An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0025
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Incorrect information sent to credit reference agency Appointment of debt collection agency Level of contact or communications re. Arrears Failure to provide accurate account/balance information Failure to provide correct information
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

On **13 December 2005**, the Complainants and the Provider entered into a home loan for the sum of €263,000.00 to be paid over 25 years on a tracker rate of ECB plus 1.35% for the life of the home loan. The purpose of loan was to purchase a residential investment property. On **27 January 2006**, the monies were drawn down.

Throughout the course of the mortgage, the Complainants and the Provider entered into alternative payment arrangements from time to time.

On **27 July 2015**, the Provider wrote to the Complainants indicating that it had agreed to sell the Complainants' loan to a third party. On **27 October 2015**, the Provider sold the loan to a third party.

On **30 March 2016**, the third party's credit servicing firm, wrote to the Complainants indicating that there were arrears of €16,896.45 outstanding on the mortgage account. The Complainants made this payment, but understood that there were no arrears on the mortgage account. The Complainants wrote to the Provider querying whether or not the

Provider informed the third party that there were arrears on the account and whether or not this would affect the Complainants' Irish Credit Bureau rating. The Complainants' ICB rating showed that there were arrears on the account, which the Complainants believed did not take account of the arrangements that had been entered into.

In **October 2016**, the Complainants raised a complaint with the Provider. In **November 2016**, the Provider replied indicating that it was prepared to amend the payment profile on the Complainants' mortgage account to reflect the account being in an arrangement. There was no indication that the lump sum paid to the third party would be repaid. In **February 2017**, the Complainants wrote again to the Provider indicating that their ICB rating had still not been updated and still showed that there were missed payments on their mortgage. The Complainants had a phonecall with the Provider's representative who indicated that the ICB profile would be fixed. In **April 2017**, the Complainants made a complaint to the FSO, as nothing had been done. On **16 June 2017**, the Provider issued its final response letter stating that the Complainants' ICB rating had been amended that same day and apologising for the delay in doing so. The Provider stated that at the date of sale of the loan, the loan was in arrears in the sum of €12,786.83. The Provider set out the dates and nature of the alternative repayment arrangements that the Complainants had entered into. The Provider, therefore, indicated that it was not in a position to repay the sum that had been paid to the third party by the Complainants. The Provider indicated that the Complainants should take the matter up directly with the third party.

The Complainants' Case

The Complainants' case is set out in the complaint form and the scheduled documents thereto. The Complainants advance two primary arguments.

Firstly, the Complainants contend that the mortgage account was never in arrears and that the Provider was wrong to inform the third party that there were arrears when it sold the loan. In support of this, the Complainants state that they were on various alternative repayment arrangements that generally involved just making interest only payments. In support of this, the Complainants refer to the letter of 16 November 2016 where the Provider's representative wrote that '*I do acknowledge that there were issues with the calls when trying to discuss the outcome of the SFS that was completed in January 2014. This resulted in an arrangement not being applied to the account for some time until the account transferred to* [the third party].

Secondly, the Complainants contend that the Provider incorrectly represented the arrangements that had been entered into on their ICB profile. Additionally, the Complainants assert that the Provider failed to amend their ICB profile notwithstanding that it had promised to do so on two separate occasions. The Complainants asserts that this delay inhibited their ability to receive credit, and they have furnished a letter from another financial service provider, in support of this argument.

The Complainants want the money they paid to the third party to be repaid and they also want to receive payment for the stress and inconvenience caused.

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The Provider's Case

The Provider's case is set out in its formal response and the scheduled documents thereto.

Firstly, the Provider asserts that the mortgage account was in arrears in the sum of €12,786.83 when it sold the loan and that it was correct to inform the third party of this.

The Provider asserts that the Complainants started to go into arrears from April 2014 until March 2015, and that the bulk of the sum of €12,786.83 accrued between these dates.

Secondly, the Provider sets out the dates of the alternative repayment agreements that the parties entered into.

- Between December 2010 and November 2012, the Provider contends that the Complainants were on an interest only ARA of €238.44 p/m.
- Between December 2012 and November 2013, the Provider contends that the Complainants were on an interest only ARA of €329.73 p/m.
- Between January 2014 and March 2014, the Provider contends that the Complainants were on a temporary ARA for 3 months of €216.83 p/m while a SFS was processed.
- Between January 2015 and June 2015, the Provider contends that the Complainants were on an ARA for 6 months of €770.00 p/m.

Thirdly, with respect to the Complainants' ICB rating, the Provider accepts that it delayed in implementing the Complainants' request. The Provider maintains, however, that there was no ARA for some periods of the overall relevant period. Consequently, the Provider contends that it agreed to amend the Complainant's ICB rating more as a goodwill gesture, as opposed to genuinely recognising that an error had been made.

The Provider is willing to offer €7,500.00 to the Complainants in light of the foregoing.

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

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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 22 January 2019, 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, the final determination of this office is set out below.

Arrears

It is clearly in dispute between the parties that the Complainants' mortgage was in arrears at the time that the loan was transferred to the third party. The Complainants maintain that there were arrangements in place, and that all of the payments on foot of those arrangements were paid. The Provider maintains that the Complainants did not have the benefit of an ARA for certain periods, and that, accordingly, arrears began to accrue. The parties appear to have a fundamental dispute, therefore, as to the extent of the ARAs, that were agreed. The starting point for any analysis of whether or not arrears began to accrue has to be the terms of the loan offer entered into. The loan offer provides that payments were to be made on an interest only basis for the first five years and to then revert to capital and interest payments, after that. The default position, therefore, is that any failure to make capital and interest payments in accordance with the loan facility – after five years had elapsed - would result in arrears accruing, unless an ARA had been agreed and therefore applied at the relevant time and that payments were made in accordance with the terms of that ARA.

The only documentary evidence furnished in respect of ARAs was that furnished by the Provider. While the Complainants assert that they had the benefit of an ARA on an interest only basis for the whole time prior to their loan being sold, the documentary evidence made available does not confirm this and indeed suggests otherwise. It is notable also that, the Complainants acknowledge that they received letters informing them when an ARA had ended, but they continued to only make interest only payments. It seems that this is why the arrears built up.

For example, on 2 May 2014, the Complainants acknowledged receipt of a letter stating that the arrears for one missed payment had been incurred in the sum of €1,197.34 for the month of April 2014. The Complainants continued to receive arrears letters such as this until 2 February 2015 which stated that their account was in arrears in the sum of €11,519.01 on foot of ten missed payments. On 10 February 2015, the Complainants received a letter indicating that they were to commence a new ARA backdated to January 2015 requiring payments of €770.00 p/m. It is quite clear, therefore, that the Provider was writing to the

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Complainants indicating that arrears were being accrued, during the period(s) when no ARA was in place. In these circumstances I take the view that the Provider was correct in informing the third party that the account was in arrears when the loan was sold in October 2015.
The Complainants paid a total sum of €16,896.45 to the third party purchaser of the loan, in response to correspondence they received from the third party in March 2016. If the Complainants believe that this has involved an overpayment on their part, then it would seem that the Complainants should advance that matter further with the third party which received the payment, rather than with the Provider. From the date of the mortgage being assigned, their contractual relationship with the Provider ended, and their new relationship was with the third party. Any credits that they are entitled to are a matter as between the Complainants and the third party. It will be appropriate however, for the Provider to write to the third party purchaser to confirm the precise level of arrears on the account, as at the date of the transfer, so as to ensure that there is no misunderstanding in that regard as between the Complainants and the purchaser of the loan.

The Complainants note that the Provider admits that it took some time to input an ARA on the account. They believe this to be an admission that the Provider had not applied the arrangements on the account, when it sold the loan to the third party. It seems that this letter states that the arrangements were not applied until the Provider's own debt servicing agency took carriage of the loan, but this was in fact prior to the loan being sold. Consequently, I do not accept that this amounts to an admission by the Provider that the wrong arrears figure was confirmed to the third party.

I find, therefore, that the Provider was entitled to state that there were arrears on the account when it sold the loan to the third party in October 2015; the Complainants cannot show that there were ARAs for the entirety of the loan period that allowed interest only payments to be made. There are gaps in the ARAs, for which periods of time the Provider charged capital and interest payments, in accordance with the underlying contractual arrangements in place from 2005, which were not paid by the Complainants. This is where the arrears came from. I accept that the Complainants were informed in writing that these arrears were accruing. Consequently, I do not believe that it is appropriate to uphold this element of the complaint.

ICB Rating

With respect to the ICB rating issue, while the Provider states that it does not accept that the Complainants always had the benefit of an ARA and were, in fact, missing payments it is quite clear that the Provider agreed in November 2016 to correct the Complainants' ICB profile for the period April 2014 to October 2014, to reflect the account being in an arrangement, during that time.

In November 2016, the Provider wrote to the Complainants indicating that there had been some difficulty in implementing ARAs onto their system. The Provider stated that it would be willing to amend the ICB profile as aforesaid.

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In February 2017, the Complainants found it necessary to write again indicating that their ICB profile had not been amended as had been agreed. As noted above, it took until August 2017 for the Provider to properly follow up on its promise to the Complainants to amend the ICB profile as agreed.

I find that the Provider's actions fell significantly below the service that the Complainants were entitled to expect. The Provider made a promise that it would amend the ICB profile, and then totally failed to do so until the Complainants made a further complaint and then lodged a formal complaint to the FSO. I find that this was an unreasonable delay on the part of the Provider, as no valid explanation has been proffered.

I note that the Complainants were understandably agitated by their credit score on their ICB profile, as it could have had negative effects on their creditworthiness. Indeed, by letter dated 24 October 2017, a separate financial service provider set out that it had refused a term loan application based on the Complainants' ICB profile.

I accept, however, as set out in the Provider's letter and response that the Complainants were not actually in an ARA at the material times that were reflected in the ICB record. Consequently, the ICB profile for the period April 2014 to October 2014, if corrected as promised by the Provider, may not have given rise to the Complainants' other loan application being approved in any event, as there were still gaps during which contractual payments had not been made.

I note that in responding to this complaint, the Provider has indicated that in recognition of its errors in this regard, it wishes to offer a sum of €7,500 to the Complainants.

Having considered the evidence before me, I take the view that this is a very reasonable figure to compensate the Complainants for the delay in the Provider actioning the correction it had promised in November 2016. I note that this offer remains open to the Complainants for acceptance and, in those circumstances, I do not consider it necessary to uphold this element of the complaint, given that the Provider has confirmed its error in that regard and offered a reasonable figure of compensation to the Complainants.

If the Complainants wish to accept that compensatory payment, they should make direct contact with the Provider as soon as possible in that regard, as the Provider cannot be expected to hold that offer open indefinitely, particularly as it no longer has a contractual arrangement with the Complainants.

Whilst the Complainants have made it clear that they wish this office to direct the transfer back of their borrowing from the third party to the Provider, together with a direction that the borrowing be placed indefinitely on a "*interest only*" arrangement, I do not believe that such redress is appropriate. It is clear from the terms and conditions of the home loan agreement entered into between the parties in late 2005 that the Complainants irrevocably and unconditionally consented to the Provider at any time assigning, disposing or transferring the loan "*to any third party*" on such terms as the Provider may think fit. The loan has been transferred in accordance with the parties' 2005 agreement, and I do not

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believe that it would be appropriate for this office to direct the transfer back of that borrowing to the Provider, as requested by the Complainants.

Accordingly, for the reasons outlined above, I am satisfied that this complaint should not be upheld, but the Complainants may accept the Provider's compensatory offer of €7,500, if they wish to do so. Since the Preliminary Decision was issued to the parties on 22 January 2019, the FSPO has been given to understand that the Complainants wish to accept the Provider's offer of redress. Accordingly, the Provider should liaise directly with the Complainants as soon as possible, with a view to making arrangements to transfer the said compensatory offer of €7,500, upon receipt of the required details from the Complainants.

Conclusion

It is my Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

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

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

13 February 2019

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.