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| <u>Decision Ref:</u> | 2022-0073 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Repayment Mortgage |
| <u>Conduct(s) complained of:</u> | Failure to process instructions |
| <u>Outcome:</u> | Rejected |

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to the alleged misapplication by the Provider, of the Complainants' funds, contrary to their instructions.

The Complainants' Case

As a result of loan restructuring that occurred in **2013**, the Complainants held two mortgage accounts and two 'warehouse' loan accounts with the Provider.

In **March 2020**, the Complainants instructed a solicitor (the Representative) to seek redemption figures for all four loans from the Provider. The Representative received the redemption figures and advised the Complainants to redeem the active loan of **€23,700.15** (twenty-three thousand, seven hundred Euro and fifteen Cent), as it had an interest rate of 4.25%. It seems that the Representative informed the Complainants that overpayment of the loan would trigger a full mortgage review. The Complainants were happy to proceed, and they engaged with an Agent from a local branch of the Provider, in this regard.

The Representative additionally advised the Complainants to discharge approximately €8,000 (eight thousand Euro) against the other live loan, in order to reduce the balance.

The Representative, authorised to act on behalf of the Complainants in this complaint, submits to this Office that he was not informed by the Provider that the live loans could not be repaid, over the warehouse loans.

On **10 March 2020** the Representative sought to redeem the live mortgage loan ending 021 in full, on behalf of the Complainants. A payment of “€8,000+” (eight thousand Euro plus) was made against the mortgage loan ending 328. The payments were made via SEPA transaction.

The Provider did not discharge the funds against the above accounts, and instead allocated the funds to the warehouse loans, which had an interest rate of 0%. The Representative submits that the Provider should have returned the funds if it was not prepared to follow the instructions given. He also submits that the Complainants were entitled to redeem the active loans and there was nothing in the contract that prevented this.

In response to the Provider’s reply to the formal investigation of this Office, the Representative submits that when the redemption figures were requested, the Provider did not state that the warehouse accounts had to be cleared first, and did not refer to the **2013** conditions, in its standard letter.

The Representative also disputes that condition (m) had application to these transactions, because these transactions were different from when a *“lump sum is paid by the Borrower in partial redemption of the mortgage”*. In any event, he submits that the fairest course of action would have been to return the monies. He submits that the Provider’s actions were of benefit to itself, and of detriment to the Complainants.

The Representative submits that the Provider was in breach of General Principles 2.1, 2.2, 2.4, 2.6, 2.12, 4.1 and 4.2 of the Consumer Protection Code (CPC). He reiterates his submissions in relation to the following of instructions, for Provision 3.3 of CPC, referring to the Law on the appropriation of payments.

Finally, in reference to a call between an Agent of the Representative’s office and an Agent of the Provider, made in relation to seeking the redemption figures, the Representative submits that the failure of the Provider’s Agent to state that the warehouse loans had to be cleared first, was *“a misrepresentation by silence”*.

The Provider's Case

The Provider says as follows:-

- On **10 March 2020**, the Provider received a SEPA transfer of **€23,717.55** (twenty-three thousand, seven hundred and seventeen Euro and fifty-five Cent) into the Complainants' main mortgage account, ending 021. On the same day, the Provider received an email from the Complainants' Representative, advising that this transfer was to redeem the mortgage ending 021.

On **13 March 2020**, the Provider transferred **€14,915.75** (fourteen thousand, nine hundred and fifteen Euro and seventy-five Cent) into the warehouse account ending 808, in line with its '*split mortgage overpayment repayment conditions*'. This transaction cleared the loan in full, and the account was closed. This was communicated to the Complainant via letter on **18 March 2020**. The residual **€8,801.80** (eight thousand, eight hundred and one Euro and eighty Cent) was credited to the mortgage account.

- On **30 March 2020**, the Provider received a SEPA payments of **€13,629.45** (thirteen thousand, six hundred and twenty-nine Euro and forty-five Cent) to the mortgage account ending 328.

On **1 April 2020**, the Provider transferred **€12,958.86** (twelve thousand, nine hundred and fifty-eight Euro and eighty-six Cent), into the warehouse account, in line with its split mortgage overpayment repayment conditions. The residual **€670.59** (six hundred and seventy Euro and fifty-nine Cent) was credited to the mortgage account.

The Provider says that it relies upon the **Split Mortgage Conditions 2013 (v1)** document, setting out the conditions for the mortgage split offer of **27 September 2013**. In particular, it relies on conditions (b), (f), (g), and (m).

The Provider states that these conditions apply to the main mortgage accounts and the associated warehouse accounts. The conditions document was provided to the Complainants on **27 September 2013**, and the offers were accepted for both accounts on **22 October 2013**.

This Office asked the Provider if it was satisfied that it had complied with General Principle 2.6 of the **Consumer Protection Code 2012 (CPC)**, in the context of the Complainants' submission that they were not advised of the restriction on paying off the live mortgages, when requesting the redemption rates.

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The Provider responded that its Agents of the local branch who spoke to the Representative, recollected informing him that *“any overpayment/redemption lump sums”* received for a mortgage account would be allocated into the warehouse account. The Provider included Statements of Evidence from those Agents in its submissions to this Office.

The Provider submits that it did not explain the specific conditions of repayment in the redemption figures letter, as this was a standard form letter. Instead, it submits that it has complied with General Principle 2.6, because this information was included in the mortgage conditions document that was provided to the Complainants in **2013**.

The Provider says that it is satisfied that it complied with General Provisions 2.1 and 2.2 of CPC. It referred to the circumstances in which the mortgage split was agreed, and noted that this restriction was a long-term repayment arrangement, created with the purpose of reducing the repayment burden of the Complainants. It submitted that any overpayment lump sums *“will always go towards the Warehouse Mortgage Account as a priority (after any arrears)”*.

The Provider was asked if it was satisfied that it had complied with General Principle 3.3 of CPC. The Provider referred to the communication from the Agent in the local branch and the terms of the split mortgage conditions. It pointed out that the email from the Representative of **10 March 2020** stated that the Representative recommended that a discussion take place prior to the next transaction, but no further communication was made by the Representative.

The Provider submits that it is satisfied that it has complied with General Principle 3.3 of CPC insofar as it promptly and properly processed the lump sum payment in line with the applicable terms and conditions.

In relation to General Requirement 4.2 of CPC, the Provider stated that both the Territory Sales Manager and the Branch Lead, informed the Representative of the relationship between the warehouse loan and the mortgage loan.

The Provider was asked why it did not return the payments to the Representative, if it could not allocate the funds as outlined in their instructions.

I note that the Provider responded:

“As the Solicitor had been made aware prior to the SEPA transfers that an overpayment into the Main Mortgage Account would trigger action by the Bank’s ASU and/or be applied firstly to the associated Warehouse Account, the Bank did not feel that further clarification in this regard was required. Consequently, when the Branch Lead received the Solicitor’s email of 10 March 2020, no further action was taken as the Bank understood the Solicitor was aware the funds lodged by the Solicitor would be appropriated to the associated Warehouse Accounts in the first instance”.

The Provider however noted that it could have provided a copy of the **2013** conditions with its Final Response Letter of **12 May 2020**, but it did not do so. For this oversight, it made a compensatory offer of €300 (three hundred Euro) to the Complainants.

In response to the Complainants’ Representative’s further submissions, the Provider has reiterated many of its previous submissions. It further stated that the redemption figures for all four loans had been provided, when only the figures for the mortgage loans was requested, because all four mortgages would need to be repaid in full. The Provider also made submissions refuting the Representative’s assertion that this action benefited the Provider.

The Complaint for Adjudication

The complaint is that the Provider failed to follow the Complainants’ repayment instructions and incorrectly lodged funds to the Complainants’ warehouse loan accounts.

The Complainants want the Provider to allocate the total funds to the correct accounts and to offer them compensation.

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.

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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 **7 February 2022**, 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. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Evidence

I note that the **Split Mortgage Conditions 2013 (v1)** document agreed by the Complainants in **2013**, states as follows:

- a) The Borrower acknowledges that the proceeds of any life policy currently in place may not be sufficient to repay the Mortgage (Main Mortgage Account and Warehouse Account) in full in the event of death or at any time during the Term. The Borrower must indicate whether they intend to take out additional life cover as a result of entering into the Agreement by completing the life cover section of the Restructure Agreement.
- b) The Mortgage will be treated as a Split Mortgage for the duration of this Agreement.
- c) On the Commencement Date and before the Mortgage becomes a Split Mortgage, any arrears outstanding on the Mortgage will be capitalised.
- d) The balance in the Main Mortgage Account will be repayable by repayments of capital and interest by Direct Debit at the rate specified in the Mortgage and as may have been varied from time to time and as may be varied in accordance with the conditions of the Mortgage.
- e) The Borrower must apply for Tax Relief at Source (TRS) in relation to the interest only amount (if applicable).
- f) The balance in the Warehouse Account may be reduced by the Bank by the transfer of sums from the Warehouse Account to the Main Mortgage Account. Such transfer may take place following a Review(s) by the Bank or where the Bank reasonably believes that the financial circumstances of the Borrower warrant the transfer of all or some of the funds from the Warehouse Account to the Main Mortgage Account whereupon the sums transferred will become repayable by repayments of capital and interest at the then interest rate applicable to the Main Mortgage Account. The Review(s) will be at the discretion of the Bank. The Borrower must co-operate with these reviews (for example by submitting an updated SFS).
- g) The Borrower will inform the Bank as soon as any material change takes place to the financial circumstances of the Borrower whether such material change constitutes an improvement or disimprovement in the Borrower's financial circumstances. A material change is one which affects either positively or negatively the Borrower's repayment capacity to pay the amounts in the manner set out in the Agreement.

The conditions also include the following:

- m)** Where a sum is paid by the Borrower (including any lump sum paid in partial redemption of the Mortgage) which is in excess of the monthly repayment due in respect of the Main Mortgage Account, such excess will be applied firstly towards arrears due under the Main Mortgage Account, secondly in reduction of the balance in the Warehouse Account and thereafter in reduction of the balance in the Main Mortgage Account.

The Representative's email of **10 March 2020** to the Provider states as follows:

"As confirmed last week, please see attached payment redeeming our clients mortgage account number [XXXXXX-XXXX021].

Our client will be discharging a further €13k+ against their account [XXXXXX-XXXX328] but I'd prefer to discuss with you prior to making said payment. Also, I've recommended to the client that a discussion should take place with a mortgage adviser in relation to the matter ongoing."

Analysis

In relation to the obligations on the Provider to inform the Complainants of the condition on their mortgage accounts that overpayment would result in any surplus funds being transferred to the warehouse accounts, I am satisfied that this information was provided clearly in the **Split Mortgage Conditions 2013 (v1)** document. I do not believe that this information was obscured, as the font was legible, the language was comprehensible, and this information was set out on the first two pages of the document. I note indeed that the split mortgage offer dated 27 September 2013, clearly specified on the front as to "**how your split mortgage will work**" and explained as follows:-

"If you choose to accept this offer, your mortgage will be restructured. As part of the restructure your mortgage term may be extended and your mortgage balance including arrears (if any) will be split into two accounts:

- **A Main Mortgage Account:** *You will pay monthly capital and interest repayments on your Main Mortgage at the interest applicable to your existing mortgage. Interest will continue to be applied in line with your original mortgage terms and conditions.*

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- **A Warehouse Account:** *The interest rate on your Warehouse Account will be zero percent, and you will not be required to make repayments towards the capital in this Account until the end of the mortgage term unless your repayment capacity improves.*

We expect that under this arrangement your monthly repayments will be better aligned with what you can afford to repay each month..."

I further note that on Page 5 of the offer, the details included a paragraph entitled "**Understanding this Offer**" and details were given regarding the opportunity to take independent legal and financial advice, to which the Provider would pay a contribution of €250 plus V.A.T. the first time a customer used this service. The Complainants were also encouraged to ask any further questions about this offer if they were unsure about the implications of entering into the agreement.

I am satisfied in those circumstances, that this split mortgage arrangement was of significant benefit to the Complainants, insofar as a portion of their borrowing was moved to a Warehouse Account, where it was subject to zero percent interest, creating a significant financial benefit. It is also clear that the conditions of this arrangement included the condition quoted above whereby where a sum would be paid by the Complainants including any lump-sum, such a payment would firstly be set against any mortgage arrears on the account and secondly, such payments would be applied in reduction of the balance in the Warehouse Account and only, thereafter, in reduction of the balance in the Main Mortgage account.

I have had regard to the Statements of Evidence from two of the Provider's Agents who corresponded with the Representative and I consider it likely that this condition was communicated to the Complainants' Representative, though perhaps it may have been misunderstood. I am conscious that the Complainants were represented by a solicitor for the purpose of the transactions in question and it seems likely to me that their legal representative will have taken the time to consider the terms of the mortgages, including the arrangement made in 2013 when they entered into the split mortgage agreement.

Regarding the phone call between the Agent of the Representative and the Agent of the Provider, relating to the redemption figures, I do not believe that the Provider's Agent had an obligation to reiterate condition (m) of the contract. This phone call did not directly relate to the way in which the payments would be applied, and this Agent did refer to the fact that all four mortgages would need to be paid off.

In those circumstances, I do not accept that the Provider acted in breach of Provisions 2.1, 2.2, 2.4, 2.6, 2.12, 4.1, or 4.2 CPC.

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In relation to the submission that the Provider failed to follow the Complainants' instructions, I note that the Provider has stated that it complied with General Requirement 3.3 by processing the payments in accordance with the terms and conditions.

General Requirement 3.3 states:

"3.3 A regulated entity must ensure that all instructions from or on behalf of a consumer are processed properly and promptly."

I do not accept that the Provider's obligations pursuant to principle 3.3 of the Central Bank of Ireland's Consumer Protection Code, in some way overrode the contractual arrangements which were in place between the parties, pursuant to the terms of the split mortgage agreement entered into in 2013. Nevertheless, I take the view that in circumstances where the manner in which the payments fell to be applied, ran contrary to the instructions received from the Complainants' representatives, it would have been helpful and appropriate for the Provider at this point to have written to the Complainants' representative, confirming the manner in which the payment had been applied.

I note indeed that on **18 March 2020**, the Provider issued a letter to the Complainants confirming that it had applied a payment of €14,915.75 to the Warehouse Account ending 808, as a result of which that loan had been cleared in full and the account was closed, with a residual amount of €8,801.80 credited to the relevant mortgage account.

Notwithstanding this clear information, I note that some 2 weeks later, the Provider received a further payment of €13,629.45, the majority of which it transferred to the Warehouse Account, with the residual amount of €670.59, credited to the Mortgage Account.

In all of those circumstances, bearing in mind the parties' contractual arrangements, I do not accept, as suggested, that the Provider in some manner misappropriated the funds and rather, the manner in which those payments fell to be applied, had been long since agreed between the parties.

I do not accept that the evidence discloses any wrongdoing by the Provider and in those circumstances, I do not consider it appropriate to uphold this complaint. I note that the Provider has indicated that it could have included a copy of the 2013 conditions when it issued its Final Response Letter to the Complainants on 12 May 2020, and it has offered a compensatory payment of **€300** in that regard.

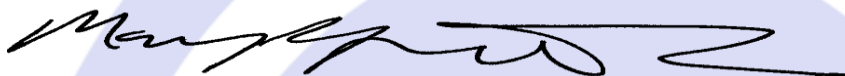
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If the Complainants wish to accept this offer, they should make direct contact with the Provider to make arrangements for payment with a view to concluding this matter. In that event, the Complainants should make contact expeditiously as the Provider cannot be expected to hold this compensatory offer open indefinitely.

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
Financial Services and Pensions Ombudsman (Acting)

1 March 2022

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.