



<b><u>Decision Ref:</u></b>	2020-0204
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Selling mortgage to t/p provider Delayed or inadequate communication
<b><u>Outcome:</u></b>	Rejected

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

#### **Background**

The Complainants entered into a mortgage agreement with a financial service provider in **2004** (“the original mortgage Provider”) on **13 May 2004**. The mortgage was subsequently bought by another provider in **2015** (“the named third party Provider”). By **Mortgage Sale Agreement** dated **17 August 2016**, the Provider against which this complaint is made, purchased the Complainants’ mortgage from the second Provider.

Following its purchase of the Complainants’ mortgage, on **24 November 2016** the respondent Provider issued a letter to the Complainants which contained the following notice;

*“If you do not keep up your repayments you may lose your home.”*

The complaint relates to the appropriateness of the inclusion of this notice in the Provider’s letter to the Complainants.

#### **The Complainants’ Case**

The Complainants state that they received a “Hello” letter from the Provider on **24 November 2016**, confirming that the Provider had taken over their loan from the named third party Provider. They outline that **page 4** of the letter stated:

*“If you do not keep up your repayments you may lose your home.”*

The Complainants state that on **8 January 2017** they performed a folio search with the Property Registry Authority of Ireland (the "PRAI") and discovered that the Provider had not yet registered its interest in their family home. They state that they phoned the PRAI on **9 January 2017** seeking clarification on this and an officer of the PRAI stated over the phone that the Provider had not yet registered any interest in the Complainants' home. The Complainants submit that therefore, almost two months after the Provider had issued the "Hello" letter containing the warning, it appeared that the **Form 56 Deed of Transfer** had not yet been submitted by the Provider to the PRAI.

The Complainants submit that they then contacted the Provider to let it know that, in their view the Provider had no right to issue such a warning to them, as it was a:

*"legally unenforceable assertion, and consequently, a misstatement."*

The Complainants argue that the Provider is not entitled to issue a warning that it will take possession of someone's home on a notice unless it has a legally registered interest in the property.

The Complainants submit that in the Provider's letters to them dated **7 February 2017, 4 April 2017** and **27 April 2017**, it did not provide any clarification as to whether or not it had submitted the **Form 56 Deed of Transfer** to the PRAI.

The Complainants state that:

*"It was only upon [the First Complainant's] own examination of documentation at the Bank's premises during summer 2018 that the Form 56 was introduced, and [we] finally became satisfied that the transfer had been effected accordingly."*

The Complainants state that the Provider has:

*"failed to apply due care and diligence ... nor was all relevant information disclosed in a timely manner. The issue was not handled speedily in spite of responses falling within the 20 working day remit ... The Bank's information has therefore, in our opinion, not been clear, accurate, up to date and on a timely basis"*.

The Complainants submit that the Provider failed to comply with the following provisions of the **Consumer Protection Code 2012 (the "CPC 2012")** for the following reasons;

- a) **Provision 2.2**, on the basis that the warning was made by the Provider without legal foundation;
- b) **Provision 2.6**, on the basis that the Provider never informed the Complainants that it had not taken any steps to register its interest in their property;
- c) **Provision 2.8**, on the basis that six months after notice of the proposed transfer of the mortgage to the Provider, no attempt had been made by the Provider "to instigate matters with the Land Registry";

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- d) **Provision 3.11**, as the Provider failed to register its interest in the property until at least five months after the transfer;
- e) **Provision 4.1**, on the basis that the information provided by the Provider has been unclear, inaccurate, and not up to date;
- f) **Provision 4.2**, on the basis that information has not been provided by the Provider on a timely basis; and
- g) **Provision 9.19**, on the basis that the letter containing the warning was not an advertisement within the meaning of the **CPC 2012**.

The Complainants state that they:

*“concede that a number of our suspicions relating to breaches of the 2012 CPC Code (2.9, 4.12, 4.13i, 4.13k, 4.13l, 4.21, 4.22, 5.1, 5.3, 5.6a and b, 5.8, and 10.9c) have been allayed by [the Provider’s] response”.*

#### **The Provider’s Case**

The Provider states that by **Mortgage Sale Agreement** dated **17 August 2016**, the named third party Provider agreed to unconditionally sell, transfer, assign and convey a portfolio of loans to the respondent Provider, including all right, title and interest in the associated security including life policies. It details that the sale closed on **18 November 2016** and the transfer was completed on **21 November 2016**.

The Provider states that it issued a “Welcome” letter to the Complainants on **24 November 2016**, confirming that their mortgage had transferred to the Provider and advising them of their new mortgage account number. It states that this letter contained information including legal notices which are mandatory notices the Provider is obliged to inform consumers of pursuant to the **Consumer Protection Code 2012**. It states that the provisions of the CPC 2012 are binding on the Provider and must be complied with at all times.

The Provider states that it was obliged to correspond with the Complainants and provide the new mortgage account number together with contact information and mortgage information details for the Provider. It states that the warning in its letter of **24 November 2016** that stated “*If you do not keep up your repayments you may lose your home*” is a mandatory legal notice that it is obliged to insert in all mortgage information correspondence issued to a consumer as set out in the **Consumer Credit Act 1995**.

The Provider rejects the Complainants’ contention that its letter of **24 November 2016** was “*without proper and full legal foundation*” on the basis that its charge had not been registered on the folio relevant to the property to which their mortgage loan account was attached. The Provider states that a **Form 56 Deed of Transfer** was completed and executed on closing on **18 November 2016** between the vendors and the Provider, and once the mortgage was transferred to the Provider on **21 November 2016**, the **Mortgage and Charge**

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which was registered to the named third party Provider was included in the **Schedule** to the **Form 56** which was sent by the Provider to the PRAI for the completion of registration.

The Provider states that it was reliant on the PRAI to complete the process for the registration of the charge and it cannot be held accountable for due process within the PRAI. The Provider states that the new ownership of the charge arising from the transfer was registered on **16 August 2017**.

The Provider states that it acted in accordance with **General Requirement 2.8** of the CPC 2012. It states that it issued three Final Response letters to the Complainants' complaint on **7 February 2017, 4 April 2017** and **27 April 2017**.

The Provider submits that it acted in accordance with **General Requirements 4.1 and 4.2** of the CPC 2012 and is satisfied that its *"Welcome"* letter was in plain English and denies that the method of presentation disguised, diminished or obscured important information.

The Provider has submitted that **Provision 9.19** is not relevant to this complaint as the Provider did not advertise the residential mortgage which was drawn down with the first Provider in **2004**.

The Provider submits that the Complainants have not adduced evidence to suggest that the Provider has been negligent or that it has failed to act with due skill, care and diligence, or has acted against the best interests of the Complainants.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider wrongly issued a notice to the Complainants which stated *"If you do not keep up your repayments you may lose your home"*.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 28 May 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.

While I note that the Mortgage Sale Agreement has not been submitted in evidence, I accept the Provider's submission that it is not in a position to furnish it, as it is commercially sensitive.

I have considered the documentation that has been furnished in evidence, including the **Form 56 Deed of Transfer** dated **18 November 2016** and the copy **Land Registry Folio** relating to the property and I accept that the Provider had a legitimate interest in the secured property at the time the "Welcome" letter was sent. I accept that the internal processes of the PRAI with regard to the registration of charges over property, are not within the Provider's control. It is clear to me from the evidence that the registration of the charge was a process that was being undertaken. Whether the Provider had registered the charge at the time the "Welcome" letter was sent is immaterial, in circumstances where it was the party entitled to be registered as owner of the charge from **21 November 2016**, and was entitled to take steps to take possession of the Complainants' home if they failed to make repayments; it was a matter for the Provider as to whether to register its security on the Folio. I note that it is confirmed on **page 5** of the **Folio** that the Provider's charge over the property was duly registered on **16 August 2017**.

**The General Principles of the CPC 2012** detail as follows;

*"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:*

...

- 2.2 *acts with due skill, care and diligence in the best interests of its customers.*
- 2.6 *makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer"*

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**Provision 4.1 of the CPC 2012** details as follows;

*“A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.”*

**Provision 4.2 of the CPC 2012** details as follows;

*“A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following:*

- a) the urgency of the situation; and*
- b) the time necessary for the consumer to absorb and react to the information provided.”*

The evidence before me does not support the Complainants’ submission that the Provider has failed to act with due skill, care and diligence. I cannot accept the Complainants’ submission that the Provider displayed *“a lack of diligence”* by including the notice which is the subject of this complaint, in its letter of **24 November 2016**, in circumstances where the Complainants’ mortgage had been acquired by the Provider at the time the letter was issued.

Nor do I accept the Complainants’ submission that there *“was no disclosure that the mortgage did, in fact, not legally exist”* when the letter was sent. For the reasons outlined above I accept that the Provider was the owner of the Complainants’ mortgage and held the charge over the property at the time the *“Welcome”* letter was issued.

It appears that a complaint was raised on **9 January 2017** by the Complainants. A response was issued to the Complainants within a number of days in compliance with the Provider’s obligations in this regard. A first Final Response letter was issued in **February 2017** and second Final Response letter was issued in **April 2017**, following ongoing correspondence between the Complainants and the Provider. Having examined carefully the correspondence following receipt of the Complainants’ complaint, I accept that the Provider complied with its complaint handling obligations.

I accept that the *“Welcome”* letter contained correct *“clear, accurate and up to date”* information and accordingly the Provider was not in breach of **Provisions 4.1 or 4.2** of the **CPC 2012**. As detailed above, the Provider was the holder of the charge from **November 2016** and was entitled to take steps to take possession of the Complainants’ home if they failed to make repayments. The fact that Provider did not inform the Complainants that the charge was not yet registered does not amount to a breach of **Provision 2.6 of the CPC 2012**.

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**Provision 9.19 of the CPC 2012** provides as follows;

*“A regulated entity must ensure that an advertisement for a residential mortgage contains the following warning statement:*

***Warning: If you do not keep up your repayments you may lose your home.”***

The Provider has also referred to **Section 128 of the Consumer Credit Act, 1995** which details as follows;

*“Warning on 128.—(1) A loss of home.mortgage agent shall ensure that—*

- (a) an information document,*
- (b) an application form for a housing loan, or*
- (c) any document approving a housing loan,*

*shall include the following notice:*

***“WARNING***

***YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT.”***

The

Provider has submitted that **Provision 9.19 of the CPC 2012** is not relevant to the complaint as the Provider did not advertise the residential mortgage which was drawn down with the first Provider in **2004**. Therefore the Provider’s rationale for including the notice set out in **Provision 9.19** in the “Welcome” letter to the Complainants is unclear to me in circumstances where the Provider has itself acknowledged that that the “Welcome” letter was not an advertisement within the meaning of the **CPC 2012**. It is my view that the “Welcome” letter should have included the notice in the form specified in **Section 128** of the **Consumer Credit Act 1995**.

While I accept that the Provider did not adhere to the specific wording prescribed by regulation, I am of the view that the Complainants have not suffered any detriment because of this minor error on the Provider’s part.

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The error in terms of the form of wording used was as follows:

*“Warning: if you do not keep up your repayments you may lose your home”;*

was used in place of:

*“Warning: your home is at risk if you do not keep up payments on a mortgage or any other loan secured on it”,*

While the slight variation in the wording is unfortunate, I believe it is so inconsequential that it should have had little or no effect on the Complainants.

For the reasons outlined above, I do not uphold this 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**

19 June 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,

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**(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.**

