,000 made by [the Bank] to the Company subject to the terms and conditions referred to in the letter of sanction dated 26th July 2011"

  Acknowledgment

  *"The Company acknowledge that there is a requirement to make an up front payment to the broker [*Third Party *financial services company]. The company [the Complainant Company] has sought and received independent legal advice on this matter and are fully aware of the implications and are satisfied to proceed"*

  The above is signed by the Complainant Company directors and dated 26th July 2011.

  Guarantees in respect of the monies lent were also signed by Guarantors and dated 26th July 2011.

- A Letter of Waiver of Independent Legal Advice on the Guarantees was signed by the Complainant Company directors, as follows:

  "I confirm that, having duly considered the matter, I have decided NOT to avail of such invitation or opportunity as I am acquainted with the nature of the transaction and the effect of the Letter of Guarantee on my rights".

- Thereafter the transfer was made to the Lichtenstein Bank.

- In October 2011 the Complainant Company attempted to have the monies returned from the Third Party financial services company, without success.

From the above, it is clear that the Bank had concerns about the method of transfer of monies in relation to the Agreement between the Complainant Company and the Third Party financial services company. The Bank's concerns were that the monies were apparently going to be in the Third Party financial services company's control. Suggestions were made by the Bank to safeguard the monies while awaiting the Third Party financial services company's fulfilment of its agreement. The stipulation in the agreement that there be an Escrow account set up would, if properly set up, have provided protections for the Complainant Company. However, the Bank's suggested solution did not have the agreement of the Third Party financial services company, and in those circumstances the Bank alerted the Complainant Company of its need to take legal and financial advice on the agreement. I consider that this was a prudent step for the Bank to take. The Complainant Company directors acknowledged that they took the step of seeking legal and financial

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advice. The Complainant Company did agree to doing this as part of the Bank's requirements attached to the granting of the loan.

As regards the level of information that was inserted on the International Payment Application Form, it is noted that the relevant account details as stated in the letters from the Third Party financial services company were included, all that was missing was the actual name of the account, that is: "[Third Party financial services company] Escrow, reference Project [Complainant Company]".

The Complainant Company do not highlight how the inclusion of the account name would have changed matters. It appears, the information that was included would have been enough for the transfer to take place to the identified account number. I consider that it was reasonable for whoever completed the Application Form to assume that the account number, IBAN and BIC set out in the Third Party financial services company's corresponded as belonging to an Escrow Account, was in fact the position. It is also noted that the Complainant had sight of what was or was not inserted on the Transfer Application Form (which is a one page document), and the directors of the Company signed same, specifically requesting: *"Please carry out the above international payment instruction on my/our behalf .."*

Therefore, I conclude that it would have been reasonable of the Complainant Company directors, upon a perusal of the application form, to question the absence of the name of the account, but apparently they did not.

There is a claim made by the Complainant Company that the absence of the name of the account, as being an Escrow account led to the happening of the alleged fraud, but this is not evident here. There is an implication of this being the position, but the actual circumstances leading to the alleged fraud, have not been proven / set out in the submissions. In that regard the submission from the Complainant Company is that there is a criminal investigation into the matter.

To conclude it is my Legally Binding Decision that the complaint is not upheld, on the basis that there was a condition precedent in the letter of loan offer dated 21st July 2011, that (a) the Complainant Company had to obtain independent legal advice prior to drawdown, specifically due to the Bank's concerns regarding the Third Party financial services company's requirement to make an up front payment of the €840,0000 to that entity, and (b) the Complainant Company directors signed the payment transfer form confirming what account the funds were to be sent to and (c) the details matched the account and reference bank numbers provided by the Complainant Company to the Bank at the time. I consider that having set out their concerns regarding the transfer of the monies to an account that was not a joint account, and required the Complainant Company to take independent legal and financial advice, there was no onus on the Bank to further question the instructions from its customer when making the transfer, nor do I consider it reasonable to expect the Bank to question the information it was given describing the account identifiers as those pertaining to an Escrow Account.

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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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

10th 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.