An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0011
Sector:	Investment
Product / Service:	Property Investment
Conduct(s) complained of:	Complaint handling (Consumer Protection Code)
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns the Provider's administration of the Complainant's mortgage loans.

The Complainant's Case

The Complainant explains that she held three residential investment property loans with the Provider, against which this complaint is made, jointly with her husband. Sadly, the Complainant's husband died in 2016. While the Complainant was a joint borrower with her deceased husband, the Complainant explains that her husband was the sole point of contact with the Provider and that she had no day-to-day involvement in the banking relationship. Following the death of her husband, the Complainant says she discovered there were residual, unsecured investment property borrowings of approximately €220,000.00 with the Provider, which were in arrears. The Provider subsequently sold these loans to a third party purchaser ("the TPP") in **August 2017**.

In **September 2017**, the Complainant says, on the advice of her solicitor, she engaged the services of a regulated debt management firm ("the Debt Management Firm") to advise her in relation to her former Provider borrowings because at that stage, the TPP was demanding repayment of the outstanding balance.

The Complainant advises that the review undertaken by the Debt Management Firm identified a number of issues in relation to two of her loans, as follows.

Loan account 101 – The Complainant says this loan was for an amount of €352,000.00 and was entered in **March 2006** to buy out a property located in Dublin ("Property 1"), which was owned on a 50/50 basis by the Complainant's husband and his brother. The Complainant says the review identified that, on the buy-out, the property was registered in the sole name of the Complainant's husband, but despite this, the Complainant says she was joined in the loan as a joint and several borrower.

The Complainant says Property 1 was charged as security for this loan and this was the only security held for the loan. The Complainant says she was not given the opportunity by the Provider to obtain independent legal or financial advice before signing the loan offer, which the Complainant submits would have identified that she was gaining no benefit from the transaction but was taking on joint and several liability for the loan.

The Complainant says Property 1 was sold in **October 2015**, as a result of pressure from the Provider, with the sale proceeds totalling €427,955.00. At that stage, the Complainant says the balance outstanding on the loan was €369,329.90. However, for whatever reason, the Complainant says, only €151,694.98 of the sales proceeds were applied to the loan, leaving an unsecured, residual balance of €217,634.92 which, with interest, increased to €222,185.13 by the stage the loan was sold to the TPP.

The remaining sales proceeds of €276,260.02, the Complainant says, were applied to repay loan account 201 in full. However, the Complainant says this loan, unlike loan account 101, was to be secured by a life policy which provided life cover in the amount of €261,500.00 with an expiry date of **18 May 2032**.

Loan account 201 – The Complainant says this loan was taken out in **2006** and was topped up in **March 2007** in the amount of €100,000.00. The Complainant says this loan was to be secured by life cover on the borrowers' joint lives in the amount of €261,500.00. The Complainant says the loan agreement stated, as follows:

"Additional Mortgage Protection Insurance Required	*€100.000.00 giving total borrowings of €261,491.87 for 24 years and 8 months/296 months*

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Life or lives to be insured	[Complainant's husband and the Complainant]"

As part of the investigation undertaken by the Debt Management Firm, the Complainant says it was discovered that although the required life cover was taken out by her late husband, the Provider did not take an assignment over the policy and the policy was cancelled by her husband in **January 2015**. Again, from the investigations undertaken, the Complainant says it would appear the motivation to cancel this policy was the result of relentless pressure on her husband from the Provider to make repayments. The Complainant says she was completely unaware of this.

The Complainant submits that had the Provider taken an assignment over this policy, it would not have been possible for her husband to cancel it without the Provider's knowledge and consent. In response to this, the Complainant says the Provider has stated that it was not the Provider's policy to take an assignment of a life policy where the loan advanced was below €320,000.00.

In resolution of this complaint, the Complainant states, as follows:

> *"I am seeking the following:*
>
> 1. *A payment of €222,185.13 being the balance outstanding on Loan No.* [101] *at the date of the sale of the loan to* [the TPP].
>
> 2. *Compensation of €30,000 for the workload and stress on me arising from these issues following the death of my late husband.*
>
> 3. *Reimbursement of legal and financial advisory fees totalling €18,450, inclusive of VAT."*

The Provider's Case

In its Complaint Response, the Provider has set out a 33 page timeline of events covering the period **17 May 2006** to **28 August 2017**.

In respect of loan account 101, the Provider says this loan agreement is dated **27 March 2006** and was in the amount of €352,000.00. The Provider says the purpose of the loan was to re-mortgage Property 1 (to buy out a third-party share in the property), and the security held for this loan was a first legal mortgage and certificate of title over Property 1. The Provider says this loan was transferred to the TPP in **August 2017**.

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In respect of loan account 201, the Provider says this loan agreement is dated **23 October 2006** and was in the amount of €161,000.00. The Provider says this was an equity release in respect of Property 2, and the security for this loan was Property 2. The Provider says this loan account was closed on **30 October 2015** when funds of €276,206.02 were lodged to clear the balance. On **16 March 2007**, the Provider says additional funds were advanced in the amount of €100,000.00 in respect of loan account 201 for the purpose of purchasing a property in Bulgaria. The Provider says the security for this advance was Property 1.

In respect of loan account 301, the Provider says this loan agreement is dated **23 October 2006** and was in the amount of €210,000.00. The Provider says this was an equity release in respect of Property 1 and the security for this loan was Property 1. The Provider says this loan account was closed on **31 March 2008** when funds of €210,865.36 were lodged to clear the balance.

The Provider says Property 2 was sold in **March 2008** and that sales proceeds were lodged to account 301 on **31 March 2008**. The Provider says Property 1 was sold in **October 2015** and the net sale proceeds of €427,955.00 were lodged to accounts 101 and 201 on **28 October 2015**.

In respect of obtaining independent advice, the Provider says the loans the subject of this complaint were applied for through a broker ("the Broker"). As the application for this loan account was handled by the Broker, the Provider says is it not in a position to confirm or deny the Complainant's allegation. The Provider says this is in light of the fact that the discussions relating to whether or not the Complainant was advised to obtain independent legal or financial advice took place before signing the loan offers.

However, the Provider says Letters of Sanction dated **27 March 2006** and **10 October 2006**, which were addressed to the Complainant and her co-borrower, contained the wording:

> *"You are strongly advised to consult your legal adviser before you accept this offer."*

The Provider says these documents also outlined that:

> *"The Bank is agreeable, at the request of the Borrowers, to the property* [Property 1] ***vesting in the sole name of {the Complainant's co-borrower}."***

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In relation to the Letter of Loan Offer dated **16 March 2007**, the Provider says that under 'Part 4 – General Terms and Conditions Governing Supplemental Home Mortgage Loans', it is stated that:

> *"The Bank strongly recommends that you take independent legal advice before signing your Letter of Offer of Supplemental Home Mortgage Loan and shall not be responsible should you elect not to do so."*

In respect of the Complainant's day-to-day involvement with the Provider, the Provider says both the Complainant and her co-borrower completed application forms for the mortgage loans in question. The Provider says these were sanctioned and, by way of signed Letters of Loan Offer by both the Complainant and her co-borrower, the Complainant is liable for the repayment of the debt.

The Provider says while it understands the arrangement the Complainant is referring to with her late husband may indeed have been the personal arrangement the Complainant had with the co-borrower, from the Provider's perspective both the Complainant and the co-borrower were jointly and severally liable for the mortgage debt.

Furthermore, the Provider refers to copies of documentation enclosed under Schedule 8 of the Schedule of Evidence which includes the Complainant's signature on applications for reduced repayment arrangements and numerous arrears letters (at Schedule 12) that were issued to the Complainant as well as the co-borrower.

With respect of arrears that accrued on the loan accounts, the Provider refers to arrears correspondence at Schedule 12 and says that this correspondence issued to the Complainant and her co-borrower.

With respect of the alternative repayments sought, the Provider refers to the following forbearance applications which were submitted and signed by the Complainant:

- Reduced Repayment Application dated **11 June 2013**
- Reduce Repayment Application received on **9 August 2013**
- Reduced Repayment Application dated **20 May 2014**

The Provider refers to the following alternative repayment arrangements that were sought and sanctioned across the three loan accounts:

- 3 month moratorium approved on account 301 in **November 2007**

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- Moratorium declined on accounts 201 and 301 in **April 2011**
- 12 months interest only repayment in **July 2011** on account 101
- 12 months interest only repayments in **August 2011** on account 201
- 6 months fixed repayments at €1,000.00 per month on account 101 and €935.00 per month on account 201 in **November 2013**
- Assessment completed in **July 2014** and unsustainable decision remained
- Loan accounts 101 and 201 deemed unsustainable in **July 2015**. Voluntary Sale for Loss approved with estimated sale price of €427,200.00 leaving a residual debt of €217,613.95 payable over 144 months at €1,596.78 per month.

Regarding the application of the proceeds from the sale of Property 1, the Provider says this property sold in **October 2015** and that it received total net sale proceeds of €427,955.00 on **28 October 2015**. Following the repayment for **October 2015** falling due on **7 October 2015**, the Provider say the balance outstanding on account 101 was €369,329.90 which was inclusive of an arrears balance of €47,808.40. At this time, the Provider says account 201 had an outstanding balance of €276,207.05 inclusive of arrears totalling €37,430.52. Upon receipt of the net sale proceeds, the Provider says €276,260.02 was lodged to account 201 which cleared the balance in full including interest accrued and the account was closed. The Provider says the remaining balance of €151,694.98 was lodged to account 101 which cleared the arrears balance in full and the account balance reduced to €217,634.92. As a result of this lodgement, the Provider says the monthly repayment decreased from €1,857.92 to €1,260.97.

In response to the Complainant's contention that the net sale proceeds were "not applied in full against the balance of the loan secured by the Property", the Provider says it rejects this contention on the basis that both accounts were secured over Property 1.

The Provider refers to the Voluntary Sale for Loss Letter of Agreement which issued on **30 July 2015** ("the Letter of Agreement"). In this Letter of Agreement, the Provider says it outlined the expected minimum sale proceeds at €427,200.00. Upon receipt of these funds, the Provider says they were lodged to close account 201 and the remaining balance was lodged to account 101, reducing the balance to €216,713.95 to be repaid by way of repayments of €1,596.78 per month over 144 months.

The Provider cites the following passage from the Letter of Agreement:

> *"Prior to signing this Letter of Agreement we strongly recommend that you:*
>
> - *Obtain independent legal, tax and financial advice particularly if there is any aspect of this Letter of Agreement that you do not fully understand; and*

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- *Carry out a review of all insurance products associated with this Mortgage Loan. Any insurance policies e.g. property insurance, mortgage protections or payment protection insurance, will remain in place until you advise your insurers otherwise. You must continue to hold adequate property insurance, until such time as the Mortgage Property is disposed of, as detailed in this Letter of Agreement."*

The Provider says the Letter of Agreement goes on to state that:

> *"This is a legal document and you should obtain legal advice before signing it."*

The Provider says the apportionment of the sale proceeds from Property 1 was executed in line with the Letter of Agreement which issued to both the Complainant and her co-borrower. The Provider says it issued further correspondence to the Complainant's solicitor on **8 September 2015** confirming receipt of the net sale proceeds and that they would be lodged into account 101 and 201.

In respect of loan accounts 201 and 301, the Provider says it would like to clarify that the borrowings drawn under accounts 201 and 301 in **October 2006** were separate borrowings and neither account served as a top-up of the other.

The Provider refers to the Letter of Loan Offer issued on **10 October 2006** in respect of account 301 and states that under the heading 'Security', one of the items sought as security was, as follows:

> *"Mortgage Protection Policy on the lives of the Borrowers for the amount and duration of the Loan, duly assigned to the Bank. The Mortgage Protection cover must take account of the non-reducing capital sum from the interest only aspect of this facility for the first 60 months."*

The Provider says this was also stated in the Letter of Loan Offer issued on **13 October 2006**.

The Provider says it is within its discretion to determine the terms and conditions under which it is willing to advance funds. In this case, the Provider says it subsequently determined, and the Complainant agreed, that assignment of the policy was not required in relation to the borrowings advanced under account 301, as evidenced by correspondence to the Provider dated **20 October 2006**.

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In its Final Response Letter dated **21 June 2018**, the Provider says it acknowledged that the Letter of Offer dated **13 October 2006** in respect of account 201 required the assignment of *"Mortgage Protection Policy on the lives of the Borrowers for the amount and duration of the Loan, duly assigned to the Bank."* The Provider says it accepts in the absence of a waiver of this requirement, it can be considered that this assignment should have been put in place. The Provider says its records confirm that this did not happen and that is apologises for this.

Despite this, the Provider says account 201 was refinanced in **April 2007** under the terms set out in Letter of Offer dated **16 March 2007**, which was issued and subsequently accepted by the Complainant and the co-borrower. The Provider says the terms of this Letter of Offer clearly set out that *"this Letter of Offer supersedes all previous Home Plan Offers made to the Borrower"* and which did not contain a requirement for assignment over a mortgage protection policy.

The Provider says these borrowings were arranged through a broker and therefore, the Provider is not in a position to comment on any advice provided to the Complainant and the co-borrower prior to accepting the terms set out in the Letter of Offer.

The Provider says it has policies and procedures in place for new lending which outline how such lending is carried out. The Provider says these documents include the need for a financial assessment for affordability for the repayment of the amount sought, stress testing, security sought, loan to value ratios and income sustainability for example. Due to the commercially sensitive nature of these documents, the Provider says it is not in a position to provide a copy of these policies and procedures externally.

In relation to the assignment of a life policy, the Provider says its position is that an assignment is only sought in relation to the borrowings sanctioned and governed under the Letter of Offer dated **13 October 2006** (loan account 201). As noted above, the Provider says it accepts that in the absence of a waiver of this requirement, it can be considered that this assignment should have been put in place. The Provider refers to the refinancing of this facility in **April 2007**. The Provider also refers to the Complainant and co-borrower's waiver of life cover for the co-borrower which was provided, signed by both parties, under undated letter received on **20 October 2006**.

The Provider says it is satisfied that it has, in the majority of its dealings with the Complainant and the co-borrower, adhered to its policies and procedures.

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However, as outlined above, the Provider acknowledges that in the absence of a waiver, its failure to take assignment of a life policy as required under the terms of the Letter of Offer dated **13 October 2006** (until the restructure of the debt governed by the Letter of Offer dated **16 March 2007** when this was no longer required) as a failure to comply with its policies and procedures relating to taking assignment of life policies. The Provider says it acknowledges this error and apologises for this.

The Provider says it is within its commercial discretion to determine the terms and conditions under which it is willing to advance funds and in this case, it determined that assignment of policy was not required. The Provider also refers to the Complainant and co-borrower's waiver of life cover for the co-borrower received on **20 October 2006**.

In response to a question of whether, at the time of apportioning the proceeds of sale from Property 1, the Provider made enquires with the Complainant or the co-borrower as to whether there was a life policy in force in respect of either loan, the Provider refers to the timeline of events as containing details of its interactions between the Complainant, the co-borrower and their appointed solicitor during the time of the sale of Property 1. The Provider also refers to the Letter of Agreement which outlined how the sale proceeds would be split between accounts 101 and 201.

In terms of the Provider's position that it does not take an assignment of life policies where a loan does not exceed €320,000.00, the Provider says this falls within its commercial discretion, and it is within its commercial discretion to determine the terms and conditions under which it is willing to advance funds. By virtue of the fact the Complainant and the co-borrower signed all four Letters of Loan Offer, the Provider says this would determine that they accepted the terms and conditions as set out by the Provider.

In respect of its Final Response Letter dated **21 June 2018**, the Provider says at the time this letter was composed, the Complaints Handler did not have sight of the mortgage deed for Property 1. During the course of this investigation and in preparing its Complaint Response, the Provider says it has been able to obtain a copy of the mortgage deed. The Provider says it would like to apologise for any inconvenience this delay may have caused.

The Provider continues its Complaint Response by setting out its compliance with Provision 49 of the ***Consumer Protection Code 2006*** and Chapter 11 of the ***Consumer Protection Code 2012***.

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In concluding its Complaint Response, the Provider addresses the complaints made by the Complainant as follows:

Independent advice

The Provider says the loans the subject of this complaint were applied for through the Broker. As such, the Provider is not in a position to confirm or deny the Complainant's allegations. This is in light of the fact that the discussions relating to whether or not the Complainant was advised to obtain independent legal or financial advice took place before signing the loan offers.

However, the Provider says all Letters of Sanction relating to the loan accounts contained recommendations from the Provider that legal advice should be sought prior to the acceptance of the offer and the terms of the offer.

In relation to Property 1 vesting in the sole name of the co-borrower, the Provider says in the Letter of Sanction dated **26 March 2006**, the Provider was agreeable *"as* (sic) *the request of the Borrowers, to the Property* [address] ***vesting in the sole name of {the Complainant's co-borrower}.****"*, with the request for this being received from the Broker.

Apportionment of sale proceeds

The Provider says its position is that the apportionment of the sale proceeds from Property 1 was executed in line with the Letter of Agreement, issued to both the Complainant and her co-borrower. The Provider says it notes the Complainant's assertion that her co-borrower was the sole point of contact with the Provider. The Provider says it has reviewed its records regarding the Letter of Agreement and puts on the record that it did not receive any objection to the planned apportionment of the funds as set out in this letter at the time of its issuance or at the time the funds were applied to the accounts in **October 2015**, following the sale of Property 1. The Provider says its records show that dissatisfaction with the apportionment of the net sale proceeds was not recorded until **8 March 2018**, when a complaint was received from the Complainant's third party representative.

Assignment of the life policy

The Provider says the borrowings under loan account 101, as set out in the Letter of Offer dated **27 March 2006**, did not require the assignment of a mortgage protection policy.

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The Provider says the borrowings under loan account 201 are governed by the terms set out in the Letter of Offer dated **16 March 2007**, were issued and subsequently accepted by the Complainant and the co-borrower, and did not contain a requirement for assignment over a mortgage protection policy.

In addition to the above, the Provider says while it acknowledges the customer service failings associated with not taking assignment of a life policy as required under the Letter of Offer dated **13 October 2006**, this failure was to the detriment of the Provider, and the security it held in relation to loan account 201.

The Provider says it is also aware that the co-borrower cancelled existing unassigned life policies prior to his death.

The Complaints for Adjudication

The complaints are that the Provider:

Failed to afford the Complainant the opportunity to obtain independent legal and financial advice in respect of loan account 101;

Failed to take an assignment of a life policy as security for loan account 201; and

Incorrectly applied the proceeds from the sale of Property 1 to loan account 201.

Decision

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

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

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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 18 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 Complainant's representative made a submission under cover of his letter to this office dated 6 December 2021, a copy of which was transmitted to the Provider for its consideration.

The Provider advised this office under cover of its letter dated 9 December 2021 that it had no further submission to make.

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

It should be noted that in my Preliminary Decision and above in the 'Provider's section' of my decision I stated that "*In respect of loan account 201, the Provider says this loan agreement is dated* ***23 October 2006*** *and was in the amount of €161,000.00.*"

The Complainant's representative has, as part of a post Preliminary Decision submission, stated that "[t]*he Loan Agreement in respect of loan account 201, (€161,000), is dated 13th October 2006 and not 23 October 2006 as stated in the Preliminary Decision".*

The Complainant's representative is correct, the Provider's previous submissions detailed that "*The* [Provider] *confirms that the associated Letter of Sanction issued on 13 October 2006 and was subsequently accepted by the Complainant and her co-borrower"* but the Provider has 23 October 2006 listed as the date on which the mortgage was "*drawn down into account…2/01".*

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Loan Account 101

By letter dated **9 March 2006**, AD wrote to the Provider on behalf of the Complainant and her husband (together, "the Borrowers") in respect of a mortgage loan application in the amount of €330,000.00 and enclosed a mortgage application form. It appears from this letter that AD was a member of a firm which provided certain financial services. The letter further described this firm as being regulated by the Irish Financial Services Regulatory Authority as a 'Multi-Agency Intermediary' and as a 'Mortgage Intermediary' ("the Broker").

By letter dated **24 March 2006**, the Broker wrote to the Provider in respect of Property 1, as follows:

> *"Further to our telephone conversation, I wish to confirm that the title of the above property will be registered in the name of* [the Complainant's husband] *only."*

By letter dated **27 March 2006**, the Provider wrote to the Borrowers to inform them that it was agreeable to advance the sum of €352,000.00 subject to the terms and conditions set out at Appendix A. In terms of seeking legal advice, this letter states that:

> *"You are strongly advised to consult your legal adviser before you accept this Offer."*

Almost directly beneath this, the Borrowers signed the declaration contained in the 'Acceptance' section indicating their acceptance of the offer.

Property 1 was identified as the security for this loan and at Appendix A, under the heading 'Security', it states, as follows:

> *"Please note that the Bank is agreeable, at the request of the Borrowers, to the property* ***vesting in the sole name of*** **[the Complainant's husband].***"*

By letter dated **6 April 2006**, the Broker wrote to the Provider enclosing a *"signed offer of advance"*.

By letter dated **7 April 2006**, the Provider wrote to the Borrowers' solicitor, in part, as follows:

> *"2.* [The Provider] *have, inter alia, stipulated the following security in their Letter of Sanction dated 27 March 2006.*

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(a) *Legal Mortgage over freehold/long leasehold property at* [Property 1] *to vest in the name of* [the Complainant's husband] *stamped to cover borrowings of €352,000.00"*

This letter also referred to a number of enclosures, including a 'Deed of Mortgage/Charge', 'Undertaking in Law Society approved form' and a 'Certificate of Title – Law Society approved form'.

It appears (from a letter dated **5 May 2006**) that the previously mentioned undertaking was returned to the Provider around **13 April 2006** (a copy of this undertaking does not appear to have been provided by the parties). In terms of the ownership/title of Property 1, it appears from the Land Registry folio in respect of Property 1 that the Complainant's husband was registered as owner on **24 July 2006**.

It appears from the documentation submitted by the Provider that a series of correspondence was exchanged between the Provider and the Broker, and the Provider and the Borrowers' solicitors during **April** and **May 2006**. Following this, by letter dated **5 May 2006**, the Provider wrote to the Borrowers' solicitor enclosing a cheque in the amount of €352,000.00.

Property 1 Mortgage

By way of mortgage deed dated **2 May 2006**, the Borrowers agreed to mortgage Property 1 in favour of the Provider in respect of all present and future borrowings.

In the context of the present complaint, clause 3(c) states, as follows:

"3. The Borrower hereby covenants with the Mortgagee to the intent that these covenants shall be binding and subsisting so long as any monies remain owing by the Borrower to the Mortgagee:-

[…]

(c) *The Borrower hereby irrevocably **WAIVES** his right to appropriate to which account of the Borrower any sum received by the Mortgagee shall be paid.*

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The Mortgagee shall be at liberty notwithstanding any contrary direction by the Borrower to appropriate in such manner and to such account of the borrower as in its absolute discretion the Mortgagee shall think fit all sums received by the Mortgagee from or for the credit of the Borrower."

Loan Account 201

By letter dated **13 October 2006** (Provider reference 0293), the Provider wrote to the Borrowers to inform them that it was agreeable to advance the sum of €161,000.00 subject to the terms and conditions set out at Appendix A.

In terms of the security to be provided for this loan, Appendix A states, under the heading 'Security', as follows:

"The security for this Home Loan shall be:
Sought:

1. *First Legal Mortgage and Certificate of Title in the Bank's standard form over* [Property 2].

   […]

2. *Mortgage Protection Policy on the lives of the Borrowers for the amount and duration of the Loan, duly assigned to the Bank.* […]

As Held:

3. *Legal Mortgage and Certificate of Title in the Bank's standard form over* [Property 1] ***vesting in the sole name of*** **[the Complainant's husband]**."

By letter dated **17 October 2006** (reference 0293), the Borrowers' solicitor wrote to the Provider enclosing *"copy Letter of Loan Offer duly accepted by our clients."*

By letter dated **19 October 2006**, the Provider wrote to the Borrowers' solicitor regarding the 'Letter of Sanction' dated **10** and **13 October 2006**. In respect of the security already held in respect of Property 1, this letter stated, as follows:

*"**As Held***

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- *Legal Mortgage and Certificate of Title in the bank's standard form over* [Property 1] *vasting* (sic) *in the sole name of* **[the Complainant's husband]**.*"*

Under cover of letter dated **20 October 2006**, the Provider wrote to the Borrowers' solicitor enclosing two cheques in the amounts of €210,000.00 (loan account 301) and €161,000.00 (loan account 201).

Supplemental Mortgage Loan

On **20 February 2007**, the Broker wrote to the Provider in respect of an equity release of €60,000.00 and an increase in the mortgage loan on Property 2.

By way of 'Letter of Offer of Mortgage Loan' dated **16 March 2007**, the Provider offered a 'supplemental mortgage loan' to the Borrowers. In respect of the conditions applicable to this loan, the letter of offer stated that the supplemental mortgage loan was:

> *"subject to the mortgage loan being secured by the existing legal mortgage/charge for present and future advances in favour of the Bank over the property described in Part 1, and acceptance of and compliance with the Special Conditions in Part 2, and subject to the General Terms and Conditions Governing* [the Provider's] *Supplemental Mortgage Loans detailed in Part 4."*

Part 1, 'Particulars of Offer of Mortgage Loan', states, in part, as follows:

> *"Property already Mortgaged* [Property 2]
>
> […]
>
> *Additional Mortgage Protection Insurance required* *€100,000.00 giving total borrowings of €261,491.87* […]
>
> *Life or lives to be insured* [The Borrowers]*"*

Part 2, 'Special Conditions', states, as follows:

> *"An original Statutory Declaration of marital status* […]

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The Bank will rely on the following as additional Security for this borrowing: Legal Mortgage over [Property 1] *(As Held) vesting in the sole name of* [the Complainant's husband]

It is a condition of sanction that this loan is for an additional sum of €100,000.00 amount and will be amalgamated with your existing loan account number [201] *giving total facilities of €261,491.87.*

This Letter of Offer supersedes all previous Home Plan Offers made to the above borrowers."

Part 3, 'Pre-Drawdown Requirements', states, in part, as follows:

"Before your Supplemental Mortgage Loan, or any part of it, is drawdown, the following must be furnished to the Bank:

[…]

(b) (i) The policy document relating to the ***Mortgage Protection Policy*** *stipulated in Part 1 of the Particulars of Offer of Supplemental Mortgage Loan and any additional or substituted policy or policies approved of and accepted by the Bank must be lodged with the Bank. The policy document will be held by the Bank for the duration of the Supplemental Mortgage Loan term but may be substituted with an alternative policy with the Bank's prior consent.*

(ii) A ***Mortgage Protection Policy*** *for the amount and the period specified in Part 1 of the Particulars of Offer of Supplemental Mortgage Loan* […] *must first be exhibited to the Bank and, where required by the Bank, legally assigned to the Bank. Where assigned, the policy document will be held by the Bank for the duration of the Supplemental Mortgage Loan term, but may be substituted with an alternative policy with the Bank's prior consent. By accepting an assignment of the policy, the Bank neither represents nor warrants that the policy is in fact suitable or adequate in any respect."*

The Borrowers signed Part 7, 'Acceptance and Consent', which is dated **22 March 2007**. The Borrowers' signatures were also witnessed by a solicitor.

On **19 April 2007**, the Provider wrote to the Borrowers' solicitor enclosing a cheque in the amounts of €100,000.00.

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Mortgage Protection

It appears that the Borrowers incepted a 'Mortgage Protection Assurance' policy of insurance with both Borrowers recorded as the lives assured in the amount of €261,500.00. The start date of this policy was stated as **18 May 2007** with an expiry date of **18 May 2032**.

Loan Account 301

By letter dated **10 October 2006** (Provider reference 0294), the Provider wrote to the Borrowers to inform them that it was agreeable to advance the sum of €210,000.00 subject to the terms and conditions set out at Appendix A. The security for this loan, as stated in Appendix A, was identical to the security required in respect of loan account 201.

By letter dated **16 October 2006** (reference 0294), the Borrowers' solicitor wrote to the Provider enclosing *"copy Letter of Loan Offer duly accepted by our clients in addition to copy Mortgage Protection Plan Policy Statements."*

By letter dated **19 October 2006**, the Provider wrote to the Borrowers in respect of Property 2 and a Letter of Sanction dated **10 October 2006**, requesting that the borrowers contact their solicitor as soon as possible with a view to complying with the Provider's requirements prior to drawdown. This letter identified the documents that were required to be lodged with the Provider before a loan cheque could be issued. Amongst the documentation listed was an *"Original Level Term Life Policy as specified in the loan sanction"*.

As noted above, the Provider wrote to the Borrowers' solicitor enclosing cheques in the amounts of €210,000.00 and €161,000.00 on **20 October 2006**.

By way of undated letter bearing a Provider date stamp of **20 October 2006**, the Borrowers wrote to the Provider in respect of its letter dated **10 October 2006** (reference 0294), as follows:

> *"We refer to your Loan Offer of the 10th October 2006.*
>
> *We hereby consent to the waiver of any requirement for Life Cover on* [the Complainant's husband] *as security for the said Loan."*

Account statements for loan account 301 show that in **March 2008**, this loan account appears to have been cleared following the sale of Property 2.

/Cont'd…

Sale of Property 1

By letters dated **15 July 2014**, the Provider wrote to the Borrowers in respect of loan account 101 and loan account 201. These letters advised that following an assessment of the Borrowers' financial circumstances, the Provider did not consider that the Borrowers would be in a position to return to full contractual repayments in the foreseeable future.

The Provider also suggested that the Borrowers consider the option of either a voluntary sale or voluntary surrender.

It appears from emails exchanged between the Provider and the Complainant's husband during **June 2015** (in particular emails dated **4** and **11 June 2015**) that the proceeds from the sale of Property 1 were discussed in the context of the borrowings associated with Property 1, and the Borrowers' total debt and the residual debt that would remain following the deduction of the sale proceeds from the total debt. However, it does not appear that discussions took place as to the precise manner or order in which the sale proceeds would be distributed across loan accounts 101 or 201.

In an email dated **17 July 2015**, the Provider wrote to the Complainant's husband discussing the sale proceeds and the residual debt in the context of the total debt, as follows:

> *"Letter of agreement is being posted to you. In the letter of agreement it states*
>
> *To sell the property for €445,000.00 minus sale costs of up to 4%, which means the minimum slae proceeds is €427,200.00*
>
> *Residual debt will be approx.: €216,028.00 and repayments of €1592.63 will clear this over 12 years. This will be at your current rate of 1%.*
>
> *Once this Letter of Offer is signed, we can then write to your solicitors giving consent to sale of the property."*

The Complainant's husband responded to this the same day, stating:

> *"as I keep saying I can't afford or commit to anything like that.* […] *can we not sell the house and revisit my personal circumstances when I know them* […]*."*

/Cont'd…

As part of its response to this, the Provider advised the Complainant's husband that if and when his circumstanced changed, the Provider could revisit the matter and put a new plan in place. The Provider further advised that it would not be consenting to the sale of Property 1 without an agreement as to the residual debt.

The Provider issued a single 'Letter of Agreement' to the Borrowers regarding the sale of Property 1 dated **30 July 2015**. This letter addressed both loan account 101 and 201. In respect of loan account 101, the 'Mortgaged Property' was noted as Property 1. In respect of loan account 201, the 'Mortgaged Property' was noted as Property 1 and Property 2 as *"(Sold)"*. The Letter of Agreement states, in relevant part, as follows:

> *"*[W]*e have considered whether it might be appropriate for you to participate in the Buy to Let Voluntary Sale for Loss Scheme (the* ***"Scheme"****), whereby you sell the Mortgaged Property (specified above) at a price acceptable to us, however the proceeds of such sale are unlikely to be sufficient to discharge all amounts due by you in respect for your Mortgage Loan(s). We are agreeable to you selling the Mortgaged Property on condition that you use the* ***"Sale Proceeds"*** *to reduce the Mortgage Loan balance(s) and repay the remaining balance(s) in accordance with the terms and conditions of this Letter of Agreement.*
>
> […]
>
> *The amount remaining in your Mortgage Loan(s) after the Sale Proceeds have been applied to your Mortgage Loan(s) (the* ***"Residual Debt"****) shall be repayable to the Lender under the terms and conditions of this Letter of Agreement. Details of the proposed repayment of the Residual Debt are set out below.*
>
> […]

Minimum Sale Proceeds	*€427,200.00*
Agreed Lump Sum	*€0.00*
Estimated Residual Debt	*€216,713.95*

Mortgage Loan Account Number	[101]
Estimated Revised Loan Account Balance	*€216,713.95*
*Estimated New Repayment Amount**	*€1,596.78*
Interest Rate	*1.00%*
Interest Rate Description	*Tracker (ECB + 0.95%)*
[…]	

/Cont'd…

[…]	
[…]	
[…]	

Mortgage Loan Account Number	[201]
Estimated Revised Loan Account Balance	*€0.00 - Account to close*

[…].*"*

Solicitors acting on behalf of the Complainant's husband wrote to the Provider in respect of the sale of Property 1 by letters dated **2 June 2015** (outlining certain fees and charges) and **17 August 2015** (advising of a sale agreed price of €445,000.00).

The Provider wrote to the solicitors instructed by the Complainant's husband on **8 September 2015** in respect of the sale of Property 1, stating at the second paragraph that:

> *"*[The Provider] *will apply the sale proceeds received in partial redemption of Mortgage Loan Account Number:* [101] *&* [201] *the Borrower remains fully liable for repayment of all residual monies due and owing under Mortgage Loan Account Number:* [101] *&* [201] *following the sale of the Mortgaged Property."*

By email dated **15 September 2015**, the Provider wrote to the Complainant's husband advising that as an agreement had not been reached in respect of the residual debt, he remained liable for this debt to allow Property 1 to be sold.

Account statements for loan account 101 show that on **27 October 2015**, an amount of €151,694.98 was applied in reduction of the capital balance leaving an outstanding loan balance of €217,634.92. Account statements for loan account 201 show that on **27 October 2015**, an amount of €276,260.02 was applied in reduction of the capital balance, clearing the outstanding loan balance.

Analysis

It is the Complainant's position that she was not given the opportunity to obtain independent legal or financial advice prior to signing the letter of offer dated **27 March 2006** in respect of loan account 101.

/Cont'd…

In this respect, I note that Provision 17 of Chapter 4 of the ***Consumer Protection Code 2006*** ("the Code") states that a regulated entity must ensure that consumers are made aware of the importance of seeking independent legal advice. However, Provision 17 is confined to 'lifetime mortgages', which are defined as loans secured on a borrower's home.

The security in respect of loan account 101 was Property 1, which was not the Borrowers' home nor did the Borrowers reside at this property. As such, I am not satisfied that the requirements of Provision 17 apply to the letter of offer in respect of loan account 101.

In considering this aspect of the complaint, I also note the following comments of Hogan J. in *Irish Life and Permanent Plc v. Financial Services Ombudsman* [2012] IEHC 367:

> *"46. Accordingly, save in the special case of where the mortgagee enters into possession of mortgaged property it is clear that the mortgagor/mortgagee relationship is not a fiduciary one* […]*. Nor can it be said that there is there a general duty on a Bank to insist that customers take independent advice in relation to Bank dealings* […]*."*

I note that the loan application relating to loan account 101 was completed through, and with the assistance of, the Broker. Based on the available evidence, it appears the Broker was engaged in the provision of financial services regarding mortgages, life assurance, pensions, savings, and investments. I also note that the Borrowers instructed a firm of solicitors to act on their behalf in respect of this loan application and the associated mortgage in respect of Property 1. In terms of the letter of offer, I note that the Borrowers were expressly advised to consult with their legal adviser before signing the letter. Further to this, the signed letter of offer was returned to the Provider through the Broker.

In terms of registration of Property 1 in the sole name of the Complainant's husband, I note that this was expressly acknowledged by the Broker in a letter to the Provider dated **24 March 2006**; stated in bold print on the letter of offer dated **27 March 2006** (which was signed by the Borrowers); and communicated to the Borrowers' solicitors in the letter dated **7 April 2006**. It also appears that steps were taken by the Borrowers' solicitors to effect the registration of title/ownership of Property 1 in the sole name of the Complainant's husband with the Land Registry. In subsequent letters of offer dated **10 October 2006**, **13 October 2006** and **16 March 2007**, Property 1 is stated as having vested in the sole name of the Complainant's husband.

/Cont'd…

Therefore, I accept that the Borrowers, the Broker and the Borrowers' solicitors were aware that Property 1 was to vest in the sole name of the Complainant's husband. In these circumstances, I note that no queries regarding the title or ownership of Property 1 appear to have been raised by any of the parties. If the Complainant had any particular concerns regarding the title or ownership of Property 1, I accept that it was a matter for her to discuss these with the Broker and the Borrowers' solicitors, each of whom were aware that Property 1 would vest in the sole name of the Complainant's husband.

Equally, if the Broker or the Borrowers' solicitor has any concerns regarding the title or ownership of Property 1 vesting in the sole name of the Complainant's husband, I am satisfied that any such concerns ought likely to have been brought to the Borrowers' attention.

If the Complainant considered that she did not have sufficient time to take independent legal or financial advice, it is my opinion that it was open to her to refrain from signing the letter of offer until such time as she was satisfied that she had sufficient opportunity to take such advice or whatever advice she deemed necessary. It was also open to the Complainant to bring any queries or concerns to the attention of the Provider, the Broker or the Borrowers' solicitors. However, I note from the evidence that no queries or concerns appear to have been raised by the Complainant around the time the letter of offer was signed.

In the context of this complaint, having signed the letter of offer, it is my opinion that the Complainant must necessarily accept the terms on which this offer was accepted. In this respect, I note the following passage from the decision of Clark J. in *ACC Bank Plc v. Kelly* [2011] IEHC 7:

> *"**7.5** If the person does not have an opportunity to properly read the document then they should insist on such an opportunity and should not sign the document until they have been given an adequate opportunity to read it. If they sign it without adequately reading it then they must accept the consequences. If having read it there are terms or provisions which they do not properly understand then again they should not sign it unless and until they have taken advice. If they do sign a document whose terms they do not fully understand without taking advice then again they must accept the consequences. By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances."*

/Cont'd…

Further to this, I note that the absence of an opportunity to obtain independent legal or financial advice does not appear to have been raised until 12 years after the letter of offer was signed, in the Debt Management Firm's letter of **5 March 2018**.

The Complainant's representative has, in its post Preliminary Decision submission, expressed its dissatisfaction with the above statement.

The Complainant's representative states:

> "*The Preliminary Decision states that our client had not raised any issue in relation to the matters, the subject of this complaint, until she engaged ourselves as financial advisers. We are at a loss to understand the relevance of this. Following the death of her husband, who dealt solely with the loans in question, our client engaged ourselves on the advice of her solicitor. Following a detailed 'due diligence' the issue in question were discovered.*
>
> [The Complainant's representative] *are regulated by the Central Bank of Ireland and if you have any issue in relation to how we have dealt with this matter, or any issues with the advice we have given to our client, please feel free to report us to the Central Bank. We take grave exception to the inference that we, in some form or other, 'invented' the issues the subject of our client complaint".*

Any reasonable reading of the above could not in any way infer that the Complainant's representative had "'*invented*' *the issues*". Nor did I criticise how the Complainant's representative has dealt with this matter. From my review of the documentation on file it is apparent that the absence of an opportunity to obtain independent legal or financial advice did not appear to have been raised by the Complainant with the Provider and was first noted in the Debt Management Firm's letter of **5 March 2018.** This is simply a statement of fact and I fail to understand why the Complainant's representative takes issue with it.

If the Complainant considered that she did not have sufficient opportunity to obtain independent advice, I consider it reasonable to expect this issue to have been raised at a much earlier point in time, and I can see no evidence which would justify or explain the delay in bringing this matter to the Provider's attention.

Accordingly, I do not accept that the Provider failed to afford the Complainant the opportunity to obtain independent legal or financial advice prior to signing the letter of offer dated **27 March 2006**.

/Cont'd…

It is the Complainant's position that the Provider failed to take an assignment of a life policy in respect of loan account 201.

In this respect, I note that pursuant to the letter of offer dated **10 October 2006** (loan account 301) and the letter of offer dated **13 October 2006** (loan account 201), the Provider required the assignment of mortgage protection policies in respect of the Borrowers. By letter dated **16 October 2006**, the Borrowers' solicitor returned a signed letter of offer to the Provider in respect of loan account 301 together with a mortgage protection policy plan statement (I note that a copy of this plan statement does not appear to have been provided by the parties). By letter dated **17 October 2006**, the Borrowers' solicitor returned a signed letter of offer to the Provider in respect of loan account 201. However, this letter does not mention, or appear to have been accompanied by, a mortgage protection policy. Further to this, it appears that a mortgage protection policy was not put in place in respect of this loan at this time. By letter dated **20 October 2006**, the Provider furnished loan cheques in respect of loan accounts 201 and 301 to the Borrowers' solicitors. At the same time, the Provider also received an undated letter from the Borrowers on **20 October 2006** in respect of loan account 301, waiving the requirement for life cover in respect of the Complainant's husband.

On considering the evidence, it does not appear that the required mortgage protection policy in respect of loan account 201 was in place at the time the loan cheques issued. In this respect, I note the Provider has acknowledged that the required mortgage protection policy was not assigned to it, as stipulated in the letter of offer. While the Provider issued a loan cheque in respect of loan account 201 prior to ensuring that the required mortgage protection policy was in place, it is also important to note that the Borrowers were aware, or ought reasonably to have been aware, of the requirement for a mortgage protection policy to be assigned to the Provider.

In my Preliminary Decision I had stated that in consideration of the above it was my opinion that both the Provider and the Borrowers failed to ensure that the appropriate mortgage protection policy was in place, and duly assigned, in respect of loan account 201, and each party must accept a certain degree of responsibility for this oversight.

The Complainant's representative has, in its post Preliminary Decision submission, taken *"issue"* with the above statement. The Complainant's representative details that they:

> "*take issue with the assertion that it was as much the Borrowers responsibility, as it was of the Bank, to ensure that the security for the loan was put in place".*

/Cont'd…

While the Complainant's representative takes issue with the above, it remains my opinion that both parties failed to ensure that the appropriate mortgage protection policy was in place, and duly assigned, in respect of loan account 201, and each party must accept a certain degree of responsibility for this oversight, both parties had an interest in ensuring this was done correctly and each had a part to play to in ensuring it was done correctly.

Pursuant to a letter of offer dated **16 March 2007**, the Provider advanced a further amount of €100,000.00 to the Borrowers in respect of loan account 201. As part of this advance, the letter of offer states, at Part 1, that additional mortgage protection insurance was required in respect of the Borrowers. Part 3 of the letter of offer states that, as a pre-drawdown requirement, the mortgage protection policy stipulated in Part 1 must be lodged with the Provider, to be held by the Provider for the duration of the loan. Part 3 further states that the mortgage protection policy must be exhibited to the Provider and where required by the Provider, legally assigned to the Provider. A loan cheque issued to the Borrowers' solicitors under cover of letter dated **19 April 2007**. Subsequent to this, it appears the Borrowers incepted a mortgage protection policy with a start date of **18 May 2007** in an amount equal to the total amount advanced in respect of loan account 201.

Having considered the evidence, it does not appear that the Provider adhered to the pre-drawdown requirements contained in the letter of offer dated **16 March 2007** and proceeded to issue the loan cheque before satisfying itself that the required mortgage protection policy was in place. Equally, the Borrowers do not appear to have provided a copy of their mortgage protection policy to the Provider in advance of the drawdown of this loan.

While I am satisfied the letter of offer dated **16 March 2007** required a mortgage protection policy to be in place, having regard to the wording of Part 3, I do not accept that the policy was required to be assigned to the Provider unless the Provider expressly required an assignment. However, there is no evidence to show that the Provider requested or required an assignment of this policy.

The letter of offer dated **16 March 2007** is said to supersede all previous offers, being the letter of offer dated **13 October 2006**. As such, while there was a requirement for the assignment of the mortgage protection policy in respect of this letter of offer (which does not appear to have been put in place), I do not accept that the policy incepted in **May 2007** was required to be assigned to the Provider or that the Provider was required to take an assignment of this policy.

/Cont'd…

I also note the Provider has a policy of not seeking an assignment of a mortgage protection policy where the amount advanced is below €320,000.00. While this does not appear to have been communicated to the Borrowers at the time the funds in respect of loan account 201 were drawn down in **October 2006** or at the time of the additional advance in **April 2007**, on considering the letter of offer dated **16 March 2007**, I am satisfied it was reasonably clear from this letter that while a mortgage protection policy was required, it was not required to be assigned to the Provider, unless stipulated by the Provider.

Accordingly, I accept that the Provider did not ensure that the required mortgage protection policy was in place prior to issuing the loan cheque on **19 April 2007**. However, a policy was later incepted by the Borrowers with effect from **18 May 2007**. Although a policy was subsequently incepted, I do not accept that there was any requirement to assign this policy to the Provider or that the Provider was required to seek an assignment of this policy. Therefore, I do not accept that the Provider failed to take an assignment of the policy incepted by the Borrowers in **May 2007**.

When Property 1 was sold the Provider allocated the net sales proceeds such that the outstanding balance on loan account 201 was cleared in full and the outstanding balance on loan account 101 was reduced by an amount of approximately €150,000.00, leaving a residual debt of approximately €217,000.00. The Complainant disagrees with the manner in which the Provider allocated the net sale proceeds, stating that they should have been allocated to clear the outstanding balance on loan account 101.

Although the funds advanced in respect of loan account 101 were used to facilitate the purchase of Property 1, this property was used to secure the loan facilities in respect of both loan account 101 and loan account 201. In terms of the mortgage deed signed by the Borrowers, clause 3(c) allows the Provider to appropriate all sums received from the Borrowers to any of the Borrowers' accounts, despite any direction of the Borrowers to appropriate the sums in a particular manner. I also note the discussions which took place between the Provider and the Complainant's husband during **2015** regarding the proceeds from the sale of Property 1 were in the context of the total outstanding debt and the debt associated with Property 1. There does not appear to have been any discussion surrounding the precise manner in which the sale proceeds would be allocated and the Complainant's husband did not appear to indicate or suggest any preference in this regard.

While the Letter of Agreement was not signed by the Borrowers, the Provider clearly set out the manner in which it proposed to allocate the net sale proceeds in this letter, which was to clear the loan account 201 and apply the remainder of the proceeds to reduce the balance of loan account 101.

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However, I note that neither of the Borrowers took issue with the proposed allocation of net sale proceeds or suggested an alternative allocation. It appears that it was not until the Debt Management Firm's letter of **5 March 2018**, over two years after the sale of Property 1, that the question of why the Provider did not use the net sale proceeds to clear loan account 101 was raised.

As detailed previously the Complainant's representative has, in its post Preliminary Decision submission, expressed its dissatisfaction with the above statement, as it believes it infers that it "'invented' the issues".

Again, I do not accept this characterisation by the Complainant's representative. From my review of the documentation on file it would appear that neither of the Borrowers took issue with the proposed allocation of net sale proceeds or suggested an alternative allocation, with the first expression of dissatisfaction appearing to be detailed in the Debt Management Firm's letter of **5 March 2018.**

The Provider also wrote to the solicitor acting for the Complainant's husband in **September 2015** advising that it would apply the net sale proceeds in partial redemption of loan account 101 and loan account 201. However, I note that no further discussion appears to have taken place as to the precise allocation of the net sale proceeds.

The point is made that the Complainant's husband dealt with the Provider regarding the loan facilities the subject of this complaint and that the Complainant was not involved in the banking relationship.

Although the Borrowers may have decided that the Complainant's husband would deal with the Provider regarding these loan facilities, I do not accept this means that the Provider's conduct, particularly in the context of the allocation of the net sales proceeds, was wrong or unreasonable. It is my opinion that it is not unreasonable for the Provider to have engaged solely or predominantly with the Complainant's husband.

In this respect, I accept that the Complainant was aware, or ought reasonably to have been aware, of her obligations in respect of each of the loan facilities. I also note that the Provider issued correspondence regarding the loans to both Borrowers and that the Complainant was involved in certain forbearance/reduced repayment applications. Further to this, the evidence indicates that the Complainant was aware that her husband was dealing with the Provider.

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In particular, I note that during a telephone conversation on **17 June 2014**, the Complainant told the Provider's agent that:

> *"if it's* [about] *mortgage business, my husband deals with all that* […]*. If it's joint business, he deals with it all."*

If the Complainant wished to have a greater involvement with the Provider, I am of the view that it was open to the Complainant to do so. Therefore, I cannot accept that because her husband dealt with the Provider regarding the loan facilities, the Provider's conduct was in some way wrong or unreasonable. As a joint borrower it was the Complainant's responsibility to ensure she was sufficiently or reasonably appraised of any matters relating to these loan facilities.

The Complainant's representative has, as part of a post Preliminary Decision submission, detailed that while "[t]*here is reference throughout the Preliminary Decision to* [the Provider] *having day to day contact exclusively with* [the Complainant's] *late husband. In view of this and the fact that Property 1 was being registered in the sole name of* [the Complainant's] *late husband, the* [Provider] *should have investigated and satisfied itself that* [the Complainant] *was in not a position of being 'unduly influenced'.* The Complainant's representative's submission continues and states "w*hile* [the Provider] *may have written to* [the Complainant]*, on occasions, the fact is that* [the Complainant] *exclusively deferred to her late husband in relation to all decision regarding their* […] *loans and the* [Provider] *would have been well aware of that".*

I note the Complainant does not appear to have suggested that she was in "*a position of being 'unduly influenced'"* and as detailed above the Provider issued correspondence regarding the loans to both Borrowers and that the Complainant was involved in certain forbearance/reduced repayment applications. Further to this, the evidence indicates that the Complainant was aware that her husband was dealing with the Provider as shown by the telephone recording described above.

The Complainant and the Debt Management Firm point to the mortgage protection policy as being the security in place for loan account 201. However, I note this policy appears to have lapsed in or around **January 2015**, prior to the sale of Property 1. As such, there was no alternative security in place in respect of loan account 201 at the time of sale.

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While the Complainant's representative has, in a post Preliminary Decision submission, detailed that had "*the policy, which was taken out by our clients husband, been assigned this would have a provided a compelling reason for the retention of the residual borrowings on Loan No. 102 as opposed to Loan No. 101 and on the death of our clients husband this residual borrowing would have been repaid in full from the policy proceeds.*

It remains my view that even if the policy remained in place when Property 1 was sold, I do not accept this would necessarily have affected the Provider's entitlement regarding the allocation of the net sale proceeds nor would it mean that the manner in which the Provider allocated the net sale proceeds was wrong or unreasonable.

In the first instance, and quite importantly, as there was no requirement to assign the mortgage protection policy to the Provider, the Provider would not have been entitled to any benefit payment made under the policy. Further to this, on considering the cover offered by the mortgage protection policy, the basis of cover is stated on the policy schedule as *"Joint First Life Death"*. As such, it appears that the benefit under this policy would only become payable in the limited circumstance of the death of either of the Borrowers. If it were the case that neither Borrower died before loan account 201 was cleared or the expiry date of the policy (**18 May 2032**) then no benefit would be payable.

The manner in which the Provider allocated the net sale proceeds resulted in an outstanding balance on loan account 101 of approximately €217,000.00. However, it appears that had the Provider used the net sales proceeds to clear loan account 101 and apply the remaining proceeds to loan account 201, then a residual balance in the exact same amount would have arisen, only this time on loan account 201. It also appears that both loan account 101 and loan account 201 were subject to the same interest rates at the time the net sale proceeds were allocated. Therefore, there does not appear to have been any adverse consequences for the Borrowers insofar as concerns the outstanding residual debt or the interest rate applicable to this debt.

Accordingly, it is my opinion that the Provider was reasonably entitled to allocate the net sales proceeds from Property 1 in the manner in which it did.

Goodwill Gesture

In the final section of its Complaint Response, the Provider refers to a delay in providing a copy of the mortgage deed in respect of Property 1 and the requirement for an assignment of a mortgage protection policy in the Letter of Offer dated **13 October 2006**.

In this respect, the Provider states, as follows:

/Cont'd…

"The Bank accepts that these represent customer service failings on the Bank's behalf.

The Bank apologises for any inconvenience, stress or upset caused to the Complainant in respect of any errors or service failings that have been identified in this submission.

In particular the Bank acknowledges that arrears letters were issued on a number of occasions with the incorrect arrears balances quoted, and we advise that this has been escalated within the Bank for further review. In recognition of these failings the Bank would like to offer a gesture of goodwill payment of €6,500 to the Complainant in full and final settlement of this dispute."

I note the Complainant's representative argues that the offer of €6,500 is insufficient and requests that a more appropriate compensation payment be offered in the Final Decision.

On considering the conduct the subject of this complaint, I consider this goodwill gesture of €6,500 to be a reasonable sum of compensation for the customer service failings on the part of the Provider. Nothing in the Complainant's representative's post Preliminary Decision submission has persuaded me otherwise. In these circumstances, on the basis that this offer remains available to the Complainant, I do not uphold the 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

7 January 2022

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

(a) ensures that—

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

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

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