

Early termination penalty in the event of the sale of condominium units

Topic: **Fixed-rate mortgage** Case number: **2017/04**

The client owned a rental property comprising five rented apartments. In 2015, he took out a fixed-rate mortgage with the bank over ten years. One year later he informed the bank of his desire to sell the five rental units in the condominium. According to the client, during these discussions, the bank assured him it would be possible to avoid the early termination penalty. Without further contact however, the bank then debited some 30,000 CHF. The client then asked the bank to waive this early termination penalty. Although it initially rejected the client's request, the bank declared its willingness to refund the full amount during mediation.

For years the building, owned by the client and comprising five rented apartments, had been financed by the bank by means of a mortgage. In early 2015, the client decided to take out a fixed-rate mortgage with a fixed term of 10 years. The very next year, intending to sell all rental units in the condominium, the client spoke to the bank about the possibilities of avoiding the early termination penalty payable in the event of early repayment of the mortgage. According to the client, during these discussions, the bank promised him that in any event they would find a satisfactory solution. In particular, the bank stated that, where possible, the purchasers should agree their financing with it. In light of these discussions with the bank, the client commissioned an estate agent to deal with the sale of the apartments. The client criticised the bank for having recovered the outstanding mortgage amount directly through the notary public without having notified him, and for charging him an early termination penalty of 30,000 CHF. The bank did this after the sale of the first four condominium units, in other words before all of the units had even been sold. At that time however, it was not yet known how many purchasers would ultimately agree their financing with the bank. The client also claims this behaviour was due to the fact that, during the sale of the first units, the bank had released too high a proportion of the mortgage note cover (initially relating to the entire rental property) so that the remaining mortgage amount no longer had adequate cover. That said, the client's account did not enable the Ombudsman to get a clear idea of the situation in this case. In particular, the latter did not manage to determine whether or not the bank entered into a binding commitment to waive the early termination penalty that was agreed upon as is normal practice, and, if so, what commitments the bank gave in this respect. The Ombudsman contacted the bank since, in its direct response sent to the client, it failed to address the client's comments regarding the way in which the various sales took place. The bank's initial position statement was also very brief and it limited its discussion to the following explanation: the early termination penalty had been collected because the purchaser of the last unit sold had agreed their financing with a different bank. Therefore, the contractually stipulated early termination penalty had been applied to the portion of the mortgage in question, namely to 200,000 CHF. The bank also stated that the client had been informed during the discussions about the fact that the contractually agreed early termination penalty could only be avoided if all purchasers were willing to obtain financing from the bank. At first, it therefore refused to accommodate the client's request.

This position, along with the uncertainties regarding the events described by the client, led the Ombudsman to contact the bank again. He asked the bank for a detailed statement regarding the

sale process criticised by the client, in particular how the credit amount changed over time, the monetary flows resulting from the sales, and the outstanding balance of the mortgage and mortgage cover after each sale. He also asked the bank to accurately describe the settlement performed with the notary directly. In addition to these issues and the contractual agreements concerning the early termination penalty, the Ombudsman was curious to know the total amount that the mortgages contracted with the bank by the purchasers ultimately represented. Depending on the amount of these new mortgages, and in light of the fact that, according to the client, the bank agreed to find a way of avoiding the early termination penalty, the Ombudsman wondered if it was fair, given the interest likely to be collected by the bank from the new mortgagees, for the client to be forced to pay an early termination penalty.

The bank then responded to the Ombudsman that charging the early termination penalty was in compliance with the contract and therefore justified. After reviewing the profit and loss situation however, it came to the conclusion that in view of the total financing granted to the purchasers, and taking into account the loan amounts, their maturity dates and interest rates, it was not in a less favourable position than before the sale. It therefore declared its willingness to refund to the client the full amount of the early termination penalty it had collected, namely 30,000 CHF. In light of the fact that, by so doing, the bank satisfied the client's request in full, it did not provide any additional information regarding the progress of the sales or the distribution of the mortgage note, aspects contested by the client. The client gratefully accepted this offer.