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| <u>Decision Ref:</u> | 2019-0197 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Lending |
| <u>Conduct(s) complained of:</u> | Misrepresentation (at point of sale or after) |
| <u>Outcome:</u> | Partially upheld |

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

Background

In July 2005, the Complainants decided that they wished to purchase lands owned by their aunt in a provincial town identified in this Decision as Site A. At the time, the lands were valued at approximately €3.65 million euro, and were zoned for medium residential use, but had no planning permission. The Complainants did not have enough funds to purchase the property. The Complainants did own a nearby site which was unencumbered identified in this Decision as Site B. The Complainants discussed the matter with their accountant. It was determined that the only viable way of purchasing the lands would be by an equity release in respect of Site B, and to bring in a partner to help fund the remaining equity required. The Complainants found such a partner, and sought funding from the financial service provider against which this complaint is made (the Provider).

In October 2005, the Complainants asserted that the Provider's representative verbally promised at that stage that the Provider would fund the development of the lands, as opposed to just the purchase. This is disputed by the Provider.

In December 2005, the Complainants entered into two loan facilities with the Provider. The first loan facility was in respect of Site B and was in the sum of €350,000.00 including interest roll up. The second loan facility was in respect of the Site A and was in the sum of €2,465,000.00 including interest roll up. The first loan was secured by a first legal charge on Site B, while the second loan facility was secured by a mortgage executed by the vendor and

personal guarantees from the members of the Complainants' partnership. The stated purposes of the loan facilities was to fund the purchase of Site A.

In March 2006, the Complainants entered into a development licence agreement which had a term of eight years with the vendor. This allowed the Complainants access to the lands in order to commence development. In 2008 and 2009, the Complainants obtained planning permission for 28 houses and 48 apartments at Site A and 8 apartments at Site B.

In November 2010, the Provider sent non-compliance letters to the Complainants as a result of the loan facilities being breached. The Provider reserved its rights in respect thereof. Subsequent to this the Complainants and Provider entered into discussions about what to do with Site A and Site B. The Complainants provided statements of affairs to the Provider and the Provider indicated that the Complainants would have to voluntarily sell the properties. The Complainants felt that the Provider should fund the development, while the Provider stated that it could not provide the finance required.

In February 2012, the Complainants asserted that the Provider had agreed to provide development finance. The Complainants asserted that the partnership structured itself by relying on this promise. By letters dated 15 February 2012 and 1 March 2012, one of the Complainants set out the partnership's grievances with the sequence of events.

On 18 May 2017, this Office gave a determination in relation to jurisdiction of the Complainants' complaint. It was determined that this Office could not investigate any wrongdoing of the Provider prior to **14 May 2008** (being six years prior to the complaint being lodged and received by the then Financial Services Ombudsman). Therefore, this Office did not investigate whether any promise of development funding was made or not to the Complainants. The letter of **18 May 2017** sets out quite clearly that this adjudication relates to two discrete complaints, which are:

1. The Complainants state that from **15 May 2008** onwards, continuing until 2011, the Provider Bank wrongfully refused to make development funding available to the Complainant. **(Complaint A)**
2. The Provider was guilty of breach of duty and maladministration from February 2012 onwards in the manner in respect of which it dealt with the Complainants' complaint and in particular by failing to advise the Complainants of its entitlement to make a complaint to the Financial Services Ombudsman. **(Complaint B)**

Accordingly, this adjudication is solely related to Complaint A and Complaint B, and will not consider any conduct that occurred prior to **14 May 2008**. It is important to note that this Office advised the Complainants in its correspondence dated **18 May 2017** that: *'If the Complainant believes that the outcome of [Complaint A] is dependent upon the adjudication of the [the verbal promise complaint], it is open to the Complainant to advise this office that it does not wish to proceed with [Complaint A].'*

Following the enactment of new legislation allowing for an extension of time limits within which to lodge complaints, this Office requested that the parties lodge submissions in respect of whether or not the Complainants believed they met the new time limits. On **26 February 2018**, this Office gave a determination that the Complainants' complaint did not involve a '*long-term financial service*' and, therefore, certain aspects of the complaint could not be investigated or adjudicated upon as they were outside the 6 year time limit. The Complainants were invited to proceed with only Complaint A and Complaint B. On **27 February 2018**, the Complainants indicated that they were willing to proceed to adjudication involving only Complaint A and Complaint B.

The Complainant's Case

In respect of Complaint A, the Complainants assert that in 2008 and 2009 planning permission was granted and that the Complainants requested development funding from the Provider. The Complainants assert that the Provider advised them to keep making interest payments and to "sit tight." The Complainants assert that they continued to make interest payments, but that in January 2011 the Provider called in their loans and refused to provide development funding. The Complainants assert that in June 2011, the Provider's representatives unequivocally confirmed to the partnership that there would be no development funding.

In respect of Complaint B, the Complainants assert that an initial letter of complaint was sent on **15 February 2012**, which was replied to on **27 February 2012** by the Provider. On 1 March 2012, the Complainants sent a further letter of complaint, which the Provider replied to by phonecall. The Complainants assert that there was no notification of the Complainants' right to bring a complaint to the Financial Services Ombudsman at that time. On **5 March 2012**, the Complainants assert that there was a further phonecall with the Provider's representative in which the Provider stated that no promise of development funding had been made.

In June 2014, the Complainants' loans with the Provider were sold to a third party financial service provider, and the Complainants submitted requests for information pursuant to the Data Protection Acts from the Provider and the Provider's solicitor who acted at the material time.

On **2 September 2014**, the Complainants made a request pursuant to the Data Protection Acts. On various dates subsequent, the Provider furnished documents held by it which contained information pertaining to the Complainants. The Complainants on various occasions complained to the Data Protection Commissioner, which resulted in the Provider furnishing documents to the Complainants.

On **30 July 2015**, the Complainants wrote to the Provider asserting that the Provider's handling of the complaint had been done incorrectly and that further redress would be sought. Following further correspondence articulating its complaints, on **6 November 2015** the Provider wrote a final response letter to the Complainants.

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The Provider's Case

In respect of Complaint A, the Provider asserts that the essence of the Complainants' complaint relates to conduct that allegedly occurred in 2005 more than six years prior to the complaint being lodged with the Financial Services Ombudsman. The Provider asserts that there is no reference or evidence of any agreement to provide development funding. The Provider asserts that the Complainants have been unable to identify any terms of the supposed agreement to provide funding including the principal sum, the amount of interest to be applied, the repayment terms, the conditions applicable to the availability of the funding and any other terms that would normally be agreed before the Provider could enter into a binding commitment to fund. The Provider asserts that the global and financial crash that occurred in 2008 meant that the Provider simply could not have promised to fund the Complainants' development of the sites at that stage. The Provider further asserts that the loan facilities granted to the Complainants were for the stated purpose of site acquisition and not development of the sites.

In respect of Complaint B, the Provider asserts that it responded promptly by letter and by phonecall to the Complainants' second letter of complaint. The Provider has furnished a copy of its Customer Complaints Resolution Policy which was in place in 2012. The Provider asserts that its compliance with its own resolution policy was assessed and tested on an overall basis and not specific to individual complaints. The Provider asserts that its initial investigation would have involved a full review of all documentation, which have been provided to the Complainants. The Provider accepts that it did not provide details of the Financial Services Ombudsman on 27 February 2012, when it replied to the Complainants' initial complaint, and that the complaint was not acknowledged in writing within 5 days. The Provider asserts that it called the Complainant on 1 March 2012 to confirm that its response of 27 February 2012 was final.

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.

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A Preliminary Decision was issued to the parties on **25 March 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.

The following submissions were received after I issued my Preliminary Decision:

- 8 April.** The Complainants made a submission.
- 9 April.** The Complainants sought clarification on a procedural issue
- 11 April.** The Complainants made a submission.
- 12 April.** The Complainants made a submission.
- 14 April.** The Complainants made a submission.
- 19 April.** The Complainants made a submission.
- 23 April.** The Complainants made a submission.
- 1 May.** The Complainants made a submission.
- 3 May.** Complainants sought procedural clarifications
- 10 May.** The Provider made a submission.
- 20 May.** Complainants state they have no further submissions to make
- 21 May.** The Complainants made a further submission.
- 23 May.** The Complainants made a further submission.
- 24 May.** The Complainants made a further submission.
- 24 May.** The Complainant made a further submission.
- 27 May.** The Complainants made a further submission.
- 27 May.** The Complainants stated they had nothing further to add
- 5 June.** The Complainants sought procedural clarification.
- 12 June.** The Complainants sought procedural clarification.

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22 July. Provider stated it has nothing further to submit.

All of the submissions were exchanged between the parties

Following the consideration of all of the evidence and submissions including the Post Preliminary submissions from the parties, my final determination is set out below.

A very significant number of submissions were made after I issued my Preliminary Decision and a considerable amount of material was submitted. Having considered these submissions and the material submitted, I am satisfied that nothing in the submissions or documents constitutes an additional point of fact, an error of fact or an error in law which has caused me to alter my Preliminary Decision.

The Complainants in an e-mail to this Office, dated **5 June 2019** at 16:14 hours, stated, *"We wish to confirm that we have not raised any issues in response to your Preliminary Decision issued on 25th March that we have not raised previously over the course of filing and investigation of our complaint with your office."*

Notwithstanding the Complainant stated that none of the material submitted contained anything new, they did, however, during the exchanges after my Preliminary Decision, make unspecified allegations of criminal activity on a number of occasions. These included:

Email dated, **14 April 2019** at 16:14 hours, *"You will be aware from several of our previous correspondences that we furnished your office with during the mind-numbing and nerve shredding three year and a half year period of investigation that we are and have been waiting for your final decision to issue before we file a criminal complaint in the matter and so although we have provided you with some new documentary evidence in our response to your preliminary findings and some summarised argument it is the fact that you had already been supplied with all of that evidence and argument in various forms of delivery over the course of your extensive investigation into our complaint."*

Email dated **19 April** at 07:51 hours, *"We have every confidence that the Final Decision from your office in the matter will no doubt be reinforced by the finding of the investigation into the criminal complaint that will follow and that it will reaffirm to all the integrity and independence of your office in such important matters concerning the integrity of our statutory and regulatory authorities within our State and which are in-twined with the core of the foundations of the State itself."*

In response, the Provider by letter of **10 May** stated, *"While we do not believe that there are anything advanced in support of the substantive complaint in the Complainants' recent submissions, we are gravely concerned that the Complainant is now suggesting that the Provider engaged in criminal behaviour. This spurious allegation is based entirely on conjecture and is rejected outright. There is absolutely no basis for same save for the bald statement that if certain documents were not provided, it must follow that the documents existed but were 'disappeared'. It is an extremely serious accusation to make and will be robustly defended if pursued."*

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For the avoidance of doubt and to re-iterate what has been stated in previous submissions, the Provider has not engaged in any intentional destruction of documents and rejects in the strongest terms the allegation that it has altered the file."

Email dated **21 May** at 12:57 hours, the Complainants state that they expect the decision imminently, *"So that we can file the criminal complaint that we have advised your office of previously where we look forward to all of the main witnesses involved being compelled to give sworn evidence to the NGECEB (National Garda Economic Crime Bureau.)"*

As this Office does not investigate allegations of criminal activity, I wrote to the Complainants on **20 June 2019**. This letter, among other things, included the following, *"Given the content of a number of your correspondences with this Office in relation to allegations of criminal activity, and your indication of your intention to refer matters to the NGECEB, I must ask you to clarify beyond any doubt whether there are any matters that form the basis of the complaint before this office that are the subject of criminal allegations."*

I must point out once again, that I will not be progressing the investigation or adjudication of this complaint any further until you have set out in clear terms if there are any elements of the [Complainant's] complaint with [the Provider] in respect of which you are alleging criminal behaviour. If in fact, there are elements of this complaint that are the subject of criminal allegation, then you must now outline those aspects of the complaint clearly. This is the case no matter at what stage such an allegation was made. Whether it was prior to the issuing of the preliminary Decision or after the issuing of the Preliminary Decision, it will not be sufficient to refer to previous correspondence or submissions. This office will not issue a Legally Binding decision in respect of any matter that is the subject of an allegation of criminality, irrespective of when that allegation was made."

If it is the case that the matters for which you are alleging criminal behaviour do not form any part of the complaint before this office in respect of the [Complainant's] complaint against [the Provider] then please confirm in clear terms that you are not alleging criminal behaviour in respect of any element of the above complaint."

The Complainants responded on **25 June** at 15:33 as follows;

"We are writing to you in reply to your letter to us dated 20th June 2019 where you request that we provide you with further clarifications in regard to previous allegations which we have consistently raised in our complaint to your office regarding [The Provider]."

We shall not be provided any further clarifications to you in that respect."

We note for the record that after concluding your investigation into two particular aspects of our complaint you were totally content to issue Preliminary Findings in favour of the Bank where you concluded that the complaint had been investigated by the Bank and that they had no case to answer in the matter, while you were fully aware of all of the many allegations we had raised in the matter ever since we first filed our complaint with your office."

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And now you are insisting that certain of those previously known allegations which we had raised prior to you issuing your Preliminary Findings in favour of the [Provider] now prevent you from issuing a Legally Binding Decision in the matter, when in fact all that has changed since you issued Preliminary Findings is that you received our response submission where we highlighted very serious legal / criminal issues which you completely and deliberately overlooked when concluding that the bank had no case to answer.

You were fully aware from your investigation into the matter that the [Provider] never investigated our complaint as they claimed, that they had an open complaint on their files which was never concluded and which they were falsely claiming had been, that there was sufficient evidence on file even today to prove our complaint against the [Provider] and that representatives from the [Provider] & their professional advisers had withheld / suppressed crucial evidence / information in this regard from their clients and the FSPO.

We would be of the opinion that if you now deem it the case that you are prevented from issuing a Legally Binding Decision in the matter then you should never have issued Preliminary Findings in the first instance but rather you should have recused yourself and your office there and then and reported the matter immediately to the NGECEB, in particular regard to the serious matters that have been discovered throughout the investigation of the complaint.

As we see it any ruling you chose to make from this time onward in regards to Findings / Binding Decisions has little or no relevance now to our case which we will progress with the NGECEB and probably only has any relevance for the FSPO / [the Provider] / Professional Advisers and all of the individuals from those organisations that have played a hand, act or part in this matter.”

While the Complainants have made general sweeping allegations of criminal activity, no specific allegations have been made and no evidence of criminal acts has been provided. Therefore I have decided to complete the adjudication of this complaint and to proceed to issue my Legally Binding Decision. For the avoidance of doubt, I must clarify that no evidence of criminal activity has been provided to this Office at any stage nor has this Office investigated any such allegations.

Complaint A

There is no evidence of any agreement or representation made to provide development funding contained within the documents or evidence submitted. There is no evidence of any agreement or representation made in respect of the essential terms of a loan such as: the principal sum, the term of the loan, the security for the loan, the interest applicable, credit committee approval or a written facility letter.

The Complainants rely on their own conduct subsequent to their decision to purchase and develop the lands, arguing that this put the Provider on notice of their intention to develop the lands. For example, the Complainants assert that the Provider and the Provider's solicitor were aware of the development licence and the partnership agreement, which

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made clear that the Complainants intended to develop the lands. It is not disputed that the Provider was aware that the Complainants intended to develop the lands. It does not follow, however, that because the Provider was aware of the Complainants' intentions, that the Complainants, therefore, had a right to a loan from the Provider to develop those lands.

The Complainants assert that the Provider intended to provide development finance to the partnership to develop the lands. In this regard, various documents are of relevance, but the most relevant is the credit committee application in respect of Site B, which expressly states that *'this site will also be the subject of a further credit at a later stage to provide the relevant development facility.'* This is, at most, a statement of intent by the Provider. It does not amount to a binding agreement.

In respect of Complaint A, I have been provided with no evidence to support the contention that the Provider wrongfully refused to provide development funding to the Complainants from 2008 to 2011.

Therefore, I do not uphold this aspect of the complaint.

Complaint B

It is clear from the evidence submitted that the complaint made to the Provider by the Complainants was not dealt with appropriately by the Provider.

The Provider's response to the initial letter of complaint was wholly inadequate and failed to engage with the lengthy and focussed complaints of the Complainants. The Provider was obliged, at the very least, to properly engage with the grievances that the Complainants had, which involved significant sums of money and serious allegations.

I find that the Provider did not contact the key representative in question until the second letter of complaint was sent by the Complainants.

The Provider by its own admission failed to acknowledge the Complainants' complaint in writing within 5 days and also did not notify the Complainants of the possibility of referring the dispute to then, Financial Services Ombudsman.

The Provider's own Customer Complaints Resolution Policy was not adhered to by the Provider in light of the failure to refer to this Office and the failure to acknowledge the complaint within 5 days in writing.

I believe the Provider could have better facilitated the Complainants in accessing records.

Elements of this complaint were deemed to be outside the time limits for bringing a complaint to this Office (and the predecessor Financial Services Ombudsman).

The legislation changed a number of times during the investigation of the complaint and on each occasion a new assessment was undertaken to establish if any further elements of the complaint could be considered.

This included an assessment of the implications of **Section 54(2) of the Financial Services and Pensions Ombudsman Act 2017** which prescribes that:

“the time specified in Section 51 is suspended for the period during which a complaint is being considered under the appropriate internal Dispute Resolution Procedure”.

It is clear that although the Complainant in this instance made a complaint to the Provider in **February 2012**, significant delays were thereafter experienced, which the Complainant maintains, delayed it in bringing a complaint to the FSO.

The element of the complaint which falls outside the jurisdiction of the FSPO, is the complaint that the Provider was guilty of mis-representation in or about **October 2005** (i.e. that the Bank mis-represented to [one of the partners] on behalf of the Complainant that if the Complainant chose to develop the 2 sites referred to, the Bank would make development funding available to the Complainant).

This is not a complaint concerning a *“long-term financial service”* and rather, the complaint was required to have been made within a period of 6 years i.e. by **October 2011**.

It is clear that the complaint was therefore already out of time before the Complainant made a formal complaint to the Respondent Financial Service Provider and, consequently, **Section 54(2)** does not serve to extend the time limit.

The Provider was negligent in not informing the Complainants of their right to bring a complaint to the Financial Services Ombudsman and in delaying in responding to the complaint. However, for the reasons set out above, I do not believe that these omissions and delays prevented the Complainants from having their complaint dealt with by this Office, as the aspect of the complaint later found to be out of time, was already out of time at this stage.

In light of the foregoing and as is apparent from the file, the Complainants have spent a great deal of time engaging with both the Provider and this Office. The Provider should have facilitated the Complainants better, and should not have made the processing of their complaints so difficult.

I therefore uphold Part B of this complaint and direct that the Provider pay the Complainants a sum of €3,000 compensation.

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)(b) and (g)*.

I direct pursuant to *Section 60(4)* of the *Financial Services and Pensions Ombudsman Act 2017*, that the Provider pay the Complainants a sum of €3,000 in compensation for the inconvenience caused to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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**

31 July 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.