Decision Ref:	2021-0273
Sector:	Banking
Product / Service:	Accounts
Conduct(s) complained of:	Failure to process instructions in a timely manner Maladministration
Outcome:	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant is a limited company. The complaint relates to the Provider's withdrawal of facilities in 2015 to the Complainant Company, and its refusal to release the deeds to a property the Provider held as security for the Complainant Company's overdraft ("P…. property"). The P…. property was personally owned by the Complainant Company's Directors. The release of the deeds was sought by the Complainant Company Directors (the then owners of the business) for the purpose of progressing the sale and leaseback of the business, in order to repay the Provider's overdraft.

The Complainant's Case

The Complainant Company argues that while it understands the Provider's right to call in the overdraft, it is concerned in the manner in which the Provider had carried this out. The Complainant Company asserts that it was not afforded the opportunity by the Provider to resolve the situation due to the restructuring demands of the Provider. The Complainant further argues that the Provider refused to release the deeds relating to P… property from where the Complainant Company ran it business. The Complainant Company Directors state the borrowings for that P… property were re-paid in full in 2014. The Complainant Company submits that that the Provider should have released the deeds earlier than it did, in order to facilitate the proposed sale and leaseback of the business.

The Complainant Company asserts that the Provider wrongfully moved the Complainant Company's facilities to the Provider's restructuring group in 2013 and in turn to another

area of the Provider in 2014. It also asserts that the Provider wrongfully closed the Complainant Company's Current Account and removed the overdraft facility.
It further asserts that the Provider wrongfully linked one of the Directors' personal accounts with the Complainant Company's accounts resulting in the non-release/delayed release of the deeds of the property and gave incorrect information in relation to the release of the deeds to a property used by the Complainant Company directors as security.

The Complainant Company also asserts a delay in releasing/vacating/discharging of mortgage/charge over the property in question.

The Complainant also relates to the overall communication by the Provider regarding the administration of the Complainant Company's facilities, since 2014.

The Complainant Company states that it is difficult to understand why the Provider adopted the approach it did in response to the Complainant Company Directors' proposal for the sale and leaseback of the business, to repay the overdraft to the Provider. The Complainant Company says that the Directors, as guarantors, owned the secured property as an investment, and it was not intended for sale. The Complainant Company carried out their commercial business from the P… property. The Complainant Company states that what triggered the sale and leaseback of the business was the Provider serving notice on the Complainant Company that it wanted the overdraft (only the overdraft) repaid by February 2015. The Complainant Company states it could not repay the overdraft in the timeline allowed so the Directors, as guarantors, undertook to sell the P… property (as personal owners of that property) and apply the proceeds to a full repayment of the overdraft and apply as much of the surplus funds as needed in additional working capital for the Company. The Complainant Company states that the Directors informed the Provider of this plan and kept the Provider informed. The Complainant Company states that it secured a sale for €310,000 and leaseback which would have enabled the Complainant Company to continue its business without interruption.

The Complainant Company states that the Provider would not furnish the deeds and did not initially explain why the deeds were being withheld. Subsequently the Provider's representatives confirmed in separate letters that the deeds were being held back for personal loan debts.

The Complainant Company argues that the Provider could have co-operated with the sale and leaseback, have the overdraft repaid in full, and raise claims over the surplus funds to be held by the Provider, if as the Provider contended the property was also available to it as security for personal loans.

The Complainant Company's position is that there is cause to suspect the Provider may have put itself in this position to protect its disposal and sale of the personal loans to the new owner of its loans, and had erroneously transferred the security of the property as additional security for the loans. The Complainant Company submits that if the Provider had made that transfer or undertaken to do so, this would explain what it describes as this strange behaviour.

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The Complainant Company says that Director 1 and 2, as directors of the Complainant Company are adamant that the sale and leaseback of the property would have enabled it to clear the overdraft debt in full, and if needed to pay off the Company debt to the Provider and still have funds to continue the trading of the Company and also to do so from its established place of business on a new lease.

The Complainant Company states that in 2015 it had to change to another Provider for its trading account after the Provider closed its account in respect of transactions. The Complainant Company asked the new Provider to provide facilities and that Provider indicated it would do so, but only on the release of the deeds of the P… property as security. The Complainant Company states it was not able to provide the deeds and was extremely concerned as to what the Provider would do next if the overdraft was not repaid. As directors they were advised that the primary security given by the Company to the Provider for the overdraft was a First Fixed Floating Charge over all the assets of the Company. The Complainant's position is that it had a real fear the Provider might appoint a receiver without warning and this would be a disaster for the Company and its stakeholders. The Complainant Company says that it and its Directors considered there was only one option and that was a quick sale of the Company's business to a competitor.

The Complainant Company says that the *nuclear option* of the sale of the business was secured in early 2016 and the Provider's overdraft repaid in full.

The Complainant Company states that up to 2015 it was a strong viable trading company of over 30 years and it provided Director 1 and 2 with income and security. The Complainant Company states it was under no threat until the Provider refused to release the deeds for the P… property, and that the Complainant Company was not for sale.

The Complainant Company explain that this changed when it was felt the threat from the Provider was so serious it might appoint a receiver without warning. The Complainant Company submit that the only option open to Director 1 and 2 was to sell the business immediately.

The Complainant Company says this meant the Complainant Company would cease operations and the business would pass from the owner's control. For Director 1 and 2 it also meant the loss of their income and livelihood.

The Complainant Company says that as shareholders Directors 1 and 2 were paid a purchase price for their shares in the company, and says this was always their entitlement for investment and risk. The Complainant Company says however, that because they were forced to lose employment the directors should be entitled to compensation separate to the sale of their shares.

The Complainant Company states that the loss of the Directors' employment is a direct result of the Complainant Company not being able to continue its trading operations.

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The Complainant Company asserts a loss, to Directors I and 2 of annual earning of over €400,000 resulting from the Provider's conduct.

The Complainant Company asserts that its loss is directly measurable in its trading income. It states that it had for a number of years earned income from trading of over €400,000 per year. It asserts that this level of earnings was sustainable and likely to continue for many years. It further states that the income the company earned allowed it pay its director/stakeholders a good liveable income and provide them with security of tenure and services with direct impact on their living standards.

The Complainant Company states that the director/stakeholders had salaries of €72,500 each plus car expenses and pension contributions. It also states that the Complainant Company also made net profits after the salary payments and expenses to its stakeholders. It states that these were the direct losses incurred by the Complainant company.

The Complainant submits that the damage to the Company was €144,000. It states that this was the value of the contingent asset in 2015 and the contingent asset was lost by direct result of the Provider refusing (throughout 2015) to provide the deeds of the P … property to complete the sale and leaseback. The Complainant Company says that the Overdraft of €144,000 was paid from the sale of the business forced on the Company and its directors when the sale and leaseback could not be completed. The Complainant states that the loss of the business was substantially higher for the Company.

The Complainant's position is that the Provider is wrong about the Company's profitability, that the Company was profitable in 2013, 2O14, and 2015, and in all years the net profit stated, is after the payment of salaries and benefits to the directors, and rent.

The Complainant disagrees with the Provider and argues that the Provider did not work with the company to repay its borrowings. That it obstructed the company in its efforts to repay the overdraft.

As regards the termination of the overdraft, the Complainant says the Provider notified the company initially on **5 January 2015** (not **5 January 2014**) and then formally on **30 June 2015**, after the directors had secured a sale and leaseback agreement of the P… property, and even after the FSO had summarised the complaint on **15 September 2015** to the Provider it continued to obstruct the company and did not facilitate the Company and its directors to complete the sale and leaseback which was still live and available at that date and was still being pursued by the Complainant as the solution to the repayment of the overdraft.

As regards the repayment of the overdraft and closure of accounts, the Complainant says the overdraft was repaid, but the Company had to sell its business to make this payment.

As regards Provider's argument that the P… property was not owned by the Complainant Company, the Complainant agrees. But says that it is irrelevant as the Complainant company had an enforceable asset interest in the P… property as its overdraft with the Provider had to be repaid from the proceeds of sale of the property in priority to any

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benefit of funds from a sale being payable to the registered owners (Director 1 and 2) and this condition precedent was in place as a result of the Provider attaching it as a condition to the offer of the overdraft facility on **23 November 2011**. The Complainant states that from that date once signed into mortgage by the owners on December 2011, this benefit became a contingent asset of the Complainant company and while any part of the overdraft covered by the agreement of **23 November 2011** remained outstanding to the Provider then the Company had an enforceable right to have that overdraft repaid in priority to the interests of the owners or any other party making a claim against the property. The Complainant states that the claim now by the Provider in regard to ownership is both spurious and irrelevant to the facts which it had created, itself, in the security conditions which it attached to the overdraft **23 November 2011**.

As regards the Provider's argument that at all times, the Provider acted lawfully in its dealings with the Complainant Company and in accordance with the terms of the Overdraft Facility, and there has been no suggestion made that the Provider acted otherwise, the Complainant's response is that the Provider did not act lawfully in denying the company and directors access to the deeds of P… property in order to complete a sale and leaseback for the sole purpose of repaying the overdraft facilities demanded by the Provider.

As regards the Provider's argument that it is impermissible and inappropriate that Director 1's personal complaint is placed within the Complainant Company's complaint, or that it forms any part of the Complainant Company's complaint, the Complainant says the Company in its own right is the Complainant. The Complainant says the Company and its directors including its managing director (Director 1) were left with no alternative but to sell the business in order to repay the overdraft demanded by the Provider for the very specific reason that the Provider would not facilitate them to complete the sale and leaseback of the business and make the repayment of the overdraft in that way and in having to make the outright sale of the business, the Company was no longer in a position to retain the employment of Director 1 and pay him his salary and benefits which he had been in receipt of for over 30 years, and that the same applies to Director 2.

The Complainant states that prior to the acceptance of the overdraft terms and conditions as set out in the Provider's letter of offer **23 November 2011** the Complainant Company had no interest or claim in regard to the P… property.

The Complainant Company says that by reason of the security given in completion of the terms of **23 November 2011** and for all periods where the Company had an overdraft liability outstanding to the Provider it held an entitlement to receive funds from any realisation or sale/disposal of P… property by its owners (Director 1 and 2) in priority to their interest in the property or the proceeds of sale to an amount required to repay the Provider in full the overdraft liability afforded it under the terms of offer **23 November 2011**. The Complainant states that this was a real asset of the Company contingent only on whether an overdraft existed.

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The Complainant Company submits that as the overdraft did exist throughout 2015 and up to the time the overdraft was repaid in **April 2016** this contingent asset had a real and monetary value to the Complainant Company.

The Complainant Company says that the overdraft amount was always a substantial sum and was not inconsequential.

The Complainant Company states that the submission made by the Provider that the Company and its directors had no entitlement to seek the deeds of P… property to complete a sale and leaseback in favour of the Complainant Company (who occupied the property as their place of business), is completely wrong and most emphatically as it was for the stated purpose of repaying the overdraft outstanding to the Provider by reason of the agreement entered into on foot of the offer of **23 November 2011**.

The Complainant Company states that it should be noted that the contingent asset in favour of the Company was a cause and effect of the terms and conditions attached by the Provider to the overdraft offer of the **23 November 2011**.

The Complainant Company submits that the damage to the Company was €144,000. This, it states, was the value of the contingent asset in 2015 and the contingent asset was lost by direct result of the Provider refusing (throughout 2015) to furnish the deeds of P… property to complete the sale and leaseback. The Complainant Company says that the overdraft of €144,000 was paid from the sale of the business forced on the Company and its directors when the sale and leaseback could not be completed. The Complainant Company states that the loss of the business was substantially higher for the Company.

The Provider offered the amount of €9,500 to the Complainant Company in recognition that its responses were not at all time as clear and comprehensive as they ought to have been. This offer was rejected by the Complainant Company.

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

The Provider does not accept the Complainant Company's contentions regarding the provision of facilities, the restructure and amalgamation of loans, the holding of security and the closure of the Complainant Company's current account or sale of facilities to a third party. While the Provider acknowledged the Complainant Company's dissatisfaction with the fact that its facilities were included as part of a portfolio sale by the Provider, the Provider's position is that it was acting within its rights to take this course of action. In support of its right of action the Provider refers to the Provider's Standard Terms and Conditions Governing Business Lending to Companies — which contains the power for the Provider to assign the facilities and associated security.

The Provider states that the facilities in question were offered to the Complainant Company on a non-advisory basis, for their consideration prior to acceptance or decline of the facilities. The Provider submits that the Complainant Company's Directors accepted the facilities offered on the basis set out in facility letter dated **12 August 2011** and by

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further advancement on **23 November 2011**, and under the Provider's Terms of Business issued and accepted by the Complainant Company on **16 August 2011** and **02 December 2011**. The Provider states that the Complainant Company confirmed its acceptance of the facilities offered by way of signed Board Resolution and by signature attaching to the facility documents.

The Provider's position is that it understood that the security held would be available for all the company's liabilities to the Provider. The Provider states that it notified the Complainant Company of the Provider's intention to cease providing overdraft facilities on **30 August 2015** (extended to **16 October 2015**) and further that the Provider intended to sell the overdraft facility to the new loan owner.

The Provider states that the P… property secured the Complainant Company's facilities by way of personal guarantee from Directors 1 and 2. The Provider submits that the Complainant Company's interests in the P … property, being the occupational lease (if any), was secured to the Provider within the floating charge of the debenture given by the company to the Provider.

The Provider's Facility Letter in favour of the Complainant Company was dated **12 August 2011.** It states that this Facility was accepted by way of signature of Directors 1 and 2 on **16 August 2011**, in their capacity as Directors of the Complainant Company.

In relation to the losses asserted by the Complainant Company the Provider requested that the Complainant Company and its financial advisor provide full details and documentary proof in support of its claim that it suffered detriment. It requested that such details and proof relate solely to the complaint by the Company.

The Provider states that the Complainant Company is a limited liability company. The Provider says that at the time its complaint was submitted to the, then, Financial Services Ombudsman, Director 1 and 2 were directors of the Complainant Company.

The Provider states that Director 1 and 2 resigned as directors of the Complainant Company with effect from 20 April 2016.

The Provider says that as has been pointed out, Director 1 had also submitted his own separate complaint to the this Office. This complaint has now been withdrawn.

The Overdraft Facility

The Provider states that the business overdraft facility made available by the Provider to the Complainant Company was governed by the terms and conditions contained in the facility letter dated **23 November 2011** and the attaching General Terms and Conditions for Business Lending to Companies ("the overdraft Facility"). The facility letter offered the overdraft Facility to the Complainant Company with a limit of €150,000.

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The Provider says it was stated in the facility letter that the purpose of the overdraft Facility was for the Complainant Company's working capital. The repayment terms of the overdraft Facility were stated as follows:

> *"Subject to the [Provider's] right to demand repayment at any time, the Facility will be available until notification to you by the [Provider] of its intention to cancel the Facility. Without prejudice to the [Provider's] rights under this Clause, the Facility will be subject to review on at least an annual basis."*

Clause 3.2 of the General Terms and Conditions for Business Lending to Companies provided as follows:

> *"An overdraft Facility is repayable on demand and the [Provider] may at any time by written notice:*
>
> *(a) terminate the Facility and/or*
>
> *(b) demand immediate repayment of all or any amounts drawn and outstanding under the Facility and all accrued interest and other sums payable in respect of the Facility."*

The Provider states that the Complainant Company accepted the terms and conditions, including the General Terms and Conditions for Business Lending to Companies, by the signing by the Complainant Company's directors of the acceptance provisions contained in the facility letter on **02 December 2011**.

Also attached to the facility letter was a certified extract of the minutes of a meeting of the board of directors of the Complainant Company held on **02 December 2011** resolving to approve entry by the Complainant Company into the overdraft Facility.

Security required for the Overdraft Facility

It was also stated in the facility letter dated **23 November 2011** that the Provider continued to rely on the following as security for the overdraft facility:

> *1. "All sums debenture giving the Provider a first fixed and floating charge over the assets of the Complainant Company; and*
>
> *2. Letter of guarantee of Director 1 and 2 supported as collateral by an all sums legal charge over the premises at P… property.*

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The P…. property

The Provider states that P… property was owned personally by Director 1 and 2; it was not owned by the Complainant Company, and nor was it an asset of the Complainant Company.

There was an all sums charge in favour of the Provider over the P…. property.

The Provider states that in those circumstances, the Complainant Company was unable, in its own right, to dispose of the P… property or require that the title deeds to the P.. Property be released into the Complainant Company's custody.

The Provider Accordingly, says that the basis of the Complainant Company's complaint (as stated in its initial complaint to the FSO) that "*…the Provider [had] refused to release the deeds relating to [the P.. Property]…[and] that it [was] imperative that the Provider release these deeds into [the Complainant Company's] custody, in order to carry out the sale of the premises which it [was then] trying to negotiate*" was clearly mistaken and incorrect.

The Provider's Recovery division and the Capital Resolution division

The Provider says its recovery division operated within the Provider and was for those borrowers who the Provider considered required a greater level of management due to their challenging financial circumstances. The Provider states that the Provider's policy in this regard was to ensure that borrowers who needed a higher level of loan management and support were managed within the specialised division that had been established for that purpose.

The Provider states that borrowers' rights and obligations under the relevant loan facility agreements were entirely unaffected by the transfer of the management of the loan facilities to its recovery division.

The Provider states that on **01 November 2013** the Capital Resolution section was set up. The Provider states that this was a separate business within the Provider whose objective was to manage and wind down its higher risk and capital-intensive assets by the end of 2016.

The portfolio included, but was not limited to, certain lending products and other financial instruments originated by the Provider including assets from the Providers other legal entities.

The Provider says that in 2014 all affected borrowers were notified of 4 possible outcomes in line with the recovery agreed principles.

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The Provider states that this meant that, in broad terms, the possible outcomes included, but were not limited to:

1. A refinancing of the relevant asset on market terms;

2. Repayment of the financing arrangement;

3. A sale of the financing arrangement to a third party; or

4. In appropriate circumstances, the enforcement of its rights.

Transfer of the management of the overdraft Facility within the Provider

The Complainant Company was formally notified of the transfer of the management of the overdraft Facility to the specialised recovery division of the Provider in 2013 by way of letter dated **28 January 2013**.

In this letter, the Provider explained that management of the overdraft Facility was being transferred to the specialised recovery division;

> *"…predominantly due to the ongoing loss-making nature of the company and of the hardcore usage of the overdraft facility."* The [Provider] also explained that the recovery division's role was *"…to seek to understand the problems the borrower is currently facing and to explore all possible solutions. The [Provider's] ultimate strategy is to improve the Risk [sic] profile of this exposure to the extent that it meets normal business parameters and can be returned to the management of the Business Banking team."*

The Provider states that at the time of the transfer of the Complainant's Company's overdraft Facility to the division, the Provider had increasing concerns about the financial position of the Complainant Company and the losses being sustained by it, and that it was unable to meet its financial commitments.

In a letter to the Complainant Company dated **4 February 2013**, the Provider identified the following concerns that resulted in the transfer of the overdraft Facility to the recovery division of the Provider:

1. Falling level of turnover;

2. The Complainant Company's losses;

3. Cash flow pressures and hardcore overdraft borrowings; and

4. Concerns regarding repayment of the borrowings.

The letter concluded by stating that the main objective of the recovery division was business turnaround.

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The Provider states that at all times, the Complainant Company's rights and obligations as contained in the facility letter dated **23 November 2011** were entirely unaffected by the transfer of the management of the overdraft Facility to the recovery division of the Provider.

The Provider submits that it remains satisfied that, in the circumstances of the financial position of the Complainant Company, at the time that the transfer of the management of the Complainant Company's overdraft Facility to the recovery division, was the correct and prudent course of action for the Provider to take.

The Provider states that in 2014, when the entire recovery portfolio was transferred to another division of the Provider (as described above), the implications for the Complainant Company were fully documented to the Complainant Company. The Provider says by way of example, the Provider wrote to the Complainant Company by letters dated 5 January 2014, 1 August 2014, and 7 October 2014. The Provider's position is that at all material times, it was open to the Complainant Company to refinance its debt and move its banking business to another lender.

Termination and repayment of the Overdraft Facility

The Provider states that in accordance with the terms of the facility letter dated **23 November 2011**, by letter dated **30 June 2015**, the Provider notified the Complainant Company of its intention to terminate the overdraft Facility, and close the current account to which it was connected, within no less than two months of the date of the letter.

The Provider submits that ultimately, the overdraft Facility was repaid in full by the Complainant Company on 22 April 2016 and the current account, to which the overdraft Facility was connected, was thereafter closed.

The Provider says that the P… Property was not owned by the Complainant Company. The Provider states the Complainant Company could not, therefore, have itself disposed of the P Property to pay down the debt of the Complainant Company.

Aggregation policy of the Provider

The Provider states that the Provider is required by prudential requirements of the CBI to aggregate or link connected accounts in order to appropriately manage the Provider's lending risk.

The Provider however, says the Provider is satisfied that, at all time, it dealt with the Complainant Company on a standalone basis, and that the aggregation or linking of any connected accounts formed no part of, and did not influence, the Provider's assessment and decision making process as regards the Complainant Company and the overdraft Facility.

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Provider's Conduct

The Provider states that the Complainant Company had suffered a decrease in turnover since 2008 and had incurred losses.

The Provider says that at all times in its dealings with the Complainant Company, the Provider acted lawfully and in accordance with the terms of the overdraft Facility, and there has been no suggestion made that the Provider acted otherwise. In that regard, the Provider points out that the Complainant Company acknowledged in its initial complaint to this Office that it "*[understood] the Provider's right to call in the [overdraft Facility]*."

The Provider states in the submissions of the Complainant's representative dated **20 November 2020**, it is stated that the Provider "*…had a duty of care to provide the deeds [of the P… property] to complete the sale and leaseback and facilitate [the Complainant Company] to repay its overdraft.* ***This is what the Provider did wrong****.*" [representative's emphasis]

The Provider's response is that, as has been explained, the P…. Property was not owned by the Complainant Company. Rather, it was owned personally by Director 1 and 2, the former directors and shareholders of the Complainant Company, and the Provider held an all sums charge over the P… property.

The Provider submits that at the core of the Complainant's representative's submissions is Director 1's personal complaint that he and Director 2 had to sell their interests in the Complainant Company, and that the Complainant Company could not then continue to provide Director 1 and 2 with a living and a livelihood.

The Provider says it is impermissible and inappropriate that Director 1's personal complaint (and that of his then fellow director and shareholder) is placed within the Complainant Company's complaint or that it forms any part of the Complainant Company's complaint.

The Provider's position is that to do so is to mistakenly confuse and conflate matters and issues affecting the directors personally with those of the Complainant Company. The Provider says that the Complainant Company is a separate legal entity and there must necessarily be a clear delineation and distinction drawn between the personal affairs of the directors and the affairs of the Complainant Company. The Provider's position is that this confusion and conflation can be traced back to the initial complaint made by the Complainant Company. The Provider says in this regard, the basis of the Complainant Company's initial complaint that "*…the Provider [had] refused to release the deeds relating to [the P.. property]…[and] that it [was] imperative that the Provider release these deeds into [the Complainant Company's] custody, in order to carry out the sale of the premises which it [was then] trying to negotiate*" was clearly mistaken and incorrect.

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The Provider says any complaint (whether with, or without, any basis) in relation to the Provider's refusal to release the P property or concerning or relating to the P property and/or the Provider's charge on it, must necessarily be made by either Director 1 and 2, personally, as the owners of the P… property. The Provider's position is that the Complainant Company does not have capacity to make any such complaint. It points out that Director 1 has withdrawn his complaint from this Office.

The Provider asserts the following:

1. Since 2008, the Complainant Company suffered a downturn in revenues and sustained losses.

2. The Provider worked with the Complainant Company in relation to its borrowings with the Provider.

3. Ultimately, and in accordance with the terms of the overdraft Facility, the Provider notified the Complainant Company of the termination of the overdraft Facility.

4. The overdraft Facility was repaid by the Complainant Company on **22 April 2016** and the current account, to which the overdraft Facility was connected, was thereafter closed.

5. The P…. property was not owned by the Complainant Company.

6. At all times, the Provider acted lawfully in its dealings with the Complainant Company and in accordance with the terms of the overdraft Facility, and there has been no suggestion made that the Provider acted otherwise.

7. It is impermissible and inappropriate that Director 1's personal complaint is placed within the Complainant Company's complaint, or that it forms any part of the Complainant Company's complaint.

The Provider states that during the course of the complaint the Provider has endeavoured to address the issues regarding the P… property as they related to the Complainant Company and separately to the owners of the P… property.

The Provider states that the Provider's efforts to assist in resolving the complaint extended to its suggestion that a third-party professional be engaged at the Provider's cost. The Provider states that while it was pleased that its offer in this regard was accepted, it regrets that it did not assist in reaching a mutually acceptable outcome.

The Provider says, it accepts that in the course of responding to the Complainant Company's complaint that its responses were not at all time as clear and comprehensive as they ought to have been, and for that the Provider has apologised. In recognition of this, and also in the spirit of resolution, the Provider offered the amount of €9,500 to the Complainant Company. This offer was rejected by the Complainant.

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<u>Evidence</u>

<u>Facility Documentation</u>

23 November 2011 – Facility letter for Complainant business

> *"Repayment*
> *Subject to the [Provider's] right to demand repayment at any time, the Facility will be available until notification to you by the [Provider] of its intention to cancel the Facility. Without prejudice to the [Provider's] rights under this Clause, the Facility will be subject to review on at least an annual basis".*
>
> *Additional Terms & Conditions Applicable To All Facilities*
>
> *Security*
> - *Held: All Monies Debenture giving the [Provider] a First Fixed and Floating charge over the assets of the Company.*
> - *All monies Letter of Guarantee signed by [Director 1 and 2] with as collateral: All Monies legal charge over premises at [P… property].*
>
> *It is understood that the above security held will be available for all your Company's liabilities to the [Provider]".*

The Facility Letter is signed by the Complainant Company Directors and dated **2 December 2011.**

Facility Letter **12 August 2011**

> *"Repayment*
> *Subject to the [Provider's] right to demand repayment at any time, the Facility will be available until notification to you by the [Provider] of its intention to cancel the Facility. Without prejudice to the [Provider's] rights under this Clause, the Facility will be subject to review on at least an annual basis".*
>
> *Additional Terms & Conditions Applicable To All Facilities*
>
> *Security Held*
> - *All Monies Debenture giving the [Provider] a First Fixed and Floating charge over the assets of the Company.*
> - *All monies Letter of Guarantee signed by [Company directors] with as collateral: All Monies legal charge over premises at [company's business address].*
>
> *It is understood that the above security held will be available for all your Company's liabilities to the [Provider]".*

The Facility Letter is signed by both directors and dated **16 August 2011**.

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Continuing Guarantee – **dated 11 February 1991**

"To [the Provider]

In consideration of the [Provider] giving time credit banking facilities or other accommodation to [the Complainant Business] (the Debtor)

NOW [director's names]…(the Guarantor) hereby guarantees payment to the [Provider] on demand of all present or future actual or contingent liabilities of the Debtor to the [Provider] whether on account of loans credit advances bill of exchange cheques promissory notes guarantees indemnities interest discount commission banking charges and whether incurred as principal or surety and whether solely jointly or in partnership with others and all legal or other expenses (on a full indemnity basis) howsoever incurred by the [Provider] in connection therewith .."

In respect of the Guarantor's liability hereunder the [Provider] shall have a lien on all securities or other property of the Guarantor held by the [Provider] whether for safe custody or otherwise. The [Provider] shall further be entitled (as well before as after demand hereunder) to set-off against any credit balance in any account of the Guarantor with the [Provider] (whether current or otherwise or subject to notice or not) the liability of the Guarantor to the [Provider] hereunder and to apply any such credit balance or any part thereof in satisfaction or reduction of such liability as and when the [Provider] shall think fit.

This Guarantee shall apply to the ultimate balance owing by the Debtor to the [Provider] and until such balance has been paid in full the Guarantor shall not be entitled to share in any security held or money received by the [Provider] on account of that balance or to stand in the place of the [Provider] in respect of any security or money nor until such balance has been paid in full shall the Guarantor take any step to enforce any right or claim against the Debtor in respect of any moneys paid by the Guarantor to the [Provider] hereunder or have or exercise any rights as surety in competition with the [Provider].

Where this Guarantee is signed by more than one person (other than as agents for a named principal) the agreements and obligations on the part of the Guarantor herein contained shall take effect as joint and several agreements and obligations and all references to the Guarantor shall take effect as references to the said persons or any one or more of them and none of them shall be released from liability hereunder by reason of the Guarantee ceasing to be binding as a continuing security on any other or others of them".

General Terms and Conditions for Business Lending to Companies

"Security

11.11 Save as the Facility Letter may otherwise provide, the Security will extend to cover all the present and future obligations of the Borrower to the [Provider] whether in the Borrower's sole name or jointly with others, whether as principal or surety and whether actual or contingent"

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"Assignment by the [Provider]

11.32 The [Provider] shall have the right to assign, transfer or sub-participate the benefits and/or obligations of all or any part of any Facility to another entity without the prior consent of the Borrower and the [Provider] may disclose to a prospective assignee or to any other person who may propose entering into contractual relations with the [Provider] in relation to this Agreement such information about the Borrower as the [Provider] shall consider appropriate".

Correspondence

17 June 2015 – Provider's Final Response re the Complainant Business

"I wish to advise it is not within the remit of the Provider to release the security held, as the said security is now assigned to an affiliate of [new owner of loans]. You will have received correspondence from the Provider on 15 May 2015 to indicate that this assignment has taken place, and we understand that [the new owner of loans] have contracted with [Managing Agent] to manage the assigned security comprised in [company address] on their behalf, and that [Managing Agent] have sent the owners of that asset a letter to indicate the contact details of your new .. relationship manager. The owners of [company address] should contact [Managing Agent] in relation to any request to release security. The assignment of the relevant security to [the new owners of loans], which included the two personal guarantees of the Company's overdraft from [the directors of the company], took place in February 2015. We would point out that the facilities owing to the Provider by [the company] remain secured by the personal guarantees which are in turn secured by the charge over [company address], so the proceeds from any sale that [new owner of loans] might consent to of the [company address] property would be used in the first instance, in reduction of the [company's] facilities that remain owed to [the Provider]. Our records show, this information was communicated and discussed with your Solicitor … as recently as 5 June 2015".

As regards the position that the loan advanced in respect of the secured property had been repaid in full with zero money owing, the Provider's position was that there were still two personal guarantees in place that secure the overdraft facility owed by the Complainant Company and that these guarantees were supported by the charge over the business premises.

07 May 2015 – Providers Final Response regarding overdraft facility

"The Title deeds to "[business address]" form part of the [Provider's] security in your facility letter of 23 November 2011 signed and accepted by [Company Directors]. Your relationship Manager RC has replied to you under separate cover on this issue.

/Cont'd…

Please find enclosed copy of MRC's letter to you dated 8th April 2015 advising you of the [Provider's] position in relation to this security".

08 April 2015 – The Provider Regarding release of deeds

"I refer to the offer letter of [business address] dated 23rd November 2011. The overdraft sanctioned therein was secured by two personal guarantees signed by both [directors] supported by the property. The [Provider] still has debt owing under the company, to the effect that effect the [Provider] cannot release its charge over the property given that there is still exposure owing under the personal guarantees".

07 October 2014 – The Provider advising of what could happen in the future:

"The assets of [recovery section] are subject to four outcomes communicated to you as set out below:

1. *A refinancing of the relevant asset on market terms (which for [recovery] purposes means a syndicated financing involving new lenders with materially improved risk characteristics).*
2. *Repayment of the financing arrangement;*
3. *a sale by [recovery section] of the financing arrangement to a third party; or*
4. *in appropriate circumstances, the enforcement by [recovery section] of its rights".*

05 September 2014 the Provider advised that:

"With regard to your contention that your personal facilities should not be managed by [recovery section of Provider] I can confirm that, in line with the Provider's policy, the personal loans advanced to the directors of this company are managed as part of the [Complainant Company] connection. The directors exercise significant control over the Company and hold an economic interest in the performance of the company. Therefore as you are in receipt of income from the company and control its performance we have to ensure that Directors' risk is captured and managed appropriately to ensure full repayment of the associated borrowings".

05 September 2014 – The Provider to the Complainant Company addressing the following issues / complaints:

- *You have advised of your dissatisfaction with the fact that the management of your facilities has been transferred to [other part of Provider – resolution of debt].*

/Cont'd…

- *You are dissatisfied by the method used by the Provider to inform you that the management of your facilities had been transferred to ..*
- *You have stated that you do not believe that your personal banking facilities should be managed by …*

The Provider refers to overdraft Facility dated **12 August 2011**, €150,000.00.

"Security

- *Held: All Monies Debenture giving the [Provider] a First Fixed and Floating charge over the assets of the Company.*
- *All monies Letter of Guarantee signed by [named directors] with as collateral: All Monies legal charge over premises at [Company's business address]".*

The Provider states that it is understood that the above security held would be available for all the company's liabilities to the Provider.

04 February 2013 – letter from the Provider to the Complainant Company confirming the handover of the Complainant's banking relationship to its recovery division. The Provider identified the following areas of concern:

- *"falling level of turnover and losses*
- *Cash flow pressures and hardcore overdraft borrowings*
- *Concerns regarding repayment of the borrowings"*

Release of Deeds

18 February 2015 – The first time the Complainant Company Directors formally seek (through their Solicitor) the release of the deeds to P… property.

08 April 2015 – The Provider Regarding release of deeds

"I refer to the offer letter of [business address] dated 23rd November 2011. The overdraft sanctioned therein was secured by two personal guarantees signed by both [directors] supported by the property. The [Provider] still has debt owing under the company, to the effect that effect the [Provider] cannot release its charge over the property given that there is still exposure owing under the personal guarantees".

From **February 2015** up **to April 2016**, the Complainant Company Directors sought the release of the deeds to the property. The Provider refused to release the deeds.

11 April 2016 – the Complainant Directors advised that they received the deeds and the business was sold.

/Cont'd…

22 April 2016 – The Provider to Complainant Company

> *"I acknowledge receipt of payment for €144,000. Subject to the payment clearing. I confirm that this discharges the [company] overdraft in full".*

16 January 2017 – the Complainant advised that still not received "letter of release".

30 January 2017 – Provider to the Complainant

> *"Release of security of asset at [company address]*
>
> *This security item was assigned to an affiliate of [new owner of loans] since the clients loans and security items were sold. I understand that this was outlined previously. As clients will also be aware [new owner of loans] then contracted [Management Agent] to manage the loans and assets on their behalf.*
>
> *[Management Agent] contacted the Provider 9th January 2017, to ascertain that [the Provider Provider] was no longer relying on the above asset as security for any borrowings and the Provider confirmed that this was the case. It is the Provider's understanding that the charge on this property had already passed to the purchaser.*
>
> *I understand the [Managing Agent] are now investigating whether this is the case and will revert with confirmation of same or the necessary documentation for the charge to be formally released if required.*
>
> *Accordingly execution of the formal release of the property is outside of the direct control of [the Provider], however we will action anything necessary on receipt of same in line with [Provider] policy.*

February 2017 – The Complainant Directors inform that it has not yet received letter of release – Provider advise pressure of workload

02 March 2017 – Second Director to Provider

> *"It took years to obtain our own deeds for [company address] from [the Provider], now we are at the same position with regard to the "Release Document" specifically because of [the Provider's] incorrect procedures and cunning, relating to our personal debt documents and the passing of same.*
>
> *Therefore attempting to apportion your responsibilities to various branches of [new owner of loans] is unacceptable.*

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As stated above unless I receive the release document within 7 days from this date, I will take immediate legal action and will be looking for compensation in regards to 2 buyers for [company] where we were not able to close the sale due to [the Provider's] negligence".

27 March 2017 – Managing Agent to the Complainant Company Director

"As already stated, we have approval to release the charge and [the Provider] are just checking that the Deed of Release is in order before it is executed".

9 June 2017 – Complainant Director Financial Services Ombudsman

"Please note that [the Provider / Managing Agent] eventually provided the final document necessary for us to complete the sale of our premises, over 1 year and two months following our repayment in full of all due amounts back in April 2016. I confirm the sale is now closed".

12 July 2017- Provider to Financial Services Ombudsman

"Separately the position regarding the "common" security item at [the business address] has been previously outlined i.e. that the property was owned jointly and personally by [the named directors] and was held under guarantee for the obligations of the company. As the company debt was repaid in full, I understand that this item of security has now been released to the owners i.e. [the named directors]".

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 **30 July 2021**, outlining the preliminary determination of this office 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.

On **10 August 2021**, the Provider advised that it would not be making submissions in response to my Preliminary Decision. On **11 August 2021**, the Complainant also advised it would not be making submissions in relation to my Preliminary Decision. Both parties were then advised by this office that my Legally Binding Decision would issue, in due course.

I now set out my final determination below.

The complaints for Adjudication

The complaints for adjudication are that the Provider:

- Wrongfully transferred the Complainant Company's facilities to the Provider's restructuring group in 2013 and in turn to another area of the Provider in 2014.

- Wrongfully closed the Complainant Company's Current Account and removed its overdraft facility.

- Wrongfully linked the Directors' personal accounts with the Complainant Company's accounts resulting in:

  The non-release/delayed release/misinformation on the release of the deeds to a property used by the Complainant as security.

  A delay in releasing/vacating/discharging of mortgage/charge over the property.

- Furnished overall poor communication about, and administration of the Complainant Company's banking facilities.

Analysis

I accept that the Complainant Company has standing to refer this complaint to this office. The Complainant Company's directors who were the owners of the P… Property (from which the company's business was operating from), pledged the deeds of the property as security for the Complainant Company's overdraft. I accept that this afforded the Complainant Company an interest in what happened to the pledged security relative to its

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impact on the Complainant Company's overdraft and the later proposed re-payment of the overdraft to the Provider to keep the business in operation.

The initial complaint was raised by the Complainant Company Directors on behalf of the Company, and the Complainant Company has permitted (by way of the consent of the owners / directors, as set out on a letter dated **13 March 2018**) the former Directors to continue with the complaint, on its behalf. By way of correspondence dated **28 June 2021** one of the Complainant Company's Directors advised that the Company had now reverted back to his ownership.

I accept that the Provider had the contractual rights to assign / transfer the loans (within the Provider to its restructuring section, and to generally sell its loans to a new owner), to close the Complainant Company Provider accounts, and to call for the repayment of the Overdraft Facility. While these were all contractual rights of the Provider, I accept that they would have greatly impacted the Complainant Company's everyday business dealings.

However, as regards the overdraft facility, I consider that the Provider could have reasonably and correctly advised the Complainant Directors of the security position, when the Complainant Directors put forward a plan of action in early 2015 to pay back the Company's overdraft to the Provider (following the Provider's demand for the repayment).

I accept that the Provider should have, at the earliest point in 2015, fully and accurately advised the Complainant Directors of the actual difficulty it had in releasing the deeds to the property, for any sale and leaseback of the business.

The Provider had all the information regarding the loans and should have reasonable acted and communicated with the parties regarding these matters.

The Provider allowed the Complainant Company Directors in early 2015 to pursue their plan for the sale and leaseback of the business and later refused the release of the deeds for that purpose.

I consider that the release of the deeds on accountable trust receipt could reasonably have formed part of the Provider's discussions with the Complainant Company Directors. No reasonable explanation was given as to why the release could not take place on accountable trust receipt.

I have been given no reason why any outstanding personal debts of the Complainant Company Directors prevented the Provider's release of the deeds to the Complainant Company directors (the owners of the secured property) on accountable trust receipt.

I have not been furnished with definitive details (due to the Provider's confused responses) what was actually assigned / not assigned to the new owner of the Provider's loans. I have no details of the loan sale agreement between the Provider and the new owner of the loans.

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I would have expected greater engagement, communication, and assistance from the Provider, in circumstances where the Complainant Company was doing all it possibly could to ensure that the Complainant Company continued in business, while trying to meet its obligations to the Provider.

The Provider has accepted that in the course of responding to the Complainant Company's complaint that the Provider's responses were not at all time as clear and comprehensive as they ought to have been. It has apologised for these lapses.

The Provider accepted (**04 November 2020**) it should not have included the security in respect of the overdraft in the sale to the new owner of its loan book. In this regard, the Provider states:

> *"The [Provider] accepts that we did not release title deeds in a timely manner and we have apologised for this error. The [Provider] also accepts a fall down in service with respect to [its] communications with [Director 1] at the time of the loan sale in 2014/2015.*
>
> *The [Provider] mistakenly included the benefit of the security over the [secured] property in the loan sale documentation which passed to [the new owner of its debts]. The benefit of this security should have been withdrawn from the transaction with [new owner of its debts] when the related joint loan facility, which was also to be included in the transaction with [the new owner of debt], was repaid and therefore that joint loan facility was removed from the transaction with [the new owner of debts]".*

It appears that the Provider had also sold on the personal debts of Director 2 to the new owner.

I accept that if Director 2's personal debts were sold on with their own security attaching, there was no need for the Provider's reliance on the P… property security for those debts and no real bar to the Provider passing the deeds on accountable trust receipt for the proposed sale and leaseback, and payment of the overdraft.

It was not until the Provider's submission to this office of **04 November 2020**, some 5 years after the complaint originally arose, that the Provider accepted that the security covering the overdraft should not have been included in the sale to the new owners (the security which included the deeds to the P… property). This is most unreasonable and most unacceptable.

The Provider also submits in its subsequent letter of **18 November 2020** that its statements in communications with the Complainant Directors, that it was relying on that security in respect of the overdraft after it was included in the sale, was incorrect. Again, this is unreasonable and unacceptable.

I accept that it was reasonable of the Complainant Company directors to expect the release by the Provider in 2015 of the title deeds to their property to effect a sale and

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leaseback, to pay off the Company overdraft, which had been demanded by the Provider. In support of this I would point to the following.

The Complainant Company directors had pledged the P… property as security only in respect of the debts of the Complainant Company.

The General Terms and Conditions for Business Lending to Companies it states that:

> *"Security*
>
> *11.11 Save as the Facility Letter may otherwise provide, the Security will extend to cover all the present and future obligations of the Borrower to the Provider whether in the Borrower's sole name or jointly with others, whether as principal or surety and whether actual or contingent"*

I note that the above clause 11.11 - of the General Terms and Conditions, the Facility Letter did ***otherwise provide*** as to what the security, would extend to. The wording of the **2011** Facility Letter for the guarantee of the overdraft and the charge over the property is quite specific on **it** applying only to the company's liabilities. The Facility Letter specifically states:

> ***"It is understood that the above security held will be available for all your company liabilities to the [Provider]".***

The loan in respect of the P… Property was fully paid off, in 2014. In the normal course of events the deeds should have been returned when the loan was repaid. The pledging of the property as security for the Company overdraft in 2011, would have prevented the return of the deeds in 2014 when the loan in respect of which the security was held had been paid off. On that basis, I consider it reasonable of the Complainant Company Directors to assume that when the loan for the property was repaid in 2014, the security they pledged was limited to the Company borrowings. The Provider has not furnished any evidence that the P… Property was specifically pledged by either director as security for other loans in the intervening period.

In the Provider's submission of **23 March 2018** it states as follows:

> *"I understand that the property was also included as security for the joint borrowings of [Director 1 and 2]. I enclose Facility Letter dated 23 November 2011 in this regard. I note that this facility [the Facility relating to P.. property] was not sold to [new owners of loan book], as it was repaid in 2014.*
>
> *… From my investigation of our records, I have concluded that [the Provider] was referring to the sole personal facilities of [Director 2] on the basis of the "All sums due" clause within the mortgage document in respect of this property. ..*
>
> *Please note that the property was sold as part of the loan sale transaction on the basis that it was personally owned by [Director 1 and 2] and that the mortgage /*

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> *charge over the property contained an "all sums due" clause. I note that it is not specifically listed in the sole personal Facility Letter of [Director 1], however this clause may have facilitated the reliance on the [property] as security for personal borrowings of either owner".*

In the Provider's submission of **18 November 2020** it states that it was not relying on the security over the property that was sold on to the new owner of its loans. In this letter it stated:

> *"The [Provider] accepts that some of its correspondence contained misleading information when it stated that the property in question was being relied upon as security for the overdraft of the Company following the inclusion of the property in the loan sale. This was incorrect and we very much regret and apologise for those errors and any confusion caused to the Company as a result of them."*

As regards any specific pledging of the P… Property as security for other personal debts, Director 1 states that he, as joint owner of the property, never consented to such security being given. I therefore accept that it is reasonable for the Complainant Company directors to question the Provider's stance in including only the security (charge on the "P… property and guarantees), in the Provider's sale to the new owner, while still seeking to rely upon that same security in respect of the Complainant Company's Facilities. I accept that the Provider's changing position on what was sold / assigned to the new owner of its loans, and what it was going to be relying upon as security in respect of the Complainant Company's borrowings, did not assist matters.

From the evidence outlined above it is clear that:

- The "Facility" supporting the purchase of P… Property was not sold on (having been repaid in 2014) stated by the Provider in its letter of **23 March 2018**.
- That the only other Facility (in the evidence submitted by the Provider) that contained the P.. Property as security was the one dated **23 November 2011**.
- The **23 November 2011** Facility Letter is very specific as to the extent to which the security is held by the Provider, that is:
  "It is understood that the above security held will be available for all your company liabilities to the [Provider]".
- The Provider states that in respect of the overdraft of the business, it was not relying on the security that was sold on to the new owner of the Provider loans.

From the above (and without evidence of any other facilities granted by the Provider that contains the said property as security) I accept that it is difficult to understand how the Provider, or the new owner of the Provider's loan book, could say it was relying on the *"all sums due clause"*, contained in the charge document over the P… Property, for the personal debts of the Directors. Therefore, I conclude that the Provider unreasonably relied on that position to deny the release of the deeds on accountable trust receipt to the Complainant Company Directors to facilitate the sale and leaseback of the business in 2015. I further hold that the Provider acted unreasonably in initially leading the Complainant Company Directors to believe that it would release the deeds, only to later

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refuse the release of the deeds on accountable trust receipt for the sale and leaseback of the business, in order for the Complainant Company to repay the Provider the business overdraft.

I accept that the conduct of the Provider in relation to the matters complained of was most unreasonable. There can be no doubt that the Provider's refusal to engage meaningfully with the Complainant Company and the misinformation it furnished to the Company over a protracted period of time denied the Company the ability to properly manage its financial affairs in the most appropriate and beneficial manner. This undoubtedly resulted in a loss to the Company and caused great inconvenience to the Company.

Because of the length of time it took to establish the true situation and the loss and inconvenience suffered on foot of this delay, I believe a substantial sum of compensation is merited. I therefore substantially uphold this complaint and direct the Provider to pay a sum of €75,000 (seventy five thousand euro) to the Complainant Company.

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld on the grounds prescribed in ***Section 60(2)(b) and (g)*** for its unreasonable conduct and for not providing an explanation of the conduct complained of when it should have.

- 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 €75,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

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

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

13 August 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.