



<u>Decision Ref:</u>	2019-0312
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Commercial Mortgage
<u>Conduct(s) complained of:</u>	Selling loan to third party provider Delayed or inadequate communication Dissatisfaction with customer service
<u>Outcome:</u>	Partially upheld

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

Background

This complaint concerns the administration of the Complainant's mortgage loan accounts.

The Complainant's Case

In 2012 the Complainant, who is a chartered accountant, took out a mortgage loan with the Provider, secured upon a 2.5 acre site and units situated in a county adjacent to Dublin. The Complainant submits that since loan inception he has complied fully with the applicable terms and conditions and made all monthly repayments in accordance with the loan agreement.

The Complainant states that in late 2016 the Provider sold his commercial loan and another loan to a third party, without any prior notification and without his consent.

The Complainant explains that upon discovering that his loans had been sold, he contacted the Provider and was duly informed that his loans had been sold due to the negative equity status of his borrowings based on an internal valuation. The Complainant was advised that the property securing his commercial loan had been valued at €360,000 with the outstanding loan amount being €740,000. The Complainant states that he immediately informed the Provider's agent that there must be some mistake and he sent them images

of the property. The Complainant submits that the property is in fact worth in excess of €2,000,000. The Provider's agents sympathised with the Complainant's predicament and the Complainant states that the agent indicated his own opinion was that the loans should not have been included in [name of project redacted] and sold.

The Complainant submits that he was subsequently told that his loans had been sold because his current account 'feeder account' had been overdrawn some 9 months earlier, which caused him a cross default on his mortgage.

The Complainant is extremely aggrieved at the Provider's decision to sell his loans to a 'vulture fund'. He states that while his current account was indeed overdrawn for a short period in 2015, his account was subsequently brought back into credit. The Complainant states that he had been assured at the time that the fact his account had been overdrawn would not affect his relationship with the Provider.

The Complainant is also disappointed at the Provider's response to a Subject Access Request he made under Data Protection Legislation in November 2016. He states that, initially, he was provided with an incomplete set of documents. He had to complain to the Provider in order to receive further documents. The Complainant is still of the view, however, that his request was not fully complied with. He points out that he did not receive the valuation the Provider carried out on his property, or any other documentation surrounding the decision to include his loans in the [name of project redacted] portfolio.

The Complainant states that during the period the loans were being transferred to a third party, he was being asked to continue to lodge monies to his current account, which he did. However, he states that on the 14th of April 2017 the Provider closed his account without prior notification and withdrew an amount of €27,659. The Complainant states that a "*tortuous period of ringing all around [the Provider] to find out what was going on*" ensued and no representative he spoke with was able to tell him where his monies were. In June 2017 he was eventually informed that the monies were being transferred to the third party; however this information was incorrect, it is claimed, on the basis that the monies were not in fact transferred until August 2017. The Complainant states that in the intervening period the third party was threatening him with default proceedings due to non-receipt of monies.

The Complainant submits that the Provider's decision to sell his loans has impeded his ability to enter into a long term lease in respect of the mortgaged property, because during the period of transfer the Provider was unable to consent to his entering into any such long term lease. The Complainant further points out that his mortgaged property is incomplete. He states that if he had a tenant any "ordinary bank" would agree to finance the completion of works. He states that as his loans are now owned by a "non-bank third party" he has no prospect of being in a position to complete the development of his property.

The Complainant states that there has been a complete failure on the Provider's part to communicate properly with him. He states that the customer service he received was deplorable and cites one occasion when he travelled to the Provider's branch in Dublin as being particularly disappointing because "*no one would meet*" with him.

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The Complainant is of the view that the transfer of his loans has adversely impacted his credit rating. He states the entire ordeal has caused him stress.

The Provider's Case

The Provider has stated that the loan was included in a portfolio of loans sold to a third party due to concerns about the risk attaching to the facility, and its entitlement to sell its interest in the facilities to a third party is provided for under the borrowing contract.

The Provider states that once the decision was made to call in the loan (in November 2015), the entire loan balance became due and owing and it was not sufficient to simply clear the arrears.

The Complaints to be Adjudicated

The first complaint is that the Provider wrongfully sold the Complainant's loans to a third party, without prior notification and without his consent.

The second complaint is that the Provider gave the Complainant a wholly inadequate level of customer service by failing to properly communicate with him, and by mismanaging the account.

In his submissions to the FSPO the Complainant outlined how he would like his complaint to be resolved as follows:

"I think [the Provider] should give me mortgage approval to go back and settle the mortgage with [the third party] or buy it back themselves. They should do something to compensate me for all the grief also with a significantly reduced interest rate on the loan and a partial write down."

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 22 July 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.

Following the issue of my Preliminary Decision to the parties on 22 July 2019, the Complainant made a further submission to this Office by letter dated 23 July 2019, a copy of which was transmitted to the Provider for its consideration. The Provider has not made any further submission.

Following consideration of the Complainant's additional submission dated 23 July 2019, I set out below my final determination.

I must point out that this investigation does not deal with the Complainant's Subject Access Request, as this aspect of the complaint is more properly a matter for the Data Protection Commissioner.

The Complainant took out a loan with the Provider in the amount of €254,000 in 2004 to purchase a site for development. In 2006 a further loan was taken out in the amount of €760,000 to finance the building of a second unit. A further €40,000 was loaned to pay what is described as the final bill of costs.

In March 2012 the Complainant was advised that current account ****0083 had been used to pay outstanding interest on the loan account, thus leaving that current account in excess of the agreed overdraft limit by just over €5,000.

This borrowing was restructured in April 2012 whereby the Complainant drew down loan ****0166 for the amount of €879,233.00 for the continuation of a previous facility and "takeout" of the hard core overdraft facility ****0083 of €10,000. In other words, the current account ***0083 had been operating consistently at its overdraft limit (or beyond), so finance was arranged such that this account could be put back into credit and the Provider states it was to operate in credit from then on.

The Provider states that this hard core overdraft had been a concern to it. From 2013 to June 2015, the current account ****0083 was overdrawn consistently to varying degrees (between €160.19 to €22,061.25). This overdraft arose primarily as a result of loan repayments for loan account ****0166 being taken from current account ****0083.

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This arrangement was one which helped control the arrears balance of the loan, but which resulted in indebtedness in the current account rather than arrears on the loan account. Essentially, it was borrowing from the current account to pay the mortgage account.

In February 2015 the Provider called upon the Complainant to bring the current account back into a credit balance. At that stage the overdraft was €17,753.57.

The failure of the Complainant to bring this account back into credit constituted an event of default within the meaning of the loan account terms (section 8.2).

Having failed to bring the current account back into credit, and having failed to agree an alternative repayment arrangement with the Provider, the Provider was entitled to call in the debt in full when it did so by letter dated the 27th of November 2015.

The Complainant's contention that he fully complied with the terms and conditions of the loan since inception is not supported by the evidence before me. The loan was being fed from an unauthorised overdraft which he failed to clear or agree alternative repayment arrangements, when requested by the Provider to do so.

In its response to this office, the Provider has furnished a detailed explanation of why the loan was called in, including long term arrears; concerns about repayment capacity in the long term; issues with letting some of the property; failure to clear the overdraft balance; failure to furnish statement of affairs, and copy statements from another bank. One can argue the merits of a decision to call in a debt every time that such a decision is made, however it is fundamentally a decision within the commercial discretion of the provider. In this case there are no exceptional circumstances which could possibly cause this office to consider interfering with that discretion.

The Complainant, in his post Preliminary Decision submission of 24 July, raises a number of issues in relation to valuation of the property, the interest on the loan, the overdraft, and states that his main complaint was not addressed in my Preliminary Decision.

The Complainant's main complaint relates to the sale of the loan. I believe I have dealt with the sale of the loan both in my Preliminary Decision and in this my Legally Binding Decision.

As I set out in my Preliminary Decision and again the Legally Binding Decision, the terms and conditions of the loan acceptance clearly permit the Provider to sell the loan. I will deal with this further below.

In my view, nothing turns on the issue of a supposed wrongful valuation of the security in the context of the overall picture of the loan.

The loan account terms and conditions section 11.32 permit the Provider to sell the loan to a third party (without the consent of the Complainant). The Provider was be entitled to sell the loan even if there was no default.

“11.32 The Bank shall have the right to assign, transfer or sub-participate the benefits and/or obligations of all or any part of any facility to another entity without the prior consent of the Borrower and the Bank may disclose to a prospective assignee or to any other person who may propose entering into contractual relations with the bank in relation to this Agreement such information about the Borrower as the Bank shall consider appropriate.”

Therefore, I cannot uphold a complaint against the Provider for selling the loan.

However, there are a number of other aspects to this complaint, which I will deal with hereunder.

By letter dated the **7th of July 2015** the Complainant was informed that if his current account was in credit and he had any other outstanding debt with the Provider, the Provider would invoke its right of set off between accounts. From **January 2016** repayments on the loan account ceased to be taken from the current account, however, lodgements continued to be made to the current account (apparently by the Complainant or his tenants).

The Provider invoked its right of set off between accounts to apply the sums of €40,845.00, €25,667.93 and €2,029.50 from the current account to reduce the loan balance in **November 2016, August 2017** and **August 2017** respectively. The Provider states that these transfers were given a value date of **5 April 2017** and **12 April 2017** thereby ensuring that the Complainant was not charged interest as a result of any delay in these transfers being effected.

The Provider has accepted that there was a degree of delay in applying these credits to the loan account, for which it has apologised and its proposed remedy is set out later in this Decision.

The Complainant states that no one would meet him face to face, and cites as an example the **20th of October 2016**. On **19 October 2016** the Complainant sent an email to his relationship manager detailing concerns he had with his account and how it was being managed. He ended the email with *“I intend to make a point of attending a face to face meeting with yourself either tomorrow afternoon or Friday morning [...] please confirm timing of appointment”*. The following day the Complainant had not received a response and at 8.49am he wrote to the Provider’s agent stating *“I will be in Dublin for 2pm today meeting you if you can confirm at your office”*. At 11.45am the Provider’s agent responded by saying *“I regret that I am not in a position to meet you”*. The Complainant responded at 12.01 stating *“I have address for [Provider’s address] am just leaving for Dublin now”*.

It is clear from the foregoing that no meeting had been arranged or agreed. The Complainant decided to go to Dublin anyway, presumably on the basis that once he was there he would have to be seen. This is not a matter for which the Provider can be criticised.

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It cannot be in dispute that the Provider and the Complainant engaged in numerous telephone calls and correspondence, and while a face to face meeting may have been beneficial, there is no guarantee that it would have made any difference to the Complainant's situation. This is not a case where the Provider cancelled meetings or failed to engage.

The Complainant contends that due to the transfer of his loan to a third party, he is now unable (or at least much less likely) to obtain finance to complete the development of his premises and thus bring it to full occupancy.

I cannot hold the Provider responsible for any future applications for credit. There is no guarantee that if the loan had not been sold, that the Provider (or any other financial service provider) would have advanced further credit.

The primary grievance in this complaint is the sale of the loan to a third party. The Complainant is adamant that his debt was "*not a problem debt*". Unfortunately, the Provider decided in its commercial discretion to call in the debt and sell the loan and it was entitled to do so.

The other aspects of the complaint flow in the main from the allegation of a wrongful loan sale, and so are not sustainable when one considers that the sale of the loan has not been found to be wrongful.

However, the Provider has accepted that it delayed in applying credits to the account and delays in dealing with a data access request.

It has apologised for these delays, and offered the sum of €2,000 as a gesture of goodwill.

A large proportion of the complaint is also concerned with the nature of conversations had between an agent of the Provider and the Complainant. A large proportion of the Complainant's complaint is that he was reassured by the Provider's agent at various times to the effect that his debts would not be called in. I have no independent evidence before me of the actual content of those conversations, and the Provider's agent appears to have retired.

While I am not prepared to make a finding that the Provider's agent advised the Complainant at various times in the precise terms that the Complainant alleges, I am of the view that the Provider ought to have been in a position to furnish either telephone recordings of the conversations, or contemporaneous notes of them. If a provider chooses not to record conversations, it runs the risk that a customer will make allegations about what was said and this Office will not be in a position to assess the merit of those allegations with the benefit of objective evidence.

I am not satisfied that an Oral Hearing would be of any benefit in circumstances where, in the absence of an agreed variation of the loan terms evidenced in writing, even taking the Complainant's allegations at their height, it would not be possible to find that the loan terms

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had been varied such that the Provider would not have been entitled to call in the loan when it did.

The lack of telephone recordings or notes of those interactions has undoubtedly added to the Complainant's inconvenience, and accordingly I am satisfied that he is entitled to compensation for inconvenience of a higher level than the €2,000 offered to him by the Provider for the delays set out above. Accordingly I partially uphold this complaint and direct the Provider to pay €4,000 to the Complainant for the inconvenience he has been caused.

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 €4,000, 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**

2 September 2019

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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.

