



<u>Decision Ref:</u>	2021-0298
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling - Mortgage Arrears Resolution Process Complaint handling (Consumer Protection Code) Selling mortgage to t/p provider
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants entered a mortgage loan agreement with the Provider in **July 2006**. Arrears subsequently began to accrue on the Complainants' loan account. In **February 2014**, the Provider received an undertaking from solicitors acting on behalf of the First Complainant to the effect that any damages awarded to the First Complainant in ongoing High Court proceedings would be applied to the Complainants' loan account. The Complainants believe that the Provider has breached the terms of the undertaking and wrongfully transferred their loan to a third party.

The Complainants' Case

The Complainants explain that their mortgage loan account was in arrears and that the Provider was aware of ongoing legal proceedings which the Complainants were involved in. The Complainants say that the Provider *"asked for and were given and accepted a legal undertaking to pay off arrears + mortgage once the legal proceedings concluded."* The Complainants say the Provider is now attempting to renege on this agreement. The Complainants also submit that the undertaking is a financial instrument.

The Complainants say they are worried that their loan would be sold to a vulture fund and that they want the Provider to abide by the agreement, which, they state, is a legal contract.

The Complainants submit that it is highly unfair and illegal for the Provider to attempt to renege on the agreement.

In an email to this Office on **12 November 2018**, the First Complainant stated that:

"[The Provider] never released the solicitor from [the undertaking] and never informed me that they were seeking to release him and never gave me the opportunity to put any other arrangements in place to cover the mortgage arrears. I have legal proceedings before the court which would have paid my mortgage off in its entirety including the arrears."

In a further email on **12 November 2018**, the First Complainant stated that:

"[The Provider] accepted a legal and binding [undertaking] to cover the mortgage arrears. They never disputed it and were happy while my legal proceedings went through the courts.

[The Provider] are entitled to sell my mortgage into whoever they wish. However, with our agreement in place the correct thing for them to do would be to formally release the solicitor from the undertaking which they never did and allow me the chance to either negotiate another arrangement or pay the mortgage off. None of this happened. ..."

In an email to this Office on **7 May 2019**, referring to the documentation submitted in support of the complaint, the First Complainant stated that:

"You will see quite clearly that the undertaking was given to [the Provider's agent]. She asked me for it when I met her. I got it for her and they never once disputed it. They were happy to have it to secure their position.

The legal procedure is that the bank are obliged to notify myself and the solicitors who provided the undertaking if they wish to release the solicitor. They never did. ... [T]here is not one piece of paper the bank can show that they ever disputed it, weren't happy with it and or wanted no part of it. ..."

In a further email on **8 May 2019**, the First Complainant submitted a number of legal references and stated that the Provider should have bought-out the undertaking, as follows:

"The legal advice is that a buy out is the only option if no agreement can be reached in the transfer.

The [Provider] should buy out the undertaking that they asked for. And accepted. ..."

The Provider's Case

In its response to this Office dated **23 October 2020**, the Provider explains that the Complainants' mortgage loan was transferred to a third party on **1 February 2019**.

The Provider says that it is entitled to transfer the Complainants' mortgage loan to a third party at any time and at its absolute discretion. The Provider says this entitlement is clearly set out in the Complainants' mortgage contract. In this respect, the Provider refers to the Letter of Approval dated **17 July 2006**. The Provider further refers to clause 1.15 of the 'General Mortgage Loan Approval Conditions', which states that:

"[The Provider] may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions."

The Provider also refers to clause 6.7 of its 'Mortgage Conditions':

"[The Provider] may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person..."

The Provider says that the Complainants signed the 'Acceptance of Offer of an Additional Loan' on **18 July 2006**, declaring that:

"I/We the undersigned accept the above offer of an additional loan the terms and conditions set out in

- (i) The Letter of Approval*
- (ii) The General Mortgage Loan Approval Conditions*
- (iii) The [Provider] Mortgage Conditions"*

The Provider also refers to the following declaration:

"I/We confirm that I/we have obtained or been given an opportunity to obtain independent legal advice prior to accepting the offer of an additional loan."

The Provider says it is satisfied that it transferred the Complainants' loan to a third party on **1 February 2019** in accordance with the terms and condition as set out above.

The Provider says that the Complainants' loan was assessed as a Non-Performing Loan (NPL). By way of general comment, the Provider says the performance or non-performance status of a mortgage loan is not determinative of its legal entitlement to sell a loan. However, the transfer of loans in **February 2019** was a sale of non-performing loans.

The Provider says that Complainants' loan was assessed in line with European Banking Authority (EBA) guidelines as *"unlikely to pay his credit obligations in full without realisation of collateral"* and therefore classified as an NPL. The Provider says the specific reason for this classification was the significant arrears balance on the loan and extensive forbearance granted to the Complainants that is, it was the forbearance required by the Complainants

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which classified the loan as 'Non-Performing' from a regulatory perspective. The Provider says that extensive forbearance included:

- 3 month moratorium from September 2009 to November 2009
- 1 month moratorium for January 2012
- 12 month interest only restructure from April 2012 to April 2013
- 6 month partial moratorium from May 2013 to October 2013
- 6 month trial restructure arrangement from December 2013 to May 2014
- 6 month trial restructure arrangement from May 2014 to October 2014
- 2 month moratorium from June 2015 to July 2015
- 2 month moratorium from October 2015 to November 2015
- 6 month trial restructure arrangement from February 2017 to July 2017

In terms of the loan classification, the Provider says that this derives from loan performance classification criteria set by Regulators which the Provider must adhere to. The Provider states that it does not, independently, deem a loan to be an NPL or otherwise.

In the Complainants' case, the Provider says it offered forbearance, as set out above, during an extensive period of **September 2009** and **July 2017**. As full principal and interest were not being met for the period of forbearance, a lump sum would be owed on maturity of the loan. For this reason, the Provider says the Complainants' loan fell within the application of the EBA's NPL classification guidelines.

Referring to the Letter of Undertaking dated **11 February 2014** furnished by the Complainants' solicitor on their behalf, the Provider says it is important to note from the outset that this undertaking was submitted to the Provider by the Complainants' solicitor as a means of outlining how the Complainants intended to deal with their arrears situation and how their loan would be discharged upon a successful conclusion of the proceedings at an undetermined point in the future. The Provider says that undertaking did not, in and of itself, alter or in any way change the classification of the Complainants' loan. While the undertaking was dated **11 February 2014**, the Provider says it had yet to receive any such funds from the Complainants or their solicitors up to and including the date of transfer on **1 February 2019**.

The Provider says it did not seek an undertaking from the Complainants' solicitor regarding the discharge of the arrears at any time. The Provider says it would have no reason to request such an undertaking as it is reliant at all times on the Complainants' mortgage loan contract. To clarify, the Provider says the Complainants are obliged to repay their loan in full, including arrears accrued, within the term of the loan and this obligation is set out clearly in the Complainants' mortgage contract. In this respect, the Provider refers to and sets out clauses 2.1 to 2.5 under the heading 'Provisions for Payment' of the Mortgage Conditions.

The Provider says the Complainants' solicitor submitted an undertaking outlining the First Complainant's intention to discharge the mortgage loan debt in full, upon successful conclusion of the ongoing legal proceedings, which the Provider says, it did not request.

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Addressing the point that the Provider never wrote to the Complainants indicating that it was not accepting the undertaking, the Provider says the First Complainant seems to suggest that by not responding to solicitor letters of **9 October 2013** and **11 February 2014**, the Provider indicated its acceptance of the terms outlined in these letters. The Provider says it rejects this assertion. In the letter of **11 February 2014**, the Provider says the Complainants' solicitor states that:

"[The First Complainant] has indicated that the Bank is prepared to grant him certain facilities secured on his family home at [address]. We understand that his wife will enjoin herself in whatever security arrangements are necessary, including but not limited to the execution of a future mortgage in favour of the Bank and/or the repayment of the amount of money currently advanced.

We confirm that we have the Borrower's irrevocable authority to undertake upon the successful conclusion of the [details redacted] proceedings to remit to the Bank a sum equivalent to the principal and interest which shall then have fallen to you on the additional financial accommodation granted.

Please confirm that the Bank is relying on this undertaking or not."

The Provider says this undertaking sets out the Complainants' intention to request additional lending facilities from the Provider, on the promise of receiving funds upon the successful conclusion of legal proceedings at an unspecified date in the future. The Provider says while it did not respond in writing to the Complainants' solicitor, a file note states:

"Please see attached docs customer is looking to use solicitors undertaking to borrow €45,000. [Bank employee] called [the first named Complainant] on 12.2.14 and advised customer we do not lend against solicitors undertaking. [The first named Complainant] accepted same."

Furthermore, the Provider says that as the Complainants' solicitor specifically requested confirmation that the undertaking would be accepted and such confirmation was not issued in writing or otherwise, it is the Provider's position that the undertaking was not formally accepted or agreed upon.

Similarly, the Provider says the letter of **9 October 2013**, states:

"We act on behalf of [the first named Complainant] of the above address in relation to the above High Court matter. Please note that the case is ongoing and that [the First Complainant's] mortgage arrears will be discharged out of the proceeds of his damages."

Again, the Provider says, it is important to note that this statement was made to inform the Provider that the First Complainant was party to ongoing High Court proceedings and, once concluded, the First Complainant would arrange for the discharge of the arrears from the damages.

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The Provider says that while it did not respond in writing to this correspondence, it was noted on its files for information purposes as the Complainants had been engaging with the Provider directly in relation to their arrears.

Notwithstanding this, the Provider says it is important to note that had it accepted such an undertaking, its position would have in fact remained the same. The Provider says the undertaking simply set out the First Complainant's intention to redeem the loan at an unspecified future date, if and when the [details redacted] proceedings concluded successfully. The Provider says the Complainants' solicitor did not set out what the Complainants' intentions were should the proceedings conclude unsuccessfully. As the Complainants are free to redeem the loan at any time during the loan term, regardless of the undertaking being accepted or not, the Provider says it had no reason to rely on it. The Provider says the Complainants' obligation to repay the full mortgage loan debt is contained in the terms and conditions of the mortgage contract therefore, the undertaking referred to in this complaint has no relevance in this regard.

Furthermore, the Provider says it is important to note that in accordance with the Complainants' mortgage loan contract, the Complainants are jointly and severally liable for the full outstanding loan account balance, including any arrears, regardless of the status of the solicitor's undertaking. Therefore, on successful or unsuccessful conclusion of the First Complainant's legal proceedings, the Complainants are obligated to repay the mortgage loan in full, regardless of the outcome of the proceedings.

The Provider submits that the undertaking is not legally binding in the manner in which the First Complainant suggests. The Provider says the Complainants are legally obliged to repay the loan in full and any repayments received from the Complainants' solicitor regarding the repayment of the loan is irrelevant as the Complainants remain jointly and severally liable for the full outstanding loan balance and are free to redeem it at any time. Furthermore, the Provider says that had it agreed to accept such an undertaking, it is noted that the funds promised in **October 2013** and **February 2014** had not yet been received by **1 February 2019**. Therefore, the Provider says, the Complainants' solicitor had not honoured the undertaking in this regard.

The Provider notes that the undertaking the subject of this complaint was made by the Complainants' solicitor outlining an intention to repay the mortgage loan in full, to include arrears on the account to date, from the proceeds of any damages awarded on the successful conclusion of legal proceedings. The Provider says it did not seek an undertaking of this nature nor would it be necessary to do so, as the Complainants' obligation to repay the mortgage loan including arrears, is set out in the mortgage loan contract. The Provider says that had it agreed to accept the undertaking, its position would have remained unchanged. The undertaking contained a promise from the Complainants' solicitor, on behalf of the First Complainant, to repay the loan on the successful conclusion of the legal proceedings. The Provider says it had no part to play in the undertaking and, furthermore, had no control or input into the legal proceedings referred to by the solicitor.

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Therefore, the undertaking was made by the solicitor outlining further actions that his client intended to make at some unspecified date in the future, if and when his client was awarded damages on conclusion of the legal proceedings. The Provider says it was not a party to this promise and therefore the undertaking was solely agreed between the First Complainant and his solicitor. The Provider says it had no commitment to honour this matter.

Regarding the sale of the Complainants' loan and the undertaking, the Provider says it was entitled to sell the loan in accordance with the terms and conditions of the account. The Provider says it was not bound by the solicitor's undertaking in any way and had no part in its preparation or submission. The Provider says it did not request or induce the Complainants to provide an undertaking, therefore, the Complainants' suggestion that the Provider reneged on an agreement is unfounded. The Provider further says that it is not in breach of the undertaking as it had no part in its execution and at no point did the Provider rely on the undertaking. The Provider says it was not a party to the legal proceedings and therefore had no input into the conclusion of these proceedings. The Provider says the undertaking outlined a course of action to be completed by the First Complainant and his solicitor and the Provider was not required or requested to take any action in this matter.

Regarding the Complainants' position that the Provider was required to release the Complainants' solicitor from the undertaking prior to the sale of the loan, the Provider says it rejects the Complainants' contention in this regard. The Provider says the undertaking submitted by the Complainants' solicitor was not requested or required by the Provider. At no point did the Provider confirm to the Complainants' solicitor that it was relying on the undertaking. The Provider says it clearly set out the Complainants' obligation to repay the loan in the terms and conditions of the loan and the Complainants accepted their obligations when signing the Acceptance of Offer of an Additional Loan on **18 July 2006**. The Provider says its records show that one of its staff members telephoned the First Complainant on **12 February 2014** to advise that it would not issue lending facilities on the strength of such an undertaking.

The Provider says its position is that there was no requirement for it to release the Complainants' solicitor from the undertaking in the manner suggested by the Complainants. The undertaking outlined a scenario that would only come to pass should the First Complainant's legal proceedings conclude successfully. The Provider says the Complainants' solicitor advised that his client, the First Complainant, would repay the mortgage loan, including arrears, from any damages received. The Provider says it made no promises to the Complainants or to their solicitor with regard to the mortgage loan nor was it obliged to do so. Therefore, the Provider says it had no obligation to release the solicitor from the undertaking and had no reason to request or accept such an undertaking from the Complainants or their solicitor.

Regarding the sale of the Complainants' loan and the Complainants' position that the Provider should have afforded them the opportunity to put another arrangement in place or repay the mortgage loan prior to the sale, the Provider says, referring to its timeline of events, that it had engaged with the Complainants in relation to their arrears situation on an ongoing basis since the loan account first fell into arrears in **2009**.

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As detailed in the timeline, the Provider says the Complainants availed of numerous Alternative Repayment Arrangements in an effort to address their arrears. Furthermore, the Provider notes that the Complainants received 6 month Trial Restructure Arrangements on three separate occasions with a view to putting a long term restructure in place (a Split Mortgage Arrangement), however, the Provider says on each occasion the Complainants failed to meet the trial repayments in full and as a result, each trial period was a failure. The Provider says it is satisfied that it allowed the Complainants every opportunity to address their arrears situation and was at all times open to engaging with the Complainants in relation to their mortgage loan.

The Provider says the Complainants were also free to redeem their mortgage loan in full at any time prior to the transfer date but did not do so. The Provider says its initial correspondence dated **2 August 2018** regarding the transfer, states:

“IF YOU WISH TO REPAY YOUR LOAN PRIOR TO THE TRANSFER DATE

Please note that, you may at any time repay all amounts owing under your Loan. You can contact [the Provider] on [telephone numbers] for details of the outstanding balance owing on your Loan and the interest accruing on your Loan, or if you have any queries at all in relation to your Loan.”

The Provider advises that the Complainants’ loan transferred to a third party on **1 February 2019** with an outstanding balance of €247,827.26 which included an arrears balance of €67,292.50.

The Complaints for Adjudication

The complaints are that the Provider:

- Breached an agreement/letter of undertaking regarding the Complainants’ loan;
- Failed to release the Complainants’ solicitor from the undertaking;
- Failed to afford the Complainants the opportunity to make alternative arrangements prior to the sale of their loan; and
- Wrongfully sold the Complainants’ loan to a third party.

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.

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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.

A Preliminary Decision was issued to the parties on 5 August 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.

Pursuant to a Letter of Approval dated **17 July 2006**, the Provider offered an equity release loan to be Complainants in the amount of €230,000 secured on a property. The Complainants signed an Acceptance of Offer of Additional Loan on **18 July 2006** which indicated their acceptance of the terms and conditions set out in the Letter of Offer, the General Mortgage Loan Approval Conditions and the Mortgage Conditions.

On **9 October 2013**, a solicitor acting on behalf of the First Complainant wrote to one of the Provider's branch staff members in respect of certain High Court proceedings where the First Complainant was the plaintiff, as follows:

"We act on behalf of [the First Complainant] of the above address in relation to the above High Court matter. Please note that this case is ongoing and that [the First Complainant's] mortgage arrears will be discharged out of the proceeds of his damages."

By letter dated **11 February 2014**, the First Complainant's solicitor wrote to the same branch staff member, as follows:

"We confirm that we act on behalf of the above named [First Complainant] in connection with the above entitled High Court legal proceedings, which arise out of claims for [details redacted] being pursued by [the First Complainant]."

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The pleadings are at a point where Discovery of documentation has been granted and certain documentation produced. This documentation is currently being examined and if it reflects the totality of what was expected to be received upon Discovery the case will then be in a position to proceed to a full hearing. If the documentation is incomplete a further application to Court may be required to ensure that the balance of the outstanding documentation not discovered has been disclosed.

For the foregoing reason it is not possible to accurately identify a precise date for the full hearing of this case. The best view we can offer at this point is that the case may come for hearing in the winter of 2014 but that if other issues arise in respect of Discovery that a full hearing date may well only incur in early 2015.

[The First Complainant] has indicated that the Bank is prepared to grant him certain facilities secured on his family home at [address]. We understand that his wife will enjoin herself in whatever security arrangements are necessary, including but not limited to the execution of a further mortgage in favour of the Bank and/or the repayment of the amount of money currently advanced.

We confirm that we have the Borrower's irrevocable authority to undertake upon the successful conclusion of the [details redacted] proceedings to remit to the Bank a sum equivalent to the principal and interest which shall then have fallen to you on the additional financial accommodation granted.

Please confirm that the Bank is relying on this undertaking or not."

Following receipt of the undertaking, the Provider's branch staff member appears to have prepared the following file note on **12 February 2014**:

"Please see attached docs customer looking to use solicitors undertaking to borrow €45,000. [Named individual] called [the First Complainant] on 12.2.14 and advised customer we do not lend against solicitors undertaking. [The First Complainant] accepted same."

In a system note dated **25 March 2014**, the following entry is made in respect of a telephone conversation with the First Complainant:

"... Currently unemployed but has case in high court ... which may result in a settlement figure which would be substantial enough to clear arrears and mortgage. On interest only until 03/05/2014 and I advised that I will contact in April to set up new SFS to address a/c again as term of restructure ends."

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In a Standard Financial Statement signed by the Complainants on **23 April 2014**, the following note is recorded by the Provider's agent:

"[The First Complainant] is involved in a case with the High Court and was recently offered 175k. He refused this on advice of his solicitor as they think a figure of €400k will be offered down the line. [The First Complainant] is also due back payments from Social welfare of nearly €8000 which is due next week. He will pay €6500 off the arrears at this stage. ..."

In a system note dated **4 June 2014**, the following entry is made in respect of a telephone conversation with the First Complainant:

"... advised restructure was in place and is making repayments. due lump sum from court case 8500e to pay off arrears. also in court proceedings and will hopefully clear all off mortgage when this is received. ..."

The First Complainant's solicitor wrote to the Provider's branch again on **29 September 2014** enclosing a copy of the undertaking and a Letter of Authority dated **11 February 2014**. However, it is not clear from the evidence if this Letter of Authority was furnished to the Provider at the same time as the above solicitor's letter of **11 February 2014**. The Letter of Authority is addressed to the First Complainant's solicitor and is signed by both of the Complainants. The Letter of Authority states:

"We hereby irrevocably authorise you to offer and bind us to an undertaking in the form of the attached draft letter or such other security or text of undertaking as may be required by our Bank for a sum equivalent to the principal and interest as will have fallen due on additional financial accommodations granted to us by the Bank. For both our parts we both enjoin ourselves and agree to the execution of such security documentation as may be required by the Bank and for my part I, [the First Complainant], direct and authorise the direct deduction from the proceeds of the damages secured in the above High Court proceedings and repayment therefrom of the financial accommodation granted in full by the Bank from the said proceeds."

A copy of the undertaking appears to have been sent to the Provider in **September 2014** following a request from the First Complainant. In an email dated **24 September 2014**, the First Complainant informed his solicitor that the copy of the undertaking previously sent to the Provider may have been misplaced.

In a system note dated **4 October 2014**, the following entry is made in respect of a telephone conversation with the First Complainant:

"Adv of arrears. [The First Complainant] adv he will be clearing all outstanding debt with [the Provider]. He expects this to be settled in the next 2 weeks and his solicitor will be directly transferring the funds. He said he has authorised this. ... Customer adv he has had been dealing with [Provider's agent] and she received it. ..."

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In a system note dated **6 November 2014**, the following entry is made in respect of a telephone conversation with the First Complainant:

"[The First Complainant] advised he has a court case undergoing and will be receiving a payment. He advised this will clear arrears and Balance. I advised collections process will still apply as LTT trial failed. ..."

The Complainants' solicitor wrote to the Provider on **9 March 2015** with an update in respect of certain High Court proceedings involving both Complainants. In this letter, the Complainants' solicitor makes reference to an undertaking and its application to any damages awarded in respect of the joint High Court proceedings.

The letter also gave a brief update as to the status of the First Complainant's High Court [details redacted] proceedings, as follows:

"4. In respect of the undertaking heretofore given, we confirm that same still stands and that it is operable in respect of any damages received by us in respect of these legal proceedings and in this regard [the Complainants] have signed an Authority authorising that such damages will be payable to these offices and authorising the negotiation of any financial instrument representing damages.

5. In respect of the [details redacted] proceedings being pursued by [the First Complainant], these are currently on stay pending the outcome of the [joint] proceedings."

In an undated letter from the Provider to the Complainants' solicitor (which appears to have issued after the above letter), the Provider stated that:

"Customers have sought a further period of forbearance from the Bank in respect of their home mortgage and prior to adjudicating on such a request, we would be most grateful if you would up-date us on the current status of ongoing legal action. We would appreciate an estimate of quantum together with a time frame that might enable us consider a further temporary arrangement on their mortgage account, where possible, to mirror the likely time frame to the conclusion of this action."

The Complainants' solicitor wrote to the Provider on **16 December 2015** in response to and referencing correspondence received from the Provider on **4 December 2015**, as follows:

"We are not prepared to speculate as to the likely level of quantum in a case which amongst other reliefs seeks damages for [details redacted]. Damages in respect of [details redacted] actions can range from 1cent to seven figure, and the ultimate level of damages would be assessed by a jury. There is no safe methodology for assessing likely level of damages. Damages awarded by a jury would be entirely dependent on the presentation of the case and how the jury would perceive the parties to the legal action.

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The case is not set down for trial and there is a Discovery process which is ongoing. The Defendants have made inadequate Discovery and there will be further Motions before the High Court requiring that full Discovery is made

We would consider it unlikely that the case would be concluded in 2016 but do consider it likely that the case would be concluded in 2017.”

The Provider wrote to the Complainants on **11 March 2016** advising that its Underwriting Team had requested an update from their legal team regarding *“the legal claim that is in the process of being finalised.”*

In **2018**, the First Complainant wrote to the Provider on **12 June 2018**, as follows:

“Please refer to previous correspondence in which my solicitor [Solicitor] provided an undertaking to the bank to settle all outstanding arrears and mortgage once a High Court Legal case had been concluded.

*This remains the same as the case has not yet been concluded. However for the avoidance of doubt let me state again that it is my intention to settle fully all arrears and my mortgage from the proceeds of the legal case once settled in the High Court.
...”*

Analysis

The Complainants’ position is that following a request from the Provider, a solicitor’s undertaking was given to the Provider to the effect that the proceeds from certain legal proceedings would be remitted to the Complainants’ mortgage loan account in discharge of the outstanding loan balance together with any arrears. The Complainants maintain that the Provider has breached this undertaking and has also failed to release their solicitor from the undertaking. The document relied on as providing the undertaking is a letter dated **11 February 2014** (the **Letter of Undertaking**).

Solicitors acting on the First Complainant’s behalf wrote to the Provider on **11 February 2014** in respect of certain legal proceedings involving the First Complainant. The final three paragraphs of this letter state, as follows:

“[The First Complainant] has indicated that the Bank is prepared to grant him certain facilities secured on his family home at [address]. We understand that his wife will enjoin herself in whatever security arrangements are necessary, including but not limited to the execution of a further mortgage in favour of the Bank and/or the repayment of the amount of money currently advanced.

We confirm that we have the Borrower's irrevocable authority to undertake upon the successful conclusion of the [details redacted] proceedings to remit to the Bank a sum equivalent to the principal and interest which shall then have fallen to you on the additional financial accommodation granted.

Please confirm that the Bank is relying on this undertaking or not."

Having reviewed the Letter of Undertaking in detail, it is my opinion that the language used suggests that there had been previous discussions between the Provider and the First Complainant regarding a new or additional loan facility and the purpose of this letter was to facilitate the drawdown of this facility by offering to remit to the Provider the monies awarded to the First Complainant as part of certain High Court [details redacted] proceedings.

In this respect, I note there is no reference to the Complainants' existing mortgage loan agreement (which is the subject of this complaint) or that the monies awarded to the First Complainant in the legal proceedings would be used to redeem the existing mortgage loan or reduce the arrears.

The Letter of Undertaking indicates that the Complainants' family home would be used as security for the additional loan facility and that the Second Complainant would agree to whatever security arrangements that were necessary to secure this new/additional loan facility. The letter goes on to suggest that this would include the Second Complainant agreeing to *a further mortgage* in favour of the Provider or the repayment of the amount of money *currently advanced* – which appears to be a reference to the existing mortgage loan. These suggestions and the language used would indicate that this letter was directed towards securing further borrowings and was not intended to address the Complainants' existing mortgage loan.

The penultimate paragraph of the Letter of Undertaking expresses the purpose for which the monies awarded to the First Complainant in respect of the [details redacted] proceedings would be used, this is, to remit a sum *"equivalent to the principal and interest ... on the additional financial accommodation granted."* The Letter of Undertaking is quite clear in identifying the *additional financial accommodation* and makes no reference to the Complainants' existing mortgage loan or the repayment of this loan.

In the final paragraph of the Letter of Undertaking, the First Complainant's solicitors requested confirmation as to whether the Provider would be relying on this undertaking. In this regard, I note that there is no evidence of the Provider responding to the First Complainant's solicitors indicating it was accepting the undertaking nor is there any evidence that the First Complainant's solicitors sought to follow-up with the Provider to seek such confirmation. There also does not appear to be any evidence to suggest that the First Complainant informed his solicitors that the undertaking had been accepted or, on foot of such notification, that the solicitors wrote to the Provider to confirm this position.

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It appears that the Letter of Undertaking was followed by a telephone conversation between the Provider and the First Complainant around **12 February 2014**. A file note dated **12 February 2014** records that the First Complainant was seeking to borrow additional funds of €45,000 and that the Provider telephoned the First Complainant on **12 February 2014** to advise that it did not loan money on the strength of a solicitor's undertaking. In a submission delivered on **31 October 2020** in response to the Provider's Complaint Response, the First Complainant explains that:

"I was aware the morning that the undertaking was being sent that it was to be sent. I had a phone call with [the Provider's agent] that morning after it was sent and discussed with her the contents of the undertaking and if it was sufficient. She was quite happy with the contents of the wording and informed me that the bank was happy that their position was secured. That was the exact term she used "The bank was happy that its position was secured".

She reiterated several times to me that the bank was happy that its position was secured and the arrears were no longer a concern for me or them as the bank's legal dept was aware of the undertaking and the legalities of it. ... We discussed the legalities of the undertaking and she told me the position of them as far as the bank was concerned that it was a legally binding contract on us both, bank and myself, and the only way out of it was for the bank to give me notice it wanted to terminate the agreement, which they never did.

I had a subsequent call with [the Provider's agent] maybe 10 days later as I had asked her to call me when the legal department had a chance to read it if they were happy. She rang me to say she had talked to the legal department who had the undertaking and were happy with it. Any contention by the bank otherwise is false. They never disputed it and I gave them what they asked for."

The Provider's file note and the First Complainant's evidence are very much at odds with one another. I am not satisfied that the First Complainant's account of the telephone conversations he had with the Provider is consistent with the proper interpretation of the Letter of Undertaking, which I have considered above. In such circumstances, I am of the view that the Provider's file note is more likely to reflect the telephone call which took place around **12 February 2014** both in terms of the purpose for which the Letter of Undertaking was intended and also that the undertaking was not acceptable to the Provider.

Although a Letter of Undertaking was provided, I am not satisfied the undertaking was accepted by the Provider and I do not accept that simply providing the Letter of Undertaking in and of itself means that it is binding on the Provider nor does an absence of any written response from the Provider mean it was accepted. I believe that for any such undertaking to become binding, a clear and express acceptance of the undertaking by the Provider is required, and there is no evidence of such acceptance.

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It is the First Complainant's position that the undertaking was requested by the Provider in the course of conversations and meetings with certain of the Provider's staff members. The First Complainant poses the question as to why he would furnish the undertaking if one had not been requested? The First Complainant also makes the point that no correspondence was ever received from the Provider querying why the undertaking was furnished.

The Complainants' position is that verbal requests for an undertaking were made by the Provider. However, I note that there is no documentation to support the position that an undertaking was required. I also note that the Letter of Undertaking does not suggest that the undertaking was being provided in response to a request from the Provider. Rather, this letter appears to have issued on foot of discussions surrounding additional borrowings sought by the First Complainant.

Having considered the evidence, I am of the view that the evidence shows a clear intention on the part of the Complainants to use the monies awarded in certain legal proceedings to discharge their mortgage loan and outstanding arrears. It is also clear that the legal proceedings in which the Complainants were involved were discussed by the parties and that the Complainants would use the monies from these proceedings to discharge their liability to the Provider. The Provider also sought updates regarding the status of these proceedings and various updates were provided by the Complainants' solicitors. Despite this, there is no evidence that the Provider sought any form of undertaking regarding the application of the monies received by the Complainants arising from their legal proceedings. Further to this, I do not consider that any discussions surrounding these legal proceedings necessarily means that any form of undertaking had been sought by the Provider.

While the First Complainant makes the point that an undertaking would not have been provided unless requested, I have been presented with no evidence that such a request was made. Further to this, while it is reasonable to expect the Provider to have responded to the Letter of Undertaking and it is disappointing that it did not do so, I do not accept that an absence of a response means that a request for an undertaking had previously been made by the Provider or that the Letter of Undertaking had been accepted.

Therefore, it is my opinion that there was no agreement or undertaking in place between the Provider and the Complainants regarding the discharge of the balance outstanding (including arrears) in respect of the mortgage loan the subject of this complaint. As I am not satisfied that the undertaking given in the Letter of Undertaking was accepted, I do not consider there to have been any failure on the part of the Provider to release the Complainants' solicitor from the undertaking contained in this letter.

Although I have reached this position regarding the undertaking, it is clear from the evidence that the Provider does not appear to have engaged with the Letter of Undertaking or subsequent references to the undertaking by the First Complainant and the Complainants' solicitors (until the Complainants were informed of the transfer of their loan). This is other than the telephone conversation which took place around **12 February 2014**. The Provider's lack of engagement with this issue appears to have led the Complainants to believe that a valid undertaking was in place.

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It is disappointing that the Provider did not engage with the various references to the undertaking especially when the Letter of Undertaking was sent to the Provider a second time in **September 2014**. However, in light of my comments regarding the telephone conversation of **12 February 2014**, it is likely that First Complainant was advised in **February 2014** that the undertaking was not accepted by the Provider. That said, had a formal response to the Letter of Undertaking been issued, it is my view that any confusion surrounding the acceptance of the undertaking could have been addressed from an early stage and quite possibly avoided. However, despite this, there is no evidence that the Complainants ever sought to remit any monies towards the loan account received by them arising from the legal proceedings referred to in the communications with the Provider in the five year period between the date of the Letter of Undertaking and the date of the transfer of the loan.

The Provider's entitlement to sell the Complainants' loan is set out in the General Mortgage Loan Approval Conditions and the Mortgage Conditions. In this respect, clause 1.15 of the General Mortgage Loan Approval Conditions, states:

"[The Provider] may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions."

Further to this, clause 6.7 of the Mortgage Conditions, states:

"[The Provider] may at any time without the consent of the Mortgagor transfer the benefit of the Mortgage to any person"

The Provider wrote to the Complainants separately on **2 August 2018** to inform them of the transfer of their loan to a third party. The Provider also wrote to the Complainants' solicitor on **2 August 2018** noting that this solicitor had been appointed to liaise with the Provider regarding the Complainants' loan account and enclosed copies of the above correspondence.

By email dated **20 August 2018**, the First Complainant wrote to the Provider challenging its entitlement to sell the Complainants' loan. In the context of the present complaint, this email stated:

"I have received comprehensive legal advice this morning on the attempts by the [Provider] to sell my mortgage to a vulture fund.

I am advised the following:-

1: [The Complainants' solicitors] provided a legal binding undertaking to pay off arrears and the mortgage in its entirety once legal proceedings had been completed.

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At no stage was I advised or provided with any written clarification from the [Provider] that they had released [the solicitor] from any undertaking. Insofar as additionally supplying me with a written update of this which is my legal right and entitlement.

In the absence of any such documentation I Therefore am advised that the undertaking still remains in place and legal and any attempt to sell my mortgage off to a vulture fund would be illegal and contested in court. ...”

This email appears to have been acknowledged as a complaint by the Provider’s Customer Resolution Team on **24 August 2018** and was followed by a further series of correspondence between the parties.

On **8 October 2018**, the Provider’s Customer Resolution Team wrote to the First Complainant, as follows:

“While the Bank will review the matters raised by you, please note however that the Bank does not have a general discretion to remove loans from the agreement with [the third party]”

The Provider wrote to the Complainants on **6 November 2018** outlining its response to the issues previously raised and, in respect of the undertaking, the letter advised that:

“4. As outlined [in] our previous correspondence the Bank has entered into a legal agreement to transfer your loan to [a third party]. The Bank does not have a general discretion to remove your loan from this legal agreement.

The transfer of your loan is legally permitted. The terms of your loan, including clause 1.15 of the General Mortgage Loan Approval Conditions provide that [the Provider] “may at any time transfer the benefit of the Agreement and the Mortgage to any person or company in accordance with the Mortgage Conditions”.”

The Provider issued a Final Response letter to the Complainants on **7 November 2018** essentially repeating the above position.

Following this, the Provider wrote to the Complainants on **1 February 2019** by way of separate letters advising them of the completion of the transfer of their loan on **1 February 2019**. Copies of this correspondence was also sent to the Complainants’ solicitor on **4 February 2019**.

The basis for the Complainants’ position regarding the Provider’s entitlement to sell their loan arose from the belief that an undertaking was in place in respect of the loan and that their solicitors had not been released from this undertaking. In circumstances where I am not satisfied that an undertaking was not in place arising from the Letter of Undertaking, I am not satisfied that the Provider has wrongfully sold the Complainants’ loan.

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The Complainants further maintain that the Provider failed to afford them the opportunity to make alternative arrangements prior to the sale of their loan. The basis for this arises from the Complainants' assertion regarding the Provider's repudiation or breach of the undertaking.

While there appears to have been a poor level of engagement regarding the undertaking, I do not consider that the Provider was necessarily obliged to afford the Complainants the opportunity to put alternative arrangements in place prior to the sale of their loan. In particular, I note that no such requirement is contained the General Mortgage Loan Approval Conditions or the Mortgage Conditions for instance nor is the consent of the Complainants required before a sale can proceed.

In the Provider's letter of **2 August 2018**, the Complainants were advised that the transfer of their loan would take place on a date at least 2 months after the date of this letter. In the penultimate section of this letter, the Complainants were also advised of their entitlement to repay all amounts due in respect of the loan at any time. It also appears that the Complainants had the benefit of legal advice at the time their loan was being sold and that the loan sale correspondence was also being sent to their solicitors. Further to this, it appears that from around **October/November 2018**, the Complainants were aware that the existence or otherwise of an undertaking would not prevent the sale of the loan.

Therefore, I am satisfied that the Complainants had a number of months to put alternative arrangements in place prior to the transfer of their loan. Accordingly, I am not satisfied that the Provider failed to afford the Complainants the opportunity to make alternative arrangements prior to the transfer.

Finally, I wish to highlight the poor response of the Provider to the complaint logged on foot of the First Complainant's email of **20 August 2018** regarding the Provider's entitlement to transfer the Complainants' loan. In the context of this complaint, the First Complainant challenged the Provider's entitlement to transfer the loan in light of the existence of the undertaking. The Provider issued correspondence to the First Complainant on **8 October 2018** and to both Complainants on **6 and 7 November 2018** where it sought to clarify its entitlement to transfer the loan. In this correspondence, the Provider explained that it did not have a general discretion to remove a loan from the transfer process and also cited clause 1.15 of the General Mortgage Loan Approval Conditions. However, the Provider's correspondence failed to address in any way the specific points raised by the First Complainant as to why he considered the Provider (by reference to the undertaking) was not entitled to transfer the loan. I also note that the Provider did not reference clause 6.7 of the Mortgage Conditions. In light of the specific points raised by the First Complainant in respect of the undertaking, I am not satisfied that the Provider responded to this aspect of the First Complainant's complaint to a reasonable standard and better efforts should have been made to address the points raised in respect of the undertaking.

Therefore, in light of the Provider's poor level of communication and engagement surrounding the undertaking and its poor response to the First Complainant's formal complaint, I partially uphold this complaint.

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Conclusion

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

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €500, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

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**

3 September 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,

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and

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

