An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0272
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Misrepresentation (at point of sale or after) Arrears handling - Mortgage Arears Resolution Process Delayed or inadequate communication Dissatisfaction with customer service
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the Complainants' mortgage loans held with the Provider, which were subsequently sold to a new owner.

The Complainants' Case

The Complainants state that when they originally took out their mortgage in **2001/2002,** the Provider's terms and conditions did not advise them that the Provider *"could at any point sell on the loan".*

The Complainants further state that due to a serious illness, the mortgages fell into arrears in **2008**.

The Complainants say that the Provider approved a recapitalisation offer in **March 2018** for €51,676.67, to restructure the larger mortgage account; the recapitalisation offer was made following the assessment of a Standard Financial Statement submitted by the Complainants to the Provider.

The Complainants further advise that the Provider failed to recapitalise the smaller mortgage loan for the amount of €24,000, which they state had been agreed by the Provider as part of the recapitalisation process. The Complainants state that the Provider apologised for this administration error in **May 2018,** which resulted in a delay in the recapitalisation process for this second loan, for a further six months.

The Complainants submit that both loans were sold to a new owner as part of a cohort of loans, in **August 2018.** The Complainants further submit that they had contacted the Provider prior to the sale and were assured that *"we had nothing to worry about regards the loan sales to vulture funds as ours were due to be recapitalised".* The Complainants also state they were obliged to go through a trial repayment period, and that they had requested to pay the last two trial payments on both loans, by phone in **January 2018** and in writing on **13 March 2018** because they *"were concerned about media reports and wanted at all costs to avoid inclusion in any potential loan sale".* The Complainants state that they were informed that this was not necessary, and then were assured that *"we would be fine as long as we adhered to the restructure terms and conditions"*.

The Complainants assert that two years earlier, they were misled by the Provider, when they requested a meeting with the Provider in **December 2016** where they asked if "*it might be advisable to pay off a large lump sum against the arrears, which we could arrange immediately"*.

The Complainants assert that they were not encouraged to do so, as the Provider stated that *"we all have to live"* and it would be better to recapitalise. The Complainants state that they were since informed that the Provider's arrears team would definitely have advised them to pay the arrears, in preference to recapitalisation.

The Provider's Case

The Provider states in its Final Response Letter dated **3 December 2018,** that the Provider is required by regulators to reduce the percentage of loans which are classified as non-performing loans.

The Provider further states that although the Complainants are engaging in an arrangement with the Provider, their loans were still classified as non-performing based on the regulatory definition and due to the arrears outstanding. The Provider asserts that it entered into a legal agreement to transfer these loans to a new owner, and that the Provider had no general discretion to remove these loans from this agreement. The Provider further asserted that all Central Bank of Ireland statutory Codes of Conduct relevant to the loans would continue to apply to the Complainants' loans after the transfer to the new owner.

The Provider also maintains that, by refence to the terms and conditions of the Complainants' borrowing, it had authority to sell the loans should it so wish. This authority was unqualified and was not limited by reference to any analysis, as to whether the loans are performing or not performing.

Notwithstanding the foregoing, the Provider has acknowledged certain "service issues" on its part including the failure to ensure that the smaller mortgage was recapitalised at the same time, and in tandem with the larger mortgage in 2018. It also acknowledges the incorrect opinion offered by its agent during the phone call of **13 March 2018**, and the confusing wording included in a letter of **23 March 2018**.

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Considering this, the Provider offered compensation in the amount of **€1,000** to the Complainants which it subsequently increased to **€6,000**, but this was not accepted to resolve the complaint.

The Complaint for Adjudication

The complaint is that the Provider:

1. Misled the Complainants in 2018 when they were in financial difficulty. The Complainants advise that they were led to believe that their loans would be deemed *'performing'* once recapitalised. They also advise that they received reassurances from the Provider that they "*had nothing to worry about, regards the loan sales to vulture funds, as ours were due to be recapitalised"* and *"we would be fine as long as we adhered to the restructure terms and conditions"*

2. Failed in its *"duty of care"* by advising the Complainants in 2016 to recapitalise, in preference to paying off a lump sum. The Complainants contend that the Provider's arrears unit would have recommended the payment of a lump sum

3. Failed to recapitalise the smaller mortgage loan as agreed, leading to a six-month delay in implementing the recapitalisation arrangement. The Complainants contend that as a result of this error, both their loans were categorized as non-performing, because at the time of the sale, both loans were linked

4. Proffered poor customer service throughout

The Complainants are seeking that the Provider reverse the loan sales, or provide compensation for the stress and upset caused by its behaviour, as outlined above.

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.

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Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **20 July 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 Complainants' two mortgage loan accounts were transferred to a new owner on **01 February 2019.** The Provider states that the "*compilation of the loans to be included in this* [sale] *was concluded 31 March 2018*".

It should be noted that the new owner is not a party to the complaint before this Office. The function of this Office is limited to an analysis of the conduct about which this complaint is made.

This complaint has been articulated in a great many documents and exchanges between the parties. It is a complex complaint which requires the following issues to be addressed:

1. Was the Provider entitled to sell the Complainants' loans?

2. If the Provider was entitled to sell the loans, did the Provider engage in any conduct leading up to that sale which was unreasonable or unjust or otherwise contrary to ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017***?

<u>The Sale of the Loans</u>

The Provider relies on the following terms and conditions of the Complainants' loan accounts referable to the Letters of Offer signed by the Complainants on **16 March 2001** and **20 March 2002** respectively. I note that the relevant terms are identical in respect of both accounts.

The Provider relies on Clause 1.15 of '*General Mortgage Loan Conditions'* as referenced in the Letter of Offer signed by the Complainants:

> *1.15* [The Provider] *may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions.*

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The Provider also relies on Clause 6.7 of '[The Provider's] Mortgage Conditions 1996' document as referenced in the Letter of Offer signed by the Complainants:

> *6.7* [The Provider] *may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person and from and after such transfer.*

The Complainants have raised an issue regarding the notification to them of these terms and conditions upon which the Provider relies and they have noted that nothing was "signed" by either of them confirming that they were "*aware that they could sell on our loans under any circumstances*".

The Provider has responded by pointing out the Letters of Offer signed by the Complainants on **16 March 2001** and **20 March 2002** respectively, each of which confirmed the Complainants' acceptance of the terms in the following manner:

"

1. *I/we the undersigned accept the within offer on the terms and conditions set out in*

   i Letter o Approval
   ii the General Mortgage Loan Approval conditions
   iii the [provider] mortgage conditions

   copies of the above which I/we have received, and agree to mortgage the property to the [provider] as security for the mortgage loan.

2. *I/We hereby state that no third party (whether a person or persons or body or bodies) has or claims any financial, equitable or beneficial estate or interest in the property. In the event that a consenting spouse is completing the spouse's consent to this letter of Offer, I, the spouse of that spouse, do hereby consent to my said spouse giving her/his undertaking to sign the Deed of Confirmation in the [provider's] Mortgage Deed as referred to in the Spouses Consent.*

3. *I/We hereby irrevocably authorise and direct my/our Solicitor to give the Undertaking referred to in the Special Conditions on the Letter of Approval.*

4. *My/Our Solicitor has fully explained the said terms and conditions to me/us.*

5. *I/We hereby further irrevocably authorise the [provider] to make the loan cheque payable to my/our Solicitor (or his/her Firm as the case may be)".*

[my underlining for emphasis]

I have reviewed each of the relevant documents identified above and I am satisfied that the terms and conditions of the mortgage loans accepted by the Complainants included a power in favour of the Provider to sell the loans to a third party. I do not accept the Complainants' contention in that regard that nothing was signed by either of them, to confirm that they were aware that the Provider could sell the loans.

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It is worth noting that the right to sell outlined in the terms and conditions, is unqualified in any manner and was not restricted by reference to any analysis or categorisation of the loans being sold, as 'performing' or 'non-performing'. Consequently, I accept that the Provider was contractually entitled to sell these loans.

I am also satisfied in those circumstances that the Complainants were on clear notice of these terms and conditions of the borrowings which they had accepted in 2001 and 2002, and which they specifically confirmed had been explained to them by their solicitor, at those times.

Did the Provider engage in unreasonable or unjust conduct?

In circumstances where the Provider was empowered and entitled to sell the Complainants' loans to a third party, I consider it appropriate to examine the conduct of the Provider to establish whether its conduct was unreasonable or unjust or in some other manner contrary to ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, or contrary to some other relevant Code or statute.

The Complainants essentially argue that the conduct of the Provider denied them the opportunity to have their loans categorised as 'performing' such as would have, it is suggested, avoided the loans being included in the sale to the third party. There are a number of matters to consider in this regard.

In the first instance, the Complainants take issue with an administrative error on the part of the Provider in failing to link the two accounts and in failing to ensure that the recapitalisation agreement was applied to both accounts at the same time. This oversight in fact caused a delay of nine months on the recapitalisation of the smaller top-up account. This is disappointing.

I note that in accordance with the Provider's policies, both accounts had to essentially pass a 6-month trial period, before the recapitalisation agreements would be put into effect. I note that the Complainants returned the necessary documents, to initiate this trial period on **11 October 2017** however, in error, only the main account was initiated for the trial period; this was to take effect from **31 October 2017**.

The six-month trial period for this main account was thus due to come to a conclusion on **30 April 2018,** approximately one month after the various loans for inclusion in the Provider's sale portfolio, had already been selected. It is therefore unclear to me why a letter of 23 February 2018 refers to the 6-month trial period concluding on 31 March 2018. In the event, documentation to complete the recapitalisation process was returned by the Complainants in early **April 2018** and the account was in fact recapitalised on **16 April 2018**, however this was after the loans for inclusion in the sale portfolio had already been identified, as of **31 March 2018**.

Accordingly, quite apart from the Provider's power to sell either loan regardless of their performance status, the Complainants' complaint on this point must take account of the chronology of events.

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Whilst the proximity of the end of the trial period and the date when the loans were identified for sale, may be the source of considerable dissatisfaction for the Complainants, I note that their loans remained in arrears at the time when the loans for sale were identified and compiled by the Provider, and before that trial period had completed.

I note that, in fact, the Provider goes further and points out that the loans would have to have been performing for one year *after* the recapitalisation, for them to have avoided qualifying for the loan portfolio sale. In that context, I consider it adequate to note that the loans were indeed in arrears at the point when they were selected for sale, and indeed at that point they had been in arrears for approximately nine years. In my opinion therefore, on the basis of the evidence, there can be no real challenge to the Provider's inclusion of the loans, in a cohort of non-performing loans, identified for sale.

I note that the Complainants were seeking to bring the six-month trial period to a pre-emptive conclusion, by pre-paying the necessary payments by way of lump sum or otherwise. Whilst I sympathise with the Complainants who were clearly doing everything in their power to bring about their desired result, it is nonetheless the case that the Complainants had no entitlement, whether contractual or otherwise, to foreshorten the trial period, whether by early payments or otherwise. The purpose of the trial period was to establish a pattern of consistent payment, over a period of 6 months, not simply to have the Complainants transfer an amount of money by way of lump-sum.

It should be noted that there was, in fact, no legal obligation on the Provider to enter into the recapitalisation agreement. The obligations on the Provider were restricted to the contractual terms of the account agreed in 2001 and 2002 respectively, and the additional obligations to engage, as set out in the Code of Conduct on Mortgage Arrears. Having agreed to consider the recapitalisation request, the Provider was entitled to insist on the observance of the proposed conditions over the full duration of the 6-month trial period it had stipulated, but it should however have ensured that <u>both</u> loans were arranged to reflect the 6-month trial period, as agreed.

The Provider points out that the Complainants were advised during the phone call of 13 March 2018, that they could make the last payment early, but no early payment in fact followed.

A further element to this aspect of the Complainants' complaint relates to the reassurances and/or advice said to have been given to them, regarding the status of the loans. In essence, the Complainants say that they were misled into believing that their loans would be deemed 'performing' once recapitalised. The significance of this, is that the Provider states that the terms of any recapitalisation must be observed for a probationary "*cure period*" of one year, after long term restructuring has been agreed, before the loan will then be re-categorised as 'performing'. It seems to me that this argument would be more relevant if the recapitalisations had in fact occurred, before the date when the loans were selected for sale. The Complainants' loans were not however selected for sale in the course of a one-year 'cure period' (which the Complainants say they were never told about).

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Rather, the loans were selected before the beginning of any such "cure" period and before the recapitalisation of the loans. For that reason, the wrongdoing by the Provider is limited, in my opinion, to its failure to in any way explain to the Complainants that such a one-year cure period would arise. I take the view that this was unfair to the Complainants.

It is important in this regard to bear in mind that the Complainants had no way of knowing the parameters of the loans which might be included in a sale by the Provider of non-performing loans. They were clearly concerned in respect of the media reports, and they were seeking to do anything in their power to ensure that their loans would not be sold as part of a portfolio of non-performing loans, but the information which they received from the Provider was less than helpful.

A connected matter relates to the assurances expressly given to the Complainants, that their loans would not be included in the sale. In an email of **12 March 2018**, (19 days before the final identification of the loans to be sold) the Complainants first expressed concern about their loans being sold. The concerns were reiterated the following day, during a phone call when the Provider's agent stated that "*we haven't been told what loans may or may not be included in the sale yet*". The agent went to state as follows:

> *It's just a case of keeping up your payments at the moment, only have one month as it stands. A couple of them were late slightly so we will probably have to wait for the last payment to come through which is the 29/03/18 but look it's a trial for a capitalisation, obviously this isn't gospel but the Bank are looking to sell properties that they are not going to be able to get, em, Its NPLs which you are probably aware from media coverage are non-performing.*
>
> *This is a trial for capitalisation so <u>once this trial is finished, it will be performing</u>, it wouldn't, in my mind, it wouldn't make sense for it to be sold on because the bank are going to get more money from you than they would from a potential buyer, if that makes sense? No, that's not again, I'm not saying, that is just my understanding of it and kind of common-sense approach to it. I'm not saying that is exactly the way the thing is, but people that are on CAP trials, where the Bank is going to recover the full amount of the loan this way, whereas if they sell it they are never going to get that.*
>
> [My underlining for emphasis]

This speculation offered by the Provider's agent is indeed regrettable, and the underlined portion above, although sounding perfectly reasonable, transpired to be entirely incorrect. This is very disappointing. One can well understand why, on the strength of this conversation, the Complainants believed that once they concluded the six-month trial period, the loan would be recapitalised and would be considered to be performing. This was not however the correct position. That said, the loan was included in the portfolio of loans to be sold, before the six-month trial period had elapsed, so the categorisation of the loan from April 2018, was not in fact relevant, as events transpired.

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It is regrettable that no information of that nature which would have clarified the position to the Complainants, was shared with them at any point during the relevant period. I do not however accept that the statements made by the Provider's representative during this phone call, amounted to a binding assurance on behalf of the Provider, that the loan would not be sold. Indeed, the staff member's comments were prefaced by him clarifying that he simply did not know.

It is understandable however, that the Complainants are very unhappy with the service which they received from the Provider, as the evidence confirms that:-

1. The Provider made an error in failing to include the smaller loan in the six-month trial period, before capitalisation.

2. The Provider's phone call of **12 March 2018** led the Complainants to believe that once the six-month trial period was successfully completed, their loan would be capitalised and would no longer be classified as a non-performing loan.

3. The Provider's letter of **23 March 2018** which offered capitalisation to the Complainants on the larger loan, and its subsequent letter to them in respect of the smaller loan, on **13 December 2018**, identified a stated "*advantage*" of the capitalisation as:-

> "*If you adhere to the conditions of this arrangement, the outstanding arrears will be cleared and the loan will be deemed as performing*."
>
> [my underlining for emphasis]

Given the terms of the first of those letters at "3" above, one can well understand why the Complainants were somewhat mystified when they received a subsequent letter from the Provider dated **2 August 2018**, advising that both accounts had been included in an agreement for the transfer of a number of mortgage loans to a new owner, to be completed no earlier than 2 months from the date of the letter.

I note the Provider's indication that, in the context of the communications of 23 March 2018 and 13 December 2018 respectively, the word "*performing*" referred to performing within the terms of the new capitalisation agreement, as opposed to it being a performing loan. This explanation, in my opinion, is unconvincing at best, and must surely have been utterly confusing to the Complainants.

I note that ultimately, until the loans were transferred to the new owner in February 2019, the Provider continued to work with the Complainants in relation to the restructure of the smaller account. Happily, this was concluded in **January 2019** and accordingly, will have transferred to the new owner on those restructured terms. I am satisfied that the conclusion of this restructure arrangement was in the best interest of the Complainants, in advance of the transfer of ownership to the new owner, in **early 2019.**

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I am conscious that the Complainants also refer to discussions which they say they had in 2016, with the Assistant Manager of a particular branch when they discussed reducing the arrears. The Complainants say that this wasn't encouraged, and that ultimately the discussions moved to include the terms of a potential recapitalisation, subject to a trial repayment period of six-months being put into place.

Whatever those discussions with the Assistant Branch Manager at that time, I note that it is not suggested by the Complainants that any lump-sum payment they were seeking to make, would have discharged the arrears in full and, rather, even if such a payment had been made, the accounts would still have remained in arrears, albeit at a lower amount. In addition, it was at all times a matter for the Complainants themselves to meet their contractual liabilities to the Provider every month, but in failing to do so, this is what gave rise to the arrears developing on their accounts, over an extensive period.

I am satisfied on the basis of the evidence that the Provider has a case to answer to the Complainants for the very poor level of information given to the Complainants at a time when they were making very significant efforts to prevent their loans from being sold as part of a portfolio of non-performing loans. It is clear from the information now made available by the Provider that, short of the arrears being discharged in full, any new restructure arrangement which might have been put into place in from March/April 2018, would not have prevented the loans from being sold as part of a portfolio of non-performing loans, owing to the requirement, even in the event of a restructure, to serve a "cure" period of 12-months, before the loans would be again considered to be performing.

I am conscious that notwithstanding the particularly poor level of service made available by the Provider to the Complainants during this period, even if the correct information had been made available to the Complainants, their loans would nevertheless have been sold to the new owner.

Insofar as the Provider's error in arranging the restructure for the smaller element of the borrowing is concerned, I note that ultimately, before the ownership of the loan was transferred, the restructure was put into place in **January 2019** and therefore, whilst I am conscious that the Complainants suffered considerable inconvenience for a period, nevertheless ultimately, the loans transferred on the basis of restructured agreements which had been put into place with the Provider.

The Provider has acknowledged its "*service issues*" which gave rise, initially, to an offer of compensation (in October 2019) in the amount of **€1,000** which was subsequently (in April 2020) increased to **€6,000**. The Provider ascribes this offer to its failure to ensure the smaller mortgage was recapitalised at the same time and in tandem with the larger mortgage, and to the incorrect opinion offered by its agent in the course of the phone call of **13 March 2018.** Reference is also made to confusing wording included in a letter of **23 March 2018.**

I consider it appropriate that the Provider has acknowledged these failings, and having considered the evidence available, I am satisfied that the compensation of **€6,000** offered by the Provider, when sending its formal response to this complaint investigation, in April 2020, adequately addresses the shortcomings acknowledged.

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In those circumstances, on the basis that this offer remains open to the Complainants for acceptance, I do not consider it necessary or appropriate to uphold this complaint or to make any direction to the Provider to make a compensatory payment to the Complainants.

Rather, it will be a matter for the Complainants to make direct contact with the Provider if they wish to accept what I consider to be a reasonable compensatory payment from the Provider. In that event, following the issuing of this Decision, they should make contact expeditiously with the Provider, as the Provider cannot be expected to hold that offer open indefinitely.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

16 August 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.

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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.