An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref: 2019-0310

Sector: Banking

Product / Service: Repayment Mortgage

Conduct(s) complained of: Maladministration
Errors in calculations

Outcome: Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants entered into two mortgage agreements with a third party on **3 January, 1999**, ("first mortgage") and **26 January, 2009** ("second mortgage"). The Provider that is the subject of this complaint (**The Provider**) began servicing the Complainants' mortgages on **25 August, 2014**, on behalf of a fourth party. The Provider issued the Complainants with correspondence on **10 February, 2015**, indicating that there were arrears outstanding on the second mortgage account. The Complainants' mortgages were sold to a fifth party on **24 June, 2016**.

The Complainants' Case

The Complainants say that they have always kept current on their mortgage repayments. Having received the letter dated **10 February, 2015**, the First Complainant called the Provider on **13 February, 2015**, stating that the suggestion her accounts were in arrears was *"complete news to* [her]*."* They say that they have repeatedly called on the Provider to demonstrate where the arrears have arisen and given the Provider documentation that they believe supports their assertion that they are not in arrears.

The Complainants say that the Provider transferred credit from one of their mortgage accounts to another without their instruction. In fact, they say, they never instructed the

Provider to split their mortgage into two accounts. This splitting, they argue, has caused the arrears.

The Complainants do not believe that due diligence was completed prior to the transfer of the day-to-day servicing from the fourth party to the Provider or prior to the sale of their mortgages to the fifth party by the fourth party. By letter dated **19 October, 2015**, the Complainants criticised the Provider for its failure to explain the supposed occurrence of arrears on their accounts on **25 August, 2014**, on the basis that a sixth party was servicing the accounts at that stage.

They say that their accounts demonstrate that they were not in arrears. They never received any correspondence from either the third or sixth parties, who serviced the accounts prior to and subsequent to the Provider taking over, to say that they were in arrears. They say that the position adopted by the Provider in its letter of **20 July, 2015**, where it states "*we acknowledge that you have been maintaining your Normal Monthly instalment (NMI) since migration of the account*" while at the same time claiming that payments have been missed is contradictory. The Second Complainant received a letter from the Provider on **30 January 2015**, which acknowledged that there were no arrears on his accounts.

They say that they submitted a data subject access request to the Provider, which was granted. The Complainants sent the sum of €6.35 by cheque to the Provider to enable it comply with the request. That sum was set off against the mortgage accounts the subject of this complaint.

The Complainants continued to receive mortgage arrears correspondence subsequent to the submission of this complaint, the latest noted on this Office's file is dated **19 April, 2018**.

They say that they lost trust in the ability of the Provider to properly administer the account. They are concerned that their reputation will have been damaged with the Irish Credit Bureau as a result.

<u>The Provider's Case</u>

The Provider says that on the date that it commenced servicing the Complainants' mortgage accounts, the first mortgage had a credit balance of €1,229.09 and the second had arrears of €2,265. The combined arrears, accordingly, stood at €1,035.91. On **10 February, 2015**, the Provider issued a letter to the Complainants indicating that the arrears on the second mortgage stood at €3,573.56. The Provider informed the Complainants by telephone on **13 February, 2015**, that there was, however, a credit balance of €700 on the first mortgage.

The Provider told the Complainants on the telephone on **18 February, 2015**, that the arrears on the second mortgage had arisen due to missed payments in **December 2014** and **February 2015**. It said that it could transfer the credit balance of €693.18 from the first mortgage account to the second mortgage account, which would result in the arrears on the second mortgage decreasing to €878.64 once the Complainants made their monthly

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repayment by **28 February, 2015**. On **27 February, 2015**, the Complainants discharged the sum of €500 by telephone payment.

As the Complainants had not received a reply to queries they had raised with the Provider about the arrears that were recorded on their account, they lodged a complaint with the Provider on **7 April, 2015**. A review of the Complainants' accounts found that the credit balance outstanding on the first mortgage account at the date of transfer had been incorporated in the principal balance of the mortgage and that the credit balance recorded a figure €1,229.09 less than it was. That was rectified on **4 June, 2015**, when the credit balance on the first mortgage stood at €2,203.18 and the second mortgage was in arrears of €2,875.36. On **4 June, 2015**, the Provider also stated that the arrears on the accounts stood at €672.18.

By Final Response Letter of the same date, the Complainants were informed that if they wanted to transfer the credit from the first mortgage account to the second mortgage account, they would have to contact the Provider. In the intervening period, on **2 June, 2015**, the First Complainant telephoned the Provider and instructed the Provider to transfer the sum of €1,922.27 to the second mortgage account, which was done on **19 June, 2015**.

On **14 August, 2015**, the Complainants lodged a further complaint regarding the arrears on their account. By Final Response Letter issued on **6 October, 2015**, the Provider outlined the repayments made on the mortgages. That letter stated that there were no arrears on the first account and arrears of €588.62 on the second mortgage. The Complainants disputed that arrears calculation by letter dated **19 October, 2015**, however, on the telephone on **3 November, 2015**, the First Complainant accepted that there was a shortfall in repayment in **December 2014**. That payment was €500 made on **23 December, 2014**. They advised that they would make a further payment on **6 January, 2015**, to meet the repayment obligations for December, 2014. This was never received. The arrears outstanding on that date, as stated on the telephone, were €593.81. The Provider stated that the arrears on migration of the account had been discharged by payment on **30 August, 2014**. The credit balance outstanding on the first mortgage on **5 October, 2015**, was applied to the second mortgage to reduce the arrears to €588.62.

The Provider says that there was a credit balance on the first mortgage account of €2,265 on **25 August, 2014**, against arrears of €1,229.09 on the second mortgage on that date. It says that due to an administration oversight, the payment made by the Complainants in the sum of €1,035.91 on **30 August, 2014**, was allocated to the first mortgage. This, the Provider says, led to an increased credit balance of €2,265 on the first mortgage and arrears of €2,265 on the second mortgage.

On **10 September, 2014**, the Provider says that a payment fell due on the first mortgage account of €280.91 and that this was automatically deducted from the credit of €2,265, which reduced the credit to €1,984.09. The repayment due on the second account of €755 fell due on the same date and this increased the arrears on this account to €3,020. On **29 September, 2014**, the Provider made an adjustment to the account that resulted in a credit amount of €1,229.09 being deducted from the principal balance. Due to this inadvertence,

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the credit on the first account was reduced from €1,984.09 to €755. The credit on the account of €1,984.09 should have been applied to the second mortgage.

On **30 September, 2014**, the Complainants made a payment of €500 to the first mortgage, which resulted in a credit increase from €755 to €1,255. The arrears on the second mortgage stood at €3,020 at that point. On **2 October, 2014**, the Complainants paid the balance of their **September 2014**, instalments by telephone, which reduced the arrears to €2,484.09. On **31 October, 2014**, and **28 November, 2014**, the Complainants made their monthly repayments on both accounts after the due dates.

By Final Response Letter dated **10 December, 2015**, the Provider informed the Complainants that a review of the repayments over the past ten months had showed that payments were made after the due date and thus recorded as missed whether they had actually been made or not. They were, accordingly, reset in **November 2015** to two missed repayments.

Following a review of the Complainants' mortgage accounts, the Provider determined that interest was incorrectly applied to the first mortgage account in the sum of €5.29 between **31 October, 2015**, and **23 June, 2016**. This was ultimately waived by the Provider.

The Provider acknowledges that the credit on the Complainants' first account was sufficient to clear the arrears due on the second account following the payment of **30 August, 2014**, but due to an administrative oversight on its part, the Provider used that amount to reduce the principal sum due.

The Provider accepts that it did not furnish the Complainants with a response to their query raised on **13 February, 2015**, until **4 June, 2015**. It says that the number of missed repayments indicated on the letter issued to the Complainants on **11 August, 2015**, was inaccurate. It accepts that on a number of telephone calls, its employees failed to demonstrate how the arrears arose or that they were valid. The Provider accepts that the correspondence issued on **20 July, 2015**, misstated the arrears owing on the Complainants' accounts. Following its review in **June 2015**, the Provider corrected the mistakes on the Complainants account. The Provider says that all due diligence was correctly carried out in any transfer of the Complainants' accounts.

In light of its customer service failings, the Provider has offered to pay €100 as a gesture of goodwill.

<u>The Complaints for Adjudication</u>

The complaints for adjudication are that:-:

1. The Provider inaccurately calculated the arrears on the Complainants' mortgages;

2. The Provider incorrectly set out the arrears due to it;

3. The Provider split the Complainants' mortgage account without their permission;

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4. The Provider applied credit from one mortgage account to another without the permission of both Complainants;

5. The Provider improperly applied a cheque intended to discharge the costs of a data subject access request against the alleged arrears.

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.

A Preliminary Decision was issued to the parties 11 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.

Following the issue of my Preliminary Decision, the parties made additional submissions as follows:

1. Letter from the Provider to this Office dated 26 July 2019.

2. Letter from the Complainants to this Office dated 8 August 2019.

Copies of the above submissions were exchanged between the parties.

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Having considered these additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

The Provider says that as a result of the Complainants making late payments on their accounts, regardless of whether a payment was made or not, these payments were recorded as missed. It says that on the date of migration of the Complainants' accounts to it, there was a credit balance of €2,265 in the first mortgage against arrears of €1,229.09 on the second mortgage on that date. By **2 September, 2014**, the date by which the Complainants' payment of **30 August, 2014**, was credited to their account, there was, by the Provider's own admission, enough credit to discharge any outstanding arrears. Due to an administrative oversight, this was not done. Had that been done, the accounts would not have been in arrears until after **10 December, 2014**.

It is exceptionally difficult to understand the Provider's explanation of what happened to the accounts after **10 February, 2015**. What is clear, however, is that there were a litany of failings on the Provider's part. For some reason, the credit balance of €1,229.09 that should have been on the Complainants' first mortgage at the date of transfer was set off against the principal sum. This was not discovered until the Complainants lodged a complaint and was not rectified until **4 June, 2015**. Recordings of telephone calls have been provided in evidence. I have considered the content of these calls. Having considered the audio recording of the call that the Provider says the Complainants directed it to transfer the sum of €1,922.27, namely on **2 June, 2015**, I note this instruction was never given. It seems that, with no discernible pattern or instruction, the Provider would decide to apply or not apply the sums discharged by the Complainants to one or both mortgage accounts or against the principal sum. There is no explanation provided for why this was done. Due to the Provider's maladministration of the accounts, including its repeated inability to explain the alleged arrears to the Complainants, I have no confidence in its calculation of the arrears figures.

The Complainants say that their mortgage accounts were only split when the Provider took over the administration of their accounts. It is clear from the loan documents submitted to this Office that the Complainants took out two separate loans. Notwithstanding that fact, there does not appear to have been any issue with applying the repayments to both loans until the Provider took over the management of the accounts.

The Provider's poor servicing and administration of the Complainants' accounts has led to them receiving inaccurate correspondence about mortgage arrears since **10 February, 2015**, to at least **19 April, 2018**. The Complainants have spent considerable time and effort dealing with this and have, understandably been annoyed and greatly inconvenienced by it. As the mortgages have been sold to yet another party, I believe the most appropriate redress is compensation.

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I think it is extraordinary that the Provider, in full knowledge of the Complainants disputing the arrears allegedly owing on their accounts, would apply the sum paid by them to the Provider to enable it comply with a data subject access request against sums allegedly owing by them to it on **16 July, 2015**, a date by which the Provider had already revised its arrears calculations.

The Provider says that the Code of Conduct on Mortgage Arrears ("CCMA") did not apply to the loans because the fourth party was not required to adhere to it. It accepts that this was changed by the enactment of Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015, which was commenced on **18 July, 2015**. Accordingly, any actions taken by the Provider after that date are subject to the provisions of the CCMA.

As a result of the Provider's failings set out above after that date, I find that it did not comply with its obligations under Provisions 12 and 23, which state:

12. A lender must ensure that:

a) All ***communications*** *about* ***arrears*** *and* ***pre-arrears*** *are provided to the* ***borrower*** *in a timely manner;*

b) All information relating to a lender's handling of ***arrears*** *and* ***pre-arrears*** *cases must be presented to the* ***borrower*** *in a clear and consumer friendly manner, and*

c) The language used in ***communication****s must indicate a willingness to work with the* ***borrower*** *to address the situation and must be in plain English so that it is easily understood.*

23. When ***arrears*** *arise on a* ***borrower****'s mortgage loan account and remain outstanding 31 calendar days from the date the* ***arrears*** *arose, a lender must:*

a) inform each ***borrower*** *and any guarantor on the mortgage, unless the mortgage loan contract explicitly prohibits such information to be given to the guarantor, of the status of the account on paper or another* ***durable medium****, within 3* ***business days****. The letter must include the following information:*

(i) the date the mortgage fell into ***arrears****;*

(ii) the number and total monetary amount of repayments (including partial repayments) missed;

(iii) the monetary amount of the ***arrears*** *to date;*

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(iv) *confirmation that the lender is treating the* ***borrower****'s situation as a* ***MARP*** *case;*

(v) *relevant contact points (i.e., the dedicated* ***arrears*** *contact points not the general customer service contact points);*

(vi) *an explanation of the meaning of* ***not co-operating*** *under the* ***MARP*** *and the implications, for the* ***borrower****, of* ***not co-operating*** *including:*

A) the imposition of charges and/or surcharge interest on ***arrears*** *arising on a mortgage account and details of such charges;*

B) that a lender may commence legal proceedings for ***repossession*** *of the property immediately after classifying a* ***borrower*** *as* ***not co-operating****; and*

C) a warning that ***not co-operating*** *may impact on a* ***borrower****'s eligibility for a* ***Personal Insolvency Arrangement*** *in accordance with the Personal Insolvency Act 2012;*

(vii) *a reminder that* ***borrower****s who have purchased payment protection insurance in relation to the mortgage account which subsequently went into* ***arrears*** *may wish to make a claim on that policy;*

(viii) *how data relating to the* ***borrower****'s* ***arrears*** *will be shared with the Irish Credit Bureau, or any other credit reference agency or credit register, where permitted by contract or required by law, and the impact on the* ***borrower's*** *credit rating; and*

(ix) *a link to any website operated by the Insolvency Service of Ireland which provides information to* ***borrower****s on the processes under the Personal Insolvency Act 2012.*

In my Preliminary Decision, I indicated my intention to direct the Provider to pay a sum of €20,000 in compensation to the Complainants.

In a post Preliminary Decision submission dated 26 July 2019, the Provider stated:

"Having considered the case and your Preliminary Decision we agree with the spirit of the decision where measured against our administration of the account and the level of service offered to the Complainants – we recognise our failings in this regard.

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> *However, we feel that the level of compensation awarded to the Complainants is excessive in respect of the impact of each issue on the Complainants. Whilst we agree that the Complainants have spent considerable time and effort dealing with these issues and recognise the consequential annoyance and inconvenience to them, we feel the award is excessive when balancing detrimental impact against financial impact over inconvenience caused and note that you have not found there to have been any detrimental or financial impact to the Complainants".*

In a post Preliminary Decision dated 8 August 2019, the Complainant stated:

> *"In addition I note that [Provider] in their submission indicate that they 'agree with the spirit of the decision' and also 'recognise our failings in this regard' and in this submission they have not attested to any new information, any error of fact or any error of law.*
>
> *I would also like to comment on their statement in their submission that 'you (the financial services and pensions ombudsman) have not found there to have been any detrimental or financial impact to the Complainants'. This statement is at complete variance with the commentary in your Preliminary Decision wherein you correctly comment that ' The Complainants have spent considerable time and effort dealing with this and have, understandably been annoyed and **greatly inconvenienced by it**'. I cannot therefore accept their comment as set out in theirs of 26th July that 'you have not found there to have been any detrimental impact or financial impact to the claimants'. Both my wife and I have spent a considerable amount of our own time and energies dealing directly with [Provider] and subsequently through your own office over a considerable amount of time as set out in all the details submitted to your office and in fact the addition of this statement in the submission from [Provider], I would contend, contrary to the facts as have been set out in your own preliminary decision. The inclusion of this statement in their submission does not engender an acceptance or recognition of the considerable personal annoyance and inconvenience that this matter has caused to us both over the past number of years particularly in light of the accepted complete lack of ability by the service provider to provide information on our account and its management over this period of time".*

I have not been persuaded that my direction for compensation is excessive. Accordingly, for the reasons set out above, I consider that the Provider's offer of €100 is derisory. I uphold this complaint and direct the Provider to pay a sum of €20,000 in compensation to the Complainants.

I also direct that the Provider amend the credit record of the Complainants on the ICB and Central Credit Registry so that there are no negative records relating to the period the Provider serviced the loan.

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Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld, on the grounds prescribed in ***Section 60(2) (a), (b), (e) and (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by amending the credit record of the Complainants on the ICB and Central Credit Registry so that there are no negative records relating to the period the Provider serviced the loan .

I also direct that the Provider pay a sum of €20,000 to the Complainants 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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

2 September 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.**