An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0478
Sector:	Banking
Product / Service:	Savings Account
Conduct(s) complained of:	Maladministration Failure to provide notification /reason for closure Non-receipt of money
Outcome:	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant entered into a loan agreement with Entity 1 on **1 November 1988** where the Complainant borrowed £21,000 to assist with renovations to his family home. On **22 November 1988**, the Complainant lodged £15,000 to an investment account held with Entity 1. As security for the loan, the Complainant executed a lien dated **4 November 1998** in favour of Entity 1. Around this time, the Complainant also deposited a number of documents with Entity 1 using its Safe Custody service. Amongst the documents deposited was the passbook to the investment account. In **1994**, Entity 1 merged with another financial services provider to form a new entity, the Provider, against which this complaint is made.

Following correspondence from the Provider in **August 2018**, the Complainant collected the Safe Custody documents in **September 2018**. When doing so, the Complainant sought to withdraw the funds held in the investment account. However, the Provider informed the Complainant that it had no record of the account, and that the funds must have been withdrawn and the account closed.

The Complainant's Case

The Complainant explains that on **22 November 1988** he invested £15,000 in an investment account with Entity 1 with account number ending 728. This money represented part of a redundancy payment received by the Complainant.

The Complainant points out that in his previous employment he enjoyed a substantial death in service protection policy for his family. This ended with his redundancy. The Complainant's intention was to set this money aside for his family in the event of his premature death or for his retirement.

At the same time, the Complainant borrowed £21,000 from Entity 1 to renovate his family home. The loan was secured by the deposit of the title deeds to his house.

Entity 1 also took a lien over the £15,000 in the investment account. The Complainant asserts that because of the lien, the Provider retained the original deposit book for the account. The Complainant states that he repaid the loan in full by way of monthly instalments in accordance with the loan agreement.

On **23 August 2018**, the Complainant received a letter from the Provider informing him that he was to collect all items held by the Provider before **17 September 2018**. The Complainant collected the *safe keeping* envelope, which he states contained the following:

a) Original Savings Book for account ending 728;
b) Record to accompany deposit of original title deeds;
c) Letter of Lien;
d) Memorandum of Withdrawal of Correspondence; and
e) Record of opening the account.

Sometime after this, the Complainant made enquiries with respect of the money held in the investment account. The Complainant states he was informed by the Provider that there was no record of the account or his money. The Complainant wrote to the Provider on **17 January 2019** asking that it investigate the matter. Two acknowledgement letters were received from the Provider on **25 January 2019** and **12 February 2019**. The Complainant then received a letter from the Provider on **2 April 2019** stating that it did not hold records for the account and it appeared the account was closed prior to **2001**.

The Complainant consulted with a solicitor, who wrote to the Provider on his behalf on **29 May 2019** requesting that the matter be fully investigated. The Provider responded on **19 June 2019** stating that no records relating to the investment account were available. It asserted that this would indicate the account was closed prior to the merger in **2001**. The letter further stated that the account closed with a balance of nil.

The Complainant states: *"I am certain that I did not withdraw the money from the above account and I did not give any other person authority to withdraw this money. I am further certain that the loan of IR£21,000 referred to in the documents was repaid by me fully and that the bank had no reason to use the letter of lien."*

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The Provider's Case

Safe Custody Service

The Provider outlines that it offered a Safe Custody service throughout its branch network which allowed customers to hold items in safe custody on a branch's premises.

This provided additional security for customers in respect of items of importance. The Provider ceased offering this facility in **2002**. However, it continued to hold items already placed in custody.

The Provider states that it has no knowledge or sight of items placed in safe custody and customers' discretion was a key element to this process. The Provider explains items were placed in a large brown envelope which was sealed with a customer's signature, dated and marked with the customer's full name and account number. Each envelope was issued with a Safe Custody receipt number. A copy of the receipt was also provided to the customer. The envelopes were then placed in a fire proof safe on the branch premises and remained there until a customer returned with the corresponding receipt and valid identification. The Provider also states that it would not instruct a customer to place an item in its Safe Custody as the service is entirely optional. In this instance, the Complainant placed the passbook to the investment account, loan agreement and letter of lien in a sealed envelope. The Provider states that it did not instruct the Complainant to submit these documents.

In **July 2018**, the Provider undertook a project whereby all customers holding items in Safe Custody were contacted to collect their items. The Complainant attended the relevant branch and, on presenting the receipt and identification, his envelope was released into his custody.

On retrieving the items from Safe Custody which included a manually updated passbook for the investment account, the Complainant requested that the balance amount noted on the passbook as at **22 November 1988** be released to him.

It is the Provider's position that it had no knowledge or oversight of the Complainant's choice of documents placed in its Safe Custody. Furthermore, as the account is no longer held on the Provider's system, it is the Provider's position that the account was closed and that the funds were withdrawn by the Complainant at some point after **November 1988**.

Withdrawal of Funds

The Provider states it is satisfied *"… that the funds must have been withdrawn by the Complainant at some point after 22 November 1988."* It submits that if the funds had remained on deposit and no other transactions took place on the account, the account would have become dormant after a period of 15 years.

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In line with the Provider's procedure, and the Dormant Accounts Act 2001, any funds on deposit in a dormant account would have been transferred to the National Treasury Management Agency (**NTMA**) and a record of this would have been kept on the Provider's system logs. In this case, the Provider states that it has no record of the account being transferred to the NTMA nor does it hold a record of the account on its system. This, it suggests, indicates that the funds were withdrawn by the Complainant, and the account was subsequently closed with a nil balance before the 15 year period elapsed.

The Provider explains that due to the passage of time, it is unable to confirm the date of withdrawal. However, it states that it would appear from the documentation submitted by the Complainant that funds in the amount of £15,000 were held by the Provider as a lien for a loan issued on **1 November 1988** in the amount of £21,000.

This loan was for a period of 38 months commencing on **4 January 1989**, suggesting the loan account was due to expire in **March 1992**. Accordingly, the Provider asserts that in **March 1992**, the lien applied to the investment account would also have expired, leaving the Complainant free to withdraw funds at any time thereafter.

The Provider advises that it is not in a position to confirm who withdrew the funds from the investment account. However, in accordance with normal banking practices and security protocols across the industry, the account holder named on the account would be the only person entitled to make a withdrawal. The Provider notes that as evidenced in the passbook, the Complainant is the sole account holder and he alone would have been permitted to withdraw funds from the account.

The Provider notes the Complainant is of the opinion that while his passbook was held in the Provider's Safe Custody, he would have been unable to withdraw funds from the account. It asserts that this is not the case. It states that a passbook was provided to each customer when an account was opened. It explains that passbooks were used as a log to track a customer's transaction history and was updated manually after each transaction. It states that it was not a requirement for a customer to present the passbook when attending branch to withdraw funds or close an account. In order to transact on the account, the Complainant could present valid identification at the branch and his funds would have been available to him.

Efforts to Locate the Account

The Provider explains that it has completed a thorough search of its systems and records for information in respect of the Complainant's investment account. The Provider has outlined the extent of these searches in its Formal Response. The Provider states that its IT department have advised that it is likely the investment account was closed prior to the merger as it appears this account was never migrated to the Provider's current system which has been in use since **1994**. The Provider submits that this would tie in with its earlier assumption that the Complainant's loan expired in **March 1992**, leaving the Complainant free to withdraw the funds in the investment account.

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The Provider explains that it also reached out to the NTMA to establish if the account was transferred to its database. However, the NTMA was unable to assist as it did not hold individual account details on file. The Provider advises that if the funds were transferred to the NTMA, the Provider would retain a record of the account on its system as any funds transferred to the NTMA remain the property of the account holder. The Provider asserts that as no record exists for the investment account, it is reasonable to conclude that the account was closed with a nil balance and not transferred to the NTMA.

The Provider explains that while reviewing the Complainant's correspondence file, an overdraft application form dated **16 June 1994** was located. On the form, the Complainant noted his only current account as account number ending 495. The Complainant did not reference any other account which would suggest the investment account had been closed prior to the application form being submitted.

The Provider also advises that its system shows a transactional history for the current account from **July 1996** and it also holds a log of a current account statement from **November 1993**.

The Provider states that pursuant to data protection legislation it is not obliged to retain any documentation or account information in respect of an account for more than six years after its closure.

The Complaint for Adjudication

The complaint is that the Provider wrongfully and/or unreasonably refused to pay to the Complainant the monies lodged to his investment account.

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.

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A Preliminary Decision was issued to the parties on 27 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.

Background

The Complainant entered into a loan agreement with Entity 1 in **November 1988**. This was secured by way of an equitable mortgage over the Complainant's home together with a lien over all *"… moneys which now stand or may hereafter stand to my credit whether on deposit account or otherwise …"* in the amount of £15,000.

The loan agreement, letter of lien and investment account passbook were placed with Entity 1' Secure Custody service in **November 1988**.

The Provider wrote to the Complainant on **23 August 2018** referring to a letter issued on **18 July 2018** requesting that he make arrangements to collect his Safe Custody items. I note that a copy of this letter has not been furnished. However, it is not necessary for the purposes of this investigation and adjudication.

These items were collected by the Complainant in **September 2018**. Subsequently, when the Complainant attempted to withdraw the funds from the investment account he was informed that the Provider had no record of the investment account, and that the funds must have been withdrawn and the account closed.

The Complainant wrote to the Provider on **17 January 2019** requesting that an investigation be carried out to ascertain the whereabouts of his account and his money. The Complainant also stated:

> *"I never had reason or cause to touch or withdraw either the said bank book or the paper receipt in the period since 22nd November, 1988. Your safe deposit box records are evidence of this. I merely always assumed that my investment amount of IR£15,000.00 was safe and had accrued substantial interest in that period of 30 years."*

The Provider ultimately responded on **2 April 2019** advising the Complainant that it *"… investigated all areas and records that are available to us and we do not hold information for the account in question. It appears the account was closed prior to 2001."*

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The Complainant's solicitor wrote to the Provider on **29 May 2019** stating that the Complainant discharged the loan with the Provider; there was no evidence to show the Provider exercised the lien; and that the Complainant did not withdraw the funds. A request was also made to fully investigate the matter.

The Provider issued a Final Response letter on **19 June 2019** to the Complainant's Solicitor advising that:

> *"Following my investigation, I wish to advise that no records relating to a [Entity 1] Investment Account [number] in the name of [the Complainant] with an address of … have been located.*
>
> *This would indicate that [the Complainant's] Investment Account was closed prior to the merger ….*
>
> *…*
>
> *Our investigations in relation to your Client's Investment Account [number] indicate that the Investment Account was closed with zero balance and six years following this account closure, all account records were purged from our system. …"*

As part of its investigation into this complaint, the Provider consulted with its IT department. The following two emails outline the IT department's conclusions. The first was on **14 May 2020**:

> *"It looks to be an account that was opened and operated on the old [Entity 1] system. Active accounts were migrated from that system to [the new system] in 1994.*
>
> *Therefore the fact that this account is not showing on [the new system] indicates that it was closed prior to the migration – hence it wasn't brought over to [the new system]."*

The second email is dated **18 May 2020**:

> *"I have extracted that range of purge and active account numbers for branch [number] and can see that this account ending 772* and another account ending 776* are missing from the list.*
>
> *This indicates that they were closed prior to the merger of the 2 [entities] that resulted in [the Provider] and were never brought on to [the new system]."*

<u>Analysis</u>

The Complainant entered into a loan agreement in **November 1988** in the sum of £21,000 repayable by way of monthly instalment of £553.01 commencing on **4 January 1989** *"until the whole of the principal of the loan and all interest thereon shall have been paid."*

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The Complainant has not provided the date on which the loan was repaid. However, the Provider estimates this to have been some time around **March 1992**. It is not disputed that the loan was repaid in accordance with the terms of the agreement.

There is also no evidence to suggest that the Provider invoked its rights under the lien to recover the money advanced on foot of the loan or any other borrowings made by the Complainant.

The Complainant's position is that he lodged £15,000 to the investment account in **November 1988** and did not attempt to withdraw this money until some time after **September 2018**. The Provider has no record of the account and its position is that the money was withdrawn by the Complainant and the account closed.

There appears to be no record of this account or document referring to or evidencing the account except for the passbook which was deposited with Entity 1 in **1988** and retrieved thirty years later in **2018**. The passbook shows a lodgement in the amount of £15,000 on **22 November 1988**; no other transactions are recorded on the passbook. A receipt for this lodgement has also been furnished by the Complainant.

The Provider explains that it was not necessary to present a passbook in order to withdraw money from the account. All that was required was valid identification.

Contrary to this, the Complainant's solicitor states in a submission dated **3 July 2020** that:

> *"… it is [the Complainant's] recollection that when he dealt with financial institutions in the 1980s and 1990s for deposit bank accounts, he always would have brought the paper deposit book into the bank at the time of lodgement or withdrawal to have the book manually updated."*

While Entity 1 may not necessarily have required a passbook to carry out a withdrawal on an account, I am not satisfied this shows, to a satisfactory standard and in the context of the evidence in this complaint, that the money was withdrawn from the account.

It appears the Complainant held a joint current account with **Entity 1** in the early 1990s which is still in use today. The earliest records of this account are a *History Log* from **June 1994** and a *Statement History* from **November 1993**. While not necessarily determinative of this complaint, having received this account's history, there is no evidence to suggest the Complainant deposited the money from the investment account to this account during or after **November 1993**.

The Provider points to an overdraft application form dated **16 June 1994** and observes that the Complainant referenced only his current account. The Provider submits that as the Complainant did not reference any other account, this would suggest the investment account was closed prior to the application form being completed.

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The Complainant responded to this point through his solicitor on **3 July 2020**, stating that:

> *"… the only account used on a regular basis that he had in 1994 with [Entity 1] was his current account and this is the reason that the investment account was not referred to. …*
>
> *[I]t was [the Complainant] and his wife's normal policy in the 1990's to maintain an overdraft of £1,000 Irish Pound which had to be renewed on an annual basis."*

The Provider has submitted two *Loan Application Forms* for the years **1993** and **1994** in respect of an overdraft on the joint account. Section 6 required information on *Previous and/or existing loans with the Bank* and section 7 required information on *Dep/Inv Current A/C No.* However, neither the Complainant's loan from **November 1988** nor the investment account are recorded on these forms. This would suggest that the loan was repaid prior to the 1993 overdraft application, and it could also suggest that the investment account was not in use. Alternatively, it could be that the Complainant simply did not include this information, for whatever reason.

The Provider states that as the investment account was not transferred to its computer system following the merger with Entity 1 it concludes that it must be the case that the account was closed prior to the merger with a zero balance. The Provider is unable to furnish any evidence to show the money was withdrawn and/or that the account was closed.

However, this of itself is not sufficient reason to uphold the complaint. There are a number of features to this complaint that, in my view, give considerable credence to the Complainant's version of events.

Simply because the account was not transferred to the Provider's system following the merger does not mean the Complainant withdrew the money and closed the account. There are other possible explanations for this. For example, the account may have been overlooked, it may not have been recorded properly (or at all) on Entity 1's system, or it may have been considered dormant at the time of the merger. There is also no evidence to show the account was rendered dormant within the meaning of the ***Dormant Accounts Act 2001***. However, this does not mean the account was closed; particularly as it is not entirely clear why the Provider has no record of the account or a more definitive explanation as to why there was apparently no record of it at the time of the merger.

The Provider asserts that in **March 1992**, the lien applied to the investment account would also have expired, leaving the Complainant free to withdraw funds at any time thereafter.

However, I note that the lien does not appear to have been executed solely for the purpose of the loan in **November 1988** and the wording of this document would suggest that it was to endure for longer than the loan's term. The lien was executed *"… pending payment of any sum or sums due or to become due to you from time to time by me either alone or jointly with any other person or persons …"*

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Given the nature of the lien and its value to Entity 1 and ultimately the Provider, particularly as the Complainant held a joint account with the Provider, there is no evidence of the lien being recorded or acknowledged by Entity 1 or the Provider prior to or at the time of the merger. Further to this, the Provider did not appear to have any knowledge of, or documentation relating to the lien until the circumstances giving rise to this complaint arose. Therefore, as the lien was not necessarily account or transaction specific, and the Complainant continued to bank with and borrow from the Provider, it is not clear why the Provider has no record of it.

I note the Complainant has stated that that because of the lien, the Provider retained the original deposit book for the account. The Provider has responded to state that this is not the case. The Provider has also stated that it was not aware of the content of the envelope placed in its secure service by the Complainant. I accept that the Provider would not have retained the deposit book and I accept that it would not necessarily have known it was in its secure service. However, I also accept that the Complainant may have thought that it was a requirement given that he also surrendered the deeds of his home as security for the loan at that time.

The Provider suggests that the Complainant's loan expired in **March 1992**, leaving the Complainant free to withdraw the funds in the investment account and asserts that this is why it appears this account was never migrated to the Provider's current system which has been in use since **1994**. The wording of the lien does not support this view.

The Provider relies heavily on the fact that it is not obliged to retain any documentation or account information in respect of an account for more than six years after its closure. I accept this to be the case.

As stated already, the Provider suggests that the Complainant's loan expired in **March 1992** and that the Complainant withdrew the money and closed the account sometime between **1992** and **1994** and this is why the account was never migrated to the Provider's current system which has been in use since **1994**. I have a difficulty with this argument. Even if the Complainant had withdrawn the money immediately he repaid the loan, in **March 1992**, the Provider would have been required to keep a record of that transaction and the account, by its own admission, for six years from **March 1992**, that is, **March 1998**. This is four years after the transition to the current Provider's system in **1994**. I believe the Provider has been unable to offer any credible reason why it has no record of either the investment account or the loan being in existence or having been purged from the system.

Therefore, the evidence shows the Complainant lodged £15,000 to the investment account in **November 1988**. While there had been a significant passage of time which included a merger between two entities, there is no direct evidence of the withdrawal of this money or that the account was closed. The Provider is seeking to rely on the absence of references to the account in **1993** and **1994**, the absence of any record of the account, and the fact it was not transferred during the merger as proof that the money was withdrawn from the account most likely prior to **1993** or at the latest prior to the merger in **1994**, and that the account was closed.

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Taking the evidence of this complaint into consideration and the foregoing observations, I am not satisfied the Complainant withdrew the money from the investment account and/or that the investment account was closed by the Complainant. Therefore, I believe the Complainant is entitled to the sum of £15,000. The Euro currency came into circulation in Ireland during **2002** and at that time the conversion rate was approximately €1/£0.787564. This would mean that in **2002**, the Complainant's lodgement (excluding any accrued interest) would have converted to €19,046.07.

The account in question was also an investment account which would have earned a certain amount of interest during the deposit period. Accordingly, the Complainant is also entitled to an amount in respect of accrued interest. However, neither party have given any evidence as to the amount of interest that would have accrued on the account between the date of deposit in **1988** and the date of attempted withdrawal in **2018**.

For the reasons outlined in this Decision I uphold this complaint and direct the Provider to pay a sum of €25,000 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), (f) and (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €25,000, 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.

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GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

21 December 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.