



<u>Decision Ref:</u>	2019-0150
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Lost or mislaid title deeds Maladministration
<u>Outcome:</u>	Partially upheld

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

This complaint concerns the loss of title deeds by the Provider.

The Complainant's Case

In 2003 the Complainant and his two brothers, both of whom are now deceased, took out a mortgage loan with the Provider, secured upon some 17 acres of land situated in County Kildare. The Complainant states that in or around October 2006 it came to light that the title deeds to these lands had been mislaid by the Provider. The Complainant states that it subsequently transpired, in November 2007, that the security held by the Provider was incorrect in that the Provider also held a charge over his own family home, over and above the 17 acres of security to which the Provider was entitled. The Complainant explains that his family home comprises a house and plot, which adjoin the secured lands.

By way of a timeline of events, the Complainant submits that by letter dated 5 June 2008 the Provider indicated that the title deeds for the unregistered portion of lands had been mislaid – the Complainant explains that the Provider's letter of 5 June 2008 references a charge over registered lands. Subsequently, by letter dated 3 February 2014 the Provider set out in writing that it did "*not hold the Title Deeds in respect of the above property*". By email dated 29 June 2016 the Provider revealed that the title deeds had been located.

The Complainant argues that it is clear from the Provider's correspondence that the title deeds for the unregistered lands were mislaid for a minimum of 2 years and 4 months but effectively for a much longer period.

The Complainant states that during the period the title deeds were missing, he would have been unable to complete any legal transactions with regard to the subject lands. When the Complainant submitted a Complaint Form to the then Financial Services Ombudsman he sought compensation of "*minimum €15,000.00*". Subsequently in a letter to this office dated 25 July 2018, the Complainant's representative indicated the quantum of compensation being sought (and the reasons for same) as follows:

"It is obviously difficult to quantify precise losses in this matter given the uncertainty of the situation. Without the certainty of access to their Title Deeds the family could not arrange for the disposal of the land or if so required the re-financing of their facility with [the Provider]. Because of the family's inability to dispose of the land without Title Deeds the [Provider] loan continued in place with ongoing financial exposure for the family. There is also the matter of stress and anxiety for the family. In these circumstances a figure of €50,000.00 is considered reasonable as compensation."

The complaint is that the Provider mislaid the title deeds for the lands forming the security for the Complainant's mortgage, causing inconvenience and potential loss, which has not been vouched, but for which a figure of €50,000.00 compensation is sought.

The Provider's Case

The Provider acknowledges that its correspondence when referring to title deeds ought to have been clearer with regard to what documents were and were not held by it at various points in time in order to avoid confusion.

However, the Provider states that the crux of the issue is that the Complainant's solicitor provided a letter of undertaking and charge over lands held as security for the Complainant's debt, and due to an error on the solicitor's part a charge was provided over a land bank larger than what had actually been agreed between the parties as forming security for the debt (an additional 2.32 acres).

The Provider states that it has at all times acted in good faith and only sought sufficient information to facilitate the request to release its charge over the additional 2.32 acres and investigate the allegation of lost title deeds. It states that this information was not provided by the Complainant's solicitors, but instead the loan was repaid in full and the lands were promptly discharged.

The Provider also submits that the Complainant has not demonstrated any financial loss associated with the alleged loss of the title deed.

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The Provider queries whether or not this office has jurisdiction to deal with the complaint in circumstances where it appears to relate to clarification of information required to facilitate release of security – as provided by the solicitor in error – as opposed to the offer, provision or non-provision of a financial service by the Provider to the Complainant.

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 9 April 2019, 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, I set out below my final determination.

In May 2003 a loan was advanced to the Complainant (jointly with his two brothers) for €400,000 over ten years, to be secured over lands. His brothers passed away in 2008 and 2010.

During the period from 1987 to 1992 an agreement was reached whereby the Complainant's father could transfer 2.32 acres to the Complainant. Ordinarily, the borrower's solicitor would be responsible for carrying out the necessary paperwork to effect such a transfer.

However, this transfer did not occur, and in 2003 when the Complainant took out the loan the subject matter of this complaint the lands that formed the security included the 2.32 acres referred to above, in error. The necessary paperwork for putting a charge in place pursuant to the loan agreement was attended to by the Complainant's solicitor.

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In 2006 the Complainant's solicitor sought the title deeds but was informed that according to the Provider's records they were held by the Complainant's solicitor.

In November 2007 the Complainant's solicitor advised the Provider that the release of the charge (i.e. over the 2.32 acres as had been agreed in 1992) had "unfortunately" not been completed.

The loan term expired in 2013 without having been repaid in full.

On the 3rd of February 2014 the Provider wrote to the Complainant's solicitor advising that *"As we do not hold Title Deeds in respect of the above property, we are not in a position to ascertain..."*, and sought a copy of the mortgage deed, the schedule to that deed, and a land registry map.

The Complainant's solicitor replied on the 10th of February 2014 noting that *"whereas in the past some of the deeds were released to us on accountable receipt, the original deeds remain held by your good selves..."*, whilst including the documentation sought by the Provider.

Having followed up during 2015, in October 2016 the Complainant's solicitor wrote to the Provider advising that the charge issue and the outstanding debt required resolution. On the 20th of October 2016 the Complainant's solicitor required release of the charge and agreed that the Complainant would then be willing to pay €17,000 in settlement of the residual debt, which would have been a little over €30,000 at that time. This correspondence is the first indication of a possible claim being brought on the Complainant's behalf regarding the *"failure of the bank to release" the "charge which should never have been applied to the house"*. In other words, the bank is invited to agree a writedown of the debt and in return the Complainant will agree not to bring a claim against the bank arising from the issue in relation to the charge.

A number of issues arise in relation to the jurisdiction of this office to deal with this complaint (or portions of it).

Where issues of sustainability / repayment capacity / debt restructure are in dispute, this office will not interfere with the commercial discretion of a provider unless the conduct complained of is unreasonable, unjust, or improperly discriminatory in its application to the Complainant, within the meaning of **Section 60(2)(c) of the Financial Services and Pensions Ombudsman Act, 2017**.

In that regard, while the focus of the Complainant appeared to move towards attempting to secure a writedown in 2016, the decision of the Provider not to accede to this was a matter within its own commercial discretion, and not one with which this office will interfere.

Although it was agreed between 1987 and 1992 that 2.32 acres of land would be excluded from the charge held by the Provider as security for its debt, the necessary paperwork to formalise this exclusion was not completed. This error appears to have come to light in 2007, but a complaint was only made to this office in 2017. Accordingly, section 51 of the Financial

Services and Pensions Ombudsman Act, 2017 (the Act) precludes this office from investigating that aspect of the complaint due to the passing of time.

Furthermore, insofar as that aspect of the complaint, even post 2007, concerns rectification of security held over certain lands, this does not in my view constitute conduct involving the provision of a financial service to the Complainant and thus does not constitute conduct within the remit of section 44 of the Act.

Finally, insofar as the complaint involves an issue of title and rectification thereof, I am satisfied that in accordance with section 52 of the Act it is appropriate for me to decline jurisdiction over that portion of the complaint in circumstances where an alternative and satisfactory means of redress was available to the Complainant – under section 32 of the Rectification of Title Act, 1964. In any event, it appears that the charge issue was remedied once the loan was repaid.

In light of the foregoing, the remaining issue that does fall to be considered by me is whether or not the Complainant is entitled to redress for the conduct of the Provider in apparently losing the title deeds to the security between February 2014 and June 2016.

Analysis

The complaint is that the Provider could not furnish the title deeds to the property in 2014 and that this caused the Complainant to suffer a loss.

This proposition appears to be primarily based on the content of the Provider's letter of the 3rd of February 2014, which advises that *"we do not hold title deeds..."*. In spite of that correspondence, the Provider does not appear to accept that the title deeds were in fact mislaid. It states *"the letter of 3rd February 2014 advises we did not have the title deeds as we were not holding a copy of the mortgage deed amongst other named documents. On 10th February 2014 (in response to [the Provider's letter] of 3rd February) [the Complainant's solicitor] provided a copy of the mortgage deed..."*.

It is clear from the correspondence that various documents (all of which would form part of the papers collectively referred to as "Title Deeds") went back and forth between the Complainant's solicitors and the Provider over many years. It is nigh on impossible to divine from the correspondence precisely who had what at all given times.

However, even if one assumes the deeds were mislaid by the Provider between 2014 and 2016, there is a fundamental problem with the Complainant's contention that he has suffered a loss.

There is no evidence whatsoever that the Complainant was attempting to "deal with" the property at any point during that period, by attempting to sell it, for example. There was no mention of any attempt to deal with or sell the property, or any suggestion of any loss until the Complainant's solicitor sought to negotiate a writedown of the debt in 2016. The complaint arose primarily as part of a different issue (resolving the charge over the

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property), and was only focussed upon by the Complainant when he sought to negotiate a writedown of the debt.

Since then the Complainant's estimate of loss has fluctuated from €15,000.00 to €50,000.00, but without ever putting forward any evidence upon which to base such a claim. Even the claim for "additional interest" of €10,000 put forward by the Complainant's solicitor by letter dated 14th August 2018 is speculative, given that the Complainant only paid €1,100 toward this debt from February 2014 to redemption, and once the Complainant actually repaid the loan in full the lands held as security were promptly discharged.

I am obliged to take cognisance of the law in relation to compensation for loss of title deeds. As set out by Finlay Geoghegan J. in *ACC Bank -v- Fairlee & Anor*¹, a claimant must satisfy a number of evidential hurdles in order to successfully ground such a claim. In this complaint, there is none of the correspondence one might expect if the sale had fallen through due to the deeds being, nor is there evidence that, for example, a purchaser pulled out due to the deeds being mislaid, or by reason of any conduct whatsoever on the part of the Provider. Nor are there any vouched expenses of any sort put forward by the Complainant which he contends are a "loss" caused by the absent title deeds.

There is no evidence whatsoever to suggest that he in fact did suffer any loss.

I do not accept that there are any grounds for me to make a finding that the Provider compensate the Complainant for loss arising out of the title deeds being mislaid.

However, I do accept (and the Provider accepts) that the letter of the 3rd of February 2014 was worded in such a manner as gave rise to confusion regarding the deeds. I accept that this constituted a failure of the Provider to communicate in a clear and accurate manner. However, in measuring compensation I do take cognisance of the fact that the letter of the 3rd of February 2014 was sent not to the Complainant, but to his solicitor, and formed part of a larger chain of correspondence and issues spanning over two decades.

For the reasons outlined above, I partially uphold this complaint and direct the Provider to pay a compensatory sum of €500 to the Complainant.

¹ [2009] IEHC 45

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2) (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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**

8 May 2019

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.