An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0218
Sector:	Banking
Product / Service:	Interest Only
Conduct(s) complained of:	Mis-selling
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns a mortgage loan advanced to the Complainants in **2006**.

The Complainants' Case

The Complainants took out a mortgage loan with the Provider in early 2006 for €350,000, repayable over fifteen years on an interest only basis for the entire term. The Complainants state that the purpose of this loan was an investment in a property consortium. The Complainants assert that this consortium banked with the Provider and that the Provider was part of the professional team promoting the investment. The Complainants submit that the subsequent property crash had a major impact on the value of their investment, such that by **2013** they were aware that there would be no return on their investment.

In **December 2014**, the Complainants submitted a complaint to the Financial Services Ombudsman regarding the conduct of the Provider arising out of the sale of the mortgage in 2006. The Financial Services Ombudsman declined jurisdiction to investigate that complaint because of the time limit of six years then applying under ***s. 57BX(3)(b)*** of the ***Central Bank Act 1942*** (as inserted by ***Section 16*** of the ***Central Bank and Financial Services Authority of Ireland Act 2004***).

Certain changes to the time limits for bringing complaints to the Financial Services Ombudsman came into effect with the enactment of the ***Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017***. Arising out of these changes, the Complainants re-submitted the complaint on the 1st of September 2017, concerning the sale of their mortgage in 2006, which led to the re-opening of the original 2014 complaint file.

The Complainants have been advised that, as this complaint is made against the Provider, assertions of misconduct on the part of the independent mortgage broker (that it submitted inaccurate information) does not fall within the scope of this complaint, as the mortgage broker not a tied agent of the Provider.

The Complaint for Adjudication

The complaint is that the Provider wrongfully approved facilities for the Complainants, insofar as it:

1. Approved the fifteen year, interest only facility without seeking any confirmation of how the capital would be repaid, at the end of that period, thereby amounting to reckless lending.
2. Approved the mortgage based on a number of factual inaccuracies in the mortgage application, including the purpose of the mortgage and misstatement of the previous lender.
3. Approved the mortgage on an interest only basis for fifteen years, in circumstances where the Complainants contend they did not specify this period on the application form.
4. Failed to take relevant information regarding the Complainants' income into consideration and failed to adhere to its own credit policy and stress testing of ability to repay in approving the mortgage.
5. Breached its duty of care to the Complainants, and caused their family home to be put at risk.

In a second complaint form submitted in September 2017, when asked how they would like the Provider to put things right, the Complainants accepted some responsibility for the losses they have incurred, but said that they want the Provider to write off the balance of the mortgage over and above the €270,000 they have offered to pay. They estimate the amount that would be written off in this scenario, to be €80,000.

The Provider's Case

In its final response letter dated 6 October 2014 the Provider submitted that it relied on the accuracy of the information contained in the Complainants' application form, that was submitted by the independent mortgage broker.

The Provider has referred to the application form received from the mortgage broker on behalf of the Complainants. The purpose of the mortgage as stated on the application form

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was for a "*equity release*" and the Complainants signed a declaration form confirming that the mortgage application was true and complete. The Provider points out that the broker in the normal course, would have discussed the terms of an interest only mortgage with the customer, prior to submitting a mortgage application to the Provider.

The Provider points out that the type of mortgage offered to the Complainants was an interest only repayment tracker mortgage. It points out that the offer of mortgage loan agreement furnished in evidence includes the following information:-

> *"This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. Legal advice should be taken before this document is signed."*

The Provider also points to Section 2.6 of the additional conditions on the loan agreement which stated:-

> *"You have elected to pay interest only on your mortgage for the term of the loan. With an interest only mortgage your repayments only repay the interest arising from the amount drawn. At the end of the term, you will be obliged to repay the full loan amount together with any accrued interest in full. You should make provision in your financial planning for the payment of the principal amount on conclusion of the term."*

The Provider notes that the Complainants signed the loan agreement indicating their acceptance of the mortgage agreement offered on the associated terms and conditions. In addition, the Complainants signed the "interest only" declaration which stated:-

> *"I understand that interest only on this mortgage will be paid on a monthly basis and that the original amount of the loan (together with any accrued or unpaid interest) will have to be repaid on or before the end of my mortgage term."*

The Provider is satisfied that the Complainants were fully aware that the type of mortgage requested and offered was an interest only repayment mortgage and the Complainants were advised to seek legal advice prior to signing the loan agreement. The Provider points to the fact that the loan agreement was witnessed by the Complainants' solicitor. It points out that prior to signing the mortgage offer letter, it was the responsibility of the Complainants to ensure that they had a repayment plan in place to meet their obligations, on the expiry of the mortgage term.

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

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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 9 July 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, within the period permitted, the final determination of this office is set out below.

The limitations of the jurisdiction of the Financial Services and Pensions Ombudsman should be borne in mind in complaints of this type. Where issues of sustainability / repayment capacity / debt restructure are in dispute, this office will not interfere with the commercial discretion of a provider unless the conduct complained of is unreasonable, unjust, or improperly discriminatory in its application to the Complainants, within the meaning of ***Section 60(2)(c***) of the ***Financial Services and Pensions Ombudsman Act, 2017***. It is not a matter for this office to impose a write-down or write-off of debt on a provider, except in very exceptional circumstances.

An application form completed by a mortgage broker on the Complainants' behalf contains the following information pertinent to this complaint:

> *Purpose of mortgage: Equity Release*
> *What type of payment method do you require? Interest only [box ticked]*
> *Mortgage term: 15 Years*

The Complainants both signed this application form, thereby declaring that the contents were true to the best of their knowledge; that there were no existing loans or advances in their names with any lender other than those disclosed in the form; and that they would tell the Provider of any changes to the information provided therein, prior to the loan being drawn down.

A data entry form completed by the Provider in relation to this application contains the following pertinent information:

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Term sought (Years): 15
"clients remortgaging to purchase RIP abroad"

The letter of offer of mortgage loan, dated the **24 March 2006** contains the following information pertinent to this complaint:

"***IMPORTANT INFORMATION as at 24 March, 2006***

(1)	*Amount of credit advanced:*	*350,000.00*
(2)	*Period of agreement:*	*15 years*
(3)	*Number of Repayment Instalments*	*180*
(4)	*Amount of each Instalment*	*€947.92*
(5)	*Total Amount Repayable*	*€520,625.60.*
(6)	*Cost of this credit (5 minus 1)*	*€170,625.60*

…"

In addition, the "***PARTICULARS OF THE OFFER***" included the following:-

"Loan term:	*15 years*
Amount of the Loan:	*€350,000.00*
Loan type:	*Interest only"*

The security required for the loan was a first legal charge over the Complainants' property in Lxxxx. A pre-drawdown requirement was that the Complainants' solicitor confirm in writing the reason for raising capital. It was also a condition of the loan offer that a portion of the funds being advanced would be used to clear the Complainants' debts on foot of two other loans.

I note that the Complainants both signed acceptance of the mortgage loan offer, witnessed by their solicitor, which confirmed (amongst other things) that they accepted the terms of the loan offer, and they understood the terms of same. A further declaration signed by them confirms that they understood that the mortgage was interest only and the original amount of the loan would have to be repaid on or before the end of the mortgage term.

In a letter dated **28 March 2006**, solicitors acting for the Complainants wrote to the Provider in the following terms: *"I confirm that the Homeloan is being raised by [the Complainants] for the purpose of the purchase of shares"*.

The funds received by the Complainants were ultimately used to invest in a geared property investment fund.

<u>Analysis</u>

The crux of this complaint is the Complainants' contention that the Provider should not have lent money to them in 2006, that it was reckless or negligent to do so, that it failed in a duty

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of care to the complainants, and that consequently it should be required to agree to a significant write down of the debt.

The Provider has furnished an account of the basis for the loan and the information furnished by the Complainants when applying for the loan. The Complainants signed their acceptance of the loan. There is no suggestion that the Complainants did not sign it. Nor is it apparent from the evidence before me that any undue influence or duress was present to the extent that the Complainants did not have capacity to make their own decisions.

There does not appear to be any suggestion after the loan was advanced, that the Complainants did not want it. On the contrary, they disbursed the money they received, and used it to invest in a geared property fund. The nature of the mortgage was that the Complainants were releasing some €200,000 of equity in their property (the property being security for the loan) with agreement that they repay it within 15 years. The Complainants have not attempted to agree capital plus interest repayments with the Provider, nor it seems have they made any repayments whatsoever since January 2016. They would like the Provider to accept a lump sum (albeit a significant lump sum) and to then write off the residual debt.

The fact that the Complainants appear to have been unable to repay the loan in full when it fell due is regrettable, but this in my opinion is not a ground to invalidate the loan agreement itself.

This complaint is that the Provider should not have advanced credit to the Complainants. Ultimately, the assessment of the risk associated with advancing funds, and the decision to advance those funds, are matters within the commercial discretion of a provider. The fact that the Provider does not appear to have been put off by whether the loan was for the purchase of a property abroad, or the purchase of shares in a geared property fund is not a factor which affects the Complainants' liability to pay the debt.

The Complainants applied to borrow the monies, they drewdown the loan funds, and disbursed them. They agreed to repay the loan within 15 years. This may have been on the basis of a return on their investment, or it may have been in some other manner. They also agreed that their property would form security for the loan. The Provider, as with any bank in this situation, can recover either by agreeing capital plus interest repayments or by realising its security (ie repossessing the property). This is the nature of an equity release mortgage loan, and there is no evidence that the Complainants did not understand that. There is also no evidence whatsoever that the Provider induced the Complainants to enter into the borrowing, or indeed that it played any part in the Complainants' decision to invest in the geared property fund, or that it purported to offer any advice as to the merit or risks associated with the geared property fund investment. The Provider simply made the facilities available, on the terms that the Complainants had asked for.

The Complainants contend that the Provider ought not to have advanced these monies to them, and they have retrospectively advanced various reasons as to why their financial situation at the time of the loan offer, did not justify the loan that was advanced to them.

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They believe that had the Provider acted more prudently, it would not have offered them a loan and they would not now be in this position.

Contract law assumes that those entering into an agreement intend that it should be legally enforceable and, unless it is shown to be otherwise, that they have entered into the agreement through their own choice and not by compulsion.

I am also conscious that the Courts have made it clear over the last number of years that there is no tort of "*reckless lending*" in this jurisdiction. The High Court in ***Harrold v Nua Mortgages [2015] IEHC15*** confirmed that it was clear from the evidence in that case that the plaintiff had applied for the loan, drawn down the loan, spent the fund and was undoubtedly a willing participant in the transaction. There was no credible evidence that the plaintiff had been "*lured into a contract*" or coerced or induced in any way to sign up to the mortgage agreement. The High Court also pointed out that any suggested non-compliance with the statutory code, did not relieve a borrower from his obligations under a loan to repay the lender, nor did it deprive the lender of its rights and powers under the loan agreement.

I am satisfied in those circumstances that it is not open to this office to make a finding that the Provider's conduct in making loan facilities available to the complainants, amounted to "*reckless lending*".

On the basis of the evidence before me, it is clear that the Complainants applied for the facilities, had the advice of their solicitor available to them at the time of the borrowing, drewdown the loan and spent the funds, and they must now repay the monies borrowed, in accordance with the terms of the loan agreement. In circumstances where the evidence before me discloses no wrongdoing on the part of the Provider, I am satisfied that this complaint cannot be 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

31 July 2019

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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.