



<u>Decision Ref:</u>	2020-0178
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Selling mortgage to t/p provider Delayed or inadequate communication Failure to process instructions in a timely manner
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants held four mortgage loan accounts on tracker interest rates with the Provider. One of the mortgage loan accounts was in relation to the Complainants' Private Dwelling Home (PDH), and the three mortgage loan accounts were in relation to Buy to Let (BTL) properties. This complaint relates to the BTL mortgage loan accounts.

The Complainants' Case

The Complainants submit that they agreed a temporary alternative repayment arrangement (TARA) with the Provider in respect of their BTL mortgage loan accounts on **13 June 2018**, on the basis that they try to sell their BTL properties. The Complainants contend that on a telephone call on **13 June 2018**, the Provider gave its consent for the Complainants to sell their BTL properties.

The Complainants submit that they sold one of their BTL properties (Property L) on **15 October 2018** for €330,000, but that the Provider delayed responding to them for a month and eventually withdrew its consent for the sale "*and caused [them] to lose the sale at a huge financial loss...*"

The Complainants submit that the Provider agreed that it would 'warehouse' the shortfall from the sale of one of the BTL properties, and that it was obliged to do this as it "*had clearly agreed to do so*".

The Complainants assert that the Provider "*blamed a future purchaser [third party fund] for [its] refusal to honour its prior consent to sell given to [them] on 13/06/18 even though [the Provider] still own and are fully responsible for all of [their] loans...*" The Complainants state in their submissions to this Office dated **23 April 2019** that the mortgage loan accounts had not yet been transferred to the third party fund and that the Provider remained responsible for all of their mortgage loan accounts.

The Complaint is that the Provider wrongfully reneged on its consent for the Complainants to sell Property L, and wrongfully sold the Complainants' performing BTL mortgage loan accounts to a third party fund. The Complainants have also remarked that this transfer was at a price below the amount the Complainants contend they would have obtained, had the Provider consented to the private sale of the property in **October 2018**.

The Complainants submit that the three month extension to their ARA was conditional on their efforts to sell the BTL properties, based on the valuations in the auctioneer's letter dated **25 August 2018** which included a shortfall on Property L.

The Complainants allege that they have been discriminated against by the Provider's employees because they made a complaint against them to this Office. They submit that this discrimination includes "*selling [their] performing loans with no arrears on prime properties in Dublin at a huge discount to [a third party fund] against [the Provider's] own attached published policy guidelines and removing [the Provider's] prior consent to sell given to [them] on 13/6/18...*"

The Complainants submit that the Provider has breached its obligations to its shareholders by refusing to consent to the sale of Property L, which the Complainants contend would have resulted in a €315,000.00 reduction in the outstanding mortgage balance of the property. The Complainants have furnished this Office with a letter dated **18 November 2018** from a third party financial advisor (who I will refer to as "Mr B"). The letter from Mr. B states that "*[the Provider] turned down a buyer's offer of €315,000.00 net of expenses, made to long-standing Irish Customers for a most likely much inferior offer possibly as low as 30% from a foreign fund and are therefore neglecting [its] fiduciary duties to [its] own shareholders to obtain the maximum amount for the collateral.*"

The Complainants also submit that they were provided with "*totally incorrect information*" on their mortgage statements sent to them by the Provider on **8 April 2019**. The Complainants submit that incorrect mortgage statements were sent to them again by the Provider on **8 May 2019**. The Complainants state that the Provider was deliberately refusing to provide them with the correct information about the total amounts outstanding on their mortgages for "*alterior [sic] motives*".

The Complainants seek compensation from the Provider to cover losses identified as:

- €65,000.00 shortfall "*in the outstanding mortgage value for [Property L] which would have been 'warehoused' by [the Provider] if our agreement was honoured and our contract to sell was not breached by [the Provider]*".

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- The loss of rental income due to the Complainants' cessation of an active tenancy in order to prepare for sale, and *"all renovation and redecorating costs"*.
- Auctioneers' professional fees incurred by the Complainants in attempting to sell the investment properties.
- Future interest payments on the remaining mortgage of approximately €380,000.00.
- Potential financial loss stemming from the Complainants' exposure to *"any future downturn in the market value of [Property L]"* as a result of the Provider's actions.

The Provider's Case

The Provider sets out in its submissions that ARAs were agreed on the Complainants' mortgage loan accounts as follows:

Table 2 (as referred to in the Provider's submissions)

Account Number	****9904	****9917	****9920	****9933
Type of property	BTL	BTL	BTL	PDH
Arrangement	Reduced Repayment	Reduced Repayment	Reduced Repayment	Reduced Repayment
Amount	€450	€300	€450	€1,000
Start Date	10/08/2015	10/07/2017	10/08/2015	10/02/2016
End Date	10/02/2018	10/02/2018	10/02/2018	10/01/2018
Pre-Expiry Letter	18/12/2017	18/12/2017	18/12/2017	16/11/2017

Table 3 (as referred to in the Provider's submissions)

Account Number	****9904	****9917	****9920	****9933
Type of property	BTL	BTL	BTL	PDH
Arrangement	Reduced Repayment	Reduced Repayment	Reduced Repayment	Reduced Repayment
Amount	€450.00	€300	€450.00	€1,831.06
Start Date	10/03/2018	10/03/2018	10/03/2018	10/03/2018
End Date	10/08/2018	10/08/2018	10/08/2018	10/08/2018
Pre-Expiry Letter	18/06/2018	18/06/2018	18/06/2018	18/06/2018

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The Provider submits that the ARAs which began on **10 March 2018** were agreed for a period of six months to allow the Complainants time to sell the three BTL properties. It states that the Complainants were informed of this by telephone on **31 January 2018**. The provider states that the underwriting department advised that they would review the position in four months and if further time was required to sell the properties, an extension of three months would be considered.

Following the expiry of the ARAs mentioned in Table 3 above, the Provider states that subsequent Temporary Alternative Repayment Arrangements (TARAs) were placed on each of the mortgage loan accounts as follows:

Table 4 (as referred to in the Provider's submissions)

Account Number	****9904	****9917	****9920	****9933
Type of property	BTL	BTL	BTL	PDH
Arrangement	TARA	TARA	TARA	TARA
Amount	€450	€300	€450	€1,831.00
Start Date	10/10/2018	10/10/2018	10/10/2018	10/10/2018
End Date	10/12/2018	10/12/2018	10/12/2018	10/12/2018

The Provider submits that these TARAs were agreed following receipt of a letter from the Complainants' estate agent dated **25 August 2018** confirming that the properties were for sale. The Provider states that on **11 September 2018**, the TARAs on the BTL mortgage loan accounts were backdated and arrears adjustments were completed to backdate the arrangements to include September's repayments. This meant the TARAs that were in place on the BTL mortgage loan accounts were in place for four months (from September up to and including December's repayments).

In respect of the telephone call on **13 June 2018**, the Provider states in its final response letter dated **23 January 2019** that it found *"no evidence to suggest that any consent was ever given to sell any of Buy-to-Let (BTL) properties...And as such [the Provider] has to reject your statement that you were given consent and or 'absolute consent to sell'. Though [the Provider] can confirm that during the call the [Relationship Manager] did stress the importance for you to try to sell your BTL properties in order to bring down your debt balance to [the Provider]"*. The Provider contends that in this call the Relationship Manager *"highlighted that any sale would require prior consent to be sought from us, [the Provider]."*

The Provider notes that the First Complainant said that notice had already been served on all of the tenants and that in respect of one of the properties, notice was given until the end of December 2018. The Provider rejects the claim made by Mr B in his letter dated **18 November 2018** that the Complainants served notice on their tenants based on the assertion that consent to sale was given to the Complainants during this telephone call.

The Provider submits that it "*afforded the Complainants 10 months in total to sell the BTL properties, by approving TARA's on the properties to facilitate this. The [Provider is] not responsible for the costs involved in redecorating any of the properties to enhance the sale prospects and this was never discussed with the Complainants at any time*". The Provider rejects the Complainants' statement that consent was given to the First Complainant during this telephone call to sell the property associated with mortgage reference ****9904 (Property L). It states that the relationship manager advised of the steps involved in selling the BTL properties. The Provider further states that following notification of the debt sale issued on **27 August 2018**, the Provider required the third party funds' consent for the sale of the property. It states that the Complainants' offer in relation to the sale of Property L was put forward to the third party fund by [the relationship manager], and that the Complainants were notified of their proposal being rejected and the reasons for this on **9 November 2018**.

The Provider submits that the First Complainant was advised during this telephone call that the Provider did not write off shortfalls at that time. It states that the relationship manager advised that shortfall write offs were coming in, but that they were not yet available. The Provider submits that the First Complainant advised that he was keen to sell the three BTL properties, however until the Provider could guarantee that he wouldn't be liable for any shortfalls, there was no incentive for him to sell the properties and he was unwilling to sell them at a shortfall.

In respect of the complaint that the relationship manager delayed in contacting the Complainants, the Provider submits that on receipt of the letter from the auctioneer dated **25 August 2018** confirming the BTL properties were for sale, the relationship manager requested a three month extension to the ARAs in place on the mortgage loan accounts. The Provider states that once these were in place on the accounts, the relationship manager emailed the First Complainant on **10 September 2018** to advise of this. The Provider further states that on **18 August 2018** the First Complainant emailed the relationship manager, who replied advising he would submit the Complainants' proposal and would revert once he had an answer. The Provider states that on **9 November 2018**, the relationship manager emailed the First Complainant to advise that the third party fund had declined the Complainants' proposal and the reasons why the proposal was rejected.

In respect of the complaint about the BTL mortgage loan accounts being sold when repayments were being made, the Provider submits that when considering if an account would be included in the loan sale, the overall performance of the account was considered, and that this would include the history of the account, including any ARAs that may have been in place on an account. It further states that as the Complainants' BTL mortgage loan accounts have been in a series of ARAs, they have been deemed by the Provider as non-performing loans and therefore in scope for inclusion in the loan sale. It states that it did not include the PDH mortgage loan account in the sale. The Provider states that it is satisfied that it has complied with relevant accounting standards and its duties to its shareholders in relation to the reporting and management of all transactions entered into by the Provider, including the loan portfolio sale within which these loans were sold.

The Provider rejects the Complainants' assertion that the loans were included in the loan sale due to their complaint being investigated by this Office.

In respect of the complaint about the incorrect mortgage statements, the Provider states in its submissions to this Office dated **26 July 2019** that *"it appears that when we requested updated statements in May, copies of the statements that were issued on 08 April 2019 were issued and not new statements. We apologise to the Complainants and would like to reiterate that it was not our [sic] intention to cause any further confusion or mislead the Complainants in any way"*. The letter further states that *"while I acknowledge that the outstanding balance figure on the front pages is incorrect, the balances on the following pages showing the transaction history are correct. It appears that the incorrect figures on the front pages are incorrect due to human error. Feedback has been issued to the relevant department in an attempt to ensure this issue does not occur again. As a gesture of goodwill we would like [sic] offer the Complainants redress of €500 in light of the incorrect information on the front page of the statements."*

The Complaints for Adjudication

The complaints for adjudication are that the Provider:

- a) Gave its consent to sell the BTL properties and confirmed that any shortfall would be 'warehoused' during a telephone call on **13 June 2018**, but that it wrongfully withdrew this consent when Property L was sold, causing the Complainants to lose the sale at a *"huge financial loss"*.
- b) Wrongfully sold the Complainants' performing BTL mortgage loan accounts to a third party fund in **August 2018** and *"blamed the [third party fund] for its refusal to honour its prior consent"*.
- c) Delayed responding to the Complainants when they emailed the Provider about the offer on Property L on **15 October 2018**.
- d) Furnished the Complainants with *"totally incorrect information"* on their mortgage statements in **April** and **May 2019** and that this was done deliberately.
- e) Discriminated against the Complainants because they made a complaint against the Provider to this Office.

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.

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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.

A Preliminary Decision was issued to the parties on 17 April 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

As a preliminary issue, I note that the Complainants submit that the Provider is "*transferring all of our financial and personal data without our consent against recent EU GDPR regulations*". Data protection issues will not be considered as part of this investigation and adjudication of these issues should more appropriately be addressed to the Data Protection Commissioner.

I will set out the sequence of events relevant to this complaint based on the evidence, including recordings of telephone calls, submitted.

Sequence of Events:

- **31 January 2018:** Email from the First Complainant to the Provider which stated that "*I received a phone call from [a staff member of the Provider] on 17/1/18 with promise to look for 6-12 month extension on existing ARA for 3 x BTL's and 1 x PDH on the basis that at least one of the BTL's is being sold and the tenants have already been given the RTB statutory declaration of notice.*"
- **31 January 2018:** The Debtor Manager Notes state as follows (in relation to the ARA offer in respect of the PDH mortgage loan account and the BTL mortgage loan accounts):

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"Approve the following deal under the strict condition that all BTLs are put on the market during this time, if further forbearance is sought after this time and we have no evidence that customers have the BTLs on the market then all accounts will be passed to [third party entity], noted also if evidence is confirmed that properties are on the market and buyers confirmed a max deal term and will be 3mths [sic] to allow the sale to be completed, also if there is [sic] no buyers confirmed then case will be moved to [third party entity]."

The Debt Manager Notes also state that *"Talked to [the First Complainant] on the phone... However he wants time 12 months to sell the BTL and 12 months on the PDH."*

- **2 February 2018:** Telephone call from the Provider to the First Complainant. The Provider informed the First Complainant that the ARA offer was being sent for review as the Complainants were not happy with the offer. The First Complainant informed the Provider that he has given notice to tenants of one of the properties and that as an arrangement has not been agreed, he hasn't given notice in respect of the other properties.
- **8 February 2018:** The Debtor Manager Notes state as follows: *"Approve the following deal under the strict condition that all BTLs are put on the market during this time, if further forbearance is sought after this time and we have no evidence that customers have the BTLs on the market then all accounts will be passed to [third party entity], noted also if evidence is confirmed that properties are on the market and buyers confirmed a max deal term will be 3mths [sic] to allow sale be [sic] completed, also if there is [sic] no buyers confirmed then case will be moved to [third party entity]."*

The Provider telephoned the First Complainant to inform him that the review had not been successful and that the ARA offer remained the same.

- **15 February 2018:** Letter from Provider to the Complainants in response to a complaint made, which confirmed that it was putting ARAs in place of reduced payments, and that these agreements were in place *"to allow for the sale of the Buy To Let properties during this time."*
- **13 March 2018:** ARA offer letters from the Provider to the Complainants in relation to the BTL mortgage loan accounts.
- **22 March 2018:** Letter from the Complainants to the Provider submitting their appeal in respect of the ARA offers on the four mortgage loan accounts.

- **16 May 2018:** Letter from Provider to the Complainants to confirm that their appeal in respect of the ARA offers had not been successful. The letter states as follows:

*"The reason for this is as follows: the original decision to offer the following arrangements ****9933 (PDH) - A 6 month reduced repayment of €1,831, ****9904 (BTL) – A 6 month reduced repayment of €300 and to request that the buy to let properties are sold was correct based on your current financial situation."*

- **13 June 2018:** Telephone call from the Provider to the First Complainant. In this call, the First Complainant informed the relationship manager that there would be a shortfall for Property L (around €50 or €60k) if it were to be sold. The relationship manager informed the First Complainant that when selling properties at a loss, there is a process that needs to be followed to obtain the consent to sale.

The relationship manager went through the process to obtain a consent to sale, and outlined to the First Complainant that it involved the Provider carrying out a review, getting their own valuation of the property, approving the consent to sale if it was happy with their own valuation, and then a letter being sent confirming the Provider's consent to sale via their third party who looks after administration on consent to sale. The relationship manager stated that as they speak, the Provider will hold the Complainants liable for the shortfall. The relationship manager said that this could change "*down the line*".

The First Complainant said that there was no incentive for them to sell that property because on the current situation, they would be liable for the shortfall. The First Complainant said that they would be "*insane at the moment to sell it*". The relationship manager told the First Complainant that "*you can still go ahead and sell it in regards of any shortfall that remains, even if its 50 or 60 thousand, whatever, or even 100 thousand, you can only pay it towards what you can. If you can't afford to pay it, then you can't afford to pay it. The good thing is here you can reduce the debt down by that level of amount and that's a positive.*" The relationship manager went on to say that "*while the shortfall is still at the present moment in time and I'm saying in today's conversation, while you'll still be liable for the shortfall, if you can't pay for the shortfall, then you can't pay for the shortfall. We're not going to come down the tracks and say look you need to pay x, y and z for it. If you can't afford the shortfall remaining balance, because the shortfall remaining balance literally sits with no interest rate on it. It just sits there. If you can contribute to it based on your financial information then we would expect you to pay something towards the shortfall balance, but if you can't and that's you know your financial circumstances, because you're tight on financial income and expenditure at the minute, that's understandable, but we will still facilitate the sale, allow you the sale, reduce the debt and leave the shortfall there.*"

The First Complainant confirmed that Property L was not on sale at the moment. The relationship manager further stated that *"don't let that stop you in the sense of trying to sell the property. If you have an offer, give it serious consideration about trying to sell it and reduce the overall balance down."*

The relationship manager said that after August, the Provider will approve a three month arrangement but that was only on production of a letter from an auctioneer which confirmed that these properties were up on the market. The First Complainant explained that he had given notice, but that one tenant would still be in one of the properties (Property C) until December *"at the earliest"* as they had been in the property for 10 years.

He went on to explain that the tenants in Property L have until end of September in the property and that the tenants in the other property (Property R) have a month and then the property needed to be redecorated. The First Complainant explained that it would then take three to six months before the sale goes through and asked, based on that information, how three months would be sufficient.

The relationship manager said that if the First Complainant had a letter from an auctioneer in August, he could go to credit and inform them that the First Complainant has given notice to the tenants, and that he would ask whether an extension could be given for more than three months so that the properties could be sold by the end of the year.

When asked by the First Complainant whether the mortgage loan accounts were included in the sale to the third party fund, the relationship manager said that he did not know which loans were included. The relationship manager said that if the properties weren't sold, the Provider could decide not to put in another arrangement and could *"move this off to another direction"*.

- **15 August 2018:** Email from the Provider to the First Complainant states as follows:

"I can confirm that your Buy to Let Mortgages have been included in the recent Loan Sale.

Letters will be issued shortly in relation to this...

As previously discussed, I need a letter from your Auctioneer confirming that the BTL properties are on the market. Once you forward this letter to us, Credit will then approve an additional 3 months arrangement."

- **25 August 2018:** The Complainants provided a letter from their auctioneer to the Provider.

The letter states as follows:

"I confirm that our client, [the First Complainant] has instructed us to sell the properties below with immediate effect:

[Property C]

[Property R]

[Property L]

I estimate that it will take 3-6 months for all of the property sales to be fully completed".

- **27 August 2018:** Letters from the Provider to the Complainants confirming that the BTL mortgage loan accounts will be transferred to a third party fund.
- **31 August 2018:** The Debtor Manager Notes state that the *"Customer is seeking 3 month extension to allow the sales of the properties to be finalised. Letter from Auctioneer Obtained and Sighted confirming that the properties are up for sale... Seeking 3 month TARA for the following to allow sales to finalise:"*

The Debtor Manager Notes further state as follows:

"Approving the following 3 month TARA arrangements...

Previous 6 months deal was [sic] approved 31/01/2018 on the strict condition that all BTLs are out on the market during this time. Confirmation has been received from [the auctioneer] that they have been instructed to sell properties; however they were only instructed 28/08/2018.

The 3 x BTLs are now part of [third party fund] project."

- **6 September 2018:** Letter from the Provider to the Complainants confirming the details of the Temporary ARA, which was a reduced payment arrangement (and referred to in Table 4 above).
- **10 September 2018:** In response to an email from the First Complainant on this date, an email from the Provider to the First Complainant states that *"The Extensions to the previous arrangements have being [sic] approved and applied to the accounts."*
- **15 October 2018:** Email from the First Complainant to the Provider states as follows:

"As discussed, we have been trying to sell our BTL properties and we have received a buyer's offer of €315,000 for [Property L].

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This offer would provide [the Provider] with over 80% of the mortgage value (315/380) which is still more than twice the amount of money that [the Provider's] shareholders would receive from the proposed sale of this mortgage to a [third party fund] as confirmed in your e-mail below.

Further to our telephone conversation, can you please confirm that [the Provider] will accept the buyer's offer of €315,000 for the sale of [Property L] and that the remaining balance on the mortgage will be 'warehoused' and eventually written off as discussed."

- **18 October 2018:** Email from the Provider to the First Complainant requesting confirmation of the costs and outlays associated with the sale of Property L. The Provider asked whether the figure was a net or gross figure.
- **26 October 2018:** Email from the First Complainant to the Provider chasing a response to his email dated **15 October 2018**.
- **31 October 2018:** Email from the Provider to the First Complainant states that "*As the Mortgage for [Property L] is part of the [Provider] Loan Sale this is taking longer to get a response back.*

As soon as I have any updated I will contact you immediately."

- **8 November 2018:** Email from the First Complainant to the Provider confirming that they have received a cash offer of €330,000 for Property L and that the cash buyer had paid his deposit and letters have been sent out to both solicitors. The Complainants put forward a proposal in respect of the other two BTL mortgage loan accounts, in that they would revert to cover full payment of capital and interest, as they have now re-let these properties for higher rents.
- **9 November 2018:** Email from Provider to the First Complainant states as follows:

"1. In relation to your request to sell [Property L]. This has being [sic] declined by the Loan Purchaser as this proposal does not deal with the other investment mortgage debt. This decision was only communicated this morning. However based on your email dated the 8th November you have advised that the other 2 Investment Mortgages will be reverting to full capital and interest repayments after the expiry of the current arrangement as you have now re-rented the properties. This is good news.

I can now return to the Loan Purchaser and update this position which addresses the other investment mortgages...

2. Please note that all three investment mortgages are included in our recent Loan Sale. We have communicated this to you in writing. This position will not change..."

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Analysis

It is important to set out the limitations of the jurisdiction of this office in relation to complaints of this kind. This office may investigate the procedures undertaken by the Provider regarding its compliance with the Consumer Protection Code, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the customer, and does not involve this office, as an impartial adjudicator of complaints. This office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of **Section 60 (2)(b) of the Financial Services and Pensions Ombudsman Act 2017**.

I note that the **Consumer Protection Code 2012 as amended (CPC 2012)**, which was the prevailing Code at the time of the subject of this complaint, applies in respect of the BTL mortgage loan accounts.

Telephone call on 13 June 2018

In respect of the Complainants' assertion that consent to sale was provided during the telephone call on **13 June 2018**, I do not accept this. I have carefully considered the recording of this telephone call and I accept that the relationship manager clearly explained the process that was required for the Provider to consent to any sale (which involved getting valuations etc.). I accept that the relationship manager explained the steps that would need to take place for the Provider to give its consent to sell where there is a shortfall, and that he confirmed that any consent to sell would be provided in writing. I also accept that the Provider did not say that any shortfall would be written off. The relationship manager made it clear that a debt write off policy might be introduced in the future, but at the time of the call, this policy was not in place.

It is important to note that this Office will not interfere with commercial decisions taken by the Provider in respect of its refusal to consent to the sale of a property when there is a shortfall. The Provider is entitled to exercise its commercial discretion when deciding whether it consents to the sale of properties where a balance on the mortgage would remain outstanding.

However, I accept that the relationship manager did not communicate to the First Complainant at any stage during the call, that consent to sell may not be provided if only one of the three properties were to be sold. I appreciate that the relationship manager was not aware at the time of the call that the mortgage loan accounts were to be included in the loan sale to the third party fund, however I accept that the relationship manager encouraged the First Complainant to proceed with the potential sale in respect of one of the BTL properties as this would reduce the overall debt.

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Whilst I accept that the First Complainant was generally aware that the Provider had said that the three BTL properties were to be sold, the relationship manager did not inform the First Complainant on the call that the Provider may not accept the sale of one of the BTL properties, if the other two properties were not also ready to be sold. I note that in the Debtors Notes there are numerous references to the ARA offers being "*on strict condition*" that the three BTL properties are put up for sale, but it was not communicated to the Complainants that it would not accept the sale of one of the BTL properties if the other two properties were not sold at the same time. It is disappointing that the Provider did not communicate this at any stage to the Complainants.

I note that ARA offer letters sent to the Complainants on **13 March 2018** and **6 September 2018** did not set out the requirement that all three BTL properties were to be sold, and in fact, there is no reference to the requirement to sell the BTL properties at all.

Whilst it is clear that the Complainants were aware that they were to sell the three BTL properties, it was not made clear that if they were able to sell one of the properties, that this may not be accepted on the basis that they were not able to sell the other two properties at that time.

There is no evidence before me which substantiates the Complainants' assertion that consent to sell was provided on this telephone call, however I do accept that there were communication failures on the part of the Provider, which I have outlined above.

The Complainants submit that the Provider agreed that it would 'warehouse' the shortfall from the sale of one of the BTL properties and that it was obliged to do this as it "*had clearly agreed to do so*". I accept that the relationship manager encouraged the First Complainant to sell one of the properties and that he stated that "*we will still facilitate the sale, allow you the sale, reduce the debt and leave the shortfall there.*" However, I also accept that the relationship manager was generally explaining the process which takes place when properties are sold at a shortfall (when borrowers are unable to pay the remaining shortfall balance). I do not accept that any agreement was entered into during this phone call about the shortfall balance. I also do not accept that any agreement was entered into during this phone about the consent to sell. I am of the view that the relationship manager made it clear earlier in the conversation that consent to sell would need to be sought from the Provider. As I have outlined above, I accept that the relationship manager failed to inform the First Complainant that the Provider may not accept the sale of one of the properties if there were no offers on the two other properties. The relationship manager inferred that the Provider would allow the sale in respect of one of the properties, and the Complainants proceeded on that basis. I do however note that the First Complainant stated on numerous occasions during this call that there was no incentive for him to sell the properties as there was no guarantee from the Provider that they would not be liable for the shortfall.

Sale of the mortgage loan accounts to a third party fund

The complaint in relation to the BTL mortgage loan accounts being sold to a third party fund without the Complainants' consent is the subject of a separate complaint and accordingly is not dealt with in this Decision.

The Complainants assert that the Provider *"blamed a future purchaser [third party fund] for [its] refusal to honour its prior consent to sell given to [them] on 13/06/18 even though [the Provider] still own and are fully responsible for all of [their] loans..."*

The Provider submits in its final response letter dated **23 January 2019** that following its agreement with the third party fund to sell, any proposal received following notification of the debt sale issued on **27 August 2018** *"would have required the [third party funds'] review, consideration and consent"*.

I accept that the mortgage loan accounts had not yet been transferred to the third party fund at the time the offer was made on Property L, and that the Provider remained responsible for all of their mortgage loan accounts. It is unclear from the evidence before me as to why the Provider were seeking instructions from the third party fund about the consent to sell, when it is clear from the transfer letter dated **27 August 2018** that the Provider maintained the rights related to the mortgage loan accounts until the transfer date. The transfer letter from the Provider to the Complainants states as follows:

"On the Transfer Date all of the rights of the [Provider] under your Mortgage Loan and your facility letter(s), related security (if any), guarantees (if any) and all other rights relating to your Mortgage Loan and (the Mortgage Documents) will be transferred to the Buyer..."

From the Transfer Date, your obligations in respect of your Mortgage Loan and the Mortgage Documents will be owed to the Buyer rather than to the [Provider]...

Until the Transfer Date, you should continue to engage in any on-going discussions with the [Provider] in relation to your Mortgage Loan..."

I recognise that there was a transaction between the Provider and the third party fund in respect of the sale of the mortgage loan accounts at this time. The Provider was commercially entitled to sell the mortgage loan accounts, and this Office will not interfere with any agreement between the Provider and the third party fund about the sale of the mortgage loan accounts.

Notwithstanding this, it is most disappointing that the Provider did not inform the Complainants that it would require the consent of the third party fund in respect of the proposed sale by the First Complainant of the BTL properties. This information is notably absent from the transfer letters dated **27 August 2018**, and in all communication to the Complainants once the ARA offer was extended for three months on **31 August 2018** to allow the Complainants to sell the properties.

From the evidence before me, the Provider only made the Complainants aware of this in an email dated **31 October 2018**, following the email from the Complainants about the offer on Property L. I accept that the First Complainant had been encouraged by the relationship manager during the telephone call on **13 June 2018** to sell even one of the BTL properties as this would reduce the overall debt. Therefore, I would have expected the Provider to inform the Complainants that it would be seeking instructions from the third party fund in respect of the sale of the BTL properties. I do not believe that the Provider was transparent with the Complainants, by not informing them of this important information. I acknowledge that this will have been frustrating for the Complainants when they had previously been encouraged to sell even one of the properties.

However, I note that the Complainants contend that the agreement with the Provider to consent to the sale and 'warehouse' the shortfall was removed by the third party fund.

I do not consider that any such agreement was entered into with the Provider during the call on **13 June 2018** and therefore I do not accept that any agreement or consent was 'removed' by the third party fund. I also do not accept that the Provider entered into a contract with the First Complainant during this call and therefore I do not accept that the Provider breached any contract.

Extension of the ARA offer on 31 August 2018

The Complainants submit that the three month extension to their ARA was conditional on their efforts to sell their BTL properties and based on the valuations in the auctioneer's letter dated **25 August 2018** which included a shortfall on Property L. There is no dispute that the ARA was conditional on the Complainants selling their BTL properties. This Office will not interfere with the commercial discretion of the Provider in respect of its offer of an ARA, but it will investigate whether it has complied with the CPC 2012 (as amended). I have not found any evidence that the Provider breached this Code. However, I am of the view that the Complainants should have been provided with the full picture about the third party fund's involvement with the mortgage loan accounts, when the ARA offer was extended.

I note that the letter from the auctioneer dated **25 August 2018** stated that it would take three to six months for the properties to be sold. I also note that the First Complainant informed the relationship manager during the telephone call on **30 June 2018** that he had given notice to the tenants, but that one tenant would still be in one of the properties (Property C) until December "*at the earliest*" as they had been in the property for 10 years. The First Complainant explained that it would then take three to six months before the sale goes through and asked, based on that information, how would three months be sufficient. The Provider confirmed that he would ask 'Credit' for a longer period of time to sell the properties in light of this information, and that the decision would be down to them. There is no evidence before me to suggest that the Provider requested a longer period of time for the Complainants to sell the BTL properties, as confirmed during the call.

The Debtor Manager Notes on **31 August 2018** refer to a three month extension being requested. Based on the evidence before me, I am of the view that the First Complainant was provided with incorrect information during this call, as a longer period of time to sell the BTL properties did not appear to be requested. The Provider had been put on notice that there were tenants in one of the BTL properties until December, and therefore would have been unable to sell this property within the three month period. I believe there was a lack of communication from the Provider towards the Complainants.

Notwithstanding the above, I do accept that the Provider allowed the Complainants around 10 months to sell the BTL properties. The ARA offer was communicated to the Complainants on **8 February 2018**. Whilst the Complainants were unhappy with the ARA offer, they agreed to sell the BTL properties. It is clear from the telephone call on **13 June 2018** that the Complainants had provided notice to their tenants, but that they had not initiated efforts to sell the properties. The First Complainant said during this call that he would be "*insane at the moment to sell it*". Therefore, I accept that the Complainants delayed in selling their BTL properties.

Communication

The Complainants submit that they sold one of their BTL properties (Property L) on **15 October 2018**, but that the Provider delayed responding to them for a month and eventually withdrew its consent for the sale "*and caused [them] to lose the sale at a huge financial loss...*"

I have reviewed the correspondence between the Complainants and the Provider from **15 October 2018** onwards. I note that the Provider responded to the Complainant three days following this email with a request for more information. This Office has not been provided with the Complainants' response to this email. The Complainants emailed the Provider to chase their response to the sale offer on **28 October 2018**, to which the Provider responded on **31 October 2018** to confirm that it was awaiting instructions from the third party fund. The Complainants emailed again on **8 November 2018**, to which the Provider responded on **9 November 2018**, confirming that the sale offer was rejected. As the Complainants had put forward a proposal in respect of the other two BTL properties in the email dated **8 November 2018**, the Provider confirmed in its email dated **9 November 2018** that it would seek instructions in relation to this proposal. The Provider's Final Response Letter states that it emailed the Complainants on **15 November 2018** to confirm that the second proposal had also been rejected by the third party fund. This Office has not been provided with a copy of that email.

I accept that there was a slight delay in responding to the contents of the Complainants email dated **15 October 2018** in respect of the sale offer, as a firm response was not provided until **9 November 2018**, over three weeks later. However, I note that the Provider did update the Complainants prior to giving a response on **9 November 2018**.

In any event, the Complainants main issue was that in the response on **9 November 2018**, the Provider did not consent to the sale. As I have outlined above, this is within the Provider's commercial discretion, however it is a customer service failing that it did not inform the Complainants earlier that that the third party entity would be involved in any decision making.

From a review of the telephone call recordings, I note there were some additional customer service failings on the part of the Provider. The First Complainant had to telephone the Provider on numerous occasions in **November 2018** to ensure that the mortgage loan accounts were up to date. This was because there was a delay on the part of the Provider in implementing the ARAs in **August 2018** and as a result arrears appeared on the mortgage loan accounts when they should not have. This was remedied by the Provider and was communicated to the Complainants by email on **23 November 2018**. I accept that added to the Complainants' frustration and confusion, when this was already a stressful time due to the mortgage loan accounts being transferred to a third party fund.

I also note that the Provider accepts the complaint made in respect of the Complainants being provided with incorrect mortgage statements, which I consider to be another customer service failing on the part of the Provider.

The Complainants allege that they have been discriminated against by the Provider's employees because they made a complaint about the Provider's conduct to this Office. Whilst I note that there were a number of customer service shortcomings on the part of the Provider (as I have outlined above), there is no evidence before me to support that the Complainants were "*discriminated*" against because of a complaint to this Office.

I note that the Complainants have furnished this Office with a letter from a financial consultant dated **18 November 2018**. This letter raises several issues about the Provider's duties to shareholders generally, whether its contracts with third party funds are legal and whether the Provider has Locus Standi over the loans. I must state that the jurisdiction of this office to consider complaints is governed by the provisions of the **Financial Services and Pensions Ombudsman Act 2017 (the "2017 Act")**. The jurisdiction of this office is limited to the investigation of complaints as set out in section 44 of the 2017 Act. This investigation will only consider the conduct of the Provider in the context of its conduct in relation to the Complainants and this complaint. It is not appropriate for this office to conduct a wider investigation about the Provider in respect of the matters raised in this letter. As such, I will not be considering these matters further.

In conclusion, I accept that on the basis of the evidence before me, the main complaints against the Provider cannot be substantiated. However, as there were shortcomings on the part of the Provider in respect of its lack of transparency and communication with the Complainants, and numerous customer service failings, I partially uphold the complaint and direct that the Provider pay the Complainants a sum of €3,500. For the avoidance of doubt, this sum includes the €500 offered by the Provider.

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 Complainants in the sum of €3,500 (to include the €500 offered by the Provider), 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**

12 May 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,

/Cont'd...

**(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.

