



<u>Decision Ref:</u>	2021-0548
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Refusal to transfer mortgage into sole or joint names Application of interest rate
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants entered into a **Mortgage Agreement** with a bank (the “**Provider**”) in 2006.

The Complainants’ Case

The Complainants entered into a **Mortgage Agreement** with the Provider in 2006 and the Second Complainant left the property in July 2008.

The First Complainant now wishes to amend the parties to the mortgage to remove the Second Complainant and to replace him with the First Complainant’s spouse, so as to make the spouse the second party to the original **Mortgage Agreement**.

The First Complainant wants to retain the terms of the original **Mortgage Agreement** that dates from 2006 and doesn’t want to enter a new **Mortgage Agreement** with her spouse at the prevailing rate of interest. The First Complainant submits that the Provider is making “*approx. 9k profit based on the existing terms on both mortgages as well as zero risk for the [Provider] given both properties having sufficient equity and life insurance cover.*” The First Complainant highlights particular terms of the 2006 **Mortgage Agreement** which she says allow her to substitute her spouse into the **Mortgage Agreement**. The First Complainant submits that her life insurance held with her spouse is something that the Provider can have regard to, in its decision making.

The Complainants submit that:

“this mortgage was purchased in September 2006 for my current residence in the names of [First Complainant] and [Second Complainant]. Since July 2008, [Second Complainant] no longer lives in the property with me being the primary occupier of the house. I have tried numerous times in the interim years to have [Second Complainant] removed from the mortgage and either have the house solely in my name or, more recently having [Second Complainant’s] name being replaced by [First Complainants’ Spouse]. Whilst the [Provider] has said this is possible – subject to submitting a brand new mortgage request for my own home and losing the tracker mortgage. The [Provider’s] argument is that this will be a completely new mortgage with new terms. I disagree with this as we are not changing the payments / length of mortgage or any other terms of the mortgage.....both myself and [Second Complainant] wish to have him removed from the mortgage as a) he has not made any payments since November 2008 b) he is unable to buy a house due to being attached (in name only) to this mortgage and c) should anything happen to me, he would be entitled to half the house with my husband and child only having half. My husband has been contributing towards the mortgage for the last 8 years....we are not seeking any monetary gain from this. We solely wish to have the second name on the mortgage amended from [Second Complainant] to [First Complainant’s Spouse]. I received a condescending, ineffective responses to my complaint from [the Provider]. Their opening line was that they tried to contact me first by phone – I had no missed or received calls from [the Provider].”

The First Complainant outlined, through an online form to the Provider dated **15 October 2019**, the following:

“I am writing to complain about the offer being made by [the Provider] in relation to a mortgage name change. To be clear, I have no complaints about the person I am dealing with directly, but rather the decision makers. I have two mortgages with [the Provider] - one rental property held solely in my name and one joint mortgage with my ex-partner, [Second Complainant] where I live. This complaint relates to my residential mortgage at the address listed above. I bought the house approx 13 years ago with my ex-partner and at the time was offered and accepted a tracker mortgage.... For the last 11 years, I have been paying the mortgage myself due to the end of the relationship. We have both subsequently married new partners and are now in a situation where we wish to remove my ex-partner from the mortgage and replace his name with my husbands... As long as my ex’s name is still on the deeds, he is unable to purchase his own property with his wife and my husband cannot be included.

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Whilst [the Provider] are allowing me to remove my ex and add my husband, in order to do so, I not only have to reapply for a mortgage we already pay, but will also lose the tracker. This will increase the mortgage by approx 500 EUR p/m. There are no changes to the actual terms of the mortgage i.e... payment frequencies, length of mortgage etc etc. I have over 15 years track record of two mortgages with [the Provider] when tracker mortgages were in the [Provider's] favour, the [Provider] made a significant amount of interest from us..... We are now in a very difficult situation where we would not be able to afford the additional €500 a month for a mortgage along with full time childcare and all other expenses yet we cannot continue to have my ex-partner on the mortgage who is unable to purchase his own house for his own family and is entitled to half the house should anything happen to me despite not contributing to the mortgage for the last 11 years as agreed, not due to neglect.

I would understand the logic / requirement in removing a tracker mortgage from people where terms are changing however, there are no mortgage terms changing in this case: My husband is already on the life Insurance for the house. I find it odd how people have the ability to to carry tracker mortgages to new properties when they sell and move on yet I cannot retain my tracker where there is zero change apart from a name. I would appreciate fresh eyes on my case. I did ask for a meeting with the decision makers however, I was told that they do not meet customers. If someone is making such a significant decision which has a serious impact on my finances, I think I should at least be able to speak to them to understand their rationale."

The First Complainant submits, by email dated **12 June 2020**, that:

"In summary, there is no issue with affordability on the current mortgage and I know if we were to go through the whole process the [Provider] has outlined to remove [Second Complainant] from the mortgage and in effect submit a new mortgage request in myself and my [First Complainant's Spouse], there would still be no issue in getting the mortgage however, the key difference is that the mortgage would increase by approx 500 a month as they will not allow me to keep my tracker. To reiterate what I have already said ... the [Provider] was more than happy to give us a tracker mortgage when it was in their favour but the minute it goes in the favour of the actual customer, they are not willing to engage in any reduction - I have even offered to go to 1.5% fixed rate to meet them part of the way."

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The Complainant also submits that:

The [Provider] deliberately seeks to take advantage of our difficult personal circumstances to extricate itself from what has transpired for it to be a commercially disadvantageous contract. It is our position that it is not entitled to do so. In addition, I would also like to point out that the loan to value rate is 85% (loan approx. 454k with current value approx. 525k) and therefore not a risk to the [Provider]. According to the last Mortgage statement as at Sept-2020 for [location], 22,500 was paid by myself and my husband with the loan reducing by approx. 17k and the remaining 5k being interest for the [Provider]. With regard to my buy to let ([address]) property the Loan to value rate is 66% (loan approx. 186k with current value approx. 280k). According to the latest mortgage statement as at Nov-2020, approx. 10k was paid by me reducing the loan by approx. 6.5k and the remainder 3.5k interest for the [Provider]. The [Provider] is therefore making approx. 9k profit based on the existing terms on both mortgages as well as zero risk for the [Provider] given both properties having sufficient equity and life insurance cover."

The First Complainant wants the Provider to allow the Second Complainant be removed from the **Mortgage Agreement** and replaced with her spouse as a party to the contract, with all of the current contractual terms remaining in place.

The Provider's Case

The Provider submits that any request to have a party removed from a jointly held mortgage account will be required to be treated as a new mortgage application and as a result it will be subject to the prevailing mortgage rates available at that time.

The Provider says that it may be possible to approve the First Complainant's spouse as the second party to her mortgage application, but it must be a new application and the original terms and conditions afforded to the Complainants in 2006 cannot simply be inherited by the First Complainant's spouse in place of the Second Complainant.

The Provider disputes the First Complainant's contractual interpretation of the 2006 **Mortgage Agreement**. The Provider argues that it cannot comment on the relevance of a life insurance contract held by the First Complainant and her spouse, with a third party company.

The Provider submitted, by letter dated **16 October 2019** and addressed to the Complainant, that:

“My understanding of your complaint is as follows:

- 1. You wish to change the named parties on your mortgage and are unhappy that [the Provider] will not allow you to keep your current tracker rate if you proceed with the Application to change the named parties to the mortgage.*
- 2. You feel that if you were to go ahead with a new mortgage that you would not be able to afford the extra €500 per month which you calculate would be payable with a new rate.*

...

Any request to have a party removed from a mortgage account (in your case a Jointly held mortgage account) will be required to be treated as a new mortgage application in accordance with the [Provider’s] prevailing lending criteria.

We note you have indicated that you have discussed this with [The Provider] who would allow the transfer of named parties, but that you will lose your current tracker rate if you proceed with this application. We can confirm that if it is the case that approval for the borrowing to continue with a new party(ies) is granted then current prevailing Interest rates will apply. As you have requested that one of the parties be removed from the mortgage and a new party added, you are looking to alter the Terms and Conditions of the original mortgage account. We therefore require a new application to be submitted, and as outlined above prevailing business rates will apply.

It is not [Provider] policy to remove a party from a jointly held mortgage account without an assessment of the party proposing to take up the borrowing in their name being conducted. The [Provider] must satisfy itself that the parties proposing to continue with the borrowing is in a viable position to do so. This is in order to protect both the applicant and the [Provider]. As outlined above, any such assessment would be treated as a new mortgage application subject to the [Provider’s] prevailing lending criteria. As it is being proposed to make a material change to the Terms and Conditions of the original mortgage it would not be possible for the original Terms and Conditions of the jointly held mortgage to be simply transferred to the party proposing to carry on with the borrowing in their name (without an assessment first taking place). Any such assessment would require all requisite Information / documentation to be submitted.

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...We acknowledge your concern in relation to the affordability of any mortgage you take on. If you do continue with the application you have the right to refuse the purchase of this product if you feel it is too expensive, you can withdraw your intention to draw down the loan at any stage before the loan cheque issued. Should you proceed with the mortgage or if you have any difficulty with repayments, our Arrears Support Unit are here to help and you can talk to a trained mortgage advisor at your local branch... You also mention in your complaint that you find it odd how people have the ability to carry tracker mortgages to new properties when they sell and move on. We cannot comment on other customer's mortgages and each case is dealt with on a case by case basis. Unfortunately there is no option to retain your current rate if you proceed to proceed with an application for new named parties on the mortgage."

The Provider further argues that:

"As detailed in the Accepted Loan Offer and the terms and conditions attaching to the existing mortgage in the names of [First Complainant] and [Second Complainant], both parties are jointly and severally liable for the debt. Both Complainants had the benefit of legal advice before draw down of their joint borrowing and they confirmed by way of signing the Loan Acceptance at section A (the borrowing contract) that all of the terms and conditions of their loan were explained to them by their legal representative (solicitor) and also that they understood the conditions....It is clearly outlined in the terms and conditions of their borrowing that both parties are jointly and severally liable for the debt. This is outlined Paragraph 25.a of the Standard Mortgage General Terms and Conditions as follows....Both parties will remain liable for the debt until such time as the joint borrowing is repaid in full. There is nothing in the terms and conditions applicable to the Complainants' existing mortgage loan that provides for or obliges the [Provider] to consent to the removal/and or substitution of one of the borrowers from the title of the secured property or from the obligations of the mortgage loan contract, at the Complainants' request. The Complainants seek to vary the existing mortgage contract which they entered into by changing the name of the borrowers and the security held. There is no contractual or other obligation on the [The Provider] to accede to that request or provide the consent that they are seeking from the [Provider]. The [Provider] does not offer the facility for an existing mortgage and title to be changed by simply removing the name of one of the borrowers from the jointly held mortgage and replacing it with the name of another party. Requests of this nature are also outside our lending credit policy and in such cases, a new mortgage and contract is required."

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The Provider also asserts that:

"To enable [First Complainant], obtain a mortgage in the joint names with her husband, it will be necessary for them to apply for a new mortgage in their joint names. A Mortgage Advisor in a local [Provider] branch will be able to assist the new borrowers in completing the mortgage application and confirm what supporting documentation will be needed to also be submitted in order to support the application - taking into account their individual circumstances. The sanction of a new mortgage will be subject to mortgage standard terms and conditions and will be assessed in line with the [Provider's] prevailing lending criteria, including a fresh credit assessment. If a new mortgage is sanctioned and all formalities are complied with, then the new borrowers can proceed to repay the existing mortgage by the drawdown of the new mortgage loan proceeds.

As tracker interest rates were withdrawn by the [Provider] in October 2008 and are no longer available for new mortgage applications, it will not be possible to retain the existing tracker rate on the new mortgage. The rate applicable to the existing mortgage for the remaining term is the ECB rate + 0.75%. In cases where mortgage borrowers who are on an existing tracker rate wish to transfer title to a new mortgage, the [Provider] does offer these customers a concessionary 10 year tracker rate on the new mortgage, with the new mortgage amount restricted to a maximum of the level of existing tracker rate mortgage borrowing. The current tracker rates for new mortgages in these cases is the ECB rate plus 2.00% or 2.50% depending on the Loan to Value ratio (LTV) of the new borrowing. This new tracker rate is for a ten-year period, subject as outlined to normal lending criteria being satisfied."

The Provider submits, by letter dated **5 February 2021**, that:

"The First Named Complainant has provided your Office with a copy Suitability Statement dated 9 February 2017 from a Third Party Company in relation to financial planning requirements and in particular life assurance. The [Provider] is not in a position to comment on advice given or action taken by the Complainants in respect of their discussions with a Third Party Company. We also do not accept the First Named Complainant's contention that the [Provider] contractually requires her husband to be a party to the mortgage in question and there is nothing that would support such a view.

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As set out in our response dated 8 December 2020 the Complainants seek to vary the existing mortgage contract which they entered into by changing the name of the borrowers and the security held. There is no contractual or other obligation on the [Provider] to accede to that request or to provide the consent that they are seeking from the [Provider]."

The Provider submits that there is no contractual basis in the original 2006 **Mortgage Agreement** for substituting parties under the **Mortgage Agreement**. The Provider asserts that the First Complainant and her spouse must apply for a new mortgage with the Provider if they wish to hold a mortgage on the property together. The Provider submits it is not in a position to comment on advice given or actions taken by the First Complainant and her spouse in respect of their insurance arrangements with a third party company.

The Complaint for Adjudication

The Complainants' complaint is that the Provider is wrongfully refusing to release the Second Complainant from his liability under the mortgage loan agreement and substitute the First Complainant's spouse instead.

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

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Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

I note the contents of the **Standard Mortgage General Terms & Conditions** (effective from **1 June 2006**) and the relevant clauses are as follows:

"The spouse of a Borrower; whether a legal owner or not, is required to be a party to the Mortgage if the Property is a family home within the meaning of the Family Home Protection Act, 1976 as amended by the Family Law Act, 1995."

"14. Interest Rate

(a) Subject to Sub-Clause 14(b), all Loans are subject to the [Provider's] Mortgage Rate at the date the Loan is drawn down.

(b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:-

(i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan."

"22. Indemnity

The Borrower indemnifies and agrees to keep indemnified the Lender against all claims, demands, liabilities, losses, costs (including legal fees on a full indemnity basis), actions, proceedings, charges and expenses whatsoever and howsoever arising which the Lender may incur or suffer by reason of:

(a) the Lender acting on any instructions received by telephone, e-mail or facsimile or by electronic, microwave, magnetic or digital means;

(b) the breach, non performance or non observance by the Borrower or any Guarantor of any of the terms, covenants and conditions of the Loan Offer, these General Terms and Conditions and the Mortgage;

(c) any repayment or prepayment; or

(d) a failure by the Borrower to drawdown all or any part of the Loan after delivery of a payment request."

"25. Joint Borrowers

(a) Where a Mortgage is granted by two or more persons, then all such persons shall be jointly and severally liable for any indebtedness secured by the Mortgage."

I note the contents of the **General Mortgage Application Form** completed in 2006, which registered all of the financial circumstances of the First and Second Complainants. The amount to loan sought was noted on the form as **€588,000.00** for a repayment period of 38 years.

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I note that the details of their Solicitor are furnished, and that the **General Mortgage Application Form** which dates from that time, says the following:

"I/we agree that this application and deceleration shall form part of the loan contract between me/us and [Mortgagee] as if all terms and conditions, declaration and consents contained herein were incorporated into such contract in full."

"The rate of interest will be that which the Company is charging on the date on which the loan cheque is issued and subsequently the rate may vary within the terms of the mortgage."

I note that the form was signed on **26 July 2006** by both Complainants.

I note the contents of the **Loan Offer** and **Terms and Conditions** which state under "*Specific Loan Offer Conditions*" that "*the policy is in the name (s) of the Borrowers.*" Under *Loan Acceptance* it also says:

"I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/We fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified."

I note that the **Loan Offer** and **Terms and Conditions** were signed by the Complainants under "*Loan Acceptance*" on **30 August 2006**. I note that the **Land Certificate Folio** shows the property was registered in the joint names of the Complainants.

The First Complainant submits that the Provider should allow her to substitute her spouse as the new second party to the original 2006 **Mortgage Agreement**. The First Complainant submits that

"the [Provider's] argument is that this will be a completely new mortgage with new terms. I disagree with this as we are not changing the payments / length of mortgage or any other terms of the mortgage. The only change is the second name on the mortgage." The First Complainant also contends that "*the [Provider] deliberately seeks to take advantage of our difficult personal circumstances to extricate itself from what has transpired for it to be a commercially disadvantageous contract.*"

On **1 March 2021** the Provider submits that:

“The original borrowers (in this case [the First Complainant] and [the Second Complainant]) are therefore liable for the mortgage debt until it is repaid. The borrowing contract is between the [Provider] and [Complainants]. There is no requirement on the [Provider] to have [The First Complainant’s spouses] name on this mortgage.”

I note that the **Mortgage Agreement** was entered into by both Complainants and with the Provider and that its terms relate solely to the parties to the contract as signed i.e. the Complainants and the Provider. The Complainants entered into the **Mortgage Agreement** on the basis that they would be *jointly and severally liable for any indebtedness secured by the Mortgage*. I note that the Complainants affirmed at the time that they had *the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions* explained to them by their Solicitor and that they fully understood them.

I note the Provider’s submissions that *“there is nothing in the terms and conditions applicable to the Complainants’ existing mortgage loan that provides for or obliges the [Provider] to consent to the removal/and or substitution of one of the borrowers from the title of the secured property or from the obligations of the mortgage loan contract”* and that *“requests of this nature are also outside our lending credit policy.”* I accept this.

I have reviewed the **Mortgage Agreement** carefully and I am satisfied that there is no provision within it which permits the Complainants to simply opt for the substitution of the parties. In circumstances where there is no contractual obligation on the Provider to allow for a substitution of the parties to the **Mortgage Agreement**, I am satisfied that such an issue is entirely one for the Provider’s commercial discretion with which the FSPO will not interfere.

I accept that the Provider is entitled to maintain the position that the First Complainant and her spouse must enter a new mortgage agreement under prevailing conditions if they wish to make new mortgage arrangements. I note that the Provider submits that it *“must satisfy itself that the parties proposing to continue with the borrowing is in a viable position to do so. This is in order to protect both the applicant and the [Provider].”* I also note that the Provider says that *“mortgage borrowers who are on an existing tracker rate wish to transfer title to a new mortgage, the [Provider] does offer these customers a concessionary 10 year tracker rate on the new mortgage, with the new mortgage amount restricted to a maximum of the level of existing tracker rate mortgage borrowing.”* This is not however, what the Complainants are proposing in this instance.

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I am satisfied that the **Mortgage Agreement** signed between the Complainants and the Provider was an important document from which considerable rights and obligations flowed. I am satisfied that the Provider is contractually entitled to decline to “swap out” the Second Complainant for the First Complainant’s spouse.

I don’t accept the Complainants’ contention that the Provider “*deliberately seeks to take advantage of our difficult personal circumstances to extricate itself from what has transpired for it to be a commercially disadvantageous contract*”

The Provider is not seeking to extricate itself from the contract, nor indeed is it seeking to amend the terms of the contract. It is the Complainants who are seeking to make such changes.

By email, dated **14 February 2021**, the First Complainant contends that:

“I would like to address [the Provider’s] statement that they don’t require my spouse to be a party to the mortgage and that there is nothing to support that contention by me. If you refer to page 3 of the terms and conditions of the mortgage - Clause 6 including the heading “Borrowers Spouse”. ‘The spouse of a Borrower, whether a legal owner or not, is required to be a party to the Mortgage if the Property is family home within the meaning of the Family Home Protection Act, 1976 as amended by the Family Law Act, 1995.’ The contract therefore expressly requires my spouse to be a party to the mortgage but by contrast it does not require my ex partner to be a party to it.”

The First Complainant also asserts that:

“the [Provider] contractually requires [First Complainant’s spouse] as my spouse to be a party to the mortgage. [First Complainant’s spouse] has already assigned his life insurance policy to the [Provider]. In the circumstances we do not see how it is legally possible for the [Provider] to refuse to substitute [First Complainant’s spouse] name for [Second Complainant’s] name on the mortgage.”

Clause 6 of the **Standard Mortgage General Terms & Conditions** (effective from **1 June 2006**) recognises the The Family Home Protection Act, 1976 which includes a protective mechanism ensuring that a spouse who wishes to sell a family home must acquire the consent of the other spouse. It is designed to ensure that family homes cannot be sold by one party from underneath the other party, without their consent.

The **Mortgage Agreement** reflects this when it says “*the spouse of a Borrower, whether a legal owner or not, is required to be a party to the Mortgage if the Property is family home within the meaning of the Family Home Protection Act, 1976 as amended by the Family Law Act, 1995.*” Importantly this provision related to the parties to the contract or the spouse of the Borrower in 2006 at the *time of their entry* into the contract, jointly, but being unmarried. This provision cannot be read retrospectively to incorporate a third party into the original 2006 **Mortgage Agreement** as clause 6 only applied to the *spouse of a Borrower* at the point of entry into the **Mortgage Agreement**.

Referring to Clause 6 of the **Standard Mortgage General Terms & Conditions** (effective from **1 June 2006**), the First Complainant refers to the *Contra Proferentem* rule. By email, dated **19 April 2021**, the First Complainant argues as follows:

“To be honest we’re at a stalemate. [The Provider’s] response confirms that there is a material ambiguity in the contract and where that contract was drafted by [The Provider] that ambiguity ought to be the deciding factor in my favour. I.e. as the contract has two alternative interpretations then my should be favoured as I didn’t draft the contract?”

The Provider submits, by letter dated **19 April 2021**, as follows:

“The Contra Proferentem rule applies only in the case of ambiguity. That rule does not require an unreasonable interpretation to be applied to what is an otherwise unremarkable clause. Clause 6 is part of the Terms and Conditions governing the [Provider’s] current mortgage contract in place with [First Complainant] & [Second Complainant] only and clearly relates as stated to “the Mortgage”. It is clear that where we were advancing a loan on a family home, we required both parties to be a party to the relevant loan and security documentation. To infer that such a lending policy implies that should one of those borrower’s later elect to change the counterparty, that the [Provider] is somehow obliged to automatically follow suit and substitute one potential borrower for an entirely different individual, some 13 years later, is not a reasonable interpretation of that clause, whatever rule you use to interpret it. A new counterparty requires a new mortgage application and contract, for to automatically substitute one borrower for another unrelated party would not be responsible lending.”

It should be noted that the *Contra Proferentem* rule recognises that when drafting a clause, particularly one which excludes liability, drafting should be precise, as any ambiguity will favour the non-drafting party.

McDermott and McDermott, in their legal textbook *Contract Law*, at paragraph 11.08, comment on the *Contra Proferentem* rule as follows:

“ In McMullan Brothers Ltd v McDonagh [2015] IESC 19 the Supreme Court held that the mere fact that the parties to a contract did not provide for a particular issue does not necessarily mean that the contract is ambiguous. Charleton J stated in respect of the contra proferentem rule that:

‘That doctrine traditionally derived in part from take-it-or-leave-it standard forms being foisted in some transactions on the other party to an agreement. The degree to which minds might truly be said to have met in such a situation and the repugnance of exclusion clauses that effectively denied the very service contracted for could also have motivated the courts in their approach to contracts that were drafted by one side to a bargain with minimal or no input from the other. But, for that rule of construction to be operative, some ambiguity has to be found in the term in question.’

I do not accept that the mortgage terms contain the ambiguity suggested by the Complainants. Clause 6 is not ambiguous in its meaning; it lends weight to the protections afforded in the Family Home Protection Act, 1976 by ensuring that *“the spouse of a Borrower, whether a legal owner or not, is required to be a party to the Mortgage if the Property is family home.”* In circumstances where the Complainants were not married whilst entering into the **Mortgage Agreement** in 2006 this clause did not relate to them, but in any event such clause would have applied only to the parties to the contract.

I note that by letter dated **16 October 2019**, the Provider asserts that *“I tried to contact you today by telephone to discuss your complaint but was unable to make contact with you.”* The First Complainant asserts that *“their opening line was that they tried to contact me first by phone – I had no missed or received calls from [the Provider].”* Whilst a call may have been made, in any event I note that a letter was issued on that date to the First Complainant, to communicate the relevant information.

In conclusion, I am satisfied that the Provider acted in accordance with the **Mortgage Agreement** in place and in accordance with its **Standard Mortgage General Terms & Conditions**, dating from 2006 when it declined, in its commercial discretion, to substitute the First Complainant’s spouse for the Second Complainant, under the agreement. Consequently, in my opinion, there is no reasonable basis upon which it would be appropriate to uphold this complaint.

I am conscious that since the preliminary decision was issued by this Office on 25 November 2021, the First Complainant has advised that:

“In the meantime, we sold our family home and bought elsewhere in order to get away from [Provider]. I did not sign up to [Provider] in the first place, I took my mortgage out with ... and was moved to [Provider].... The service has been poor, inconsiderate and downright sloppy throughout. This was also very evident when trying to close down the actual bank account, when the sale was complete - it took 5 weeks due to being fed incorrect information on how to do it, from various people within [Provider] (and that was when I was actually able to get through to them).”

It is clear that the Complainants have been unhappy with the level of service received from the provider, but insofar as this particular complaint is concerned, that the Provider wrongfully refused to release the Second Complainant from his liability under the mortgage loan agreement and substitute the First Complainant's spouse instead, for the reasons outlined above I do not consider it appropriate to uphold that 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.



MARYROSE MCGOVERN
Deputy Financial Services and Pensions Ombudsman

21 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.