



<u>Decision Ref:</u>	2020-0079
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Money Transfer (between accounts/between banks)
<u>Conduct(s) complained of:</u>	Maladministration Failure to process instructions
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to four accounts that the Complainant holds with the Provider, as follows:

1. Current account ending **912**;
2. Stocking term loan account ending **823**;
3. Mortgage loan account ending **316**; and
4. Mortgage loan account ending **438**.

The conduct complained of relates to the following;

- i. A number of asserted unauthorised transactions carried out across the current account and the stocking term loan account in **April 2011** and **May 2011**; and
- ii. An asserted unauthorised cancellation of direct debits on both mortgage loan accounts in **October 2011**.

The Complainant's Case

The Complainant submits that on **15 April 2011**, he lodged a sum of €13,161.46 to his current account. He states that on the same date he authorised the transfer of a sum of €10,000 from that account to his stocking term loan account.

The Complainant submits that on **27 April 2011**, he lodged a sum of €10,295.56 into his current account. He states that he did not authorise any transfers out of the current account on that date.

He outlines that he lodged this sum in order to ensure that there were sufficient funds in place to meet the direct debit payments on the two mortgage loan accounts, in circumstances where he would be attending hospital to undergo medical treatment for a period of time.

The Complainant states that on **29 April 2011**, there were two unauthorised payments from his current account to his stocking term loan account, both in the amount of €6,168.00. He states that he did not furnish any authority to the Provider, either written or verbal, to execute these transfers.

The Complainant states that on **4 May 2011**, it appears that there was an attempt made by the Provider to refund one of the payments of €6,168.00 back to the current account, but that this sum was simply taken out of the stocking term loan account and then put back into the same account. The Complainant states that he did not authorise this activity and was not made aware of it by the Provider.

The Complainant states that on **5 May 2011**, one of the payments of €6,168.00 was transferred out of his stocking term loan account and back into his current account. The Complainant states that again, he did not authorise this activity.

The Complainant states that as a result of these unauthorised transfers between the current account and the stocking term loan account, there were insufficient funds remaining in the current account to meet his mortgage repayment direct debits, which he had sought to ensure would be met by lodging the sum of €10,295.56 to the current account on **27 April 2011**.

The Complainant submits that he had an interest only repayment arrangement in place on the two mortgage loan accounts. He submits that this arrangement ended and he commenced paying the full mortgage loan repayments of €796.85 and €767.30 on the respective mortgage loan accounts on **1 July 2011**. He submits that, as a consequence of the unauthorised transfers from the current account in **April 2011**, the direct debits in favour of the mortgage loan accounts were "*continuously*" returned unpaid due to lack of funds. He states that a new interest only repayment arrangement commenced on **13 December 2011**, providing for mortgage payments of €500.00 and €600.00 respectively to the two mortgage loan accounts.

The Complainant states that he complained to the Provider about the unauthorised transactions and the consequences that resulted. He submits that the Provider advised him that it had a note on file dated **12 October 2011** which detailed that the Complainant had instructed the branch manager to cancel the direct debits on both mortgage loan accounts, pending the outcome of a request by the Complainant for interest only repayments. The Complainant asserts that he did not provide either written or verbal authorisation to the Provider directing the cancellation of the direct debits.

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He states *"There was no reason for me to give any such instruction and I am at a loss to understand why such an instruction was directed by the Bank."* He submits that the Provider has breached its own policies in failing to have him sign written authorities.

The Complainant submits that the unauthorised removal of funds from his current account in April 2011, and the unauthorised cancellation of the direct debits on his mortgage accounts in October 2011, caused him to default on the two mortgage loans. He submits that this led to his mortgage accounts being deemed unsustainable by the Provider during the period between **2012** and **2013** and culminated in the sale of the mortgaged property.

The Complainant submits that his credit rating with the Irish Credit Bureau ('ICB') has been negatively affected, to the extent that he was denied a car loan of €4,000.00 from the Provider in **March 2015**.

The Complainant further submits that unpaid fees were charged to his current account on **27 April 2011**, **5 May 2011** and **13 May 2011**. He states that he has sought an explanation from the Provider as to what these charges related to, which has never been clarified by the Provider. The Complainant submits that he believes that the charges may relate to unauthorised transactions on a credit card issued to him by the Provider. He submits that the Provider has not addressed his query about the credit card in its response to his complaint.

The Complainant submits that he is no longer able to trust in the Provider to properly administer his accounts. He submits that he has suffered loss, inconvenience, upset and distress, which is ongoing in circumstances where the true consequences of the unauthorised transactions have yet to be clarified.

Finally the Complainant submits that he had to wait an *"inordinate"* amount of time to receive a response from the Provider in relation to his complaint, during which period he has been undergoing continuous medical treatment.

The Provider's Case

The Provider submits that it does not accept that the Complainant can reasonably establish any link between the disputed transactions in **April/May 2011** and his mortgage repayment difficulties and the subsequent voluntary sale of the Complainant's Buy-to-Let property. The Provider states that in its view the Complainant's financial difficulties commenced before April/May 2011. The Provider submits that the Complainant's chronology in his Complaint Form commences on **15 April 2011**, but that it is important to note that the stocking term loan was overdue at this point. It submits that the arrears on the first mortgage loan account ending **438** commenced in **April 2009**, the mortgage matured on **1 September 2018** and the residual balance (unsecured) as of **November 2018** was €38,075.28. It submits that the arrears on the second mortgage loan account ending **316** commenced in **January 2011**, the mortgage matured on **1 August 2018** and the residual balance (unsecured) as of **November 2018** was €38,782.77.

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The Provider submits that the Complainant did not raise any issues regarding the disputed transactions on the current account in or around April/May 2011, until some four and a half years later in **October 2015**.

The Provider relies on the **terms and conditions** governing the operation of the Complainant's current account, and in particular to **Condition 3 (Maintenance of Account)** and **Condition 8.1 (Disputed or Unauthorised Transactions)**.

The Provider states that, as is referenced in the terms and conditions, the Complainant had a responsibility to ensure that there were sufficient cleared funds or sufficient unused agreed overdraft facility in the current account to meet payments from the current account ("debits") including cheques issued and direct debits due to be paid.

The Provider submits that the Complainant was sent monthly current account statements during the timeframe and never raised any queries on any transactions relating to the operating of the current account including the disputed transactions, until **October 2015**. The Provider submits that the Complainant had a clear obligation under **Condition 8.1** of the terms and conditions of the current account to advise the Provider without undue delay, and no later than thirteen months after the transaction date, of any unauthorised or incorrectly executed transactions. The Provider submits that the Complainant has failed in his contractual obligation under Condition 8.1 to advise the Provider of the disputed transaction, and as a result the Provider submits that the Financial Services and Pensions Ombudsman should not consider the disputed transaction in its entirety.

The Provider has responded under the following headings in an effort to capture the chronology of events:

Stocking term loan account

The Provider submits that it issued a facility letter, along with the terms and conditions for the stocking term loan to the Complainant on **31 May 2010**. It states that the facility letter confirmed that the loan amount was €20,000.00 and that the loan was repayable by **30 September 2010**. The Provider states that on **8 October 2010** it agreed to extend the repayment date by 3 months to **8 January 2011**.

The Provider submits that on **15 April 2011**, the Complainant transferred €10,000.00 from the current account to the stocking term loan account, which left an outstanding balance of €11,167.16 on the stocking term loan account.

The Provider submits that the Complainant breached the terms and conditions of the stocking loan by not repaying it in full by the due date on **8 January 2011**. It states that it reviewed the stocking loan prior to escalating the outstanding loan balance for debt recovery. The Provider states that as part of its review, it contacted the Complainant on **29 April 2011** for updated information and to engage with him towards potential resolutions.

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The Provider submits that its records confirm that during the course of this telephone call, the Complainant instructed a transfer of €6,168.00 from his current account to the stocking loan account, reducing the stocking loan balance to €4,999.16. It states that following this conversation, the Provider's agent sent an email to the branch which stated:

"I was speaking with [the Complainant] today and he has given verbal ATTF (authority to transfer funds) from his current account [ending] 912 to his Stocking Term loan [ending] 823. Please arrange for this transfer to be completed today."

The Provider strongly rejects the Complainant's assertion that he did not authorise the transfer of the sum of €6,168.00. It states that its agent acted on an express verbal instruction given by the Complainant and that such instruction was clear and unambiguous.

The Provider submits that it made an administrative error in applying this instruction and the transfer was duplicated in error, which meant that €12,336.00 (€2 x €6,168.00) was credited to the stocking loan account, which went into credit with a balance of €1,168.84. The Provider submits that on **6 May 2011**, the sum of €6,168.00 was debited from the stocking loan account, correcting the error above, which left the stocking loan account with an outstanding balance of €4,999.16.

The Provider submits that €5,934.60 was transferred from the Complainant's current account to the stocking loan account on **21 November 2011**. It submits that this transfer cleared the stocking loan and the stocking loan account was then closed.

Current account

In relation to the current account the Provider submits that;

- The current account has an overdraft facility in the amount of €5,000.00.
- In **2011**, the Complainant was in receipt of the following payments which were credited to the current account;
 - A weekly payment from the Department of Employment Affairs and Social Protection of €188.00; and
 - A monthly pension of €937.63.
- On **15 April 2011**, the Complainant lodged a sum of €13,161.46 to the current account and transferred €10,000.00 to the stocking term loan account.
- On **26 April 2011** the balance on the current account was €2,040.05 overdrawn with available funds of €2,959.95.

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- On **27 April 2011** a cheque in the amount of €4,772.00 was presented for payment and was returned unpaid due to insufficient funds within the agreed overdraft facility, and an unpaid fee in the amount of €10.15 was charged to the current account.
- Also on **27 April 2011** the Complainant transferred €10,295.56 to the current account, but these funds were not available when the cheque of €4,772.00 presented for payment.
- On **29 April 2011**, the stocking loan was overdue for payment since **8 January 2011**.
- The Provider contacted the Complainant to engage with him towards potential resolutions, and during the course of this call the Complainant instructed a transfer of €6,168.00 from the current account to the stocking term loan account.
- On **4 May 2011**, the Provider noticed that the payment of €6,168.00 from 29 April 2011 had been duplicated in error, meaning €12,336.00 was credited to the stocking account and it went into credit with a balance of €1,168.84. It attempted to reverse one of the transactions on that date; however the stocking term loan account number was inadvertently entered on both the credit and debit docket. Also on that date the direct debits in favour of the two mortgage loan accounts were paid.
- On **5 May 2011**, €6,168.00 was credited to the current account, rectifying the Provider's previous error on 29 April 2011. The Provider submits that it does not require the customer's authorisation to correct errors; it refers in this regard to the terms and conditions governing the operation of the current account.
- On **5 May 2011** a second unpaid fee of €10.15 was charged to the current account.
- On **6 May 2011**, the Provider refunded the two unpaid fees that were applied to the current account on 27 April and 5 May 2011, totalling €20.30, and this amount was credited to the current account.
- On **13 May 2011**, a cheque in the amount of €440.00 presented for payment to the current account and was returned unpaid, and an unpaid fee of €10.15 was charged to the current account.
- On **2 June 2011**, the direct debits in favour of the two mortgage loan accounts were paid.
- On **5 July 2011**, two unpaid fees in the amount of €10.15 were charged to the current account in respect of unpaid direct debits to the mortgage loan accounts which presented for payment on **1 July 2011**.

- On **13 July 2011**, two further unpaid fees in the amount of €10.15 were charged to the current account in respect of the re-presented direct debits in favour of the mortgage loan accounts.
- On **3 August 2011**, a direct debit in favour of the mortgage loan account ending **316** for €767.30 was paid, and a direct debit in favour of the mortgage loan account ending **438** was returned unpaid due to insufficient funds.
- On **4 August 2011**, an unpaid fee of €10.15 was charged to the current account in respect of the unpaid direct debit to mortgage loan account ending **438**.
- On **15 August 2011**, an unpaid fee of €10.15 was charged to the current account in respect of the re-presented direct debit to mortgage loan account ending **438**.
- On **2 September 2011**, the direct debit in favour of the mortgage loan account ending **316** for €767.30 was paid, and the direct debit in favour of the mortgage loan account ending **438** was returned unpaid due to insufficient funds.
- On **5 September 2011**, an unpaid fee of €10.15 was charged to the current account in respect of the unpaid direct debit to mortgage loan account ending **438**.
- On **14 September 2011**, an unpaid fee of €10.15 was charged to the current account in respect of the re-presented direct debit to mortgage loan account ending **438**.
- On **4 October 2011**, the direct debit in favour of the mortgage loan account ending **316** for €767.30 was paid, and the direct debit in favour of the mortgage loan account ending **438** was returned unpaid due to insufficient funds.
- On **5 October 2011**, an unpaid fee of €10.15 was charged to the current account in respect of the unpaid direct debit to mortgage loan account ending **438**.
- On **12 October 2011**, the Provider's branch manager sent a request via internal email (MMail) to the Provider's mortgage department which stated:

"Customer has completed an SFS form requesting interest only on this a/c ([account ending] 438) and on [account ending] 316 and has to date not received a response. I have today received written instruction to cancel direct debits to both accounts pending the outcome of his requests."
- On **13 October 2011**, three stop instruction charges in the amount of €5.08 were charged to the current account in respect of the direct debits cancelled the previous day.

The Provider states that it cannot furnish the Complainant's standing order / direct debit instructions nor the instruction of October 2011 to cancel the direct debits to the mortgage loan accounts and it relies on its contemporaneous notes as evidence of receipt of the Complainant's express instruction. The Provider submits that it "*cannot countenance*" a situation whereby its branch manager would instruct cancellation of the direct debits in favour of any mortgage loan account in the absence of an express instruction from a customer. The Provider further submits that it has no record that the Complainant raised a query or disputed these charges within 13 months of the transaction date. The Provider submits that the Complainant has failed in his contractual obligation under **Condition 8.1** of the terms and conditions governing the current account to advise the Provider of the disputed transaction, and as a result the Provider submits that the Financial Services and Pensions Ombudsman should not consider the disputed transaction in its entirety.

The Provider submits that it regrets if the unpaid fees were not clarified for the Complainant. It submits that the current account statements are very clear as to what the unspecified charges relate to. The Provider further submits that it has no record that a Provider credit card was ever held by the Complainant, and it is not in a position to investigate unauthorised transactions on a credit card held with a third party provider. It states that, having investigated the complaint, it found no attempted declined ATM or Point of Sale transactions on the current account between 29 April 2011 and 5 May 2011.

Mortgage loan accounts ending 438 and 316

The Provider refers to the mortgage loan offer letters and states that the Complainant had a contractual obligation to repay the mortgage in accordance with the terms originally agreed as set out in the mortgage loan offer including the schedule of payments prescribed under **General Condition 4(a)**. It submits that as set out therein, the said terms provided that the monies advanced would be repayable, with such interest, by monthly instalment repayments over the term of the loans. It submits that in the absence of an agreed alternative repayment arrangement, the Complainant is required to maintain the payments in accordance with the mortgage loan offer letters. It states that if there is no formal arrangement in place to alter the payment being billed, then the Provider will administer the repayment schedule in accordance with General Condition 4(a). It submits that arrears arise where the contractual payments due on the mortgage are either not met or partially met.

The Provider submits that by way of Mortgage Form of Authorisation ('MFA') dated **4 January 2011**, which was signed and accepted by the Complainant on **12 January 2011**, the Complainant entered into an alternative repayment arrangement, that is, interest only on the mortgage loan accounts for a period of six months which was due to expire in **June 2011**. It submits that this offer was subject to the condition that an additional €100.00 would be paid towards the arrears on mortgage loan account ending **438**. The Provider submits that it wrote to the Complainant on **16 May 2011** confirming the end of the arrangement in June 2011 and invited the Complainant to make contact if he perceived a difficulty in returning to full repayments.

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The arrangement expired in June 2011 and the mortgage loan accounts reverted to capital and interest payments, then €767.30 for mortgage loan account ending **438**, and €796.85 for mortgage loan account ending **316**. The Provider states that the Complainant submitted a Standard Financial Statement ('SFS') to the Provider requesting further forbearance on **24 June 2011**.

The Provider submits that it engaged with the Complainant in **July 2011** in relation to information regarding the sale of the land held by the Complainant. It states that it agreed to allow the Complainant a further six month interest only period and to make additional payments of €100.00 per month towards arrears on the mortgage loan account ending **438** and €381.00 per month towards arrears on mortgage loan account ending **316**. It submits that its letter history confirms that the agreements to give effect to this arrangement issued on **18 July 2011**.

The Provider submits that the Complainant informed it by telephone on **9 August 2011** that he could not accept the MFAs issued by the Provider as his medical expenses had increased, and he was advised to submit a further SFS. It states that on **28 September 2011** it issued a MFA to the Complainant offering reduced repayments for six months. It submits that the Complainant did not accept the MFA within the specified timeframe and arrears were continuing to increase on the mortgage loan accounts.

The Provider submits in respect of mortgage loan account ending **438** that direct debits were returned unpaid on **7 July 2011** and **15 July 2011** and payments were collected by direct debit in **August, September** and **October 2011**. It submits that all direct debits were returned unpaid between **July** and **October 2011** for mortgage loan account ending **316**.

The Provider submits that on **2 November 2011** the Complainant contacted the Provider to advise he had not received the MFAs, and arrangements were made to have the documentation made available for him in the branch. The Provider states that its communication records from **2 November 2011** evidence that the Complainant was acutely aware that no payments were being made, as he had expressly requested the cancellation of the direct debits in favour of the mortgage loan accounts. It submits that on **23 November 2011** the MFA which issued on **28 September 2011** was returned to the Provider signed, accepted and dated by the Complainant on **9 November 2011**.

The Provider refers to its contemporaneous notes between **July** and **December 2011** which it states confirm that it continued to engage with the Complainant pending receipt of his SFS during this period. It submits that the Complainant made no reference therein to the monies withdrawn from the current account in **April 2011**, which he now alleges led to the above consequences. The Provider submits that it offered the Complainant reduced repayments to the mortgage loan accounts in **July 2011** and the Complainant declined to accept that arrangement and submitted a further request for forbearance. The Provider submits that it made an additional offer after considering the change in the Complainant's circumstances in **September 2011**, which was not accepted by the Complainant until **December 2011**.

The Provider submits that in the absence of an agreed alternative repayment arrangement, the Complainant was required to make full capital and interest repayments on the mortgage loan accounts between **June** and **December 2011**.

The Provider has detailed further engagements with the Complainant throughout **2012** in relation to further forbearance granted on the mortgage loan accounts. It submits that on **31 October 2012** it wrote to the Complainant stating that the mortgage loan accounts had been deemed unsustainable and it would not offer him a further alternative repayment arrangement. The Provider has detailed further engagements with the Complainant throughout **2013** in relation to the sale of the property. It submits that it wrote to the Complainant again on **16 July 2013** stating that the mortgage loan accounts were deemed unsustainable and it was unable to identify a suitable alternative repayment arrangement.

The Provider submits that the Complainant's mortgaged property was listed for sale in **April 2014** as part of a voluntary sale process. The Provider submits that it agreed to the Complainant's proposed Sale at Shortfall in **October 2015**. It submits that the sale of the secured property closed in **May 2017**, leaving an unsecured residual balance.

The Provider submits that it is obliged to report all accounts that are in arrears to the Irish Credit Bureau (ICB) within the appropriate reporting guidelines. It submits that under the Consumer Protection Code ("CPC") the Provider is required to provide customers with information on how this data will be shared with the ICB, where permitted by contract or by law and the impact this may have on the Complainant's credit rating. It submits that the possibility of reporting the mortgage loan accounts and the possible effects of same have been outlined in all agreements signed by the Complainant and furthermore set out in arrears letters sent to him. It submits that the Provider may file a report about the performance of the mortgage loan accounts and the stocking term loan account with the ICB if arrears arise on the accounts. It submits that once arrears are cleared on an account, the Provider no longer adversely reports the account to the ICB. The Provider submits that it will not be amending its reports to the ICB as it is satisfied that the reports are an accurate reflection of the repayments missed by the Complainant. The Provider refers to its internal notes which it states confirm arrears on mortgage loan account ending **438** since 2009 and on mortgage loan account ending **316** since 2011. It further submits that the stocking loan was overdue and in clear breach of the terms and conditions of the stocking loan and as a result of this was referred to the Provider's Debt Recovery Department.

The Provider submits that it does not accept that there is any tangible link between the difficulties with the mortgage loan accounts and the transactions at the centre of this dispute. It submits that the Complainant has offered no evidence to connect his financial difficulties with the disputed transactions and that suggestion is unreasonable and unfounded. The Provider submits that the timing of this complaint is not insignificant and coincided with the proposed Sale at Shortfall in **autumn 2015**.

The Complaints for Adjudication

The complaint relates to maladministration of the Complainant's accounts, including that;

- The Provider carried out transactions on the Complainant's current account and the Complainant's stocking term loan account in **April 2011** which were not authorised by the Complainant.
- The Provider directed the cancellation of direct debits to the Complainant's two mortgage loan accounts in **October 2011** which was not authorised by the Complainant.
- The Provider's conduct outlined above caused the Complainant to default on his mortgage loans, which led to adverse consequences including damage to the Complainant's Irish Credit Bureau record.
- The length of time it took the Provider to respond to the Complainant's complaint was not acceptable, and the response to the complaint when received, did not adequately address the conduct complained of.

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 18 November 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.

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In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

This office has been supplied with a significant amount of documentation including all account statements and correspondence for the relevant periods along with the terms and conditions governing the accounts.

At the outset, I would point out to the Provider that this Office has jurisdiction to consider complaints that are made within 6 years from the date of the conduct giving rise to the complaint, irrespective of any terms and conditions the Provider may seek to impose. This Office will not be confined by any such terms or conditions. Therefore I do not accept the Provider's comments that I should not consider the disputed transactions.

I will deal with each of the issues raised in turn.

Unauthorised transactions in April 2011

The Complainant alleges that a transfer of €6,168.00 from his current account ending **912** into his stocking term loan account ending **823** took place in April 2011, which he did not authorise.

I will set out below the relevant extracts from the **New Customer Business Account Terms and Conditions** governing the Complainant's current account;

"3.0 Maintenance of Account

3.1 Subject to these Terms and Conditions, the Bank agrees to provide an Account in the name of the Customer. The Customer must operate the account in credit, unless an overdraft facility is agreed in advance. Where the Bank agrees to provide such overdraft facility, the applicable terms and conditions shall be those set out in the Bank's facility letter.

3.2 The Customer shall ensure that there are sufficient cleared funds (or, where applicable, sufficient unused agreed overdraft facility) in the Account to meet payments from the Account ("debits") as listed below:-

- Cheques issued which may be presented for payment*
- standing orders and direct debits due to be paid*
- Withdrawal of Cash from an ATM*
- Laser (plus Cashback)/Maestro/Cirrus transactions*
- Payments by any electronic means or by telephone*
- Any other transactions involving payments from the Account, including the application of interest and charges*

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Some of the debits listed above may not be paid, without reference to the Customer, if sufficient cleared funds (or where applicable, sufficient unused agreed overdraft facility) to cover payment is not available on the Account when such debits are due to be paid. Debits presented for payment that are not paid are subject to Unpaid Charges, full details of such Unpaid Charges are available from any branch of the Bank.

...

3.8 *If an amount is debited or credited to the Account in error by the Bank, the Bank may make any necessary correcting entry to the Account without the need for approval from the Customer.*

...

8.0 *Disputed or Unauthorised Transactions*

8.1 *The Customer must advise the Bank without undue delay, and no later than thirteen (13) months after the transaction date, of any unauthorised or incorrectly executed transactions. It shall be the responsibility of the Customer to demonstrate to the satisfaction of the Bank that any such transaction was actually unauthorised or incorrectly executed."*

I have considered the documentation furnished in evidence and I note that the current account statement dated **29 April 2011** details as follows;

<i>"Date</i>	<i>Transaction Details</i>	<i><u>Payments – out</u></i>	<i><u>Payments – in Balance</u></i>
...			
15 April 2011	CREDIT TRANSFE 70	13,161.46	
...	...		
	TOLOAN A/C	10,000.00	2,569.91 OD
...			
27 April 2011	CREDIT TRANSFE 100	10,295.56	
...		
	UnpaidFee27Apr 1101	10.15	
29 April 2011	...		
	A/C Transfer [number redacted]	6,168.00	
	A/C Transfer [number redacted]	6,168.00	
	3,353.01 OD"		

I note from the above extract that the amount of €6,168.00 was debited from the current account by the Provider twice in error on **29 April 2011**. This is not in dispute between the parties. This resulted in the Complainant's current account becoming overdrawn by the amount of €3,353.01 with available funds of €1,646.99. I note that the Complainant's current account had an overdraft facility in the maximum amount of €5,000.00.

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The Provider has submitted that the Complainant's stocking loan account had been overdue for repayments since **January 2011**.

The Provider submits that its records show that during the course of a call with the Complainant to discuss potential resolutions on **29 April 2011**, the Complainant instructed a transfer of €6,168.00 from his current account to the stocking loan account. I am most disappointed to note that the Provider is not in a position to furnish telephone recordings of its conversations with the Complainant. The Provider submits that its call to the Complainant on 29 April 2011 was not recorded. It further submits that it has no recording of calls to or from its Mortgage Department. It also submits that it does not record calls to or from direct lines including branch direct lines. The Provider submits that it relies on its contemporaneous notes as evidence of such telephone calls taking place.

I have considered the contemporaneous notes supplied in evidence. In this regard, this office has been provided with an internal mail created by the Provider at 12:50 PM on **29 April 2011** which states as follows;

"I was speaking with [the Complainant] today and he has given verbal ATTF €6,168 from his current account [account number] to his stocking term loan [account number].

Please arrange for this transfer to be completed today.

If you have any queries regarding this, please do not hesitate to contact me"

This office has also been furnished with the Credit Transfer document and the Withdrawal document which were completed on **29 April 2011** directing the withdrawal of €6,168.00 from the Complainant's current account to be transferred to his stocking loan account. In circumstances where the authorisation for the transfer was purportedly given by the Complainant verbally over the phone, it would appear that the Credit Transfer and Withdrawal documents were completed by an employee of the Provider.

Having regard to the documentary evidence before me, I am of the view that it is likely that the Complainant did verbally authorise the transfer of €6,168.00 from the current account to the stocking term loan account on 29 April 2011. In this regard, **Provision 2 of the Consumer Protection Code 2006** ("CPC 2006") and **Provision 11.1 of the Consumer Protection Code 2012** details that;

"A regulated entity must ensure that all instructions from or on behalf of a consumer are processed properly and promptly and that the date of both the receipt and transmission of the instructions is recorded."

While it is disappointing that a recording of the telephone call between the Provider and the Complainant on this date has not been provided in evidence, the documentary evidence that has been furnished to this office would appear to support the Provider's submission that such instruction was provided verbally by the Complainant. It appears to me that the Complainant's instruction was recorded and duly executed by the Provider upon receipt of

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the instruction. The Consumer Protection Code does not contain any provision that such instructions from or on behalf of a consumer must be received in writing.

However, the Complainant quite rightly points out that this transfer was executed twice on **29 April 2011**, and that on **4 May 2011**, there was an attempt made to refund one of these transfers back to the current account but it appears that the amount was simply taken out of the stocking term loan account and put back into the same account, until **5 May 2011**, when an amount of €6,168.00, was ultimately transferred from the stocking term loan account into the current account.

In this regard I have considered the Provider's internal correspondence dated **4 May 2011** which details as follows;

"just noticed that the tx request for 6168 to [the stocking loan account ending] 823 was done twice on the 29thleaving the account in credit....while that would be fantastic for us.. I don't think [the Complainant] will be too happy...can you arrange to reverse one of the payments and I will put a note on the system to make sure it goes through... Thanks for your help..."

The Provider's internal note of the same date details as follows;

"MAKE SURE DEBIT OF 6168(REVERSAL)-PUT THRU TWICE IN ERROR IS PAID ON TL. NO: [ACCOUNT ENDING] 823"

It is clear to me from the current account statements and the completed Credit Transfer and Withdrawal documents from **29 April 2011**, **4 May 2011** and **5 May 2011** that there was an attempt made by the Provider to reverse one of these transactions of €6,168.00 on **4 May 2011** which failed but which was ultimately rectified by crediting the current account on **5 May 2011**.

It is evident from the current account statement dated **29 April 2011** that the duplicate transfer on that date caused the Complainant's current account to go into overdraft in the amount of €3,353.01. However the current account did not exceed the overdraft limit of €5,000.00 prior to the account being rectified on **5 May 2011**. The current account statements supplied in evidence, show a number of cheques and two direct debits to the Complainant's mortgage loan accounts being paid on **4 May 2011**, as follows;

<i>"Date</i>	<i>Transaction Details</i>	<i><u>Payments – out</u></i>	<i><u>Payments – in Balance</u></i>
...			
04 May 2011	CHEQUE 1114	€100.00	
	CHEQUE 1115	€100.00	
	CHEQUE 1116	€213.00	
	CR TO A/C xxxxx438 DD	€229.51	
	CR TO A/C xxxx316 DD	€167.49"	

I note the Provider's statement that it "cannot countenance" a situation whereby its branch manager would instruct cancellation of the direct debits in favour of any mortgage loan

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account in the absence of an express instruction from a customer. I do not share the Provider's view in this regard and base my decisions on the evidence furnished.

In the case of the particular complaint and having regard to all of the foregoing, I am willing to accept on the balance of probability that there was no wrongdoing on the part of the Provider in executing the transfer on **29 April 2011**. I accept again on the balance of probability that this transaction was verbally authorised by the Complainant during a telephone conversation with the Provider's agent and subsequently actioned by that agent. It is my view that if this transaction was not authorised by the Complainant it is reasonable to assume that he would, or indeed should have queried this with the Provider at the time the transfer was effected. It would have been clear to the Complainant from reviewing his current account statements and his stocking term loan account statements, that the transfer had taken place. No evidence has been furnished to this office to suggest that he contacted the Provider in relation to the transaction which is now in dispute until some four years and six months later.

However, it is clear the Provider erred in executing this transfer twice on **29 April 2011**, and that this error was not rectified for a number of working days until **5 May 2011**. While this error on the Provider's part is regrettable, I accept that in accordance with the terms and conditions governing the current account the Provider was entitled to rectify the mistake by re-crediting the current account with one of the transactions. I refer to **Condition 3.8** of the **terms and conditions** which govern the operation of the current account, which expressly provides that if an amount is debited or credited to the account in error by the Provider, the Provider may make any necessary correcting entry to the account without the need for approval from the customer. I am satisfied that the Provider was not obliged either to inform the Complainant or to request the Complainant's permission to do this.

I further note that two unpaid fees in the amount of €10.15 had been charged to the Complainant's current account on **27 April 2011** and **5 April 2011** respectively. The current account statement dated **31 May 2011** confirms that these fees were refunded to the current account on 6 May 2011 as follows;

<i>"Date</i>	<i>Transaction Details</i>	<i><u>Payments – out</u></i>	<i><u>Payments – in Balance</u></i>
...			
06 May 2011	Refund Unpaid Fee		€20.30"

The Complainant has also queried an unpaid fee which was charged to his current account on **13 May 2011**. I note that the current account statement details as follows;

<i>"Date</i>	<i>Transaction Details</i>	<i><u>Payments – out</u></i>	<i><u>Payments – in Balance</u></i>
...			
10 May 2011	...		
	CHEQUE 1121	€200	€4,612.98 OD
13 May 2011	CREDIT TRANSFER 71 Payment/Transfer	€500.00	€430.75

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<i>UnpaidFee13May 1120</i>	<i>€10.15"</i>
...	
<i>27 May 2011 CHEQUE 1120</i>	<i>€440.00</i>
<i>€4,536.20 OD"</i>	

It is clear from the above that on **10 May 2011** the account was in overdraft in the amount of €4,612.98 with available funds of €387.02. I note that on **13 May 2011** the Complainant lodged a sum of €430.75 to the current account and also transferred a sum of €500.00 out of the current account. It appears that the unpaid fee charged to the account on **13 May 2011** relates to the cheque in the amount of €440.00 which was debited from the account on **27 May 2011**. I note that a copy of the cheque has been furnished in evidence and was presented for payment on **6 May 2011**.

I have considered the **Provider's Schedule of fees and charges for business customers**, effective from **March 2011** that has been supplied in evidence. I note that it details as follows;

<i>"Fee Type</i>	<i>Fee/Charge</i>
...	
<i>Unpaid charges</i>	
<i>Cheque or Direct Debit out</i> <i>(returned from your account)</i>	<i>€10.15 per item"</i>

I have been provided with no evidence that the Complainant suffered the consequences he has outlined in his complaint as a result of the disputed transaction which took place on **29 April 2011**, or indeed as a result of the Provider's error in effecting this transfer twice on that date. The overdraft facility on the current account was not exceeded as a result of the activity on the account. I note that the direct debits in favour of both mortgage loan accounts were debited from the current account on **4 May 2011** and the following month on **2 June 2011**. It would appear to me that the Complainant's difficulty in meeting the mortgage loan repayments commenced when the interest only repayment arrangement on the two mortgage loan accounts ended in **June 2011**. The first direct debits for the mortgage loan repayments that were returned unpaid following the disputed transaction in April 2011 occurred on **1 July 2011** after the mortgage repayments had reverted to capital and interest.

With regard to the disputed fees and charges, I accept that the unpaid fees charged on **27 April** and **5 April 2011** were refunded to the current account on **6 May 2011**. I also accept that the unpaid fee charged on **13 May 2011** was unrelated to the transfer on **29 April 2011** and was in accordance with the terms and conditions for the reasons outlined above. I also note that the transaction had the effect of reducing the balance on the stocking term loan account which was overdue for payment at that stage. Therefore I cannot accept that the disputed transaction on **29 April 2011** in and of itself led to the negative consequences outlined by the Complainant.

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It was set out in the terms and conditions governing the operation of the current account, it was the responsibility of the Complainant to ensure that there were sufficient cleared funds in the current account to meet debits from the current account. It is also clear from the terms and conditions that the Provider may rectify errors whereby amounts are debited or credited to the account in error by it, without the need to seek approval from the Complainant to do so.

In addition, pursuant to Condition 8.1 of the terms and conditions the Complainant had an obligation to report *“without undue delay, and no later than thirteen (13) months after the transaction date, of any unauthorised or incorrectly executed transactions”*. I note that the asserted unauthorised transactions occurred in **April 2011** and were not reported to the Provider until **1 October 2015**, which is some four years and six months after the transaction date. This is well in excess of the thirteen month period stipulated in the terms and conditions. Consequently I am of the view that the Complainant failed to report the disputed transactions in accordance with the time periods set out in the conditions governing the operation of the account and therefore there was no obligation on the Provider to investigate the transactions; nonetheless it did undertake and complete an investigation into the transactions.

Unauthorised cancellation of direct debits on the mortgage loan accounts

I note that the Provider states that it received a letter of instruction from the Complainant in or around **13 October 2011**, instructing the Provider to cancel both direct debits until the Complainant received a decision on his application for a further interest only repayment arrangement on his mortgage loan accounts following the expiry of the previous interest only arrangement in **June 2011**. The Provider has indicated that it is not in a position to furnish a copy of the letter of instruction it purportedly received from the Complainant, which is very disappointing. I note that instead the Provider relies on its internal contemporaneous notes to evidence that such a letter of instruction was received by the Provider from the Complainant. In this regard, I note that the Provider has furnished a copy of an internal mail created by the then branch manager at 15:35 PM on **12 October 2011**, which states as follows;

“Customer has completed an SFS form requesting interest only on this account and [account number] and has to date not received a response. I have today received written instructions to cancel direct debits to both accounts pending the outcome to his requests.”

I also note that the Provider’s contemporaneous note dated **2 November 2011** details as follows;

*“Excerpt from Bank Notes 02/11/2011:
[REDACTED] from [REDACTED] Branch returned call and advised that [the Complainant] asked him to stop paying DDs to Mtgs as he has not heard from us re I/O, MFA was issued in Sept’11.”*

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I have considered the Mortgage Form of Authorisation dated **4 January 2011** which was signed and accepted by the Complainant on **12 January 2011**. I note that the six month period of interest only repayments expired in **June 2011**, from which point the repayments on the mortgage loan accounts reverted to full capital and interest repayments.

I have also considered the mortgage loan statements supplied in evidence. I note that the direct debits in favour of the mortgage loan account ending **316** had been returned unpaid on the following dates;

- **7 July 2011**
- **15 July 2011**

I note that the direct debits in favour of the mortgage loan account ending **438** had been returned unpaid on the following dates;

- **7 July 2011**
- **15 July 2011**
- **8 August 2011**
- **17 August 2011**
- **7 September 2011**
- **16 September 2011**
- **7 October 2011**
- **17 October 2011**

I note that following the cancellation of the direct debts in **October 2011**, the Complainant began making manual lodgements of €400.00 and €500.00 to the respective mortgage loan accounts from **13 December 2011**. This would suggest to me that the Complainant was or ought reasonably to have been aware that the direct debits had indeed been cancelled in October 2011.

I am most disappointed to note that the Provider is unable to furnish a copy of the letter of instruction it purportedly received from the Complainant. In this regard, **provision 49 of the Consumer Protection Code 2006 ("CPC 2006")** and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows:

"A regulated entity must maintain up-to-date consumer records containing at least the following

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*

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- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”

I am of the view that the Provider has not offered any adequate reason for failing to hold a copy of the written instruction it purportedly received from the Complainant in **October 2011**. However, having considered the evidence before me, it is my view that it is reasonable to conclude that the Complainant did authorise the cancellation of the direct debits in October 2011. It is evident that the Complainant was having difficulty in meeting the mortgage payments during the period between **June 2011** and **December 2011**. I further note from the extensive arrears correspondence between the parties which has been supplied in evidence, that the negotiation of a further alternative repayment arrangement was ongoing during the period between June and December 2011. I therefore accept that it is likely on the balance of probability that the Complainant did provide a written instruction authorising the cancellation of the direct debits in October 2011 which was then executed by the Provider’s staff. Nonetheless I am disappointed about the failure by the Provider to maintain a copy of this instruction.

ICB record

The Complainant has submitted that the unauthorised transactions in 2011 have negatively impacted on his ICB record. The Complainant has submitted a copy of his Irish Credit Bureau report dated **15 June 2016**. I note that it details that there were 9 payments in arrears recorded on each of the Complainant’s mortgage loan accounts.

I note that the Complainant signed and accepted a **Loan Offer Letter** dated **9 June 2003** for the mortgage loan account ending **316** on **11 June 2003** and the Complainant signed and accepted a Loan Offer Letter dated **3 August 2005** for the mortgage loan account ending **438** on **5 August 2005**. The **Borrower’s Acceptance and Consents** on **page 5** of both Loan Offer Letters detail as follows;

1. *“I confirm that I have read and fully understood the Consumer Credit Act notices, as set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions.*

...

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4. I hereby authorise the Lender to disclose all and any details, information or documentation relating to the Loan and the Lender's Security to: [A] any third party for the purposes of or in connection with: (i) processing, administering and managing the Loan; (ii) any transfer, assignment or other disposal of the Loan howsoever arising; (iii) any loan transfer and securitisation scheme; (iv) any collateralisation scheme; (v) any mortgage, charge, security interest or encumbrance over its rights and interests under the Loan and any security held howsoever arising, other than as part of a collateralisation scheme AND

[B] to any person acting as an agent of the Lender or any other third party engaged by the Lender for general business purposes in connection with the Loan AND [C] **any credit reference bureau or agency and ALSO to make appropriate enquiries to or of any credit reference bureau or agency in relation to and arising from this Offer Letter and the Loan and any aspect thereof;** AND I hereby further authorise and consent to the processing of all and any details, information and documentation as are herein referred to by the Lender and any disclose (as referred to in this paragraph 4) for the purposes set out herein." [My emphasis]

I note that the mortgage loan account ending **438** first fell into arrears on **1 April 2009** and the mortgage loan account ending 316 first fell into arrears on **4 January 2011**.

I have considered the Provider's internal notes dated **29 June 2011**, which detail as follows;

"REQUEST: I/O REASON FOR ARREARS: Reduced Income REPAYMENT RECORD: Arrs since May 2009 but has kept to previous arrangements on i/o DEPENDENTS: 0 PREVIOUS APPROVAL HISTORY: Collections I/O X6 Jan-June 2011 PRE-DEFAULT/DEFAULT: Default INCOME & SOURCE: €2688pm EXPEDITURE: £2215pm SURPLUS/SHORTFALL: €473pm SHORT TERM DEBT BREAKDOWN: CU 110k €300pm SAVINGS: None SHORT TERM DEBT RESTRUCTURE: Has been restructured, sold cattle for 40k & paid off a lot of previous STD & 20k off CU"

I note that the Complainant entered into alternative repayment arrangements on the mortgage loan accounts on the following occasions;

- On **12 January 2011** the Complainant accepted and signed a Mortgage Form of Authorisation dated **4 January 2011**. The terms of the MFA provided for a 6 month interest only repayment period.
- On **9 November 2011** the Complainant accepted and signed a Mortgage Form of Authorisation dated **28 September 2011**. The terms of the MFA provided for a 6 month reduced repayment period.
- On **8 June 2012** the Complainant accepted and signed a Mortgage Form of Authorisation dated **21 May 2012**. The terms of the MFA provided for a 3 month interest only period.

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I note that the **Acknowledgement and Agreement** section on each MFA details as follows;

"I acknowledge that this Form will amend the terms and conditions that apply to the Loan, for example, the mortgage loan offer letter. Unless amended by this form, the terms and conditions which apply to the Loan will remain in full force and effect. I acknowledge this Form is an application by me and does not come into force until the lender accepts the Form in writing. The lender is not obliged to accept this Form.

I acknowledge and accept the following conditions and agree to be bound by them:

...

(c) The Lender may record the alternative repayment arrangement with the Irish Credit Bureau. [My emphasis]

There was also a significant volume of arrears correspondence between the parties in relation to the mortgage loan accounts between **2011** and **2017** furnished in evidence. I note that the Provider's arrears letters to the Complainant contain the following warning;

"Credit Reference Agency

We may file a report about the performance of your loan with a credit reference agency if arrears arise on the account and we do not have to tell you before we file the report. If you are in arrears, such a report could make it more difficult for you to get credit from us or other financial institutions in future. For example, you may have difficulty getting a new home/business loan. The credit report we file with the credit reference agency will show the number of payments you have missed. If we repossess a property that may also be shown on the credit reference agency record."

I note that the Complainant's property was sold in **2017** and the sales proceeds were paid into the mortgage loan accounts, leaving a residual balance of €39,172.80 on mortgage loan account ending **438** and a residual balance of €40,129.13 on mortgage loan account ending **316**.

Having carefully considered all of the evidence before me, I can find no evidence of wrongdoing on the part of the Provider in reporting the Complainant's debts to the Irish Credit Bureau. I accept that the Provider is obliged to provide an honest and truthful report of customers' repayment patterns to the ICB, and is not obliged to change or remove details from a report unless these are inaccurate. The Complainant had a contractual obligation to repay the mortgage loan accounts in full and in the terms originally agreed with the Provider. Therefore I do not accept that there is any obligation on the Provider to amend the Complainant's ICB record.

Complaint handling

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The Provider's relevant obligations in complaint resolution are provided in **Section 10.9** of the **Consumer Protection Code 2012** which provides as follows:

"A regulated entity must have in place a written procedure for the proper handling of complaints. This procedure need not apply where the complaint has been resolved to the Complainant's satisfaction within five business days, provided however that a record of this fact is maintained.

At a minimum this procedure must provide that:

a) the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received;

b) the regulated entity must provide the Complainant with the name of one or more individuals appointed by the regulated entity to be the Complainant's point of contact in relation to the complaint until the complaint is resolved or cannot be progressed any further;

c) the regulated entity must provide the Complainant with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals of not greater than 20 business days, starting from the date on which the complaint was made;

d) the regulated entity must attempt to investigate and resolve a complaint within 40 business days of having received the complaint; where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the Complainant of the anticipated timeframe within which the regulated entity hopes to resolve the complaint and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman; and

e) within five business days of the completion of the investigation, the regulated entity must advise the consumer on paper or on another durable medium of:

- i) the outcome of the investigation;*
- ii) where applicable, the terms of any offer or settlement being made;*
- iii) that the consumer can refer the matter to the relevant Ombudsman, and*
- iv) the contact details of such Ombudsman."*

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The relevant period for the conduct complained of was between April 2011 and October 2011. It appears that a complaint was not raised until 1 October 2015 on behalf of the Complainant. Responses were issued to the Complainant's solicitors within a number of days and 20 day letters and 40 day letters were also sent in compliance with the Provider's obligations in this regard. A first Final Response letter was issued in January 2016 and a second Final Response letter was issued in September 2016, following ongoing correspondence between the Complainant's solicitors and the Provider between May 2016 and August 2016.

Having examined carefully the correspondence following receipt of the Complainant's complaint, I accept that the Provider complied with its complaint handling obligations.

For the reasons set out above, I do not uphold the complaint.

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**

2 March 2020

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.

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