An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0195
Sector:	Banking
Product / Service:	Investment/buy to Let Mortgage
Conduct(s) complained of:	Failure to implement payment terms
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant entered into two loan agreements with the Bank, in December 2005 and January 2006, respectively, toward the purchase price of two student accommodation apartments.

The Complainant contends that the written Loan Agreements in question did not comprise the whole of the agreements but, rather, that there were additional terms, which had not been reduced to writing. The Complainant submits that the written Loan Agreements were varied by way of oral agreement.

The Complainant submits that he had been complying with these Agreements at all times but that the Bank has failed to recognise the actual Agreements which were in place. The Complainant's complaint is that he has been subjected to wrongful behaviour and unfair treatment by the Bank, over a number of years, culminating in the wrongful appointment of a Receiver over the properties in question.

The Complainant's Case

The Complainant submits that, in December 2005 and January 2006, the Bank loaned him €397,000 toward the purchase price of two student accommodation apartments, by way of two separate agreements.

The Complainant submits that although the Loan Agreements state, on the face of them, that they are for a 5 year and a 10 year term, respectively, in fact, the Manager of the Bank

Centre and his Assistant, who were dealing with the Complainant at the time, told him that the *"two varying loan documents were produced for bank file purposes".* The Complainant submits that he was advised that, in reality, he need only pay interest for a 10 year period, on each loan, with an option to repay capital as and when it suited him, subject to clearance by 2016.

The Complainant submits that these arrangements were offered and confirmed to him, by the Relationship Manager of the Bank Centre and the Relationship Manager's Assistant, on the **28th October 2005** and the **12th January 2006**.

The Complainant submits that, in complying with the foregoing arrangements, he made capital repayments of €117,000 in **October 2008**, and €25,000 in **February 2016**, with final payments made to close the accounts in the sums of €110,715, in **August 2016** and €72,420 on **03rd October 2016**.

The Complainant submits that he has carried out "*to the letter*" every aspect of his undertaking to the Bank, but that despite this "*total and consistent compliance with [his] undertaking*" to the Bank he submits that he was "*subjected to harassment by its officials over a five year period, culminating in the wrongful appointment of a Receiver over the apartments."* The Complainant submits that this action caused him much distress and mental anguish, as well as reputational damage.

The Complainant submits that he received a letter of apology dated **12 May 2011** from the Bank. The Complainant submits that, despite this, it "*continued major harassment and charged €2,713 per month to my account in the Branch without my agreement for 8 months to November.*"

The Complainant submits that an agreement was reached with the Bank on **13 October 2011**, involving his making monthly payments of €1,000 and €325, respectively, on each account, which, the Complainant submits, the Bank did not commence until **May 2012**. The Complainant submits that notwithstanding the agreed amendments, the Bank continued its "*monthly harassment*" from 2012 to 2015.

The Complainant submits that the Bank, in appointing a Receiver over his properties did not provide him with any notice, either written or verbal, of its intention to do so. The Complainant submits that this behaviour by the Bank, was wrongful and further, that it deprived him of the opportunity to seek legal relief, in order to protect his professional reputation.

The Complainant submits that the actions of the Bank have caused him a great deal of distress.

The Provider's Case

This Bank submits that it refutes the Complainant's contention that there was any arrangement in place, other than that which appears on the face of the loan agreements themselves.

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The Bank submits that there is no evidence from its records which supports the Complainant's assertion of alternative verbal agreements, at variance from the terms confirmed in both Letters of Offer.

The Bank submits that the Complainant's Relationship Manager at the time [Mr. M.], in 2005 and 2006, did not have any credit authority and would not have been in a position to give any assurance to the Complainant that the terms of the mortgage loans would differ from those set out in the Letters of Offer. It says that the Relationship Manager of that time resigned from the Bank a number of years ago. The Bank submits that the Relationship Manager's assistant [Ms.V.], has confirmed that she has no recollection of attending meetings with the Complainant at this time in relation to mortgage applications. The Bank has furnished a note in this regard, bearing a typed signature (of Ms. V.), which states:

"I recall looking after [the Complainant] and being his Relationship Manager but from my recollection it was not until circa late 2006 after I was appointed Assistant Manager and took over looking after the High Net Worth (HNW) portfolio in xxxxxxxxx Branch.
I do not recall being at any meeting with [Mr. M.] and [the Complainant] in relation to his mortgage accounts in Dec 2005 and January 2006. It would have been highly unusual two relationship Managers at a mortgage meeting.
In any of my dealings with customers I have never made a commitment regarding terms until it was agreed by the relevant sanctioning authority. Policy changed regularly so there was no way you could give any assurances or verbal agreement on any matter relating to facilities until you had it in writing from the relevant authority. From my recollection of [Mr. M.] he too would never have made any such commitments or given assurances in relation to facilities.
I note that [the Complainant] refers to [Mr. M.] as Manager and me as his Assistant Manager. For clarity, [Mr. M.] was a Bank Official as far as I can recall or Officer Grade at most at that time (2005) and I was an Officer Grade. As stated above, it was not until late 2006 that I was appointed Assistant Manager and that I took over a portfolio with [the Complainant] and that is when I recall having dealings with him.

In support of its position, the Bank points to its Branch Mortgage System (BMS) recommendation from the Complainant's branch, dated **17 October 2005**. It says that this BMS relates to the first mortgage loan application, account -7009, and it states "*Request for int only for 5 yrs and clear at that stage from invests*"…"*Seeking 5 years with 5 years int only. Plans to clear from invs @ end 5 years*".

The Bank submits that the first mortgage loan application was submitted to the Bank's Mortgage Lending Unit for credit approval, and that following the sanction of this application, €180,000 was drawn down by the Complainant, on **23 December 2005**. The Bank submits that this mortgage loan, account -7009, was in respect of a Buy-to-Let investment property. It says that Part One of the Letter of Offer confirmed that the terms of loan were €180,000, which was stated to be repayable to the Bank on an interest only basis over a period of 60 months (five years). It says that Part Two of the Letter of Offer set out the Special Conditions applying to the mortgage loan and, in particular, it is stated

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that, "*The repayments quoted in this Letter of Offer are interest only for 5 years after which capital plus interest accrued is to be cleared in full from [third party bank] capital guaranteed investments".*

The Bank submits that in **December 2005**, the Complainant sought facilities from the Bank to purchase a second investment property. It points to the Lender's Report dated **16 December 2005** as confirming that the application was for a term of five years, on an interest only basis, "*to clear from invests*". The Bank submits that as this was the Complainant's second investment property application, it had to be referred to the Bank's Commercial Lending Manager for credit approval. The Bank submits that the Commercial Lending manager sanctioned this mortgage, loan account number ending -**7040**, for a term of ten years, with five years on interest only.
The Bank says that Part One of the relevant Letter of Offer confirmed that the terms of the Agreement were that €217,000 was repayable to the Bank, over a term of 10 years/120 months, on an interest only basis for five years, then reverting to annuity. It submits that Part Two of the Letter of Offer set out the Special Conditions applying to the mortgage loan and that one of these Conditions states, *"The repayments quoted in this Letter of Offer are interest only for 5 years after which they will revert to principal and interest repayments".*

The Bank submits that the above Letter of Offer dated **03 January 2006** was signed by the Complainant, which it says, demonstrates his acceptance of the terms and conditions of the mortgage loan, as set out above. The Bank submits that while the Letter of Offer is not signed by his solicitors, there is a letter dated **23 February 2006** from the Complainant's Solicitors, to the Bank, which confirms that "*the signature of [the Complainant] on the loan offer was witnessed by the undersigned".*

The Bank submits that this loan was drawn down by the Complainant on **13 March 2006,** in the amount of €217,000.

The Bank submits that, based on the above, it refutes the Complainant's contention of there having been any verbal agreement reached with his previous Relationship Manager in respect of the terms of both mortgage loans. It submits that the Letters of Offer clearly indicate the terms of the contract between the Bank and the Complainant and that the Complainant had the opportunity to be advised by his own Solicitor in relation to same.

The Bank refutes the Complainant's allegations of harassment. It submits that the actions taken by the Bank were due to the failure of the Complainant to comply with his contractual repayments, as set out in the Letters of Offer.

The Bank submits that its position is that, whilst it had the right to take steps to recover the debt, it acknowledges that there were shortcomings in its customer service, following the appointment of a Receiver over the secured properties. The Bank submits that it is satisfied that it was entitled to appoint a Receiver over the Complainant's properties, due to the Complainant's failure to adhere to his contractual obligations in relation to his mortgage accounts, from 2011 onwards, the subsequent arrears which accrued on both

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accounts and the failure of the Complainant to accept the alternative repayment arrangement offered to him by the Bank.

The Bank submits that whilst it was within its rights to appoint a Receiver, it acknowledges that the Complainant was incorrectly informed during a telephone call, on **21 October 2015** that there was a Receiver in place over his properties and that the only way the Receiver would be stood down, would be for the balance on the account to be cleared in full.

The Bank says that it acknowledges that there have been a number of customer service failures on its part in its dealings with the Complainant, which it describes as follows:

- Not responding to the Complainant's letter dated **24 June 2014**;
- Incorrect information was given to the Complainant when he telephoned the Bank's ASU on **21 October 2015**, following the appointment of the Receiver;
- Failure to assess the SFS and supporting documentation submitted by the Complainant, in **November 2015**, in a timely manner;
- Incorrect information was given to the Complainant in relation to the Receiver during a telephone call on **03 October 2016**.

In light of the above customer service issues the Bank submits that it has offered, as a goodwill gesture, the sum of €10,000 to the Complainant.

Decision

During the investigation of this complaint by this Office, the Bank was requested to supply its written response to the complaint and to supply all relevant documents and information. The Bank responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Bank's response and the evidence supplied by the Bank. 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 **23 August 2018**, 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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Submissions were subsequently received from the Complainant and from the Bank, by way of response. I have considered these submissions in detail however I have not been persuaded to alter my determination in the matter. The final determination of this office is set out below.

In conducting an examination of the Complainant's complaint, I note that there is disagreement between the parties as to the terms and conditions which were in place and which governed the loan agreements in question.

The Loan Agreements

The loan agreements were entered into in 2005 and 2006, respectively. The Complainant's complaint is about the poor treatment which he submits that he was subjected to by the Bank during the period 2010 to 2016. As a preliminary point, I am satisfied, taking into account the timeline of events involved, that Section 51(5) of the FSPO Act, 2017 applies to the factual matrix of the within complaint, and that the conduct complained of constituted conduct of a continuing nature, thereby coming within the jurisdiction of this Office.

The Complainant contends that although there were written loan agreements in place, that these "*were produced for bank file purposes".* The Complainant submits that he was advised orally that, in reality, he needed only to pay interest for a 10 year period, on each loan, with an option to repay capital as and when it suited him, subject to clearance by 2016.

With reference to the Complainant's contention in this regard, I would note that there is a generally accepted position at law regarding the introduction of oral evidence to vary the terms of a written agreement. Generally speaking, it is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement. This position was re-iterated recently by McGovern J., in ***Promontoria (Arrow) Ltd. v Mallon & anor*** [2018] IEHC 145. In that case, one of the Defendants, who had agreed to the loan, sought to argue that there was an oral agreement between the parties which was not included in the facility letter. His position was that the facility letter did not comprise the whole of the agreement but rather that there was *"another key term…which was not reduced to writing*. I note that in the course of pronouncing judgment in the matter, the Court held that:

"For reasons of public policy, the courts will not permit oral evidence to be admissible if it introduced for the purpose of contradicting the terms of a written agreement between the parties."

In coming to his decision, the Judge referred to the following case law:

*"In **Ulster Bank v. Dean** [2012] IEHC 248, this Court rejected the defendant's contention that a collateral contract had varied the express terms of a loan facility. At para. 6, the court stated:-*

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'…The defendants have not produced any written documentation to support this claim. It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the "parol evidence" rule. See ***Macklin v. Graecen & Co.*** *[1983] I.R. 61 and* ***O'Neill v. Ryan*** *[1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement.'*

In ***Tennants Building Products Limited v. O'Connell*** *[2013] IEHC 197 , Hogan J. at para. 13 summarised the modern jurisprudence on collateral contracts as follows:-*

'The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and in Galvin) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in ***Deane****.'*
[my emphasis]

The ***Tennants*** case was recently cited by the Court of Appeal in the case of ***AIB Mortgage Bank -v- Hayes & Anor*** [2018] IECA 152. The High Court, in that case, had found as a matter of fact that:

"There is sufficient written evidence of a collateral agreement between the parties ..."

The Court had nonetheless applied a strict interpretation of the parol evidence rule and granted judgment to the Bank.

The Court of Appeal held that the written and oral representations by the Bank (which had been found by the High Court to be fact) had to be complied with. The appeal was thus allowed.

Notably, in reaching that decision, Gilligan J. identified that, *"In the present case, the documentation relied on [sic] the High Court showed that the promise of the five year review was a critical factor in the defendant's decision, so that the "cogent evidence" required in Tennants Building Products is satisfied in the present case.* [my emphasis]

Having regard to the entirety of the evidence before me, I am unable to find that there is any such "*cogent evidence*" in the Complainant's instance, such as would bring the matter within the terms of the above Court of Appeal decision.

I therefore consider that it is reasonable, in examining the within complaint, to proceed on the basis of the principles enunciated by the Courts in this regard. I accept, therefore that, in the absence of any written evidence to the contrary, the written terms and conditions of the loan agreements which were put in place between the parties, in 2005 and 2006 are the terms which governed the relationship between the parties.

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Correspondence between the Bank and the Complainant

The Complainant has submitted that he was subjected to "*harassment*" by the Bank, over a 5 year period.

In examining this issue, I have had detailed regard to the communications which occurred between the parties. To this end, I have set out a timeline of events, below:

I note that on **23 October 2008** a letter issued to the Complainant, from the Bank regarding account -7040, acknowledging an out of course lodgement of €**67,000.00,** on the 20th October 2008. This lodgement had the effect of reducing the balance of the outstanding mortgage to €150,053.31dr. The letter stated that the monthly repayment on the account was amended to **€626.46**, with effect from **13 November 2008**.

I note that on **28 October 2008** a letter issued to the Complainant from the Bank, regarding account -7009, acknowledging an out of course lodgement, of **€**50,000.00 which was made on the 20th October 2008. This had the effect of reducing the balance of the outstanding mortgage to €129,749.59 dr. The letter stated that the monthly repayment on the account was amended to **€539.40**, with effect from **23 November 2008**.

A letter issued to the Complainant, from the Bank, on **14 September 2010**, stating that the term of the loan -**7009** was due to expire on **23 December 2010** and that it needed to be redeemed by the Complainant before that date.

The Complainant disagreed with the Bank's position and on **20 December 2010** the Complainant wrote to his new Relationship Manager (RM) within the Bank and stated that his "*real*" agreement with the Bank (which he submitted had been reached with his RM and the RM's assistant, in 2005 and 2006) was that each of the loans were for a period of ten years until the "*section 50 restriction ended and a sale would occur*".[1] He stated that it had been specifically agreed with Bank officials, that both of his mortgage loans would be treated similarly, to be reviewed at the sixth year in order to take account of any changes to the "*tax shelter and loan interest allowance*".

The Bank submits that, in fact, the loan term on the Complainant's mortgage account -7009 expired, on **23 December 2010** and that it extended same until **12 March 2011,** to allow time for the Complainant to clear the loan, or to submit a new credit application to the Bank. The Bank submits that no agreement was, however, reached at that time as, it says, the Complainant continued to insist that the term of both loans was ten years, interest only.

By letter dated **25th March 2011** the Complainant's RM wrote to the Complainant stating that the 5 year interest only period on account -7040 had elapsed and that both accounts were due for review. The letter stated that:

[1] Section 50 of the Finance Act, 1999

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"mortgage account [-7009] has elapsed and a new loan agreement will need to be agreed and mortgage account [-7040] is due to convert to capital and interest payments next month."

The letter requested certain documentation from the Complainant in order to assess the proposal, namely *"Most recent copy of last available Notice of Assessment; Account confirmation of tax position and certified asset and liability profile."*

Arrears correspondence issued from the Bank, regarding account -7009, dated **27 April 2011** (which stated that the account had fallen into arrears on 07 March 2011 and that the total amount of arrears due was €130,451.49).

Following receipt of same, the Complainant wrote a letter to a Ms. M., within the Bank's Arrears Support Unit (ASU) on **06 May 2012**, in which he disputed that there were any arrears on the account and referred to his letter to the Bank dated **20 December 2010,** in this regard.

The Complainant also wrote to his RM on **06 May 2011,** stating he was not in arrears on either loan account. The letter requested his RM to:

"*Please also advise your colleagues in [the Bank] that I am not in arrears on account [7009] as it and [7040] are under review with you.*"

By letter of the **12 May 2011**, Ms M., of the ASU, responded to the Complainant's letter of **06 May 2011**, in which she apologised to the Complainant "*for the error"* on the part of the Bank, saying:

"*I have researched the background to your case and see that you are already in discussions with the bank regarding this facility. I sincerely apologise for the error on our part. You have indeed being doing business with this bank for a long number of years and I assure you that it very much appreciated. I have spoken to the staff in this department about this matter to ensure this kind of error does not reoccur".*

I note that the Bank's stated position in respect of the contents of the letter is that no error occurred on its part, in issuing arrears correspondence to the Complainant, and that it does not understand which error the Bank Official in question is referring to. The Bank says that while the letter from Ms. M., of the ASU, apologised to the Complainant "*for the error*", there had been no error on the Bank's part in issuing arrears correspondence to the Complainant in April 2011 on the basis that the loan was out of contract, with no agreement sanctioned, or in place, contrary to the Complainant's assertions regarding the terms of the loans. It has submitted that as the officer in question is no longer employed by the Bank, it cannot clarify with her what error she was referring to in this correspondence.

On **17 June 2011** a further Bank officer, Mr. McN., from its ASU, telephoned the Complainant, as the Complainant was querying the debit of capital and interest repayments of €2,713.83 from his current account to the credit of account -7040.

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The Complainant advised the ASU the he had an agreement in place with Ms M. of the ASU on both accounts to re-apply interest only for a further five years.

It appears from the evidence available, that while discussions were ongoing with the Complainant and the Bank, no proposal had been submitted by his RM for credit approval, at that time. The Banks' position is that the Complainant's RM was awaiting receipt of the documentation requested in the letter of **25 March 2011**.

The Bank says that Mr. McN. informed the Complainant there was no evidence of such an arrangement having been made with Ms M. and that he requested that the Complainant contact the mortgage co-ordinator in his branch to organise matters. The Bank notes that the Complainant indicated that he would prefer to speak with Ms. M. on her return from annual leave.

On **09 July 2011**, the Complainant wrote to Mr. McN. of the ASU and stated:

"I trust that you have had an opportunity to speak with [Ms M] on her return from holiday. I look forward to your confirmation that my accounts will continue to operate in accordance with my letters of 20 December 2010 and 3 June last".

There is an internal email of the Provider, dated **11 July 2011**, sent from Ms. M. of the ASU to the Complainant's RM, in which she stated:

"Whilst I have been on leave 17th June – 1st Jul, [the Complainant] has been advising the team here in the Arrears Support Unit that I have sanctioned extension of 5 years on that property we discussed, this is not the case as you know....."

There is an internal Bank note, dated **13 July 2011,** from Ms. M. stating: *"[Ms. M.] has not agreed to extend term on loan, this is within remit of RM....[Ms. M.] phoned client today re same and intended to ask him to provide up to date financials to assist with processing an application for extension of term...had to leave a voicemail requesting customer to call me back".*

On **22 July 2011**, the Complainant wrote to a Bank official, 'Ms. E.', in which he stated:

"I noted that you were not familiar with my account and I contacted Ms M.'s office to have her contact you in order to have my account amended for the months of April, May, June and July. I also noted your confirmation that there is no need for any new application as my facilities were for ten years from 2005. I look forward to seeing my account amended as soon as possible."

This was followed up by the Complainant by letter dated **07 August 2011**, to Ms. E., in which he asked:

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*"Please let me have the confirmation requested in my letter of 22 July last and earlier correspondence. In the meantime, please do not effect **any further direct debits** of some €2,713.83".* [original emphasis]

The Complainant's RM wrote to the Complainant on **24 August 2011** to confirm what he was going to propose to the Bank's Credit Unit, and stated that he would need up to date financial information from the Complainant, in order to prepare a new application.

The letter set out the following proposal, which the RM intended to put forward:

1. Account 7009 - A further interest only agreement to be to be cleared in full within 2 years, from the proceeds of a maturing [third party] investment.
2. Account 7040 - The RM stated that he would be unable to get a 5 year interest only agreement on this loan and suggested a fixed repayment of €1,500 per month, which would have the effect of clearing approximately half the loan within five years with the balance to be paid off by way of a final lump sum reduction.

The RM sought certain documentation from the Complainant in the form of:

- *Copy of last Notice of Assessment*,
- *Confirmation that Tax affairs are up to date*
- *A copy of the [third party] investment document. I will only require the original on sanction of the loan*."

The RM indicated that, *"Upon receipt I will be in a position to seek approval for the above*".

On **25 August 2011** and **07 September 2011** arrears letters issued to the Complainant re Account 7040, advising of arrears in the amount of €2,712.91.

The Complainant wrote to his RM on **02 September 2011**, stating that he was not in a position to deal with the RM's letter of **24 August 2011** until the end of the month.

On **09 September 2011** the Complainant again wrote to Ms M. of the ASU, following receipt of arrears letters dated 25 August 2011 and 07 September 2011 and that "*despite the apology in your letter of 12 May last you have renewed your insensitive letters which are very disturbing to my family*". He re-iterated that he was not in breach of his agreement with the Bank and he again referred to the content of his letter dated **20 December 2010**.

On **30 September 2011**, the Complainant wrote to the RM, enclosing the financial documentation and information sought. In his letter, the Complainant stated that he was agreeable to the proposal set out in the RM's letter dated **24 August 2011** but that such agreement was *"subject to a repayment of loan 7040 at €1,000 pm instead of €1500pm*".

On **16 November 2011**, a letter issued to the Complainant confirming his request to cancel the direct debit mandate from his current account to his mortgage account 7040, advising that:

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"*as direct debits are no longer being collected on this home loan the onus is on you as the mortgage account holder to ensure that a sufficient amount is lodged each month in order to ensure that the loan is cleared within the authorised term and the account does not go out of order or in arrears as a result."*

The Complainant has submitted that during this period and after receiving a letter of apology in May 2011 that he was nonetheless subjected to "*continued major harassment and charged €2,713 per month without his agreement.*"

I would note that as the Complainant first sought to have the Bank cancel the direct debit of €2,713 in June 2011, it is not clear why the Complainant's instructions were not acted upon until November 2011 and why such a delay arose. If the Bank had identified issues with the execution of the Complainant's instructions, then the Bank ought have discussed the matter with the Complainant.

During this period, the Bank continued to send arrears letters to the Complainant.

I accept the Bank's position, that in issuing the arrears letter it was simply acting in accordance with its obligations under the relevant codes of practice. However, I take issue with the fact that the Bank did not engage with, or address the Complainant's contention that he was acting in accordance with the terms of the agreement, as he understood them. I appreciate that the Bank did not agree with the Complainant's position, but these were clearly matters of some import for the Complainant, and I can appreciate his frustration as the Bank continued to ignore the issues he had raised and proceeded as if he had not raised these matters of concern with it.

On **02 December 2011** the Complainant's RM submitted a proposal to the Bank's Credit Department, (in the terms set out in his letter to the Complainant of **24 August 2011).** The RM sought the Credit Department to consent to the following arrangements:

In relation to Account 7009: an interest only period of 12 months with a review at the end of the 12 months, together with a repayment from [a third party] Bond. A new Letter of Offer would need to issue as it was out of contract.

In relation to Account 7040: a reduced repayment of €1,500 per month as part capital and interest, to be reviewed after 12 months. The balance after five years would then be circa €75k, which, it was proposed would be manageable from the proceeds of a third party fund, due to mature in five years.

On **16 December 2011** the Complainant's RM wrote to the Complainant to inform him that he was moving to a new branch and that he would be allocated a new RM.

On **16 January 2012** the Bank's Credit Unit sanctioned the RM's proposed request, namely interest only repayments for two years on account -7009, with a repayment from [a third party] Bond, thereafter and repayments of €1,500 per month on account -7040 for a

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period of two years, with a review to take place at that stage, subject to all arrears on both of the loans being brought up to date.

In **February 2012**, the Complainant informed his newly appointed RM, (Mr K.), that he had reached an alternative repayment schedule with his previous RM and that he was not agreeable to payments of €1,500 per month on account -7040. He stated that he had advised his previous RM, (Mr O'N) of this, prior to Mr O'N's relocation to a different branch.

At this point in time, it appears that the Complainant understood there to be an "*arrangement*" in place to pay €1,000 per month, further to his letter to the Bank of **30 September 2011**. The Bank had not however agreed to this and the effect of the Complainant's counter-proposal to pay €1,000 per month, meant that there was no agreement to the alternative repayment arrangement sanctioned by the Bank. However, the Bank did not clarify this for the Complainant or communicate the effect of the Complainant's letter on the sanctioned alternative repayment arrangement, of €1,500 per month. Resultantly, the Complainant understood the Bank's silence to constitute acquiescence to his making payments of €1,000 per month, to account -7040. Whilst I accept that it had not so agreed, I am also satisfied that the Bank should have communicated this clearly to the Complainant, at the time, to prevent any misunderstanding.

On **23 March 2012** the Bank issued an arrears letter to the Complainant in relation to Account -7040, advising of 6 missed repayments and arrears of €16,227.02 since the 18th August 2011.

On **29 March 2012** an arrears letter in respect of account -7009 advising of arrears of €134,291.18, since 07 March 2011.

On **26 April 2012** the Complainant wrote his new RM, Mr K., saying:

"*I was pleased to speak with you yesterday and look forward to hearing from you in order to re-instate the monthly debits to my Property Current Account. I confirm that I want to implement the arrangements made with your predecessor [Mr O.N] in accordance with my letters of 30 September 2011 and telephone confirmation of 13 October 2011."*

The Complainant explained the reasons, including his wife's recuperation, as to why *he "Must stay with the aforementioned arrangements"*. He also proposed making a payment of €8,291 at that time, representing €4,291 toward loan account -7009 and €4,000 toward account -7040.

On **08 May 2012**, the Complainant made lodgements of €4,611.27 to account -7009 and €4,000 to account -7040.

On **16 August 2012** the Complainant wrote to his RM, explaining that he had learned during a telephone conversation with the Bank that day, that to his great disappointment his overdraft facility was being withdrawn. He explained that:

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"as far as the two home loans were concerned, I had understood that the issue was concluded by the encashment of my cheques in accordance with my letter of 26 April and the monthly direct debits since then to my account."

The letter explained that his wife had required hospitalisation and major surgery and that she was in a convalescent home and that he needed to incur some €20,000 worth of home improvements in advance of her return home. He explained that due to his circumstances, he was "*obliged to stay with the arrangements mentioned in my letter of 26 April last".*

On **03 December 2012**, an arrears letter issued to the Complainant advising of arrears of €26,924.33, since 18th August 2011 on account -7040.

The Complainant wrote a letter to the ASU, on **05 February 2013**, saying "*I do not accept there is any excess on my above account…I refer you to my letters of 16 August 2012 and 26 April".*

On **18 February 2013**, an arrears letter issued to the Complainant in relation to account -7040 advising of arrears of €32,207.47.

The Complainant responded by letter to the Manger of the ASU, referring to his letter of the **05 February 2013**, and a telephone call (of 22 February 2013) with an agent of the, "*confirming that my account is not in arrears*."

I have listened to the audio recording of the call of **22 February 2013**. The ASU agent advised the Complainant that the call was in relation to the above correspondence it had received from him, dated 05 February 2013, as follows:

Agent: I'm calling in response to your correspondence, I think you sent correspondence in there dated 5 February just disputing, I think, that there were arrears on your two buy to let mortgage accounts, and I was asked to give you a call in relation to them…
…
Okay, [C's name] I think you are making payments of €325 and €1000 per month then on the other one.
Complainant: Yes, that's correct
Agent: As far as I can see, on the larger of the two loan accounts, the sanctioned payment were €1500 per month so that would account for the arrears there, do you know what I mean?
Complainant: €1500?
Agent: Yeah.
Complainant: Well that was wrong it was €1000, is what I offered and what I understood was accepted and that was what was being taken and paid.
Agent: Ok, well I believe €1500 was sanctioned, yeah.
Complainant: No, no, no, we were discussing various figures but as I said in my other correspondence, I ran into a lot of heavy expenditure in the past year but nevertheless I am, you know, honouring what, as far as I am concerned I committed myself to.

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Agent: Right, right, yeah, it's just how do you intend on paying down these two loans going forward.
Complainant: Well I'll keep going like that anyway. The big thing is we intend to sell them, at the end of 2015…. That's the general objective…
...If that doesn't work I'll have to pay out of my own resources.
(General discussion ensues about the potential sale of the apartments)
Agent: So it's your intention to continue paying €1000 per month on the larger of the two, is it?
Complainant: Yes
Agent: And what about the smaller one then, €325?
Complainant: Yeah, as I said in the correspondence, yeah.
Agent: Right, right, well I'll just note that on the file
Complainant: Obviously if something fortuitous happened I would do like as I did before and clear off a lump…
(The Agent explains that a manger in the ASU has yet to be assigned to his case. The Complainant explained that he had a Relationship Manager in the Bank itself.)
Agent: Okay [Complainant] In the meantime, sure listen, I'll put a note on the account of our conversation to day.
Complainant: My record is that I honour everything have undertaken everything that I have undertook to do, quite frankly with [the Bank] from the very beginning.
Agent: Ok, that's fair enough, okay and I'll note that and I suppose yeah, a manager will be assigned to your case in due course and you can discuss it going forward then.
I accept that as the Complainant was making payments of a smaller amount than those sanctioned by the Bank, this is why arrears were accruing. I note that the Complainant advised, during the above call, that he "*understood that was accepted*", by the Bank. As the Bank had not so accepted the lower repayments of €1,000, it should have clearly advised the Complainant of same.

So, the Bank did not address the Complainant's contention that his account was not in arrears but rather it simply continued to issue arrears letters.

Further arrears letters issued from the Bank, on **07 March 2013**, in respect of loan account -7009, advising of arrears of €130,513.28, since 07 March 2011 and on 20 May in respect of loan account 7040, in the amount of €37,480.61, since 18 August 2011

On **22 May 2013** the ASU issued two letters to the Complainant, to inform him that it was arranging for a Field Representative to call to his property in order to discuss the arrears on both of his mortgage accounts.

The Field Representative called to the Complainant's home on **07 June 2013** but as there was no one at the property, the Field Representative left a note to advise he had called to the property. On this same date, I note from the audio recording furnished, that the Complainant telephoned the ASU and advised that he had known nothing of the planned field visit. The Agent directed him to correspondence which he had received in this regard, and referred him to the Bank's letters of 22 May 2013 in which he was notified of same.

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On **11 June 2013** the Field Representative again called to the Complainant's property and met with the Complainant.

The Bank submits that the Complainant wrote to the Bank on **14 June 2013** referencing the letters from the Bank dated **22 May 2013** and to his meeting with the field representative, advising the Bank to "*Please confirm that you have acquainted yourself with the correct facts relating to my accounts*". In response, on **11 July 2013**, the ASU wrote to the Complainant, confirming that the accounts remained in arrears and that they required him to contact the ASU to discuss matters.

On **31 July 2013** the Complainant responded the Bank, by letter, advising that:

"It was not established with [the field agent] 'that my account remains in arrears', as far as I am concerned I have complied with all my arrangements with [the Bank] since inception of the accounts in 2005/2006."

On **19 August 2013** an arrears letter issued from the ASU, re account 7040, advising of arrears of €42,871.40.

On **05 September 2013** an arrears letter issued re account 7009, advising of arrears of €131,259.13

On **18 November 2013** an arrears letter issued from the ASU, re account 7040, advising of arrears of €48, 262.19.

The Complainant wrote to the Manager of the Bank's Mortgage Bank centre on **28 November 2013**, in which he indicated:

"I again confirm that my above two accounts are not in arrears or outside the arrangements made between [the Bank] and myself in 2005/2006, as previously pointed out."

On **05 December 2013** an arrears letter issued, re account 7009, advising of arrears of €131,741.57.

On **29 January 2014** a letter issued, re account -7040, advising of arrears and that unless the Complainant paid the full amount of arrears due and owing on each account within a 10 day period, or agreed firm repayment proposals within that time, the Bank would instruct its Solicitors to being legal action with a view to a sale of the properties.

On **30 January 2014** an arrears letter issued, re account -7009, advising of arrears of €132,060.87 and that unless the Complainant paid the full amount of arrears due and owing on each account within a 10 day period, or agreed firm repayment proposals within that time, the Bank would instruct its Solicitors to being legal action with a view to a sale of the properties.

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The Complainant responded to these letters, by writing to the ASU on **14 February 2014** in relation to this correspondence, refuting that he was in arrears.

The Bank has itself acknowledged that, since 2012:

"*it did not formally confirm in writing that no agreement was made with [Mr O'N, RM] in respect of the account as the Complainant did not agree to the terms sanctioned. The Complainant did write to the Bank on several occasions during that period referring to his original alleged verbal agreement in 2005/6 and also his subsequent alleged agreement with [Mr O'N]. It is noted that the Bank did not formally and specifically refute this allegation in writing throughout that period.*"

I am of the view that, had the Bank "*formally and specifically*" addressed these points with the Complainant, at those earlier times, it may have served to resolve matters between the parties at a far earlier stage.

Appointment of a Receiver

The Complainant contends that the Bank wrongfully appointed a Receiver over each of the secured properties in **October 2015**, leading, he submits, to "*distress mental anguish and reputational damage."*

The Bank maintains that the Receiver was validly and correctly appointed, in relation to both of the Complainant's properties. It says that the Bank's decision to appoint a Receiver was due to the high level of arrears which had accrued on the Complainant's mortgage accounts and his "*failure to engage with the Bank in a meaningful way".*

I note that, over a year prior to the appointment of a Receiver, on **18 June 2014**, correspondence had issued to the Complainant warning that, as the Complainant had failed to meet his repayment obligations pursuant to the terms of the Facility Letter governing the account, the Bank was demanding that the full balance of the loans be paid within 7 days of the date of the letter and that if the full payment was not made within 7 days, the Bank would take steps necessary to recover these debts and/or enforce its rights under the Security held to include the appointment of a Receiver and any other legal action.

On **24 June 2014**, the Complainant responded to the Bank stating that the duration of the loan agreements was in fact 10 years and that:

"[the Bank] required payment of interest only for the 10 years unless I wished to pay off capital at any point. The latter I availed of by paying off €117,000 in 2008 and by increasing the monthly direct debits in 2011 and 2012".

The Bank accepts that it did not respond to the Complainant's letter of 24 June 2014.

A Receiver was then appointed over the Complainant's properties by way of Deed of Appointment dated **06 October 2015**, over a year after he the Complainant had received

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the 7 day warning letter. The Complainant was informed of the appointment in writing on **20 October 2015**.

On **21 October 2015** the Complainant telephoned the Bank's ASU Department in relation to the appointment of the Receiver. The Complainant told the Agent that his understanding was that the loans were due to be repaid in full in 2016 and that he was "*working towards what [he] thought was an agreed solution"*. The Complainant queried if a mistake had been made in appointing the Receiver. The Agent advised that he would investigate the matter and called the Complainant back later that same day.

When the Agent called the Complainant back, he advised him that prior to the Receiver being appointed, new demand letters should have issued to him by the Bank and that, because of this failure, the Bank would have to discharge the Receiver and issue new demand letters before re-appointing the Receiver.

The Bank has submitted that it later discovered that the information given to the Complainant by its Agent was, in fact, incorrect and that it was entitled to rely on the demand letters that had issued to the Complainant in **June 2014**. It has submitted that notwithstanding this, it made the decision to discharge the Receiver.

I note that the Complainant subsequently wrote to the Bank, expressing his view that the Receiver had been appointed in error. In his letter to the Bank of **21 October 2015**, he said:

"*I had understood the Bank was happy to continue on the basis of our agreement of monthly repayment of €1000 and €325 and as summarised in my letter…Please confirm that the receivership appointment will be cancelled and allow for an honourable repayment of the loan terms during 2016, as previously agreed*."

The Complainant then wrote to the Receiver on **23 October 2015** advising him that "*Your appointment was made in error and, consequently, I return herewith your papers"*

The Complainant wrote to the Bank on **24 October 2015,** and advised that:

"*I always honoured my undertakings to [the Bank] and this will continue in 2016 when repayments will be made as already confirmed in writing. In view of the above facts, I am amazed that before the10 year loan period is due to expire, you would treat a lifelong and elderly client with such inhumanity."*

On **28 October 2015** an agent from the Bank's ASU spoke with the Complainant on the telephone and the Complainant advised him that the Receiver had contacted the Management Company dealing with his properties, which the Complainant explained was professionally embarrassing for him. The agent advised the Complainant to complete and return an SFS to the ASU.

The ASU received a completed SFS and supporting documentation, from the Complainant on **03 November 2015**.

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On **06 November 2015** a letter from the Receiver issued to the Complainant, confirming that the receivership was not proceeding.

The Bank ultimately responded to the Complainant's letter of **24 October 2015**, at some remove and by letter dated **11 January 2016**, stating:

"*The Bank acknowledges your previous good repayment record and long history as a customer of [the Bank]. However, in light of the arrears on your mortgage accounts and your failure to meet the contractual repayments, the Bank has appointed a receiver in relation to your properties. Your mortgage account number [7009] is out of contract since March 2011 and your mortgage account number [7040] is currently €97,820.32 in arrears. The decision to appoint a Receiver will continue to stand.*"

I note that this information regarding the Receiver was incorrect, as, at that point in time, the Receiver previously appointed had already been discharged.

The Bank has acknowledged that an error was made by the Agent as to the appointment of a Receiver and that the Complainant was given incorrect information in this regard. I am satisfied that it was a significant error, in all of the circumstances.

With reference to the letter which the Complainant had written to the Bank on **24 October 2015,** in which he advised that "*I always honoured my undertakings to [the Bank] and this will continue in 2016 when repayments will be made as already confirmed in writing. In view of the above facts, I am amazed that before the 10 year loan period is due to expire, you would treat a lifelong and elderly client with such inhumanity*", the Bank's position is that, although the demand letters and subsequent appointment of a Receiver were fully and legally valid, it acknowledges that it mistakenly advised the customer that new demand letters should have issued. It says that, as the Complainant had begun to meaningfully engage with the Bank and submitted an SFS with supporting documentation at the beginning of November 2015, the Bank did not then proceed with the re-appointment of a Receiver on the Complainant's properties.

Whilst no timeline was indicated on the warning letter which issued in June 2014, the Bank did not act to appoint a Receiver until over a year later. Whilst the Bank may have been legally entitled to rely on this letter in appointing a Receiver, I am satisfied that it would have been fair and reasonable of the Bank to have issued a further warning letter prior to its making the appointment.

Closing of the Complainant's Loan Accounts

The Complainant closed each of the loan accounts in 2016. On **08 February 2016** a lodgement of €25,000 was made to account 7009. The Bank says that on **08 August 2016**, redemption figures for both mortgage loan accounts were issued to the Complainant at his request. A lodgement of €30,000 was made to account 7040 and on the same date, account 7009 was redeemed and closed by the Complainant by way of a payment of €110,714.98.

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The Bank submits that on **02 September 2016** the Complainant wrote to the ASU and sought a "*substantial reduction in the amount owning*", as compensation for the Bank's actions referred to in his letter dated **24 October 2015.** The Bank says that on **09 September 2016** the Bank issued its response to the Complainant and that on **03 October 2016** the ASU telephoned the Complainant to inform him that following assessment, no forbearance had been approved for account 7040.

On 03rd October 2016 the ASU phoned the Complainant to inform him that following assessment, no forbearance had been approved in respect of account 7040. During this call, the Complainant was informed that there was a Receiver in place over his properties and that the only way to have the Receiver removed would be for the balance on the account to be cleared in full.

On this same date, **03 October 2016** account 7040 was redeemed and closed by the Complainant.

Customer Service Failures

The Bank acknowledges that there have been a number of "*customer service failures on its part in dealing with the Complainant."* I am satisfied that this is indeed the case.

The Bank has formally offered the Complainant a goodwill gesture of €10,000, in recognition of certain failures, which it identifies as follows:

- Not responding to the Complainant's letter dated 24 June 2014;
- Incorrect information given to the Complainant when he telephoned the ASU on 21 October 2015 following the appointment of the Receiver and the confusion caused by this misinformation;
- Failure to assess the SFS and supporting documentation submitted by the Complainant in November 2015 in a timely manner;
- Incorrect information given to the Complainant in relation to the Receiver on the telephone call on 03 October 16 and the confusion caused by this misinformation.

I am satisfied that, further to the above acknowledged failures, the Bank also failed to engage with the Complainant on any fundamental level, as regard his repeatedly stated position that he was operating in accordance with the terms as he understood them to have been represented.

I would note that the Consumer Protection Codes of 2006 and 2012 contain a provision which specifies that a Financial Services Provider must ensure that it "*complies with the letter and spirit of this Code".* I am not at all satisfied that the Bank's treatment of, and communication with, the Complainant complied with the spirit of the Code, and in my opinion, its failure to engage with the Complainant on a fundamental level compounded the Complainant's belief that he was acting in accordance with their "real agreements".

Having considered in detail all of the evidence before me, I am of the view that the various acts and omissions on the part of the Bank (both those admitted, and the additional errors

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I have referred to) were such that it is appropriate to partially uphold the within complaint. The Bank has already offered €10,000, which has not been accepted by the Complainant. I take the view that the figure of €15,000 is a more appropriate figure for compensation, in recognition of the difficulties, confusion and inconvenience caused to the Complainant over such an extended period.

Accordingly I consider it appropriate to direct the Bank to pay the amount of €15,000 to an account of the Complainant's choosing.

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Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2)(g).***

- Pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that the Respondent Provider make a compensatory payment of €15,000.00 to an account of the Complainant's choosing, within a period of 35 days of the Complainant's notification of account details 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

15 October 2018

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.