



<u>Decision Ref:</u>	2022-0120
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Property Investment
<u>Conduct(s) complained of:</u>	Delayed or inadequate communication Failure to provide correct information Encashment delays
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to the release of proceeds on a property trust fund.

The Complainant's Case

In **2007**, the Complainant took out a loan for **€1,000,000** (one million Euro) with a third-party provider (Lender 1). This loan was taken out for the purpose of investment into a property fund.

In **2011**, the Complainant's business was placed into receivership, and he was unable to continue making payments on his loan, to Lender 1.

On **20 January 2012**, Lender 1 wrote to the Complainant to inform him that, in light of his financial difficulties, the interest on his loans would be 'rolled up' until his bonds matured. On maturity of the bonds, the proceeds would be used to repay the loans.

The Complainant says that Lender 1 stated that if the proceeds of the matured bonds were insufficient to repay the loans, the shortfall would be written off, and it asked the Complainant to ensure that his address was kept up to date, in the event that there was a surplus on the maturity of the investment.

The Complainant says that Lender 1 subsequently left the Irish market, and in **November 2015** his account was transferred to another third-party (Lender 2). Lender 2 appointed the Provider to administer the Complainant's accounts.

The Complainant states that in **March 2018**, the final property in the investment fund portfolio was sold. As a result, fund participants were able to calculate the value of the fund proceeds owing. The Complainant contacted the Provider, as he was unsure where these funds had gone, and he sought a reconciliation of the final account.

The Complainant submits that he contacted the Provider on multiple occasions to seek a statement showing the entire proceeds of the account. However, the Provider has never issued him with this documentation. The Complainant states that he is entitled to a surplus of approximately **€59,606.69** (fifty-nine thousand, six hundred and six Euro and sixty-nine Cent). He notes that, in order to support his claim, he needs the requested information from the Provider.

In an email to this Office of **22 September 2021**, the Complainant submitted that the Provider had not properly addressed the two salient issues of his complaint:

"Explain why in my account is €59,650 which in Law is rightly mine and a full reconciliation (sic) of [property] sale and true cost..."

In response to the Provider's final submissions to this Office, the Complainant stated in an email of **16 November 2021** that the Provider's behaviour was a "*fob off*", and that he still awaited the requested documentation.

The Provider's Case

The Provider says that in **July 2015**, Lender 1 sold a portfolio of loans, including all securities and guarantees, to Lender 2. This sale included the Complainant's loan facilities, and the attached security of the property bond.

The Provider was appointed by Lender 2 to provide day to day loan management services, on **21 November 2015**, and management of the portfolio of loans transferred to the Provider. The Provider says that at that date, the Complainant's loan account had fully matured, and was in arrears of **€470,043.26** (four hundred and seventy thousand and forty-three Euro and twenty-six Cent).

On **28 November 2017**, the Provider received correspondence from the third-party managing the Complainant's property bond. This third-party noted that the Complainant had contacted it, to state that the policy was with Lender 1 and should not be assigned to Lender 2. The Provider responded that no change to the assignment was required, and that the proceeds of the policy should be paid to Lender 2.

On **24 April 2018**, the third-party wrote to the Provider, enclosing a letter to the Complainant, which confirmed that the policy had matured and that it had a value of **€59,606.69** (fifty-nine thousand, six hundred and six Euro and sixty-nine Cent). This correspondence was sent to the Provider on behalf of Lender 1, as Lender 1 was noted as the Assignee of the policy.

The Provider says that in **September 2018**, it wrote to the Complainant to note that, per the agreement entered into with Lender 1, the value of the property bond was not sufficient to clear all of his outstanding debts. As a result, it did not leave a surplus. Following this, the Complainant placed the policy with the third-party into dispute, and the remaining funds have not been encashed.

On **7 August 2020**, Lender 2 transferred the legal ownership, and all related securities, of the Complainant's loan to the Provider.

The Provider says that by way of letter dated **27 August 2020**, the Complainant complained to the Provider, that it was withholding funds in the property, and requested a full financial reconciliation, particularly in relation to the proceeds of the final sale. The Provider issued a Final Response Letter on **27 October 2020** stating that the Complainant was not due any funds from the policy.

On **30 October 2020**, the Complainant contacted the Provider again to seek financial reconciliation of the proceeds of the fund. The Provider responded that it contacted the third-party managing the property bond regarding reconciliation of the policy, but it would not provide this information to the Provider. The Provider advised the Complainant to contact Lender 1 to seek this information.

The Provider also confirmed in November 2021, that it had submitted all relevant paperwork to the third-party managing the property bond, in order to reassign the Complainant's policy.

The Provider submits that, although there was no signed agreement between the Complainant and Lender 1, the letter of **20 January 2012** is clear. It noted that where the proceeds of the policy were not sufficient to cover the outstanding balance of the loan, the remaining balance would be written off. The Complainant would be entitled to proceeds only if the policy funds exceeded the outstanding balance.

The Provider stated that the total breakdown of transactions received from the Complainant's fund were as follows:

Date	Transaction	Debit	Credit
21/11/2015	Balance at migration	€470,043.26	€0.00
09/11/2017	Bank credit	€0.00	€55,634.76

It noted that it could not provide data relating to Lender 1 as it was not managing the loan during this period.

This Office asked the Provider if it ever complied with the Complainant's request for the total breakdown of all payments to the loan owners, following the sale of the final property. The Provider stated that it did not, as it was unable to access information relating to the period of time during which Lender 1 managed the loan. It noted that when it contacted the third-party managing the property bond, it responded that:

"This fund was invested in an underlying... fund.

[Third-party] merely provided the wrapper. After [Lender 1] closed in Ireland, we started to produce investor reports to keep policy holders up to date.

We would not provide this level of detail to policy holders. And I am not sure if we would have the complete information on all of the properties".

The Provider quoted this correspondence in its final submissions to this Office, but did not provide a copy of the correspondence itself.

The Provider states that it cannot provide information relating to funds received by Lender 1. However, it noted that Lender 1 should have sent loan account statements to the Complainant, and that the Complainant was responsible for maintaining those statements. It noted that when it recommended that the Complainant contact Lender 1, it was still within the six-year period in which Lender 1 was obliged to retain that information.

The Provider reiterated its submissions in a letter to this Office of **25 November 2021**.

The Complaint for Adjudication

The complaint is that since **March 2018**, the Provider

- (i) has failed to furnish specific information requested by the Complainant, and
- (ii) since **August 2020**, it has wrongfully and unjustly withheld funds owed to the Complainant.

The Complainant wants the Provider to issue a breakdown of all payments advanced to the Provider and the previous two lenders, as well as wishing to receive *“a full and final payment of 59,606 Euro”* or *“should it help to close this issue quickly to accept 45,000 Euro subject to a 30-day period and payment directly to me with no deductions”*.

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

The first issue arising is whether the Provider complied with the Complainant’s requests for specific information. On **27 August 2020**, the Complainant sought a full financial reconciliation from the Provider, particularly with regard to the sale of the final property.

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The Provider has stated that it cannot provide a full reconciliation, as it did not manage the loan before **2015**, and the third-party managing the property investment, could not provide it with the documentation.

I acknowledge that the Provider is not able to provide the Complainant with information relating to the period during which Lender 1 owned the loan. However, the Provider has managed the loan since **November 2015**, when Lender 2 acquired ownership and the provider was appointed to manage the Complainant's loan account.

When asked for the reconciliation, I note that the Provider did not explain that a full reconciliation would not be available, nor did it offer to send the Complainant information on the payment, received to date. Instead, the Provider in its Final Response Letter of **27 October 2020**, stated that the Complainant was not due funds from the policy, as the proceeds were to:

"... be used to repay the balance of the loan due to [Lender 1]. It was agreed that if the proceeds of the Policy were not sufficient to repay the balance of the Loans in full, the [lender 1] would, in those circumstances, be prepared to write off any shortfall in respect of the Loans."

I note however, that in its subsequent Letter of November 2020, the Provider confirmed details of the payment which had been received in November 2017, in the amount of **€55,634.76**.

In my opinion, the Provider ought to have confirmed the relevant figure when the Complainant first raised a complaint, and should have been transparent around the figures available to it, particularly as the Complainant has raised a concern about the Provider "hiding" the balance of the fund.

The second issue to determine is whether the Provider has wrongfully withheld funds from the Complainant. The Provider notes that the Complainant's debt was in excess of **€470,000** (four hundred and seventy thousand Euro) in **2015**. It did not state that any payments were made, and the Complainant has not suggested that payments were made, to reduce that amount outstanding. The Provider states that a payment was received on the account for **€55,634.76** in **November 2017**.

The Provider submits in that regard that, although there was no signed agreement between the Complainant and Lender 1, the contents of the letter of **20 January 2012** are clear and represented the arrangement agreed.

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I note that the letter in question recorded that:

"I write following our discussion last year and to thank you for providing me with the detailed statement of your assets and liabilities.

I am mindful that following the demise of [redacted] you will not have the ability to service the interest on the loans referred to above. I have subsequently had discussions with [agent of Lender 1] about the options for dealing with the [name redacted] investment and associated loans. My enquiries have confirmed that, as we expected, there is no early exit route from the [name redacted] Property Bonds which are due to mature in 2014.

In view of your difficult personal circumstances, I can now formally confirm that the bank will agree to "roll-up" interest on the loans until the Bonds mature and, on maturity, the proceeds will be used to repay the loans. Should the maturity proceeds be insufficient to repay the loans then we shall write off the shortfall.

Could I ask that you advise the bank, via [agent] should you change address in the future, so that we are able to advise you of any surplus that may arise."

I note that the Provider is unable to provide data relating to transactions or payments received by a previous lender, as it was not managing the loan during that period up until 21 November 2015, when the balance due and owing by the Complainant, at the date of migration, was **€470,043.26**. The Provider has also confirmed that the only credit relevant to the balance outstanding since then, is a credit of **€55,634.76**, as of 9 November 2017; it seems that the Provider has not yet had access to the remaining funds from the sale of the final property within the investment product, which yielded approximately €59,000, still held by the third-party.

I accept that the Provider was unable to supply the Complainant with any details concerning payments made prior to the balance which transferred at migration in November 2015. The Complainant, since the Preliminary Decision was issued by this Office, takes issue with the outstanding balance as suggested by the Provider, being a figure of circa €470,000 at that time. The basis of this comment by the Complainant is that:

"... clearly this is not correct as [the Provider] purchased this fund at a very low price. You have not factored this low price which certainly bargain basement. We must establish the purchase price as without this information, which is fundamental to this whole saga and my right to the ownership of €59,606.69."

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I do not accept this. Whatever price the Provider paid for the purpose of acquiring ownership of the debt due and owing by the Complainant, this is an entirely separate issue from the balance outstanding on the loan in question, due and owing from the Complainant which I note, on the basis of the Provider's records, amounted to a little more than €470,000 as of November 2015.

Whilst the Complainant maintains that the value of the sale of the last property "*has to be in the millions*", again this issue is entirely separate from the figure which appears to have become payable by way of the proceeds of the Complainant's investment, and I note from the evidence that on **18 April 2018**, the third party investment manager wrote to the Provider (a letter it received on 24 April 2018) enclosing a copy of a letter which had been sent to the Complainant the same day advising, amongst other things, as follows:-

"As we previously advised policyholders, the last remaining property investment in the portfolio [name redacted] entered into a deferred payment contract with the purchaser. This contract completed in March 2018 and the final proceeds of the sale were received by ... made a final distribution to [third party investment manager] in April 2018. This has allowed [third party investment manager] liquidate the fund. As part of the liquidation of the fund, policyholders' remaining premium was transferred via a "cash switch" to the [third party] cash fund. Policyholders (or their assignees) can now access their remaining investment premium.

We have outlined below the process of this "cash switch" and the three options which are available to you (or your assignee)."

I note that within the letter in question, the value of the fund switch from the Complainant's property bond to the cash fund as of 10 April 2018, was noted to be **€59,609.69**.

I am satisfied accordingly that the Provider has supplied the Complainant with such information as is available to it, regarding the proceeds of his investment bond. If the Complainant has any further queries regarding the proceeds of the investment bond, he should direct those queries to the third-party investment manager in question.

Neither do I accept that the Provider has in any manner wrongfully or unjustly withheld funds which are due and owing to the Complainant. In fact, it appears to be within the control of the Complainant to arrange for the transfer of the funds amounting to €59,606 to the Provider, with a view to bringing this matter to a conclusion.

In my opinion, there is no evidence before this Office of any surplus that could be owed by the Provider to the Complainant. I am happy however to note, that the Provider has stated that it will honour the agreement between the Complainant and Lender 1, to write off the remainder of his debt, upon receipt of the proceeds due from the investment bond, and I consider this to be satisfactory and appropriate.

In the absence of any evidence of wrongdoing by the Provider, I take the view on the evidence before me that there is no reasonable basis upon which this complaint can be upheld.

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)

6 April 2022

PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.

