An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0230
Sector:	Banking
Product / Service:	Loans
Conduct(s) complained of:	Dissatisfaction with customer service
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns the alleged excessive level of security being retained by the Provider against the Complainants' outstanding borrowings.

The Complainants' Case

The Complainants are husband and wife and farmers who have done business with the Provider since approximately 1977. The Complainants argue that the Provider has acted unreasonably in refusing to release part of its security on their loans.

The Provider's Case

The Provider states that it refused the Folio [Number 2] Proposal because, according to its submission, *"the release of the land would, at that time, have left [the Provider] with security worth €215k vs a remaining exposure of €171K an excessive loan to value of 80%".*

In the letter of final response, in its submission to this office, the Provider states that the following factors were also relevant to its decision:-

> *"The residual balance on the former current account had been overdue for repayment since March 2014 and despite repeated requests to address same the Complainants had failed to engage with [the Provider or CAS] in an effort to agree a repayment schedule for this debt. Therefore the Complainants had demonstrated their ability to default on agreements with the Provider.*
>
> *[The Provider] do not have any insight into the current financial position of the Complainants (despite requests for same) and therefore do not have any insight into the financial impact on the Complainants taking on this new external debt. We did historically decline the request for additional monies for the Complainants due to concerns with repayment capacity for additional debt".*

However, the Provider did not expressly rely on these in the telephone conversations declining the Complainants' request for the release of security.

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.

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A Preliminary Decision was issued to the parties 22 November 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.

In the absence of additional submissions from the parties, I set out below my final determination.

Loans / overdrafts

On the basis of a letter of loan offer dated the 1st June, 2007, varied by a letter dated the 12th June, 2007, the Complainants received from the Provider a 20 year loan of €215,000 into loan account number *****238 for the purposes of repaying a loan with another provider and constructing farm buildings, **("the 2007 loan").**

Further, on the basis of a letter of loan offer dated the 7th January, 2009, the Complainants received from the Provider a 20 year loan of €85,000 into account number *****155, for the purposes of constructing a milking parlour **("the 2009 loan")**.

The Complainants also held a current account number *****678 with the Provider in respect of which, on the 4th April, 2012, they were granted an overdraft facility with a limit of €65,000, with an interest rate of 2.7% *p.a.* for the purposes of working capital **("the 2012 overdraft facility")**. The *"Duration and Repayment"* portion of the letter provided:-

> *"It is our intention that the Facility will be available to you until further notice. In accordance with normal practice, we will review the Facility annually and on such other occasions as we consider appropriate and, notwithstanding any other provision applicable to the Facility, we may at any time, without assigning any reason, terminate the Facility and/or demand immediate payment of any or all amounts drawn and outstanding under the Facility and all interest and other sums payable in respect of the Facility. Immediately that any such demand is made you will be liable to pay all such amounts, interest and other sums.*

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> *The right of the Bank to make such demand may be exercised at any time at the absolute discretion of the Bank and shall not be prejudiced or limited in any way by any other provision or provisions of this letter, the Current Account General Terms and Conditions, any security held for the Facility or other document"* [emphasis added].

By letter dated the 31st May, 2012, the 2012 overdraft facility on the current account was renewed but reduced to €40,000 with the Provider stating:-

> *"We are pleased to confirm that we are renewing your existing overdraft facility (the **"Facility")** to expire on the 31/12/2050 on the terms and subject to the conditions set out in the Facility letter dated 4th April 2012"*

The 2007 and 2009 loans have been fully serviced and are up to date. Although arrears have accrued on the current account, this arose in the particular circumstances set out below.

Security

There is some confusion regarding the security for 2007 loan, the 2009 loan and the 2012 overdraft facility.

In short, under the letter of loan offer the security for the 2007 loan was to comprise lands on unspecified Folios over two apparently separate parcels of land, one of 35 hectares and one of 14 hectares, totalling 49 hectares. However, in the Indenture, the security is described as comprising the lands in Folios [Number 1] and [Number 2] which, in fact, comprise 6.48 hectares and 34.4 hectares respectively and which total 40.88 hectares.

It appears that those two Folios comprising 40.88 hectares were the only Folios on which charges were registered on foot of the 2007 loan.

The security for the 2009 loan was stated in the loan documentation to comprise the Provider's *"existing first legal mortgage and charge on the 49 hectares of land"* but the relevant Folios were not identified. However, as noted above, it appears that Folios

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comprising 40.88 hectares, not 49 hectares, were the only Folios on which charges were registered on foot of the 2007 loan.

The security for the 2012 overdraft facility on the current account was stated to comprise the lands in Folios [Number 1] and [Number 2]. The same two Folios first charged in the 2007 loan.

In their complaint to this office, the Complainants stated that the Provider has *"charges on 3 parcels:-*

> *"Folio [Number 1] value €90,000 /Folio [Number 3] value €125,000 / Folio [Number 2] value €690,000".*

In its submission to this office, the Provider states that:-

> *"[f]rom valuations provided by the Complainants in July 2017 it now transpires that the lands (totalling 50.59H) are held under the following Folios:-*
>
> - *6.48 H (16a) of land at [Address] (Folio Number 1)*
> - *9.71H (24a) of land at [Address] (Folio Number 3)*
> - *0.34.40H (85a) of land at [Address] (Folio Number 2)*
>
> *Please note that the clear intent of both parties i.e. [Provider] and Complainants/Complainants' solicitor was always that 49H would be held as security for [Provider] debt".*

Provider's decision to cease trading in current accounts

By letter dated the 12th November, 2013, the Provider informed the Complainants of its decision to withdraw from providing, amongst other things, current accounts. This meant the 2012 overdraft would no longer be available to the Complainants. By correspondence dated the 19th May, 2014, in a letter entitled *"final reminder"* the Complainants were informed that their current account would close when all sums due were discharged and any outstanding balance on their overdraft had to be repaid by the 30th May, 2014. The

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Complainants did not discharge the balance on the overdraft and the First Complainant expressed his dissatisfaction to the Provider in a phone call on the 19th August, 2014.

It is disappointing that no recordings of this call has been provided to this Office.

According to the Provider's submission the Provider made an agreement with the Irish Farming Association (IFA) **("the IFA agreement")** that *"following the hand back of the banking license"* the Provider would:-

> *"progress the release of security for farmers on the basis that:-*
>
> *(i) they had not any arrears in the 5 years preceding the request*
>
> *(ii) the maximum release would be 25% of the surplus of the value of the lands over the outstanding debt – in this particular case it would have resulted in the request to release land to the value of 180k*
>
> *(iii) the farmer would agree to prioritise the repayment of [the Provider's] debt ahead of other Providers (this to be agreed in advance with the external providers) else the term of the residual debt remaining with [the Provider] to be reduced to a max term of 5 years*
>
> *(iv) the margin applying to the debt remaining would be a min 1.75% (vs the margin of the 1.15% applying to the Complainants (sic) debt".*

The Provider has not stated when the above agreement was concluded nor has it provided a copy of that agreement.

Negotiations on current account debt

It should be noted at the outset that various phone calls apparently took place between the Complainant and the Provider's representatives in the context of the negotiations on the current account debt. These phone calls are not mentioned in the Complainants' submission

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to this Office and the Provider has not provided audio recordings of them. Therefore, the only available evidence in relation thereto, are the notes of calls submitted by the Provider. It is most disappointing that recordings of these calls have not been submitted by the Provider as notes of calls as evidence are a very poor substitute.

In the months that followed the Provider's decision to withdraw from the relevant market, it issued various letters requesting the clearing of the amounts owing on the current account. Interest continued to accrue but it appears that a surcharge interest rate of 6% was not in fact applied by the Provider. The Complainants could not obtain finance to repay the amounts owed but, in phone calls with the Provider, claimed to have secured an agreement through the Provider's representative in a Business Centre, that the overdraft would continue for 3 years at 1.25% over Euribor. The Provider did not honour this alleged agreement and, by letter dated the 10th July, 2015, responded to this claim by recalling the provision of the 2012 overdraft facility in relation to duration and repayment.

In approximately November 2016, Capita Asset Services **("CAS")** took over the management of the current account and, by extension, the Complainants' debt on the overdraft.

In a letter dated the 30th November, 2017, CAS sought documents from the Complainants in order to allow it consider a recent payment proposal from the Complainants and, by letter dated the 26th April, 2017, sought certain payments from the Complainants. It seems that CAS may have begun to charge surcharge interest at this point. A letter from CAS records the balance at €35,341.70 which included arrears of €35,096.37 and states *"[p]lease note the above figures are only valid for today and change daily to include any surcharge interest".*

On approximately the 21st June, 2017, the Complainants made a payment of €2,000 in reduction of the debt on the current account, the only payment made in that regard.

On approximately the 6th July, 2017, the First Complainant apparently enquired, by phone, about a partial release of the security held by the Provider, in order to allow him to complete

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some development on the farm. The Provider's representative reportedly told him that in order for this to happen:-

(a) the arrears on the current account would have to be cleared;

(b) an up to date valuation of the land sought to be released would need to be provided; and

(c) a monetary equivalent would have to be lodged in reduction of the debt.

Thereafter, there appear to have been some relatively robust and difficult telephone exchanges between the First Complainant and CAS representative(s). More particularly, on the 14th July, 2017, the First Complainant reportedly requested through a CAS representative that the Provider release its security on Folio [Number 2] valued at €690,000, in return for which the Complainants would clear the balance on the current account and leave the security in Folios [Number 1] and Folio [Number 3] (together valued in July 2017 at €215,000) as security for the balance owed on the 2007 loan and the 2009 loan (together amounting to €172,425.84 as of December 2016 **("the Folio [Number 2] Proposal")**. The CAS representative was surprised by the level of the security release sought and, although he undertook to put the request to his senior manager and "Credit" he intimated that it would likely be refused due to the level of the release.

Although he is said to have enquired regarding a full re-finance, the First Complainant reportedly did not want to pursue this option due to the good interest rates applicable to the 2007 and 2009 loans. The First Complainant sought to meet with a senior manager that day. He was advised this was not possible, but the representative undertook to call him with a date and time as soon as possible.

Later that day, the representative phoned the First Complainant who, it is reported, sought to speak to the CEO of the Provider and pressed for the attendance of a member of the Provider (as opposed to a member of CAS) at the meeting.

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It appears that this phone call concluded with an undertaking on the part of the CAS representative to inform the First Complainant of the decision in relation to the Folio [Number 2] Proposal, as soon as possible.

By phone call on the 17th July, 2017, the CAS representative, it is asserted, told the First Complainant that he had spoken to the head of CAS Credit and to his senior manager and the decision on the Folio [Number 2] Proposal was that the security of Folio [Number 2] would be released if:-

(a) the monetary equivalent value of the lands in question was lodged in repayment of both loans (this would greatly exceed the amounts owed on the loans), or

(b) the entire connection was refinanced with the First Complainant's current bank.

The First Complainant did not accept the decision and referred, in particular, to an agreement between the IFA and the Provider regarding security releases. This was not addressed by the Provider on the call but the CAS representative subsequently noted in his note of the call of the 17th July, 2017, that *"[i]t is my understanding that [the First Complainant] does not qualify for this option because of the outstanding current account arrears".*

On the 19th July, 2017, by way of letter of final response, the Provider stated that the decision not to release the security on Folio [Number 2] *"was made in line with the Provider's credit procedures".* No other reasons were provided for the decision.

The letter also stated:-

> *"Please be advised that in order for the security to be released it is imperative that either (i) the monetary equivalent of the lands in question is lodged in repayment of the loans, or that (ii) the entire connection is refinanced with another financial provider".*

In relation to the complaint against the Provider for failing to release part of its security on live loans, I must be conscious of the loan documentation which states that the relevant

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loans *"shall at all times be secured by"* the applicable security and the Provider is under no obligation to release the relevant security until the loans are discharged. Therefore, I do not propose to uphold this aspect of the complaint.

However, I have concerns in relation to the manner in which the Provider refused to entertain the Folio [Number 2] Proposal.

There is no evidence that the Provider ever informed the Complainants about the IFA agreement. By failing to do so, the Provider denied the Complainants an opportunity to make a proposal to the Provider along the lines of that agreement around the time they became liable to repay the current account balance in May 2014.

I believe it was unreasonable of the Provider not to bring this agreement to the attention of the Complainants at that stage.

The apparent reliance by the Provider on the arrears on the current account as a reason not to consider the application of the IFA agreement was also unreasonable.

The Complainants' only arrears were caused by the Provider's withdrawal from the market; it seems unlikely that the IFA agreement was intended to preclude agreements with farmers whose arrears arose in the context in which the IFA agreement was concluded. Even if this was the intention of the agreement, as noted above, the Provider ought to have taken reasonable steps to inform the Complainants of the relevant agreement prior to issuing the demand for repayment of the overdraft, or as soon as practicable thereafter.

Furthermore, the Provider's failure to inform the Complainants of the full reasons why the relevant proposal was rejected was unreasonable.

The letter of final response provides no reasons for the rejection and, in its telephone conversations with the Complainants, the Provider appears to have been focussed almost

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exclusively on the level of security it would retain in the event that the Complainants' proposal was accepted.

I also believe that the Provider acted unreasonably in issuing its decision before offering to meet with the Complainants' representatives to discuss the relevant options. This is particularly so given that the Complainants might have been entitled to avail of other options such as the IFA agreement.

It has been suggested by the Provider that the First Complainant acted in an aggressive manner toward CAS representative(s) during the particular phone conversations.

However, I have not been provided with any evidence to support this and in the absence of recordings of the relevant telephone conversations, it is not possible to verify this.

However, if the Provider had concerns about meeting the Complainant it could have arranged to meet the Complainant's representative to seek to find a solution.

I believe such a meeting could still be beneficial for the parties.

Because of the manner in which the Provider dealt with the Complainants, I partially uphold this complaint.

I direct that any surcharge interest which has been imposed by the Provider on the 2012 overdraft facility be stayed, pending a report from the Provider to the Complainants explaining, in full detail, the amount of surcharge interest applied and the basis on which those payments have been applied. Any surcharge interest paid by the Complainants on the 2012 overdraft facility prior to the furnishing of the report is to be refunded.

I also direct that the Provider pay €1,500 in compensation to the Complainants for its customer service failures, as set out above.

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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) (b) and (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that any surcharge interest which has been imposed by the Provider on the 2012 overdraft facility be stayed, pending a report from the Provider to the Complainants explaining, in full detail, the amount of surcharge interest applied and the basis on which those payments have been applied. Any surcharge interest paid by the Complainants on the 2012 overdraft facility prior to the furnishing of the report is to be refunded.

I also direct that the Provider pay €1,500 in compensation to the Complainants for its customer service failures, as set out above.

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.

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FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

18 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.