



<b><u>Decision Ref:</u></b>	2022-0270
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Selling mortgage to t/p provider Delayed or inadequate communication Dissatisfaction with customer service Misrepresentation (at point of sale or after) Maladministration (mortgage)
<b><u>Outcome:</u></b>	Rejected

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

This complaint concerns a mortgage account.

#### **The Complainant's Case**

The Complainant held a mortgage account with the Provider, which was sold to a third party and the Complainant complains that the sale was without his *"consent or approval"*.

The Complainant further asserts that the Provider is *"not selling the loan, they are selling the property, and if they can do this, then why am I paying property tax on something I don't own?"*

The Complainant states that the *"loan was performing"* and that the decision to sell was a *"cherry picking exercise"*. He further states that if he had been *"made aware"* of the condition that his loan could be sold without his approval, he *"would never [have] agreed to the loan or the restructured agreement"*. The Complainant further asks *"How can the owner of a property not be involved in the transfer of his property?"*

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

The Provider states that the Complainant held a home loan facility of **€155,000** (one hundred and fifty-five thousand Euro) with the Provider, the ownership of which was transferred to a third-party owner on **24 May 2019**.

The Provider states that the outstanding balance at date of transfer, was **€123,805.30** (one hundred and twenty-three thousand, eight hundred and five Euro and thirty Cent).

The Provider states that the terms and conditions of the mortgage contract gave the Provider an express contractual right to transfer the benefit of the loan facility to any third party without the consent of the Complainant. The Provider states that the Complainant signed an acceptance of those terms and conditions on **3 November 2006** and that the Complainant had the benefit of legal advice at the time of signing that acceptance. The Provider further states that the terms and conditions of the loan and any Alternative Repayment Arrangements (ARA) agreed with the Provider, continue to apply, after the transfer took place.

The Provider states that it informed the Complainant of the decision to transfer the loan, in a letter dated **22 February 2019** and that the Complainant was informed that any ARAs which were in place, would continue to apply after the transfer.

The Provider states that the Complainant availed of eight short-term ARAs from **12 September 2007** onwards, before agreeing to a long term "*Part Capital & Interest restructure*" from **September 2014**; the terms of this ARA were that monthly repayments of **€523.17** (five hundred and twenty-three Euro and seventeen Cent) would be made, and there would be an amount outstanding at the end of the mortgage term of **€61,821.27** (sixty one thousand, eight hundred and twenty-one Euro and twenty-seven Cent). The Provider states that it incorrectly referred to the ARA in place, as a "*split loan*" with a "*future warehouse amount due*", in its final response letter dated **25 March 2019** and it apologises for this error.

The Provider further acknowledges that it provided the Complainant with incorrect information during a telephone call on **8 May 2019**, when it informed the Complainant that he would need to arrange a billing method with the new owner of his mortgage loan, because the details would not be transferred. The Provider states that the correct information was provided to the Complainant in written form, both before and after that phone call, and it apologises for this error as well. The Provider has made an offer of **€1,000** (one thousand Euro) as a goodwill gesture to the Complainant in relation to these errors.

The Provider states that from the time when the above ARA was put in place, it classified the loan as a non-performing loan (NPL) due to there being a capital balance that would remain outstanding at the end of the mortgage term. The Provider further states that it

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considers the circumstances of each individual loan, before making a determination as to whether it is an NPL.

The Provider also states that the loan being classified as an NPL was not a requirement of the loan being transferred, because the Provider had the express contractual right to transfer the loan, whether or not it was performing.

### **The Complaint for Adjudication**

The complaint is that in 2019, the Provider wrongfully sold the Complainant's mortgage loan facility to a new owner "without any [of his] involvement" and "without [his] consent or approval", and that it failed to inform the Complainant of the Provider's "right to transfer the loan to a third party".

The Complainant says that if the Provider had informed him of its entitlement, he "would never [have] agreed to the loan or the restructure agreement".

### **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 **13 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

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additional submissions from the parties, the final determination of this office is set out below.

The primary complaint made by the Complainant is that his mortgage was sold by the Provider to a new owner, without his consent or approval. The Provider states that it did not need the Complainant's consent or approval as it was entitled under the terms and conditions of the mortgage to transfer the benefit of the facility.

I am satisfied that the Provider is correct in this assertion. I note in that respect, the General Mortgage Loan Approval Conditions submitted in evidence which prescribe that:

*"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."*

In addition, the Mortgage Conditions submitted in evidence further state:

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

The Complainant has referred to the previous Central Bank of Ireland voluntary Code of Practice on the Transfer of Mortgages, which set out that:

*"A loan secured by the mortgage of residential property may not be transferred without the written consent of the borrower...."*

He has queried the transfer of ownership effected by the Provider, in that regard saying *"how can this be done without my consent or approval?"*

I am satisfied however that in agreeing the terms of the loan, the Complainant gave his consent to the provider at that time. In accordance with the contractual arrangement which the Complainant accepted in **2006**, the Provider was entitled, under the terms and conditions agreed, to transfer the mortgage without requiring the approval or involvement of the Complainant.

The Provider, in that context, can decide to sell or transfer a mortgage loan to a third party, and this is a matter within its own commercial discretion. This Office will not interfere with the commercial discretion of a financial service provider unless the conduct complained of is considered to be unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant. I am satisfied on the evidence that the Provider was not obliged to obtain the consent of the Complainant prior to the sale of his loan, and I do not consider it appropriate to uphold this element of the complaint.

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I note that the Complainant further asserts that he was not made aware of the above terms and conditions and that he would not have signed the documents if he had so been aware.

The evidence submitted by the Provider however includes an Acceptance of Loan Offer dated **3 November 2006** which I note is signed by the Complainant and which states:

*"1. I/We the undersigned accept the above offer on the terms and conditions set out in*

- (i) The Letter of 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 authorised 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 {Provider} to make the loan cheque payable to my/our Solicitor (or his/her Firm as the case may be).*

*Dated the 3<sup>rd</sup> day of November 2006".*

[my underlining at 4 above, for emphasis]

Given the terms of this declaration signed by the Complainant, with the benefit of legal advice, I am satisfied that in accepting the Provider's loan facility offer, the Complainant was on clear notice of the above quoted terms, entitling the Provider at any time, to transfer the mortgage without the Complainant's approval.

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When the Complainant signed the declaration to that effect he agreed to those terms and conditions, having confirmed on the face of the declaration which he signed, that his solicitor had fully explained the said terms and conditions to him.

The Complainant is also unhappy about his loan being classed as non-performing and that this classification led to it being sold. The Provider correctly notes that their power of sale does not depend on the loan being classed as an NPL, however, it is also clear that this loan was sold as part of a sale of a portfolio of NPLs and so I accept that the loan being identified as such, was relevant to the Provider's decision to sell.

I note that because of the ARA agreed by the parties, in **September 2014**, this loan was scheduled to have an outstanding balance at the end of its term, in the amount of **€61,821.27**. The Provider states that in classifying this loan as non-performing, it applied the regulatory guidance of the European Central Bank:

*“non-performing exposures are those that satisfy either or both of the following criteria:*

- 1. Material exposures which are more than 90 days past-due;*
- 2. The debtor is assessed as unlikely to pay its credit obligations in full without realisation of collateral, regardless of the existence of any past-due amount or of the number of days past due.”*

Applying the above, I accept that, although the Complainant was making payments under his ARA, it was not unreasonable for the Provider to assess his mortgage as non-performing, because there was a significant amount scheduled to remain outstanding at the end of the mortgage term. Therefore, I am not satisfied that the classification by the Provider of this mortgage as non-performing, was unreasonable or otherwise improper.

I am conscious that the Complainant asserts that the Provider was not selling the loan facility and rather was selling the property. He queries, if the Provider can do that, then why is it he who pays property tax on a property which he does not own. Insofar as the jurisdiction of this Office is concerned, the FSPO has no role to play in investigating Revenue Commissioner policy as to how property tax is assessed.

Whatever the approach of Revenue, I am satisfied that because of the loan agreement terms and conditions which the Complainant accepted in **2006**, it was open to the Provider to sell or assign that mortgage loan facility in its discretion, on the basis of the Complainant's acceptance of those terms.

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There are two acknowledged failings however, of the Provider; firstly, that it incorrectly referred to the ARA in place as a “*split loan*” with a “*future warehouse amount due*” in its final response letter dated **25 March 2019**, and secondly that it provided the Complainant with incorrect information during a telephone call on **8 May 2019** when it informed the Complainant that he would need to arrange a billing method with the new owner of his mortgage, because the details would not be transferred.

The Provider acknowledged and apologised for these errors and has offered the sum of **€1,000** (one thousand Euro) as compensation, which I consider to be adequate. Therefore, on the basis that the above figure is still open for acceptance by the Complainant, I do not consider it necessary or appropriate to uphold this complaint. Rather, it will be a matter for the Complainant to make direct contact with the Provider, if he wishes to accept the reasonable compensatory offer which the Provider has offered to him in respect of its acknowledged errors.

Insofar as the substantive complaint is concerned however, I am satisfied on the basis of the evidence before me that it is not appropriate to uphold this complaint.

### **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—

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- (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.