



<u>Decision Ref:</u>	2020-0430
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Managing Deceased Estates
<u>Conduct(s) complained of:</u>	Documents mislaid or lost Delayed or inadequate communication Failure to provide correct information
<u>Outcome:</u>	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant's parents deposited a sealed envelope with the Provider in **February 1988**. This was known as a security file. The Complainant's parents subsequently passed away and the Complainant requested access to the file. However, the Provider has been unable to locate the file.

The Complainant's Case

The Complainant explains that a security file was opened by his late father with the Provider in **1988**. The file was reviewed by the Complainant's parents on several occasions between **1988** and **2003**. However, the Complainant did not become aware of this file until the passing of his father and when his mother requested a document from the file in **2003**. The Complainant accessed the file with his mother's consent and in the presence of one of the Provider's staff members. The Complainant retrieved the relevant document and the file was retained by the Provider.

Following the death of the Complainant's mother in **2005**, the Complainant remembered the file and requested to see it, only to be told by the Provider that the file could not be located. The Complainant states that he did not pursue the matter for a period of time and made a further request to access to the file. However, the Provider could not locate it, suggesting that it may have been given to a firm of solicitors. The Complainant then asked to see the letter from the solicitors requesting the file but the Provider was unable to provide this.

The Complainant explains that “... I have been told so many different stories by [the Provider] over the past few years I now don't know what to believe anymore.” The Provider also advised the Complainant that his late father signed a disclaimer which absolves the Provider of any responsibility for the file.

The Complainant requested a meeting with the Provider to discuss the disclaimer and discovered that his father had not signed this document. The Complainant submits that “I now believe that the reason they kepted giving me the runaround is because they new that this form was unsigned.”

In terms of the contents of the security file, the Complainant states:

“As I am unaware of the contents of this file, therefore I am unable to calculate the Financial loss to my family, but what I do know is both my parents were trifty.

I have asked myself many times why would they have had a security file in the first place, and the only thing I can come up with it that they must have had something of importance within this file to benefit both my sister and myself.”

The Provider's Case

The Provider refers to a statement of one of its staff members who conducted a number of exhaustive searches within the branch where the file was to be held. This individual also contacted the Provider's Bereavement Support Unit regarding the security file or any reference to it. The Provider explains that at least three comprehensive searches were carried out in an attempt to find the security file. Searches were carried out in **November 2016, January, March and May 2018, and March 2019**. As part of a search on **28 March 2018**, its staff member contacted the relevant firm of solicitors, advising that the enquiry was being made on foot of a note on the Provider's receipt/counterfoil which stated: “*auth rec from [solicitors].*”

The Provider outlines that its staff member stated:

“At the time I did speak to someone in [the solicitors] office in relation to this, I really can't remember whom I was speaking to as it was so long ago, I know they searched their offices for this envelope to no avail. If I am not mistaken [the Complainant] had made contact with them too and they came back to him as they had nothing on file.”

The Provider states that it does not hold any further record confirming that the solicitors in question requested or received the file from the Provider. The Provider is of the view that the above note on the counterfoil is evidence that a representative of the solicitors took receipt of the file at some point further to presenting authorisation to the Provider from the owners of the file, the Complainant's parents. While the Provider does not hold a copy of the authorisation, it submits that the procedure employed at the time was to only produce such an item upon the express authorisation of the item's owner.

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The Provider is satisfied that the note on its copy of the counterfoil is a record made in accordance with its practice at the time in respect of holding a security file.

Referring to the top of the counterfoil, the Provider points out that a number of dates are transcribed. These dates correlate to occasions upon which the security file was removed. The Provider notes that the file was removed on **21 January 2003**. The Provider cannot confirm when or by whom the file was removed. Furthermore, the Provider has no record of advising the Complainant that the file had been removed prior to the passing of his father.

In light of the Complainant's submission that *'Some time after my mother died in 2005 I again thought about this file, so I requested to see this security file only to be told that they could not locate it.'*, the Provider submits that the file must have been removed by the solicitors prior to the passing of the Complainant's mother in **2005**.

The Provider outlines that the security file was accepted on the express condition that: *"in any event of damage or the loss or destruction of same or any part thereof, the [Provider] shall not be under any liability or incur any responsibility."*

It is submitted that the Provider clearly indicated in the receipt to the security file that it would not accept any liability in respect of the contents of the file. The Provider states that the disclaimer was on the counterfoil provided to the Complainant's parents upon the initial deposit of the items in **1988**. The Provider remarks that the Complainant is unable to retrieve a copy of this receipt but this should not be a reason to suggest that it was not provided to the Complainant's parents.

The Provider is satisfied that it provided the terms and conditions in respect of liability in the form of the receipt to the Complainant's parents when the original deposit was being made. The Provider submits that the Complainant's parents, through their conduct, accepted the terms and conditions having been made aware of them through the provision of the receipt. The Provider states that there is no requirement for a signature in contractual agreements such as that between it and the Complainant's parents.

Further to its Final Response letter of **22 August 2018**, the Provider explains that a meeting was arranged with the Complainant to discuss the loss of the file. It is the Provider's position that it has fully engaged with the Complainant in seeking to resolve this issue. While it cannot identify the location of the file, the Provider states that it is satisfied that its staff members made exhaustive efforts to locate it. The Provider acknowledges the Complainant's disappointment but submits that keeping the file was clearly on the condition that no liability could be incurred for its loss.

The Complaint for Adjudication

The complaint is that the Provider failed to maintain possession of the security file.

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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 Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on 4 November 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.

Analysis

The Complainant's parents deposited a security file with the Provider in **February 1988**. A copy of the counterfoil to the security file has been furnished. This states as follows:

"...

Received from: [The Complainant's parents] a sealed envelope the contents of which are not known to the Bank, and the Bank has accepted the same on the express condition that in the event of damage to or the loss or destruction of the same or any part thereof, the Bank shall not be under any liability or incur any responsibility whatsoever."

The counterfoil has not been signed by the Complainant's parents. The counterfoil also contains a number of handwritten dates which, from the parties' evidence, are the dates on which the file was accessed. In such circumstances, I accept the Complainant's parents and the Complainant are likely to have been aware of the disclaimer contained on the counterfoil.

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The Complainant wrote to the Provider on **17 January 2018** in respect of the whereabouts of the file. This email appears to have been forwarded internally by the Provider's staff members on **26 March 2018**. This appears to have given rise to a lengthy email chain extending to 10 pages. However, only pages 9 and 10 have been furnished by the Provider. The Complainant's email begins at the bottom of page 9 and continues to page 10. Two further emails are evident on page 9, beginning with the email of **26 March 2019**. Essentially everything but the date of this email has been redacted.

As the email thread starts with the Complainant's email, it is likely that the subsequent emails relate to his query regarding the file and is thus relevant to the investigation of this complaint. The Provider has not offered any explanation as to why the complete thread has not been furnished nor has it explained why redactions have been applied to the portion that has been furnished. As such, absent any claims of privilege, I am satisfied the complete thread should have been produced by the Provider in un-redacted form.

I would remind the Provider of its obligations under the ***Financial Services and Pensions Ombudsman Act 2017 (the Act)*** to furnish evidence requested by this Office.

In particular, I would draw the Provider's attention to Section 47 (3) of the Act, which states:

"In conducting an investigation, the Ombudsman may—

(a) require any person, who in the opinion of the Ombudsman, is in possession of information, or has a document or thing in his or her power or control, that is relevant to the investigation, to—

(i) provide to him or her that information, either orally or in writing,

(ii) produce to him or her that document or a copy of the document,

In what appears to be an internal email dated **26 August 2019**, recording a meeting with the Complainant, it is stated:

"...

We discussed

- a. that we have checked our records and can find no trace of the deposit.*
- b. we however believe that we previously released them but cannot be conclusive on this point as the deposit goes back 30 years.*
- c. the deposited papers were held under the depositors indemnity against loss or destruction. ..."*

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Again, I note that part of the body of this email has been redacted without explanation.

The statement of the staff member referred to by the Provider appears to be contained in an email dated **7 July 2020**.

This email states:

"I have gone back over old emails of what I still hold for [the Complainant] ... At the time I did speak to someone in [the solicitors] office in relation to this, I really can't remember whom I was speaking to as it was so long ago, I know they searched there offices for this envelope to no avail. If I am not mistaken I know [the Complainant] has made contact with them too and they came back to him as they had nothing on file.

Unfortunately I don't have any notes of this conversation.

On the book for the security envelope there was a note (released to [solicitors]) and back then if the customer was ever to look at their envelope or box on that book you would write the date, I think this was best practice. It would be rare that a customer would remove it from the premises they would just go into a room and look at it or add something (again this is just what I would have experienced).

I would never have experienced it being released to the Solr but this may have been the case back then, it usually goes through the Deceased Unit.

On the counterfoil it does have that date 1/2/1988 that would usually be the date it was first deposited. The other dates would be when the customer looked at their envelope.

..."

It is not entirely clear when the file was last accessed or by whom. However, the file appears to have been last viewed by the Complainant at some point after **18 March 2003** and prior to the Complainant's mother's death in **October 2003**. The Complainant has provided an authorisation signed by his mother and dated **18 March 2003** which states:

"I authorise my son [the Complainant] to collect from your Bank documents lodged by my late husband ... in file no [file number]."

The Complainant's evidence is that he did not remove the file, he retrieved one document in the presence of one of the Provider's staff members and returned the file once he found the relevant document. This has not been disputed by the Provider.

The next time the Complainant requested access to the file was sometime during **2005** at which point he was told the file could not be located. The Provider is unable to explain what exactly happened to the file and there is no evidence on the counterfoil to show precisely what happened either.

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The Provider suggests the file may have been removed by a firm of solicitors. This position is based on the fact that “*auth rec from [solicitors]*” has been written on the counterfoil. However, having reviewed the copy of the counterfoil furnished by the Provider it is not entirely clear if the first two words are *auth rec*.

Even if these words do in fact read “*auth rec from [solicitors]*”, I am not satisfied this necessarily means the file was removed by or relinquished to the solicitors. Additionally, no date appears to accompany this entry, therefore, it is not possible to determine when it was made. Further to this, in the staff member’s statement of **7 July 2020**, he expressed the view that files are usually released to the *Deceased Unit* and not solicitors. There is no evidence or record of the file having passed to the Provider’s *Deceased Unit*. There is also no evidence from the solicitors in question that they did in fact take custody of the file.

Taking the foregoing into consideration, I am not satisfied the file was released to the solicitors in question, nor am I satisfied that it was taken by the Complainant. The Complainant’s only access to the file was to remove a document prior to the Complainant’s mother’s death. Therefore, there is no evidence to show the file left the custody of the Provider at any point. While the Provider has endeavoured to locate the file, it has been unable to account for its whereabouts.

The Provider maintains that it is not liable for the loss or destruction of the file owing to the disclaimer contained on the counterfoil. **Section 44(1)** of the ***Financial Services and Pensions Ombudsman Act 2017*** entitles the Complainant to make a complaint in respect of the conduct of the Provider in relation to the provision of a financial service and/or the failure to provide a financial service. The investigation of this complaint is not concerned with an examination of the Provider’s liability arising out of the any apparent loss or destruction of the security file. Rather, this complaint concerns the conduct of the Provider in respect of the provision/failure to provide a service in respect of the security file. Were the Provider entitled to rely on the disclaimer in response to this complaint it would serve to completely undermine the role and function of this Office; essentially meaning that any complaint could be easily disposed of by a financial services provider simply by pointing to a similarly worded clause or disclaimer. Accordingly, I do not accept that the disclaimer is relevant and/or applies to this complaint nor does it absolve the Provider of responsibility for a complaint made pursuant to the provisions of the ***Financial Services and Pensions Ombudsman Act 2017***.

Therefore, I uphold this complaint and direct that the Provider pay a sum of €3,000 for the inconvenience it has caused to the Complainant.

Conclusion

My Decision pursuant to **Section 60(1)** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld, on the grounds prescribed in **Section 60(2) (b) and (g)**.

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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 payment to the Complainant in the sum of €3,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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

25 November 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.