



<u>Decision Ref:</u>	2020-0328
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Selling mortgage to t/p provider Arrears handling - Mortgage Arrears Resolution Process Level of contact or communications re. Arrears Failure to provide accurate account/balance information
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint relates to the Complainants' mortgage loan account.

The Complainants' Case

The Complainants entered into a mortgage loan agreement with the Provider in 2007. Subsequently, there was an arrangement whereby the mortgage was split with one part of the debt being warehoused. This resulted in the creation of a new account such that the overall debt was split over two separate accounts, namely the main mortgage account (account number ending 550), and the warehoused debt account (account number ending 369).

The Complainants' complaint is that the Provider transferred their loan to a third party without their consent. The Provider wrote to the Complainants on 30 November 2018 setting out to them that their loan, which had been classified as a non performing loan, had been sold as part of a group of mortgages to a third party as permitted in the terms and conditions of the loan. It was explained that this would result in the transfer of the Complainants' loan to a third party within the following six months and that the Provider was to continue servicing their loan until the transfer date.

The Complainants contend, according to the 'Code of Practice on the Transfer of Mortgages', that a loan secured by the mortgage of a residential property may not be transferred without the written consent of the borrower and that there are a number of obligations on the Provider when seeking such consent which the Provider has not complied with.

They contend that the Provider was obliged to provide a statement so that they could make an informed decision about the sale and that the statement must be set out in a particular manner.

Another element of complaint is that the correspondence which the Provider issued to the Complainants is unclear as to whether the whole or part of the loan was sold and was to be transferred to the third party. The Complainants contend that the November 2018 letter and other correspondence solely referenced the main mortgage account number ending 550. They contend that every year prior to the events which are the subject matter of the complaint, they were issued with two mortgage statements, one for the warehoused account and one for the main mortgage account which continued to be serviced. The Complainants contend that the Provider's communication in respect of the sale and transfer of the loan was unclear and inadequate as a notification because it did not specify whether it was the whole of the split loan being transferred or only part of the loan that is, excluding the warehoused loan amount.

The Complainants emphasise that the mortgage is on their family home and under no circumstances did they or do they agree to the transfer.

The Provider's Case

The Provider maintains that the Code of Practice on which the Complainants rely was voluntary and that it was not compelled to give effect to its provisions. Accordingly, the Provider disputes that it was required to seek the consent of the Complainants prior to the transfer of their mortgage.

The Provider further maintains that the various correspondence sent to the Complainants regarding the transfer to the third party, when considered in its entirety, rendered it clear that the entirety of the Complainants debt (that is, both the main mortgage account and the warehoused debt account) was being transferred.

The Complaint for Adjudication

There are two discrete aspects to the Complainants' complaint. In the first part, the Complainants take issue with the fact that the Provider purported to transfer their mortgage account(s) without their prior consent. Secondly, the Complainants contend that the correspondence issued to them by the Provider regarding the proposed transfer was unclear as to which accounts were affected.

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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 11 September 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.

With regard to the first aspect of their complaint, the Complainants invoke the "*Central Bank of Ireland Code of Practice on the Transfer of Mortgages*", the relevant passage of which the Complainants have quoted in their complaint form as the basis for their contention that their account could not be transferred to a third party without their consent. Since the making of the complaint to this office, the Code of Practice on the Transfer of Mortgages, which had been introduced in 1991, has been revoked by the Central Bank. Of greater significance is the fact that, prior to that revocation, the Code of Practice was originally issued as, and remained until its revocation, a voluntary code. The Provider in this case did not ascribe to the voluntary code. Accordingly, the Code of Practice on the Transfer of Mortgages did not have the benefit of force of law and it is not available to the Complainants and therefore had no application to the Complainants' situation.

The terms and conditions of the Complainants' account provide as follows:

1.15 [The Provider] may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions.

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The Mortgage Conditions, provide as follows:

6.7 [The Provider] may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person...

It is thus clear that the Provider was entitled to transfer the mortgage even in the absence of the consent of the Complainants, providing that no other relevant and applicable law or code was breached.

The transfer of mortgages is subject to the protections provided by the Consumer Protection (Regulation of Credit Servicing Firms) Act (which ensures that consumers whose loans are sold to another firm maintain the same regulatory protections they had prior to sale) and the Consumer Protection Code 2012, provision 3.11 of which provides as follows:

*Where a **regulated entity** intends to cease operating, merge with another, or to transfer all or part of its **regulated activities** to another **regulated entity** it must:*

- a) notify the **Central Bank** immediately;*
- b) provide at least two months notice to affected **consumers** to enable them to make alternative arrangements;*
- c) ensure all outstanding business is properly completed prior to the transfer, merger or cessation of operations or, alternatively in the case of a transfer or merger, inform the **consumer** of how continuity of service will be provided following the transfer or merger; and*
- d) in the case of a merger or transfer of **regulated activities**, inform the **consumer** that their details are being transferred to the other **regulated entity**, if that is the case.*

There is no evidence that the provisions of the Consumer Protection (Regulation of Credit Servicing Firms) Act or of the Consumer Protection Code 2012 have been breached by the Provider. In the circumstances, I accept that the Provider was entitled to transfer the mortgage without having first sought the consent of the Complainants.

The second aspect of the Complainants' complaint asserts that the correspondence which the Provider issued to the Complainants regarding the proposed transfer was unclear as to whether the whole or part of the loan had been sold and was to be transferred to the third party. The Complainants submit that the November 2018 letter and other correspondence solely referenced the main mortgage account number ending 550 (the main mortgage account) and omitted any reference to account number ending 369 (the warehoused debt account).

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The Provider's letter of 30 November 2018 advising the Complainants of the transfer of their mortgage refers, in its subject or reference line, solely to account number ending 550. The Provider maintains that it is implicit, nonetheless, that the entirety of the Complainants' liabilities (including the warehoused debt) were being assigned to the third party. In this regard, the Provider relies on various documents that make reference to the terms and conditions of the Complainants' 'Alternative Repayment Arrangement' (the split mortgage arrangement) as being 'unaffected' and as set to continue with the third party.

The First Complainant elaborated on the Complainants' position in an email to this office of 16 August 2019:

So on receipt of the letters from [the Provider] telling us of the intent to sell our mortgage I checked the account number they used as a reference and seen it was the one that we had been paying and not the warehoused amount. Whenever I received paperwork from them regarding the part mortgage sale of our family home I always checked the account numbers. Not one time did they mention or refer to the sale of the warehoused mortgage. Therefore I thought [the third party] only bought part of our mortgage as I was never told that they were purchasing the warehoused mortgage account.

Now [the Provider] have come back and said it was all the one mortgage, they may have known that but to a lay person like myself I did not, and I thought we would still have the warehoused amount which [the Provider] and they did not state otherwise. I knew something had happened when I logged onto my banking online and the two mortgage accounts had disappeared. I thought maybe it was written off, but we never had clear concise information telling us that both mortgages would be sold to [the third party], they only informed us that the active mortgage account was being sold as per their reference on all paperwork.

It seems to me that it may well have been obvious to the Provider that the entirety of the Complainants' debt was being transferred to the third party however, notwithstanding this, the First Complainant's submission, as quoted above, to the effect that it was not clear to her is compelling. The Provider had been in the practice of writing to the Complainants separately in respect of the separate accounts. It was thus reasonable for the Complainants to assume that correspondence which cited only one account related solely to that account.

It is clear to me that the Provider has caused confusion that could and should easily have been avoided.

The Complainants held a warehoused debt account with the Provider wherein the relevant component of the overall debt (circa €103K) was to be warehoused until mid-2036 at which point the full warehoused amount would fall due for payment. The First Complainant makes clear that the nature of the Provider's correspondence gave her to understand that the Complainants' warehoused debt account would remain with the Provider notwithstanding that the main mortgage account would be transferred.

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In fact, the warehoused debt account had also been transferred to the third party, but the Complainants nonetheless retain the benefit of the Alternative Repayment Arrangement and the third party will be obliged to give effect to the terms of that agreement. Additionally, the Provider would have been entitled to transfer the warehoused debt account in the absence of the Complainants' agreement even had the Complainants been aware that the notified transfer was to include the warehoused debt account and even had they raised objection to same. In circumstances where the Complainants have not suffered any identifiable financial loss, I intend to direct compensation in the amount of €350 to reflect the inconvenience unnecessarily caused.

For the reasons outlined in this Decision, I partially uphold this complaint and direct the Provider to pay a sum of €350 in compensation to the Complainants.

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)(b) and (c)**.

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 €350, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainant/s to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

2 October 2020

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Pursuant to *Section 62 of the Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,
and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

