An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0084
Sector:	Banking
Product / Service:	Debt Management
Conduct(s) complained of:	Misrepresentation (at point of sale or after) Delayed or inadequate communication Complaint handling (Consumer Protection Code) Dissatisfaction with customer service Failure to consider vulnerability of customer Refusals (banking)
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants, farmers, were long-term customers of the Provider with whom they had numerous banking facilities, both in their personal names and in the name of two companies that they promoted, H1 and H2. Over a period of years from approximately **2003** onwards, the Complainants' facilities were restructured on a number of occasions with additional security provided for each.

Sadly, the First Complainant died in November 2019. This decisions refers to both Complainants however, insofar as the First Complainant's estate continues to represent his interests.

The Complainants say that, in particular, in **October 2010**, the combined company and personal borrowings were restructured into a single €130,000 12 year loan, in the personal names of the Complainants, secured by 39 acres of farm land. The Complainants do not believe that they received appropriate advice at various stages from the Provider and they say that they were not advised to seek independent legal advice to ensure that they understood the consequences of the various transactions they were entering into. They are aggrieved that company debt was restructured into personal debt in 2010, secured by the family farm.

The Complainants' Case

The Complainants argue that over a 10 year period, the Provider restructured their borrowings, both personal and company borrowings, into their personal names. They state that credit agreements were given to them to sign without advising them to obtain independent legal advice. They argue that the security requirements of the Provider were enhanced on each occasion so that the original security of a verbal deposit in relation to farm lands, was upgraded to a legal charge.

The Complainants argue that the Provider persuaded them to sign the legal charge without a clear understanding of what they were doing and, further, that the Provider did not meet its duty of care towards elderly, vulnerable customers but rather protected its own position. The Complainants argue that this was done despite their solicitor writing to the Provider highlighting the dangers of sending loan cheques directly to clients. The Complainants say that they had complete trust in the manager who they dealt with and they signed all documents and guarantees when requested, believing they had no other option. They argue that in the October 2010 restructure, the Provider sanctioned a loan facility of €130,000 of which €70,000 was to be used to clear the liabilities of the company, H2. H2's business and all its accounts were closed. They argue that it was public knowledge that the company was in severe financial trouble and could not pay its debts. The Complainants quote from the Provider's report of the time, which indicates that by taking the debt into their personal names, the Complainants were honouring the guarantee signed on behalf of the company and that the situation was not ideal given their ages, but was the best available solution.

It is argued on behalf of the Complainants that the security progressed from a weak verbal deposit security position to a legal charge over the family farm. They argue that they do not believe that the security was validly taken and they say that unfair advantage was taken by the Provider in adding company debt to personal borrowings. It is argued that the Provider restructured company borrowings, in relation to which it had no chance of recovery of funds, into the personal names of the Complainants and issued credit agreements to them to sign, without insisting that they obtain independent legal advice.

The Complainants say that they have lived in poverty over a number of years in an effort to pay their debts to the Provider. They highlight that the Provider's own internal lending document of January 2014 indicates that the assets available to them are insufficient for two adults. This, the Complainants argue, indicates that the Provider recognised that the debt was unsustainable and that it was always the Provider's intention to force them to sell the family farm to clear the debt. The Complainants say that the €130,000 facility sanctioned in October 2010 encompassed:

(a) outstanding personal debt of €60,000, including unsecured credit card debt;
(b) debt from H1 of €14,000; and
(c) debt from H2 of €70,000.

The Complainants also say that it was never feasible that the 2010 facility would be repaid from farm grants because it would have required the elderly First Complainant who was 70

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years old when he signed the restructure, to continue farming throughout the period. They also point out that the amount of the grants decreases year by year.

The Complainants say that the Provider transferred the company's loan in a situation where it was clear that the Provider could not get its money back and merged it with an existing loan in the personal names of the Complainants. It is argued that the Provider then persuaded the Complainants to apply their family farm against the entire loan as security and that, despite requests from the solicitor, the Provider did not issue the loan cheque to his office so that he might advise them.

The Complainants argue that it was clearly an unfair term in the 2010 contract where the €70,000 H2 debt was restructured into the personal names of the Complainants. They argue that the Provider transferred unsecured company debt into secured personal debt without explaining to the elderly and vulnerable Complainants the consequences of what they were signing or insisting that they get legal advice.

The Complainants say that the First Complainant attended at the branch only a handful of times. It is argued that he only spoke directly with the branch manager before the 2010 restructure. The Complainants say that when the 2010 restructure was being discussed, the second complainant was in hospital. [Details of illness redacted] and was hospitalised for 14 weeks. She resigned as a director of H2 due to lack of capacity and the Complainants' son, Mr. Z, took over as director. The Complainants state that the second Complainant [details of illness redacted]. The Complainants say that at the time of the 2010 restructure, the First Complainant and Mr. Z attended at the branch with regard to the restructure.

The Complainants take issue with the Provider's "know your customer" document which indicates that the first Complainant was seeking debt consolidation. They argue that it was the Provider which was seeking debt consolidation and had made it clear that it would not continue to allow banking facilities for the farm, if consolidation to include the company's accounts was not dealt with. They argue that the Provider knew at this stage that H2 was insolvent. The Complainants argue that they were left with no option but to sign the October 2010 agreement if they wanted to continue banking facilities with the Provider. They argue that the Provider has a duty to them as vulnerable customers who depended on social welfare income, apart from the farm grants. They argue that the Provider should have insisted that they both obtain independent legal advice before signing the agreement which gave their family home and land as security.

The Complainants argue that it is usual practice for people to obtain legal advice from a solicitor when they attempt to sign loan documents. They argue that the Provider may have deliberately issued loan cheques directly to the Complainants so they did not have the opportunity to meet with and discuss terms, conditions and consequences with their solicitor. They further argue that given their age and vulnerability, the Provider should have insisted that the loan agreement was signed at the solicitor's office and witnessed by him.
The Complainants argue that the loan agreement signed by them which took insolvent company debt into their personal names, is invalid. They note that they made a proposal in August 2015, to clear the original personal debts of the Complainants with interest, but they claim that the Provider failed to meaningfully engage with them on the settlement proposal.

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They say that they corresponded with the Provider for 18 months and were passed from branch to head office and between various case managers. They ask that the Provider meaningfully engage with them in relation to the settlement of the debt and the release of the deeds of their small farm holding.

The Provider's Case

The Provider states that, historically, the Complainants were sanctioned a loan of €87,000 in **August 2006**. This loan amalgamated existing personal debt – a €57,000 loan and €16,000 overdrawn balance on the current account - and a €14,000 loan in the name of the Complainants' company, H1 and placed all debt in the company's name.

The Provider states that by this point in time, the Complainants had provided a personal guarantee for the borrowing in the name of H1 dating back as far as 1999 and took the financial decision to take the debt out of their personal names. Following on from this restructure, the Provider states that the Complainants proceeded again to borrow funds in the name of another company, H2, and provide personal guarantees in the name of the two Complainants. This was supported by an all sums mortgage over the Complainants' lands. The date of approval of the guarantee was **August 2007**.

The Provider states that when the second Complainant signed the letter of guarantee on 28 August 2007, there was no reference at the time to any health issues and it was not until July 2008 that the Provider became aware that she had suffered a [details of illness redacted] and was in hospital recovering.

In **November 2010**, the Complainants again restructured their borrowings in the form of personal loan of €130,000 incorporating:

(a) €60,000 balance of the residual loan restructure from August 2006; and
(b) €70,000 company debt (H2) for which they have signed a personal guarantee and which was supported by the land in question.

The Provider states that the Complainants had confirmed that they would be in a position to fund repayments of approximately €16,000 per year for 10 years, from single farm grant payments due to them.

The Provider states the Complainants were long-standing customers of the branch in question who had operated both personal business accounts and limited company accounts. They have borrowed both in their personal capacity (for which they provided security) and in a corporate capacity for which they provided personal guarantees. The Provider states that it had no reason to doubt based on their financial history that the Complainants fully understood the impact of what they requested, when the restructure was sought in 2010.

In relation to the allegation that the Complainants were not afforded the opportunity to obtain legal advice from the solicitor, the Provider draws attention to the loan agreement which states that:

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"**these are legal documents and should be read very carefully**"

and

"**You must send a copy of this Credit Agreement to your solicitor as soon as possible so that your solicitor can advise you in relation to the execution of the mortgage**".

The Provider states that in October 2010 when the debt was restructured, no new monies were issued arising from the facility of €130,000 to be repaid over 144 months at annual repayment of €15,938.76, together with an overdraft facility of €5,000. The Provider states that the security held by it is an 'all sums mortgage' from the first Complainant over two folios of land. It states that an 'all sums mortgage' provides that each borrower is jointly and severally liable for all debts due to the lender by the other borrowers.

The Provider says that a review was undertaken in 2010 to establish the best product suitable for the facility being requested, with up-to-date information given. It states in this case, the most suitable product was a business loan for the purpose of debt consolidation which is consistent with the purpose of the application completed for assessment and sanctioned by the case manager. The Provider argues that it had advanced funds to H2 and held personal guarantees in relation to this lending in the names of both Complainants. It states that these guarantees were supported by a charge over lands. The Provider argues that had the Complainants not engaged with it when the company was no longer trading and was unable to pay down its debt, the Provider would have had no option but to progress with calling in the security held for the debts. It says that the Complainants took the decision that they wanted to pay their debt and to engage with the Provider in relation to realising the guarantees. The Provider argues that it worked with the Complainants to ensure a viable structure was placed on all outstanding debts. In this case, it states that the only feasible restructure for the application was progressed, with annual payments being met by the Complainants and which were honoured for the first years when the loan was put in place in the Complainants' names. The Provider states that the application that was progressed to restructure the debt was based on the Complainants' preference to consolidate debt, rather than have the Provider call in their personal guarantees.

The Provider acknowledges that at the time of the restructure proposal, the Complainants were of an older generation. It states that if the debt in the company name had not been addressed at that time, however, the Provider would have had no other option but to progress with legal action to call in the personal guarantees which were provided by the Complainants and supported by legal charges over the lands. The Provider argues that various options would have been explained to the Complainants and its record reflects that the Complainants did not want to have the Provider call in the debt. They opted to progress with the option open to them, which was to take out the debt into their personal names.

The Provider states that in 2006, it was necessary to register a legal charge to satisfy changes in legislation. The Provider states that its policy in relation to the holding of security changed in December 2006 following the ***Registration of Land Certificates and Title Act 2006*** where land certificates held by way of verbal deposits or held in safe keeping were no longer accepted in this format. It states that any review of accounts following that time stated that

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existing verbal deposits or deeds in safe keeping were to be upgraded to a legal charge and this was the case with the Complainants' 2006 restructure and the change in the security held. In order to have a legal charge registered on the property, the Provider states that it was necessary for the Complainants to engage their solicitor to have a charge put in place. At that time, from the information provided, it indicated that both the construction business and farm business were in a strong financial position with the relevant business and financial expertise in place.

While the Complainants have argued that the farm was put in jeopardy when company debt was taken out as a personal loan, the Provider points out that the farm was already held as security for the company debt and was captured by the personal guarantees. The Provider states that its securities file evidences that one of the land folios was placed as security for borrowings from **20 March 1980** and was transferred to the securities team in **June 2006** for release to the Complainants' solicitor for completion of the legal charge. It states that the Land Registry records show the legal charge was registered over the two folios on **2 March 2012**.

The Provider states that the Complainants' representative indicated to the local branch manager at a meeting in January 2016 that the situation on the farm had changed, as the farm operation was now being carried out under a partnership with another family member and the issue of the farm grants was now questionable. The Provider was advised that the Complainants would no longer be receiving the grant payments for the farm as had been outlined when the debt was first extracted. The repayments would no longer belong solely to the Complainants. The branch manager pointed out that the Complainants had received €60,000 as [details of transaction redacted] of which €30,000 was due to be used to reduce the branch debt, but had never been received. The Provider was advised by the Complainants' representative that €30,000 was utilised as originally outlined to upgrade the farm and the balance seems to have been used to upgrade the Complainants' heating system and pay off debt owed to other family members. The Provider argues that it engaged proactively with the Complainants and facilitated the release of the small portion of the land held as security, which had been the subject of [details of transaction redacted] from which the Complainants gained financially.

While the Provider accepts that the Complainants are elderly, it argues that they were experienced borrowers who had operated limited company accounts since 1998 and relied on the land in question as security throughout, either by way of equitable deposit or an all sums mortgage. It argues that prior to the 2010 restructure, the Complainants had taken company debt out of their personal debt and paid down the same with the land being held as security for the debt. The Provider states that the second Complainant initially signed a letter of guarantee for H1 in **July 1999** in the amount of IR£10,000 and was involved with the company finances.

The Provider therefore does not accept that the second Complainant was not aware of the responsibilities attached to the letter of guarantee for €102,000 which she signed in **August 2007**. The Provider states that it is not satisfied that there is any evidence to corroborate the Complainants' claim that they did not understand that the farm would be at risk if the loan was not repaid.

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The Provider states that a proposal was sent to it in **August 2015** to write-down the Complainants' debt. The Provider states that the local branch engaged with the Complainants' representative over a number of months and in **May 2016**, the loan was passed to the Provider's recoveries unit for management.

On **30 May 2016**, the Provider sent letters to the Complainants asking them to complete a statement of means and a net worth statement along with supporting documentation. A third party mandate was received from the Complainants in **June 2016**. The Provider ultimately declined the proposal put forward on behalf of the Complainants and this was communicated to the Complainants by letter dated **22 December 2016**. The Complainants were advised that based on the information available to the Provider, the Complainants could clear their liability in full from the sale of the part of the land held as security and, consequently, the Provider was unable to accept the proposal which fell short of the amount owed.

The Complaint for Adjudication

The complaint is that the Provider acted wrongfully in the administration of the Complainants' banking facilities in the course of a restructure in 2010, specifically concerning:

1. The restructure of unsecured company debt into secured personal debt without the benefit of legal advice;
2. The taking of a legal charge over farm land in the place of an equitable charge without the benefit of legal advice;
3. Insufficient protection of the interests of elderly, vulnerable and seriously ill customers; and
4. Agreeing unsustainable repayments under the loan restructure such that the secured farm land would inevitably have to be sold.

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

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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 7 October 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.

Jurisdiction

This complaint specifically concerns the events of **October 2010** when the Complainants entered into a 12 year loan restructure agreement in the sum of €130,000. It seems that the Complainants became aware of the issues giving rise to their complaint following a data access request in **2015**. The present complaint was received by this Office on 10 April 2017. As the 12-year loan facility agreed in October 2010 is a "*long-term financial service*" within the meaning of the Act, the conduct of the Provider which is the subject of this complaint, regarding this restructure agreement, falls within the jurisdiction of this Office under ***Section 51*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

It should also be noted that this Office will not investigate the details of any renegotiation or proposed settlement of the commercial terms of banking facilities, which is a matter between the Provider and the Complainants and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial services provider to decline a settlement proposal, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant, within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

Since the Preliminary Decision was issued by this office, the Complainants' representative has reiterated his request for this office to examine the Complainants' loan restructure in 2006, and what he refers to as the upgrading of a legal charge at that time, which he says is "*the crux of [the Complainants'] complaint*". As the events of 2006 however, occurred 11 years before the complaint was received by this office, it seems that any complaint regarding the conduct of the Provider in 2006, will fall outside the jurisdiction of this office.

I note that the Complainants' made available a "*Charge for Present and Future advances*" which was arranged through their solicitor, so that their date of awareness appears to have been at the time when these security arrangements were put into place in 2006, and therefore such a complaint will not fall within the jurisdiction of the FSPO.

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The 2010 Restructure

According to the report prepared by the Provider in relation to the loan application dated 15 October 2010, the Complainants were directors of H2 and farmers. The report noted that they owned a 60 acre farm which they operated on a part-time basis and that the First Complainant was on an old-age pension.

It noted that H2 was to be wound down and the debt was to be taken into the sole names of the Complainants. The proposal was for a facility of €130,000 to clear company debt of €70,000 and to include a personal loan of €60,000. Repayments were to be set at €16,000 per annum over 12 years and there was to be a renewal of an overdraft of €5,000 for working capital purposes. In terms of repayment track record of the personal loan, the record notes that this was 'good'. The report noted that the management of the farm was carried out by the First Complainant and the construction business was managed by him and his son. The report indicated many years of experience in the farm business but noted that the construction business was defunct and all accounts were to close. Security was noted as an all sums mortgage over 22 acres registered in the joint names of the Complainants.

The report stated that the situation was not ideal but would solve the current debt problem. It stated that while repayment capacity was tight, the Provider was confident that the Complainants would meet the repayments and the sanction was recommended.

The lender's decision noted that the Provider had little option but to restructure and that the overall position was better with the company debt being transferred into personal names. It noted that the Complainants had been making €12,000 per annum repayments on their personal debt up to that point and that, hopefully, this would continue.

I have been furnished with a copy of the letter of loan sanction dated **22 October 2010,** which was signed and accepted by the Complainants on 3 November 2010. The loan amount is stated as €130,000 and its purpose is stated as 'Restructure'. The letter states that the borrowings are repayable on demand but, without prejudice thereto, the loan is repayable over 144 months by consecutive yearly payments of €15,938.76 commencing on 25 October 2010. The letter also includes an overdraft sanction of €5,000. The sanction letter states as follows:

> "**The security for this credit facility is:**
> 1. ALL SUMS MORTGAGE FROM [FIRST COMPLAINANT] OVER [TWO FOLIOS]
>
> **You must send a copy of this Credit Agreement to your solicitor as soon as possible so that your solicitor can advise you in relation to the execution of the mortgage**."

It appears from the information before me that the liabilities owing to the Provider prior to the October 2010 restructure were as follows:

- €10,227.50 H2 company loan;
- €58,383.37 H2 company current account overdraft;

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- €60,331.02 joint business loan in the name of the Complainants; and
- €154.40 credit card in the name of the first complainant.

After the 2010 restructure, the Complainants' liabilities to the Provider were as follows:

- €130,000 joint loan in the name of the Complainants;
- €5,000 working capital overdraft facility; and
- €712.46 credit card in the name of the first complainant.

I am satisfied that no additional monies were advanced to the Complainants as part of the 2010 restructure. Rather, personal debt of approximately €60,000 and company debt of approximately €70,000 were amalgamated into one loan in the personal names of the Complainants. The security for the 2010 restructure consisted of legal charges over two folios of land comprising part of the Complainants' farm.

There is no suggestion that the Provider insisted that the Complainants seek independent legal advice before agreeing to the 2010 restructure. The credit agreement was sent to the Complainants personally and the Provider did not seek any reassurance from them or proof that they had consulted with a solicitor. The credit agreement contained warnings, as set out above, which encouraged the Complainants to seek independent legal advice.

Analysis

Before the 2010 restructure, it seems that the Complainants' personal debt was already secured by charges over the land in question. In addition, the company debt was secured by way of the personal guarantee of both Complainants. I note that in a loan application of **June 2006** in the joint names of the Complainants, for the sum of €87,000, the security for the credit facility is an all sums mortgage over a 17 acre folio and a further all sums mortgage over a 22 acre folio.

In an **August 2006** loan application for H2 with a loan amount of €50,000 and an overdraft amount of €20,000, the security for the credit facility is a letter of guarantee for €70,000 from the Complainants and an all sums mortgage from the first complainant over the two land folios. In an **August 2007** facility, the amount of the letter of guarantee from both Complainants was increased to €102,000. I have not been furnished with copies of the relevant charges or guarantees but it seems to be common case that the documents were signed by the Complainants, although I note that the Complainants have raised certain arguments as to whether these should be enforceable or not. The validity and enforceability of such charges is not a matter for this office, but rather, a challenge to such issues is a matter for the Courts, which can consider any suggestion of undue influence by the Provider as referred to by the Complainants.

I do not express any opinion on the enforceability of the charges or guarantees signed over the years by the Complainants. For present purposes, I am simply noting what I understand to have been the security sought by the Provider and put in place by the Complainants to support their various banking facilities prior to the October 2010 restructure. The

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information before me suggests that as the legal charges over the land are "all sums" legal charges, any liability of the First Complainant under the personal guarantee was also secured by the lands in question.

The Complainants have referred to an incremental upgrading of an equitable mortgage to a legal charge, and to the company guarantees provided by them over the years prior to 2010. The Complainants are free to challenge the validity of the security in the Court, if they wish to do so, but this investigation is limited to the complaint that the Provider was guilty of wrongdoing in the manner in which the restructure occurred in October 2010. It is not in dispute that the Complainants are elderly and vulnerable and that, sadly, the second Complainant has suffered significantly with [details of an illness redacted]. It has been argued on their behalf that the Provider should have insisted that they receive legal advice before the 2010 restructure took place.

In my opinion, whilst it might have been preferable if the Provider had emphasised the value of the Complainants' taking independent legal advice, it may not have been appropriate to "insist" that the Complainants do so. Moreover, there is no general legal obligation on a regulated financial service Provider to insist that customers obtain independent legal advice, prior to entering a credit agreement or a credit restructure agreement. While there are particular circumstances in which independent legal advice is important, such as where a guarantee is sought from a surety with no connection to the principal debtor company, the presence or absence of such legal advice is used to support or rebut a presumption of undue influence that might otherwise had been established by the non-commercial guarantor in particular circumstances.

The absence of legal advice is not a legal wrong in and of itself; *Ulster Bank (Ireland) Limited v De Kretser* [2016] IECA 371; *Bank of Ireland v Curran* [2016] IECA 399. Furthermore, a plea of undue influence must be fully particularised and general assertions will not be sufficient to raise a presumption. In addition, there is no suggestion in the present case that the Complainants did not receive the proceeds of the loan facilities offered to them by the Provider over the years, or that both of them were not involved, in greater or lesser capacities, in the companies that received the loan proceeds from the Provider, prior to the 2010 restructure.

In the present case and as already mentioned, the 2010 restructure did not involve any further advance of funds to the Complainants. The biggest cause of concern to the Complainants appears to be the fact that approximately €70,000 of company debt was restructured as personal debt. It appears from the Provider's submission that part of this company debt may have been previously restructured from personal debt but I do not have sufficient detail before me in that respect.

While I appreciate the concern of the Complainants' representative as to the restructure of company to personal debt, the fact that the company debt was already secured by way of personal guarantees in the names of both Complainants is relevant to the analysis. In addition, the letter of loan sanction recommends that legal advice be sought in relation to the legal charge. It also appears from the evidence available that the Complainants' solicitor was involved in the registration of the legal charge.

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In relation to the creditworthiness of the borrowers and their ability to repay the 2010 facility, I accept that the Provider was told that the Complainants were in receipt of the single farm payment of approximately €16,000 per annum, at the time of the restructure. I appreciate the arguments made on behalf of the Complainants that this grant is a decreasing one and, due to the age of the First Complainant, it was not realistic in 2010, that he would be in position to continue to work on the farm to retain this grant for the entire duration of the loan facility. On the other hand, the Complainants were already liable for the sums in question. In addition, the entire annual grant was paid to the Provider between 2010 and 2014 in accordance with the terms of the credit restructure, which very considerably reduced the outstanding balance owed by the Complainants. If this had been a new credit facility of €130,000, I could again more readily appreciate the concerns of the Complainants' representative in relation to the likely ability of the Complainants to repay the sum over the 12 year period of the credit agreement, but that was not the situation in the present case.

Furthermore, there were no regulatory requirements at that time in relation to a lender ensuring the affordability of credit, before it was advanced. It appears from the evidence that when the Complainants' debt situation was considered by the Provider in October 2010, the age profile of the Complainants was taken into account but the decision made was that the restructure was thought to be the best available solution. It would appear that the only viable alternative at the time would have been to call in the personal guarantees of the Complainants and sell the lands in question. This does not appear to have been in anyone's interest and, as already stated, payments initially made on the restructured credit agreement since 2010, have significantly reduced the overall indebtedness of the Complainants.

I further note that €60,000 was received by the Complainants under [details of transaction redacted]. The Provider agreed a partial discharge of its charge to facilitate this and it was understood that a sum of approximately €30,000 would be repaid to the Provider out of the funds received. It appears no such sum was paid to the Provider from the proceeds of sale.

I note the argument of the Complainants' representative that the Complainants' solicitor criticised the Provider for not having sent a loan cheque through his office. It is clear from reading this letter, however, that the solicitor in question was criticising the Provider from the perspective of the solicitor's own compliance with existing undertakings given. I don't accept that this criticism was directed at any implied attempt to avoid legal advice being tendered to the Complainants. There was no criticism made in relation to the Provider sending the letter of loan sanction (which recommended legal advice) directly to the Complainants rather than sending it through the solicitor's office.

While I appreciate that the Complainants were elderly and vulnerable, there is nothing before me to suggest that they were not in a position to seek the advice of their solicitor in relation to the restructure, if they were concerned about it or if they wanted to seek any guidance or advice. They were borrowers with some experience who had been involved in the farming business and other businesses over a number of years and had been provided

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with numerous credit facilities by the Provider which were secured by guarantee and/or mortgage.

It appears from letters submitted in evidence, that the Complainants' solicitor was involved in the registration of the legal charge over the two folios from 2006 and was also in some contact with the Provider after the 2010 restructure. Furthermore, the Complainants have indicated that their son, Mr. Z, was instrumental in the negotiation of the 2010 restructure. There is no suggestion that he was not in a position to recommend to his parents that they should approach their solicitor for advice at the time, if advice had been needed.

I have noted that:-

1. No new funds were offered to the Complainants as part of the 2010 restructure.
2. The debt in question was already secured by way of personal guarantees and charges over the lands in question.

I am not satisfied therefore that there was anything wrongful in the consolidation of the Complainants' personal and company debt in the October 2010 restructure, notwithstanding the absence of legal advice to the Complainants. I accept that if the restructure had not been agreed at the time, the Provider would have been entitled to seek to rely on the guarantees in question and the charges over the lands in question to ensure the repayment of the outstanding debt. There is nothing to indicate that the Complainants wished for this outcome but rather, the restructure was agreed between the parties to avoid this outcome and to attempt to facilitate the repayment of the various facilities through the application of the single farm payments over a 12 year period. I note the payments were made in accordance with this agreement for a period of 4 years, which reduced the overall liability of the Complainants.

I am pleased to note that after the Preliminary Decision was issued to the parties, the Provider confirmed its willingness to reassess the Complainants' ability to repay the debt, based on their current financial circumstances, if the Complainants were to submit a freshly completed Statement of Means form, incorporating details of their assets, liabilities, income and expenditure. This was a welcome development and I note that following the passing of the First Complainant [date redacted], the Second Complainant has been assisted in completing a Standard Financial Statement, which has been made available to the Provider for consideration, and assessment in the usual manner.

I would encourage the parties to liaise in that regard with a view to enabling them to come to a mutually agreeable arrangement, bearing in mind the second Complainant's very difficult circumstances. In the meantime, on the basis of the evidence available, and in all of the circumstances as outlined, and for the reasons explained, I do not consider it appropriate to uphold this complaint against the Provider.

/Cont'd…

Conclusion

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

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

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

13 March 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.