An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0343
Sector:	Banking
Product / Service:	Credit Union Loan
Conduct(s) complained of:	Maladministration Application of interest rate
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a loan account held by the Complainant with the Provider.

The Complainant's Case

The Complainant held a longstanding loan account with the Provider, most recently restructured in 2009, the principal balance of which, as of November 2010, stood at €35,748.40. The Complainant refinanced this loan with the Provider on **16 November 2010** while at the same time securing an additional €3,500 in credit. The principal balance thus increased to €39,248.40 and the new loan agreement provided for the repayment of the entire amount over the 5-year term of the loan by way of weekly repayments.

The Complainant's representative submits that the Complainant is self-employed and that he made payments on the loan agreement up to **2013** at which point his business came under financial difficulty and he was unable to keep up with the repayments of the loan.

The Complainant's representative submits that the Provider wrote to the Complainant in **January 2019** to inform him that the insurance on the loan agreement would expire in **November 2019**, as the loan agreement would be ten years old at that point. The Complainant's representative submits that the Provider informed them that, in the event that the Complainant was to pass away, his shares would be taken against the credit loan agreement.

The Complainant's representative submits that the Complainant is very distressed with this information as he wishes to ensure that the shares that he has with the Provider are used to cover any funeral expenses in the event of his death and for any remaining shares to provide a nest egg for his family.

The Complainant's representative states that the Complainant turned 70 years of age in **January 2019** and that the information contained within the Provider's website states that the insurance for the loan is in place up to eighty years of age and for this reason he is confused as to why the Provider has informed him that the insurance will expire before then. The Complainant's representative states that the Provider dealt with the Complainant in an unacceptable manner and that it has failed in its duty of care to him.

The Complainant's representative submits that in **December 2014**, the Complainant was instructed by the Provider to attend a meeting with its board of management and she states that during this meeting the Complainant reluctantly agreed to transfer €4,000 from his shares to repay the arrears of the loan agreement. The Complainant's representative states that during this meeting the Provider failed to discuss with the Complainant any refinancing options which would assist him to reduce the repayments on the loan account and make it easier for him to service the loan, and it instead pressurised him to make monthly repayments of €300 towards the loan account or face legal action. The Complainant's representative submits that this conduct on part of the Provider demonstrates its lack of duty of care to the Complainant. The Complainant's representative states that they were later informed by a representative of the Provider that during his twenty-year tenure with it, he had never seen a share transfer which had not been part of a refinancing plan. The Complainant's representative states that the Complainant had never been offered a refinancing plan in respect of the loan agreement in question, nor had the Provider discussed with him any affordable options which might assist him to service the loan agreement.

The Complainant's representative submits that in **March 2016**, the Complainant was again instructed by the Provider to attend a meeting with its board of management and she states that during this meeting the Provider demanded more money from him and tried to get him to authorise another share transfer into the loan account, which he refused. The Complainant's representative submits that during this meeting in **March 2016**, the Complainant was pressurised to increase the monthly repayment to €360 and that the Complainant makes these repayments when he can.

The Complainant's representative states that had the Complainant been made aware by the Provider that it could use the shares to cover the cost of the loan account repayments, he would have transferred money from his shares to ensure that the repayments were reducing the principle sum as well as the interest on the loan account.

The Complainant's representative submits that, following a letter of complaint issued to the Provider, the Provider arranged a meeting with the Complainant on **9 April 2019**, which she also attended.

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The Complainant's representative submits that during this meeting the Provider's representative informed them that he could look into refinancing the remaining balance of the loan, which she submits stood at €23,000, over a period of five years and that this option would allow the insurance cover to remain in force, as it would effectively be a new loan agreement. The Complainant's representative submits that they were not satisfied with this offer.

The Complainant's representative submits that as of **July 2019**, the Complainant had paid €15,700 towards the principle amount of the loan agreement, in addition to which he had paid over €23,000 in interest payments. The Complainant's representative submits that the actual original intended cost of the interest on the loan agreement was only €9,516.

The Complainant's representative contends that the Complainant was forced into repayment arrangements which he was unable to afford and that the Provider did not at any time try to assist him in reducing the cost of the loan agreement. The Complainant's representative submits that it was in the interest of the Provider not to assist the Complainant as it continued to accrue large sums of money in interest from him, as a result of his financial hardship. The Complainant's representative states that the Provider acted recklessly in its lending to the Complainant and it has placed all of the financial burden on him.

The Complainant's representative states that the clause which the Credit Union has invoked in respect of the insurance lapsing after 10 years of the loan agreement being in place is not mentioned anywhere in the loan agreement and she contends that this is a clause between the Provider and its insurer, which it is trying to enforce on the Complainant.

The Complainant's representative submits that upon requesting all of the Provider's notes pertaining to the credit agreement in question, there were no records kept on its file other than "*vague notes*" dating from **2017** forward.

The Complainant's representative states that the Complainant has already paid €23,791 towards the interest on the loan account, notwithstanding that the original interest cost of the 2009 loan was €9,516 only. The Complainant seeks that the Provider writes down the principal amount owing by an amount equivalent to the difference between the interest originally planned and the interest in fact paid – that being €14,275 - which would bring the principal owing down to approximately €9,000. The Complainant's representative states that if the Provider were to agree to bring the cost of the loan down to €9,000 as highlighted above, the Complainant would in turn agree to refinance the remaining €9,000 over a five year period, as this would be more affordable for him. The Complainant's representative states in doing this, the Complainant would agree to pay the published rate of interest as stated on the Provider's website of 8.86% over the five-year period, which would secure an additional sum of €2,078 in interest rate payments to the Provider, which would be over and above the original interest amount of €9,516 already paid.

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The complaint is that the Provider failed to assist the Complainant to restructure the loan account to make it more affordable for him, that it is wrongfully purported to cancel the insurance on the loan account, and that it failed in its duty of care to the Complainant.

The Complainant wants the Provider to take into consideration the sums of money already paid towards the loan account, including interest which has been paid to date and for it to accept some financial implication for its lack of service and support to the Complainant and to write off €14,275, which is the difference between what he paid in interest on the loan agreement against the cost of the interest listed on the original loan agreement in 2010.

The Provider's Case

The Provider disputes that it engaged in reckless lending and maintains that the Complainant had a solid lending history with it and, furthermore, that at the time of the November 2010 loan, the Complainant had a very favourable loan to deposit ratio. The Provider maintains that the Complainant's agreement with it is contained within the credit agreement and that this document makes no reference to the loan protection insurance. The Provider maintains that the Complainant should be bound by the terms of the credit agreement.

The Provider disputes that it failed to engage with the Complainant regarding refinancing options and maintains that regular efforts were made to assist the Complainant.

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 Complainant was 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 16 September 2020, outlining my preliminary determination 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.

Prior to considering the substance of the complaint, it will be useful to set out certain provisions from the credit agreement agreed between the Complainant and the Provider and to set out a chronology of the loan history of the Complainant with the Provider:

Credit Agreement

The credit agreement entered into between the Complainant and the Provider dated 16 November 2010 includes the following provisions:

> *I/we hereby pledge all paid shares, all payments on account of shares and all deposits, which I/we have now or hereafter may have in* [the Provider] *as security for repayment of this Loan together with costs and expenses and I/we hereby authorise* [the Provider] *to apply all such paid shares, payments on account of shares or deposits to the payment of the said loan, interest costs and expenses.*

Elsewhere in the agreement, the following is set out:

> *The Loan is immediately repayable in the event of the bankruptcy, death or contractual incapacity of the Member…*

Chronology of Complainant's Loan History

The Complainant was provided with credit in the following amounts on the following dates wherein the total loan account balance is also noted as of the date of each advance:

Date Granted	Loan Amount Issued €	Total Loan Balance €
22/02/2000	2,539.48	2,539.48
24/10/2000	3,174.35	3,174.35
07/11/2001	7,618.43	14,525.28
02/07/2003	6,000.00	12,906.85
03/08/2004	3,000.00	9,906.85
03/05/2005	6,000.00	12,906.85
18/10/2005	6,000.00	12,906.85
27/03/2007	20,000.00	24,094.15
21/12/2007	4,000.00	24,359.89

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08/11/2008	4,000.00	24,098.76
13/03/2009	6,000.00	28,443.52
16/09/2009	6,500.00	32,353.99
26/05/2010	10,000.00	38,606.81
16/11/2010	3,500.00	39,258.40

Analysis

There are a number of aspects of this complaint.

In essence however, the complaint can be distilled into the following elements. There is a general complaint that the Provider engaged in "*reckless*" lending.

There is a complaint regarding an asserted failure to communicate to the Complainant the details of the insurance on the loan agreement, in particular the fact that this insurance would expire after 10 years, and the ramifications of this for the Complainant. This is connected to an assertion that the insurance was wrongfully cancelled. There is a complaint regarding an asserted failure to offer the Complainant the possibility of "*refinancing options*" at appropriate times. Finally, there is a general complaint that the Provider failed in its "*duty of care*" to the Complainant.

Reckless Lending

In terms of the first aspect of the complaint identified above, the Complainant alleges that "*the pattern of lending on this account was reckless at best*". The concept of a tort of reckless lending was considered by the High Court in the case of ICS v Grant [2010 IEHC 17], when Charleton J indicated on 26 January 2010 as follows:-

> *Here, what is asserted is some alleged wrong akin to reckless lending. I have no material whereby I could come to any such conclusion on this case since both the Plaintiff and the Defendant seem to have taken the same overvalued view as to the worth of the security. But, more fundamentally, the argued for tort of reckless lending does not exist in law as a civil wrong. It is not within the competence of the court to invent such a tort. The Oireachtas could, if it saw fit, pass a law creating such a civil wrong. It is difficult to imagine the parameters of such a law since those who seek a loan will have a view as to what should be borrowed, and if a loan is badly made by a bank, how can the issue of contribution be escaped from by the borrower who sought the money in the first place. Defining that civil wrong would tend to remove the presumption of arms length dealing as between borrower and bank and replace it with a new relationship based on a duty of nurture that other common law countries do not see it as their duty to put into the marketplace as any argued-for law as to reckless lending does not appear in the works on tort that I have consulted from other common law jurisdictions.*

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> *In any event, I am unable to act on this argument because such a law does not exist beyond the principle of undue influence, which is not raised in any way on the facts in this case.*

Accordingly, I do not uphold the complaint of reckless lending.

Insurance Policy

The Provider holds a loan protection insurance policy to cover the loans of borrowers in the event of their death. This is a contract of insurance between the Provider and the insurer, paid for by the Provider, and with the benefit accruing to the Provider in the event of a successful claim. In such an event, the deceased borrower's estate would be relieved of the liability associated with the loan debt. The policy is subject to a number of limitations including that it ceases to be in force upon the borrower reaching the age of 80, or upon the loan reaching the loan term limit (10 years).

The Complainant's grievance is that he was not made aware that the policy would cease to cover his debt to the Provider following the passage of 10 years from the date of the loan agreement. The Complainant contends that he would have taken certain action (such as the transfer of shares) had he been aware of the risk that his own deposits with the Provider might, in the event of this death after the expiry of this 10 year period, be applied towards his debt.

The first observation I might make is that the Complainant is not a party to the contract of insurance, nor is he, in the legal sense, a beneficiary, potential or otherwise, of same (notwithstanding that he may ultimately derive a corresponding benefit). The Complainant's loan or credit agreement with the Provider makes no reference to the insurance policy. In short, the Complainant is imbued with no rights or entitlements by reference to the insurance policy. Rather, the Complainant's relationship with the Provider is governed entirely by the credit agreement entered into between the Complainant and the Provider. The credit agreement authorises the application of the Complainant's shares towards his debt. Such an option will thus be available to the Provider in the event of the death of the Complainant (an event giving rise to an immediate requirement to repay the loan) at a time when the loan or part thereof remains outstanding.

The Complainant's argument appears to be premised on his apparently longstanding (although now challenged) belief that were he to die *at any point* following the loan agreement whilst his loan debt remained outstanding, his estate would not be burdened with the said debt owing to the operation of the insurance policy. The Complainant has offered no evidence of any action taken by the Provider which incorrectly gave him this belief. The Provider's literature on the matter (visible for example online) is meticulous to record that the insurance will apply strictly subject to the terms and conditions and cover limits contained in the policy. There is no evidence that the Provider proffered any assurances that the cover would apply without restriction or for an unlimited period of time.

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Perhaps more significantly, the Complainant is essentially seeking to avoid the application of the terms he expressly agreed to in the credit agreement by reference to an agreement to which he was not party. Notwithstanding that the terms of the insurance policy will shortly not apply to the Complainant's debt (in circumstances where his loan will imminently surpass the loan term limit), the governing document that applies is the credit agreement and this agreement clearly reserves the right of the Provider to hold deposits as security and to apply them towards debts.

The terms of the insurance policy provide that the insurance will not be available upon the loan reaching the loan term limit (in this case 10 years after the loan was created). Therefore there was no inappropriate cancelling' of the insurance. The Complainant asserts that there was a failure to properly communicate to him the details of the insurance on the loan agreement. The Complainant is not a party to the policy and thus has no automatic right to be apprised of any particular details. I have been provided with no evidence that the Provider at any stage furnished inaccurate details, or that the Complainant at any stage requested any details or further information, as he could well have done, and as indeed borrowers are invited to do on the Provider's website.

The Provider wrote to the Complainant 22 months in advance of the expiry of the insurance and approximately four years after the loan had been due to be repaid and advised the accurate position This was appropriate in the circumstances.

Refinancing

The Complainant maintains that he should have been offered refinancing options at various points since the November 2010 loan. The Complainant does not however contend that he requested and was refused any such measure(s) at any point. Rather, the Complainant's argument appears to be that the Provider should have taken the lead and proposed a restructuring in line with the Complainant's financial ability.

The Provider appears to take issue with the Complainant's account and refers to "*3 to 4*" meetings leading up to 2017 wherein the Provider maintains that all options were discussed with the Complainant:

> *The Credit Control Committee met* [the Complainant] *on a number of occasions, trying to apply our tolerant approach above, with sporadic performance. What was agreed with the member was an interim repayment schedule and this would be reviewed periodically to discuss progress. Any deviation/non-performance from this would trigger staff calls and as it happened, meetings again with the committee. From our recollections, all aspects and ways to handle the loan would have been explored and discussed amicably in a frank and open manner with* [the Complainant].

The Provider also relies on 'system notes' which it maintains record the fact of ongoing discussions regarding "*reschedule/refinance*".

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There is therefore a dispute as to whether various options were notified to the Complainant. I am satisfied however that I can come to a decision on this matter without the need to resolve this factual dispute. The Complainant was aware that he was failing to meet his obligations set out in his credit agreement. The Complainant was additionally aware that the payments that he was making were being disproportionally applied towards interest and that very little, relatively speaking, was being paid off the principal debt. Nonetheless, the Complainant does not contend that he himself requested any restructuring or refinancing, only for same to be refused by the Provider. The Complainant's argument is simply that refinancing offers were not presented to him. Furthermore, the Complainant acknowledges that a restructuring was offered to him in a meeting of 9 April 2019 but that he refused this offer.

It is important to note that it would not be appropriate for this office to decree that the Provider should have renegotiated the terms of the loan. Such a decision is a commercial one over which the Provider enjoys a discretion, and I am not satisfied there exist grounds for me to interfere with the commercial discretion of the Provider.

I will not interfere with the commercial discretion of a Financial Service Provider unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant, or unless it is in breach of any part of Section 60(2) of the Financial Services and Pensions Ombudsman Act 2017. The Complainant has not provided any evidence to establish any unreasonable, unjust, oppressive or improperly discriminatory conduct, or any other unlawful conduct, on the part of the Provider.

Duty of Care

The final aspect of the Complainant's complaint is that the Provider breached a duty of care owed to him. I do not view this aspect of the complaint as adding anything substantive to the matters already considered above. This aspect of the complaint is couched in the legal language of the tort of negligence. Quite apart from the question as to whether a duty of care can be properly said to exist in the particular circumstances of this case, I can identify no instances of particular alleged breaches other than those I have already dealt with above.

Finally, it will be appropriate to make a number of observations regarding the remedy which the Complainant has sought, namely the write down of the principal amount owing by an amount equivalent to the difference between the interest originally intended (€9,516) and the interest in fact paid (€23,791) – that being €14,275 - which would bring the principal owing down to approximately €9,000.

The Complainant highlights that he has paid a significant amount of interest on the loan already and that this amount is notably higher than the original intended full amount of interest. This is undoubtedly true. However, the fact that the Complainant has paid such an increased amount of interest is entirely the result of the Complainant's failure or inability to meet the terms of the agreement.

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The loan account originally specified a 5-year term. At the end of that term, in November 2015, on the date that it had been intended for the loan account to be cleared in full, the loan balance stood at €28,891. The mechanism suggested by the Complainant as an appropriate remedy would serve to put the Complainant in a position now, approaching five years after the loan was due to be fully repaid, as if he had not missed any repayments whilst also extending the loan for a further period beyond its intended span. The mechanism would absolve the Complainant of all interest associated with the multiple missed payments which he acknowledges missing. This would equate to the provision to the Complainant of interest-free money for a period greater than 5-years (in circumstances where the first missed payment appears to have occurred as early as December 2010, the third week of the loan). This again falls within the commercial discretion of the Provider and I do not propose to direct the Provider to write down the loan.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider or conduct within the terms of Section 60(2) of the Financial Services and Pensions Ombudsman Act 2017 that could ground a finding in favour of the Complainant, I do not uphold the 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

8 October 2020

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Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address, and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.