An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0208
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Selling mortgage to t/p provider Delayed or inadequate communication Dissatisfaction with customer service Errors in calculations Classification of borrower as non-cooperating
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint relates to the mortgage loans held by the Complainants with the Provider.

The Complainant's Case

The Complainants submit that when they took out their mortgage in 2001, it was linked to an endowment policy for the purpose of paying the capital amount due under the loan agreement, due to mature in 2026. In 2017, when their finances and loans were being reviewed by the Provider, the Complainants submit that there were errors in the calculation of their new repayment figures. They state that:

> *"We were in a split mortgage arrangement until 2017 when our finances were reviewed. [The Provider] deemed we could start repaying our loans in full. They set out the proposed repayments amount on our 4 loans, based on payment of full capital & interest. Our main mortgage 0034537963 was linked to an endowment policy since we took out the mortgage, serviced by* [third party provider]. *This policy costs €303.12 per month. This policy was due to pay off the capital on the mortgage in 2026.* [The Provider] *incorrectly included capital and interest for the new repayment amount.*

The Complainants state that they attempted to have the error corrected but have yet to receive a response: "*We requested this be rectified to reflect their error on* 29th *August 2017."*

In their complaint to the FSPO, the Complainants state:

> *"We have been unable to resume full payments on our loans until this matter was resolved. As a result of the error of* [the Provider]*, our loans are classified as non-performing loans and* [the Provider] *have informed us our loans are being transferred to* [a 3rd Party Provider]*".*

In a submission from the Complainants addressed to the Provider, the Complainants make reference to the sale of their loans to a third party entity and to letters they had received, dated **30 November 2018**, regarding the transfer of the loans. They again submit that their repayment amounts had been miscalculated and state:

> *"If this had been dealt with properly by* [the Provider] *over the last 18 months then these loans would have been classified differently and would not require transfer".*

The Complainants have raised issues with the communications and complaint handling by the Provider. In their complaint submission, received by this office on **11 January 2019**, the Complainants state:

> *"Since August 2017 this matter has been under investigation and we have regular correspondence to say the matter is ongoing by* [the Provider]*."*

The Complainants want the Provider to:

- Correct their mortgage repayments to reflect the correct amount;
- Maintain ownership of their loan(s).

<u>The Provider's Case</u>

The Provider, in its Final Response Letter dated **29 January 2019**, has acknowledged the delays experienced by the Complainants:

> *"I would like to offer my sincere apologies for the delay responding to you and would assure you it does not reflect the high standards of service we set ourselves."*
>
> *"I note from reviewing your account that you raised a query in relation to your RCR on the 29th August 2017. I note that no response was issued in relation to this query. All efforts are made to ensure our customers receive a professional and efficient service at all times and I apologise again that your experience was contrary to this."*

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In respect of these accepted "*shortcomings in service*", the Provider, in its response to this office dated 14 July 2020, made an offer of compensation in the amount of €2,000 together with its "*sincere apologies*".

The offer was expressly stated to remain open to the Complainants should they choose to accept it at a later date. The Complainants have rejected this offer indicating that they "*will not be considering any settlement figure below 30,000 euro*".

With regard to the other aspects of the Complainants' complaint, the Provider maintains that it correctly classified the Complainants' loans as 'non-performing', that it was perfectly entitled to sell the Complainants' loans to a third-party, and that it did nothing wrong in terms of the calculation of the repayments to be made by the Complainants following the end of the split mortgage Alternative Repayment Arrangements put in place.

The Complaints for Adjudication

The complaint is that the Provider:

- Incorrectly calculated the repayments on the Complainants' mortgage loan(s);
- Wrongfully classified the Complainants' loans as non-performing.

Decision

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

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

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

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A Preliminary Decision was issued to the parties on 31 May 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Analysis

There are essentially four discrete aspects to the Complainants' complaint. In the first part, the Complainants take issue with the amount of the repayments which the Provider calculated as appropriate for the Complainants to pay following the end of the split-mortgage Alternative Repayment Arrangements ['ARAs'] put in place.

Secondly, the Complainants complain about the fact that their mortgage accounts were designated as 'Non-Performing' by the Provider. Thirdly, the Complainants are aggrieved that the Provider sold the relevant loans to a third party. Finally, the Complainants are unhappy with the service afforded to them in terms of the manner in which the Provider addressed their complaints and/or queries. I will address each of these aspects of the Complainants' complaint in turn.

Prior to engaging in that analysis, I will set out a brief history of the Complainants' accounts with the Provider. The Complainants held four separate accounts with the Provider. The original account was an 'endowment variable rate home loan' opened in 2001 in the amount of approximately €160,000.00. Repayments on this account were originally in the amount of approximately €618 per month and the term of the loan was 25 years (300 instalments). The total amount repayable was stated to be approximately €384,000.00 and the cost of the credit was stated to be approximately €224,000.00. The original monthly repayments, if maintained for the full term of the loan, would have amounted to €185,586 leaving a shortfall of approximately €198,000 which it was intended to pay off in part with the proceeds of the endowment policy. The endowment policy, which was assigned to the Provider, made provision for a 'sum assured' of approximately €85,000.00.

Following the original loan, an 'equity release variable rate secured personal loan' was granted in 2003 in the amount of approximately €57,000.00, a 'further advance 1 year discounted tracker rate home loan' in the amount of €72,000.00 was drawn down in 2007, and a second 'equity release variable rate secured personal loan' in the amount of €40,000.00 was agreed later in 2007. Repayments on these accounts were originally in the respective monthly amounts of approximately €305, €485 and €283. All four loans were secured on the Complainants' home in Ireland. All four loans were transferred to the third party in May 2019.

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In terms of the development of the loans, the 'further advance 1 year discounted tracker rate home loan' fell into arrears in August 2011. In September 2011 after they had moved their primary residence to an address in the UK, the Complainants requested a 3 month 'Moratorium Restructure Arrangement' in respect of all four accounts whereby no repayments would be made; this was granted in October 2011. This arrangement came to an end in January 2012 at which time the Complainants requested an ARA whereby they would repay €500 per month across all four accounts. (I note that the Provider's response to this office refers to the proposal being a proposal to continue paying the interest on the original account together with an additional €500 across the remaining three accounts.

However, the detail on the SFS included as evidence suggests that the proposal was to pay €500 across all four accounts; the discrepancy is not something I need to resolve in circumstances where the proposal was not accepted. This request was rejected by the Provider on the basis that it was not considered sustainable. Arrears then began to accrue across all four accounts as and from January/February 2012.

In July 2012, the Complainants submitted a further proposed ARA whereby they would repay €575 per month across all four accounts. The Provider responded in August 2012 rejecting the proposal and indicating its view that there was affordability to make larger repayments.

The Complainants indicated their wish to appeal this decision which led the Provider to reconsider the matter resulting in a decision to offer interest only repayments (in the amount of approximately €527 per month) on the endowment account together with a 6-month ARA on the remaining three accounts whereby reduced repayments in the respective approximate amounts of €135, €75 and €114 would be accepted. This proposal was accepted by the Complainants and took effect from November 2012.

Thereafter, in May 2013, the Complainants submitted a further request for an ARA whereby they requested "a *further extension of our interest only arrangement*". On review of this request, the Provider determined that a 'Split Mortgage Restructure Arrangement' would be most appropriate, and in August 2013 the Provider offered an ARA whereby approximately €122,000.00 of debt would be warehoused across all four accounts at 0% interest whilst the terms of the various loans would also be extended. With regard to the endowment loan, the terms of the restructure provided for capital and interest repayments in the amount of approximately €479 per month on a balance of approximately €94,000.00 in circumstances where approximately €73,000.00 of debt was warehoused from this account. The term of this loan was extended by 152 months. The offers in respect of all four accounts, which were expressly subject to review in the event that repayment capacity improved, were accepted by the Complainants in September 2013 and the repayments were made as required.

After two years, the Provider sought to review matters and, in February 2015, requested an updated Standard Financial Statement (SFS) from the Complainants. An SFS was ultimately furnished in April 2017. Following review, the Provider determined that the Complainants had sufficient affordability to return to full capital and interest payments on all four accounts to include the amounts that had been warehoused.

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On this basis, the Provider issued ARAs to the Complainants in June 2017 which stipulated amended repayments in the approximate monthly amounts of €900, €239, €210 and €200 respectively. The Complainants did not accept this offer and therefore the four accounts remained on the Split Mortgage arrangement until the accounts were transferred to the third party in May 2019.

The Amount of the Repayments following the end of the Split-Mortgages ARA

The Complainants argue that the original loan was an 'endowment variable rate home loan', the terms of which were that repayments of a figure approximating to interest-only repayments would be made on a monthly basis and then, at the end of the loan term, the proceeds of the associated endowment policy would be applied towards the outstanding balance. The Complainants take issue with the fact that, when the Provider sought to bring an end to the Split Mortgage arrangement in June 2017, it proposed that capital and interest payments be made, and did not propose a return to interest only repayments as per the terms of the original endowment loan.

The Complainants complained about this matter at the time but were not provided with a satisfactory substantive response for a prolonged period. I will deal with this delay later.

A substantive response finally issued from the Provider on 28 February 2019 wherein the Complainants were offered the opportunity to return to interest-only payments on the full amount of the endowment loan.

It was noted that this would result in the increase of the Complainants' repayments from approximately €487 per month (the repayments under the Split Mortgage arrangement) to €525 per month. This offer does not appear to have been accepted.

In accepting the Split Mortgage ARAs in September 2013, the Complainants contractually committed to new account terms which supplanted the original terms of the loan. There was no guarantee of any right to return to the original terms. I can identify no reason why the Provider, upon review of the account in 2017, should have been restricted in any manner in terms of the details included in its proposal to further amend the terms of the account. It is of central relevance that the Provider did not seek to impose the 2017 proposal on the Complainants, instead permitting them to remain on the 2013 Split Mortgage ARAs. The fact that the Provider eventually agreed to reinstate the original terms does not alter this fact although it is noteworthy that the offer was not in fact accepted by the Complainants.

I also note that the Complainants, in claiming an entitlement to return to the original endowment account terms, appear to be overlooking the fact that they had not serviced the full loan amount (in the manner anticipated by the original terms) since late 2011. In such circumstances, at the time of the making of a complaint to this office, the account balance was quite a distance removed from where it was anticipated to be when the endowment account was opened in 2003. In addition, it is apparent that the 'sum assured' under the endowment policy is significantly less than the balance owing on the account in circumstances where the term of that loan has been extended significantly.

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Quite apart from the legal/contractual position, it is difficult to identify any reasonable basis on which the Complainants might be entitled to simply resume the original terms without any allowance being made for the significant deviation from those original terms. Once again, the fact that the Provider eventually agreed to reinstate the original terms does not have a direct bearing on this.

Designation of the Loans as 'Non-Performing'

In its letter of 28 February 2019 to the Complainants, the Provider stated as follows:

> *The definition of an NPL is complex; NPL is a regulatory classification which applies to loans even where such loans are meeting the terms of an agreed restructuring arrangement with* [the Provider]. *For this reason, your Split Loans with a future warehouse amount due at the end of the term, are classified as NPL.*

In its response to this office, the Provider maintains that the loans were correctly designated as 'Non-Performing' by reference to European Central Bank guidance.

The Provider sets out a quotation (which appears to be drawn from a European Commission Implementation Act on 'implementing technical standards and supervisory reporting') which provides as follows:

> *non-performing exposures are those that satisfy any of the following criteria:*
>
> *(a) material exposures which are more than 90 days past due;*
>
> *(b) the debtor is assessed as unlikely to pay its credit obligations in full without realisation of collateral, regardless of the existence of any past due amount or of the number of days past due.*

The Provider relies on (b) above in maintaining that it was entitled, indeed obliged, to classify the Complainants' accounts as 'Non-Performing' in circumstances where it deemed the Complainants as "*unlikely to pay their credit obligations in full within the mortgage term*".

The assessment made by the Provider was reached at a time (prior to November 2018) when the Complainants' four accounts were operating pursuant to the 2013 Split Mortgage ARAs. The Provider had, in June 2017, offered a return to full capital and interest payments however this offer adopted the extended loan terms (that is, the greater than 10 years added to each of the loan terms) that had formed part of the Split Mortgage ARAs. As such, even had the June 2017 offer been accepted by the Complainants, it was reasonable to have concluded that the Complainants were unlikely to repay their original obligations within the original terms of the agreements.

The latter point is important in circumstances where the Complainants frame, to a certain degree, their failure to accept the June 2017 offer as the result of the Provider's 'error' in terms of its calculation of the 'full' repayment figure on the endowment account.

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Notwithstanding that I have not come to any finding against the Provider relating to this matter as set out above, the fact remains that even had the Complainants been satisfied with the figure proposed by the Provider in respect of the monthly repayment on the endowment account, and even had they therefore accepted the June 2017 offer, the Provider would still, in my view, have been entitled to deem them as unlikely to pay their credit obligations in full. As such, I accept that the Provider was entitled to deem the Complainants' loans as Non-Performing.

Sale of Loans to Third Party

The Complainants complaint relating to the sale of the loans is linked to the designation of their accounts as Non-Performing. In essence, the Complainants say that their loans were selected for sale to the third party on the basis that those loans had been designated as Non-Performing. However, the Complainants contend that the designation was incorrect. On foot of such reasoning, the Complainants challenge the validity of the sale of the loans.

As stated above, I accept that the Provider was entitled to designate the Complainants' loans as Non-Performing.

The Complainants, in their letter of 26 February 2019, argued that the sale of the loans would amount to "*breach of contract*". The Complainants stated that they had legal advice from a solicitor confirming this. The Complainants did not however identify the particular term(s) of their contract with the Provider said to have been breached.

I am satisfied that there has been no breach of contract in this regard. There is no restriction on the Provider in the terms and conditions of the accounts on its ability to transfer the particular accounts. On the contrary, the terms and conditions of the accounts provide for precisely such action:

> *1.15* [The Provider] *may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person*…

It is apparent that the entitlement of the Provider to transfer any given account is not linked to any prior designation of the account as 'Non-Performing'. As such, even had the Complainants' accounts not been deemed to be 'Non-Performing', the Provider would still have been entitled to proceed with the transfer. There is no basis on which to seek to rescind the transfers nor would there have been any basis to restrict ("*stop*") the transfers prior to their completion.

Service Failings

The Provider has, quite correctly, acknowledged a series of significant failings in terms of the service it provided to the Complainants. In particular, it has accepted that there were serious delays in providing satisfactory responses to the Complainants as well as multiple instances of wholly unsatisfactory responses having been provided.

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I find the 'Final Response Letter' of 29 January 2019 which declared that matters had been addressed in previous phone calls and which entirely omitted to set out any substantive analysis whatsoever to be particularly disappointing. Equally the 'Final Response Letter' of 08 March 2019 omitted any substantive reasoning.

These failings were belatedly acknowledged in the Provider's response to this office of 14 July 2020 wherein "*sincere apologies*" were offered and wherein compensation in the amount of €2,000 was also offered. The apology was entirely necessary and appropriate.

Those failings having been, albeit belatedly, acknowledged, my function is to consider if the compensation offered is sufficient. In the circumstances, I accept that the figure of €2,000 advanced by the Provider is reasonable. The Complainants' statement that they "*will not be considering any settlement figure below 30,000 euro*" is neither realistic nor reasonable.

As I believe the Provider's offer of €2,000 to be reasonable in the circumstances of this complaint, I do not uphold this complaint.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

22 June 2021

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

(a) ensures that—

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

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

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