An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0206
Sector:	Banking
Product / Service:	Debt Management
Conduct(s) complained of:	Arrears handling Level of contact or communications re. Arrears
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the administration of the Complainants' mortgage loan account.

The Complainants' Case

The Complainants held a number of mortgage accounts with a third party provider who ultimately sold the loans to another third party provider, who in turn engaged the Provider the subject of this complaint to provide portfolio and asset management services.

The conduct that this claim relates to involves, primarily, loan account number ******107 ("Loan 107").

Loan 107 was due to be repaid in full by December 2011. It had been intended that the loan would be repaid from the proceeds of an investment. However, that investment did not mature before the end of the loan term.

The Complainants engaged with the Provider, advising them of the situation and seeking forbearance on the basis that they would make payments of interest only (or slightly more than interest only) until their investment was realised and they could repay the outstanding loan balance. The Complainants state that an agreement was reached in 2012 whereby they would make interest only repayments for a period of two years; and then in 2014 it was agreed that they would make repayments of €855 plus interest for 6 months on the understanding that repayment of the balance (or as much of same as was available) would be made when the investment was realised.

In or about the end of that 6 month period it appears that the repayment arrangement was not reviewed, the Complainants suggest that this was because the Original Lender was in the process of selling (or had sold) its loan book to the next third party provider ("the Second Lender").

The Provider wrote to the Complainants in April 2015 to advise them that it had been appointed by the Second Lender to provide asset management and portfolio services. The Complainants engaged with the Provider and contend that an agreement was reached where they would make monthly repayments of €1,000 per month and pay off the balance when investments matured. This amount was later increased to €1,450 in July 2015.

From July 2015 to February 2016 the Complainants continued to make these repayments. During this period considerable communications passed between the Provider and the Complainants as regards the progress being made on realising the investment and paying off the balance (or a large portion thereof). On the 26th of February 2016 the Provider issued demand letters, calling in the full value of the loans.

From February to June 2016 the Provider and the Complainants exchanged communications and proposals, and ultimately in June 2016 the Complainants arranged finance through another provider and settled their loan debts in full.

The Complainants state that the Provider forced them to re-finance their loans when they were not in breach of any agreement; that they were caused distress and embarrassment as a result of receiving demand letters by courier; that the Provider breached its own arrears resolution process by ignoring their proposal and not offering a review or appeal prior to issuing demand letters; that the settlement figure quoted in the demand letters was incorrect; and that, due to an error on the part of the Provider in applying a direct debit, warning letters issued to them in error.

The complaint is that the Provider has acted in breach of its arrears resolution process and has unreasonably, unfairly, and/or unlawfully proceeded on the basis that the Complainants were in breach of their agreement with the Provider. In addition, the Complainants assert that there were delays in effecting direct debits which caused repayment dates to be missed and an incorrect balance to be provided to them.

The Provider's Case

The Provider has stated the Complainants' account(s) were in default from 2012, no formal alternative repayment arrangement had been entered into, and it was thus entitled to call in the loans.

It has admitted that the balance set out in its demand letter was incorrect, and that two payments made in November 2015 were not applied to the account until March 2016. It has apologised for these (connected) errors, but contends that the decision to call in the loans was not affected by those errors.

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Decision

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

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

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

A Preliminary Decision was issued to the parties on 12 September 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.

Submission dated 1 October 2018 from the Complainants was received by the Financial Services and Pensions Ombudsman following the issue of the Preliminary Decision to the parties. This submission was exchanged with the Provider and an opportunity was made available to it for any additional observations arising from the said additional submission. While I note the Complainants, in their submission dated 1 October 2018, state that "*there were formal agreements*", this Decision notes that whilst forbearance was offered by the Provider, there was no long term legally binding agreement entered into between the Complainants and the Provider that would alter the terms and conditions of the original loan agreement. The issue, together with the additional content of the submission dated 1 October 2018 however has not persuaded me to alter my previous preliminary determination.

The Complainants entered into Loan 107 in December 2006 – a five year term mortgage for €100,000, to be repaid on an interest only basis until the end of the five year term, at which point the principal was to be repaid:

> "*at the end of the facility term or such other date as the Bank may determine at its sole discretion*".

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Loan 107 was one of a number of mortgages held by the Complainants with the Original Provider totalling €1,341,000. Security for these loans consisted of, amongst other things, a first legal charge over freehold land.

The following is listed as an event of default in the terms and conditions attached to this loan:

> *"If the Borrower fails to pay on the due date any monies payable or due by it from time to time to the Bank in the currency and manner specified in the Loan Agreement or fails to discharge or perform any obligation or liability to the Bank or if the Borrower or any Guarantor fails to comply with any term or condition under any of the Finance Documents..."*

The consequence of an event of default is set out therein as follows:

> *"then, and in such case and at any time thereafter, the Bank may, in its absolute discretion:*
>
> *(i) by written notice to the Borrower declare all drawings to be immediately due and payable and call for the repayment thereof whereupon same shall become immediately payable together with accrued interest thereon and any other sums due and payable by the Borrower under the Finance Documents..."*

At this point I would note that Loan 107 went into default once it had not been repaid in full at the end of its term (in or around December 2012).

From that point onwards, in the absence of a formal agreement or restructure, the lender was entitled to call it in and demand repayment in full. Whether it did so or not was a matter within its own commercial discretion. As set out in the finance documents, this was at the absolute discretion of the lender. This is not a discretion with which this Office can interfere. I would also note at this point that the lender refrained from calling in the loan for over 3 years.

No new agreement was entered into by both parties – such an agreement, which would alter the terms and conditions of the original loan agreement (in particular, repayment terms and loan term), would have to be signed by both parties and evidenced in writing. No such agreement has been provided to me.

The overarching complaint that the Provider forced the Complainants into a re-finance is therefore not one that I can substantiate.

The Complainants take issue with having received a demand letter by courier, and cite the distress and embarrassment that this caused them. While I appreciate it would have been a stressful experience, there is nothing inappropriate, in and of itself, about a demand letter being sent by courier. While the parties offer a different version of events about the delivery of this letter, the Provider can do no more than rely on the version provided to it by the

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courier. Whether or not the letter was signed for or simply left in a delivery box is not a matter which is necessary for me adjudicate upon – either way I can see no wrongful conduct on the part of the Provider.

However, there are a number of other aspects to this complaint, which I will deal with hereunder.

Direct Debit and Payment Issues

The Provider has admitted that it failed to apply two payments made by the Complainants in November 2015.

It provides this account of events in its Final Response Letter dated the 17th of October 2016:

> *"Our records show you contacted our offices in 04 November 2015 with regards to a Direct Debit (DD) that had not been collected from your bank account with regards to loan ******101. Our associate advised you that this was a system issue and requested that you transfer the funds by Electronic Funds Transfer (EFT). We received the funds into our bank account on 6 November 2015. On 24 November 2015 you made a payment to loan ******107 for the amount of €1,450. Due to an administrative oversight these payments were not allocated to your accounts until 10 March 2016. Monthly letters were issued to you in relation to missed repayments from November 2015 to March 2016 in relation to loan ******101.*
>
> *We would like to take this opportunity to apologise to you for the length of time taken to allocate these payments to your loans..."*

It is quite clear that the delay in failing to apply November 2015 payments until March 2016 contributed to the discrepancy in the settlement figures provided to the Complainants in the demand letter which issued at the end of February. It is difficult to quantify how much this error contributed to the decision to call in the loan, but, given all of the surrounding circumstances (the overall debt, the length of time since default etc.), I am not in a position to find that this error was a substantive cause of the loans being called in.

However, it is a serious error nonetheless, and it is quite possible that it would not have been uncovered but for the diligence of the Complainants. That is an unacceptable situation.

Code of Conduct Adherence

The Provider has furnished responses to the allegation that it failed to comply with the Code of Conduct for Business Lending to Small and Medium Enterprises 2012 ("the Code").

While the Provider has demonstrated compliance with certain applicable provisions, the following failures are evident:

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- Failure to advise the Complainants of their right of appeal in its decline letter of 2 March 2016 (contrary to Provision 28 of the Code). This has been accepted by the Provider.

- Failure to provide relevant information to the Complainants in a clear and comprehensible manner and to communicate the status of the loans clearly at all times (contrary to Provision 37 of the Code). This arises out of its failure to apply payments made in November in a timely fashion. The result of this error was that the Complainants received correspondence to the effect that payments had been missed from November 2015 to January 2016, and ultimately were advised of an incorrect settlement figure in the demand letter of the 26th of February 2016.

The decision of the Provider to call in the loans was one that it was entitled to make. Whether it did so in 2012 or later than February 2016 was a matter within its own commercial discretion. By reason of that fundamental issue, I consider the Complainants suggestion that they receive compensation equivalent to the increased cost of funding their loans (€36,118), together with all of the professional fees incurred (€10,357), to be disproportionate. Put another way, those costs were a consequence of the refinancing, and the refinancing was a consequence of a decision which the lender was entitled to make.

However, the Provider's conduct in failing to apply repayments in a timely fashion (which led to numerous breaches of the Code) and its failure to advise the Complainants of their right to appeal its decision to decline a repayment proposal undoubtedly caused confusion, inconvenience and necessitated expense to be incurred by the Complainants. The refinancing process would have undoubtedly been more streamlined had the Provider been clearer in its communications to the Complainants.

For the reasons set out above, I partially uphold this complaint and direct that the Provider pay compensation in the sum of €5,000 to the Complainants.

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)(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 Complainants in the sum of €5,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

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

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

5 December 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.