An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

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| **Decision Ref:** | 2021-0059 |
| **Sector:** | Banking |
| **Product / Service:** | Repayment Mortgage |
| **Conduct(s) complained of:** | Selling mortgage to t/p provider<br>Delayed or inadequate communication<br>Dissatisfaction with customer service<br>Failure to consider vulnerability of customer |
| **Outcome:** | Partially upheld |

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

The Complainants entered a mortgage loan agreement with the Provider in **July 2004**. A mortgage deed was executed in favour of the Provider in **March 2006**. The Complainants entered three alternative repayment arrangements between **2014** and **2015**. A number of overpayments were made to the loan account from around **2017** and the Complainants also tried to return to full repayments. The Provider notified the Complainants of the sale of their loan in **August 2018**.

### The Complainants' Case

The Complainants explain that their mortgage loan account is not, and never was, in arrears. The Complainants also feel aggrieved that they were not informed about the sale of their loan by the Provider. The Complainants submit that the Provider's *"… explanation that they're legally entitled to do this under 'a clause' flies in the face of any decent good business practice and is outrageous."* The Complainants state they were assured during a telephone call with the Provider that only loans in arrears would be sold.

The Complainants say they have made efforts to pay *extra* on their loan and have found the Provider to be *not interested*. The Complainants state that *"No explanation given about what it likely to be process."* The Complainants also point to the absence of any review of their loan account while it was *under restructure*. The Complainants believe their loan account has been *callously treated* by the Provider.

It is stated by the Complainants that:

> *"[The Provider] would need to acknowledge that they have treated me unfairly and have handled my a/c badly and agree to a suitable, manageable way forward.*
>
> *Also the issue of ringing 'an arrears' line and having money sitting gaining interest is really shocking."*

**The Provider's Case**

The Provider advises that it does not disagree with the statement that the Complainants were not, and never were, in arrears. However, the Complainants contacted the Provider as early as **February 2014** seeking a restructure due to a change in their personal and financial circumstances. It was on this basis that the Complainants were assessed for an affordable resolution option.

Referring to a timeline of events, the Provider states that the loan was restructured on three occasions at the request of the Complainants following a comprehensive assessment of their personal and financial circumstances. In **2015**, the Complainants were approved for a 5 year Interest Only arrangement which was accepted by signing a Letter of Variation (**LOV**) on **9 March 2015**. It is also stated that it was indicated by the First Complainant during a telephone call on **2 March 2015** that the Complainants had instructed an independent third party to review the documentation prior to accepting the arrangement. The Provider submits the restructures to the loan account resulted in it being classified as non-performing; and for the account to be considered as *performing*, the Complainants would have been required to return to full annuity payments by **31 March 2017** at the latest.

Following a review of telephone call recording after **31 March 2017**, the Provider says it is evident that the Complainants were not in a position to return to full annuity repayments by this time. The Provider refers to calls which took place on **22 May** and **15 June 2018**, where the First Complainant indicated affordability of €500 per month when, at that time, full annuity repayments were approximately €570 per month.

The Provider observes that the Complainants made the first ad hoc overpayment in **February 2017** and the next overpayment was received in **October 2017**. The Provider submits it is certainly not the case that the Complainants were making regular overpayments totalling the equivalent of the annuity repayments on a monthly basis.

In **January 2017**, the Provider advises the First Complainant was informed that the Complainants would need to write to the Provider if they could afford to resume full annuity repayments. Despite being aware of this requirement, the Provider states that it received no instruction to revert to full annuity repayments.

The Provider refers to clause 11(iii) of the Mortgage Deed as containing a right, without further consent, to transfer the loan to a third party.

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The Provider acknowledges the Complainants were informed that only accounts in arrears would be sold, but states that it is important to note that this was part of a conversation which took place on **9 January 2017** and staff members were not aware of the sale which was not concluded until **December 2018**. Additionally, staff members had no advance knowledge of what type of accounts would or would not be included in any future sale. The Provider states that while it regrets the Complainants were provided with inaccurate information, it does not alter the fact the sale was within the remit of clause 11(iii) which the Complainants accepted in signing the Mortgage Deed in the presence of their independent legal advisor.

In relation to the alternative repayment arrangement, specifically the Complainants' entitlement to amend the amount payable during the arrangement, the Provider refers to the clause 10.1 of the *Interest Only Repayment Plan* dated **11 February 2015** which states: *'You may cancel the arrangement at any time after the Effective Date by giving us not less than 30 days notice in writing.'*

The Provider submits this demonstrates that the Complainants were on notice of the requirement to revert to full annuity repayments. It states that this was also explained during a telephone call on **9 January 2017**, which is one of the earliest calls where the First Complainant indicated the Complainants wanted to resume capital repayments. The Provider states that no request was received.

In a telephone call on **6 October 2017**, the Provider states the First Complainant specifically noted an intention to let the restructure run to the end as scheduled, and to make ad hoc payments to reduce the capital. The Provider's agent provided a quotation based on full annuity repayments and the First Complainant's response implied that the Complainants were not in a position to resume full annuity repayments at that time.

The Provider refers to clauses 14.1.4 and 14.1.5 of the restructure agreement from **February 2015** as containing the Complainants' obligations to notify the Provider of any changes which may result in them being able to afford a higher monthly repayment during the term of the restructure. While it is evident from the telephone call recordings that the Complainants considered making overpayments, the Provider submits it is clear that they were still unsure if this was feasible on a regular basis. It was not until **July 2018** that the Complainants began to make regular overpayments prior to the sale in **December 2018**.

The Provider also refers to clause 14.1.6 as containing the Complainants' obligation to submit a Standard Financial Statement (**SFS**) and supporting documentation when requested. An SFS was issued to the Complainants on **5 July 2018** and the First Complainant accepted that this had not been returned during a telephone call on **27 August 2018**. The Provider submits that in the absence of a completed SFS, it was not possible to re-assess the loan account for increased repayments.

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The Provider explains that the Complainants' loan was categorised as part of a Buy-to-Let (**BTL**) portfolio sale and considered a non-performing loan as a result of having the terms of the loan restructured. The Provider advises that all European banks were required by the European Central Bank to look at lowering or reducing their non-performing loan portfolios.

The Provider states that prior to completing the sale of the Complainants' loan, the Provider wrote to the Complainants on **23 August 2018** giving notice of the sale and provided details of how this would affect the Complainants, the action they needed to take, and contact details should they have any queries. The Provider states that its contemporaneous account notes and the telephone call recordings indicate all of the queries raised were addressed when the First Complainant contacted the Provider following receipt of this notification.

The Provider explains that it accepts and regrets that the Complainants were provided with inaccurate information in relation to the flexible overpayment option available to non-arrears customers who were not availing of an alternative repayment arrangement. The Provider wishes to highlight that the Complainants were informed of the requirements to resume full annuity repayments, which was to write to the Provider to request this. It states that the Complainants were also correctly informed, prior to the 5 year Interest Only arrangement being implemented, that they could make ad hoc overpayments where possible and it was explained that it was in their best interests to do this so as to reduce the capital owing at the end of the Interest Only period.

The Provider advises that in **October 2017**, the First Complainant was incorrectly informed that she could complete a flexible repayment form in order to make regular monthly repayments in excess of the scheduled Interest Only repayments. The Provider explains that it was not until the form was returned and verified that the Complainants were informed that in order to make additional payments of part capital, a new SFS would need to be submitted.

While the Provider acknowledges its shortcomings with regard to the service provided, it reiterates that the terms and conditions as stipulated in the restructure documentation and signed by the Complainants on **9 March 2015**, clearly set out the necessary steps to resume full annuity repayments or to set up capital repayments.

The Provider refers to three telephone calls dated **9 March 2015**, **9 January 2017** and **6 October 2017** during which the First Complainant was informed that for any ad hoc payments to be offset against the capital, the Provider required a specific instruction from the Complainants. The Provider explains that if an overpayment is not offset against the capital balance, it sits in credit in the loan account and earns credit interest at same rate as interest is charged.

In concluding its response to this complaint, the Provider states that during its review of the telephone call recordings, particularly those calls which took place after the Complainants were notified of the transfer of their loan, it was noted the First Complainant stated that the Complainants had been trying to revert to annuity repayments but the Provider blocked them from doing so. The Provider states this is not the case.

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It states that the First Complainant was informed as early as **January 2017** that in order to revert to full annuity repayments, a written instruction was required in accordance with the restructure letter dated **11 February 2015**.

Further to this, the Provider states the Complainants imply that it refused to allow them to overpay the loan. The Provider asserts that this is factually incorrect. It states that on any occasion where there was a discussion regarding overpayments, the Complainant were provided with instructions on how to overpay to reduce the capital balance. The Provider advises that payments received were credited to the account and were not returned to source. While payments sat in credit, the Complainants benefited from credit interest. Once the overpayments were offset against the capital balance, the monthly repayments were recalculated to account for the reduced capital balance.

Finally, the Provider states that the First Complainant implies that the Provider did not want the loan to revert to full annuity repayments so that it could be included in the sale. The Provider reiterates that the account would have needed to be serviced at full annuity by **31 March 2017** at the latest in order to be considered a performing loan. After this date, regardless of whether the Complainants resumed full annuity repayments or not, the loan would still have been deemed a non-performing loan.

## The Complaints for Adjudication

The complaints are that the Provider:

1. Transferred the Complainants' loan to a third party; and

2. Provided poor customer service.

## Preliminary Decision

A Preliminary Decision was issued to the parties on 11 January 2021, 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.

Following the issue of my Preliminary Decision, the Complainants made a submission under cover of their e-mail and attachment to this Office dated 26 January 2021, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submission.

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Having considered the Complainants' additional submission and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

**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.

The Complainants, through their post Preliminary Decision submission, detailed that they "*believe that* [the Ombudsman] *have 'erred' in relation to some of the salient facts here, whether by misinterpretation or perhaps (with respect) failing to grasp what actually happened and* how [the Complainant] *reacted to the various promises and assurances*…" and that *"sometimes these things can* […] *be difficult to totally grasp when reading paperwork*- [the Complainants] *say this as an Oral Hearing may help and* [the Complainants] *are sure that often happens and is an ideal way of determining such matters"* and are *"more than happy to attend such a Hearing".* However, I remain 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.

***The Loan Agreement***

The Complainants entered a mortgage loan agreement with the Provider pursuant to a Letter of Offer dated **23 July 2004**. It was agreed that the loan would be secured on a property located in rural Ireland (the **Mortgaged Property**). The Complainants signed a Form of Acceptance on **27 July 2004** which was witnessed by their solicitors. In signing the Form of Acceptance, the Complainants expressly accepted, amongst other documents, the Provider's General Conditions for Home Loans (the **General Conditions**) and the Standard Form of Mortgage. The Complainants also signed an Indenture of Mortgage dated **20 March 2006** (the **Mortgage**) in favour of the Provider in respect of the Mortgaged Property.

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***Alternative Repayment Arrangements***

By letter dated **23 April 2014**, the Provider wrote to the Complainants noting they were not in a position to make the scheduled monthly repayments under the loan and their request for a reduction in monthly repayments. As a result of this, the Provider offered the Complainants a 6 month interest and part capital repayment arrangement. The Complainants signed this letter on **22 May 2014**. This arrangement was also confirmed in a letter dated **14 June 2014**.

On **25 November 2014**, following a telephone conversation on **17 November 2014**, the Provider wrote to the Complainants noting that due to their personal circumstances, they wished to reduce the monthly loan repayments. The Provider confirmed that a 3 month interest and fixed capital arrangement was to take effect from **1 December 2014** as agreed during the telephone call.

The Provider wrote to the Complainants on **11 February 2015** offering a 5 year interest only repayment arrangement. This was signed and accepted by the Complainants on **9 March 2015**.

***Overpayments***

One of the Provider's agents contacted the First Complainant on **9 March 2015** because there was an arrears balance on the loan account as the Complainants had not yet accepted the restructure arrangement. During the conversation, the Provider's agent advised the First Complainant that there was an option to make overpayments towards the capital balance on the loan account. The Provider's agent explained that if an overpayment was made it would come off the capital balance.

In a telephone conversation on **6 October 2017**, the First Complainant asked the Provider's agent to check whether an extra payment had been made to the loan account in the last couple of months. The Provider's agent explained that a payment of €500 was made on **20 February 2017**. The First Complainant indicated she would make a further similar payment from the same account. The Provider's agent then informed the First Complainant of a credit balance on her account in the amount €514.35, indicating this was the February overpayment amount. The Provider's agent queried whether the First Complainant intended for this amount to come off the capital balance. The Provider's agent advised that he would arrange for this to be deducted from the capital balance.

The First Complainant explained that she did not know the overpayment would sit in credit on her account, saying that *"I just automatically assumed it would come off my em …"* The Provider's agent advised that no instruction was given when the overpayment was made. The First Complainant stated that she intended to ring the Provider to clarify this but did not.

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The First Complainant then advised the Provider's agent that she was going to make some extra payments and acknowledged it was better to do it over the phone so that the overpayment would come off the capital balance (this was explained to the First Complainant again on **24 October 2017** and **28 September 2018**).

The First Complainant asked to make a further payment to the account during this call. The parties discussed overpayments, with the Provider's agent advising overpayments were a good idea if the Complainants had the means to do so. The Provider's agent advised the First Complainant that if the restructure arrangement was revoked the new monthly repayments would be approximately €560. The First Complainant indicated *that's quite a bit already*. The First Complainant suggested making once off payments in the future. The Provider's agent advised the First Complainant that if she wished to make overpayments to contact the Provider to have the payment removed from the capital balance. The First Complainant also made an overpayment during this call.

The First Complainant contacted the Provider on **9 January 2017** to query the possibility of returning to full monthly repayments.

Having discussed this, the Provider's agent advised the First Complainant about the possibility of making monthly overpayments to the loan account to be taken off the capital balance while keeping the restructure arrangement in place. Towards the end of the call, the First Complainant was advised that if she was making an overpayment she would have to specify that the payment was to be deducted from the capital balance, and in those circumstances it was best to do it over the phone.

The First Complainant contacted the Provider on **17 February 2017** to enquire about making overpayments to the loan account. The Provider's agent advised the First Complainant that she would need to submit a *Flexi Options Form*. The Provider's agent also explained, separate to this, that the First Complainant could manually make a payment to the loan account.

The Complainants completed a *Flexible Payment Instruction* which was signed by the First Complainant on **26 April 2018** and the Second Complainant on **22 May 2018**.

The form contained three options and although it was stated on the form to choose only one option, Option A and Option B were chosen:

> *"A. I/We wish to make an additional monthly payment of €282 above my scheduled mortgage repayment for a period of ____ months.*
>
> *…*
>
> *B. I/We wish to increase our total monthly repayment to €500.00 per month."*

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Just above the Complainants' signatures, the form states:

> *"Please note that the revised mortgage structure details are not confirmed until you receive a letter from us specifying the change requested has been actioned."*

The Provider telephoned the Second Complainant on **12 June 2018** to advise him that two options had been selected on the Flexible Payment Instruction form. On **13 June 2018**, the First Complainant telephoned the Provider to enquire about the Flexible Payment Instruction form. The Provider's agent informed the First Complainant that the form had only been received the previous day, but it would be in place in **July 2018**. The Provider telephoned the First Complainant on **15 June 2018** to advise her that Option A and Option B had been selected on the form. The First Complainant acknowledged this was a mistake and she forget to cross out Option B.

The Provider states that it made an unsuccessful call to the Complainants on **18 June 2018**, to advise them that the Flexible Payment Instruction could not be set up as the Provider needed to re-assess the Complainants' affordability given the change in the Complainants' financial circumstances.

The First Complainant telephoned the Provider on **2 July 2018** to enquire as to why the flexible payment option had not been implemented. The Provider's agent explained to the First Complainant that it had tried to call the Complainants on **18 June 2018**, to advise that because there was a 5 year interest only arrangement on the loan account, a flexi arrangement could not be put in place. The Provider's agent advised the First Complainant that the Complainants would have to be re-assessed for their affordability as the interest only arrangement was put in place based on the Complainants' affordability and two arrangements could not be in place at the same time. The Provider's agent explained that the First Complainant could telephone the Provider to make payments or set up a standing order anytime, but an overpayment could not be set up as a direct debit being requested by the Provider through the Flexible Payment Instruction. The First Complainant was also advised that the Complainants could exit the interest only arrangement and be re-assessed for an interest and part capital arrangement.

***Formal Complaint***

The First Complainant made a formal complaint during a telephone call on **27 August 2018** in respect of sale of the loan. The Provider issued a Final Response letter on **28 August 2018**.

The First Complainant wrote to the Provider in response to its letter of **23 August 2018** notifying the Complainants of the sale of the loan on **11 September 2018**. The First Complainant expressed her dissatisfaction with a number of aspects of the Provider's conduct, which I will summarise as follows:

i. the sale of the loan;
ii. the failure to notify the Complainants of the sale;

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iii. the failure to properly explain the transfer process;
iv. an assurance given during a telephone conversation that the loan would not be sold;
v. the failure to review the restructure agreement;
vi. the failure to action the Flexible Payment Instruction; and
vii. the failure to notify the Complainants the Flexible Payment Instruction was not actioned.

The First Complainant emailed the Provider on **2 October 2018** stating that a payment she had made on the *arrears telephone* was not taken off the capital balance. The First Complainant requested that the payments made in **August** and **September 2018** be taken off the capital balance. The Provider responded to this by email dated **4 October 2018** advising the First Complainant that the matter had been passed to the Complaints Department. The First Complainant's email was acknowledged as a complaint by the Provider on **8 October 2018**. A Final Response letter issued on **30 October 2018** which also addressed the sale of the loan.

***The First Complaint***

The Provider explains it sold a portfolio of non-performing BTL loans which included the Complainants' loan. The Provider states that the restructures on the Complainants' loan resulted in it being classified as non-performing.

The Complainants are dissatisfied with the Provider's decision to sell their loan. The reasons advanced in support of their position is that the sale was not good business practice, the loan was never in arrears, the loan was only subject to one restructure in **February 2015**, the Mortgaged Property was not a BTL, and the First Complainant was given an assurance that the loan would not be sold. The Complainants also maintain that the Provider did not notify them of the sale or properly explain the transfer process.

It is important to note that this Office can investigate the procedures and conduct of the Provider but it will not investigate the sale or transfer of a mortgage loan to a third party which is a matter within the commercial discretion of the Provider and generally conferred on it by the terms and conditions of a mortgage loan agreement. This Office will not interfere with the commercial discretion of a financial services provider unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants.

Clause 6 of the General Conditions states that:

> *"The Applicant(s)' attention is drawn to clause 11(iii) of the Mortgage Indenture. The Applicant(s) hereby acknowledge the Lender's right, without further consent or notice to the Applicant(s) to transfer the benefit of the Letter of Offer, the mortgage loan and the Lender's mortgage security …*

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> *over the property to any person, company or corporation on such terms as the Lender may think fit, without any further consent from or notice to the Applicant(s) or any other person …*

Clause 11(iii) of the Mortgage states that:

> *"The Borrower hereby acknowledges the Lender's right, without further consent from or notice to the Borrower, to transfer the benefit of this Mortgage, the Mortgage loan and the Lender's mortgage security … over the Mortgaged Premises to any person, company or corporation on such terms as the Lender may think fit, without any further consent from or notice to the Borrower or any other person …"*

The terms on which the Complainants entered the loan agreement and Mortgage conferred the Provider with a right to sell the Complainants' loan without their consent or without having to notify them of the sale. This also means the Provider was entitled to sell the Complainants' loan irrespective of the status of the loan and whether or not it was a performing or non-performing loan. In this instance, however, the Provider sold a portfolio of non-performing BTL loans.

In a letter dated **11 September 2018**, the First Complainant states that: *"I wish also to state here that my loan termed as 'BTL' was actually my original home; I am not nor have ever been an investor."* However, I accept that the Complainants' loan could be classified as a BTL loan because at the time of the sale as the Mortgaged Property it was not the Complainants' primary residence. During a telephone calls on **28 January 2015** and **17 February 2017**, the First Complainant told the Provider's agent that the Mortgage Property was rented, and it was also acknowledged in a call on **27 August 2018** that the Mortgaged Property was not the Complainants' primary residence. Further to this, the correspondence address used by the Complainants appears to be their primary residence which is not the address of the Mortgaged Property.

The loan was subject to three alternative repayment arrangements during which it was agreed that the Complainants would not be making their contractual monthly repayments as originally agreed when the loan agreement and Mortgage were entered into.

These arrangements were in place as the Complainants could not afford to make the contractual monthly repayments and, importantly, before the First Complainant made any enquiries about returning to full repayments, (which appears to have been early **2017)**. Therefore, I accept that it was not unreasonable to classify the Complainants' loan as non-performing.

During the call on **9 January 2017**, the First Complainant explained to the Provider's agent that she had been hearing a lot of talk about distressed mortgages, and asked if her loan was in distress, explaining that she would not want her loan to be handed over to a vulture fund like she was hearing on the news. The Provider's agent advised the First Complainant that this would not happen as the loan was not in distress and that was never going to be the case as the loan was subject to an arrangement.

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Although the Complainants believed the loan would not be sold, this assurance was given in the particular context of distressed loan sales to vulture funds, and I am not satisfied the it was capable of binding the Provider or overriding the contractual terms referred to above. However, it may have been more prudent for the Provider's agent to clarify that her comments did not necessarily mean the Complainants' loan would never be sold. I believe the information given was misleading.

The Complainants also state that the Provider did not notify them of the sale or properly explain the transfer process. The Provider wrote to the Complainants on **23 August 2018**, advising them of the sale of the loan as follows:

> *"We write to notify you that [the Provider] has reached an agreement with [the Third Party] to sell a loan portfolio … relating to your Loan Account … to an entity established and financed by [the Third Party], [the Buyer] …. The Buyer's registered address is…. We will write to you to confirm the date on which the Transfer has taken effect …. The clause of your loan which allows your Loan Account to be sold is Clause 11(iii) of your mortgage.*
>
> *[The Asset Servicing Firm] (the **"Servicer"**) will be appointed as servicer in relation to your Loan Account from the Transfer Date.*
>
> ***How Does this Affect You As A Customer?***
>
> *Your Loan Account will remain in place until all amounts payable under the terms of your Loan Account have been repaid in full, but from the Transfer Date all amount owing under … your Loan Account will be owed to the Buyer.*
>
> *As part of the Transfer, all relevant details relating to your Loan Account, including personal details, will be transferred to the Buyer and Servicer, which will become data controllers of your personal data in respect of the Loan Account. These details will be used by the Buyer and the Servicer for the servicing of your Loan Account and for related legal and regulatory purposes.*
>
> *The Buyer and the Servicer will use these details in a manner consistent with (and reliant on all consents and authorisations previously provided by you to [the Provider]. They Buyer and/or the Servicer will separately communicate with you about their roles and responsibilities in relation to your personal data. …*
>
> *After the Transfer Date, we will retain a copy of the information (including personal data) relating to your Loan Account and will continue to act as a data controller of this personal data for certain limited purposes such as compliance with our legal and regulatory obligations. If you require further information as to how we will use your personal data please submit your query by e-mail to … or alternatively you can write to …*

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***What Action Do You Need To Take?***

*You do not need to do anything at this time other than meet the repayments on your loan as they fall due. The Servicer will write to you shortly after the Transfer Date to advise you of any changes you need to make to your payment arrangements.*

***It Is Important To Keep Up Your Payments***

*It is your responsibility to ensure that you meet all of your payment obligations under your Loan Account. If you are concerned about your ability to meet your repayments, you may contact our Arrears Support Unit at ….*

***If You Have Any Queries***

*If you have any queries in relation to your Loan Account you can contact us on …*

*…"*

The Provider wrote to the Complainants again on **5 December 2018**, as follows:

*"We previously wrote to you to inform you that [the Provider] had reached an agreement with [the Third Party] to sell a loan portfolio, including your Loan Account … to an entity established and financed by [the Third Party], [the Buyer] ….*

*[The Buyer] nominated [the Asset Servicing Firm] as transferee of your Loan Account … with effect from [date]. [The Asset Servicing Firm] is an authorised retail credit firm regulated by the Central Bank of Ireland.*

*You can contact [the Asset Servicing Firm] on … or in writing ….*

*From the Transfer Date your Loan Account has transferred to, and your Loan Account is now held by, [the Asset Servicing Firm]. In this regard, we attach the Notice of Assignment ….*

*…*

***What Action Do You Need To Take?***

*Your Loan Account will remain in place until all amount payable have been paid, and your obligations to repay such outstanding amounts will be owed to [the Asset Servicing Firm] from the Transfer Date.*

*[The Asset Servicing Firm] will collect all repayments due in respect of your Loan Account. Depending on your payment method, you may need to make some changes outlined below.*

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***If you are making your payments via Direct Debit*** *…*

***If you are making your payments by Standing Order*** *…*

***If you wish to make an electronic payment*** *…*

***If you are making a payment by cheque*** *…*

***How Do I Contact [the Asset Servicing Firm]?***

*[The Asset Servicing Firm] may be contacted from the Transfer Date at …*

*…*

***What Happened Next?***

*As [the Provider] continued to respond to requests until the Transfer Date you may still receive some correspondence from [the Provider], if applicable, after the Transfer Date.*

*As the Transfer Date has now passed, please direct all further queries to [the Asset Servicing Firm] ….”*

In light of the correspondence issued to the Complainants in respect of the sale of their loan, it is quite clear that they were notified of the sale. Additionally, having reviewed the contents of the above letters, it is also clear that the Complainants were properly advised about the transfer process. Further to this, the First Complainant discussed the sale of the loan during a telephone call on **27 August 2018** and was provided with a telephone number for the Asset Servicing Firm during a telephone call on **28 August 2018**.

The Complainants, in their post Preliminary Decision submission, put forward that the “*promises and assurances amounted to a variation of the Contract Terms*”. Having fully considered the complaint I do not find that the assurances given to the Complainant, which were given in the particular context of distressed loan sales to third party providers, amounted to a variation of the terms on which the Complainants entered the loan agreement and Mortgage which conferred the Provider with a right to sell the Complainants’ loan without their consent or without having to notify them of the sale. This also means the Provider was entitled to sell the Complainants’ loan irrespective of the status of the loan and whether or not it was a performing or non-performing loan.

Therefore, taking the foregoing matters into consideration and the evidence of the parties, I accept that the Provider was entitled to sell the Complainants’ loan and that the Provider furnished the Complainants with adequate notice and information in respect of the sale.

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***The Second Complaint***

The elements comprising this aspect of the complaint are that the Provider prevented the Complainants from returning to full repayments, failed to action the Flexible Payment Instruction and failed to notify them of this, failed to correctly advise the Complainants as to the overpayment process, and failed to review the **February 2015** arrangement.

The evidence makes clear that the Complainants were never prevented from making overpayments to the loan account or prevented from returning to making full repayments.

In terms of overpayments, it was explained to the First Complainant on several occasions that when she was making an overpayment to specify that the payment was to be allocated towards reducing the capital balance, otherwise it would simply sit as a credit on the loan account earning interest.

The First Complainant appears to have first indicated a desire to return to full repayments on the loan during a telephone conversation on **9 January 2017**. However, on this and subsequent occasions, the First Complainant expressed uncertainty about doing so. The telephone conversations centred on the First Complainant wanting to make additional payments while querying the possibility of returning to full repayments. Further to this, the Complainants never formally instructed that they wished to exit the restructure arrangement and return to full repayments.

The Complainants have not established the precise manner in which the Provider prevented them from returning to full repayments. They have not put forward any evidence to show an ability to return to full repayments, whether information was furnished to the Provider to show such affordability, an SFS was not submitted, and there were no requests for meetings to discuss a return full repayments. I also note that the First Complainant was advised of her option to stay on the current repayment arrangement and make overpayments to the loan account, either on a regular or sporadic basic.

However, the account statements show that only two overpayments were made in **2017** and approximately 6 were made in **2018**.

A Flexible Payment Instruction appears to have been received by the Provider in or around **12 June 2018**. The First Complainant was incorrectly advised that the instruction would be in place for July during a telephone conversation on **13 June 2018**. An unsuccessful attempt was made by the Provider to contact the Complainant on **18 June 2018** to explain the payment instruction would not be set up without first re-assessing their affordability. This was explained to the First Complainant when she telephoned the Provider on **2 July 2018**.

While it was reasonable for the Provider to attempt to inform the Complainants that they could not set up the flexible payment option by telephone, it is not acceptable to seek to rely on unsuccessful telephone contact. The Provider attempted to contact the Complainants on **18 June 2018**, but it was unsuccessful.

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No subsequent attempts were made to contact the Complainants either by phone or in writing. I consider this to be totally unacceptable.

If the Provider had chosen to contact the Complainant by telephone, it should have continued to attempt to do so until successful contact was made or write to the Complainants to advise them of the situation. The Complainants did not become aware of the situation until the First Complainant telephoned the Provider. This is most unsatisfactory.

The Complainants submitted the Flexible Payment Instruction form without expressly informing the Provider that they wished to return to full monthly repayments. At this time, the Complainant were in a 5 year interest only alternative repayment arrangement. This was offered to the Complainants based on, and following an assessment of their affordability, in or around **February 2015**. Clauses 14 and 15 of this alternative arrangement state:

> *"14.1 In addition to any other covenants contained in the Letter of Offer, you hereby covenant with us that during the term of the Loan that you will (save with our prior written consent):*
>
> *…*
>
> *14.1.4 advise us immediately of any change in your financial circumstances (both positive and negative) …;*
>
> *14.1.5 meet with us to discuss your ability to revert to full annuity payments and use all reasonable endeavours to proposals to address the long term repayment of the Loan if required; …"*
>
> *…*
>
> *15.3 In accordance with the Covenants and Warranties clause, you are obliged to advise us immediately of any change in your financial circumstances, both positive such as an inheritance, an increase in income or being in receipt of a lump sum payment or negative such as …"*

These provisions make clear that if there was any change in the Complainants' circumstances, they were required to engage with the Provider. However, as noted above, no information regarding affordability was furnished to the Provider.

The evidence shows that the Provider was not preventing the Complainants' from increasing their repayments. However, before the Complainants could do so, they were required to be re-assessed for affordability. In any event, it was at all times open to the Complainants to make overpayments to the loan account without the need to complete a Flexible Payment Instruction. Further to this, it was explained to the First Complainant during certain telephone conversations with the Provider that the Complainants' could exit the interest only arrangement any time. This was also expressly stated in clause 10.1.

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The Provider wrote to the Complainants on **11 February 2015** offering a 5 year interest only repayment arrangement.

On the third page of this letter, it is stated that:

> *"We will contact you regularly during the period of the arrangement to ensure you are in a position to return to annuity (capital and interest) repayments."*

Clause 15 of the terms of this arrangement states:

> *"15.1 The arrangement set out in this letter will be reviewed to determine if the arrangement is still appropriate for you:*
>
> *15.1.1 every 18 months of the arrangement;*
>
> *15.1.2 at our discretion at any time and from time to time."*

While there was frequent communication between the parties, the Provider has not demonstrated its compliance with these undertakings. Although this would have enabled the Provider to assess the Complainants' circumstances, in particular, their affordability; I am not satisfied this in any way prevented the Complainants from returning to full repayments especially having regard to the 18 month intervals at which reviews were due to take place. Nonetheless, it is unsatisfactory that the Provider does not appear to have reviewed this arrangement in accordance with the above undertakings.

Therefore, in light of the matters outlined above and the Provider's acknowledgement of certain shortcomings in the service provided to the Complainants (particularly regarding the Flexible Payments Instruction), and communication generally, I partially uphold this complaint and direct the Provider to pay the sum of €1,000 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 (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 Complainants in the sum of €1,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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.

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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**

8 March 2021

**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.**