



<u>Decision Ref:</u>	2019-0273
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Failure to provide correct information Delayed or inadequate communication Level of contact or communications re. Arrears Complaint handling (Consumer Protection Code) Dissatisfaction with customer service
<u>Outcome:</u>	Partially upheld

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

Background

In **2005** the Complainants entered into a mortgage agreement with the Provider for the sum of €113,260.00 with a 20 year term and initial monthly repayments of €766.42, which represented both capital and interest payments.

In **2007**, the Complainants topped up the loan by €20,000.00.

In **2014**, the Complainants' business entered liquidation and they entered into alternative repayment arrangements with the Provider.

In **July 2016**, the parties entered into discussions concerning how to deal with the arrears that had built up on the borrowing, which were approximately €11,000.00. The Complainants submitted a standard financial statement and the Provider offered to recapitalise the arrears. Before doing so, the Complainants requested a breakdown of the arrears figure in order to ascertain how much of it comprised interest arrears and capital arrears.

The Provider said that it could not provide this figure, but could only provide the amount of the arrears. The Complainants complained about this, in addition to querying a drop in their

arrears figures that occurred in **December 2017** and a change in their monthly repayments from €814.00 to €914.00 in **November 2016** and the general conduct of the Provider.

On **16 May 2017** and **13 March 2018** respectively, two complaint forms were received by the FSO and the FSPO. On **29 March 2018**, the Provider's final response letter was received.

The Complainants' Case

The Complainants' case is set out in the two complaint forms and primarily their letter dated **9 March 2018**. The Complainants have also submitted additional letters and documentary evidence in respect of their complaint.

Firstly, the Complainants assert that in 2016 they repeatedly requested that the Provider provide a breakdown of the arrears figure into capital arrears and interest arrears. The Complainants indicate that they needed this information to give to their third party advisors, so that they could be advised whether or not to enter into the recapitalisation arrangement. The Complainants state that they have requested this information on numerous occasions. By letters dated **7 September 2016**, **30 September 2016** and **27 January 2017** the Complainants asked the Provider for this information, but to date it has not been provided. The Complainants note that the Provider repeatedly wrote to them indicating that the complaint was being investigated, but that they did not receive a final response letter until **29 March 2018**.

Secondly, the Complainants take issue with the arrears figure calculated by the Provider. The Complainants assert that between September 2016 and December 2017, their arrears figure fluctuated inexplicably. The Complainants assert that it was €12,198.09 in September 2016, which then dropped to €8,852.16 in November 2016 and returned to €12,198.09 in December 2016. In November 2017, the Complainants, then received a letter from the Provider indicating that it was recalculating how arrears were determined and indicating that the arrears figure was €2,296.32. The Complainants state that they have made the payments as agreed between them and the Provider and that these fluctuations cannot be explained.

Thirdly, the Complainants assert that a payment in September 2016, did not show up in a statement sent by the Provider. The Complainants state that the payment should be properly receipted. The Complainants assert that it is not contained in a September 2016 statement, but state that there is a letter from the Provider indicating that it received the payment. The Complainants query how this could be so.

Fourthly, the Complainants assert that their monthly repayment figure increased from €849.00 to €914.00 per month without explanation in November 2016. The Complainants query whether their mortgage was recapitalised without their knowledge.

Fifthly, the Complainants assert that the Provider's behaviour in delaying the progressing of their complaints is not acceptable. The Complainants assert that the Provider has not behaved appropriately in communicating with the Complainants, and has bordered on being

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abusive. The Complainants indicated that 18 months passed between raising their initial complaint and the Provider issuing a Final Response Letter. The Complainants assert that the delays in all of the foregoing has resulted in them being reported to the Central Bank's Central Credit Register, which has caused stress and inconvenience.

The Provider's Case

The Provider's case is primarily set out in its formal response dated **31 August 2018** to the within complaints.

Firstly, in respect of the query raised by the Complainants for a breakdown of their arrears figure into capital arrears and interest arrears, the Provider states that its loan system does not create this data and that the details requested cannot be provided. On **26 September 2016**, the Provider states that it provided a breakdown of the arrears balance into monthly mortgage payments due and payment received, since the loan was drawn down. By letter dated **29 November 2016**, the Provider wrote to the Complainants setting out that the arrears balance is not further broken down into capital arrears and interest arrears.

Secondly, in respect of the fluctuation in arrears figures, the Provider states that it changed its methodology in how it calculates arrears, which resulted in a reduction in the arrears figures by €8,239.73. The Provider states that this did not change the overall balance owed by the Complainants nor did it result in any credit being made to the Complainants' account or any change to the monthly repayments. By letter dated **6 November 2017**, the Provider asserts that it informed the Complainants of this change in methodology and of the new arrears figure.

Thirdly, in respect of the September 2016 payment, the Provider states that a statement of account was produced and sent on **26 September 2016**. The Provider states that a payment of €950.00 was credited to the account on **28 September 2016** and, therefore, did not appear in the statement. The Provider states that the payment was reflected in the 2016 annual statement of account, and has been credited to the mortgage account.

Fourthly, in respect of the change of the monthly repayment figure to €914 in November 2016, by letter dated **15 November 2018** the Provider states that the monthly payment changed with effect from 1 June 2015, following a change in the interest rate applicable. The revised monthly repayment of €914.35 included the accumulated arrears on the account to ensure that the monthly repayment would clear with the mortgage within the term. The Provider states that it informed the Complainants of this by letter dated **21 May 2015**.

Fifthly, in respect of the Provider's behaviour, the Provider asserts that there were 13 phonecalls made between June 2016 and July 2017 which were proportionate and not abusive. The Provider asserts that it was reasonable to contact the Complainants in order to try and resolve the outstanding issues that arose. The Provider states that it responded to the initial complaint within 2 days in December 2016. The Provider states that it provided

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repeated updates to the Complainants and that on **3 February 2017** it wrote to the Complainants indicating that the matter could be referred to the Financial Services and Pensions Ombudsman. The Provider ultimately issued a final response letter on **29 March 2018**. In respect of being referred to the Irish Credit Bureau, the Provider states that it reports loan data – including the arrears profile – to the Irish Credit Bureau in accordance with the terms of the mortgage agreement.

The Complaint for Adjudication

The complaint is that the Provider was guilty of maladministration insofar as it:-

1. Acted unfairly or unreasonably or contrary to the agreement entered into in not providing the breakdown of the arrears figure into capital arrears and interest arrears
2. Acted unfairly or unreasonably or contrary to the agreement entered into by unilaterally changing its methodology for calculating arrears.
3. Failed to properly account for the payment of €950.00 made by the Complainants in September 2016.
4. Acted unfairly or unreasonably or contrary to the agreement entered into by unilaterally altering the monthly repayments to €914.00, in order to ensure that the mortgage was paid off within the term.
5. Behaved inappropriately in dealing with the Complainants, including but not limited to delaying its response to the Complainants' queries and reporting their profile to the Irish Credit Bureau.

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 on 10 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.

It is unfortunate that the financial circumstances of the Complainants changed from in or around 2014, as a result of which they were unable to make the payments to the Provider which they had agreed to, in 2005 and 2007 respectively. This no doubt caused considerable pressure on the Complainants, but the parties were in a position to agree to some alternative repayment arrangements, as a measure to progress the repayment of the borrowings.

The discord which has ultimately led to this investigation, stems from the events of 2016 onwards, when the Complainants sought a breakdown of the arrears outstanding on the loans, in order to separate the capital arrears from the interest arrears. This request was made to the Provider after consultation with their third party advisor in the context of deciding whether or not to recapitalise their arrears. It is not clear why the third party advisor desired to know what portion of the total arrears figure was capital arrears and which portion was interest arrears, as distinct from the total arrears figure itself.

I have examined the terms of the loan agreement entered into between the parties in 2005 and note the terms of the Consumer Credit Act 1995 warning, which included the following information:-

“ARREARS

Compound interest is charged on arrears of payments at the same rate applying in the loan advanced. An additional 1% is charged on the arrears balance if a Borrowers account is more than 1 month in arrears and where the Borrower fails to make or keep an arrangement to clear the arrears.”

I have also examined the information regarding the application of interest to the borrowing, contained within the General Loan Conditions of the agreement. There is however, no contractual obligation on the Provider to make details available to a borrower in order to provide a breakdown as between the capital arrears and interest arrears figure, in the event of arrears arising.

It is notable nonetheless, that on **26 September 2016** the Provider furnished details of the total outstanding arrears on the mortgage account, set out as monthly mortgage payments due and payments received, from the date when the loan had been drawn down in 2005. In my opinion, this was sufficient to allow the Complainants to decide whether or not to accept the Provider’s offer to recapitalise their arrears, given the absence of any explanation for why the details made available by the Provider were not adequate in that regard. In my

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opinion, in the absence of an understanding as to why further details were required, the Provider did not act unfairly or unreasonably in failing to further breakdown the arrears figure.

I note that the Provider reformulated the manner in which it calculates arrears in respect of mortgage accounts. The Provider has explained that its previous methodology included the already accumulated arrears up to the date of recalculation, in order to ensure that the mortgage would be cleared within the remaining term. I accept that the balance outstanding remained the same and that the monthly repayments did not increase or decrease on the basis of this recalculation. I am satisfied that the Provider set this out in clear terms, in the letter dated **6 November 2017**. I note however, that the Complainants had been involved in negotiations with the Provider, to potentially enter into an agreement to recapitalise their mortgage. Those negotiations took place on the basis of the stated arrears, which were then subsequently recalculated. One can understand in that respect how this may have caused concern to the Complainants, but I believe that the details set out in the letter of 6 November 2017, should have made the position clear.

The Complainants are also concerned and believe that the arrears figure fluctuated between September 2016 and December 2016. In my opinion however, this is not reflected in the account statements submitted in the course of this investigation.

The Complainants have also expressed concern regarding a payment of €950.00 which the Complainants state was not properly accounted for. The payment was made by cheque in the sum of €950.00 and the Provider sent a letter in receipt dated **28 September 2016**. I note that this lodgment did not show up on the account by **30 September 2016** but, as revealed by the full 2016 annual account statement, the payment was fully credited to the mortgage account. It seems that the payment had not been cleared when the account statement dated **30 September 2016** was created, but I believe that it is abundantly clear that the payment was ultimately credited to the mortgage account, and the Complainants should have no concerns in that regard.

The Complainants have also expressed concern regarding the variation in the monthly repayments to €914.00. I am satisfied that the loan agreement entitles the Provider to vary the monthly repayments in order to reflect any change in applicable interest as per general loan condition 4, which prescribes, *inter alia*, as follows:-

"The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of annuity mortgages) and the interest accruing on the advance (in the case of interest only mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the specified day of the calendar month immediately following the month in which the advance to the Borrower's Solicitor was issued and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with

changes in the applicable interest rate. *Payment of the monthly repayments must be made by Direct Debit.*

[My emphasis]

By its letter dated **15 November 2018**, the Provider has explained that the variation occurred for this purpose. The Provider states that it informed the Complainants by letter dated **21 May 2015** at the relevant time. The account statements indicate that the repayment sum fluctuated to take account of interest changes throughout the loan, as is normal with a variable interest loan. I accept that the monthly repayment changed to reflect the change in the interest rate applicable, and was not, as feared by the Complainants, a clandestine attempt by the Provider to recapitalise the mortgage account.

With respect to the behaviour of the Provider, I have listened to the 'phone calls furnished and I am of the opinion that the Provider's representatives were courteous and proportionate. The Complainants also acted courteously and at all times engaged with the Provider.

The period, which is the subject of this investigation, was no doubt very stressful for the Complainants and it is understandable that every interaction which they had, with the Provider over the 'phone, was the source of considerable worry and strain to them, given the circumstances which they found themselves in. From the Provider's point of view, it was seeking to ensure that an arrangement was put into place which would facilitate a repayment arrangement which was acceptable to both parties. It is to the Complainants' credit that notwithstanding the difficult circumstances they found themselves in, the First Complainant managed to secure new employment in 2015 which has aided the Complainants' ability to meet their repayment obligations to the Provider. The Complainants have been through a difficult period, made worse by significant ill health and hospitalisation, but have continued to work with the Provider as is appropriate, with a view to ensuring that the mortgage accounts can be kept in an acceptable order. It is unfortunate that an element of discord has crept into the parties' relationship and it is to be hoped that this relationship will improve into the future, by way of good and clear communication.

It is of course understandable that the Complainants were very frustrated when the Provider's letter dated **29 November 2016** indicated that it could not provide the figures requested. There was a significant delay until the final response letter issued on **29 March 2018**. Before the final response letter, countless 20 day extension letters were sent by the Provider which were undoubtedly very frustrating to the Complainants. In my opinion, the Provider should have conclusively dealt with the Complainants grievances sooner than it did.

Finally, in respect of the Irish Credit Bureau reporting, it seems that the Provider has reported the level of arrears to the ICB throughout the currency of the loan. From the information provided in the course of this dispute, it seems that the parties are in agreement that the Complainants were in arrears in respect of their contractual repayments. The Complainants do appear to have made alternative repayment arrangements which they have abided by. It is clear however, from the mortgage agreement that the Complainants consented at that time to the Provider sharing details of their repayment history with the

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Irish Credit Bureau, over the course of the mortgage loan. I take the view that this was not unfair or unreasonable to the Complainants, and simply reflected the factual position, though I note that, as was appropriate, the Complainants' profile indicators were amended in November 2017, to take account of the recalculation of their arrears. I take the view that this was an appropriate amendment, to accurately reflect the new position.

Taking into account all of the evidence before me, I am satisfied that the complaint against the Provider should be partially upheld. Whilst a number of the concerns expressed by the Complainants are not supported by the evidence, I take the view that the period which elapsed between the time when the Complainants made clear their complaint to the Provider, and when a final response letter was issued some 18 months later, was unacceptable, albeit that in accordance with the Provider's regulatory obligations, it sent numerous 20 day update letters, over the course of the period in question.

It is to be hoped that the parties, from this point, will work together to come to a suitable arrangement, so as to enable the Complainants to meet their liabilities in a way which is manageable for them, but which will also be acceptable to the Provider.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider make a compensatory payment to the Complainants in the sum of €2,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.
- I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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**

1 August 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.

