



<u>Decision Ref:</u>	2021-0496
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Selling mortgage to t/p provider Level of contact or communications re. Arrears Arrears handling (non- Mortgage Arrears Resolution Process)
<u>Outcome:</u>	Rejected

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

The complaint concerns the sale of the Complainants' mortgage loans.

The Complainants' Case

In their Complaint Form, the Complainants describe their complaint, as follows:

"My Mortgage was sold by [the Provider] to another bank while I had reached an agreement with [the Provider] to dispose of the properties and service a debt agreed with them. I received [an] email off my case manager on the 22nd Feb 2018 stating that the contractual position was still in place. I proceeded with the sale of the property and started paying the residual debt to [the Provider]. I then asked if I was to proceed with the sale of the second property and I was told wait until the first Apt sale was over the line. Received email 22-05-2018 to sell."

In resolution of their complaint, the Complainants state, as follows:

"We are seeking compensation for the stress this has caused by the bank actions and our continuing struggle to get this resolved with the current bank our financial loss can not be estimated yet as it still on going."

In an email to this Office dated **28 May 2020**, the First Complainant stated, as follows:

"My understanding

This process has been going on since 2011. I bought 2 properties using [the Provider] bank and my own money to fund this. The threats started in 2011 and continued unabated until July 2016. The information at the time was to engage with your bank. I did this from the outset. I provided what ever information they required, I was subjected to constant psychological pressure about the money that was owed. I was very aware of the money that was owed. This whole pressure lasted 5 years. Only after I insisted on meeting with [CB] that this changed. During this meeting I was subjected to ridicule until I asked the question. Am I [a Provider] customer. He looked at me and the person recording what I was saying also looked at me both seemed to realise that in fact I was and maybe he should not be speaking to me in this manner. He said that he would review my case having previously said that under no circumstances would [the Provider] change the penal offer they had on the table. Where I would sell my house even though the loans were not secured against our home.

I was contacted in the weeks after this meeting to come into [the Provider] bank [branch] to meet with 2 senior managers. One being [JR] and unfortunately I can't recall or have a note of the other one. Myself and [the Second Complainant] attended this meeting. We could not believe what was about to happen. They started the meeting by apologising for the terrible way we have been treated over the years. They offered us a deal that would give us our lives back. Thats how much this meant to us. The outline of the deal was that we sell both properties and pay a sum of money agreed over 5 years. They agreed to costs related to the sale to be included in this.

Our next interaction with [the Provider] was with [CB] again and this reverted back to the way we were treated before. We got a sense of resentment from him that this deal had been done. I explained about our meeting and he was not aware of it, but we certainly made him aware of it. When we contacted him again he had changed his tone. He told us that he no longer was dealing with us and that [BL] was our new case manager.

So it started all over again. The same language towards us. The lack of information on their part. During 1 call he started the threatening language again with me. I told him I'd enough of this and that I'd revert back to [JH] and I hung up. He got so spooked that he rang me several times which I refused to answer until I got a call from his personal mobile to which I answered. He apologised and said this would not happened again to be fair it did not.

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So the process. I had to inform the tenants that my intention was to sell. The ones in [Property 2] were not too bad but still required time to move out. I contacted [BL] and informed him of this. Eventually after the initial period of the time associated with the deal I was able to sell. I was worried about that because there was a time period as a specific clause to the deal that our deal might be void. I contacted [BL] on many occasions and was always verbally assured that the deal was still in place. During this time the tenant refused to leave [Property 1]. I rang [BL] and he told me to follow the proper process for this. I contacted the PRTB and they informed me that he can stay a year. When this time has elapsed he still refused to go I contacted the prtb again and I had to start another process of getting him removed. All of this I relayed to [BL]. I constantly sought confirmation that my deal was still in place and he constantly assured me that it was. When the sale of [Property 2] went through I asked if I was to proceed with the sale because in a previous call he had told me to wait. I got confirmation to proceed. I asked for written confirmation and an email was sent to me that the deal was still in place. Dated 6/2/18. I understood from this mail that I still had a deal.

[Property 2] was sold and the money from the sale was sent by my solicitor to [the Provider]. I then immediately started to service the agreed residual debt payments as per the deal I had been given by [the Provider]. I put [Property 1] on the market as per instruction. At no stage did [the Provider] deny that our deal was intact. I feel I did everything possible to get this over the line. I did everything I was asked. What did I do wrong. Was it my fault I have a tenant that would not leave. That by law was entitled to stay. I have evidence of my interactions with him. The only evidence I don't have is for the €2000 I'd pay him to leave.

The big thing here is that [Provider] senior management gave us this deal because of their treatment of us. Have they now treated us any different to the way they have since 2011, no they haven't. I know they are entitled to sell on loans but how can they sell on a loan that was been serviced and not in default and as per agreement. If I had no agreement why was I instructed to send money back to them and start repayment. Then instructed to proceed with the sale of [Property 1]. So I'm now in the clutches of a vulture and no end in sight of this terrible nightmare we find ourselves in nearly 10 years on. I know just because I don't think it's right doesn't make it so. But surely when you are awarded a deal because of mistreatment and are assured every step of the way that the deal [is] still in place it must mean something somewhere. I suppose one of my mistakes here's was to get in writing the apology."

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The Provider's Case

The Provider says the Complainants held three mortgage accounts with it. Presently, the Provider says only one mortgage account remains with it, which relates to the Complainants' private dwelling house. The Provider says the other two mortgage loan accounts relate to separate buy-to-let ("BTL") accounts, accounts ending 101 and 201. The Provider says these loans were sold to a third party provider ("the TPP") in **May 2018**. At the time of sale, the Provider says account 101 had arrears of €73,923.75 and a balance outstanding of €240,552.95, and account 201 was up to date with a balance outstanding of €17,752.18.

The Provider says it is satisfied that it has complied with General Principal 2.1 of the **Consumer Protection Code 2012** with respect to the inclusion of the Complainants' loans (accounts 101 and 201) in a portfolio loan sale. As part of its requirement to reduce and meet 'EU Norms' regarding non-performing loans by the end of **2019**, the Provider says it identified portfolio sales which included performing and non-performing debt as part of its plans. The Provider says it reviews its position and options available on a continual basis and made a strategic decision to sell a portfolio in which the Complainants' loans were included, as part of its strategic requirement to reduce its non-performing loans.

The Provider says it conducted a thorough due diligence process prior to including any loan in this loan portfolio. However, due to their commercially sensitive nature, the Provider says negotiations in relation to portfolio sales are conducted on a confidential basis. The Provider says it is therefore not possible to provide the Complainants with any information in relation to the criteria for the selection and inclusion of accounts in a portfolio, other than to confirm that the accounts to be included in the portfolio loan sale were only confirmed immediately prior to the signing of the contracts between the Provider and the TPP.

The Provider says it provided the Complainants with timely notice that it had included accounts 101 and 201 in the portfolio of loans that it had contracted to sell to the TPP by writing to the Complainants on **23 May 2018**, advising that their loan accounts would transfer to a TPP on or after **27 July 2018**. This notification, the Provider says, also provided the Complainants with information relating to how their loan accounts would continue to be serviced following the transfer to the TPP. The Provider says it wrote to the Complainants again on **8 August 2018** confirming that legal transfer of their loan accounts to the TPP completed on **2 August 2018**. The Provider says this notification also provided the Complainants with information on how their accounts would continue to be serviced.

In its Complaint Response, the Provider has set out its legal entitlement to sell each of the Complainants' loans.

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In respect of loan account 101, the Provider says the relevant terms of the mortgage loan are set out in the Letter of Offer dated **16 June 2004**. In addition, the Provider says it relies on the 'General Terms and Conditions governing Business Lending' dated **September 2003**. In **2016**, the Provider says loan account 101 was restructured and that the relevant terms of the mortgage loan are set out in the Letter of Agreement dated **5 August 2016** and the 'General Terms and Conditions governing Business Lending' dated **July 2016**.

In this respect, the Provider refers to clause 1 and clause 3 of 'Appendix C: Securitisation' of the Letter of Offer. The Provider says this position is also outlined in the Letter of Agreement at Appendix 1 of the General Terms and Conditions.

At the time of the original sanction of the mortgage loan, the Provider says the Letter of Offer and the General Terms and Conditions of Business Lending formed part of the Mortgage Pack which issued to the Complainants' solicitor of record. Upon offering this mortgage loan to the Complainants, the Provider says it advised the Complainants, in the Letter of Offer, to seek legal advice prior to signing the loan offer.

In respect of loan account 201, the Provider says the relevant terms of the mortgage loan are set out in the Letter of Offer dated **20 December 2006** and supported by the 'General Terms and Conditions governing Business Lending' dated **March 2006**. In **2016**, the Provider says loan account 201 was restructured and that the relevant terms of the mortgage loan are set out in the Letter of Agreement dated **5 August 2016** and supported by the 'General Terms and Conditions governing Business Lending' dated **July 2016**.

In this respect, the Provider refers to clause 1 and clause 3 of 'Appendix C: Securitisation' of the Letter of Offer. The Provider says this position is also outlined in the Letter of Agreement at Appendix 1 of the General Terms and Conditions.

At the time of the original sanction of the mortgage loan, the Provider says the Letter of Offer and the General Terms and Conditions of Business Lending formed part of the Mortgage Pack which issued to the Complainants' solicitor. Upon offering this mortgage loan to the Complainants, the Provider says it advised the Complainants, in the Letter of Offer, to seek legal advice prior to signing the loan offer.

The Provider says the General Terms and Conditions governing Business Banking Lending dated **July 2016** were the applicable terms and conditions governing lending at the time of account restructure in **2016**.

The Provider says it acknowledges that at the time loan account 201 was included in the portfolio of loans to be sold to the TPP, the restructure of the account detailed in the Letter of Agreement dated **5 August 2016** had been implemented. However, the Provider says its position is that at the time loan account 101 was included in the portfolio of loans to be sold to the TPP, the account was not performing to contract. It had been agreed in the Letter of Agreement dated **5 August 2016**, the Provider says, that Property 1 was to be sold by **31 May 2017**. Due to difficulties experienced by the Complainants in achieving the sale of the property, the Provider says it agreed to extend the expected sale date and extended the interest only repayment period for a further four months (to expire on **24 November 2017**) to allow more time for the property to sell. Unfortunately, the Provider says, the property did not sell by this extended date and remained unsold at the time the loan account was included in the portfolio loan sale with no further extension to the expected sale date sanctioned by the Provider. The Provider says no further extension to the interest only repayment period was granted on loan account 101. On **27 February 2018**, the Provider says it issued a 'Reservation of Rights Letter' to the Complainants as their loan was out of contract.

Notwithstanding this, the Provider says, as outlined above, it had the right to sell the Complainants' loans and any security without notice to the Complainants or seeking their prior consent, or without any requirement for the loans to have been deemed non-performing prior to their inclusion in any portfolio sale. Furthermore, the Provider says it was its 'commercial right' as part of the requirement to reduce and meet EU Norms of non-performing loans by the end of **2019** to identify portfolio sales, which would include both non-performing and performing debt.

The Provider says the inclusion of the loan accounts 101 and 201 in the portfolio loan sale was completed in a transparent and fair manner, and in line with the terms and conditions governing the borrowings.

The Provider refers to a submission dated **9 September 2020** from the Complainants regarding a meeting on **19 July 2016**. The Provider refers to minutes of this meeting stating they reflect that the Provider acknowledged and apologised that it had not provided the level of service the Complainants should have expected. The Provider says the minutes note the Complainants were very appreciative of this. The Provider says the First Complainant advised that the recent offer from the Provider was "*very fair*" and offered a clear resolution to their financial difficulties. However, the Provider says the First Complainant detailed that the Complainants could not afford the sales costs and that this was a fundamental difficulty for them.

At the time of the meeting, the Provider says, as a gesture of goodwill to address the customer service failings, it agreed, on an exceptional basis, to waive the costs of sale in respect of the sale of both properties subject to asset disposal. The Provider says this equated to an estimated €4,000.00 in respect of Property 1 and €11,155.49 in respect of Property 2.

The Provider says it further acknowledges that the Complainants did not benefit from the costs of sale being waived on both properties, this was due to an issue with tenants and was outside of the control of the Provider and the Complainants. However, the Provider says the Complainants benefitted from the costs of sale being waived on the sale of Property 2. The Provider says it is satisfied that these customer service failings were adequately addressed to the Complainants' satisfaction at the meeting of **19 July 2016**.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unreasonably sold the Complainants' mortgage loans.

Decision

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

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

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

A Preliminary Decision was issued to the parties on 3 November 2021, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Complainants made a further submission under cover of their email to this office dated 11 November 2021, a copy of which was transmitted to the Provider for its consideration.

The Provider advised this office under cover of its email dated 15 November 2021 that it had no further submission to make.

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

The Provider's Schedule of Evidence

In its Complaint Response, the Provider advised that it has been unable to locate certain documentation for inclusion in its Schedule of Evidence.

In this respect, the Provider advises that it cannot locate a copy of a Standard Financial Statement referenced in a letter dated **12 June 2015**. The Provider advises it cannot locate a copy of the Complainants' counter proposal dated **16 November 2017** and referred to in the Provider's letter of **20 November 2017**. In terms of a fundamental restructure document dated **19 February 2016**, the Provider advises that it cannot locate a copy of the cover letter which enclosed this document.

In respect of telephone call recordings, the Provider advises that calls are not recorded in the department where the Complainants' case was being managed. In this respect, the Provider has provided file notes in respect of three telephone conversations dated **15 June 2017**, **22 August 2017** and **3 April 2019**.

Background

By letter dated **16 June 2004**, the Provider agreed to advance a sum of €242,250.00 to the Complainants, subject to the terms and conditions set out at Appendix A.

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This loan was subject to a 'First Legal Mortgage' over Property 1. The loan account number in respect of this loan ends 101.

In the context of this complaint, Appendix A states, as follows:

"Securitisation: *The Bank's authority to securitise the Facility is set out in Appendix C. By virtue of acceptance of this Facility Letter, the Borrowers authorise the Bank to securitise this Facility."*

At clause 1 of Appendix C, it states, as follows:

"SECURITISATION

1. *The Borrowers hereby irrevocably and unconditionally consent(s) to the Bank at any time or times hereafter transferring, assigning, disposing or sub-mortgaging or sub-charging the benefit of this agreement, any collateral or ancillary security (including, without limitation, any insurance policy or policies of life or endowment term assurance) and the secured moneys as defined in the mortgage, to any third party, person or body (including, without prejudice to the generality of the foregoing, a subsidiary of the Bank) and to any trust or administrative arrangement entered into by the Bank as part of any loan transfer and securitisation scheme on such terms as the Bank may think fit, without any further consent from, or notice to, the Borrowers or any other person, and to any consequential assurance or re-assurance or release under such scheme whereupon all powers and discretion's of the Bank shall be exercisable by the transferee and the Bank may include the benefit of this agreement, any collateral or ancillary security and the secured moneys as aforesaid, in the mortgage pool the subject of any such scheme without any further consent of or notice to the Borrowers."*

By letter dated **20 December 2006**, the Provider agreed to advance a sum of €330,000.00 to the Complainants, subject to the terms and conditions set out at Appendix A. This loan was subject to a 'First Legal Mortgage' over Property 2. The loan account number in respect of this loan ends 201.

In the context of this complaint, Appendix A states, as follows:

"Securitisation: *The Bank's authority to securitise the Facility is set out in Appendix C. By virtue of acceptance of this Facility Letter, the Borrowers authorise the Bank to securitise this Facility."*

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At clause 1 of Appendix C, it states, as follows:

“SECURITISATION

1. *The Borrowers hereby irrevocably and unconditionally consent(s) to the Bank at any time or times hereafter transferring, assigning, disposing or sub-mortgaging or sub-charging the benefit of this agreement, any collateral or ancillary security (including, without limitation, any insurance policy or policies of life or endowment term assurance) and the secured moneys as defined in the mortgage, to any third party, person or body (including, without prejudice to the generality of the foregoing, a subsidiary of the Bank) and to any trust or administrative arrangement entered into by the Bank as part of any loan transfer and securitisation scheme on such terms as the Bank may think fit, without any further consent from, or notice to, the Borrowers or any other person, and to any consequential assurance or re-assurance or release under such scheme whereupon all powers and discretion’s of the Bank shall be exercisable by the transferee and the Bank may include the benefit of this agreement, any collateral or ancillary security and the secured moneys as aforesaid, in the mortgage pool the subject of any such scheme without any further consent of or notice to the Borrowers.”*

By letter dated **12 June 2015** (separate to the one referred to above), the Provider wrote to the Complainants on a ‘SUBJECT TO CONTRACT/CONTRACT DENIED’ basis with Heads of Terms regarding the proposed sale of Property 1 and Property 2 with a view to putting in place a sustainable restructuring of the Complainants’ loans.

Following further discussions between the parties, the Provider wrote to the Complainants on **20 November 2015**. In the penultimate paragraph of this letter, the Provider states, as follows:

“Reserving of the Bank’s rights in relation to the Existing Facilities:

We advise you that notwithstanding that no action has been taken by us in respect of your non-compliance with the terms and conditions of the Existing Facilities, neither that matter, nor the passing of time, nor any other inaction, nor any action, statement or discussion by or on the part of the Bank, is to be construed as a waiver of, or prejudicing, any of our rights under the facility letters and related security documents (the “Security”) in respect of the Existing Facilities (including, without limitation, the right to demand repayment in full of the facilities and the appointment of a receiver and enforcement of the Security), all of which rights, and all remedies in respect of which, are hereby expressly reserved.”

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It appears that the Provider furnished the Complainants with a 'Fundamental Restructure Non-Binding Term Sheet' dated **19 February 2016** in respect of their loan accounts. As noted above, the Provider has been unable to furnish a copy of the cover letter enclosing this document.

It appears that arising from certain discussions between the Provider and the Complainants, the Provider wrote to the Complainants by way of separate 'Letter of Agreement' both dated **5 August 2016** in respect of loan account 101 and 201. In these letters, the Provider advised that it was agreeable to the Complainants participating in a 'Buy to Let Voluntary Sale for Loss Scheme' in respect of the Property 1 and Property 2. The Letters of Agreement provided for the sale of Property 1 and Property 2 (with the sales proceeds being lodged to the respective loan account) and a repayment arrangement in respect of the residual debt. On the third page of the Letters of Agreement, it states, as follows:

"By signing this Letter of Agreement you agree to be bound by the following Scheme Conditions:

[...]

4. *The Scheme Conditions contained in this Letter of Agreement, including the General Terms and Conditions set out at Appendix I, should be read in conjunction with the terms and conditions applicable to your letter(s) of offer (including any subsequent top-up loans), and any other security documents supporting your Mortgage Loan. If there is a conflict between this Letter of Agreement and the terms and conditions of your letter(s) of offer and/or your security documents, the terms and conditions of this Letter of Agreement will prevail.*

[...]

6. *For the avoidance of doubt, except as expressly amended by this Letter of Agreement, the letter(s) of offer and all security documents supporting the Mortgage Loan(s) [...] shall remain in full force and effect and shall be read together with this Letter of Agreement as one agreement. By signing this Letter of Agreement you agree to be bound by the terms and conditions of the Letter of Confirmation [...].*

[...]

8. *Target Sale Date: The Mortgaged Property must be sold and the Sale Proceeds must be received by the Lender by **31/05/2017**. In the event that the Mortgaged Property fails to sell by this date, you must notify the Lender immediately, and the Lender may reconsider the position."*

On the eighth page of the Letters of Agreement, it states, as follows:

"In the event that the Mortgaged Property fails to sell within the timeframe already stipulated in this Letter of Agreement (see 'Target Sale Date') the Lender may:

- i. Agree to extend the period of marketing of the Mortgaged Property for a further period such agreement is at the sole discretion of the Lender.*
- ii. Terminate this Letter of Agreement and take whatever steps the Lender considers may be appropriate to recover the amount owing in your Mortgage Loan(s), including commencing legal proceedings."*

As noted in the Letters of Agreement, the 'Target Sale Date' in respect of each property was **31 May 2017**. It appears that this was extended to **30 November 2017** in respect of Property 1 and **31 August 2017** in respect of Property 2, with Property 2 selling in **March 2018**.

At 'Appendix I – General Terms and Conditions' of the Letters of Agreement, it states at clause 2, as follows:

"2. SECURITISATION

The Customer hereby irrevocably and unconditionally consent(s) to the Lenders at any time or times hereafter transferring, assigning, disposing or sub-mortgaging or sub-charging the benefit of this agreement, any collateral or ancillary security (including, without limitation, any insurance policy or policies of life or endowment term assurance) and the Total Debt as defined in the Mortgage, to any third party, person or body (including, without prejudice to the generality of the foregoing, a subsidiary of any of the Lenders) and to any trust or administrative arrangement entered into by any of the Lenders as part of any loan transfer and securitisation scheme on such terms as any of the Lenders may think fit, without any further consent from, or notice to, the Customer or any other person, and to any consequential assurance or reinsurance or release under such scheme whereupon all powers and discretions of the Lenders shall be exercisable by the transferee and the Lender may include the benefit of this agreement, any collateral or ancillary security and the secured monies as aforesaid, in the mortgage pool the subject of any such scheme without any further consent of or notice to the Customer."

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By letter dated **2 June 2017**, the Provider wrote to the Complainants regarding the proposed sale of Property 2. In the final paragraph of this letter, it states, as follows:

“Reservation of Rights

It should be noted that any agreement by the Bank to release the security held over the Property in the absence of full clearance of the debt, for which this asset has been held as supporting security, does not represent any agreement in relation to the outstanding residual debt due and owing to the Bank. This letter is not to be construed as a waiver of, or prejudicing any of our rights under the Letter of Sanction, all of which rights, and all remedies in respect of which are hereby expressly reserved.”

Further letters in respect of the sale of Property 2 issued to the Complainants on **25 July 2017** and **22 February 2018**, each of which contained reservation of rights provisos identical to the one cited above.

By letter dated **27 February 2018**, the Provider wrote to the Complainants in respect of the Letter of Agreement relating to loan account 201. The Provider advised that the relevant property had not been sold in accordance with the Letter of Agreement, the Complainants were in default, and that the Provider would undertake a review of this situation. In particular, this letter contained a reservation of rights proviso almost identical to the one contained in the Provider’s letter of **20 November 2015**.

By letters dated **23 May 2018**, the Provider wrote to the Complainants separately, to inform each Complainant that it was selling loan account 101 and 201 to a named third party purchaser (the TPP) and that the transfer was expected to complete on or after **27 July 2018**. By way of further letters dated **8 August 2018**, the Provider informed the Complainants that the transfer of their loans completed on **2 August 2018**.

It appears that on foot of a telephone conversation with the First Complainant on **3 April 2019**, a formal complaint was logged by the Provider regarding the sale of the Complainants’ loans. The Provider issued a Final Response Letter dated **6 June 2018** to the First Complainant.

On the fourth page of this letter, the Provider states, as follows:

“2) The Bank has the right to sell your loan and any security held without notice to you or without prior consent, under the General Terms and Conditions governing Business Lending.

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The Bank's right was contained in the Letter of Agreement issued dated 5 August 2016 (see Appendix 1 – General Terms and Conditions – 2. Securitisation section) [...]

3) [The Provider] is not in a position to disclose the criteria as the terms of the loan sale are confidential and commercially sensitive.

As part of [the Provider's] requirement to meet EU norms of reducing Non-Performing Loans by the end of 2019, portfolio loan sales have been identified to form part of our plans to reduce Non Performing Exposures (NPEs).

The Bank made a strategic decision to sell this portfolio and commercial and operational considerations were given to which facilities would be included. The portfolio identified for this sale is made up of predominantly, but not exclusively, Non-Performing Loans. There are some instances where performing facilities have been included in this loan portfolio sale.

Both of your loans however would not have been classed as performing as they were effectively out of contract as you had missed the asset disposal target date for both properties.

4) You agreed to sell [Property 2] as per the Letter of Agreement ("LOA") you signed dated 5 August 2016. As per this letter, the property was due to be sold by 31 May 2017. As outlined in point (1) above, you were granted an extension to this asset disposal date to 31 August 2017 before the property was eventually sold on 28 March 2018.

A key tenet of the Bank's Customer Treatment strategy is "treating customers fairly." While we come across a range of distressed customers with differing circumstances and requirements, we are obliged to treat all customers on a consistent basis. We endeavour to put sustainable solutions in place for customers who are in financial difficulty. Sometimes it is necessary to propose measures involving the disposal of assets through Voluntary Sale for Loss agreements to arrive at an agreeable solution for all parties.

The bank offered you a deal that included a significant debt write off which you accepted when you signed the LOA dated 5 August 2016."

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Analysis

Beginning with the facility letters dated **16 June 2004** and **20 December 2006** (together, “the Facility Letters”) it can be seen from Appendix A that by accepting the terms contained in the Facility Letters, the Complainants authorised the Provider to securitise each of the loan facilities. At Appendix C, the Complainants consented to the Provider, at any time, transferring or disposing of the particular loan “*without any further consent from, or notice to*” the Complainants.

The evidence shows that in **June 2015** formal Heads of Terms issued to the Complainants in respect of the proposed sale of Property 1 and Property 2 with a view to restructuring the loan account 101 and 201. This was followed by a letter **20 November 2015**, in response correspondence and discussions regarding the restructure of the Complainants’ loan accounts. As be seen, this letter contained an express reservation of rights provision stating, in essence, that the Provider’s conduct to date was not to be construed as waiving or prejudicing any rights under the Facility Letters.

The Letters of Agreement dated **5 August 2016** state that these letters were to be read in conjunction with the Facility Letters and that the Facility Letters were to remain in force with full effect. The Letters of Agreement also state that where there was a conflict between the Letters of Agreement and the Facility Letters, the terms of the Letters of Agreement were to prevail. In terms of the sale of the Complainants’ loans, at clause 2 of Appendix I of the Letters of Agreement, the Complainants consented to the Provider, at any time, transferring or disposing of the particular loan “*without any further consent from, or notice to*” the Complainants.

In the correspondence that issued in respect of Property 2 in **June 2017, July 2017** and **February 2018**, the reservation of rights provisions contained in these letters stated that any agreement to release the security over Property 2 did not represent an agreement in relation to the residual debt. These provisions continued by stating that the particular letter was not to be construed as waiving or prejudicing the rights of the Provider under the ‘Letter of Sanction’ (identified as the letter dated **5 August 2016**). A further reservation of rights provision was also contained in the Provider’s letter dated **27 February 2018** (similar to the one contained in the **20 November 2015** letter).

While it may have been the case that the Complainants entered an agreement with the Provider to sell Property 1 and Property 2 with a view to restructuring their loans, I cannot accept that such an agreement, in and of itself, prevented the Provider from disposing of the Complainants’ loans. Further to this, there does not appear to be any evidence to suggest that the Provider agreed to refrain from selling the Complainants’ loans as part of, or arising from, this agreement.

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In this respect, the Facility Letters show that the Provider possessed a contractual entitlement to sell the Complainants' loans, and this contractual entitlement was expressly retained as part of the Letters of Agreement. Additionally, on several occasions, the Provider wrote to the Complainants' expressly reserving its rights under the Facility Letters and the Letters of Agreement, which would include its right to sell the loans.

Accordingly, having regard to the contractual provisions governing the Complainants' loans, I accept that the Provider had a right to sell these loans.

By letter dated **23 May 2018**, the Provider wrote to the Complainants to notify them of the sale of their loan accounts, which was expected to complete on or after **27 July 2018**. The Provider wrote to the Complainants again on **8 August 2018** to inform them that the sale of their loans completed on **2 August 2018**.

On considering the contractual terms governing the Complainants' loans, I note that the prior consent of the Complainants to the sale was not required and neither was the Provider required to notify the Complainant of the sale.

However, Provisions 2.1 and 2.2 of the *Consumer Protection Code 2012* ("the Code"), requires the Provider to act honestly and fairly, and with due skill, care and diligence in the best interests of its customers, and Provision 2.6 also requires the Provider to make full disclosure of all relevant material information. Further to this, Provision 4.2 requires the Provider to supply information to consumers on a timely basis, having regard to the urgency of the situation and the time necessary to absorb and react to the information.

In terms of notifying the Complainants of the sale of their loans, I note that over two months' notice was provided. In the course of its **May** and **August 2018** correspondence, the Provider also advised the Complainants as to the identity of the TPP and its Servicing Agent, the transfer date and the effects of the sale.

In the circumstances, I accept that the Provider complied with its obligations under the Code in respect of the sale of the Complainants' loans.

In terms of the decision to sell the Complainants' loans, it is important to note that this Office will not interfere with the commercial discretion of the Provider in relation to such matters unless the Provider's conduct is unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants within the meaning of *section 60(2)(b)* of the *Financial Services and Pensions Ombudsman Act 2017*.

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However, the Provider's conduct must be viewed in the context of its contractual entitlement to sell the Complainants' loans, which does not seek to limit, or define, the circumstances in which the Provider can sell these loans.

The Complainants state that the Provider entered an agreement to sell their loans despite an agreement being reached with the Complainants to sell Property 1 and Property 2, and service the residual debt. In an email dated **28 May 2020**, the First Complainant refers to the Provider's previous treatment of the Complainants and the difficulties encountered with the sale of Property 1. The First Complainant also posed the question of *"how can [the Provider] sell on a loan that was been serviced and not in default and as per agreement."*

In its Complaint Response, the Provider refers to a requirement to reduce its portfolio of non-performing loans, which I understand to derive from the Capital Requirements Regulation (EU) No. 575/2013 and Directive 2013/36/EU.

In this respect, the Provider has cited arrears of almost €74,000.00 on loan account 101 at the time of the loan sale in **May 2018**. The Provider also refers to the fact that Property 1 was not sold by the Target Sale Date which was subsequently extended. However, it is noted that certain difficulties were encountered regarding the sale of this property which were beyond the parties' control.

At the time of the loan sale, it appears that Property 2 had been sold. In its Final Response Letter, the Provider stated that the Complainants' loans would not have been classified as performing as they were *"effectively out of contract"* as the Complainants had missed the Target Disposal Date for each property. In its Complaint Response, the Provider acknowledges that the restructure of loan account 201, as detailed in the Letter of Agreement dated **5 August 2016**, had been implemented.

I am not satisfied that because of the manner in which the Provider may have dealt with the Complainants prior to the Letters of Agreement being put in place; the fact Letters of Agreement were signed; that a restructure in respect of loan account 201 had been implemented; or because difficulties were encountered, or certain discussions had, in respect of the sale of Property 1 that the Provider was not entitled to sell the Complainants' loans. I am satisfied that, at all times, the Complainants' loans were subject to the Provider's right to sell these loans.

I note the Complainant, in a post Preliminary Decision submission, states that I did not look at the bigger picture and focused only on the contractual element.

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I would point out that I have taken all the submissions and evidence into account. Furthermore, it is important to understand that the loan is governed by the terms and conditions which the parties agreed.

Accordingly, having considered the evidence and the parties' submissions, I do not find the Provider's decision to sell the Complainants' loans was unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants.

Finally, I note that in its Final Response Letter and its Complaint Response, the Provider appears to rely on the applicable 'Terms and Conditions governing Business Lending' as one of the sources of its right to sell the Complainants' loans. Having considered the Facility Letters and the Letters of Arrangements, I cannot see where these particular terms and conditions are incorporated into or form part of the Facility Letters or the Letters of Agreement or that the Complainants' loans were subject to the 'Terms and Conditions governing Business Lending'. As such, I do not accept that the Provider was entitled to rely on these terms and conditions in respect of the sale of the Complainants' loans. However, as noted above, the Provider's right to sell these loans is provided for in the Facility Letters and the Letters of Agreement.

Goodwill Gesture

In its Complaint Response, the Provider states, as follows:

"The Bank appreciates and understands the upset and frustration that the Complainants have experienced in relation to pursuing this dispute. In recognition of the time and effort expended by the Complainants in pursuing a resolution to this complaint, the omission in the Banks evidence of some items of documentation, in addition to the passage of time, the Bank would like to make an offer in the amount of €2,500 to the Complainants as a gesture of goodwill. The Bank confirms that this offer is being made in full and final settlement of the Complainants' dispute."

On considering the conduct the subject of this complaint, it is my opinion that this goodwill gesture constitutes a reasonable sum of compensation. In the circumstances, on the basis that this offer remains available to the Complainants, I do not uphold this complaint.

Conclusion

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

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



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

8 December 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.