An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0338
Sector:	Banking
Product / Service:	Direct Debit
Conduct(s) complained of:	Failure to process instructions
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns a direct debit instruction on a mortgage account held by the Complainants with the Provider.

The Complainants' Case

The Complainants state that in **February 2019** they realised that a direct debit for the mortgage account had not been applied since **September 2018**.

The Complainants submit that they contacted the Provider to query the reason the direct debit was not taken from their account. The Complainants state that they received a number of responses from the Provider as to why the direct debit had been cancelled, but no evidence of why.

The Complainants state that because of the direct debit being cancelled incorrectly, their mortgage went into arrears. The Complainants state that in **February 2019** they requested a mortgage restructure with the Provider to address those arrears.

The Complainants assert that in **February 2020** the Provider sold their mortgage to a third party "*Vulture Fund*"[1]. The Complainants say that this was due to the fact that the loan was classified by the Provider as being on *"interest only"* repayments. The Complainants state that their mortgage was never on *"interest only"* but was on *"capital and interest"*.

The Provider's Case

The Provider, in its letter dated **27 June 2019**, stated that the IT logs for the Complainants' online account showed that the Complainants cancelled the direct debit online, at 11:01:22 on **1 August 2018**. The Provider, in its letter dated **27 June 2019**, submitted that it had made several attempts to contact the Complainants on the numbers held on their file and that it issued several letters to them informing them of the arrears amount. The Provider stated that the amount of the arrears at that time was *"currently €8722.81 and interest continues to accumulate daily"*.

The Provider, in its letter dated **5 October 2020**, stated:

> *"I understand you were advised by one of our agents when you called on 23 September 2020 that the reason for your mortgages being sold was because they were on an Interest Only Product. This is not the case; the mortgages have been on Capital and Interest repayments since inception".*

The Provider, in its letter dated **28 October 2020** states that, on further review of the Complainants' online request, it highlighted an internal processing error which resulted in the "active" direct debit in favour of the Complainants' mortgage account ****2318 being cancelled. It states that this in effect means that the Complainants could still see "active" on their online banking screen whereas, as far as the Provider was concerned, the "active" direct debit had been cancelled.

The Provider submits that the Complainants' loans were included in the sale to the new owner, because they had been classified as a non-performing loan (NPL); it acknowledges that this classification was as a result of the arrears balance, on one or more of the Complainants' accounts.

[1] It is noted that the new owner of the loan is a financial service provider that is regulated by the Central Bank of Ireland

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The Complaint for Adjudication

The complaint is that the Provider mal-administered the Complainants' mortgage loans in the period from September 2018 onwards. The Complainants want the Provider to have the Complainants' *"ICB cleared and something stating the mark on the ICB is there in error".*

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

A Preliminary Decision was issued to the parties on **7 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

I note that the Complainants were offered a mortgage loan facility with the Provider in **August 2005** for an advance of **€250,000.00** to be repaid over 30 years, secured over a property in Dublin. The indicative capital plus interest monthly repayments were described as €994.31. The Complainants accepted this offer, and this became loan ****2318. I note that some 18 months later, the Complainants were offered a top up mortgage loan facility with the Provider in **February 2007** for an advance of **€40,000.00** to be repaid over 25 years. The indicative capital plus interest monthly repayments were described as €237.34. The Complainants accepted this offer, and this became loan ****6114.

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During the exchange of submissions between the parties to this complaint, several issues were ventilated. These are addressed below under the following separate headings:

- Direct Debit Issue – August 2018
- "Non-performing" Loan issue
- Loan Sale issue
- Credit Rating issue

Direct Debit Issue – August 2018

This issue formed the initial basis of the complaint to this Office.

I note that in the lead up to **August 2018**, monthly repayments due were €939.35 (for loan ****2318) and €242.76 (for loan ****6114) – a combined total monthly repayment of **€1,182.11**. I note that these constituted capital plus interest repayments, as a previous alternative repayment arrangement (ARA) had expired in **June 2017**.

During 2018, there was little or no arrears on the account (arrears fluctuated between €939.35 and €0). However, after what was the final successful direct debit applied on **8 August 2018**, the direct debit for account ****2318 was cancelled, resulting in monthly payments of €939.35 not being made.

This situation prevailed for a year until **August 2019**, when monthly repayments recommenced by direct debit for just under €950.00. An arrears balance remained on the account of between €8,724.38 and €9,671.49, until the loan was transferred to a new owner on **10 February 2020**.

The Complainants state that they did not cancel this direct debit instruction. I note that the Provider originally insisted that the Complainants had cancelled this direct debit, using its online banking facility, at 11:01:22 on **1 August 2018**. The Provider consistently told the Complainants this, in response to countless queries and the constant insistence of the Complainants that the Provider had made a mistake.

I note that the Provider furnished logs, consisting of lines of codes and numbers which in my opinion, are likely to have been utterly incomprehensible to most people, including the Complainants. The Provider stated that this proved its contention that the Complainants themselves had given an instruction to cancel the direct debit, in August 2018.

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The Provider stood steadfastly over this contention from the time of the Complainants' initial inquiry into the matter (in **February 2019**) until further reviews were carried out and the Provider ultimately by letter dated **28 October 2020**, accepted that the direct debit had been cancelled in error. At this point, the Provider apologised, offered an ex-gratia payment of **€1,000.00** to the Complainants (which they did not accept) and assured the Complainants that it was *"in the process of reviewing and will subsequently amend"* the Complainants' ICB and CCR records.

In its responses to this Office, the Provider elaborated on the nature of its error, and provided the following explanation for the cancellation of the direct debit:

> *"The Bank's system show that on 1 August 2018, the Complainants cancelled a direct debit instruction using the Bank's Online Banking Service […]. The Bank understands it was the Complainants' intention to delete an inactive direct debit instruction from their online records, in particular a direct debit instruction for Mortgage loan ending 2318 which was created on 20 December 2013 (Direct Debit reference number 47) and which had since been replaced with their active direct debit instruction (Direct Debit reference number 68) created on 5 January 2017.*
>
> *When selecting the option to cancel the inactive direct debit (number 47) online, the instruction was forwarded to the Bank's Mortgage Department for action, as is the process for Mortgage direct debit cancellation requests.*
>
> *To clarify, the Bank's Mortgage Department manually reviews such a cancellation request in an effort to put an alternative payment method in place (i.e. a new direct debit/standing order, check payment, manual lodgement etc).*
>
> *In the Complainants' case, the Bank processed the cancellation instruction on 9 August 2018 however the Bank cancelled the Complainants' active direct debit instruction (number 68) in error. As a result, the Complainants' mortgage loan ending 2318 had no direct debit instruction in place to facilitate payment."*

Accordingly, in **October 2020** the Provider eventually accepted that the direct debit had been cancelled in **August 2018** by reason of its own error, rather than because of an instruction given by the Complainants. This was more than 2 years after this very serious error had occurred and some 20 months after the complaint was made, by which stage the Provider had issued numerous letters stating that the Complainants had themselves cancelled the direct debit, including its Letters **28 March 2019**, **30 May 2019**, and **27 June 2019**. The Provider consistently maintained in that regard that its IT logs, when reviewed, confirmed that the Complainants had cancelled the Direct Debit by way of online banking at 11:01:22, on Wednesday 1 August 2018.

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The Provider states, and I note, that after the direct debit was (erroneously) cancelled, it attempted to contact the Complainants by telephone in an effort to discuss the account status. Furthermore, the Provider wrote to the Complainants regularly and in accordance with its obligations under the Code of Conduct on Mortgage Arrears (CCMA) advising the Complainants of the mounting arrears.

It is unfortunate that the Complainants did not engage with these communications until they contacted the Provider, some six months later, on **26 February 2019**, when it appears the cancellation of the direct debit came to light. It is also unfortunate that the Complainants did not notice from a perusal of the account statements for this period, that the direct debit was not being processed.

However, I do not accept that this relieves the Provider of the responsibility for its error or the impact of that error. I would note in this regard that, had the Complainants raised the issue earlier, it seems likely that they would still have been met with the Provider telling them that they cancelled the direct debit themselves, though of course, it would have been open to them to instruct a new direct debit, sooner.

I also note that, even though this error was recognised by the Provider and communicated to the Complainants in **October 2020**, the Complainants' ICB records were only amended to reflect the correct information, in or around **May 2021**. This is very disappointing. I accept that some of this delay was because the loan was sold to a new owner but, again, this does not relieve the Provider from its responsibility for the error.

I am satisfied that, in erroneously cancelling the active direct debit on account ***2318 as of August 2018, and in telling the Complainants repeatedly that this had been the Complainants' own action, the Provider mal-administered the Complainants' mortgage loan ***2318.

"Non-Performing" Loan issue

During the investigation of this complaint, an issue arose as to whether or not the Complainants' loan was correctly classified as a "non-performing loan" (NPL). Although the Complainants were advised by this Office that this Office would only consider the complaint insofar as it related to the cancellation of the direct debit, both the Complainants and the Provider have continued to exchange submissions and observations on this NPL issue, no doubt because of the apparent impact which the cancelled direct debit had on the status of the loan.

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Bearing in mind that the Provider issued a Final Response Letter in response to this issue, and it has addressed the issue arising, therefore in order to obviate the requirement for a new complaint to be commenced and to bring finality to this dispute, I am satisfied that it is appropriate to consider this in the course of the adjudication of this complaint.

Firstly, it should be noted that whether or not a loan is a non-performing loan, does not necessarily affect the entitlement of a lender (where provided for in the loan agreement), to sell a loan to a third party. In other words, if a loan was fully up to date with no arrears and full contractual repayments had been made since drawdown, a lender could still decide to sell the loan to a new owner, if permitted to do so, by the loan agreement.

A loan can be classified as "non-performing" in *either* of the following circumstances:

1. A loan repayment is more than 90 days past the due date; ***or***
2. The Borrower is assessed, by the lending bank, as being unlikely to meet the full credit obligation without realisation of collateral.

In terms of the loan classification, I accept the Provider's submission that this classification derives from loan performance classification criteria set by the Regulator, with which the Provider must adhere, so that the Provider does not independently have the discretion to deem a loan to be a non-performing loan.

The Provider in its responses to this Office has furnished a detailed history of the operation of these accounts which appears accurate, by reference to the supporting documentation supplied. In light of the extensive account history furnished, I do not consider there to be any evidence that the Provider has acted in an unreasonable or otherwise wrongful manner in classifying the Complainants' loan(s) as non-performing, even if one considers only the account history prior to the direct debit issue.

However, whilst the direct debit issue may not have been the decisive factor in the classification of the loan(s) as non-performing, I am mindful that this direct debit issue, and the timing of it, and the Provider's insistence over a period of time that the Complainants had themselves cancelled the direct debit, played a part of some considerable significance in that decision.

Loan Sale issue

On **20 February 2020** the Complainants' loans were sold to a new owner by the Provider.

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Although the Complainants were advised by this Office that the FSPO would only consider the complaint insofar as it related to the cancellation of the direct debit, both the Complainants and the Provider have continued to exchange submissions and observations on this loan sale issue, no doubt because of the apparent impact of the cancellation of the direct debit. Bearing in mind that the Provider issued a Final Response Letter in response to this issue, and has addressed the issue raised by the Complainants, therefore in order to obviate the requirement for a new complaint to be commenced and to bring finality to this dispute, I am satisfied that it is appropriate to consider this in the adjudication of the complaint.

I note that the terms and conditions for both loans (which are the basis of the relationship between borrower and lender, and specify the obligations/entitlements of both) contain the following provisions:

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

In short, the contract made clear that the Provider was entitled to sell the Complainants' loan, even if it had never been in arrears. I accept however that the cancellation of the direct debit contributed to the Provider's consideration of the potential inclusion of the Complainants' borrowings in any portfolio being sold. The Provider acknowledges in that regard that the Complainants' loan was included in a sale of a portfolio of non-performing loans, and it has sought to explain how that classification was arrived at, as referenced above.

The sale of the loan has undoubtedly complicated matters, as it meant that the new owner (which is not a party to this complaint) had to take action in order to resolve the Complainants' credit rating issue. I also note that, although the new owner appears to have assigned a status of "interest only" to the loans when they were acquired by it, there is no evidence that this was as a result of any conduct or action by the Provider, which had confirmed that the loans were being operated by it, on a capital plus interest repayment basis.

Credit Rating issue

The direct debit issue has undoubtedly caused incorrect and adverse information to be furnished to, as the case may be, the Irish Credit Bureau (ICB) and the Central Credit Register (CCR).

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The direct debit issue caused missed repayments to be recorded in relation to loan ****2318 from September 2018 onwards, during which time the contractual repayments may in fact have been made, had it not been for the direct debit having been cancelled by the Provider in error.

These records were not amended until **May 2021**. The Complainants submit that in the meantime they were refused a credit union loan over the telephone, refused a car loan, and a mortgage application was put "on hold". In relation to the mortgage application, the Complainants state that this caused them to miss out on the purchase of a house.

I do not consider it appropriate to find that the reporting issue was the direct cause of the Complainants' loan applications being refused, because there is a wide breadth of reasons why a loan application may be refused and, taking into account the history of these loan accounts, I am not satisfied that an incorrect ICB or CCR record was necessarily the sole operating cause of any of the loan refusals.

Nevertheless, I accept that the Complainants have suffered considerable upset and inconvenience as a result of this issue, and that the delay in resolving it was completely unacceptable, even allowing for the fact that the Provider could not directly resolve the issue after it sold the loans, without involving the new owner.

It is particularly disappointing, bearing in mind the history of this matter, that when the Provider ultimately engaged with the new owner, it is clear from the evidence that the arrangement requested was for the Complainants' ICB and CCR records to be corrected for the period from February 2020 to July 2020. The new owner received this instruction request in February 2021.

The evidence available includes a letter sent by the new owner of the loan dated 13 May 2021, to the First Complainant, confirming that subsequently, a second instruction was received from the Provider on 7 May 2021, to update the Complainants' ICB and CCR records for the period September 2018 – February 2020. One can well understand the Complainants' frustration with the situation they found themselves in. I note in that regard the complainants' submission in May 2021 that:

> "*Like I have said in the past. There have been more times than I can count that I didn't want to wake up in the mornings due to the ridicule caused by [Provider]'s error, their continued allegations of us being liars and their complete incompetence forcing us to fight our case for so long. I am very lucky to have a wonderful family who reminded myself and [Second Complainant] of who we are and how we cannot allow such a huge institute to crush us*."

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Summary

I note that, during the latter period of this complaint, the Complainants and the Provider were engaging with a view to agreeing a new mortgage for the purchase of a new house. This is a matter within the commercial discretion of the Provider and with which it would not be appropriate for this Office to interfere. I note in that regard that approval in principle was granted to the Complainants by the Provider, but in **June 2021** the Complainants advised that this offer had come too late, and that the vendors of the property they had been looking to purchase, were not willing to wait any longer. At that point, the Complainants were keen to achieve closure.

Insofar as the complaint made to this Office is concerned, that the Provider maladministered the Complainants' mortgage from September 2018 onwards, I am satisfied on the evidence available that it is appropriate to uphold this complaint. Although the Provider has acknowledged its wrongdoing, I take the view that the compensatory offers made to the Complainants to redress the Provider's errors, and the impact of those errors, has not been adequate in the circumstances.

I note the First Complainant's comment that if nothing else, the investigation by this Office "*proved to us that we weren't going mad, that we didn't cancel the most important DD we will ever have*". I note in that regard that the Provider's errors have visited the most considerable frustration and inconvenience upon the Complainants, insofar as those errors contributed to the Provider's decision to include the Complainants' borrowings in the sale of a portfolio of non-performing loans, to a new owner.

I note that, ultimately, the Complainants' records on the ICB and CCR were corrected. It is also worth noting that the ICB creased operating from October 2021 and that all of its records have since been deleted. Insofar as the Central Credit Register (CCR) is concerned, I note that ultimately, from **May 2021**, the Complainants' records were corrected. I am mindful, nevertheless, that the Complainants bear a level of responsibility for the arrears which arose in circumstances where it seems that they did not notice that the direct debit payments due to be made from September 2018 onwards, had failed (and that those monies to be paid towards the mortgage loan, had not been transferred from their account) until ultimately the matter was discovered in early 2019.

Notwithstanding this partial responsibility of the Complainants, I take the view that the nature of the Provider's error, which contributed to the profile of the borrowings being classed as non-performing loans, and ultimately being included in a sale as part of a portfolio of non-performing loans to a new owner, was then compounded by the Provider's insistence that it was the Complainants' own actions which had cancelled the direct debit in August 2018.

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In my opinion, the Provider's actions in that regard were unreasonable and unfair to the Complainants and this constituted conduct that was unreasonable and unjust within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

I am conscious that the Provider has repeatedly attempted to resolve this complaint from the Complainants and followed its original offer of **€1,000.00** by letter dated **28 October 2020,** with subsequent offers to the Complainants, seeking to redress the issue that had been discovered. In that regard, when responding to the formal investigation by this Office in January 2021, the Provider increased its settlement offer to a figure of **€3,000**. Thereafter, in March 2021 and May 2021, the Provider offered €8,000 and €10,000 respectively, but notwithstanding the Provider's desire to resolve the matter to the Complainants' satisfaction, the Complainants were unwilling to resolve their complaint, on those terms.

Whilst those increased offers are noted to have constituted a more realistic attempt to resolve the complaint, I am satisfied that this conduct by the Provider warrants a significant compensatory payment to the Complainants, and accordingly, to finalise, I consider it appropriate to direct the Provider to make a compensatory payment to the Complainants as specified below.

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is 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 make a compensatory payment to the Complainants in the sum of **€20,000** (twenty thousand Euros) 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.***

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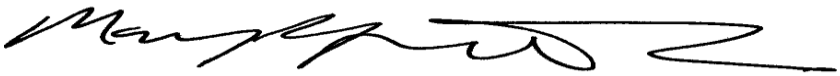
The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

17 October 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.