



<u>Decision Ref:</u>	2019-0407
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Maladministration Dissatisfaction with customer service Fees & charges applied Failure to switch interest rate Errors in calculations
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Second Complainant entered into six mortgage loan agreements with the Provider. Five of these loans were subject to tracker interest rates from inception with the remaining loan converting to a tracker interest rate in **November 2007**. The Second Complainant provided four buy-to-let (**BTL**) properties as security for these loans. The Second Complainant entered into a fixed interest arrangement with the Provider for the period **July 2007** to **August 2009**. On the expiry of this arrangement, the Provider applied a variable interest rate to the Second Complainant's loans for almost two years without first offering the Second Complainant the option of returning to her original tracker interest rates. This error led to an overcharging of interest on the Second Complainant's loan accounts and the accumulation of substantial arrears. On becoming aware of this error, the Provider subsequently offered the Second Complainant the option of returning to the tracker interest rate and made an interest adjustment to the affected accounts by way of interest refund in **June 2011**. The Provider subsequently appointed receivers over the Second Complainant's BTL properties between **September** and **November 2011**. The Complainants dispute the Provider's entitlement to appoint the receivers on the basis that the arrears on the Second Complainant's loan accounts were caused by the overcharging of interest by the Provider.

The Complainants' Case

The Complainants state that the accounts the subject of this complaint went into arrears due to the overcharging of interest by the Provider. The Complainants attribute the cause of the overcharging to the Provider *"... switching us to a higher rate of interest than that which we should have been paying and we were owed a refund of this interest ..."* The Complainants submit that this is not disputed by the Provider.

The Complainants point out that *"... rather than providing us with the money (which they admit was wrongfully taken from us). Instead this money was lodged against arrears on our mortgage accounts but these monies were insufficient to clear the arrears."* The Complainants submit that it was on this basis that the Provider appointed receivers over their BTL properties.

The Complainants state that their primary position is that the accounts would not have entered into arrears but for the wrongful actions of the Provider. Consequently, the appointment of receivers constituted a wrongful act on the part of the Provider in that the Provider had no legal entitlement to appoint receivers over their BTL properties when the accounts were in arrears because of the overcharging of interest.

The Complainants submit that even if the accounts would have entered arrears, which they dispute, the accounts would not have been in arrears at the time the receivers were appointed. The Complainants state that given the improving property market, the early appointment of receivers *"... resulted in a real and substantial loss to us in terms of the undervalue realised by the sale of those properties and the loss of rental income."*

It is submitted by the Complainants that the actions of the Provider have led to a situation where the amounts owed to the Provider are significantly greater than they would have been but for *"... the repeated acts ..."* of the Provider. The Complainants state that the mortgage accounts in respect of their family home have been deemed unsustainable and the Provider is seeking repossession of this property. The Complainants submit that if it was not for the actions of the Provider they would have been able to service their family home mortgage accounts.

In a further submission to this Office dated **20 July 2018** from the Complainants' solicitors, it is stated that the appointment of receivers over the Complainants' BTL properties began in **September 2011** with the final appointment taking place in **November 2011**. It is stated that these appointments took place after the Complainants were reimbursed by the Provider for the overcharging. It is submitted that *"... it was due to the overcharging on [the Complainants'] accounts between 2009 and 2011 of the [Provider] that their accounts went into arrears to begin with."* It is also pointed out that the arrears on the Complainants' accounts *"... almost equated with the amounts the accounts were overcharged by and so it is in these circumstances that the complainants submit that Receivers were wrongfully appointed and their properties wrongfully sold at under value."*

It is also stated that as soon as the Complainants' accounts went into arrears, the Provider began contacting them and this contact quickly became excessive so as to amount to

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harassment. This harassment continued for two years from **2009** to **2011** in circumstances where the Complainants were co-operating with the Provider and communicating with it in relation to the arrears. It is submitted on behalf of the Complainants that they had regular meetings with the Provider during this period and put a number of proposals to it to deal with the arrears on their accounts. The Complainants' solicitor states that the Complainants were *"... upfront about their financial position at all times and were making every effort to take responsibility for and deal with their mortgage accounts."*

It is also pointed out that the Complainants found it frustrating that they were dealing with different personnel within the Provider on each occasion *"... such that they felt they were going back to square one each time."*

It is accepted by the Complainants that the BTL properties would have to have been sold and *"... went so far as engaging a Sales Agent to market the properties and secured offers ..."* on certain properties but these were rejected by the Provider. As a result of the harassment from the Provider and the acceptance that the BTL properties would have to be sold, the Complainants allowed two of the properties to become vacant and prepared them for sale. It is submitted that the Complainants handed over the keys to these properties to the Provider in or around **October 2010** *"... as they were assured that if they did so, their family home would be safe. However, notwithstanding this assurance, the [Provider] proceeded to appoint receivers over the buy to let properties and sold same at undervalue."*

The Complainants state that *"We wish to be compensated for all losses suffered as a result of the [Provider's] actions."*

The Provider's Case

The Provider states that refunds of interest were due on five of the six accounts the subject of this complaint. In or around **July 2007**, five of the Complainants' accounts switched from a tracker interest rate to a fixed interest rate until **August 2009**. Prior to the expiry of the fixed interest rate period, the Provider states that it had discontinued offering tracker interest rates and for this reason the tracker interest rate was not made available to the Complainants at the expiry of their fixed interest rate period in **August 2009**. The Provider advises that the five loan accounts rolled on to a standard variable interest rate.

The Provider states that following certain work undertaken by the Central Bank of Ireland, a review of the practices of the lending industry generally concerning tracker mortgage switching and a review of the Second Complainant's loan accounts, it had come to the attention of the Provider that the options presented to the Second Complainant at the end of the fixed rate period did not include the tracker interest rate as one of the interest rate options. The Provider states that by letter dated **4 May 2011**, it wrote to the Second Complainant to inform her that this option was not offered. The Provider states that the Second Complainant was offer the option of the tracker interest rate which was accepted and an interest rate adjustment was made on each of the five accounts on **1 June 2011**. The Provider states that these interest rate adjustments were not sufficient to clear the arrears on any of the accounts.

The Provider disputes that it caused or contributed significantly to the arrears on the Second Complainant's loan accounts. The Provider further disputes that the arrears on the loan accounts at the time of the interest rate adjustment equated to the amounts refunded. Referring to the arrears statements for each of the accounts and a table containing the arrears that had accumulated on the accounts and the amounts refunded, the Provider submits that the accrual of arrears in no way amounts to the refunds applied to the relevant loan accounts.

The Provider also points out that no adjustment was required in respect of one of the accounts and arrears still accrued on this account which stood at €10,752.71 on **1 June 2011**.

Loss of Income of Second Complainant

The Provider refers to a note of a telephone conversation with the Second Complainant on **20 March 2008**, where the Second Complainant indicated that she did not have the funds to discharge the repayments due on the loans and asked the Provider to *"put the payment due onto the end of the mortgage"*. The Provider states that the notes taken by its case manager in respect of telephone call which took place on **27 May 2009**, indicate that the Second Complainant called looking for a further extension of interest only repayments on the family home mortgage loan account as she could not afford full capital and interest repayments.

The Provider refers to a financial review form returned by the Complainants in **June 2009** and the Second Complainant stated on the form that *"I enclose copy of my letter from my employer ... who are refusing to pay me this month's invoice 24.06.09 due to a dispute over commission payments ..."*. Following a meeting between the Second Complainant and the Provider in **August 2009**, the Second Complainant advised the Provider that she was no longer in employment and that her income had reduced from €115,000 to zero.

The Provider submits that the lack of payments to the loan accounts and resulting accrual of arrears is a direct consequence of the Second Complainant's loss of income from her employment leading to her inability to comply with her contractual obligations under each of the loan agreements.

Rental Income

The Provider states that on **2 June 2010**, the Complainants wrote to it advising that they were not in a position to make the full repayments on the BTL properties, that the rental income from these properties was being paid to the Provider, and that they would seek to provide an undertaking from their solicitor to clear €25,000 on the BTL loan accounts from the proceeds of the Second Complainant's employment claim. The Provider points out, referring to the arrears statements in respect of each of the loan accounts, that the Second Complainant was collecting rent in the sum of €4,000 per month in respect of the BTL properties and none of this rental income was being applied to the mortgage loan accounts. The Provider states that from **March 2010 to February 2011**, only one payment of €800 was made to account number ending 301.

The Provider states that on **19 August 2010**, its representative met with the Complainants, their solicitor and an auctioneer engaged on their behalf. At this meeting it was accepted that the Second Complainant had not been applying rental income from the BTL properties to the loan accounts notwithstanding the arrears position on these accounts.

The Provider states that it was confirmed at the meeting that the Complainants were receiving rental income of €4,100 with one tenant due to leave which would reduce the rental income to €3,000 per month. The Provider submits that the reason advanced by the Complainants for not applying the rental income to the loan accounts was because they were renovating certain of the apartments.

The Provider states that the Complainants were advised to make contact with MABS. The Provider sets out a proposal it subsequently received from the Complainants. The Provider wrote to the Second Complainant separately in respect of the proposal made in respect of the BTL property loans outlining that these proposals were given serious consideration but were unacceptable. The Provider then called on the Second Complainant to deliver voluntary possession of the properties.

The Provider states that it is difficult to comprehend how the Second Complainant could reasonably assert that it was responsible or partially responsible for the arrears on the mortgage loan accounts in circumstances where the Second Complainant was not making any repayments to these accounts yet was collecting a monthly rental income in excess of €4,000. The Provider further submits that the Second Complainant cannot reasonably content that the Complainants *“co-operated fully with the Bank and made every effort to address the arrears in their accounts.”*

The Provider states that a solicited call was made to the Second Complainant on **24 January 2011**, by its case manager who queried why the BTL properties were not vacant and was advised that if they were not vacant by **1 February 2011**, the Provider would instruct solicitors accordingly. The Provider states that its case manager called the Second Complainant on **4 February 2011** in relation to the possibility of accepting her proposal to make interest and part capital payments on the private dwelling home. During this conversation, the Provider states that the Second Complainant was advised that the delay in delivering vacant possession of the BTL properties was deemed unacceptable and that solicitors were about to be appointed in respect of this matter.

The Provider states that it instructed its solicitors on **9 February 2011**, to write to the Second Complainant demanding vacant possession of the BTL properties. On **10 February 2011**, the Provider received correspondence from the Second Complainant's solicitors withdrawing any consent to vacant possession that may have been given and that any attempts to repossess the properties would be strongly resisted. The reason given was that the Second Complainant did not have independent legal advice.

The Provider states that it received a letter dated **24 February 2011** from the Complainants where it was proposed that the Complainants would manage the BTL properties and rent would be mandated directly to the Provider together with the immediate sale of one property followed by the sale of the remaining properties which would be rented pending

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sale. The Provider states that given the repayment history on the loan accounts, the substantial rents that had been collected, diverted, and the increasing arrears, the proposal was declined.

Tracker Rate Adjustments

The Provider submits that even after the interest rate adjustments on each of the affected accounts thus reducing the arrears, arrears continued to accrue in **June, July and August 2011** despite a new revised repayment arrangement and the fact the BTL properties were rented during this period.

Co-Operation with the Provider

The Provider disputes that the Complainants were fully co-operative with it. It also disputes that the Complainants made every effort to address the arrears on their accounts. The Provider states that the amount drawn down by the Second Complainant in respect of the accounts the subject of this complaint was approximately €1.2 million. The Provider states that the Complainants also had joint borrowings of €700,000.

The Provider states that arrears first commenced on account ending 442 in **May 2009** and account 961 in **July 2009** when the interest only repayment period rolled off [I note that these accounts are not the subject of this complaint]. The Provider states that it agreed to a further six months of interest only repayments on the basis that the Complainants were to take independent legal and financial advice.

August 2009 Meeting

The Provider refers to the meeting that took place in **August 2009** where the Second Complainant advised the Provider of her ongoing dispute with her employer. The Provider states that the Complainants were seeking further forbearance in the form of an extension of interest only repayments on their primary dwelling home loan facilities and a moratorium on each of the BTL property loans. The Provider refers to two letters sent to the Complainants dated **17 August 2009** and **19 November 2009**, and the subsequent reply received from the Complainants. The Provider states that on the basis that the Labour Court decision in respect of the Second Complainant was scheduled for **12 January 2010**, it issued the Complainants with Mortgage Forms of Authorisation on **8 December 2009** offering a further three month period of interest only on their primary dwelling home loans.

Short Term Debt

The Provider submits that (based on the response from the Complainants referred to above) it is clear that the Complainants were prioritising short-term debt or at the very least intending to prioritise short term debt over their facilities with the Provider. In spite of the lodgement books that had been sent to the Complainants, no payments were applied to the loan accounts during this period.

Referring to letters sent to the Complainants dated **19 March 2010** and **9 April 2010**, the Provider states that it was clear at that juncture that it had advised the Second Complainant that the arrears situation relating to the BTL properties was unsustainable and that a sale of these properties was required to reduce their liabilities to the Provider.

The Provider has outlined the response received from the Complainants in respect of this correspondence and states that it demonstrates that the Complainants were not co-operating fully with the Provider. It states that the refusal to provide the full proceeds of the employment claim towards the increasing arrears together with the refusal to pay anything until an agreement was in place in relation to the family home supports this conclusion.

The Provider states that it wrote to the Complainants on **13 May 2010**, agreeing to a further period of 12 months interest only on the primary dwelling home loan accounts subject to full repayments resuming on the BTL loan accounts, an undertaking was to be provided by the Complainants' solicitor to provide the full proceeds of the employment claim towards arrears and a commitment was sought from the Second Complainant to put the BTL properties on the market within 12 months. The Provider received a response dated **2 June 2010** which has been outlined above.

Employment Dispute

The Provider advises that the Second Complainant indicated that she was hopeful of achieving a minimum award of €65,000 in respect of her employment dispute. The Provider states that it was explained to the Second Complainant that it would require an undertaking that the proceeds of this dispute would be utilised to address outstanding arrears. The Provider states that the Complainants indicated their intention to give an undertaking of €25,000 and apply the remaining balance of the award to monies owed to their son and short term debt which stood at €82,000 with various lenders.

On **31 March 2011**, the Complainants wrote to the Provider advising that *"the €20,000 ... is no longer available to [the Second Complainant]. This money has been spent on subsidising her financial commitments over the last two years included her share of the interest repayments on the home loans. ... We will give you a gesture of our good faith a bank draft of €3,400 which is all we can raise."* The Provider submits that the Second Complainant refused to co-operate with it by using funds available to her to reduce the arrears on her loans.

The Provider refers to a letter dated **4 May 2011** and the response received from the Complainants on **11 May 2011** seeking further interest only repayments for the *"foreseeable future"* and advising that the First Complainant had three salary reductions over the past year and that the Second Complainant was informed by her employer that there was not enough work for her.

The Provider states that a further meeting took place with the Complainants and their solicitor on **19 May 2011** to discuss interest rate refunds, the non-payment of the employment award and the sustainability of the Second Complainant's loans. It was agreed that the private dwelling home mortgages were to be prioritised notwithstanding the fact that the Second Complainant had admitted that her award from her employment dispute was to be used to pay a credit card debt of €6,000 and a car loan. The Provider states that the Complainants also confirmed their financial position as outlined in the financial review form from **January 2011** was now false and that position was significantly worse. Referring to the minutes of the meeting, the Provider states that the Second Complainant's attention was drawn to the fact that payments received to date in respect of her loans totalled approximately €7,160 over 18 months – an average of €150 per month on each account. It was further highlighted that despite the positive impact of the interest rate refunds, outside of rental income, there was insufficient income which would ultimately have a bearing on their private dwelling home.

Rejection of the Complainants' Proposals

The Provider points out that at a very early stage that the Second Complainant was granted a moratorium for two months followed by a term extension in respect of her BTL property loans in **2007**. The Complainants made several proposals to the Provider including the voluntary sale of the BTL properties which never materialised.

Due to the fact that the loans were deemed unsustainable in **April 2010**, together with the fact that the rental income from the BTL properties was not being applied to reduce the Second Complainant's liabilities to the Provider, the Provider states that it deemed that the only solution to reduce the Second Complainant's indebtedness was immediate asset disposal.

The Provider states that the Second Complainant was given the opportunity to voluntarily dispose of the BTL properties. The Second Complainant did not co-operate in this regard and the Provider had no option but to exercise its powers under the mortgage deeds and appoint a receiver over the BTL properties. The Provider submits that this is not to say that every proposal offered by the Complainants was rejected. The Provider states that it is evident from the amount of forbearance granted to the Complainants on their private dwelling home loans that a number of their proposals were accepted. The Provider sets out the proposals that were accepted.

Appointment of the Receivers

The Provider states that the Second Complainant failed to make the repayments on her mortgage loans as they fell due. This failure amounted to an event of default pursuant to the mortgage loan agreements entered in with the Second Complainant.

On that basis, the Provider submits, it was entitled to make a demand for the entire amount outstanding in respect of each of the Second Complainant's mortgage loans on **17 August 2011** which the Second Complainant did not meet.

The Provider states that it wrote to the Second Complainant on **17 August 2011** in relation to the BTL properties calling in the respective debts and advised that if the Second Complainant did not pay the Provider the sums owed within 10 business days, it would exercise its rights including but not limited to the appointment of a receiver over the BTL properties. The Provider also states that its solicitors wrote to the Second Complainant on **8 July 2011** in similar terms. The Provider states that the Second Complainant's solicitor was also written to at the same time advising of the Provider's intended course of action.

In **August 2011**, the Provider states that its Mortgage Appeals Board concluded that the private dwelling home loans were unsustainable and that asset disposal was necessary to improve the Complainants' overall financial position.

In light of the deteriorating arrears and a lack of progress in relation to the sale of the BTL properties, the Provider states that a receiver was appointed to three of the BTL properties on **2 September 2011**. The Provider states that it received a letter from the Complainants' solicitor dated **13 September 2011** advising that offers were made by the tenants in respect of the two remaining properties. The Provider states that it responded by letter dated **23 September 2011** advising that following an independent valuation of these properties the offers were extremely low and unacceptable. A copy of the valuations was provided to the Complainants' solicitors. A receiver was then appointed over the remaining property on **10 November 2011**. The Provider states that the receiver also wrote to the Second Complainant advising of its appointment.

The Provider states that it wrote to the Second Complainant prior to the appointment of receivers and the Second Complainant continued to fail to address the arrears. The Provider submits that it had the right to recover the debts and in doing so it has an equal interest in recovering the maximum amount through the sale of the BTL properties. As the Second Complainant did not fulfil her obligations under her mortgage contract, a receiver was appointed over the properties and the Provider exercised its right to sell the properties.

Rejection of Purchase Offers

The Provider sets out the offers received in respect to two of the BTL properties and states that it engaged its own independent valuers and responded to the Complainants' solicitors by letter of **23 September 2011** as outlined in the previous section. The Provider states that the Complainants' solicitors asked it to review its position in relation to the valuations of the properties to which the Provider responded on **11 October 2011**. The Provider submits that based on the details provided by the independent valuers and its internal valuers both offers were declined.

The Provider points out that in **October 2012**, while the [South Dublin] property was in receivership, the tenant and daughter of the Complainants made a further offer for the purchase of this property in the sum of €220,000. The Provider states that the estate agent appointed by the receiver secured a higher offer in the sum of €225,000 and the tenant was invited to make a further offer but declined to do so at that time.

The Provider states that any offers made were given due consideration and based on advices provided by independent valuers engaged by the receiver (an agent of the Second Complainant) were declined where appropriate.

Assurances in respect of the Private Dwelling Home

The Provider wholly rejects the contention that any assurances were given to the Complainants that their private dwelling home *would be safe* if they handed back the keys for two of the BTL properties. The Provider submits that it advised the Complainants to prioritise their mortgages relating to their private dwelling home above all other debts. The Provider submits that the Complainants did not do this and instead entered into arrangements with short term creditors.

By telephone conversation on **24 January 2011**, the Provider states, referring to the transcript, that the Second Complainant was clearly advised that the ongoing strategy was to resolve her debt with the Provider and discussions were centred around the possibility of disposing of the property in France to reduce their private dwelling home debt and the immediate surrender of the BTL properties. The Provider states that the Second Complainant was advised that if she did not surrender vacant possession of the BTL properties by **1 February 2011**, it would proceed to instruct its solicitors.

The Provider states that the minutes of the meeting that took place on **21 February 2011** supplied in evidence show that the issue of the private dwelling home being *safe* was specifically raised by the Second Complainant. The Complainants were advised at that meeting that a number of steps were required to be taken in order to make an impact on the arrears on the private dwelling home loans to include lump sum repayments, interest only plus capital payments and the sale of the investment property in [Europe]. The Provider states that the Complainants both stated that they were not willing to make capital and interest repayments on the private dwelling home while there was potential for the Provider to obtain a judgment mortgage in respect of the residual debt. The Complainants specifically sought assurances that this would not happen before they entered into an arrangement on their private dwelling home. The Provider states that the minutes of this meeting are clear in this regard and there is no doubt that the Complainants were in fact advised that no such assurance could be given and that ultimately the residual debt was repayable.

Excessive Communication and Harassment

The Provider does not accept that there was excessive communication nor that this amounted to harassment of the Complainants. The Provider submits that it complied with its obligations under the **Consumer Protection Code 2012** in terms of its communication with the Complainants whilst they were in arrears on their loans. The Provider submits that

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a substantial amount of correspondence issued from the Complainants to the Provider which it deemed required a response. The Provider states that of the 112 non-standard letters that are listed in the Schedule of Evidence, 57 letters came from the Complainants or their appointed representatives. The Provider states that due consideration must be given to the number of mortgage loan accounts held by the Complainants. Finally, the Provider states that the ultimate goal of the correspondence was to ensure full engagement with the Complainants as well as assisting them with a view to meeting their financial obligations with the Provider.

Dealing with Different Personnel

The Provider states that from **26 November 2010 to March 2012**, one case manager dealt with the Complainants. However, the Provider acknowledges that there were “... *some changes in personnel dealing with this file, but no more than would be seen in the normal course of business.*” The Provider disputes any suggestion that the management of the Complainants’ mortgage loan accounts were adversely affect by this in any way. The Provider states that rigid controls are in place to ensure smooth transition of accounts and files to newly appointed case managers and this was the position in respect of the Complainants.

The Provider states that detailed memos and file notes were maintained in respect of the Complainants together with copies of relevant correspondence. The internal system utilised by the Provider acts like an electronic diary to document all correspondence and conversations with the Complainants to ensure a consistent and informed approach to the handling of files and minimising disruption.

The Provider points out that the Complainants engaged different personnel between **November 2010** and **March 2012**. The Provider also points out that the Complainants retained the services of four different representatives between **March 2010** and **February 2012**.

The Complaint for Adjudication

This Office cannot examine the conduct or actions of a receiver appointed by a financial service provider as a receiver is not a regulated financial service provider. Equally, this Office cannot investigate, as part of a complaint made against a financial service provider, the conduct of a receiver appointed by the financial service provider.

This is because, at law, a receiver is considered to be an agent of the mortgagor (i.e. the borrower) and not an agent of the financial service provider.

Therefore, the complaint is that the Provider wrongfully, unreasonably and/or unlawfully appointed a receiver over the BTL properties on foot of arrears that accrued as a result of the overcharging of interest on the Second Complainant’s mortgage loan accounts.

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 on 13 November 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, I set out below my final determination.

In a letter dated **4 November 2009** to the Provider, the Complainants state:

"The monies received from the labour Court is going to pay off one car loan and a small personal loan which will result in me having more money to put towards the interest repayments on the apartments.

... We are very insistent that all lump sum monies will be used to reduce our borrowings, which include money from the Court Case, and Lump Sum received by [the First Complainant].

...

In the meantime I have lost my job at a time when we were most exposed financially. Never the less we have continued to meet interest repayments on all of our loans over this most difficult time. When the claim is settled and I am back working again we will be in a much better position to repay capital on all outstanding loans. Any lump sums we receive we will also use to reduce our borrowings. ..."

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In an email from the Second Complainant to the Provider dated **16 February 2010**, the Second Complainant writes:

“Just bringing you up to speed ... I have an old boss (retired at 60) who is trying to set up a new company and he met me last week, I have a few things in the pipeline, the only jobs being offered to me are trade mags which are a nightmare to sell and people are treated like crap. I am so busy trying to make sure that all the apartments are in good nick and being let out that I do not know how I had time to work. ...”

In a letter dated **19 March 2010** to the Complainants, the Provider states:

“Following a detailed review of all accounts, in order for us to consider a further interest only period on the family home, we will require a commitment from you on the following:

- *Standardise the repayments on all accounts, so that at minimum we are receiving repayments of €6,736.95 per month.*
- *An undertaking from [the Second Complainant] that any proceeds from her claim against ... will be used to clear in full the arrears on all accounts and depending on the amount received from the claim, consider a capital reduction on the overall level of debt.”*

The Provider emailed the Second Complainant on **9 April 2010** stating:

“In order to consider a further period of Interest Only we will require the following information/commitments:

Financial:

...

4. *A letter of undertaking relating to proceeds of claim as outlined in my letter of the 19th March 2010.*
5. *An update regarding your own employment situation is required, we would stress that importance of trying to return to employment as a matter of urgency.*

...

Investment Properties:

The situation as regards to arrears on your Investment Properties, is in our view, not sustainable and unacceptable. We are seeking your agreement to place all these properties on the market immediately, in conjunction with [the Provider].

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Please note that if we cannot reach an agreement on this, [the Provider] will take all necessary steps to realise our Security. Under the terms of your Mortgage you will remain liable for any shortfall in the event that the sale price achieved is not sufficient to clear the mortgage balance in full. ...”

The Provider wrote a letter to both Complainants in similar terms on **12 April 2010**. In response to this letter the Complainants replied by what appears to be an incorrectly dated letter of **20 March 2010**:

“We wish to respond to your letter of April 12th 2010. ...

We also explained that the four Investment Properties were in excellent condition, all newly refurbished, all fully let and bringing in rental income and all in excellent locations. If we were both in full employment we would be able to subsidise the rental income and meet full repayments on all four properties. We thought this was a reasonably good situation in the present climate and that if we were granted another year we would be able to establish whether the situation had improved or deteriorated.

...

Returning to your letter of April 12th we wish to state the following in relation to your six bullet requests:

...

- Proceeds of claim- 50% we will give*
- Employment- currently on a two month contract from April 15- June 14th*

...

We must have some means of having an interest only loan on [the family home] for the 700 k mortgage. How this is achieved is irrelevant or the method used is irrelevant. We will pay interest for a number of years if the capital is warehoused or parked until we are in a position to make a large repayment off the capital on retirement and on the sale of other properties in a few years time.

This is not a request but a necessity and it is also our first priority. We cannot agree to pay anything else until we have secured our family home ...”

On **13 May 2010**, the Provider wrote to the Complainants stating:

“As you are aware, we have conducted a further review of your accounts with a view to granting a further extension of interest only on the above numbered [Name of product

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redacted] mortgage accounts ... but subject to obtaining your agreement in writing to the following:

- 1. Resumption of full repayments of circa €5,492 combined on all BTL accounts with immediate effect.*
- 2. An undertaking from your solicitor, to clear in full the outstanding arrears balance on all BTL's (currently €35,119), from the proceedings of your claim. ...*
- 3. Your commitment to place all BTL properties on the market within a 12 month period ..."*

The Complainants responded by letter dated **2 June 2010**, stating:

"In light of your last letter dated the 13th 2010 (sic), we would like to propose the following.

- 1.) We are not in a position to make full repayments on all B.T.L. properties of circa 5,492 per month. We currently receive rental income of just under 4000 from the 4 properties which are now all currently let. This income is going straight to the bank. We would therefore require some leeway on a number of properties until such time as they are sold.*
- 2.) We will seek to provide an undertaking from our solicitor to clear 25,000 on the BTL properties from the proceeds of [the Second Complainant's] claim.*
- 3.) We have found an agent with immediate effect in order to market each of the BTL properties for sale.*

The Provider demanded repayment of the loan accounts the subject of this complaint by letters dated **19 August 2010**.

The Provider has furnished minutes of a meeting held with the Complainants on **19 August 2010**. I note the following from these minutes:

- "• [The Complainants] confirmed the current rental income as €4,100 per month however tenant in [South Dublin] apartment leaving this month thus total rental income €3000.00 per month.*
- The reason that the rent was not being received in full they claimed was because they were utilising rental income to revamp the apartments.*
- ...*
- [The Second Complainant's] claim against her employer was heard in February ... [the Second Complainant] is hopeful of achieving min €65k. It was explained that [the Provider] would require an undertaking that full proceeds will be utilised to address outstanding arrears. They intend on offering an undertaking for claim proceeds net of €25,000 owed to their son and clearance of Short term debt. Short term debt currently outstanding with various lenders is €82,000.*

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- *[The Second Complainant] conf she is still trying to establish a new business however details of when she will generate income were not forthcoming. ...*

Proposals:

...

- ***They will continue to use rental income to revamp properties and propose to make sporadic repayments to accounts if any surplus rent remaining.***

We conveyed that we will expect the full rental incomes. ...”

On **2 September 2010** the Provider wrote to the Second Complainant advising that further to the above-mentioned meeting and following serious consideration, the proposals offered by the Complainants were unacceptable. The Provider then called on the Second Complainant to deliver up vacant possession of the BTL properties.

By letter dated **16 September 2010**, the Complainants indicated their intention to use the funds received in respect of the Second Complainant’s employment dispute to clear the arrears on the private dwelling home loans.

In a letter to the Provider dated **28 September 2010**, the Second Complainant writes:

“... The four properties concerned are all buy to let investments (sic) as a large part of my pension plan, being self employed all my life. As (sic) you prepare to dispose of my pension i request some answers.”

The Complainants completed a Mortgage Financial Review Form dated **20 January 2011**. I note from this form that the First Complainant was employed but the Second Complainant was “Looking for Job”. On this form the Complainants stated:

“We need a more reasonable structure sorted out for us to enable us to continue paying our mortgage ...”

In an email to the Provider dated **7 February 2011**, the Second Complainant informs the Provider in respect of the private dwelling home loans:

“... I have another job interview this morning ... [The First Complainant] said that we cannot pay back that 2000 a month from March as I am not working ...”

Following the Provider’s notification to the Second Complainant of its omission to offer her the option of a tracker interest following the expiry of her fixed interest period, the Complainants wrote to the Provider on **11 May 2011**:

“... There have been a lot of Financial outgoings that could not be foreseen, insurance, new tyres for car, repairs to house after the winter, maintaining and paying bills for the apartments as two of the properties have had to get work done to them, one

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flood damage and the other broken locks and doors and damp damage due to them being left empty ...”

The Provider wrote to the Complainants on **24 June 2011**, stating as follows:

“Following our meeting on the 19th May last we subsequently received statements of income and expenditure through your Solicitors ...

As you are aware, a formal demand for the entire debt was issued to you on the 19th August 2010. Since that date ongoing attempts have been made by [the Provider] to remedy the position including assessment of your financial circumstances and the sanction of reduced interest only repayments for a period of six months from September 2010 to February 2011.

At our meeting on the 19th May, you have confirmed that the information previously provided was false and the position which has now been detailed is significantly worse than you had previously communicated. We refer specifically to your completed Financial Review form dated 20th January 2011.

We also refer to the proceeds of a claim settlement of €20,000.00 which were promised to [the Provider] to reduce the outstanding arrears. You have subsequently admitted that these funds were used to negotiate reduced settlements on short term debt.

Considering the overall financial position and taking into account the level of income available to service the loans, [the Provider] deems the debt to be completely unsustainable. ...”

In a letter from the Complainants’ solicitor to the Provider dated **29 June 2011**, the Complainants’ solicitor advises:

“In relation to [the Second Complainant’s] income, obviously since her redundancy her income has been somewhat erratic. However, [the Second Complainant] is confident that, as the economy starts to pick up, she will be in a position to contribute more to the household income. Unfortunately, [the Second Complainant] is of the view that her earning capacity will not be as strong as it was over the period of 2006 to 2008 when the loans were provided to her.”

On **6 July 2011**, the Provider wrote to the Complainants advising them that the borrowings in respect of the private dwelling home were unsustainable and advised as to a voluntary sale, trading down, voluntary surrender and sale of other assets. The Complainants’ solicitor replied to the Provider on **3 August 2011**, stating:

“We confirm our clients’ wish to appeal the decision of the Bank to refuse an alternative repayment option for our clients relating to the management and repayment of their family home mortgage.

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Our clients are of the view that, in considering the position, the Bank did not pay sufficient attention to the following: -

- 1. The potential for our clients to increase income - particularly [the Second Complainant];*
- 2. Alternate forms of ownership ...*
- 3. Our clients' ability to discharge the mortgage attributable to a realistic value for the property."*

Analysis

The Complainants do not dispute the Provider's right to appoint a receiver pursuant to the various mortgage loan agreements. What is disputed however, is the exercise of the Provider's right to appoint a receiver over the secured properties. In essence, the Complainants submit that the Provider wrongfully appointed a receiver over the secured properties as a result of arrears that accumulated on the Second Complainant's mortgage loan accounts which the Complainants assert were caused by the overcharging of interest by the Provider.

The Second Complainant entered into six mortgage loan agreements with the Provider in her sole name and four BTL properties were provided as security for these loans. These loans were subject to a tracker interest rate. The Second Complainant entered into a fixed interest arrangement in respect of five of her loans on **31 July 2007**.

This arrangement expired on **28 August 2009** at which point the Provider incorrectly calculated the Second Complainant's interest payments on the basis of a variable interest rate without first offering the Second Complainant the option of returning to the tracker interest rate. The Provider subsequently offered the Second Complainant the tracker interest rate which was accepted by the Second Complainant. The Provider then made an interest rate adjustment to the Second Complainant's accounts on **1 June 2011**. Of the six BTL accounts held by the Second Complainant, five were affected by the Provider's misapplication of the variable interest rate. These accounts were overcharged for a period of almost two years. I note that none of this is disputed by the parties to this complaint.

The Complainants submit that it was the overcharging of interest which led to the accrual of arrears on the Second Complainant's loan accounts. The Provider had provided a table containing the arrears on the Second Complainant's accounts at **31 May 2011** prior to the interest adjustment and post the interest adjustment on **1 June 2011**. The Second Complainant's arrears stood at over €96,000 on **31 May 2011**. Following the interest rate adjustments, which were only required in respect of five accounts, the Second Complainant's arrears stood at over €42,000. Therefore, I do not accept that the overcharged interest amounts to substantially all of the arrears which had accumulated on the Second Complainant's accounts as submitted by the Complainants. Furthermore, the

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accounts were still in arrears following the interest refund and at the time of the appointment of the receiver. The arrears on these accounts were over €52,000 when the Provider began to appoint receivers over the BTL properties.

There are a number of other relevant factors that must be considered when determining if the Second Complainant's arrears were caused by the overcharging:

1. Around the time of the expiry of the fixed interest period and the overcharging, the Second Complainant was in arrears on all of her six loan accounts from around **August 2009**.
2. The Second Complainant had a very poor repayment history from **August 2009** up to the date of appointment of the receivers.
3. The unaffected account had arrears of approximately €12,500 on the date of appointment of the receiver.
4. Once the overcharged interest was refunded, the accounts remained in arrears and arrears continued to accrue on all six accounts.
5. The Second Complainant was unemployed.
6. The Complainants were experiencing financial difficulties (which has been acknowledged by the Complainants in the correspondence outlined above).
7. The Complainants acknowledged that they were not in a position to make the repayments on their loans, which included the Second Complainant's loans.
8. The Second Complainant had other long-term and short-term debt to service outside of the loans in issue in this complaint.
9. The Complainants indicated a refusal to make repayments on their loans unless some form of arrangement was reached in respect of their family home.
10. The Complainants were using the rental income from the rental properties to service their family home loans.

I also note that in the correspondence between the parties following the interest adjustment, the Complainants did not make the case that the arrears that had accumulated on the relevant accounts were caused solely by the overcharging. I also note that the Complainants had the benefit of legal advice/legal assistance around the time of the notification of the overcharging and the appointment of the receivers over the BTL properties, however, no steps were taken to prevent these appointments on the basis of

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the argument advanced in this complaint – that the overcharging of interest was the cause of the arrears.

Taking the above matters into consideration, the reality of the Complainants' circumstances appears to have been that they were simply unable to meet all of their repayment obligations in respect of their borrowings. While this is unfortunate, I do not accept that the overcharging of interest by the Provider was the sole cause of the accumulation of arrears on the Second Complainant's loan accounts. Therefore, I accept that the Provider was entitled to appoint receivers over the BTL properties.

Finally, having considered the evidence and submissions of both parties, I do not accept that the level of communication from the Provider constituted harassment and neither do I accept that the change in personnel dealing with the Complainants' file was unreasonable or excessive.

Therefore, for the reasons outlined above, I do not uphold any aspect of this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

6 December 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.

