



<u>Decision Ref:</u>	2019-0122
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Failure to implement payment terms
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant, together with a number of other individual investors, entered a Mortgage contract with the Provider (“the Bank”) for an investment property, on 6th December 1999.

Each of the investors were provided with separate individual Mortgage Accounts, secured on the investment property. This complaint is in relation to the Complainant's sole Mortgage Account. The loan supporting the investment had a limited recourse facility as part of the terms of the loan. Such limited recourse finance is provided by means of a **loan** that is secured by a charge on assets. Should the borrower default, the lender is entitled to enforce the charge but can recover only a limited amount of any shortfall directly from the borrower.

The Complainant’s complaint is that the Bank did not correctly and reasonably apply the limited recourse facility in his circumstances.

The Complainant’s Case

The Complainant states that his position is that he invested in a business property that went badly wrong. The Complainant states that the loan supporting the investment had a limited recourse facility as part of the terms of the loan. The Complainant says that the investment property was sold at a loss and most investors still owed a good deal of money and that they invoked the “Limited Recourse” to reduce their liability.

The Complainant submits that unfortunately he paid his mortgage loan in full, but as the property was sold at a substantial loss, he incurred quite a loss on the investment. The Complainant states that he considers that the "Limited Recourse" should have been applied by the Bank to his situation.

The Provider's Case

The Bank states it outlined the terms of the Complainant's Mortgage Account in the Facility Letters dated 12th November 1999 and the Payment Undertaking dated 6th December 1999.

The Bank submits that it advanced a Mortgage loan to the Complainant to enable him to acquire a 1/13th share of the property, together with a number of other Borrowers. The Bank states that the Complainant's Mortgage Account was structured on an interest only basis and in accordance with the terms and conditions of the Mortgage loan, the Complainant was required to make payments to a Sinking Fund Account (The [Investment Property] Sinking Fund Account) in lieu of making repayments on the Principle Mortgage Account balance.

The Bank says that its Facility Letters of 12th November 1999 also provided the terms and conditions of a Further Advance in the amount of €69,078.83 (IR£54,404.00), which was drawn down by the Complainant in late 2001, bringing his total borrowings with the Bank to €343,837.45.

It is the Provider's position that in accordance with the terms of the Loan Agreement, the Complainant committed to lodge his share of rental income, received from rental of the property, directly to the Mortgage Account in an effort to service the interest payments of the Mortgage loan.

The Bank states that the Complainant also committed to lodge a total of at least €117,000.00 to a Deposit Account (The [Investment Property] Sinking Fund Account) over the life of the Mortgage term, in lieu of Principal Mortgage Account repayments. The Bank says that the original Mortgage loan term was 13 years, however the Bank afforded the Complainant, and the other Investors, with a Term Extension in 2013, bringing the total Mortgage loan term to 14 years.

The Bank submits that the purpose of the Sinking Fund Account was to accumulate funds on deposit, with the intention of redeeming any Principal Mortgage Account balance at the end of the Mortgage loan term. The Sinking Fund Account was specifically charged to the Bank as a mortgaged asset.

The Bank says that the Complainant continued to deposit funds to the Sinking Fund Account throughout the term of the Mortgage loan.

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The Bank states that it advanced credit by way of a Mortgage loan to the Complainant in the amount of €343,837.45 and the Complainant was contracted to repay this amount in full to the Bank, together with any interest or charges accumulated on the Mortgage loan throughout the 14 year term. The Bank says it did not agree to reduce the amount owing at any time throughout the Mortgage loan term, and held the Complainant liable for the full Mortgage loan amount (including interest & charges) at all times, in accordance with the terms and conditions of the Mortgage loan.

The Bank says that the mortgaged property was sold in January 2015 and following the sale of the property, the sale proceeds were divided equally among all the Investors loan accounts including the Complainant. The Bank states that as a result, the Complainant's share of the sale proceeds, in the amount of €63,012.68, was lodged to the Complainant's Mortgage Account on 2nd February 2015, reducing the outstanding Mortgage Account balance to €94,167.86.

It is the Bank's position that as outlined in the terms and conditions of the Mortgage Account, the Complainant was obligated to use the accumulated funds in his Sinking Fund Account to redeem the remaining Principal balance on his Mortgage Account.

The Bank says that the Complainant's Sinking Fund Account had an accumulated balance of €119,008.53, therefore an amount of €94,167.86 was transferred to the Complainant's Mortgage Account on 22nd April 2015, redeeming it in full. The Bank submits that the Complainant provided his written consent for this transaction in his correspondence to the Bank dated 16th April 2015.

The Bank states that the remaining surplus funds in the Complainant's Sinking Fund Account, in the amount of €24,297.81 was transferred to the Complainant's personal account on 22nd April 2015, as per the Complainant's request.

The Bank submits that the Complainant's Mortgage Account was redeemed in full with a combination of the property's sale proceeds at the end of the Mortgage loan term, and the transfer of accumulated funds held on deposit in the Sinking Fund Account to the Mortgage Account. The Bank advise that as a result, the Mortgage Account did not have a residual shortfall balance at the end of the Mortgage loan term and the Limited Recourse provisions did not have to be invoked by the parties to the mortgage. The Complainant fulfilled his contractual obligations in full to the Bank by discharging the full Principal Mortgage balance, together with any additional interest due and payable throughout the Mortgage term.

As regards the Covenant to Pay, the Bank says that the Complainant's contractual obligations to repay the Mortgage loan in full are set out in the Bank's Facility Letters dated 12th November 1999 and the Payment Undertaking duly signed by the Complainant on 6th December 1999.

The Bank's Facility Letters of 12th November 1999 outlines the term of the Mortgage loan advance as follows;

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Loan Amount:	IR€216,390.00
Period of Agreement:	13 years
Number of repayment instalments:	52
Amount of each instalment:	51 x IR€3,526.62 1 x IR€219,916.62

Total Amount repayable: IR€399,774.24 Annual Percentage Rate: 6.68%

A Further Advance in the amount of €69,078.83 was provided to the Complainant in late 2001, bringing the Complainant's overall indebtedness to €343,837.45 with the Bank. The Bank states that it is also noted that the Period of Agreement was extended in 2013, bring the term of the Mortgage loan to 14 years in total.

The Bank's Payment Undertaking states:

*"B The Bank has agreed to advance a loan to each Mortgagor.
C Each Mortgagor has agreed to enter into this Mortgage for the purpose of
(i) covenanting to repay the loan advanced to him."*

And Page 4, under the heading 'Covenant to Pay', states:

"2.1 Each Mortgagor hereby covenants with the Bank that he will on demand pay and discharge his Direct Liabilities when same are due".

Direct Liabilities are defined on Page 2 of the Payment Undertaking as follows;

" "Direct Liabilities" means in relation to each Mortgagor all monies and liabilities whether certain or contingent which now are or at any time hereafter may be or become due, owing or incurred by him to the Bank under or pursuant to or in connection with his Facility Letter".

The Bank states that as outlined in the terms and conditions above, the Complainant was contractually obligated to repay the Mortgage loan in full to the Bank within the agreed Mortgage loan term.

The Bank says that the Complainant signed the Payment Undertaking on 6th December 1999, in the presence of his solicitor, indicating that he read and understood the terms and conditions outlined in same.

The Bank submits that the Complainant's obligations with regards to repaying the Mortgage loan in full are also outlined in the Bank's Facility Letters dated 12th November 1999. Page 2 of same which states:

"Subject to the non occurrence of any Event of Default it is envisaged that the Loan will be repaid, as to principal and interest, in the following manner;

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Principal

Payments to be ultimately applied in respect of principal are to be made to a deposit account maintained by the Borrower with the Bank (The [Investment Property] Sinking Fund Account). ... These payment shall commence not later than one year after the date of our initial advance hereunder.

A final payment, which shall be payable not later than the thirteenth anniversary of the date of initial drawdown hereunder, shall be for an amount sufficient to discharge the balance of the Loan after application of the funds accumulated (including interest) on the Borrowers [the Investment Property] Sinking Fund Account”.

The Provider states that the original term was for 13 years, and in late 2013, the Bank afforded the Complainant a Term Extension which extended the Mortgage term to 14 years. The Bank says as a result, the Mortgage term ended in July 2014 and the property was sold in January 2015. The Bank’s position is that in accordance with the terms and conditions, the Complainant was obligated to make a final payment at the end of the Mortgage loan term, from the Sinking Fund Account, sufficient to redeem the Mortgage Account in full.

The Bank states that the Complainant's share of the sale proceeds were remitted to the Complainant's Mortgage Account balance on 22nd April 2015. Following the sale of the property, the funds on deposit in the Complainant's Sinking Fund Account were remitted to the Mortgage Account, redeeming the account in full, in accordance with the terms and conditions as set out above. The Bank says that the surplus funds remaining in the Complainant's Sinking Fund Account were transferred to the Complainant's personal Current Account on 22nd April 2015

The Provider submits that the Complainant's covenant to pay is set out further in the Bank's Facility Letter of 12th November 1999, under the heading 'Security', which states:

"Security: As security for the Loan the Bank requires:-

4. The rental income (and/or payments under the Payment undertaking) to be assigned to the Bank for credit to a "[Investment Property] Rental Account" maintained in the joint names of all the tenants-in-common. The credits received for this account are to be utilised as follows:-

(ii) To discharge interest arising on the individual loans of the Tenants in Common in proportion to their respective holdings in the Property. (Any shortfall of interest, from time to time, after application of net rental income, shall be the liability of the Borrower)”.

The Bank submits that, the Complainant was contracted to make payments to his Mortgage Account in order to discharge the interest accruing on same. The Bank says that these interest repayments were to consist of the rental income received by the

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Complainant from the property at the Investment Property. The Bank says that if the rental income was not sufficient to discharge the interest owing on the Mortgage Account in full, the Complainant would be held liable by the Bank for any shortfall that may arise as a result.

The Bank says that furthermore, the Facility Letter of 12th November 1999, under the heading 'Security', states:

"Security: As security for the Loan the Bank requires:

5. An undertaking by the Borrower to:-

(i) Pay all interest not otherwise discharged by rental income from the mortgaged property and/or payments made under the Payment Undertaking, immediately upon demand by the Bank.

(ii) Pay on demand all principal sums due to the Bank on foot of this Loan.."

The Bank reiterates that the Complainant was contracted to repay the full Mortgage loan amount in full, including Principal and Interest.

The Complainant signed the Bank's Facility Letter on 16th November 1999 indicating that he accepted and understood the terms and conditions of the Mortgage loan. The Complainant also signed the Payment Undertaking on 6th December 1999 in the presence of a solicitor, indicating that he read and understood the terms and conditions outlined in same.

As regards the mortgage repayments, the Bank states that the Complainant's Mortgage Account was transferred to the Bank's systems on 1st July 2004, with a balance of €349,418.17. The Complainant continued to lodge funds to the Mortgage Account in accordance with his contractual obligations.

The Banks states that on 14th May 2008, the Complainant made a lump sum payment to the Mortgage Account in the amount of €150,000.00, in an effort to reduce his overall indebtedness to the Bank and to benefit from reduced interest going forward. The Bank says that as a result of this lodgement, the outstanding Principal balance was reduced to €193,381.82. The Bank submits that the Complainant remained fully liable for the remaining Mortgage Account balance, including all interest due on same, in accordance with the Facility Letters of 12th November 1999 and the Payment Undertaking of 6th December 1999. The Bank says that it is noted that the Complainant continued to benefit from lower Mortgage interest payments going forward as a result of the lump sum payment.

The Complainant's Sinking Fund Account was also transferred to the Bank's systems on 1st July 2004, with a balance of €58,979.48. The Bank submit that as per the terms and conditions of the Mortgage contract, the Complainant was obligated to lodge an amount of €177,000.00 to the Sinking Fund Account throughout the term of the Mortgage loan (14 years). The Bank says that the Complainant fulfilled his contractual obligations in this regard and the Sinking Fund Account maintained a balance in excess of €177,000.00 from

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1st July 2013. The Bank submits that following the acceptance of a Term Extension in November 2013 the Mortgage loan term ended in July 2014.

The Investment Property was sold in January 2015. The Complainant's share of the sale proceeds amounted to €63,012.68, which was lodged to the Complainant's Mortgage Account on 2nd April 2015, reducing the Complainant's outstanding Mortgage Account balance to €94,706.70.

The Provider says that following the above lodgement of sale proceeds, the Complainant remained fully liable for the remaining Mortgage Account balance, as outlined in the terms and condition of the Bank's Facility Letters of 12th November 1999 and Payment Undertaking of 6th December 1999.

The Bank's position is that as the funds in the Complainant's Sinking Fund Account were held as security for the Mortgage loan, in accordance with the Mortgage contract, the remaining Mortgage Account balance was redeemed in full using the proceeds of the Sinking Fund. Therefore, on 22nd April 2015, an amount of €94,706.70 was transferred from the Complainant's Sinking Fund Account to the Complainant's Mortgage Account, redeeming the Mortgage Account in full. The Bank says that the Complainant provided his written consent for this transaction in his correspondence to the Bank dated 16th April 2015. The surplus funds in the Complainant's Sinking Fund Account, in the amount of €24,297.81 were transferred to the Complainant's personal Current Account, as per the Complainant's request.

As regards Limited Recourse, the Bank notes the Complainant's assertion that the Bank is bound by the Limited Recourse Provision in relation to his Mortgage Account, as set out in his Mortgage contract.

In the Complainant's Complaint Form of 28th April 2016, the Complainant states:

"There was a limited recourse of €127,000.00 written into the Loan Agreement. Most of the investors were at a loss after the sale. I however had paid a lump sum of €150,000.00 during the course of the mortgage and as a result have overpaid the loan to the region of €130,000.00"

The Bank's response is that a Limited Recourse Provision is outlined in the Bank's Facility Letters of 12th November 1999 and the Bank's Payment Undertaking of 6th December 1999.

At Page 8 of the Bank's Facility Letter of 12th November 1999 it states:

"Recourse: Recourse by the Bank to the Borrower will be limited in the manner set out in the mortgage".

Page 19 of the Bank's Payment Undertaking of 6th December 1999, under the heading 'Joint and Several Liability and Limit Recourse', states:

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"25.2 The total amount recoverable against the Mortgagors in respect of the Secured Liabilities shall not exceed. ...the net proceeds received from enforcing the security created or evidenced or otherwise constituted by this Mortgage. Such net proceeds shall be attributable to each Mortgagor in proportion to his percentage ownership in the Mortgaged Property (as specified in Schedule 1)"

Schedule 1 of the Bank's Payment Undertaking of 6th December 1999, outlines the Complainant's Limited Recourse as follows;

"The Mortgagors

<i>No</i>	<i>Name</i>	<i>Address</i>	<i>Proportionate Share</i>	<i>Maximum Limited Recourse</i>
<i>12</i>	<i>[the Complainant]</i>	<i>[the Complainant's address]</i>	<i>7.69%</i>	<i>IR€100,000.00</i>

The Bank states that the Limited Recourse provision is also referred to in correspondence of 15th November 1999 issued to the Complainant from Solicitors, which states;

"Recourse — in the event of default, the Bank's main recourse will be to what it can obtain from a sale of the property. If that is insufficient, it can look to your other assets to make up the shortfall. However, once the property has been let to an acceptable tenant, the bank can only look to your other assets up to a maximum of IR€100,000.00 (excluding accrued but unpaid interest). "

The Bank states that the Complainant appears to be seeking to rely on his interpretation of the Limited Recourse Provision to release him from his obligations with respects to repaying his Mortgage Loan and the specifically charged Sinking Fund Account obligations to the Bank. The Bank submits that the Complainant appears to maintain that as he repaid his mortgage loan in full, he is of the opinion that he should be refunded any repayments made in excess of €127,000.00 (IR€100,000.00) because of the Limited Recourse provisions.

However, the Bank states it asserts that the Complainant's obligations to repay the Mortgage loan in full are clearly outlined in the mortgage contract and that the Complainants obligations pursuant to the Limited Recourse Provision and his obligations pursuant to the specifically charged Sinking Fund Account operated separate and apart from one another.

The Bank refers to Page 19 of the Bank's Payment Undertaking of 6th December 1999, under the heading 'Joint and Several Liability and Limit on Recourse', which states:

"25.1 Save for the covenant to pay contained in clause 2.1 all agreements, obligations, covenants, undertakings, warranties, representations, mortgages and charges herein expressed or implied on the part of the Mortgagors shall be deemed to be made or undertaken by all the Mortgagors jointly and severally... The covenant to pay contained in clause 2.1 shall be deemed to be the several covenant of each Mortgagor and. ...nothing in this Mortgage shall entitle the Bank to have recourse to the Other Assets of any Mortgagor (as opposed to the Mortgaged Assets) for any part of the Secured Liabilities other than his Direct Liabilities. "

The Provider says that the covenant to pay clause 2.1 as referred to above is outlined on page 4 of the Payment Undertaking of 6th December 1999, under the heading 'Covenant to Pay', which states:

"2.1 Each Mortgagor hereby covenants with the Bank that he will on demand pay and discharge his Direct Liabilities when same are due. "

The Bank submits therefore, that it was within its rights to hold the Complainant fully liable for the entire Mortgage loan amount, until such time as the Mortgage Account was discharged in full. It is the Bank's position that in light of this, the Limited Recourse Clause is not relevant in this case and cannot be relied upon by the Complainant.

The Bank says that on further review of this matter, the Bank conducted a full review of the documentation pertaining to the investment property. Following the outcome of this review, the Bank states that it is satisfied with its position on this matter and has declined the Complainant's request for a refund.

Further Submissions from the Complainant and the Bank

The Complainant's submission of 18th May 2017

The Complainant refers to Bank's Schedule of Evidence 2 ("A summary of the dispute") which states, under the heading "Limited Recourse Provision of €127,000" that: -

"The Complainant's Mortgage contract (Loan Agreement) contains a Limited Recourse Provision in the amount of €127,000.00. This limited recourse provision was stated to come into effect if a shortfall arose on the Mortgage Account after the sale of the Mortgage Assets. If such a shortfall event arose, effectively a cap of €127,000 would be placed on the borrowers' exposure. i.e. if the sale proceeds and the funds on deposit in the Sinking Fund Account are not sufficient to discharge the Mortgage Account in full, the Bank would only seek an amount up to a maximum of €127,000.00 from the Complainant, regardless of the shortfall amount. "

It is the Complainant's submission that this is not correct. The Complainant states that the loan contract (i.e. the facility letter — provided as follows in relation to limited recourse: -

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"Recourse: Recourse by the Bank to the Borrower will be limited in the manner set out in the mortgage." (Page 8, facility letter).

Page 9 of the facility letter summarises the Borrower's obligations as follows:

"In summary, these obligations are as follows:

- *The full amount of the credit advanced to you hereunder until such time as the Property is fully let to a qualifying tenant or tenants in accordance with the requirements of this offer, or £100,000 (One Hundred Thousand Irish Pounds) after the Property has been fully let to a qualifying tenant under a lease the terms of which shall be not less beneficial than those outlined herein...etc."* [Emphasis added]

The Complainant says that in a situation where the facility letter was provided to him, (in this instance via the bank's solicitors) on 15 November 1999 with a message that: "As completion of this matter is imminent it is essential that we receive all of the documents to be returned to us by Wednesday 17 November", it is clear that he had no practical option but to accept the accuracy of what he was being told by the bank and its solicitors in relation to the loan contract and the related mortgage. The Complainant states that the bank summarised the terms of his obligations in the facility letter and also summarised its recourse entitlements. Such recourse entitlements were mirrored in the solicitor's letter of 15 November 1999.

The Complainant says that the manner in which the Bank has interpreted the loan contract documents to their advantage is perhaps best exemplified by its letter of 31 December 2015 addressed to him. At page 2 of that letter (paragraph 5) the bank states as follows: -

"After application of these [i.e. monies in my Sinking Fund Account] to the Loan Facility, the Bank shall (in addition to its recourse to the Property) be entitled to recourse to you in respect of the balance of the Loan Facility, up to the limit of IRE100,000.00 (c. €126,973.81) specified in Schedule 1 of the Mortgage, being the Maximum Limited Recourse and additionally for all interest which has accrued or charged on the loan but is unpaid, in respect of your direct liabilities to the Bank."

The Complainant's position is that the above interpretation is, nowhere to be found in the loan contract documents. The Complainant says that the bank was not entitled to appropriate from him an amount very considerably in excess of the recourse amount even if he had previously made a substantial additional payment towards reduction of his Mortgage Loan Account. The Complainant considers that the Bank should have made it clear to him that his obligation

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under the loan contract documents extended no further than an obligation to furnish his 1/13th share of the proceeds of sale of the property to the Bank in part discharge of the Mortgage Loan Account and an obligation to allow transfer of the proceeds of the Sinking Fund Account towards the Mortgage Loan Account, on the basis that the proceeds of his Sinking Fund Account would be credited towards the IR€100,000.00 (€127,000) recourse to which the Bank was entitled in addition to the proceeds of sale. The Complainant submits that instead, the Bank unlawfully appropriated the additional monies which he had paid into the Mortgage Loan Account. The Complainant says that in that regard his letter of 16 June 2015 refers and he submits that he is due a refund of €153,825 less the amount of €24,297.81 already received, in total a refund equalling €129,528.81.

The Complainant concludes that in summary, the Bank was entitled to no more than (a) the net proceeds of sale of the property and (b) the limited recourse amount (€127,000). The Complainant says that it is notable that the Bank have apparently failed to request either of the signatories of the Facility letter to confirm the Bank's interpretation of the loan contract. The Complainant submits that the Bank's failure to do so results from the Bank's overwhelming apprehension that the signatories cannot support the Bank in this matter.

The Bank's response of 7th June 2017 in response to the above is that:

"The Bank would make the following comments in respect of the additional submission of the Complainant dated 18th May 2017.

1. The letter of 15th November 1999 from [the Bank's] Solicitors, which the Complainant quotes from, specifically states as follows:

"Recourse — in the event of default the Bank's main recourse will be what it can obtain from the sale of the property..." [the Bank's emphasis].

There was no default in the Complainant's Mortgage Account repayments and no shortfall upon the sale of the property. Therefore the recourse provisions did not fall to be invoked by the Complainant. As set out in the Bank's initial submission, the investors in the [investment property] scheme entered into a covenant to repay the direct liabilities which they owed to the Bank on foot of the loan. This included a specific obligation to make "a final payment, which shall be payable not later than the thirteenth anniversary of the date of initial drawdown hereunder, shall be for an amount sufficient to discharge the balance of the Loan after application of the funds accumulated (including interest) on the Borrowers' [investment property's] Sinking Fund Account".

2. Also, the Bank understands that [the Bank's] Solicitors acted on behalf of the [Investment Property's] borrowers in this transaction, albeit that a different section of that firm may have been advising the [Investment Property's] borrowers, including the Complainant.

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3. *The Complainant's obligations were to repay the Mortgage Loan in full which he did, and each of his co-borrowers had a several liability to repay his full share of the overall loan. The limited recourse conditions were not the method by which the loan was to be repaid, rather they were to be invoked in certain specific circumstances where the property was sold and a default arose. These circumstances did not apply to the Complainant as he had repaid his loan in full".*

The Complainant's submission of 15th June 2017

*".. I must emphasise the following points:
The facility letter (page 9) summarised my obligations. "In summary, these obligations are as follows " (my emphasis). That summary is entirely different to what the bank now contends for.*

- The facility letters and related documentation were provided to me by the bank's solicitors, ... and signed by me on a 'last minute' basis. As already submitted, I believed what I was told by the facility letter and the [the Solicitor's] letter of 15 November 1999. It is quite clear that I did not receive any or any adequate time within which to analyse the mortgage document to see if it conflicted with the facility letter. I proceeded on the basis of assurances received from the bank and its agents. The bank is now seeking to benefit from a conflict within their own documents.*
- I never engaged [the Solicitors] to advise me in relation to the transaction. With respect to the bank, it is a neat fiction that I engaged [the Solicitors]. I never received any engagement documentation from [the Solicitors] nor paid any fee to them. One thing however is certain: they did represent the bank at that point in time.*
- The bank, having received the net proceeds of sale and the contents of my sinking fund account, were fully paid on foot of the contract which was entered into between me and In that regard, the bank's failure to seek support from either or both of the Facility Letter signatories speaks volumes".*

Evidence

Facility Letter and Cash Advance Facility Terms and Condition - dated 12th November 1999

"Security: As security for the Loan the Bank requires:-

.....

Recourse: Recourse by the Bank to the Borrower will be limited in the manner set out in the mortgage.

In summary, these obligations are as follows:

- The full amount of the credit advanced to you hereunder until such time as the Property is fully let to a qualifying tenant or tenants in accordance with the requirements of this offer, or £100,000 (One Hundred Thousand Irish*

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Pounds) after the Property has been fully let to a qualifying tenant under a lease the terms of which shall be not less beneficial than those outlined herein; and

- All interest arising on the Loan and not otherwise discharged by rentals and/or payments made under the Payment Undertaking”.

....

Standard Terms and Conditions

C. Events of Default

The Bank without prejudice to its right to require immediate repayment of the facility on demand at any time, will be entitled to terminate its commitment to lend under the facility and to call for immediate repayment of all monies outstanding including interest and other charges on the occurrence of any Event of Default.

- (i) If the Borrower(s) fail(s) to comply with any of the terms or conditions of the Facility Letter.
- (ii) If default is made in any repayment of principal when due and such default remains unremedied for thirty days or more.
- (iii) If any interest is in arrears and unpaid for seven days after the date fixed for payment thereof.
- (iv) If any representation or warranty made by the Borrower(s) proves or shall prove in the opinion of the Bank to have been materially untrue or inaccurate.
- (v) If a distress or execution is levied or issued against any of the Borrower(s) property and is not discharged within fourteen days.
- (vi) If the Borrower(s) is/are declared bankrupt or dies.
- (vii) If the Borrower(s) stops or threatens to stop payment to his/her creditors or ceases or threatens to cease to carry on his/her business or any part thereof or changes the nature of his/her business or part thereof material to the Borrower(s).
- (viii) If the Borrower(s) default in payment or any taxes due and payable or a material amount (other than those being contested in good faith).
- (ix) If an encumbrancer takes possession of or a Receiver is appointed over any of the assets or undertakings of the Borrower or any Judgement Mortgage, Instalment Order or Committal Order is made against the Borrower(s).
- (x) If the Borrower(s) defaults in the payment of any premium due under any policy or policies assigned by the Borrower(s) to the Bank.
- (xi) If in the opinion of the Bank there occurs or is likely to occur a material adverse change in the Borrower(s) or in connection with the Borrower(s) business.
- (xii) The mortgage or any other security for the Borrowers liability under the Facility Letter fails or ceases in any respect to have full force and effect or to be continuing or is terminated or disputed or becomes in jeopardy, invalid or unenforceable”.

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Letter date 15th November 1999 to the Complainant from Solicitors in addition to the Facility Letter:

"[We] now report the terms of the mortgage deed to be entered into in connection with the purchase of [investment property].

A. Facility Letter and Side Letter in relation to Additional Facility

...

Recourse – in the event of default, the Bank's main recourse will be to what it can obtain from a sale of the property. If that is insufficient, it can look to your other assets to make up the shortfall. However, once the property has been let to an acceptable tenant, the bank can only look to your other assets up to a maximum of IR£100,000.00 (excluding accrued but unpaid interest)".

Payment Undertaking of 6th December 1999

1. Interpretation

"Direct Liabilities" means in relation to each Mortgagor all monies and liabilities whether certain or contingent which now are or at any time hereafter may be or become due, owing or incurred by him to the Bank under or pursuant to or in connection with his Facility Letter"

"Enforcement Event" means any of the following events:

- (i) A failure by any Mortgagor to pay or discharge any of the Secured Liabilities when the same ought to be paid or discharged; or*
- (ii) Any event by virtue of which any of the Secured Liabilities becomes due to be paid or discharged before the date on which it would otherwise be due to be paid or discharged".*

"Mortgaged Assets" means all assets rights and property of the Mortgagors the subject of any security created or expressed or intended to be created, evidenced or otherwise constituted by or pursuant to this Mortgage and any reference to the "Mortgaged Assets" includes a reference to any of them"

5. Continuing Security

5.1 This Mortgage shall be a continuing security, shall extend to the ultimate balance of the Secured Liabilities and shall continue in force notwithstanding any intermediate payment or discharge in whole or in part of the Secured Liabilities.

..

7. Default and Enforcement

7.1 On the happening of an Enforcement Event (for whatever reason, whether within or beyond the control of the Mortgagors or any of them) the Bank shall cease to be under any further commitment to the Mortgagors and any of the Secured

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Liabilities not already payable on demand shall become immediately due and payable on demand and the security constituted by this Mortgage shall become immediately enforceable.

7.2 The Mortgagors hereby covenant to immediately notify the Bank in writing of the occurrence of an Enforcement Event or of the occurrence or the happening of an event which with the lapse of time, giving notice or determination of materiality (or any combination of the foregoing) will or may constitute an Enforcement Event”

25. Joint and Several Liability and Limit on Recourse

25.1 ...The covenant to pay contained in clause 2.1 shall be deemed to be the several covenant of each Mortgagor and, save as provided in clauses 25.4, 25.5, 25.6, 25.7, nothing in this Mortgage shall entitle the Bank to have recourse to the Other Assets of any Mortgagor (as opposed to the Mortgaged Assets) for any part of the Secured Liabilities other than his Direct Liabilities.

25.2 The total amount recoverable against the Mortgagors in respect of the Secured Liabilities shall not exceed (except as provided in clause 25.4, 25.5, 25.6, and 25.7) the net proceeds received from enforcing the security created or evidenced or otherwise constituted by this Mortgage. Such net proceeds shall be attributable to each Mortgagor in proportion to his percentage ownership in the Mortgaged Property (as specified in Schedule 1)”

25.6 If any of the events specified in clause 25.5 occurs in relation to a Mortgagor that Mortgagor shall lose his right to limited recourse to the extent of the amount (the “Shortfall”) that the Bank would have received if the relevant event had not occurred and accordingly the Bank shall in these circumstances be entitled to have recourse to that Mortgagor and his Other Assets for the amount of the Shortfall.

25.7 The Bank shall (in addition to its recourse to the Mortgaged Assets) have recourse to the Other Assets of each Mortgagor in respect of his Direct Liabilities for:

- (i) a sum not exceeding the amount set opposite his name in Schedule 1 hereto under the heading “Maximum Limited Recourse”; and*
- (ii) additionally for all interest forming part of his Direct Liabilities which is charged or accrued but is unpaid.*

Without prejudice to clause 25.6, the Bank shall be entitled to call upon a Mortgagor for payment or any sum or sums not exceeding the Maximum Limited Recourse attributable to that Mortgagor prior to enforcing the security created or evidenced or constituted by this Mortgage . .

25.10 The Bank shall be at liberty to release or discharge any one or more of the Mortgagors from any liability under this Mortgage or in respect of his or their interest in the Mortgaged Assets or to take any composition from or make any other arrangements or variation with any one or more of them without thereby

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releasing or discharging any other or others of them or otherwise prejudicing its rights or remedies against any other or others of them or the Mortgaged Assets”.

Schedule 1 – “Maximum Limited Recourse” IR£100,000.00”.

Summarised Indicative Term Sheet

“6. Security

The Bank’s security shall comprise the following:-

- 1. A first legal charge over the property being purchased in ...*
- 2. An interest cover guarantee from each Borrower for their respective share of all interest which remains outstanding in respect of all facilities and unpaid one calendar month after it falls due to be paid to the Bank.*
- 3. An assignment over all of the rental income due from the Tenant (which will include any upward movements in the rental).*
- 4. Recourse to each Borrower shall be limited individually and severally to a maximum amount of £100,000 per Borrower, once a qualifying lease with a suitable tenant is signed on terms acceptable to the Bank. This valuation is to be determined by an independent valuer acceptable to the Bank.*
- 5. The investors are required to provide life cover in the amount of IR£100K and to assign that cover to the bank. The bank may waive this requirement at its discretion”*

Correspondence between the parties

12 May 2008 – The Complainant to the Provider

“Following our conversation today in relation to the mortgage on [investment property], I enclose a cheque for €150,000 to be offset against the mortgage”.

18th November 2013 – document accompanying Letter of Offer: Term Extension

“Security assignment over Life Assurance Policy / Policies:

6.Default

6.13 any event (whether described as an event of default or otherwise) occurs by virtue of which any of the Secured Liabilities becomes due to be paid or discharged before the date on which it would otherwise be due to be paid or discharged ..”

27 March 2014 - the Bank to the Complainant

“On the basis of the clauses contained in the Facility Letters and the recourse provisions in the Mortgage, the Bank is obliged to off-set monies which have accumulated in the [Investment Property] Sinking Fund Account to the Loan Facility. After application of these monies to the Loan Facility, the Bank shall (in addition to its recourse to the Property) be entitled to recourse to you in respect of

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the balance of the Loan Facility, up to the limit of IR€100,000.00 (c. €126,973.81) specified in Schedule 1 of the Mortgage, being the Maximum Limited Recourse and additionally for all interest which has accrued or charged on the loan but is unpaid, in respect of your direct liabilities to the Bank. The Bank awaits your proposal in respect of the residual balance on the Loan Facility given the recourse provisions set out above”.

18 November 2014 – The Bank to the Complainant

“As you will be aware, the Bank has consented to the sale of the Property for a consideration of not less than €860,000.00 subject to the conditions set out in the Bank’s letter to ... Solicitors dated 6 August 2014. Assuming that the sale of the Property completes and sales proceeds are applied to the Loan Facility in reduction of your indebtedness’s to the Bank, there will be a residual balance on the Loan Facility.

The Bank requires your proposals in respect of the residual balance on the Loan Facility given the recourse provisions as set out in the Bank’s letter dated 27 March 2014”

9th February 2015 – The Complainant to the Bank

“I believe there should be enough funds to cover whatever payment is due but if there is a shortfall I will make sure that is paid upon my return”.

9th April 2015 – The Bank to the Complainant

“In the event that you wish to transfer funds from the Sinking Fund Account to be offset against the outstanding balance in respect of the loan Facility, the Bank will require your written instruction in this regard. On receipt of your written instruction, I will forward your request to the relevant department within the Bank and request that any surplus funds that remain in the Sinking Fund Account are returned to your nominated account. I would appreciate if you could revert with your preference in this regard”.

16th April 2015 – The Complainant to the Bank

“I refer to your letter dated 9th April, 2015 detailing the balances on my loan account after allocation of the 1/13th share of the sale proceeds which does not included any accrued interest since 31st March 2015 and my sinking fund in relation to [investment property].

Sinking fund €119,008.53

Outstanding Loan account ... € 94,658.48

€ 24,350.05 balance due

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I authorise you to transfer all the funds from the Sinking Fund account to be offset against the outstanding balance of the Loan Facility. I would then like the remaining monies (plus any residual interest) to be transferred to my account”.

28th April 2015 – Complainant’s wife to the Bank

“I was wondering whether you could give me a time frame as to when the funds from the sale proceeds will be transferred to our bank account as [Complainant] has a purchase in mind and needs to know when the funds will be available to him”.

14th May 2015 – The Bank to the Complainant

“I wish to confirm that the Bank transferred a sum totalling €24,297.81 to your nominated account as per there enclosed letter on 22nd April 2015”.

16th June 2015 – the Complainant to the Bank

“As [the investment property] was sold at a loss in January 2015, the Limited Recourse clause in our contract with the bank is applicable. This means that [the Bank] is entitled to €127,000.00 (IR€100,000) (the “Recourse Amount”) plus the proceeds of the sale of [the investment property] which amounted to €63,012.00 per individual after sale expenses were deducted”.

14th September 2015 – the Complainant to the Bank – seeking response to his letter of 16th June 2015.

15th January 2016 – The Bank to the Complainant

“[The] Loan Account was repaid and closed prior to the transfer date and accordingly did not transfer to [entity intending to buy loan book]”

16th February 2016 – The Complainant to the Provider acknowledging the Provider’s of 15th January. The Complainant requests repayment of monies he considers were overpaid by him.

22nd February 2016 – Complainant to Bank requesting repayment of monies.

22nd March 2016 – The Bank’s response to the complaint.

21 December 2016 – The Complainant’s letter of complaint

“In essence, my position is that I invested in a business property that went badly wrong. It had a limited recourse facility as part of the terms of the loan. It was sold at a loss and most investors still owed a good deal of money. They are invoking the “Limited Recourse” to reduce their liability.

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I unfortunately paid my mortgage in full, but as the property was sold at a substantial loss, I incurred quite a loss on my investment. I feel that the "Limited Recourse" should apply to my situation too".

The Complaint for Adjudication

The complaint for adjudication is that the Bank did not correctly and reasonably apply the limited recourse facility in the Complainant's circumstances.

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 Complainant was 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 29th April 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.

Analysis

Based on the loan documentation and accompanying correspondence, I accept as a matter of construction that the loan was issued on the basis of the Bank having recourse to the Complainant, in the manner that it sought and received the loan repayment from the Complainant.

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It is not clear to me why the Complainant thought that the limited recourse provision referring to the IR€100,000.00 (€126,973.81) was the only amount that would be payable by him to the Bank (in addition to the proceeds of the sale of the property) upon a realisable loss on the property investment. This is particularly so when it is clear that he paid over to the Bank in 2008 a greater sum of €150,000 by way of reduction of his loan. Likewise it is not clear that there was any reliance by the Complainant on what was advised in the Solicitor's letter over and above that contained in the loan agreement itself regarding the recourse provision. In that regard I note that the Complainant in 2015 freely consented that monies be deducted by the Bank from the Sinking Fund in respect of his outstanding indebtedness to the Bank. This action on his behalf went beyond what he later says was his understanding of the limited recourse provision.

The evidence shows that there was no communication from the Complainant to the Bank to the effect that he was not able to pay the outstanding loan amount or was going to default on the payment of the outstanding loan amount when called upon to do so by the Bank in 2015.

The Bank has stated that there was no default in the Complainant's Mortgage Account repayments and no shortfall upon the sale of the property. I note that the Complainant has also not argued a default (other than saying he suffered a loss on the investment) when questioning the Bank's non-application of the recourse limitation in his circumstances.

The appropriate and most opportune time, for the Complainant to question the Bank's requirements as to the payment of the outstanding debt was at the time of the Bank's request for payment in 2015.

From a reading of all the loan documentation and accompanying communications supplied in evidence, I am satisfied that the Maximum Limited Recourse of IR€100,000.00 (€126,973.81) was to be the limit of the Complainant's exposure to the Bank's financial recourse after the Bank had taken the proceeds of the sale of the property, the amounts deposited in the Sinking Fund and interest accrued or charged on the loan, if unpaid. However, in the absence of a default by the Complainant in his Mortgage Account repayments, the Bank took his share of the proceeds of the sale of the property, and a certain amount from the Sinking Fund so as to clear his indebtedness to the Bank. That is how the Bank dealt with the Complainant's indebtedness in his particular circumstances. In general, such limited recourse debt allows a Bank to collect (up to the limited amount stated in the agreement) of what is owed to the Bank, even after it has taken what has been pledged by way of security for the debt, that is so long as it does not exceed what has been lent by the Bank.

In this case Complainant pledged his share of the sale of the investment property, plus the amounts standing in the Sinking Fund.

The Complainant may have legitimately (in a default situation) have paid a lesser sum to the Bank had he not made the €150,000 reduction on his loan in 2008. However, this

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reduction on his loan in 2008 was voluntarily made by the Complainant, and without evidence of the Complainant having re-negotiated the terms of the loan with the Bank, I accept that the Bank has acted correctly in relation to its payment requests in 2015 and in its dealings with the Complainant regarding his loan. Of note in this regard is that the loan agreement allowed for a situation where an intermediate payment or discharge was made by the borrower. The Payment Undertaking of 6th December 1999 stated as follows:

“5.1 This Mortgage shall be a continuing security, shall extend to the ultimate balance of the Secured Liabilities and shall continue in force notwithstanding any intermediate payment or discharge in whole or in part of the Secured Liabilities.”

Therefore, having regard to all the circumstances and the reasons set out above, it is my Legally Binding Decision that the complaint is not upheld.

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

23 May 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.**