



<b><u>Decision Ref:</u></b>	2019-0215
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Cheques
<b><u>Conduct(s) complained of:</u></b>	Maladministration Disputed transactions
<b><u>Outcome:</u></b>	Upheld

**LEGALLY BINDING DECISION**  
**OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

The Complainant took out a loan with the Respondent Bank in June 2007 to fund an investment in a [Name Redacted] Property venture. The Complainant submits that although the initial period of agreement was 5 years, this was later extended. The Complainant explains that because the underlying fund was (and is) still in being, the Bank was agreeable to the facility continuing beyond the stipulated term.

**The Complainant's Case**

The Complainant states that in 2014 the Bank requested full repayment of the loan. He notes that the repayment request he received was different to the repayment requests other investors in the same fund, who had received finance from the Bank, had received. The Complainant states that upon receipt of the demand letter, he noticed that the repayment amount appeared to be incorrect. He requested account statements and when he eventually received them, he realised funds in the sum of €12,500, which he had paid, had not been credited to his account.

The Complainant states that he spent in the region of four years engaging with the Bank in an attempt to trace the missing funds. He says that initially he was advised that his account statements were correct and that there was no missing payment. Eventually however, after

extensive communications between the parties, the Bank advised him that the disputed sum of €12,500 had been placed in a suspense account.

The Complainant states that he ultimately discovered, following receipt of another customer's statement sent to him in error, that the funds in question had been credited to the account of another customer, who has a very similar name. On another occasion, the Complainant was issued with a letter from the Bank which he was subsequently asked not to open and to return it to the Bank, which he says he found very strange.

The Complainant states that prior to the missing funds issue being resolved, his loan was sold, without his consent to [a third party], in 2015. The Complainant is of the view that this sale was not permissible under the terms of the loan agreement. The Complainant argues that he received no notice about the impending sale. The Complainant points out that because the amount of €12,500 was missing from his loan account at the time it was sold, it was sold to the third party for an incorrect amount.

The Complainant submits that following on from the sale of his loan account, the Bank made the decision to discontinue to offer him its banking services. Consequently, he had to transfer all of his accounts to another provider, even though he had a fully functioning credit card at the time, and other accounts that were in order.

The Complainant remains dissatisfied with the Bank's response to his complaint. He notes that one of his letters of complaint, dated the **18 April 2016**, was not responded to sufficiently quickly. The Complainant points out that it was solely as a result of his persistence that the issue surrounding the missing amount of €12,500 was finally resolved. He states that it has been *"a very stressful and long winded process"*.

### **The Provider's Case**

Regarding the missed €12,500 payment, the Bank states that it did make an error in the application of funds. The Bank states that this error was acknowledged previously and an apology was offered. The Bank explains that in order to rectify the error, the Complainant's loan account was credited and reduced by €12,500 and by the interest which was overcharged as a result of the error, in the amount of €962.13. The Bank states that the Complainant was also offered a compensatory amount of €1,500, which was subsequently increased to €2,000.

The Bank submits that while it is regrettable that the error occurred, once it was brought to the Bank's attention, it was rectified immediately.

In relation to the sale of the loan account to a third party, the Bank states that loan sale notification correspondence issued to the Complainant on the **27 July 2015** to the address held on file for the Complainant. The Bank submits that under the terms and conditions of the Facility Letter dated the **19 June 2007**, the Bank is entitled to execute a sale of the facility without the Complainant's consent. It states that the power of sale is outlined under Clause 13 of the Facility Letter.

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The Bank states that it has no record of receiving the Complainant's letter dated the 18 April 2016. The Bank states that it addressed the Complainant's further grievances when it was notified of it in June 2017.

The Bank is satisfied that there was no deliberate misconduct on its part. The allegation of maladministration is rejected by the Bank.

### **The Complaints for Adjudication**

The first complaint is that the Bank acted wrongfully by failing to credit an amount of €12,500 to the Complainant's loan account in or around December 2012.

The second complaint is that the Bank acted wrongfully and in breach of the terms of the loan agreement in place between the parties by selling his loan to a third party in 2016, without his consent.

The third complaint is that the Bank provided the Complainant with a poor level of customer service.

### **Decision**

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

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

A Preliminary Decision was issued to the parties on **25 February 2019**, 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.

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Following the issuing of my Preliminary Decision, both parties made further submissions as follows:

- Letter from the Bank to this Office dated **15 March 2019** which was exchanged with the Complainant.
- Letter from the Complainant to this Office, together with enclosures, dated **10 April 2019**, which was exchanged with the Bank.
- Letter from the Bank to this Office dated **29 April 2019**, a copy of which was transmitted to the Complainant for his consideration.
- The Complainant advised this Office by letter dated **2 May 2019** that he did not wish to make any further submission.

Following consideration of the parties' additional submissions, together with all of the evidence and submissions furnished, I set out below my final determination.

The Complainant advanced a number of grounds of complaint, all of which revolve around the Bank's conduct regarding the operation and administration of a loan account he took out with the Bank in June 2007. I propose dealing with each grievance separately, but before dealing with the substance of the complaints I will set out the details of the loan agreement at issue.

A copy of the Facility Letter dated the **19 June 2007** has been furnished in evidence. On the 19 June 2007 the Bank agreed to advance an amount of €250,000 to the Complainant *"for the sole purpose of facilitating an investment in a [Name of Fund and Provider Redacted]"*. The first page of the Facility Letter sets out the *"Important Information"* pertaining to the loan as follows-

Amount of credit advanced	€250,000.00
Period of Agreement	5 Years
Number of repayment instalments	60
Amount of each instalment	€1,235
Total amount repayable	€324,125
Cost of this credit (5 minus 1)	€74,125
Annual percentage rate	6.1%

Clause 6 of the Facility Letter sets out information regarding repayment of the loan, as follows-

*"While amounts drawn under the Facility are repayable on demand at the Bank's absolute discretion or in accordance with normal banking practice, in the absence of such demand the Borrower shall repay the Facility and interest by way of 60 monthly*

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*interest only instalments of €1,235.00 commencing 1 month after drawdown date with principal amount of €250,000 plus all outstanding interest due repayable in one instalment on or before the 20<sup>th</sup> June 2012. The Bank reserves the right to adjust the amount or number of such monthly instalments should the interest rate applicable on the Facility vary.”*

Clause 13 of the Facility Letter sets out a number of general terms and conditions applicable to the loan.

On the **1 August 2007**, the Complainant signed the Facility Letter and by doing so he made the following declaration-

*“I accept and agree the terms of this facility letter and undertake to comply therewith.”*

The first grievance described by the Complainant concerns an amount of €12,500 which he submits went missing from his account. The Complainant insists that this sum of money was credited to another customer’s account; he explains that he discovered this upon receipt of correspondence from the Bank pertaining to another customer’s account. This third party has a similar name to that of the Complainant and the Complainant says he is known to him. The Complainant states that it took the Bank a number of years to resolve the issue

The Bank acknowledges that an amount of €12,500 was credited to an incorrect customer account in error.

The complaint stated that he spent four years engaging with the Bank trying to trace these funds.

In a letter to this Office in February 2018, the Bank explained what occurred, as follows-

*“The Complainant lodged a cheque for €12,500 to a central suspense account (in accordance with Bank instructions for such payments) on the 21<sup>st</sup> December 2012. The Bank is now aware that the incorrect customer account was credited with these funds...*

*In order to rectify this error, the Complainant’s loan account was credited and reduced by €12,500 (the principal sum) and by the interest which was overcharged as a result of that error, in the amount of €962.13. Both of the above transactions ensured that the Complainant was placed back in the same financial position as if the error had not occurred.*

*The Bank offered the customer €1,500 by way of compensation for the inconvenience that this error caused. When the Complainant expressed his dissatisfaction at this amount and mentioned costs (unquantified) in terms of telephone calls, emails and letters, the Bank reconsidered the offer and increased the amount offered to €2,000.*

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*While it regrettable that the error occurred initially, once it was brought to the Bank's attention it was rectified immediately. There is no evidence of misconduct."*

There is no doubt that the Bank perpetrated an error on the Complainant's account. An amount of €12,500 that should have been applied to his account in 2012 was credited to a third party account in error. This error was not corrected until four years later. It seems that the error would never have been uncovered had the Complainant not brought the matter to the attention of the Bank. The Complainant's account has now been restored to the position it would have been in had the monies been correctly credited back in 2012. The question that falls to be determined is whether the Bank's conduct in terms of investigating the money missing from the Complainant's account was reasonable and whether the bank's offer of compensation is appropriate and sufficient in all the circumstances?

The Complainant refers to the "long-winded" and "stressful" process he underwent in an attempt to track down his missing monies. He argues that he first raised the matter with the Bank in 2014; however the Bank disputes this timeline and insists that the issue was only brought to its attention in September 2016. The Bank states further that by October 2016, when the Final Response Letter issued to the Complainant, arrangements were already being made to credit monies to the Complainant's account.

Having examined the documentation furnished by the parties, I note that in a letter to the Bank as far back as **6 February 2014**, the Complainant stated:-

*"Please note that repayments have been made from the original sum of €250,000 down to €175,000 and not €187,500 as stated in your correspondence. I have requested an up to date loan statement but have not received it to date. The most recent correspondence regarding repayment was from [agent of Bank] on 12<sup>th</sup> December 2013."*

I also note that in August 2014 an email issued to the Bank regarding the Complainant's account and the Complainant's concern that the balance on his account as quoted in the recent letter of demand was €12,500 less than the figure he believed was outstanding in respect of the facility. The email was sent on the 18 August 2014 at 15:57, with the subject "[the Complainant's] debt relating to the [Name of Fund Redacted] ". In the email the Bank was notified of the following-

*"As discussed [the Bank] has called in [the Complainant's] debt relating to a [Name of Fund Redacted] managed by [the Third Party service provider]*

*The demand letter issued to [the Complainant] is for €187,500. However it is [the Complainant's] understanding the amount outstanding is €175,000. He has requested an up-to-date statement but he has not received same..."*

Given the content of this electronic correspondence, I am of the view that the Bank was alerted to the possible issue of the money missing from the Complainant's account in very clear terms over two years before it claims to have been made aware of the money being missing in September 2016. I am also cognisant of the various dealings the Complainant had

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with Bank representatives prior to the Bank identifying its error. In an e-mail dated the **13 September 2016**, sent from a representative of the Bank addressed to the Complainant, the Complainant was told definitively that *“all payments were applied to [the Complainant’s] loan facilities at the time”*.

I find the Bank’s attention to this aspect of the complaint both unreasonable and worrying.

In particular, I am concerned with the response, by the Bank to this Office in its Schedule of Evidence that *“while it is regrettable that this error occurred initially, once it was brought to the Bank’s attention it was rectified immediately”*.

Based on the evidence before me, I do not find that statement by the Bank reflects the facts and reality of what happened.

The fact is that it was clearly outlined, in writing, to the Bank, as far back as August 2014, that the Complainant believed that his loan account balance was incorrectly showing as being €12,500 more than it should have been. Yet this was not in fact rectified until December of 2016, after the Complainant received information in error showing the money had been credited to a third party account.

Apart from its obvious obligation to ensure money is lodged to the account of the correct person, the Bank also has obligations under the Consumer Protection Code (CPC) in relation to correcting errors.

Provision 10.2 of the CPC provides as follows:

10.2 A **regulated entity** must resolve all errors speedily and no later than six months after the date the error was first discovered, including:

- a) correcting any systems failures;
- b) ensuring effective controls are implemented to prevent any recurrence of the identified error;
- c) effecting a refund (with appropriate interest) to all **consumers** who have been affected by the error, where possible; and
- d) notifying all affected **consumers**, both current and former, in a timely manner, of any error that has impacted or may impact negatively on the cost of the service, or the value of the product, provided, where possible.

In my view, the error in relation to the €12,500 that was missing from the Complainant’s account was brought to the attention of the Bank in writing, and in very clear terms, two years before the Bank took any corrective action despite the Complainant’s efforts to have it corrected. I note the Complainant’s claim that he had in fact been trying to have the matter rectified for a period of four years.

It is very worrying that the only reason the matter was corrected by the Bank was because the Complainant mistakenly received the statement of the person’s account to which the

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€12,500 had been credited in error. If this second error had not occurred it is not at all clear whether the Complainant would ever have managed to get his money credited to his account.

Given the mishandling of this matter by the Bank and the delay in correcting its error, I believe the Bank is in breach of Provision 10.2 of the CPC in relation to its handling of this matter.

The Bank, in its post Preliminary Decision submission of 15 March, takes issue with my Preliminary Decision as follows:

*“2.2 The FSPO has erred in law in finding that the Bank’s offer to the Complainant of compensation in the amount of €2,000, arising from the crediting to another customer’s account a payment of €12,500 which had been made by the Complainant in 2012, was inadequate on the grounds prescribed by Section 60(2) (b) or (g) of the Act.*

*2.3 The FSPO stated that ‘the question that falls to be determined is whether the Bank’s offer of compensation is appropriate and sufficient in all the circumstances’. The preliminary decision on that issue amounts to a finding by the FSPO that the making of the compensatory offer in the amount of €2,000 was neither appropriate nor sufficient and has been held to have been unreasonable, unjust, oppressive or improperly discriminatory or otherwise improper within the meaning of Section 60(2) (b) and (g) of the Act.*

*2.4 It is respectfully submitted that the offer made was none of those things and the FSPO has erred in law in making its finding where it has not been established that the Bank acted in a manner which was unreasonable, unjust, oppressive, discriminatory or improper. The offer of €2,000 made by the Bank was additional to the interest repaid by the Bank to the Complainant which had incorrectly accrued prior to the application of the payment of €12,500 to the Complainant’s account and €2,000 was the amount considered by the Bank to be an appropriate amount to compensate the Complainant for the error made by the Bank in the management of the Complainant’s loan account. It is respectfully submitted that the amount of €2,000 might be determined to be insufficient at the discretion of the FSPO but the making of the offer in that amount was not unreasonable, unjust, oppressive, discriminatory or improper within the meaning of Section 60(2) (b) and (g) of the Act”.*

I disagree completely with the Bank’s position as set out in its response.

I am most disappointed and surprised that having had the opportunity to reflect on its conduct, the Bank seems to think that ignoring a customer’s clear assertion that money is missing from his account and informing this Office that the matter was corrected as soon as it was brought to its attention is somehow reasonable.

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The Bank did not properly investigate that money was missing from the Complainant's account until he himself could prove through another error on the Bank's part that it had credited the money to another customer's account. I find this conduct to be most unreasonable. By its own admission, the Provider's offer of €2,000 compensation is based on its own incorrect assertion that it corrected the error once it was noticed. This assertion is wrong, therefore I believe that both the conduct and the offer of compensation are unreasonable and the offer of €2,000 is wholly inadequate.

Considering all of the circumstances, including the fact that it was the Complainant who identified the missing money and the fact that the payment amount that went missing was sizeable, and the period of time it took to rectify the matter, I remain firmly of the view that the compensatory amount of €2,000 currently on offer from the Provider is inadequate for the inconvenience caused to the Complainant.

Moving on to the second ground of complaint- the Complainant maintains that the Bank acted wrongfully and in breach of the terms of the loan agreement in place between the parties by selling his loan to a third party in 2016, without his consent.

Some of the pertinent loan details have already been set out above including a reference to Clause 13 of the Complainant's Facility Letter, which outlines some general terms and conditions applicable to the loan. The Bank insists that it acted correctly and in accordance with the loan agreement when it sold the economic interest in the loan facility to a third party in 2016. The Bank states that Clause 13 of the Facility Letter dated the **19 June 2007** entitles it to execute a sale of the facility without the borrower's consent. The Bank explains that the Complainant was offered the option of consenting to the sale of the legal interest in the facility to the third party purchaser but he did not consent, which was his right.

The Bank argues that the Complainant was notified of the impending sale of the economic interest in the loan by way of notification correspondence dated the **27 July 2015**. The Bank submits that the Complainant was subsequently issued with correspondence in April 2016 informing him of the sale and of his options regarding the sale.

The Complainant contends that the sale was not permitted under Clause 13 because the third party purchaser, who now owns the economic interest in the loan, is not an entity within the Bank's Group, nor is it a bank performing banking business in Ireland.

The contractual clause in question, Clause 13, is set out at page 5 of the Facility Letter dated the **19 June 2007**, and provides as follows-

*"The Bank shall have the right to assign or transfer or sub-participate the benefits and/or obligations of the Facility or any part thereof to another entity within the [Respondent Bank] Group and/or another bank carrying on banking business in Ireland. The Borrower is not permitted to assign or transfer the benefits or obligations of the Facility or any part thereof to any other party without the prior written consent of the Bank."*

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This office sought clarification from the Provider in the following terms on **20 August 2018**:-

*"Please confirm that the third party purchaser, [the Purchaser of the loan], was an entity within the Provider's group on the date of transfer. Alternatively, if [the Purchaser of the loan], was not an entity within the Provider's group, please specify the evidence relied upon by the Provider to establish that the third party purchaser, [the Purchaser of the loan], was a bank carrying on banking business in Ireland, on the date of transfer.*

*Please confirm the Provider's position in that regard as to whether it agrees that a "bank carrying on banking business in Ireland" must be regulated by the Central Bank of Ireland, or whether alternatively, it takes the view that it is possible for a bank carrying on banking business in Ireland, to do so without being regulated by the Central Bank of Ireland."*

The Bank responded on **3 September 2018** as follows:-

*"In response to the specific questions raised by the FSPO the Bank confirms that, [the Purchaser of the loan] is not part of [the Provider's] [Name of Provider Redacted] group nor to the Banks knowledge would, [the Purchaser of the loan] be considered as a bank carrying on a banking business in the traditional sense. The Bank also confirms its position "that a bank carrying on a banking business in Ireland" must be regulated by the Central Bank or Ireland.*

*In order to clarify the position, though the Bank sold the economic benefit only, in this loan to [the Purchaser of the loan], the Bank therefore remains the legal owner and the lender of record for this loan. As the legal owner of the loan the Bank retains all legal and regulatory obligations in connection with this loan. The Bank took all appropriate professional advice in regards the sale of this loan and in this regard and on foot of that advice, we are satisfied the Bank was legally entitled to transfer the economic benefit of this loan to, [the Purchaser of the loan]."*

This office sought clarification as follows, on **18 September 2018**:-

*"I note the Bank's contention that the third party purchaser [the Purchaser of the loan] was the purchaser of only the "economic benefit" of the Complainant's loan, whilst it has retained the "legal interest". In that context, I would be grateful if you would clarify the precise "legal interest" which remains within the ownership of the Bank if, as outlined in the Bank's communication to the Complainant explaining his options, "all decisions regarding [the Complainant's] loan will be made by the purchaser and/or their appointed representative or servicer."*

The Bank replied as follows, on **20 September 2018**:-

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*“As advised in the Bank’s email dated 3<sup>rd</sup> September 2018 to your office the Bank remains the lender of record for this loan. As such the Bank remains responsible for all legal and regulatory obligations owed to the Complainant with a view to maintaining the regulatory protections they had prior to the sale of the economic interest in their loan to [the Purchaser of the loan].*

*In order to clarify the Bank’s previous communication to the Complainant as outlined in your letter “all decisions regarding your loan will be made by the Purchaser and/or their appointed representative or servicer” and to give the correct context to that statement would mean that all decisions in relation to repayment proposals, arrears discussions and any economic decisions would need to be agreed with [the Purchaser of the loan] or their Servicer as they are now the economic owner of the loan.”*

The Bank accepts that the third party purchaser is not an entity within the Bank’s group and that it is not another bank carrying on business in Ireland. While it would appear that the third party purchaser is carrying out banking business to a certain extent, it is not a regulated bank. Therefore, I have not been provided with evidence demonstrating that it falls within the ambit of what is permissible under Clause 13. As I have been provided with no evidence showing that [the Purchaser of the loan] is a related entity of the Bank or that it is a bank, it is my view that the sale of the economic interest in the Complainant’s loan was not completed in accordance with the parameters of the Facility Letter dated **19 June 2007**. My view is not based on the alleged lack of consent to the sale by the Complainant - I accept that such consent is not necessary under Clause 13.

Rather, I have reached this view because I have not been persuaded that the criteria surrounding the bodies to whom an interest in the loan can be assigned/transferred under Clause 13 have been made out in this instance. I note furthermore, that Clause 13 does not distinguish between the legal and economic interest in the facility but simply refers to the right to transfer, assign or sub-participate the benefits and obligations of the facility. I am of the view, therefore, that any type of interest under the loan, economic legal or otherwise, requires adherence to the procedures envisaged under Clause 13.

In its post Preliminary Decision submission of 15 March, the Bank states:

*“(a) The FSPO erred in law upholding the Complaint relating to the Bank’s sale of the economic interest in the Complainant’s loan on the grounds prescribed by Section 60(2) (b) or (g) of the Act where it has not been established that the Bank acted in a manner which was unreasonable, unjust, oppressive, discriminatory or improper.*

*(b) The Bank respectfully submits that the FSPO has erred in law in finding that the Bank’s sale of the economic interest in the Complainant’s loan was in breach of the Facility Letter dated 19 June 2007 ...”*

Having considered the Bank’s post Preliminary Decision submission, including the extensive information regarding the trust, which was established for the purpose of dealing with the economic interest in the loan, nothing in that submission has convinced me that I should

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not uphold this aspect of the complaint. In my view, Clause 13 is very clear and the Bank has not produced any evidence that the entity to which it sold the economic interest in the loan comes within the definition set out in Clause 13. Therefore, I believe that the sale of the Complainant's loan was both unreasonable and improper.

The Bank has also argued in its post Preliminary Decision submission of **15 March 2019** that:

*"This limb of the Complaint is of such complexity that the Court would be a more appropriate forum and so no finding should be made on this limb of the Complaint having regard to the provisions of Section 52 (1)(f) of the Act"*

I do not agree. I believe this is a relatively straightforward matter that clearly falls within the jurisdiction of this Office. Furthermore, I do not understand why the Bank would await the issuing of a Preliminary Decision before raising the jurisdiction of this Office to investigate the complaint.

The Bank argues in its post Preliminary Decision submission of 15 March:

*"That the Complainant is estopped from maintaining this complaint in circumstances where the Complainant entered into a settlement agreement with the [third party financial service provider] (a fact which does not seem to have been disclosed by the Complainant to the FSPO) which purchased the economic interest in the Complainant's loan from the Bank thereby acknowledging that [the third party financial service provider] had validly acquired its economic interest in the Complainant's loan.*

*The Bank respectfully submits that the FSPO erred in law in failing to take account of the settlement agreement in its Preliminary Decision rendering its finding flawed".*

I do not agree with the Bank's view in this regard and I do not believe that the Complainant's dealing with the third party financial service provider after the Bank had transferred his loan is of any relevance to the complaint at hand. Furthermore, I do not believe the Complainant had any choice in the matter given that the Bank had informed him that *"all decisions regarding your loan will be made by the purchaser and/or their appointed representative or servicer"*

The Bank goes into considerable detail in its post Preliminary Decision submission of **15 March 2019** to point out that it had sold only the *"economic interest"* and that all amounts owing in respect of the Complainant's loan continued to be owed to the Bank and that the Bank continued to owe obligations arising under the relevant facility to the Complainant as its customer. It goes on to say:

*"The sale of the Bank's economic interest to the Complainant had had no material impact upon the Complainant and has caused no loss whatsoever to the Complainant. It is respectfully submitted that the preliminary decision by the FSPO that the Bank breached its contract with the Complainant is not only wrong as a*

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*matter of law but it also has the potential to have significant ramifications for the Bank and the banking sector more generally”.*

I must point out that I must make my decisions on the facts and circumstances of the complaint before me and the conduct of the Bank in relation to that particular complaint rather than the wider implications for either the Bank or the banking sector.

The Bank, in its post Preliminary Decision of 15 March, goes into great detail about the fact that it chose to realise the economic value of the Complainant’s loan by granting a trust over the proceeds of the loan in favour of a third party financial service provider. It states:

*“The Declaration of Trust did not alter in any way the contractual nexus between the Bank and the Complainant and there was no change in the contractual, other legal or regulatory protections to which the Complainant was always entitled under the terms of the Facility Letter. Accordingly, there was no breach of clause 13 of the Facility Letter”.*

I find this to be at odds with the Provider’s undated letter to the Complainant which opens:

*“We refer to our letter dated 25 July 2015, in which the Bank informed you that it has contracted to sell the economic benefit in the loans advanced to you by it (**the Economic Benefit**), along with all facility letters, guarantees and security entered into between you and the Bank (the Facility Documents).*

This letter goes on to state:

*“In practical terms this means that, whilst you continue to have a relationship with the Bank, the Bank cannot make any decisions in relation to your loan. All decisions regarding your loan will be made by the purchaser and/or their appointed representative or servicer”.*

Having considered the extensive submissions in relation to the matter, including the post Preliminary submissions, I remain of the view that the sale / transfer of the Complainant’s loan was improper.

Because of the possible implications of this decision for other loans held or sold by the Bank, it is my intention to bring this matter to the attention of the Central Bank of Ireland.

Turning now to the third and final ground of complaint - the Complainant has expressed dissatisfaction with the customer service received.

The Complainant points to a letter dated the 18 April 2016 which he says the Bank did not respond to in an expeditious manner. The Complainant also submits that requests for account statements were either not responded to or were responded to after a lengthy delay. The Complainant also refers to other customers in a similar position (that is those who also borrowed monies from the Bank in order to invest in the [Name of Fund Redacted] who were not issued with demands for payment.

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As this complaint is focused on the Complainant's situation only, I am unable to make a comparison as to how the Bank may or may not have dealt with the Complainant in relation to other borrowers.

I do note, however, that in accordance with Clause 6 of the loan agreement in place between the parties, the Bank was entitled to demand repayment of the facility forthwith. Clause 6 provides that *"amounts drawn under the Facility are repayable on demand at the Bank's absolute discretion..."*

Regarding the other instances of alleged poor customer service, it does appear that, on occasion, the Complainant had to issue multiple requests for account statements before statements were provided. This is borne out by the copy correspondence on file. For example, in an email to the Bank dated **18 August 2014**, reference is made to a request for an up-to-date statement but it having not been received. In his submissions the Complainant states that a request for a statement in February 2014 was not complied with until April 2016.

In its response to questions posed by this Office, the Bank explained that it has no record of receiving the Complainant's letter dated **18 April 2016**, but that when it received the Complainant's *"second complaint"* in June 2017, it issued a response promptly.

The Bank, in its post Preliminary Decision submission of 15 March states:

*"The FSPO has erred in law in upholding the complaint that there were lapses in quality of the service provided by the Bank to the Complainant on the grounds prescribed by Section 60(2) (b) or (g) of the Act, which means that the FSPO has determined that the Bank's actions or omissions in the provision of the services to the Complainant were unreasonable, unjust, oppressive, discriminatory or otherwise improper.*

*It is respectfully submitted that the FSPO has erred in making that finding where it was not established that the Bank acted in the management of the Complainant's account in a manner which was unreasonable, unjust, oppressive, discriminatory or improper.*

*Without prejudice to the foregoing, the Bank is prepared to accept a decision by the FSPO that a nominal amount should be paid to the Complainant on account of what the FSPO has found to be a failure to provide account statements in a timely fashion, but it is not clear what proportion of the total amount of €15,000 awarded by the FSPO to the Complainant is attributable to that particular finding".*

In response, the Complainant in his post Preliminary Decision submission of **10 April 2019**, stated:

*"There was an inordinate amount of delays in getting information from [the Bank]. They constantly came back with erroneous information and misleading replies. I was*

/Cont'd...



*not issued with regular bank statements and when I requested same I didn't receive them. It took almost two years to get a statement from them. They even sent me out someone else's personal banking information...I believe that their maladministration leaves a lot to be desired. It is very clear that [the Bank's] treatment of me has been unreasonable, unjust and oppressive".*

I believe the lapses in customer service demonstrated by the Provider were in fact improper. Furthermore I find the bank's ongoing unwillingness to take responsibility for its actions and understand the effect of its conduct on the Complainant to be unreasonable.

The Bank has, in its post Preliminary Decision submission, queried the basis for the amount of compensation I propose to direct. The issues involved in this complaint are all very closely interlinked and therefore I do not propose to break down the compensation I will direct into discrete elements of the complaint. I believe the conduct of the Bank, both in terms of the original conduct that gave rise to the complaint and in its handling of the complaint, has been a source of serious inconvenience to the Complainant and merits a substantial amount of compensation.

For the reasons outlined above, I uphold this complaint and I believe that payment of a sum of compensation is the most appropriate remedy for the various errors and lapses in customer service which include not crediting funds to the Complainant's account, not rectifying the matter in a timely manner when brought to its attention, the sale of the Complainant's loan in a manner not consistent with the terms of the loan and the poor customer service he received, I believe these lapses and errors by the Bank have caused the Complainant considerable inconvenience.

I note the Bank has offered €2,000 to the Complainant in respect of one aspect of his complaint. Given the inconvenience caused to the Complainant, I do not find this at all adequate. Therefore, taking into account all of the above, I direct that the Bank make a compensatory payment to the Complainant in the sum of €15,000.

## **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) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €15,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

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

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

**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

17 July 2019

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.