



<u>Decision Ref:</u>	2022-0214
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Maladministration
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns the sale by the Provider of a site securing a mortgage loan held by the Complainant.

The Complainant's Case

The Complainant submits that he believes there was a clear conflict of interest with regard to a Provider's employee (herein referred to as "Ms. X") purchasing his site at auction.

The Complainant attests that in the summer of **2017** the Provider gave him an ultimatum that his site would have a receiver appointed, if it was not put up for auction. The Complainant submits that the auction was held on **20th September 2017**. The Complainant states that he felt he was being "*railroaded*" by the Provider to put the site to auction. The Complainant submits that "*I felt as though I was being rushed*". The Complainant submits that he felt that the site had not been given the proper exposures, so as to gain the best value.

The Complainant submits that on learning that the site was purchased by Ms. X, he requested a meeting with the Provider. The Complainant says that at this meeting the Provider's employee (referred to as "Ms. A") advised that she had spoken to Ms. X about the Complainant's site being put up for auction, however, she said that this discussion did not occur until the site had been advertised for auction.

The Complainant submits that Ms. X did not carry out any external due diligence or request contracts prior to the date of auction. The Complainant states that he questions the motives of the Provider, in sending the site to auction at such a late stage.

The Provider's Case

The Provider, in its letter dated **13th December 2017** states that it confirms that Ms. X purchased the Complainant's property at public auction. It says that she had no access to any details in relation to the Complainant's file.

The Provider submits that Ms. X fairly obtained publicly available information in relation to the site from the land registry, the planning authority and through an independent legal search.

The Provider states that Ms. X was the highest bidder at the auction and secured the site based on that bid. The Provider attests that the Complainant entered into a contract with the purchaser and a deposit was paid on that day.

The Complaint for Adjudication

The complaint is that the Provider maladministered the sale of the Site by '*rushing*' the sale, which resulted in the Site not achieving "*its true value*", and by allowing details of the sale to be disclosed to one of the Provider's employees who, acting on this information, purchased the site at a discounted price, which constituted a conflict of interest and breached client confidentiality.

The Complainant has not specified what he is seeking in resolution of the complaint.

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.

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A Preliminary Decision was issued to the parties on **28 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, to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Chronology of Events

- **23rd January 2017:**
 - Email from the Provider to the Complainant noting that the Complainant's protective certificate under the Personal Insolvency Act 2012 had expired and no personal insolvency arrangement had been reached with his creditors.
 - The email also confirmed that the Provider was willing to reissue a Letter of Offer dated **27th April 2016** with a view to restructuring the outstanding debt. Under this Letter of Offer, the Complainant agreed to sell the site within 3 months of the agreement, remit the net proceeds of the sale to the Provider and discharge 25% of the residual balance within 60 months

- **30th January 2017:**
 - Email sent by the Complainant to the Provider to advise that he would be returning from work abroad between the **28th February 2017** and **4th March 2017**.
 - Email from the Provider to the Complainant to confirm that the offer letter would be ready for collection from the **28th February 2017** at the Complainant's local branch and that he could sign while he was at home, if it suited.

- **1st February 2017:** Email from the Complainant to confirm that he would drop into the branch to sign the documentation before **4th March 2017**.

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- **21st February 2017:**
 - An Offer Letter issued to the Complainant for collection at his branch which contained the following terms:
 - 1. The Complainant will sell the property within 3 months from the date of the agreement for a price that is agreed in advance in writing with the Provider;
 - 2. All net sale proceeds must be paid to the Provider;
 - 3. The Provider has full authority to communicate directly with any estate agent, legal advisor or other agent appointed on behalf of the borrower for the purpose of the disposal of the asset;
 - 4. The Complainant to clear 25% of the remaining balance of the loan facility within 60 months of the agreement date.

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- **1st March 2017:**
 - Email from the Provider asking what day the Complainant was intending to come to the branch in order to have the letter ready
 - Email from the Complainant to advise that his wife would collect the documentation and he would sign same and return it to branch
- **8th March 2017:** Email from the Provider querying with the Complainant if the documentation had been signed and returned.
- **9th March 2017:** Offer Letter signed by the Complainant.
- **22nd March 2017:**
 - Email from the Provider to the Complainant to confirm receipt of the accepted offer letter and other documentation, but noting the letter of authorisation for Auctioneer had not been signed.
 - A further copy of the letter of authorisation was enclosed for signing. The Provider sought details of the Auctioneer the Complainant intended to instruct and also queried if the Complainant wanted to put the property in any of the upcoming auctions.
 - The Provider also confirmed that a Personal Customer Identification Form had been posted to him for completion.
- **20th April 2017:** Email from Provider to the Complainant to confirm that no response had been received to the email of the **22nd March 2017** and the email requested the outstanding documentation be returned in order to progress the agreed restructure.
- **24th April 2017:** Email from the Complainant confirming that he would return the documentation on that same day.
- **9th May 2017:** Email from the Provider to the Complainant advising that the documentation had still not been received.
- **17th May 2017:** Further email to the Complainant seeking the outstanding documentation. The email also sought details of his Auctioneer for the sale of the property, and in the event that he had not appointed an Auctioneer, if he intended to put the property in any of the upcoming auctions.
- **19th May 2017:** Email from the Complainant to advise that he was away with work until the **25th May 2017** and would complete and hand deliver the outstanding documents.
- **11th August 2017:** Email from the Complainant's Auctioneer to the Provider advising of details of a regional auction and stating that this action would best suit the sale of the Complainant's property.
- **11th September 2017:** Email from the Provider to the Complainant's Auctioneer seeking confirmation of whether the Complainant had agreed for the site to be included in their September auction.

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- **12th September 2017:**

- Email from the Complainant's Auctioneer to the Provider confirming that the Complainant had consented for the property to be included in the September auction but the Complainant's solicitor required a letter of release in order for the contract to be submitted to the auction house and the deadline for inclusion in the September auction was **13th September 2017**
- Email from the Provider to the Complainant's Auctioneer expressing disappointment that the Complainant had not advised the Provider earlier of his decision to consent to the sale of the property by auction, given he was previously against having it sold by auction
- Email from the Provider to the Complainant confirming the Complainant's instructions to his Auctioneer to sell the site in the Auctioneer's September auction. The Provider also confirmed that it would issue the letter of release to the Complainant's solicitor.
- Letter from the Provider to the Complainant's Solicitor confirming its understanding from the Complainant's Auctioneer that the site was to be included in the Auctioneer's September auction. The letter confirms the Provider was not involved in the sale but consents to the sale by auction at or above the agreed reserve price of €45,000. The letter further confirms that it would issue a deed of discharge upon receipt of the net proceeds of sale of the property.

- **13th September 2017:**

- Email from the Complainant to the Provider advising that Auctioneers were seeking payment of their fees in advance and he was not in a position to discharge them
- Internal Email sent from the Provider's Agent (Ms. A) to Ms. X asking *"Well, are you back at work this week? Is this site a neighbour of yours?"*

- **14th September 2017:**

- Ms. X replied that:
"Well – I came back on Wednesday last fatigued from the whole ticket thing from the week leading up to the match...I am now being referred to as the [redacted by the Provider]."

This is [Complainant's] site up the road from me where the foundations were put in and nothing done since...I'd be interested in getting this bit of ground. Do you know when/where this auction will be? Is it the Leinster one in Dublin by any chance? I would go to it and see what kind of money it makes..."

[No reply email from Ms. A to Ms. X has been included in the evidence supplied to this Office.]

- Email from the Complainant's Auctioneer to the Provider enclosing invoice for payment
- Email from Provider to the Complainant's Auctioneer confirming payment of this invoice would be arranged

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- **15th September 2017:** Email from the Provider to the Complainant's Solicitor regarding title deeds.
- **20th September 2017:** Email from the Complainant's Auctioneer to the Provider advising the sale of the site had achieved €76,000 at auction.
- **20th September 2017:** Email from the Provider to the Complainant's Auctioneer confirming it was "*good news*".
- **21st September 2017:** Meeting took place between the Complainant, the Complainant's wife and two of the Provider's agents. The Provider's memorandum of this meeting is set out in the 'Evidence' section below.
- **22nd September 2017:**
 - o Email from the Complainant to the Provider following on from their meeting wherein he claims an alleged conflict of interest by the Purchaser of the site at the auction and a breach of data protection
 - o Email from the Provider to the Complainant confirming receipt of his email and noting the context.
- **25th September 2017:** Email from the Provider to the Complainant confirming that his complaint had been passed to the Provider's Complaint Department for investigation.
- **27th September 2017:** The Provider issued an acknowledgement letter to the Complainant confirming receipt of his complaint.
- **28th September 2017:** Letter from the Complainant's solicitor to the Provider seeking a discussion regarding the complaint.
- **9th October 2017:** Statement from the Provider's employee, Ms. A, setting out the context of the discussion with the Purchaser in relation to the auction of the site.
- **10th October 2017:** Letter from the Provider to the Complainant's solicitor advising that the complaint was currently being investigated.
- **17th October 2017:** 20 day letter from the Provider to the Complainant updating him on progress of his complaint.
- **14th November 2017:** 40 day letter from the Provider to the Complainant advising him that the investigation had not yet concluded and advising him of his right to refer his complaint to this Office.
- **13th December 2017:** Final Response Letter issued by the Provider to the Complainant.

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- **26th February 2018:** Letter from the Provider to the Complainants seeking an update on lodgement of the net proceeds of the sale of the site pursuant to the credit agreement.
- **29th March 2018:** Email from the Complainant reiterating his complaint and proposing to withdraw his complaint if the Provider would allow him to accept a bid equal to the purchase price of the site from an independent party.
- **3rd April 2018:** Email from the Provider to the Complainant acknowledging his email and requesting a proposal on how the Complainant proposes to deal with his outstanding liabilities.
- **11th April 2018:** Email from the Complainant to the Provider advising that if the Provider accepts his proposal, he will honour his previous agreement with regard to the residual debt.
- **13th April 2018:** Email from the Provider to the Complainant advising him to contact his solicitor regarding the sale of the property and that the Complainant remained liable for the full outstanding debt.
- **16th July 2018:** Letter from the Complainant to the Provider requesting specific information in relation to his loan account which is the subject matter of this complaint.
- **15th August 2018:** Letter from the Provider to the Complainant enclosing documentation requested under the General Data Protection Regulation.
- **10th October 2018:**
 - o Meeting took place between the Complainant, his wife and two of the Provider's officials. The Complainant sought to discuss his complaint regarding the auction. The Provider's official advised that he was willing to listen and offer guidance on the complaint procedure.
 - o The Complainant made a proposal "*to get a loan for the reserve price to purchase the site and be left with no residual debt*". The Complainant was advised that the Provider had no contractual involvement in the sale and the Provider could not negotiate on the property as it was subject to contract.
 - o The Complainant contacted the Provider by telephone following up on the above mentioned meeting, however the Provider's position remained as outlined at said meeting.

Evidence

The Provider's Memorandum of a meeting on **21 September 2017**, the day after the auction, concerns a meeting between the Complainant, the Complainant's wife and two of the Provider's bank officials.

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The Complainant maintains that he had obtained the consent of the Provider's Agent, Ms. A to record this meeting. The Provider has stated in its submissions that the meeting was recorded by the Complainant without the consent or knowledge of the Provider.

Another of the Provider's employees has made a statement available that they "*have no specific recollection of [the Complainant] seeking permission to record the meeting*". The Complainant sought this meeting with the Provider as he was dissatisfied with the purchaser of the site. The Provider advised that the site was purchased at public auction and achieved a price in excess of what was anticipated by the Complainant's Auctioneer.

The memorandum submitted by the Provider in evidence, is heavily redacted, as a result of which it is impossible to identify the representative of the Provider who was present. As a result, this Memorandum is not quoted in its precise terms and rather, below, is a record of what the Memorandum demonstrates:-

The Complainant asked if the purchaser had access to his file. The Provider confirmed that the purchaser did not have access to the file. The Provider explained that the Complainant accepted a consensual sale of the site with 25% buyout option within 5 years. The alternative to this was for the Provider to appoint a Receiver to sell the site and Receiver's costs would leave little net sale proceeds, to reduce the debt. The Provider also referred to the option of sale by private treaty but as the Complainant had refused to sign the authorisation for the Provider's Auctioneer to oversee the sale, which was a requirement of the Provider, this option had not been accepted by the Complainant. The Complainant's appointed Auctioneer had suggested a sale of the site by auction which both the Complainant and the Provider were in agreement with.

The Complainant advised that the sale was 'rushed'. The Provider's representative present at the meeting stated that the sale was not rushed by the Provider and confirmed that when she returned from leave on the **11th September 2017**, she contacted the Complainant's Auctioneer to clarify if the Complainant had agreed for the sale by auction and the Complainant's Auctioneer had confirmed the following evening that the site was being included in the auction on the **20th September 2017**. The Provider was contacted thereafter on the **13th September 2017** seeking the title deeds which had been held with another solicitor's firm and who agreed to provide copies of the deeds to the Complainant's solicitor to draft the contracts for sale. The Complainant advised that the auction sign was put up on the property on **Thursday 14th September 2017** with the auction to take place the following **Wednesday 20th September 2017**.

The entry on the Provider's record reads as follows:-

"[Complainant]...advised auction sign put up on Thursday with auction following Wednesday 20th".

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The Complainant advised that the purchaser had not requested legal documents from his Auctioneer or solicitor, prior to purchase of the site at auction and the purchaser must have had inside information. The Provider confirmed that many purchasers buy properties at auction based on the information on the Auctioneer's website. The Complainant advised that he had bought the site without planning for about €234,000 and had spent €40,000 securing planning permission and that he and his wife were very upset about the outcome of the auction. The Provider noted there was previous interest in the property but for various reasons, the sale had not progressed. The Provider advised that the market dictates the price at public auction and the Provider would recommend a sale by auction if a property was not selling at private treaty.

The Complainants felt that the purchaser got a very good price for the site and was an employee of the Provider and purchased the site without any due diligence and therefore he was of the opinion that the purchaser received information from his file. The Provider stated that lots of properties with title issues to go auction and that anyone can buy a property at public auction.

The Complainant confirmed that his solicitor signed the contract on the auction day.

[What may have been the Complainant's wife] asked if the Provider had discussed the sale of the site with the purchaser. The Provider's employee, Ms. A, advised that she had *"mentioned that the auction sign was on the site as both live in the area and advised that this was the full extent of their discussion"*. Ms. A reiterated that the purchaser had no access to the file and the purchaser did not work in the Business Banking Challenged area. The Provider's Official advised that she was unaware that Ms. X was going to attend the auction.

The Complainant advised that he would meet with the Provider again if he wanted to discuss the situation or he would pursue the matter by legal route. The Provider advised the Complainant that the details of the meeting would be conveyed to management.

Statement of 9th October 2017 by the Provider's employee, Ms. A, setting out the context of the discussion with the purchaser in relation to the auction of the site.

I note the following relevant excerpts from Ms. A's statement:

*"I had a brief conversation with [Ms. X] on the late afternoon of **Wednesday 13th September** in relation to the above.*

"It was purely co-incidental that [Ms. X] was in [Ms. A's branch/office] on the day in question.

“Both myself and [Ms. X] live in the [Location] area and the subject site is on my way home, and is across the road from where [Ms. X] lives. The site in question had lain idle for a good number of years and had previously been on and off the market...”

“I mentioned to [Ms. X] that I believed that the site across the road from her was coming up for auction and whether the auction sign was in place. The comment was in the context of general chit chat, and we did not at any time discuss [the Complainant] or any details of his dealings with [the Provider]. Neither did [Ms. X] and I have any conversation regarding her attending the auction”.

Statement of 20th October by the Provider’s employee / the purchaser, Ms. X

I note the following relevant excerpts from the purchaser’s statement

“I did not seek any details from the Selling Agent prior to the Public Auction as I was aware of a potential Conflict of Interest between the Vendor and the local Selling Agent. The property was the subject of 2 Planning Applications in recent years so the ownership of the site was a matter of public knowledge. We were aware of both Applications at the time of submission. We undertook a Planning Search with [Local Authority] which disclosed details of both Applications. I was able to get independent Law Searchers to check the Folio to confirm the name of the previous and current owner(s), Particulars/Burdens etc but the matter of ownership made no difference to me as we have particular family reasons for wanting to buy the site and following the most recent Planning Application, the matter of ownership was publicly known throughout the locality as there were numerous Objections submitted in opposition to this development (which was refused).

I held no discussions with anyone in the [Provider] regarding the proposed purchase of the Site. We did not need to arrange finance as we had access to our own funds and had agreed a maximum level to which we would bid.

*On **Wednesday, 13th September**, a [redacted] Colleague [redacted by Provider] working on the BB Challenged Team (who happens to be a near neighbour of mine) mentioned in casual conversation that ‘a site near me was on the market’ or a similar sentence. She did not disclose any details with regard to the Vendor, exact location or particulars/method of sale. From memory, my reply was “that’s interesting” or words to that effect. There was no further discussion. The following day the property was advertised on line and the For Sale sign was erected.*

*“On **Wednesday 13th**, at approximately 7pm an email was sent to me by a Colleague, also working within the Challenged Portfolio [redacted] [redacted by Provider]. This email did not come to my attention until the following day. The email questioned if a site at [Location] was a neighbour of mine. I replied that I was indeed familiar with the site, was aware of who the registered owner was and would be interested in buying it. There was no further interaction between [Colleague] and I*

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“Neither of the above interactions were intentionally sought or solicited by me and were purely conversational in nature. Due to the timeline as outlined, I held no unfair advantage over any other [prospective] buyer nor do I believe that either of my Colleagues intended to imbue any undue benefit”.

Final Response Letter

The Provider issued is Final Response Letter to the Complainant on **13th December 2017**. I note the following excerpts.

“I can confirm that [Ms. X] who purchased your property at Public Auction had no access to any details in relation to your file. [Ms. X] fairly obtained publicly available information in relation to the site (and the ownership of the site) from the land registry, the planning authority and via an independent legal search. She attended a public auction, was the highest bidder, secured the site based on that bid, entered into a contract with you (which contract you agreed to) and paid a deposit on that day.”

Analysis

In respect of the Complainant's assertion that he was ‘*railroaded*’ by the Provider to put the site up for sale at action, I am not satisfied that sufficient evidence of this has been submitted. The Complainant submits that *“I felt as though I was being rushed”*. This is at odds with the chronology of events which addresses the background to the Complainant’s loan account with the Provider, which was secured by the site that is the subject matter of this complaint.

It is evident from the volume of correspondence in this respect that the Provider repeatedly offered the Complainant the opportunity to avail of forbearance measures, in a clear attempt to assist the Complainant to retain possession of the site, despite the original agreement to make full repayment of the loan within 6 months of the Letter of Offer on **1st August 2003**. The Complainant persistently missed the monthly repayments, and when it became apparent that the agreement was unsustainable, the Provider engaged consistently with the Complainant and reassured him that it would agree to a consensual sale of the site.

The terms of the Letter of Offer dated **21st February 2017** are set out above in the Chronology of events and were signed and accepted by the Complainant. I note that it was the Complainant, and not the Provider, who instructed an Auctioneer to proceed with placing the site for sale action on **20th September 2017**, whereas in all its dealings with the Provider up until that point, he had indicated that he did not want to sell the site at auction. It is apparent that the Provider facilitated the sale to proceed by issuing its letter of consent to the Complainant’s solicitor and confirming its agreement to issue the deed of discharge.

It is now evident that the site was sold for **€76,000** where the reserve price had been **€45,000** and nothing has been submitted by way of evidence to indicate that the site was not simply sold to the highest bidder at the auction.

In respect of the Complainant's assertion that the Provider's employees, Ms. A and Ms. X engaged in discussions about the sale of his site prior to the site being put up for auction, I note that the Provider has acknowledged that this communication took place and the relevant excerpts have been set out above under 'Evidence'.

I accept that the Provider was not the seller of the site, and therefore was not a party to the agreement between the Auctioneer and the Complainant to place the property for auction on **20th September 2017**. This is once again at odds with the Complainant's contention that he was being '*rushed*' into selling the site by the Provider.

Having considered the correspondence and the statements made by Ms. A and Ms. X in addition to the audio evidence submitted by the Complainant, I note that on **12 September 2017**, the Provider was put on notice that the Complainant's site was being sold at public auction on 20 September 2017.

It is apparent from the evidence that two separate individuals working for the Provider's Business Banking Challenged Team, then interacted with another employee of the Provider Ms. X, the following day **13 September 2017**.

According to Ms. X who ultimately purchased the site at auction, one employee of the Provider "*mentioned in casual conversation*" that a site near Ms. X's living location "*was on the market*" or "*a similar sentence*". Ms. X's statement suggests that the person who told her about this site on the market, did not disclose any details regarding the vendor, the exact location or the particulars/method of sale. Having mentioned that a site near to Ms. X was on the market, it is of course surprising that the conversation would not then have included which particular site it was.

Whether or not the conversation included the particular site however, I am satisfied that it was inappropriate for the Provider, through its employee, to reveal information of that nature to Ms. X, given that the information had come into that employee's possession in the course of her work on behalf of the Business Banking Challenged Unit of the Provider. In my opinion, this was inappropriate and indeed improper within the meaning of **Section 60(2)(g)** of the **Financial Services and Pensions Ombudsman Act 2017**.

It is somewhat remarkable that another separate employee of the Provider then, at 18:56 on Wednesday **13 September 2017**, forwarded an email marked "*Classification: Confidential RED*" to Ms. X, asking whether she had returned to work that week and: "*is this site a neighbour of yours?*".

I note that the email in question which identified "*this site*", included an earlier email below in the email thread (also marked "*Data Classification: Confidential RED*" and dated 13 September 2017). The email had been sent one hour earlier, at 17:56, and advised:-

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“[The Complainant]’s site is going into September [Auctioneer identified] auction email from [Complainant] attached advising that [Auctioneer] are looking for the fees upfront. I reckon the fees will be around €2k plus VAT sales fee and marketing €850 plus Vat.

Is there any place I can debit this fee in advance of the auction?”

It is clear in those circumstances that although Ms. X did not work in that particular unit of the Provider, two separate employees of the Provider who worked within the Business Banking Challenged Team, shared confidential information with her within a day of the Provider being put on notice that the Complainant’s site was to be included for sale at public auction.

I note that Ms. X has indicated that it was not until the following day that she became aware of the email and at that point she replied indicating that the site in question was “*up the road from me*” and that she would be “*interested in getting this bit of ground*”. She raised further queries regarding where the auction would be held, so that she could go and see “*what kind of money it makes*”, though ultimately, I note that it was she who bought the site, at the auction.

The Provider says in its submission to this Office that a reply email was not sent by the Provider’s employee to Ms. X. As a result, if the employee in question did respond, this was not captured, in email form.

When the Provider responded to this Office by way of reply to the formal investigation of this Office, it advised that although a Contract for Sale was signed by the Complainant and/or his representative, with the purchaser Ms. X, the Provider, at that point, had not received the net proceeds from the sale and the Complainant continued to remain in breach of his agreement.

The Provider has advised that the full balance of the loan remained outstanding in the sum of **€284,782.30**. I note in that regard that the sale price achieved at the auction was **€76,000** although there were auctioneering fees and charges to be deducted from those sale proceeds. It seems likely in those circumstances, that, taking account of the agreement reached between the Complainant and the Provider (that he discharges 25% of the residual balance outstanding after the sale at auction) the Complainant seems likely to be faced with a liability in the sum of approximately **€53,000**.

I note from the employee’s account of the conversation in question that although Ms. X did not work in the BB Challenged area, she “*had stationed herself*” at that location to work for the remainder of the day, as a result of which it was entirely coincidental that she was in the same place as the employee, when the conversation took place. I note that the employee’s statement indicates that she mentioned that “*the site across the road*” from Ms. X was coming up for auction and I note that this does not align with the statement of Ms. X which indicated that the particular site had not been identified.

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I note that following the investigation of the Complainant's complaint, the Provider wrote to the Complainant on 13 December 2017 advising that *"there is no evidence to support your view that there was a conflict of interest or a breach of data protection in this case."*

Having considered the evidence available in this matter, I wrote to the Provider on **8 March 2022** asking, amongst other things, for the Provider's comments regarding the sharing of information by two separate employees working at the BB Challenged Unit, with another employee on 13 September 2017.

I asked the Provider whether it agreed that the release of this confidential information by each of those employees to a colleague was inappropriate, given that the information in question had come into their possession in the context of their work on behalf of the Provider and ought to have remained confidential to the BB Challenged Unit.

When the Provider responded on the following day, it advised that it did not accept that any confidential information was shared between the two employees in its Business Banking Challenged Unit, with the other employee. The Provider said that: -

"The communication between these parties referred to the subject site being on the market. The Complainant had unsuccessfully sought to sell the site by private treaty as far back as 2014 and decided to include it in the [Auctioneer] public auction on 20 September 2017 with his auctioneer [name redacted] erecting a "For Sale" sign at the site and listing the property details on the [Auctioneer name redacted] website in advance of the auction."

The Provider also went on to state that the Complainant had set a reserve of €45,000 and open bidding took place at the auction, with the highest bid of €76,000 being ultimately placed by the purchaser and accepted by the auctioneer. The Provider has pointed out that this bid was well ahead of the reserve and with no other interested parties placing a bid in excess of this figure. The Provider concluded by saying that

"The purchaser's bid on the site was informed by her own due diligence carried out on publicly available records and there was no confidential information disclosed to her by the employees in the Provider's Business Banking Challenged Unit."

I am conscious that the Central Bank of Ireland's **Consumer Protection Code 2012**, as amended, requires a regulated financial service provider to have a conflict of interest policy in place, identifying the circumstances which constitute or may give rise to a conflict of interest *"entailing a risk of damage to the interests of its customers who are consumers"* and such a policy must specify the procedures to be followed and measures to be adopted in order to manage such conflicts.

On the basis of the evidence available, I note that the reserve price at auction of €45,000, was agreed between the Complainant and the Provider. The Provider refers in that regard to a letter of 12 September 2017 in which it consented to the sale at auction *"at or above the agreed reserve price of €45,000"*.

In those circumstances, I take the view that the interest of Ms. X in purchasing the property may well have given rise to a higher price being achieved at the auction than might otherwise have been, when the site was sold in September 2017.

This complaint is not made against Ms. X. Rather, it is the conduct of the Provider which is at issue in the complaint which the Complainant has made to this Office. The Provider is responsible for the conduct of its employees and I take the view, on the evidence before me, that a very serious concern arises as to the failure of the Provider's employees to respect the confidentiality of the information which had come into their possession in the course of their work on behalf of the Provider's Business Banking Challenged Unit, and the improper nature in which this was shared with a colleague working outside of that unit. It seems that each of those employees were mindful of the personal situation of Ms. X, in terms of her place of residence and her potential interest in the Complainant's property coming on the market.

I am unsurprised in those circumstances that the Complainant raises the question regarding the integrity of the process, albeit that ultimately the price achieved at auction was significantly more than the reserve price. In those circumstances, I do not accept the Complainant's contention that the property did not achieve its true value at auction, but I accept his contention that the purchaser was made aware of the property coming on the market, as a result of receiving confidential information from the Provider, before the auction sign was placed on the site. In that regard, I note that the Provider's own Memorandum of the meeting between the parties on **21 September 2017**, records the fact that the Complainant advised at that time, that the auction sign was put up on the property "on Thursday" (14 September 2017). There is no suggestion within the Provider's record of the content of the discussion at that meeting, that this date was in any way challenged.

It seems to me in those circumstances that the action of the Provider, on 13 September 2017, through its employees, in sharing confidential information with a third party (who was another employee) effectively intermeddled in what ought to have been an arm's length process of the site being sold on the open market, at public auction.

I am disappointed with the Provider's response to the queries of this Office and its failure to recognise the inappropriate nature of the communications as between the employees in question, as a result of which information which had come into possession of the BB Challenged Unit, was shared with the third party Ms. X, before that information became available to the public. I take the view that the actions of those employees on 13 September 2017, demonstrate an interest or a potential interest in the position of Ms. X, *vis-à-vis* the auction which was due to take place and a failure to recognise the sensitivities and the inappropriate nature of their sharing of information, regarding the operations of the BB Challenged Unit of the Provider.

Having considered this matter at length, I take the view that the Provider must bear responsibility for the flagrant sharing of confidential information with Ms. X, before that information was placed in the public domain.

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In that respect, there is no evidence that details of the reserve price were inappropriately shared with the employee in question, but prior to the “For Sale” sign being placed on site, on 14 September 2017, Ms. X was alerted by two separate sources within the Provider, to the property coming on the market.

I do not accept the Provider’s suggestion in that regard that because the Complainant had unsuccessfully sought to sell the site by private treaty, as far back as 2014, this was not confidential information. Neither do I consider that the sharing of the information was in any way more acceptable, because it was shared “*in the context of general chit chat*”. Accordingly, I consider it appropriate to substantially uphold this complaint.

I do not accept that the Provider “*rushed the sale*” and rather, I accept that it was the Complainant himself who agreed the auction date, directly with the auctioneer. I accept however, that in breach of the Provider’s duty of client confidentiality, details of the inclusion of the property at the auction, were disclosed to Ms. X who ultimately purchased the property, though I do not accept on the evidence that the purchase was made at a discounted rate.

In all of the circumstances, I am satisfied that the inconvenience caused to the Complainant has been extensive. One can well understand why the Complainant was concerned with “*insider trading*” and he has pointed to several inconsistencies in the position being adopted by the Provider’s employees who are central to his complaint.

In my opinion, there is no evidence whatsoever that the employees who shared the confidential information did so with a view to in any way prejudicing the position of the Complainant. It is disappointing however, that neither of the employees in question appear to have recognised the inappropriate nature of the communications they engaged in, with Ms. X.

When the preliminary decision of this Office was issued, I recommended to the Provider in that it undertake detailed training with its staff, to ensure a full understanding of the duty of confidentiality to customers and indeed the obligation to recognise conflicts of interest (including apparent conflicts of interest) and to address such conflicts in an appropriate manner.

I note in that regard that since the preliminary decision of this office was issued to the parties in April 2022, the Provider has referred in detail to its existing conflict-of-interest policy, and has confirmed that arising from the decision of this Office, it will

“review its training materials further to ensure that: (i) staff have a full understanding of the duty of confidentiality to customers; (ii) the obligation on staff to recognise conflicts of interest and (iii) that there is a process to address such conflicts of interests.”

I am also conscious of the Complainant’s submission since the preliminary decision of this office was issued to the parties in April 2022.

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Amongst other things, he has submitted that:

Whilst I acknowledge the preliminary decision has taken a very dim view of the breach of confidentiality on the part of the Bank, I believe that the penalisation of the Bank does not go far enough.

The Supreme Court in the decision of Walsh v National Irish Bank Limited [2008] 2 ILRM 56 reaffirmed the duty of confidentiality between a Bank and its customer.

The Supreme Court held it was an implied term in any contract between the Bank and its customer, that the Bank will not divulge to third parties without the customer's consent, the state of the customer's account, or the amount of his/her balance, the securities offered and held, the extent of frequency of transactions or any information acquired by the Bank by reason of its relationship with the customer.

The Complainant submits that the Provider flagrantly breached its duty of confidentiality, through its employees, and whilst the Provider has made it clear that it does not accept this, I note that its comments in that context, have addressed the impact of those communications, rather than the flagrancy or otherwise of such communications.

The Complainant has suggested that upon receipt by the Provider of the proceeds of sale from the auction, it should not only write-off the remainder of the debt (as I indicated in the preliminary decision, it was my intention to direct) but in addition it should pay compensation to him, *"in order to ensure that no repeat may occur and that the [Provider] ensures that it acts honourably with all its dealings with its customers"*. The additional comments above, in response to the preliminary decision of this Office, also refer to *"the penalisation"* of the Provider not going far enough.

It is important to note that this Office plays no role in the penalisation of financial service providers. The function of this Office is to investigate individual complaints about the conduct of financial service providers and pension providers. As a result, if the adjudication of an individual complaint finds that the complaint is upheld, substantially upheld or partially upheld, this Office can make such directions as permitted by its governing legislation, as it considered to be appropriate to the particular conduct complained of.

In addition, it should also be noted that it is only the conduct of the Provider in this particular matter, concerning its dealings with the individual Complainant, which is the subject of this investigation. This investigation does not concern the position of any other customer.

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In concluding the investigation of this complaint, I take the view that the inconvenience caused to the Complainant by the actions of the Provider, through its employees, warrants the direction which I have specified below.

In addition, however, taking account of the parties' further submissions, and noting that the Provider's conflict of interest policy and its training in that regard, failed to adequately alert its employees to the seriousness of their inappropriate information sharing, I also consider it appropriate to refer this decision to the Central Bank of Ireland, for such action as it may consider to be warranted.

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)(g)**.
- Pursuant to **Section 60(4)(a) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of, by ensuring that upon receipt by the Provider of the proceeds of sale from the auction, and the application of those proceeds to the Complainant's debt, it then write-off 100% of the balance outstanding on the Complainant's loan (instead of 75% as outlined in the offer letter dated 21 February 2017).
- 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)

27 June 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.