



<u>Decision Ref:</u>	2020-0029
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling - Mortgage Arrears Resolution Process Dissatisfaction with customer service
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage account and alleged maladministration, poor customer service and the Provider's suggested unreasonable refusal to accede to the Complainant's proposals to manage their debt with the Provider.

The Complainants' Case

The Complainants hold a mortgage account with the Provider. The Complainants state that their mortgage fell into arrears from **2011** onwards. However, they complain that due to an error in the Provider's accounting procedures in relation to a deeds release fee of €38, their account was wrongfully marked as being in arrears since 2007.

In addition to the foregoing, the Complainants state that they had sought forbearance from the Provider in **2013** in order to allow them address the mortgage arrears. They state that they sought to achieve a workable solution with the Provider and they made a number of proposals to the Provider but that all of these requests were declined. The Complainants complain that the Provider was unreasonable in refusing proposals of a lump sum payment in full and final settlement made to the Provider on their behalf. Finally, the Complainants complain of a general substandard level of customer service and insensitivity on the part of the Provider. In particular, the Complainants state that the Provider had made an unnecessary amount of calls to the Complainants and did not keep proper records of the previous conversations and required the Complainants to answer standard security

questions on each occasion. In addition, the Complainants were frustrated by the fact that there appeared to be a number of different individuals dealing with their account who appear to be unaware of information having already been provided to their colleagues by the Complainants.

The Complainants also suggest that the Provider failed to follow through on a request that a direct debit be cancelled, which resulted in one presentation for a direct debit being unpaid as a consequence of which, the Complainants say that an account with a third party provider was “downgraded”.

The Provider's Case

The Provider accepts that it incorrectly dealt with the €38 deeds release fee in **December 2007**. The Provider says that in the normal course, a fee is raised on an account, for the fee in question, with the payment being credited to the account to offset the fee. In this instance however, the payment was lodged in reduction of the capital balance, in error, thereby leaving the “fee” due on the account and therefore showing as nominal arrears. The Provider has confirmed that the sum of €38 remained in arrears and that the figure in question accrued arrears interest, for a number of years. The Provider has also confirmed that any accrued interest regarding this particular item was reversed and that the “nominal arrears amount” had no adverse effect whatsoever on the Complainants’ credit rating.

The Provider has confirmed that the account fell into actual arrears in **March 2011**, and remained in arrears until January 2016 when the proceeds of sale of the mortgaged property, were applied to the account. The Provider has noted that on 21 June 2016, an email was sent to the Complainants to confirm that the matter of the deeds release fee was fully corrected, and that their account had been adjusted accordingly.

In every other aspect of the complaint, the Provider does not accept the Complainants’ assertions and states that it acted appropriately and fairly in its dealings with the Complainants. The Provider states that it adhered to the requirements of the Mortgage Arrears Resolution Process (MARP) and its obligations under the Code of Conduct and Mortgage Arrears (CCMA).

The Provider has confirmed that in accordance with the MARP, ongoing communication was maintained with the Complainants. Their financial and personal circumstances were sought, received and assessed, and appropriate resolution options were offered to them. These included:-

- April 2011 - a 9 month interest and part capital arrangement.
- January 2012 - 5 month less than interest only arrangement.
- June 2012 - 3 months of less than interest only arrangement.

The Provider has confirmed in that regard that full cognisance was given to all aspects of the CCMA and to all borrowers obligated to the loan, their individual personal circumstances, their joint overall indebtedness, the information provided in each of their Standard Financial Statements, their current repayment capacity and their previous payment history.

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When the Provider confirmed the position on 12 February 2018 it confirmed as follows:-

Capital Balance	€45,539.68
Arrears Balance	<u>€10,552.48</u>
Total Current Balance	€56,092.16

Finally, the Provider confirmed that a decision regarding the residual mortgage balance was agreed in **April 2016** whereby the Complainants were allowed the opportunity to pay €4,000 up front with a final settlement of €21,000 in 5 years. The Provider has noted that this resolution option was not accepted by the Complainants at the time. Whilst the Complainants have been seeking a full write-down of the residual mortgage balance, the Provider has indicated that in its commercial discretion, it is unwilling to agree to a write-off of that level. The Provider however confirmed that if the Complainants were agreeable to providing any requested up to date financial and personal information, it would reconsider the resolution option which was under discussion in April 2016, as outlined above.

The Complaint for Adjudication

The complaint is that the Provider has wrongfully and unreasonably refused to accede to the Complainants' proposals to manage their mortgage debt with the Provider and that the Provider was guilty of maladministration and poor customer service. The Complainants are seeking a full write down of the residual amount outstanding on their mortgage account.

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 27 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

In addition to the complaints referred to above, the Complainants also complain that the Provider failed to adequately carry out its obligations in respect of a Data Access Request made by the Complainants. In particular, the Complainants complained that some of the documents received were of poor quality, had redacted information and some sheets were blank. The Complainants state that the Provider promised to provide better copies, but failed to follow through on this promise. The Complainants also complain in relation to a fee of €6.35 charged in respect of the data access request which, they say, was firstly lodged incorrectly to their mortgage account and then, that credit was corrected by the Provider transferring the fee to the correct FOI account. I note that the Complainants say that they were not notified by the Provider of this transaction until they raised a complaint in 2016. I further note that, at that point, the Provider made it clear to the Complainants that it operated a process whereby the fee in question, due and received, was recorded in that manner with the corresponding credit and debit transactions. The Complainants state that they were never notified of this charge, or how it would be applied.

Issues regarding Data Access Requests, or the adequacy or otherwise of the response from a data processor, does not however come within the remit of the Financial Services and Pensions Ombudsman, and must instead be referred to the Data Protection Commission. Consequently, these particular issues have not been addressed in the course of this investigation. For that reason, the FSPO similarly has no role to play regarding the Complainants' concerns, arising from the Provider's apparently inadvertent error in making details of another customer available to the Complainants.

This office has been furnished with a significant volume of documentation including all correspondence for the relevant periods along with account terms and conditions and documentation furnished to the Complainants on foot of their Data Access Request.

I have been furnished with a copy of the mortgage agreement dated **24 November 2005** which shows the amount of the mortgage on draw down was €128,000, repayable over a 25 year term. The agreement provided for "interest only" repayments for the first 5 years on a variable rate and converting to full capital and interest repayments thereafter. The documents evidence a further advance or top up on the mortgage account in **December 2007** of €30,000.

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From 2011 onwards, repayments of capital and interest become operative and it is clear from the account statements that the Complainants began to struggle to meet the repayments from that point onwards. It is also evident that the Complainants were afforded Alternative Repayment Arrangements on a number of occasions in 2011 and 2012, as outlined in the Provider's response to this office on 12 February 2018, and these are all evidenced within the documentation furnished in evidence.

The account statements clearly show the transaction in December 2007 which related to the top up borrowings at that time. The Provider has explained that the deeds release fee of €38 was lodged to the Complainants' account in respect of a top up facility which had been approved. The Provider went on to explain that ordinarily, the fee is raised on an account with the payment being credited to the account to offset the fee, but on this occasion, the payment was lodged in reduction of the capital balance in error, leaving the fee due on the account and therefore showing as nominal arrears. The sum of €38 remained in arrears and accrued arrears interest for a number of years.

Clearly this should not have happened and the Provider has explained that it was an error. It seems however from the documentation that the Provider never acted upon this anomaly as "arrears" in the normal way, and therefore it did not report this issue on the Complainants' profile with the Irish Credit Bureau. The Provider has confirmed that this nominal arrears amount had no adverse effect whatsoever on the Complainants' credit rating and that in **June 2016**, this matter was corrected and the account was adjusted accordingly. In light of the foregoing, I consider it appropriate to uphold this aspect of the complaint, as the Provider was guilty of maladministration as a result of an administrative oversight and whilst it appears that this issue did not give rise to any tangible loss on the part of the Complainants, nevertheless I am conscious that this administrative oversight remained uncorrected, for a long number of years.

In relation to the Provider's allegedly unreasonable refusal to accede to the Complainants' proposals to manage their debt with the Provider, the Complainants have stated that the Provider refused a proposal from them, in **August 2013**. The Provider states that it is satisfied that it has been fully compliant with the Central Bank's Code of Conduct on Mortgage Arrears and the related MARP. The suite of documents furnished to this office include the documents relevant to the 2013 request for an Alternative Repayment Arrangement. The completed Standard Financial Statement (SFS) of June 2013 is included.

Having assessed this application, the Provider wrote to the Complainants by letter of **17 July 2013**, explaining that it was not in a position to agree to their request for "*Less Than Interest Only*" repayments, as the amount of net disposable income being allocated to other debt, needed to be reviewed. The Provider went on to state that it may be able to offer the Complainants other alternative repayment options.

I accept on the evidence before me that the Provider dealt with the Complainants' application based on its own policy and on an individual assessment and on the basis of its affordability criteria and that it did not act unreasonably in doing so. I also accept that the Provider adhered to the Central Bank's Code of Conduct on Mortgage Arrears and the related MARP. I also accept that the Provider acted reasonably in offering the various proposals offered in respect of the mortgage account since the inception of the mortgage, based on its own policy and on an individual assessment taking into account its affordability criteria. A lending institution has a broad discretion over a commercial decision such as whether to accede to an application of this nature, and on the facts of this case I am not inclined to interfere with that discretion. I am satisfied that in assessing the repayment proposals which form the subject matter of this complaint, the Provider considered all of the relevant information.

It is not the function of this office to act as a final appeal for applications for forbearance that have been refused. In the absence of evidence of wrongdoing by the Provider or conduct coming within the terms of the **Financial Services and Pensions Ombudsman Act 2017** that could ground a decision in favour of the Complainants, I am not in a position to uphold this aspect of the complaint.

In relation to the complaint regarding the direct debits, the Complainant states that the failure to cancel the direct debit resulted in the status of an account held with a third party provider being downgraded. I note from the evidence made available that the Complainant sent an email on **10 January 2016** asking that the Provider

"make the necessary arrangements to ensure that no DD is presented to our bank for payment on 1 February 2016 or thereafter".

I further note that the following day, the Provider responded explaining that:-

"In order for us to cancel your current DD you will need to provide us with a letter confirming you both wish to cancel your current DD. We also require you both sign this letter."

I note that the Complainants appear to have printed the email which they had received from the Provider and then wrote in handwriting on the document, as follows:-

*"PLEASE CANCEL DIRECT DEBIT IMMEDIATELY CONFIRM BY RETURN. 14.1.2016
[signed by both Complainants]"*

An entry on the evidence submitted to this office suggests that the original was posted to the Provider on Friday 15 January 2016. It is unclear what transpired thereafter but I note that the Complainants suggest that they had agreed with the Provider to set up a standing order to make nominal payment to the mortgage account, whilst trying to sell the property and it was in that context that the Complainants asked for the direct debit to be cancelled. The Complainants maintain that this was not done and this resulted in:

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“... my nominal payment being paid and the full monthly claim being presented. These items were unpaid which resulted in my [third party bank] account status being down-graded”.

There is however insufficient evidence available in the papers before me to suggest that these events indeed had an adverse effect on the third party account.

Finally, in relation to the general complaint of poor customer service, the many audio recordings of the phone calls between the parties have been listened to. I note that some of these calls did not go beyond the initial introductory stage. However I have sought to summarise the most relevant calls in the following manner:

3 October 2011. A call from Provider. This was a discussion regarding an alternative repayment arrangement. The first Complainant explained that he was trying to regularise his rental property and then he would be in position to come up with a proposed figure for the Provider. He confirmed he would pay a short-term ‘nominal’ payment for the month of October.

22 December 2011. A call from the Provider. The Provider was seeking an update on the plans regarding the arrears on the property. The first Complainant advised that it was better to ring his wife at home, as she had all the paperwork to hand.

15 May 2012. A call from the Provider. The first Complainant said he was going to hand in his Standard Financial Statement to the Provider the following day. The Provider noted he had been making shortfall payment of €200 per month.

24 October 2012. A call from the Provider to the second Complainant. The second Complainant advised that the first Complainant had dropped in the SFS the day before.

15 December 2014. The Provider called regarding a restructure request from the Complainants and looking for supporting documentation.

10 April 2015. The second Complainant complained about a lack of response from a Ms Mc[xxx].

13 April 2015. The call related to an arrears balance of over €41,000. The Complainants were advised that there was a danger of the arrears situation going to the legal department and potential repossession. The first Complainant explained that his second property was close to a sale and once it was sold, he would approach the Provider in order to sort out the current situation.

8 July 2015. The Provider was looking to get a restructure in place. A less than interest only arrangement had been in place for the previous 3 months.

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5 January 2016. The Provider stated that it had not received the November 2015 payment under the restructure arrangement then in place. The first Complainant denied this and expressed his deep frustration with the manner in which the Provider had dealt with him and his wife.

29 March 2016. The Provider called regarding a letter of variation that was sent out earlier in the month for a long term restructure on the account. The first Complainant said that he was liaising with a third party, which was assisting him with it.

From listening to the calls, it is clear that the Complainants were very frustrated with the Provider. The frustration on the part of the Complainants in one sense is entirely understandable and having to deal with the same security questions at the start of every conversation was clearly a source of frustration for them.

In addition, the Complainants were frustrated at the fact that they were not dealing with the same person each time and they felt that perhaps there was a lack of internal communication within the Provider, which resulted in repetitive questions and requests for information. Having considered very carefully these phone calls and the documentation, I am unable to uphold any complaint of wrongdoing or unreasonableness or oppressive behaviour on the part of the Provider, taking into account the contents of the entirety of the correspondence between the parties and the contents of the phone calls that were furnished in evidence to this office.

Whilst the Complainants have been frustrated with the requirement to adhere to Data Protection policies operated by the Provider, it is important that the Complainants understand that the security questions asked of a customer who makes contact with the Provider, is to ensure that the sensitive personal information of that customer is protected, and is not revealed to an incorrect person. Whilst it would of course have been preferable for the Complainants if they had been in a position to liaise on an ongoing basis with the same person, it is inevitable that, from time to time, different staff members are no longer available and the point of contact dealing with any one customer must change.

Having considered this matter at length, I am satisfied that the primary dissatisfaction of the Complainants stems from the Provider's unwillingness to agree to write-down the residual balance of the loan. Ultimately, it is a matter for the Provider as to whether it is willing to write-down the balance of the residual debt due and owing by the Complainants, whether in whole or in part. Such a matter is for the commercial discretion of the Provider and the FSPO has no role to play in that regard.

In relation to that aspect of the complaint which I have upheld, which is in relation to the €38 deed release fee, it appears that this went unnoticed and was not rectified for a period of nine years approximately. By the Provider's own admission, interest accrued on this amount although happily, this anomaly was not reported to the ICB as arrears, in the normal way. Accordingly, while this error occurred as a result of a genuine mistake and was subsequently rectified, I consider, taking into account the period of 9 years in question, that an amount of €750 is an appropriate amount of compensation to be paid to the Complainants.

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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 partially upheld on the grounds prescribed in **Section 60(2) (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 make a compensatory payment to the Complainants in the sum of €750, 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

28 January 2020

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.