An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0278
Sector:	Banking
Product / Service:	Loans
Conduct(s) complained of:	Mis-selling (banking) Delayed or inadequate communication Dissatisfaction with customer service
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants purchased an investment property in the UK with the assistance of a Sterling loan from a financial services provider. The relationship manager with whom the Complainants dealt with then moved to the Provider, against which this complaint is made. The Complainants maintain that the relationship manager approached them to refinance their Sterling loan with a Euro loan and use a forward foreign exchange contract to mitigate the risk of currency fluctuations. The Complainants believe that these facilities were mis-sold to them and that the Provider failed to advise them to obtain independent financial advice prior to entering the transactions.

Investigation of the Complaint

A Complaint Form signed by the Complainants on **27 September 2013** was received by the then Financial Services Ombudsman on **1 October 2013**. In light of the time limits contained in the ***Central Bank and Financial Services Authority of Ireland Act 2004*** (the **2004 Act**) for the making of complaints to the Financial Services Ombudsman (**FSO**) and the definition of *consumer*, further clarity was sought from the Complainants regarding their complaint on **11 December 2013**. By letter dated **21 January 2014**, the Complainants were advised that the FSO was declining to investigate their complaint as they did not meet the definition of *consumer* as defined in the 2004 Act.

Following the introduction of the ***Financial Services and Pensions Ombudsman Act 2017*** (the **Act**) and the establishment of the Office of the Financial Services and Pensions Ombudsman, the Complainants' representative wrote to this Office on **27 November 2017** requesting that the complaint be reviewed with a view to it being investigated.

The Provider was given an opportunity to address the Complainants' request and, after a series on submissions on the issue, this Office informed the partied by letters dated **8 January 2020** that, after careful consideration, the complaint, as originally submitted, would proceed to formal investigation.

The Complainants' Case

The Complainants explain that they own an investment property in the UK which they originally purchased with the assistance of a Sterling loan from a third party financial services provider (the **"Third Party Provider" or "TPP"**). In **2007**, the Complainants' relationship manager within TPP moved to the Provider and approached the Complainants to transfer their loan to the Provider.

In late **2007**, the Complainants state the Sterling interest rate was high when compared with Euro rates. The Provider suggested that the Complainants considered converting their loan to Euro to benefit from lower exchange rates. At the time the loan was approved, the Complainants submit the Sterling/Euro exchange rate was £0.67 and the Provider approved a loan of €3.6 million to pay off the TPP loan of £2.409 million. When the Complainants made their complaint to this Office, they stated that their investment property was rented and the rent was received in Sterling. The rent was used to service and repay the underlying borrowings.

On **21 December 2007**, the Complainants explain that they entered into a Forward Foreign Exchange Contract (**FFEC**) with the Provider for the loan amount at a rate of £0.72. At this exchange rate, the Euro amount required to repay the TTP loan was circa €3.35 million. When the loan was drawn down in **2008**, the Provider advanced the sum of €3.6 million to the Complainants although only €3.35 million was required to refinance the TPP loan.

The Complainants maintain that *"[a]t no time did [the Provider] explain to us the risks involved in entering into what was a high risk and inappropriate transaction as our income was denominated in Sterling and the asset securing the loan was located in the UK."* The Complainants *"… feel strongly that the [Provider] should have explained the risks involved and advised us to seek appropriate financial advice before entering into the transaction."*

The Complainants submit that as a result of the strengthening of the Sterling against the Euro and the drop in the value of property, they found themselves in a position that they were unable to repay their loan *"… in a large part due to the conversion of the Sterling loan to Euro."*

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In resolution of this complaint, the Complainants want the Provider *"… to compensate us fully for the loss incurred by the transfer of the loan to Euro with the amount involved to be applied in reduction of our loan."*

The Provider's Case

Approach from the Provider's Representative

The Provider rejects the submission that one of its representatives approached the Complainants to switch their loan to the Provider. The Complainants and their advisers contacted the Provider with a view to refinancing their existing Sterling loan facility held with the TPP to a Euro denominated loan. The Provider submits that the Complainants have not furnished any documentary evidence to support their assertion.

The Provider states the following facts demonstrate that it was approached first in relation to refinancing the TPP facility. Referring to an email dated **10 August 2007**, the Provider states this confirms that a third party contacted the Provider to discuss the proposed facility. This email also confirms that its representative spoke to the First Complainant. The email further confirms that its representative was not involved in the UK property loan deal and that he had never met the Complainants. The Provider explains that its representative states that the Complainants' third party contacted him in relation to the Complainants wishing to refinance their Sterling loan and the Provider's request for further details in order to progress the loan application. Following this, the Provider issued correspondence to the Complainants on **21 August 2007** which requested further information in order to progress their application.

A statement from the Provider's representative dated **10 June 2011** of his dealings with the Complainants is also relied upon by the Provider. The Provider observes that its representative categorically states that his discussion with the Complainants did not involve him advising the Complainants to borrow in Euro.

On **27 September 2007**, a meeting took place with the Provider's representative and the Complainants. This meeting took place at 10:30am in a Dublin hotel. The Provider submits it is noteworthy that this meeting took place after the Letter of Offer issued to the Complainants. The Complainants had already decided to apply for the refinance of their Sterling loan.

The Provider also refers to minutes of a telephone conversation with the Complainants' financial adviser on **14 July 2011**. The financial adviser stated *"that their … had dealings and a good relationship with the Bank's Representative and that he introduced them ('his sisters') to him."*

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The Complainants' Brother and the Property Consultant

The Provider submits that the passage of time leading to the natural turnover of staff significantly inhibits its ability to investigate this matter in full.

The Provider's representative received verbal authority to discuss the prospect of the refinance of the existing Sterling loan facility with it. This is evident in the email correspondence to the Complainants' third party where the Provider's representative stated: *"Spoke to [the First Complainant] this morning so I expect she rang you after speaking to me."* The email further notes: *"I know very little about [the Complainants], the properties, leases, rent etc …"*

In terms of the authority of the Complainants' third party, referring to the same email, the Provider points out that its representative stated: *"I spoke to … briefly last week from [abroad], so as you can imagine, it wasn't a detailed discussion. He texted me that [the Complainants] wanted to refinance their £ loans with a [TPP] by way of a loan in euros and that the loans amounts were £2,375,367 & £2,394,554."* The Provider submits this shows that a detailed discussion did not take place with respect to the Complainants' affairs with a third party.

The Risks and the Need for Independent Financial Advice

The Provider submits that the Complainants and their advisors approached it of their own free will in respect of converting their Sterling loan to Euro. The Provider states that the option to avail of legal advice was always open to the Complainants and the fact they did not choose to obtain legal advice cannot be borne by the Provider.

Referring to the Complainants' Statement of Affairs (**SoA**) dated **25 August 2007**, the Provider observes these set out significant holdings and joint liabilities in respect of investment property. The magnitude of these investments must be reasonably inferred as that of a professional investor taking part in a substantial commercial refinancing of existing liabilities. The First Complainant also held a share portfolio with an investment firm valued at €517,000.00 in **August 2007**.

The Provider submits that in light of the above and a series of emails from the First Complainant, the Complainants were experienced in dealing with commercial transactions. The Provider referring to a statement of its representative asserts that valuations in respect of the property and correspondence between the First Complainant and her solicitors demonstrates close involvement of a third party and his role as their financial adviser.

Nature of the Relationship between the Parties

The Provider explains that its relationship with the Complainants is based on contract.

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This relationship arises from the fact that the Complainants signed and accepted the Offer Letter and the workings of the loan account are based on the terms and conditions of the Offer Letter which were agreed between the Provider and the Complainants. The Offer Letter was signed by the First and Second Complainants on **9 October 2007** and **12 October 2007**.

The Provider submits that the Offer Letter is very clear in relation to the pertinent terms of the agreement with the Complainants and it was the Complainants' prerogative as to whether they wished to accept the terms of the Offer Letter.

The Offer Letter was a business banking offer which confirmed that the purpose of the loan was an investment for the purpose of a commercial investment property. In **October 2011**, the Provider issued correspondence to the Complainants as they were in default of the repayment obligations contained in the Offer Letter.

The Provider states it is satisfied that it fully adhered to the terms and conditions of the Offer Letter. It states that if the Complainants had any doubt about the contents of the Offer Letter and the implications of the letter, they should have raised these at the time. Furthermore, the Complainants had the option to avail of independent legal advice, however, the First Complainant signed and accepted the Offer Letter on **9 October 2007** and the Second Complainant signed and accepted the Offer Letter on **12 October 2007**. The Provider submits it is important to note that it was always open to the Complainants to accept or reject the Offer Letter. The Provider also relies on the terms and conditions of the FFEC and refers to clause 10.

The Forward Foreign Exchange Contract (FFEC)

The Provider remarks that it is not evident what detriment the Complainants could have suffered by entering into the FFEC. The duration of this contract was very short. The Provider explains that the FFEC eliminated the risk of exchange rate fluctuations by allowing the Complainants to lock in the exchange rate on **21 December 2007** for a transaction that would take place in the future. The Provider explains that foreign exchange rates are volatile, unpredictable and can go in either direction. By entering into the FFEC, the Complainants were guaranteed an exchange rate of £0.72. This provided protection against adverse movements in the Sterling exchange rate.

When the Complainants drew down the loan on **6 March 2008**, the exchange rate was £0.76 but as they had entered into the FFEC on **21 December 2007**, the rate of £0.72 was applied at drawdown.

The Provider submits that the Complainants made their own decision to refinance the Sterling loan to a Euro denomination with the Provider. The terms and conditions of the FFEC clearly state that the Complainants made their own independent decision to enter into this FX contract and that they were capable of assessing the merits and demerits, and understand the risks inherent with FX contracts.

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The Provider advises that it did not act as a fiduciary for or an advisor in respect of the Complainants.

The Sum Advanced

In response to the Complainants' submission that €3.6 million was advanced by the Provider although only €3.35 million was required to refinance, the Provider refers to the Credit Application and the Offer Letter.

The Provider has also set out a list of dispersals from the loan account as follows:

6 March 2008	€3,325,537.57: clearance of TPP loan
10 March 2008	€695.47: draft to third party in relation to valuation of six residential properties required as security for the proposed transfer of an additional €2 million in property related loans domiciled with the TPP
10 March 2008	€11,404.25: draft to third party – Provider's UK solicitors
18 March 2008	€154,418.93: transferred to account held in the joint names of the First Complainant and a third party
8 April 2008	€37,740.00: transferred to account held in the joint names of the First Complainant and a third party
13 May 2008	€108,000.00: transferred to a third party on behalf of the Second Complainant

The Consumer Protection Code

The Provider states that it complied with the relevant provisions of the ***Consumer Protection Code 2006*** (the **Code**). In terms of clause 24 and clause 30 of the Code, the Provider states that in correspondence issued by this Office in **January 2014**, this Office concluded that the Complainants did not meet the definition of *consumer*. Therefore, clauses 24 and 30 are not applicable.

Concluding Submission

The Provider rejects the Complainants' allegations that they were mis-sold the Euro domiciled investment loan. The Provider contends that the relationship between the parties is based on contract and the workings of the loan account is based on the terms and conditions of Offer Letter.

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The Provider submits that the Complainants and their advisors approached the Provider of their own free will in respect of converting their Sterling loan to Euro and the Provider merely acted on the Complainants' instructions. The Provider rejects the Complainants' assertion that its representative approached them with a view to transferring their loan to the Provider and rejects any implication that this request was made on the advice of the Provider.

The Provider refers to additional significant lending to the Complainants in **2008** from its mortgage division. The Provider highlights that the Complainants were advised to seek independent legal advice prior to the execution of the Mortgage Loan Offer Letter. The Complainants wrote to the Provider declining to seek such legal advice.

The Complaints for Adjudication

The complaints are that the Provider:

1. Mis-sold the Euro domiciled investment loan and FFEC;

2. Did not advise the Complainants to obtain independent financial and/or legal advice prior to entering the transaction; and

3. Advanced €3.6 million to the Complainants when only €3.35 million was required to refinance the Sterling loan.

Decision

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

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

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

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

Transaction Correspondence

In an email from the Provider's Business Manager to an individual who appears to be the Complainants' property consultant dated **14 August 2007**, it is stated as follows:

> *"Thanks for your call. Spoke to [the First Complainant] this morning so I expect she rang you after talking to me. I wasn't in the [UK] loan deal in [the TPP] which was handled by [TPP agent]. In fact, I have never met [the Complainants' first brother's] sisters.*
>
> *I spoke to [the Complainants' first brother] briefly last week from [abroad] so, as you can imagine, it wasn't a detailed discussion. He texted me that [the Complainants] wanted to refinance their £ loans with [TPP] by way of a [Provider] loan in euros and that the loan amounts were £2,375,367 & £2,394,554.*
> *I know very little about [the Complainants], the properties, leases, rent, etc. What I really need is the following:-*
>
> - *Background details on [the Complainants] including statements of net worth.*
> - *Property details. Copy of most recent report and valuation. …*
> - *Term required on loan. Interest-only or annuity, etc*
>
> *If you can get this stuff to me asap that would be great."*

By letter dated **21 August 2007**, the Provider wrote to the Complainants in the following terms:

> *"Many thanks for your recent application to [the Provider]. With reference to your conversation with [the Provider's Business Manager] yesterday, I will require the following information in order to further process your application.*
>
> - *An update on the value of and the rental income on the following properties: …*
> - *Statements of Net Worth to be submitted by [the Complainants] …*
> - *…*

/Cont'd…

Once I am in receipt of the above information I will be able to progress your application. If you have any queries, please don't hesitate to contact me …"

The First Complainant appears to have responded to this letter by email dated **27 August 2007**. I note that all names except the Complainants' have been redacted.

Credit Application

A credit application was created on **15 August 2007** in respect of the refinance. The Complainants are described as *Property Investors* on the credit application. The *Brief Summary of Proposal* states:

"E3.6m 3 Year Int Only Facility to refinance [TPP] loan on [UK property]

E2.4m 20 Year Facility to re-finance [TPP] (First 3 years interest only)"

The *Borrower/Relationship Background* describes the Complainants as follows:

"…

- *[The First Complainant] (56) is a retired [profession]. She is married with 3 children and lives on a [redacted] acre farm …. [The Second Complainant] (57) is single and is a self-employed [profession] living in a house on [redacted]acres ….*

- *Following our refinancing of their brother's … facilities, [the Complainants] are also looking to refinance their facilities …."*

At section 6, *Purpose*, the credit application states:

"[The Complainants] are looking to move their banking relationship … to [the Provider], as their brother … has done …"

I note that the credit application contained a detailed consideration of the Complainants' assets, financial position, repayment capacity, a security analysis, and a risk assessment.

The *Recommendation* made on foot of this application states:

"This is a good opportunity to further strengthen the [Complainants] connection. Overall LTV is 68% for the the (sic) 1st 3 years reducing to 22% when [UK] is sold. The [Complainants] have sufficient liquid assets to meet any interest shortfall.

While we acknowledge the currency mismatch on the [UK] loan we feel we have mitigated this risk by charging a higher margin (1.5%) coupled with an LTV of no higher than 70% on this loan."

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Statements of Affairs dated **25 August 2007** also appear to have accompanied the credit application.

Offer Letter

By way of Offer Letter dated **20 September 2007**, the Provider wrote to the Complainants in the following terms:

> *"I am pleased to advise you that, subject to the terms and conditions outlined below and in the attached Appendix dated the 20th September 2007 which is deemed to*
>
> *form part of this Offer Letter, [the Provider] will make available to [the Complainants] the following facilities:*
>
> ***Amount & Type of Facility***
>
> *1. €3,600,000 … by way of Loan.*
>
> ***Purpose***
>
> *1. To refinance [TPP] loan on [UK property]*
>
> *…*
>
> ***Acceptance***
>
> *In order to signify your acceptance of the foregoing facilities on the terms and conditions outlined above and in the attached Appendix, the duplicate letter should be signed by you and returned to this office …*
>
> *We shall instruct our Solicitors to proceed with the security arrangements outlined above and advise you as to the completion of the remaining drawdown requirements. In this connection, please let us know the name and address of the Solicitor you will be instructing.*
>
> *…"*

The Offer Letter also contained information under the following headings: *Interest Rate*, *Terms of Facilities and Repayment*, *Required Security*, *Legal and Other Fees*, *Conditions Precedent to Drawdown* and *Covenants*.

The Offer Letter was signed by the First and Second Complainants on **9 October 2007** and **12 October 2007** respectively.

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The *Form of Acceptance* states:

> *"We have read and agree to be bound by and fully accept all of the terms and conditions contained in this Offer Letter and in the Appendix to this Offer Letter.*
> *…*
>
> ***Warning, if you do not meet the loan repayments of your loan, your account will go into arrears. This may affect your credit rating."***

The FFEC

The Provider sent the following FFEC confirmation to the Complainants dated **21 December 2007**:

> *"The purpose of this letter is to confirm the terms of the foreign exchange forward transaction entered into between [the Provider] and [the Complainants] (the "Counterparty") on the Trade Date specified below (the "FX Contract").*
>
> *1.*
> *(a) General Terms:*
> *…*
>
> *2. This ISDA 1998 FX and Currency Option Definitions and the 2000 ISDA Definitions are incorporated into this confirmation.*
> *3. …*
> *4. This FX Contract is subject to [the Provider's] Treasury Terms and Conditions.*
>
> *We deem this Transaction suitable for you based on the information that we received from you.*
>
> *Please confirm that the above details are correct by signing this confirmation in accordance with your Account Mandate and returning it to the Bank …*
>
> ***Any errors in this confirmation must be raised within 10 business days of the date of this letter** …"*

Global Market Terms and Conditions

The terms and conditions accompanying the FFEC state as follows:

> *"**1 Applicability***
> *…*
>
> *1.2 These Terms and Conditions constitute a contractual agreement having legal effect which you accept …*

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1.3 Please ensure that you read, understand and accept the Terms and Conditions. If you do not accept them, you should speak to your branch/relationship manager …

…

10 Foreign Exchange (FX) Contracts

…

10.7 Customer's Own Risk

You acknowledge that all FX Contracts are entirely at your own risk. We shall not be liable for any losses you incur, of whatever nature, which arise from the FX Contracts. You represent and warrant to us and acknowledge to and agree with us that on each date on which you enter into or vary an FX Contract:

(a) you have made your own independent decision to enter into or vary the FX Contract and as to whether the FX Contract is appropriate or proper for you based upon your own judgement and upon such advice from such advisers as you have deemed necessary.

You are not relying on any communication (written or oral) from us as investment advice or as a recommendation to enter into or vary an FX Contract. Further you understand that information and explanations relating to the terms and conditions of an FX Contract shall not be considered investment advice or a recommendation to enter into that FX Contract. No communication (written or oral) received from us shall be deemed to be an assertion as to the expected results of that FX Contract.

(b) you are capable of assessing the merits and negative features of and (on your own behalf or through independent professional advice) understand and accept the risks inherent in FX Contracts.

You are capable of assuming, and will assume, the risks of the FX Contract; and

(c) we are not acting as a fiduciary for or an adviser to you in respect of the FX Contracts and we are acting on our own behalf."

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Post Transaction Correspondence

The First Complainant appears to have written to the Provider on **28 January 2008** (however, the name of the recipient has been redacted), advising:

> *"I have tried yours and [redacted] and [redacted] telephones this morning but you must all be at a meeting. I just remembered that we have not actually received the offer letters for [location redacted] and I have spoken about it and they were to be the same terms as the other [location] properties, no more than 1.25% over the ECB rate. Of course if you can give a better rate, we will be delighted.*
>
> *If you email the offer letter to each of us, it would be quicker for us to sign and return them. They will not need to be countersigned as they are separate loans.*
>
> *I know [redacted] is hoping for all the loans to be transferred over on the same date. Perhaps you will get back to me."*

On **18 April 2008**, the First Complainant appears to have written to the Provider with a deposit rate query:

> *"Can you let me know what your best deposit rate is for sterling, say about £200,000+."*

The Complainants' representative wrote to the Provider on **30 June 2011** outlining their position as follows:

> *"In relation to the conversion of the Sterling denominated borrowing to Euro the background to this it that in August 2007 [the Complainant] met with [redacted] in [Dublin hotel]. The purpose of the meeting was to discuss the borrowings that [the Complainants] had with [redacted] and to see if [the Provider] could offer more competitive terms. At that meeting [redacted] suggested that the Sterling loan be transferred into Euro as at that time there was a significant interest rate differential in favour of sterling."*

A further letter was sent to the Provider on **3 August 2011**:

> *"On checking her records in more detail [the First Complainant] now accepts that the meeting with [the Provider's Business Manager] did in fact take place on 27th September …*
>
> *[The First Complainant] did have a telephone conversation with [redacted] in mid August following which it was agree to progress an application for the transfer of the loans from [the TPP] to [the Provider]. Following that telephone conversation a letter dated 21st August 2007, signed by [redacted] was received (by fax) outlining what was required to progress the application. We note this letter was copied to … brother of [the Complainants], who introduced [redacted] to [the First Complainant].*

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Other than that [the Complainants' first brother] had no involvement in the refinancing application."

The Provider issued a Final Response letter dated **5 November 2013** which advised the Complainants that:

"Our records confirm that businessman [the Complainants' first brother] contacted the Bank in early August 2007, to advise that the Borrowers wished to refinance their existing Sterling Loan facility, domiciled with [the Provider], to a Euro denominated loan with [the Provider].

Mr. … , a property consultant with [Partnership name] subsequently contacted the Bank of the 10th August 2007 on behalf of the Borrowers to discuss the proposed facility. Email correspondence of the same day was sent to [redacted] advising that the following information was required to progress the loan application:
…"

Meeting in May 2011

The Complainants, their second brother and their financial adviser met with the Provider on **31 May 2011**.

I note the following passage from the Provider's memo of the meeting:

*"[The Complainants' second brother] then interjected and stated that the biggest problem here was not values of assets and liabilities but the fact that [the Provider's Business Manager] had advised on taking the loan in euro***. He stated that it was basic lending practice that the currency of the loan should be in the currency denomination of the asset. He believed that the customers did not receive sufficient advice from the Bank in relation to the implications of this transaction. [The Provider's agent] stated that this was not how he understood the situation to have been and that as he understood it, the customers had approached the Bank for a loan. [The First Complainant] then stated that she met with [the Provider's business manager] in [a Dublin hotel] for coffee and that he said 'we'll do it and that will no problem'**. She said she had no idea of the implications of the currency risk and that this should have been explained to her. [The Provider's agent] asked her was there anybody advising her or did she have other family members who had advised her and she said she didn't. [The Provider's agent] asked her why she had purchased the property and she said that she had identified it as a good investment opportunity. On further enquiry of [the First Complainant] as to why euro rate was chosen she assumed it was to do with lower interest rates in euro. …*

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Note:

**** [The Complainants' second brother] was never present nor had any involvement in negotiation of sterling facility. He was making forceful accusations in circumstances he was not directly involved.*

****

[The First Complainant] did not make any specific allegation that Bank Relationship Manager had encouraged her to borrow in euro. Her issue was more around point that bank did not advise her to seek independent legal advice."

Statement of Business Manager

A statement of the Provider's business manager who was previously employed by the TTP dated **10 June 2011** has been submitted. This states:

"[The Complainants] were clients of mine in [TPP] in respect of a £2.4m loan which [the TPP] advanced to purchase [the UK property]. Their [first] brother … was also a client of mine in [the TPP] in respect of his wholesale distribution [type of] business … and also a commercial investment property …

When I moved to [the Provider] in May 2006, [the Complainant's first brother] (who was a longstanding [Provider] customer …) asked me to refinance his [TPP] commercial investment loan …

At the time [the Complainants' first bother's business] imported much of its stock of [product] from the UK and [the Complainants' first brother] … was very conversant in dealing with €/£ exchanges and were in regular contact with [the Provider] on commercial FX trades. …

[The Complainants' first brother] introduced his two sisters to me while I was in [the TPP] and they were comfortable about borrowing in euros on the [UK] property. … While I don't recall saying to the [Complainants] that they should obtain independent financial advice on the wisdom of borrowing in euros to finance a sterling asset, I was satisfied that their brother was advising them in this regard. They spoke of [their first brother] as a successful businessman and while they were not experienced property people they relied on his expertise both in terms of buying a UK property, where and how to finance it and any inherent currency risk. I was fully satisfied at the time that [the Complainants'] brother was 'holding their cards' in all of their property investments … I recall that the attraction of the [UK] property to the [Complainants] was the Government tenant, the (at-the-time) strong UK property market and the fact that [the Complainants'] brother already owned property there and could show them the ropes. They instructed the same property advisors for [UK] that [their brother] had instructed for [other UK city].

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As stated earlier, the €2.85m loan offer to [the Complainants' first brother] was issued on August 10th 2007. The €3.6m loan offer to [the Complainants] was issued on September 20th 2007. It is no co-incidence that two euro loan offers were issued within five weeks of each other to refinance two sterling loans.

At no time did I ever advise, suggest or propose that [the Complainants] should finance the UK property in euro. I am not now nor was I ever an FX expert and if I felt that a client was unaware of the risk inherent in a currency/asset mismatch I would have suggested that they seek independent financial advice. In this instance, I was fully satisfied that [the Complainants' first brother] was an experienced and trusted advisor to his two sisters. I recall meeting both [Complainants] in [a Dublin hotel] but can categorically state that our discussion did not involve me advising them to borrow in euros. …"

The First and Second Complaints

While the Complainants do not appear to have been professional investors in the strict sense of the words, they were nonetheless very wealthy individuals with a number of investment properties, and in the context of the Second Complainant, she had a reasonably large investment portfolio with an investment firm. Furthermore, the *Post Transaction Correspondence* outlined above demonstrates that the Complainants were aware of and were involved in their financial affairs. It also appears, in particular from the email dated **18 April 2008**, that the First Complainant had a familiarity with exchange rates or dealings in foreign currencies.

In terms of the Euro loan, the evidence suggests that the Complainants and/or someone on behalf of the Complainants (the Complainants' first brother or their property consultant) approached the Provider with a view to refinancing the Sterling loan. I have not been provided with any evidence to show that the Provider or any of its agents recommended or advised the Complainants to re-finance. Further to this, I note it is stated by the Provider's business manager in his statement that the Complainants' first brother refinanced a Sterling loan with the Provider a number of weeks before the Complainants.

I am not satisfied there was anything about the Euro loan that rendered it unsuitable for the Complainants or that the Provider misrepresented any aspect of the loan to the Complainants. The Complainants had engaged in borrowing activities prior to this loan and in my view they would have been or it would be reasonable for each of them to have been aware of the risks involved with borrowing money.

In terms of the FFEC, I have not been provided with any evidence to suggest that the Provider recommended or advised the Complainants to enter into this transaction. Further to this, exchange rates can fluctuate and are, at times, quite volatile. To protect against movements in exchange rates, people enter into contacts to fix the exchange rate to help eliminate and/or mitigate exchange rate risk.

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The evidence suggests that the Complainants had some form of advice around the time they entered into the loan agreement and FFEC. Based on this and the Provider's assessment of the Complainants' circumstances, I am not satisfied that the Provider was obliged to advise the Complainants to seek independent legal or financial advice regarding the Euro loan or the FFEC. The documentation outlined above, in particular clause 10.7 of the *Global Market Terms and Conditions*, makes clear that there were risks associated with foreign exchange transactions, and that the Provider was not holding itself out as advising the Complainants regarding the transaction and that no reliance should be placed communications from the Provider. On reading the provisions of the *Global Market Terms and Conditions*, I am satisfied that the Complainants should or ought reasonably to have been aware of the need to obtain independent financial or legal advice regarding the FFEC. The fact they chose not to do so is not the responsibility of the Provider.

Therefore, taking the foregoing into consideration, I am not satisfied that the Euro loan or FFEC were mis-sold to the Complainants nor am I satisfied that there was any obligation on the Provider to advise the Complainants to obtain independent financial or legal regarding either of the transactions.

The Third Complaint

The third complaint is that the Provider advanced €3.6 million to the Complainants when only €3.35 million was required to refinance the Sterling loan.

The loan offer letter states that the Provider was advancing the sum of €3.6 million to the Complainants. This was subsequently drawn down by the Complainants and the Provider has set out the manner in which the money was disbursed.

This has not been disputed by the Complainants. I note that approximately €3.325 million was used to discharge the Sterling loan. Of the remaining funds, around €190,000 was paid to the First Complainant and €108,000 was paid to a third party on behalf of the Second Complainant. The final €12,000 was used to pay valuation and legal fees.

While this aspect of the complaint asserts that more funds were advanced than were necessary, I note that the Complainants signed and accepted the loan offer letter which clearly stated the amount being advanced was €3.6 million. Further to this, there is no evidence to suggest that the Complainants were unhappy with the amount being advanced or that they believed it to be excessive or surplus to their requirements. I would also note that the Provider agreed to advance €3.6 million. This does not necessarily mean the Complainants were obliged to drawn down the full amount. It was open to the Complainants to drawn down no more than was necessary to discharge the Sterling loan. Further to this, the remaining funds, once the loan was discharged, were paid to the benefit of the Complainants.

Therefore, I do not accept that the Provider advanced a sum that was greater than was required.

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For the reasons set out in this Decision, 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

20 August 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.