An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0152
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Fees & charges applied (mortgage) Delayed or inadequate communication Complaint handling (Consumer Protection Code) Dissatisfaction with customer service Failure to process instructions in a timely manner Maladministration
Outcome:	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants took out a mortgage with a bank (the "**Provider**") and took out a mortgage protection policy / life policy for this mortgage with an insurance company (the "**Insurer**").

The Complainants' Case

The Complainants submit that they set up a mortgage protection policy, with the Provider, when they re-mortgaged their 'old home' in **2016**. The Complainants further submit that "*on the sale of this property in **June 2018** we had given instruction to [the Provider] to cancel the policy*." The Complainants advise that a mortgage protection policy was set up, with the Provider, on their 'new mortgage' in **July 2018**. The Complainants contend that their instructions to cancel the old policy "*was never actioned*" by the Provider and that "*this only came to light in [August 2019], at which point we requested repayment of the incorrectly deducted premiums*."

The Complainants assert that the Provider "*said they were unwilling to refund the amount*" and that as a consequence, the Complainants "*made a formal complaint*." The Complainants contend that they "*sent a follow up complaint letter on 25 September [to the Provider] and*

have not yet received a formal response." The Complainants assert that the Provider "*benefited from the sum of circa €700 at our expense and we derived no discernible benefit in return*."

The Complainants submit that:

> "*The insurance product was presented and cross-sold to us as a [Provider] product in 2016 by the then branch manager, [Name]. [Provider Bank Manager] made the introduction to the representative from [Insurer]. Notwithstanding [Provider Agent] failure to recollect events, it was intimated by [Provider Agent] in 2018 that the [Provider] had the necessary authority to cancel the policy further to our instructions. Had [Provider Agent] clarified matters as per her statement …we would have simply written to the Insurer and cancelled the policy - a worthwhile exercise for the sake of circa €700*."

The Complainants submits that they are "*quite appalled by [the Provider's] handling of events and this matter has forced us to reconsider our relationship (of almost 25 years) with the [the Provider]*." The Complainants are seeking a refund of 15 months' worth of premiums which they say were incorrectly deducted and which they calculate as amounting to €706.65 (seven hundred and six euro and sixty-five cents).

The Provider's Case

The Provider submits that the Complainants' mortgage protection policy / life policy was incepted on **21 November 2016** and was for a term of 20 years. The Provider submits that the **Terms & Conditions** of the policy stipulated that upon the death of either of the Complainants, a lump sum of **€300,000.00** (three hundred thousand euro) would be paid out and that there was an initial premium of €46.65 (forty-six euro and sixty-five cents) per month.

The Provider submits that the mortgage loan that is associated with this policy was drawn down on **22 November 2016** and was redeemed on **12 June 2018**. The Provider says that it understands that the policy was cancelled with the Insurer by written authority on **30 August 2019**. The Provider maintains that the contract entered into, and its associated **Terms & Conditions** are a matter for the parties to that contract – the Complainant and the Insurer. In its **Final Response Letter**, dated **12 September 2019,** the Provider submits that "*no written instruction was received to cancel the policy in 2018 and that we understand that you were relying on a bank staff member to cancel the policy on your behalf*." The Provider contends that the policy can only be cancelled in the manner outlined in the **Terms & Conditions** of the policy.

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The Provider submits the following:

> "*the Provider would note that the [policy] product is not provided by the Provider. Rather the policy is provided and operated by a third party Insurer. No terms or conditions of the mortgage loan agreement between the Provider and the Complainant confer obligations on the Provider to cancel the [policy] on an instruction (written or verbal) by a customer to the Provider. As is clearly stated at Clause 5 of the terms and conditions governing the policy agreement between the third party Insurer and the Complainants, 'written notification that [the Complainants] wish to cancel [their] policy' is required to be provided to the Insurer before the cancellation of the policy can be effected. The Provider, who is not privy to the contract between the Insurer and the Complainants, is not in a position to terminate the contractual relationship between the Insurer and the Complainants*."

The Provider submits that "*it was ultimately the responsibility of the Complainants to ensure that the previous mortgage protection policy was cancelled in accordance with the terms and conditions of that policy as agreed with the Insurer*."

The Complaint for Adjudication

The complaint is that the Provider failed to cancel the Complainants' mortgage protection policy, after the Complainants "*had given instructions to [the Provider] to cancel the policy*".

The Complainants also say that the Provider proffered below par complaints handling.

Decision

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

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions

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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 **5 April 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 substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Provider relies on Provision 5, page 6, of the *"[Insurer] Choice – you and Your Family, Policy Conditions*" (the "**Terms & Conditions"**) which says as follows:

> "5. *Cancelling your Policy/Protection Benefits Ceasing*
> *The Protection Benefits will cease when one of the following events occurs:*
> • *A claim is made under the Lump Sum on Death Benefit or Income on Death Benefit on a single life policy.*
> • *Both Lives Insured make a claim under the Lump Sum on Death Benefit or Income on Death Benefit on a dual life policy.*
> • *You make a claim under Standalone Specified Illness Benefit and there is no Lump Sum on Death or Income on Death Benefit on a single life policy.*
> • *The Life Insured(s) reaches the end of the Term(s) of Cover for the Protection Benefit(s) (with the exception of the Whole of Life Continuation Benefit)*
> • *You give written notification that you wish to cancel your policy*.
> • *You do not pay us a Premium on the date the Premium is due for payment and 30 days elapse since that date the premium was due*.
> *The Company will retain any Premiums paid under the Policy*"
>
> [My underlining for emphasis]

The Complainants submit as follows:

> "*We were not advised, at any stage, to write to [the Insurer] in relation to this matter and we were led to believe that our instructions would be carried out by the branch officials. In circumstances where [Provider] branch officials facilitated the policy and the execution of same, and where the policy was being offered by a [Provider] entity, it was reasonable for us, as retail customers, to rely on representations made by [Provider] staff and to satisfy ourselves that they ([Provider] staff) were sufficiently familiar with the terms and conditions of the policy. It is simply*

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unacceptable to hold retail customers to a higher standard than your own employees, who intimated that they were familiar with the process. Despite the obvious importance of these terms and conditions, they were never explicitly brought to our attention and we are unfamiliar with same….

We did not wish to cancel our policy simpliciter as the term suggests, rather we were required by [Provider] to switch policies in view of the fact that we were selling one property and buying another - we remained [Provider] customers throughout the process."

The Provider submits, in its letter dated **28 September 2020**, as follows:

"*The Complainants contend that the provision by the Provider of a copy of the Insurer's terms and conditions intimates that the two entities are connected and, by extension, should be in position to carry out instructions issued by a customer to one entity in respect of a different entity. Whilst the Provider and the Insurer are within the same group of companies, they are entirely separate entities, with an entirely separate corporate structure, processes and procedures. As a result, there is, nor should there be, a mechanism whereby the Provider receives a verbal instruction to cancel an insurance policy, which can be transmitted to an entirely different entity, namely the Insurer, who will action that instruction without any further verification… The Provider does not promote or market insurance products, as it does not sell insurance products. The Provider is in a position to facilitate an appointment with a representative of the Insurer in question, after which it is entirely a matter between the Complainants and the Insurer as to whether to proceed with the purchase of an insurance product*."

I note the Complainants' submission that "*it is disingenuous of the [Provider] to present the Provider and Insurer as two entirely unrelated entities, when they clearly operate under the same umbrella organisation*."

I note that the Provider says that "*it was not providing the product or service in question, namely the mortgage protection policy*."

I do not accept that individual corporate entities under an umbrella organisation are party to one another's contracts with consumers. I note the Complainants' submission that "*the insurance product was presented and cross-sold to us as a [Provider] product in 2016".* I am not satisfied however that a referral from the Provider creates the necessary contractual relationship that would place a responsibility on the Provider legally or under the Central Bank of Ireland's Consumer protection Code ("**CPC")**. The Complainant also submits that

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quick response times between the Insurer and the Provider demonstrates their close working relationship. I am not satisfied that this imports any legal or regulatory obligations on the Provider in relation to a contract entered between the Complainants and the Insurer. I am satisfied that the Insurer and the Provider are separate legal entities.

However, I note that the nature of the complaint made is that the Complainants, who bought a new mortgage product from the Provider, were mis-advised at that time, about the existing policy and how to go about effecting the cancellation. Therefore, it is the Provider's role in this context, in **2018**, that falls to be investigated by this Office. The Provider's Agent submits the following regarding their recollection of events in the branch:

> "*In 2018, I was the mortgage advisor who was managing the mortgage for the purchase of [Complainant's] new home in [location]. Although I cannot recall specific conversations had with the clients given it was over 2 years ago and I had a number of mortgage clients at that time, matters in relation to mortgage protection advice were standard practice. As a mortgage advisor, in the initial meeting, I would advise the clients that there was a need for mortgage protection in order to draw down their new loan. Had the clients advised that they would need to cancel their existing policy; my advice to them would be that they would need to contact [Insurer] and request that the policy be cancelled by way of written instruction. As a mortgage advisor, I had no authority to carry out these requests for clients…. All queries and requests in relation to existing mortgage protection policies were directed to the [Insurer] contact centre*."
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> [My underlining for emphasis]

The Complainants submit that the *Contra Proferentem* rule applies. The Provider submits, in its letter dated **28 September 2020**, as follows:

> "*In respect of any such 'onerous terms' as a requirement to cancel a policy with the policy issuer in writing, the Provider would respectfully view this as common sense. Further, if the Complainants do believe the particular term was onerous, the Provider would suggest that this is a matter between the parties to the contract, namely the Complainants and the Insurer*."

I am conscious that the *Contra Proferentem* rule says that when drafting a clause, particularly one which excludes liability, you should be precise as any ambiguity will favour the non-drafting party.

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

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> "*In McMullan Brothers Ltd v McDonagh [2015] IESC 19 the Supreme Court held that the mere fact that the parties to a contract did not provide for a particular issue does not necessarily mean that the contract is ambiguous. Charleton J stated in respect of the contra proferentem rule that:*
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> > '*That doctrine traditionally derived in part from take-it-or-leave-it standard forms being foisted in some transactions on the other party to an agreement… But, for that rule of construction to be operative, some ambiguity has to be found in the term in question*.'"
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> [My underlining for emphasis]

I am satisfied that the **Terms & Conditions** of the policy which say that "*you give written notification that you wish to cancel your policy*" is neither onerous nor ambiguous. More importantly, I am satisfied that matters of contract law are relevant only to the parties to the contract and simply do not apply to the Provider which was not a party to this contract. I am similarly satisfied that any argument about how the term of the contract can be interpreted in accordance with the *European Communities (Unfair Terms in Consumer Contracts) Regulations,* is outside the scope of this investigation, in circumstances where the Provider is not a party to the contract.

I do not accept that the Provider's Agent should have taken on the responsibility for cancelling a customer's policy of insurance with the Insurer, in **2018**, as it would not have been appropriate for it to do so. I certainly accept however, that it was a matter for the Provider to make clear to the Complainants, if requested to do so, that it was **not** the Insurer and that the request for cancellation must be **made to the Insurer**.

I note that the Provider submits that "*it does not have a specific written procedure for the handling of instructions requesting that a mortgage protection policy is cancelled*." I note the Complainant's argument that the Provider should have "*clear written procedures*" where it "*markets and facilitates*" the purchase of products. In my opinion, a significant level of miscommunication took place between the parties in 2018 at the time when the Complainants arranged for a new mortgage product. I note in that regard that the Complainants have submitted that "*it was intimated*" by the Provider that it had the necessary authority to cancel the policy, further to their instructions.

I am also conscious that the Agent of the Provider who dealt with the Complainants at that time, has made clear that if the clients had advised that they wished to cancel their existing policy, the advice to them at that time would have been that they would need to contact the Insurer directly by way of written instruction, to cancel the policy in question. In my opinion, the absence of a standard operating procedure by the Provider to address such

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circumstances left open the question of the already existing mortgage protection insurance policy and it seems to me from the evidence available, that this either went entirely unaddressed or, alternatively, references by the respective parties to the policy, did not achieve any particular common understanding as to whether or not it was to continue in existence.

I note that written confirmation of cancellation was furnished to the Insurer on **30 August 2019** by way of letter and an instruction given to "*cease with immediate effect*" payment under the policy. I note the Complainants' submission that as the Provider promotes and markets these products, it is "*reasonable for customers to assume it also has the requisite authority to cancel*" them. I don't accept this. I take the view that it would have been obvious in the course of a referral, that the Insurer was a separate entity, for example, in the literature, company name and different staff and I note that the entity name is clearly stated on the **Terms and Conditions**. I take the view that if the Complainants had instructed that the policy was to be cancelled, that they would be likely to have checked that fact, whereas the 15 months of outgoing payments towards a premium for that policy, suggests that they simply overlooked the continued existence of the policy.

I note that the Complainants highlight that the policy payments were issued from a Provider bank account. I do not accept however that it would be reasonable to expect the Provider to examine each customer's outgoings to see if they relate to policies which are potentially no longer relevant to their customers.

The Provider says that "*representatives were aware of the position in relation to the cancellation of a mortgage protection policy, and that it was standard practice to advise of same*." I also note the Provider's point that "*it would be unreasonable to impose an obligation on the Provider to inform the Complainants about the operation of certain terms and conditions that relate to a product that was not provided by the Provider*." In my opinion however, the awareness of the Provider's staff of the position regarding necessary steps to be taken in the event of seeking a cancellation of an existing mortgage protection policy, was of no benefit to the Complainants, in the absence of a standard operating procedure to share that awareness with the customer, in this instance the Complainants, to ensure that the Complainants were aware of the option available to them, as to either continue with the existing cover in place (at the cost of the continued payment of premium) or alternatively, to write to the Insurer to give effect to a cancellation of the historical policy, in circumstances where they were putting a new one in place.

In those circumstances, I take the view that both parties to this complaint bear an element of responsibility for the fact that the policy continued in being, without a clear understanding as to whether or not this was a requirement. I take the view that this situation would have been avoided, if the Provider had a standard operating procedure to

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ensure that an already existing policy of mortgage protection insurance, was specifically addressed. In my opinion, the Provider's failure to address in any adequate manner, this issue as part of its standard operating procedures was unreasonable, within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

I am however also conscious that the Complainants were on notice of the transactions in their bank account from which the outgoing payments for premium were being made, and yet no issue was raised for some 15 months, and consequently, in my opinion, they also share some of the responsibility for the issue which arose.

Separately, I note the Provider's submission that an acknowledgement letter was issued to the Complainants on **2 October 2019**, further to their response to the **Final Response Letter**. The Provider advised the Complainants that it would be "*in touch no later than 25 October 2019*." I note that the Provider states that it has no record of corresponding with the Complainants further to **2 October 2019** and it has apologised for its error in not making contact after the **2 October 2019** as promised and has offered €150.00 (one hundred and fifty euro) as a "goodwill gesture."

Accordingly, having considered the matter at length, I take the view that it is appropriate to substantially uphold this complaint and to direct the Provider, pursuant to ***s60(4)(d)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** to make a compensatory payment in the sum of **€350** to the Complainants, in recognition of the part the Provider played in failing to specifically address the continuation or otherwise, of the historical mortgage protection policy, during the parties' discussions in **2018** when a new mortgage protection policy was sold. To take account of the offer of €150 referred to above, arising from the Provider's failure to respond further to the Complainants after 2 October 2019, I also consider it appropriate to direct the Provider to make a compensatory payment to the Complainants in the sum of €500, in order to conclude.

I also recommend to the Provider that it undertake a review of its standard operating procedures, with a view to avoiding situations such as the Complainants', which have given rise to this complaint.

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld on the grounds prescribed in ***Section 60(2)(b).***

- Pursuant to ***Section 60(4)(d) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €500 (five hundred Euros)

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to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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)

4 May 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,

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and

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