



<b><u>Decision Ref:</u></b>	2019-0034
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Arrears handling - Mortgage Arrears Resolution Process
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION**  
**OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

The Complainant, who was a Financial Service Provider at the time, entered into the mortgage agreement the subject of this complaint with the Provider by execution of letter of loan offer on 19 November, 2007 for the sum of €725,000 repayable over a period of 11 years in regular instalments subject to certain interest conditions (the Mortgage). The mortgage was drawn down on 18 December, 2007. The Complainants' mortgage was on an interest only basis for a period of 3 years from the date of drawdown. The purpose of the mortgage was to allow the Complainants to purchase the shareholding of a retiring shareholder within a company in which they were also shareholders (the Business).

The Provider had previously on 18 October, 2007 offered the Complainants the sum sought on the basis that it was to be secured against a pension policy. This offer was conditional on a copy of the pension policy document being produced to the Provider. As the Complainants were unable to comply with this condition, the Provider made the second offer, which is the subject of this complaint, on 14 November, 2007.

From time to time over the term of the loan, the parties entered into Alternative Repayment Arrangements (ARAs). The following is a summary of the ARAs:-

1. 6 months interest only from January 2011;

2. 36 months reduced repayments of €2,746.00 from July 2011;
3. 3 months reduced repayments of the greater of €2,090.00 or interest only from 31 July, 2014;
4. 12 months reduced payments of the greater of €2,090.00 or interest only from 31 January, 2015.

### **The Complainants' Case**

The First Complainant asserts that following a review of his account, the Provider demanded that the Complainants pay arrears in the sum of €94,895.86 (Arrears). The Complainants appealed this decision to the Provider. Their ground of appeal is set out thus in the letter of appeal dated 3 June, 2016 as follows:

*"The arrears you refer to are not arrears in the true sense. I have made all monthly payments as agreed with you and you have added these arrears during the period whilst my mortgage was under review. Arrears can only arise when I do not pay what is asked of me and I have always paid what was asked and agreed with you. I think your unilateral action is unfair and to be penalised in this manner is unjust."*

In a letter accompanying the Complainants' complaint form to this Office, the Complainant stated:

*"They recently carried out a review of my mortgage repayments and following this review the [sic.] demanded that 'arrears' of €94,895.86 be paid."*

The Complainants state that they do not owe the arrears.

### **The Provider's Case**

The Provider asserts that the executed mortgage imposes mutual obligations on both parties, including adherence to the repayments schedule. This repayment schedule remains binding on the Complainants unless a formal alternative is agreed in writing. In the absence of such a formal alternative agreement in writing, arrears will accrue for any repayments scheduled missed by the Complainants.

The Provider contacted the First Complainant on 21 July, 2014, informing him of the need to submit documentation to show the likely ability of the Complainants to repay the entirety of the mortgage, which they proposed to do from the proceeds of the sale of the Business, should they wish to avail of further forbearance. They failed to do so prior to the expiration of 3 months as agreed by the ARA of 31 July, 2014.

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In or around December 2014, the Complainants provided the requisite documentation and the Provider decided to enter into a further ARA for a period of 12 months to facilitate the sale of the Business. This decision was based on the premise that some of the proceeds of the sale of the Business would be used to clear the Arrears.

The Complainants submitted a further Standard Financial Statement (SFS) in January 2016. Having reviewed the documentation provided, the Provider determined that further information was required. Accordingly, it reverted to the First Complainant on 23 February, 2016. The First Complainant confirmed that he would furnish the Provider with correspondence from his accountant, which he duly did on or around 8 April, 2016. On the basis of the information provided, the Provider offered the Complainants an ARA for a period of a further 6 months. This offer was conditional on the Complainants discharging the arrears that had accrued on the account.

The Complainants were unhappy with this offer and, accordingly, exercised their right of appeal to the Provider. The Provider heard the Complainants' appeal and provided its final response by letter dated 27 July, 2016. The final response concluded that the offer the subject of the appeal was fair and reasonable in the circumstances and that the Complainants had ample funds to discharge the sums proposed by the ARA. The Provider states that it informed the Complainants that as a gesture of goodwill, it would forego its entitlement to the month of arrears that accumulated prior to the Complainants' appeal and its final response.

### **The Complaint for Adjudication**

The Complainant asserts that there are no arrears on his mortgage account.

### **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 30 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, I set out below my final determination.

General Condition 4(a) of the Mortgage provides:

*“Unless otherwise stated herein or agreed by the Lender in writing, the repayment of the Loan shall be by monthly instalments in arrears .... The due dates for repayment of the Loan are those dates that are from time to time set by the Lender. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender in its absolute discretion.”*

General Condition 4(b) provides:

*“In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the Covenants or conditions contained in any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the conditions of the Loan.”*

Special Condition a(iii) provides:

*“For the first three years of the term of the Loan, repayment of this Loan shall be comprised of interest and any other amounts payable only and General Condition 4(a) is hereby varied. At the end of the above period, repayments shall comprise of principal and interest and any other amounts payable fully in accordance with General Condition 4(a). The amount of such revised repayment instalments shall be as advised to the Borrower by the Lender in writing.”*

The Complainants’ account first fell into arrears on 30 June, 2014. Prior to the Complainants lodging their complaint, the Provider notified the Complainants of their arrears on the following dates:-

5 November, 2014;  
13 November, 2014;  
1 December, 2014;  
2 December, 2014;  
10 December, 2014;  
9 January, 2015;  
23 January, 2015;

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2 June, 2015;  
28 August, 2015;  
26 November, 2015;  
1 February, 2016;  
24 February, 2016;  
24 May, 2016; and  
22 August, 2016.

On the basis of the foregoing, I do not accept that the Complainants are correct in saying that they made all payments as agreed.

They ought to have been aware of this mounting arrears problem of which they were notified on 14 separate occasions over a period of two years.

They assert that they were not obliged to make payments under their Mortgage while the Provider considered applying an ARA to their account. They do not specify the time period they are referring to or offer any basis for that belief.

It is clear from General Condition 4(a), that the Complainants were obliged to repay the mortgage by monthly instalments in arrears *unless* otherwise agreed. The Provider maintains that the arrears were applied in accordance with any ARA that was in being at the particular time. There was no evidence provided to this Office that arrears were applied to the Complainants' account at a time where an alternative agreement was in place.

The Provider agreed to four separate ARAs since January 2011. There has been an ARA in place on the property since January 2011 with the exception of the period October 2014 to January 2015.

The continuing ARAs were, at least in part, based on an undertaking given by the Complainants that they were selling their business and the proceeds would be used to pay off the mortgage in its entirety. The Provider spoke to the First Complainant on 21 July 2014 seeking progress reports on the sale of the business as a condition of further extending their forbearance.

The Complainants did not furnish the Provider with the requested updates and the agreed three month period ended. The First Complainant had told the Provider in July that he would provide the information to it in the month of September 2014, but did not do so until December 2014 when the Provider assessed the information.

Following that assessment, the Provider confirmed an offer of 12 months reduced repayments. At that time the Provider had noted the Complainant was due to receive an initial payment for his business. The Provider concluded that this down payment should be used to clear the arrears on the mortgage which had accrued during the time period when there was no alternative arrangement in place.

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In January 2016, the Complainants submitted a new Standard Financial Statement which prompted the Provider to seek further information from the Complainants. Based on the additional facts, in particular the fact that the Complainants had sufficient money in their account to pay off all of the arrears, in May 2016, the Provider offered a six month reduction in payments on the condition that the Complainants paid off the outstanding arrears.

On 11 May 2016, the Complainants owed €640,714 under the mortgage loan, of which €94,895 were arrears. The mortgage was due to end in November 2018.

The Complainant appealed on the 3 June 2016 against the decision of the Arrears Support Unit which was acknowledged by the Provider's Mortgage Appeals Board on the 14 June. It undertook in its reply to deal with the appeal within 40 days, update the Complainant every 20 days and confirm the outcome of the appeal within 5 days of the appeal being heard. In his letter of appeal, the Complainant first mentions the phrase, "*the arrears you mention are not arrears in the true sense.*"

On 26 July 2016, the Provider offered a further ARA, outside of the Mortgage Arrears Resolution Process (MARP) since the mortgage loan was no longer covered by MARP. At that stage, the amount owed under the mortgage loan was €638,960 and the arrears were €125,617. However, on the 27 July 2016 the Provider considered the appeal. The Appeals Board agreed to backdate a period forbearance to May 2016 reducing the arrears amount back to €94,895, however, the Appeals Board repeated the condition of the forbearance, namely that the outstanding arrears had to be paid off from the adequate and available funds in the Complainants' savings account.

Having considered all of the evidence before me, it is unclear to me why the Complainants think that adhering to the temporary provisions of the ARA do not require them to 'make up' the amounts owed over the term of the mortgage from his letter, other than the assertion that he has paid what the Provider asked for.

The Code of Conduct on Mortgage Arrears (CCMA) and the Mortgage Arrears Resolution Process (MARP) place certain requirements on a provider in dealing with mortgage arrears.

Having examined the Provider's obligation in relation to CCMA and MARP, I find the Provider has provided ample, detailed evidence of their communications both written and verbal with the Complainants at every stage throughout the various processes. It has provided a history of the letters, as well as copies of the relevant documents over a ten year period.

The Provider has met its obligations under the CCMA in terms of timely and intelligible information. Meetings have been conducted in privacy and information relating to MARP was provided to the Complainants.

The Provider has relied on the SFS from the Complainants at various stages in the different ARAs and there is evidence they have been assessed on their individual merits.

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The Provider had not rejected an ARA based on the SFS provided by the Complainants until May 2016 when the Provider required the Complainants to clear the accrued arrears on their mortgage account using money they had available in their savings account. The Complainants preferred to retain that money in order to assist their son to buy a house. Their view was that once the first Complainant's business had been sold, a process which had taken a considerable amount of time, they could clear the account in full and that the Provider would therefore be obliged to wait.

The Complainant has stated that "*the arrears you refer to are not arrears in the true sense.*" It is relevant that since the inception of the mortgage, the Complainants have paid three years of interest only payments followed by a succession of ARAs.

Having been provided with no evidence to support the assertion that the arrears which had built up over a considerable period of time, are not due nor why they are not, '*arrears in the true sense*', I therefore do not uphold this complaint.

### **Conclusion**

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.**

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

25 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.