



**Decision Ref:** 2020-0476

**Sector:** Banking

**Product / Service:** Mortgage

**Conduct(s) complained of:** Maladministration

**Outcome:** Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainants entered into loan agreements with the Provider in **April 1999** and **December 2004**. These loans were used to purchase two investment properties with these properties used as security for the loans. The Complainants decided to sell the properties and requested the Provider's consent to the sale at various points between **2013** and **2015**. The Complainants believe the Provider's delay in giving consent resulted in the loss and/or delayed sale of the properties. The Complainants also believe the Provider incorrectly applied interest to their loan accounts, wrongfully claimed a residual balance existed in respect of one of the loans, and engaged in incorrect credit reporting.

**The Complainants' Case**

The Complainants have engaged a firm of solicitors to act on their behalf in respect of this complaint. The Complainants' position was formally set out in correspondence from their solicitors dated **4 July 2017**.

It is stated that the Complainants and their solicitors were seeking, for considerable time, the Provider's consent to the sale of Property 1 and Property 2. Consent to the sales of the properties was only obtained after 24 months of writing to the Provider. However, during this time, a sale opportunity in respect of each property was lost.

The Complainants' solicitors explain the sale of Property 2 was on the strict proviso that following the completion of the sale, a meeting would be arranged with the Complainants to discuss and reach agreement on the following matters:

- a) irregularities regarding interest charged on the loan accounts;
- b) the damage, loss, expense and costs suffered by the Complainants as a result of the Provider's refusal to provide consent to sale;
- c) the alleged balance on the accounts following remittal of sales proceeds; and
- d) rectification of the Complainants' credit rating.

It is submitted that following the remittal of the sales proceeds and as a result of overcharging of interest on the loan accounts, there are no arrears on the Complainants' accounts and there is an amount of money due to the Complainants. However, despite this, the Provider continues to maintain that arrears have accrued on the loan accounts. The Provider's credit reporting in this regard has negatively impacted the Complainants' credit rating. In addition to this, the Provider has steadfastly failed and/or refused to agree to a meeting or to any kind of meaningful engagement to finalise these matters.

The Complainants' solicitors have set out the position in respect of each aspect of the complaint under separate headings.

#### ***Irregularities regarding the interest charged on the accounts***

Referring to a report dated **3 July 2017** prepared by a firm of chartered accountants in respect of the loan accounts, it is submitted the report "... *found that the mortgage rates involved were increased to extraordinary levels due to the accounts being in arrears.*" This further impaired the Complainants' in their efforts to discharge the monies owing to the Provider. It is also observed that in delaying its consent to the sale of the properties, the Provider was able to charge these increased interest rates for a longer period of time.

It is stated the report shows that additional interest totalling €48,057 "... *over and above what could be considered a reasonable margin has been charged on the Properties as a result of these arrears.*" The Complainants' solicitors remark that while the report allows for a reasonable rate of the average Euribor Rate plus 3%, it has found that at all times from **2009** to **2015** the rates charged by the Provider on both loans were well in excess of this, rising to as much as 6.6% at one point.

It is submitted that the Complainants' arrears were allowed to continue as a result of the Provider's *intransigence* in unreasonably delaying consent to sale. The delay between locating a buyer and obtaining consent to sale in relation to Property 1 was 9 months, and 10 months in respect of Property 2.

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During this time, the Complainants assert that the Provider charged punitive interest rates despite it being within its power to bring matters to an end by consenting to the sales at an earlier point in time.

***Damage suffered by the Complainants as a result of the Provider's refusal to provide consent***

The Complainants' solicitors explain they first contacted the Provider in relation to the properties on **13 December 2013**. Prior to this, an offer was received in respect of Property 1 on **20 August 2013** which was immediately communicated to the Provider. However, consent was not forthcoming and the purchaser was lost.

It is stated that due to the lack of progress achieved by the Complainants, they retained the services of their now solicitors to engage with the Provider on their behalf. The Complainants' solicitors were clear in their correspondence with the Provider in that the Complainants were seeking the forbearance of the Provider to allow the sale of the properties and the discharge of the amounts validly owed to the Provider. To this end, the Complainants' solicitors sought to arrange a meeting between the Complainants and the Provider, and for consent to the sale of the properties.

On **1 May 2014**, the Complainants' solicitors wrote to the Provider informing it that a cash purchaser had been found for Property 1 and sought consent to sale. Consent to this sale was issued on **6 June 2014** and the sale of Property 1 took place shortly thereafter. The proceeds of the sale were used to discharge Loan 1 in full with the excess proceeds of €95,054.09 being paid towards Loan 2.

After this, the Complainants' solicitors continued to request a meeting between the Complainants and the Provider, and for consent to the sale of Property 2. A buyer for Property 2 was located in **January 2015** which was communicated to the Provider and consent to the sale was sought. However, despite the Complainants' attempts to satisfy the Provider's requirements, the buyer was lost due to the delays occasioned by the Provider's refusal to consent to the sale in a timely manner. In order to facilitate the sale of Property 2, the Complainants secured vacant possession of the property and did not renew the tenancy agreement that was in place. This resulted in a substantial loss of rental income and, as a direct consequence, led to the accrual of arrears on the underlying loan facilities. The Complainants were also required to place the property back on the market and incurred additional and unnecessary legal expense. Consent to the sale of Property 2 issued on **21 October 2015** and the property was sold in **December 2015**.

***The alleged balance on Loan 2***

Following the sale of Property 2, the Provider claimed that a shortfall existed on Loan 2 in the amount of €31,624.03. This was communicated to the Complainants shortly after the proceeds of sale in respect of Property 2 were paid towards Loan 2.

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It is stated that the Complainants received no further correspondence from the Provider with the exception of an annual letter indicating the outstanding arrears. It is also stated that no interest has been charged on this amount and the Provider has refused to engage with the Complainants in relation to this outstanding balance.

### ***Rectification of the Complainants' credit rating***

It is submitted that the Complainants' credit rating has been adversely affected by the outstanding balance on Loan 2. It is stated that the Complainants "... have carried out checks of same and found that [the Provider] have registered the claimed debt relating to the shortfall from the sale of [Property 2]." The Complainants' solicitors contend the arrears "... only built up in relation to that property as a result of the intransigence of [the Provider] ..." and the Provider has caused further losses in requiring the tenants' removal from the property without providing consent to sale.

In a letter dated **17 November 2017**, the Complainants' solicitors clarify that the Complainants' credit rating has been adversely affected as a result of the arrears which accrued and not as a result of the outstanding loan balance.

### **The Provider's Case**

The Provider, in its Formal Response on **14 August 2017**, has responded to the complaint under each of the headings outlined by the Complainants' solicitors.

### ***Irregularities regarding the interest charged on the accounts***

The Provider disputes the assertions advanced under this heading and has submitted a chronology of events for the years **2013, 2014** and **2015** in evidence.

The Provider refers to the Letters of Approval issued to the Complainants in **April 1999** and **December 2004** wherein the loans were subject to one year fixed interest rates. The Provider also refers to the option, pursuant to *General Mortgage Condition 5.4*, to convert a loan at the end of a fixed period to a variable rate loan. Further to this, the *Mortgage Conditions* state the Provider "... may from time to time increase or reduce the *Appropriate Rate*."

The Provider observes that the report relied on by the Complainants uses the Euribor rate. The Provider remarks that both loans were issued at a fixed rate with the option to convert to a variable rate. There is no special condition attached to either loan stating that the interest rate was linked to the Euribor rate.

It is submitted that the interest rates applied to both loans are correct and no irregularities occurred. The Provider also advises that the interest rate on Loan 2 had been at 0% since **1 January 2016**.

***Damage suffered by the Complainants as a result of the Provider's refusal to provide consent***

The Complainants wrote to the Provider on **31 May 2013** enclosing a Standard Financial Statement (SFS). The letter advised of the Complainants' intention to sell Property 1. The Provider wrote to the Complainants on **11 June 2013** requesting further documentation. On **31 July 2013**, the Provider received the requested documentation.

Following an assessment of the SFS, on **19 July 2013**, the Provider issued a letter offering an alternative repayment arrangement (ARA). The ARA was a capitalisation of arrears and interest only for 3 years. The Provider considered the loan in question was sustainable with this ARA. On **12 August 2013**, the Provider received a letter from the Complainants' advisor querying whether there were any other restructure options available and included two proposals. The Provider contacted the Complainants' advisor by telephone and confirmed the ARA previously offered was the only one available at that time.

The Provider explains that the Complainants' letter dated **20 August 2013** advised they had received an offer of €190,000 in respect of Property 1. Correspondence issued to the Complainants on **22 August 2013** outlining the Provider's requirements for the release of the property which included a valuation of the property. Further correspondence was received on **30 August 2013** and the Provider issued a consent to sale on **5 September 2013**. The Provider confirmed on **5 September 2013** that it was in a position to release this property subject to conditions. This consent expired on **5 March 2014**.

On **1 May 2014**, the Complainants' solicitors requested that the Provider consent to the sale of Property 1. On **8 May 2014**, the Complainants' solicitors sent a confirmation of the offer. The Provider assessed the Complainants' request and on **6 June 2014**, the Provider gave its consent to sell the property. The consent was valid until **6 December 2014** and outlined the conditions to be met by the Complainants.

The Provider received a letter from the Complainants' solicitors on **24 June 2014**. This letter explained that the Complainants did not have access to funds to clear their arrears but had agreed a sales price which would allow the arrears to be cleared. On **25 June 2014**, the Provider advised the Complainants' solicitors that it would not accept a figure lower than the outstanding debt. This redemption figure at that time was €377,356.81 with interest accruing on a daily basis of €59.40.

On **24 July 2014**, the Provider issued an email to the Complainants' solicitors advising '*as discussed please find attached consent to the sale of [Property 1]. We are agreeable to the sale once the net sales proceeds of €184,381.13 is lodged. It has been broken down in the letter but this is the total amount required.*' The Provider received the proceeds of sale on **4 September 2014**.

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On **12 January 2015**, the Provider received a letter dated **5 January 2015** from the Complainants' solicitors advising they had negotiated the sale of Property 2 and required the Provider's consent to the sale. In order to assess this request, the Complainants were required to complete an SFS and submit supporting documentation on **14 January 2015**.

On **23 January 2015**, the Complainants' solicitors wrote to the Provider outlining a number of issues, some of which are the subject of this complaint. The Provider spoke with the Complainants' solicitors on **20 February 2015** and explained that in order to process the application, an SFS was required. An SFS was sent to the Complainants' solicitors that day. A completed SFS was received on **4 March 2015**. This was followed by a number of further emails between **4 and 6 March 2015**.

On **12 March 2015**, the Complainants' solicitors requested the Provider's consent to the sale of Property 2. This email also advised that *'when the sale goes through we can discuss the balance outstanding.'* The Provider advised the Complainants' solicitors on **13 March 2015** that once its assessment was complete, it would contact them. The email also advised that *'whilst the Bank will consider the proposal to sell there is no blanket guarantee that a consent is forth coming.'*

On **8 April 2015**, the Provider received an email from the Complainants' solicitors stating that it had yet to respond to the request for consent to sale and that the Complainants had not renewed the tenancy agreement in respect of the property. On **10 April 2015**, the Provider emailed and spoke with the Complainants' solicitors requesting clarification of the Complainants' salaries submitted with the SFS and queried if they would consider renting the property and remain on interest only repayments until the term of the loan expired.

The Provider wrote to the Complainants on **11 May 2015** advising them of their arrears which stood at €2,180.78. On **18 May 2015**, the Provider received an email from the Complainants' solicitors. This included an email dated **20 April 2015**. However, the Provider has no record of receipt of the April email and notes the email address is not a valid email address for the staff member in question. The Provider also refers to a telephone conversation with the Complainants' solicitors on **18 May 2015**.

On **11 June 2015**, the Provider emailed the Complainants' solicitors in relation to the proposed sale advising that the Arrears Support Unit (**ASU**) requested further statements from the Second Complainant. The Complainants' solicitors responded on **16 June 2015** stating that the Provider had all the information it needed. The Provider responded on **22 June 2015** explaining that it would revert in the coming days regarding its assessment. On **26 June 2015**, the Provider advised the Complainants' solicitors of the information and documentation required to process the sale of the property, and in order to facilitate the request for a meeting, to contact the appointed Portfolio Manager. The Provider states that it received the requested information on **1 October 2015**. The Provider telephoned the Complainants on **15 October 2015** to inform them that correspondence would be issuing that morning consenting to the sale with a number of conditions.

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The Provider advises that the First Complainant noted he would not be sending in a proposal regarding the shortfall (which was one of the Provider's conditions) but would consider the meeting with the Provider. On **16 October 2015**, the Provider issued a letter confirming the sale of the property for €177,000 which was valid until **16 April 2016**.

The Provider states that during the 10 months between **January** and **October 2015**, it was in regular contact with the Complainants' solicitors regarding issues such as completing documentation, submitting supporting documentation, assessment of documentation, discussions advising that the rental income was sufficient to service the loan repayments and the sale of the property would not be deemed necessary (which was declined as the Complainants wished to sell the property), and the requirements needed in order to agree to a consent to sale.

The Provider states that its records do not indicate the Complainants secured consent to sale on the proviso that following completion of the sale, a meeting would be arranged to discuss the interest rates applicable to the loans, expense and damage as a result of the delay, the outstanding balance on the loan and rectification of the Complainants' credit rating. The Provider explains that it set out the terms and conditions under which it was agreeable to the sale of Property 2 in correspondence issued to the Complainants' solicitors on **16 October 2015**.

### ***The alleged balance on Loan 2***

The Provider states its letter of **16 October 2015** clearly outlined that it was agreeable to the sale of Property 2 for €177,000 less the agreed solicitor's fees of €2,202.50 and auctioneer's fees of €3,265.55. The consent also stated that all parties to the loan would remain jointly and severally liable for the resulting shortfall of €29,273.74.

Prior to the sale of Property 2 in **2015**, the Provider states that the balance outstanding on Loan 2 was €194,373.36 plus arrears of €7,616.12. The Provider received a cheque in the amount of €171,531.95. The outstanding balance on the loan account following this lodgement was €31,363.42. The Provider states that this amount remains outstanding and the Provider advises that interest in not being charged on this balance.

The Provider also refers to clause 2.11 of the *Mortgage Conditions* where the Complainants agreed to repay any shortfall where net sales proceeds were insufficient to discharge the debt.

### ***Rectification of the Complainants' credit rating***

The Provider submits it is not in a position to amend the Complainants' credit rating and is obliged to report accurate information to the ICB regarding loan repayments. The Provider also refers to clause 24.2 of the *Mortgage Conditions* outlining its credit reporting duties.

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### **The Complaints for Adjudication**

The complaints are that the Provider:

1. Delayed in providing consent to the sale of Property 1 and Property 2;
2. Charged an unreasonable rate of interest in respect of the Complainants' arrears;
3. Wrongfully claimed that a shortfall balance existed on Loan 2; and
4. Engaged in incorrect credit reporting.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 27 November 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.



### **The Loan Agreements**

Pursuant to a Letter of Approval dated **6 April 1999**, the Provider extended a loan facility to the Complainants in the amount of £130,000 (**Loan 1**) to facilitate the purchase of a residential investment property, Property 1. This loan was subject to a 1 year fixed rate of interest and the interest rate was stated as 4.75%.

The Complainants signed an Acceptance of Loan Offer on **15 March 1999** accepting the terms and conditions set out in the Letter of Approval, the General Mortgage Loan Approval Conditions, and the Provider's Mortgage Conditions.

Pursuant to a Letter of Approval dated **3 December 2004**, the Provider extended a loan facility to the Complainants in the amount of €270,000 (**Loan 2**) to facilitate the purchase of a residential investment property, Property 2.

This loan was subject to a 1 year fixed rate of interest and the interest rate was stated as 2.47%. An Acceptance of Loan Offer was signed by the Complainants on **16 December 2004**.

The Complainants also acknowledged that the various terms and conditions had been fully explained to them by their solicitors.

### **Correspondence**

The Complainants wrote to the Provider on **31 May 2013** stating they had made several attempts to negotiate a resolution in respect of the difficulties experienced regarding the loans. The letter also explained that the Complainants were in the process of trying to sell Property 1. The Complainants' advisor wrote to the Provider on **8 August 2013** in respect of the loans requesting that certain arrangements be put in place until Property 1 was sold.

The Complainants informed the Provider by letter dated **20 August 2013** that a firm offer of €190,000 had been received in respect of Property 1 and, in essence, sought the Provider's approval of the sale and outlined a proposal to deal with the residual debt estimated to be around €100,000. Confirmation of the offer was furnished to the Provider under cover of letter dated **21 August 2013**. The Provider responded on **22 August 2015** requesting that a *Request for Release* form be completed together with independent valuations of Property 1 and Property 2. The Complainants supplied the Provider with the relevant documentation under cover of letter dated **30 August 2013**.

By letter dated **27 August 2013**, the Complainants advised the Provider they had formally accepted an increased offer of €197,500 on a subject to contract basis in respect of Property 1 and could not wait for the consent of the Provider.

The Provider wrote to the Complainants on **5 September 2013**, indicating it was prepared to consent to the sale of Property 1 and the consent was valid until **5 March 2014**.

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However, the Complainants were advised that the Provider's consent was subject to the following:

- “1. *Arrears of instalments of €8,889.72 on [Loan 2], and costs, if any, outstanding on the above numbered mortgage account being fully paid up prior to the execution of the Deed of Discharge.*
2. *All future payments being made by way of direct debit.*
3. *[The Provider's] costs in the sum of €125.00 being discharged by your clients.*
4. *Deed of Discharge being furnished for approval and sealing ...*
5. *Mortgage account [Loan 1] to be redeemed in full.*
6. *A Capital Reduction of €99,861.48, inclusive of arrears as per Condition 1, being lodged to account number [Loan 2] ...*
7. *Receipt of a copy of the relevant folio ...*
8. *The attached capital reduction form to be completed and signed by all parties to the mortgage ...”*

By letter dated **26 November 2013**, the Complainants requested a meeting with someone within the Provider who has authority to negotiate with them regarding the management and sustainability of their loans.

The Complainants' solicitors wrote to the Provider on **16 December 2013** advising of the Complainants' intention to sell both properties and requested that the Provider engage with them “... in relation to a process or procedure whereby our clients will be entitled to sell the properties in an orderly manner without the necessity of proceedings, foreclosure orders, mortgagee suits or appointment of Receiver.” The Provider has furnished a draft letter dated **23 December 2013** which responded to the letter from the Complainants' solicitors advising that a letter of authority was required to discuss the Complainants' account. It is not clear, however, if this letter was issued. The Complainants' solicitors wrote to the Provider again on **15 January 2014** requesting a response to its previous correspondence. In a separate letter dated **15 January 2014**, the Complainants' solicitors requested “... a meaningful discussion and/or correspondence in relation to putting together a restructuring proposal ...”

On **20 December 2013**, the Complainants' solicitors wrote to the Provider's solicitors suggesting a meeting during the week commencing **27 January 2014** to discuss a restructure/work-out of the Complainants' loans. The Provider's solicitors responded to this letter on **24 January 2014** outlining that it was not received until **22 January 2014**. The Provider's solicitor advised that contact be made with the Provider's solicitors to arrange a branch meeting. Responding to this by a letter dated **15 January 2014** (which appears to be incorrectly dated) the Complainants' solicitors suggested a date during the week commencing **17 February 2014**. The Provider's solicitors responded on **12 February 2014** advising that the letter had been received on **4 February 2014**, explaining that a meeting would take place at a branch of the Complainants' choosing and to revert with a suitable time, date and location.

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The Complainants' solicitors informed the Provider's solicitors by letter dated **6 March 2014** that the Complainants would be willing to attend a meeting at the Provider's Head Office on **12 February 2014** (the incorrect month appears to have been cited in this letter). The Complainants' solicitors wrote to the Provider's solicitors on **18 March 2014** explaining that as they did not hear from the Provider's solicitors, the meeting did not go ahead and requested that it be rescheduled. By letter dated **23 March 2014**, the Provider's solicitors apologised for a delay in responding to previous correspondence. The letter also advised that the Provider awaited confirmation of a suitable date and time for the proposed meeting between the parties. The Provider's solicitors wrote to the Complainants' solicitors again on **1 April 2014** indicating that they awaited the Complainants' confirmation as to the time and date of the proposed meeting.

The Complainants' solicitors responded to the Provider's solicitors on **25 April 2014** expressing their dissatisfaction with the delay in organising a meeting and requested that a meeting take place in the Provider's Head Office. The evidence also indicates that a meeting was arranged during a telephone call between the parties' solicitors on **29 April 2014** for **13 May 2014**.

Following this, the Complainants' solicitors wrote to the Provider's solicitors on **1 May 2014** requesting its consent to the sale of Property 1 noting the previously issued consent had expired. The letter pointed out that an earlier sale had fallen through due to the Provider's delay in furnishing the relevant consent. It was also noted that due to the recent offer of €190,000 in respect of Property 1, "[t]he necessity for an immediate meeting has perhaps been surpassed ... [and] would be premature." It was suggested that a meeting take place after the sale of the property. A similar message was contained in a subsequent letter dated **8 May 2014** which also contained a Sales Advice Notice in respect of Property 1. On **13 May 2014**, the Provider's solicitors wrote to the Complainants' solicitors indicating that a qualified Mortgage Advisor would meet with the Complainants at their local branch. The letter also acknowledged the cancellation of a meeting arranged for that day.

The Complainants' solicitors wrote to the Provider's solicitors on **28 May 2014** pointing out they had not heard back in relation to their request for consent to the sale of Property 1. The Provider's solicitors were advised on **6 June 2014** by the Complainants' solicitors that all preliminary and pre-contract issues relating to the sale of Property 1 were complete and requested consent to the sale.

The Provider wrote to the Complainants' solicitors on **6 June 2014** indicating it was prepared to consent to the sale of Property 1 but this consent was subject to the following:

1. *Arrears of instalments of €8,889.72 on [Loan 2], and costs, if any, outstanding on the above numbered mortgage account being fully paid up prior to the execution of the Deed of Discharge.*
2. *All future payments being made by way of direct debit.*
3. *[The Provider's] costs in the sum of €125.00 being discharged by your clients.*
4. *Deed of Discharge being furnished for approval and sealing ...*
5. *Mortgage account [Loan 1] to be redeemed in full.*

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6. *A Capital Reduction of €95,054.09, inclusive of arrears as per Condition 1, being lodged to account number [Loan 2] ...*
7. *Receipt of a copy of the relevant folio ...*
8. *The attached capital reduction form to be completed and signed by all parties to the mortgage ...”*

Responding to this letter, the Complainants’ solicitors outlined in a letter dated **19 June 2014** that the Complainants:

*“... will not be able to proceed on that basis as they do not have access to funds sufficient to discharge the arrears as per your suggestion. ... The net sales proceeds, as set out below, would immediately be remitted to you. Thereafter the arrears can be addressed. ...”*

The Provider wrote to the Complainants’ solicitors on **25 June 2014** outlining its position as follows:

*“I confirm the Bank will not accept a lower sum settlement of the debt as there will be a shortfall on the final redemption figure.*

*Please note that the Bank will be seeking repayment of the full amount outstanding on the loan, and no waiver of debt can be given in circumstances where the outstanding mortgage balance is not repaid in full.*

*...*

*However, without prejudice to the above the Bank will consider discharging the property from the Mortgage to allow the sale of the property if it can be demonstrated that this is the best price available in the current market and the bank receiving an amount in reduction of the loan to the satisfaction of the bank. You would continue to be liable for the shortfall in your personal capacities.*

*To evaluate our position, can you please provide us with the following details once a sale price is agreed, in order for the Bank to consider the case further:*

- *Written authorisation from all parties to the mortgage confirming your authority to act on their behalf.*
- *Full valuation carried out in the property by [Auctioneer] ...*
- *Name and address of selling agent.*
- *Following details from the selling agent;*
  - *Date of taking instructions*
  - *Details of sales/marketing campaign*
  - *Number of enquiries/viewings of the unit*
  - *Number and level of offers*
  - *Rationale for sale price/Comparable*

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- *Confirmation that the sale is an arm's length transaction.*
- *We would be obliged if you could make an appointment with a Mortgage Advisor in your local [Provider] branch for all parties to the mortgage to complete a Standard Financial Statement. ...*
- *Written proposals confirming how you intend to repay the remaining shortfall if property is sold.*

..."

Noting the sale of Property 1 was nearing completion, the Complainants' solicitors wrote to the Provider's solicitors on **1 September 2014** requesting a meeting to discuss the Complainants' loan accounts, how it would be restructured, and dealt with in the future. A follow-up letter was issued on **18 September 2014**.

On **20 October 2014**, the Complainants' solicitors highlighted the fact that a meeting between the parties had not been arranged despite the many requests to do so which was all the more necessary given the account irregularities that had arisen.

The Provider's solicitors wrote to the Complainants' solicitors on **28 October 2014** referring to the meeting arranged for **13 May 2014** and previous requests on their part to arrange a meeting. The letter asked that the Complainants' solicitors confirm the purpose of the meeting, advising that one would be arranged immediately. The Complainants' solicitors explained the purpose of the meeting by letter dated **30 October 2014**.

The Complainants' solicitors wrote to the Provider on **5 January 2015** to advise that they had negotiated a sale of Property 2 in the amount of €172,000 and requested the Provider's consent to the sale. Referring to previous correspondence, the Complainants' solicitors also explained they would be happy to meet with the Provider to discuss the outstanding balance on Loan 2 and other matters concerning the loan account, including certain account irregularities.

The Complainants' solicitors wrote to the Provider on **22 January 2015** in respect of certain of the matters raised in this complaint. The letter concluded with a suggestion that following the sale of Property 2, both parties meet to discuss the alleged balance on Loan 2 and the account irregularities.

The Provider emailed the Complainants' solicitors on **20 February 2015** explaining that in order for it to consider the Complainants' application for the sale of Property 2 and resulting shortfall, the completion of an SFS together with the supporting documentation outlined in the email was required. It was also stated that following the Provider's assessment, it may revert and seek additional information.

A completed SFS was returned to the Provider under cover of letter dated **4 March 2015**. The Provider emailed the Complainants' solicitors on **5 March 2015**, requesting the first page of the account statements furnished by the Complainants and a signed authority authorising the Provider to correspond with the Complainants' solicitors.

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An internal email to the Provider's Underwriting Department was sent on **6 March 2015** requesting that the assessment of the Complainants' SFS be fast tracked. This was followed by a number of further requests in a similar vein.

The Complainants' solicitors emailed the Provider on **12 March 2015** requesting consent to the sale, advising that the purchaser would withdraw from the sale unless there was certainty from the Provider. It was indicated that the property was vacant and no rental income was being generated. It was also stated that it was the purchaser who required vacant possession of the property. Further to this, it was acknowledged that a shortfall would remain after the sale "*... however when the sale goes through we can discuss the balance outstanding.*" The Complainants' solicitors also referenced account irregularities that would have to be addressed. The Provider responded on **13 March 2015** advising that while it would consider a proposal to sell, there was no blanket guarantee that it would consent to such a proposal. It was also stated that the Provider was assessing the SFS and when that was complete, the Provider would be in a position to revert but may require additional information.

The Provider's ASU Administrator emailed the agent dealing with the Complainants' case on **19 March 2015** with an enquiry regarding the payment of the Second Complainant's salary. The Provider's agent responded on **30 March 2015** advising he was absent from the office on sick leave.

The Complainants' solicitor requested consent to sale by email dated **8 April 2015** and referred to several previous emails requesting such consent. The Provider responded to this on **10 April 2015** asking whether both Complainants' salaries were lodged to the bank account submitted with the SFS. The email also queried that, as rental income was sufficient to service Loan 2, would the Complainants consider renting the property as opposed to selling it. It appears from the Provider's internal email correspondence between **15 and 23 April 2015**, answers to these questions were needed to progress the Provider's assessment.

On **18 May 2015**, the Complainants' solicitors emailed the Provider highlighting the delay on the part of the Provider in furnishing its consent to the sale of Property 2. The email also attached a letter previously emailed to the Provider on **21 April 2015** and dated **20 April 2015**. This letter, amongst other matters, responded to the questions raised by the Provider on **10 April 2015**. The Provider states in response to this complaint that it has no record of receiving the April letter and points out that it was not sent to a correct email address. This is not disputed by the Complainants or their solicitors nor has any explanation been provided as to where they obtained the email address in question. Following the email from the Complainants' solicitors, the Provider's internal email correspondence between **18 and 22 May 2015** shows that the Provider's agent attempted to ascertain why the April letter was not responded to. The agent dealing with the Complainants' case also stated in an internal email dated **3 June 2015**, that he had not received any documents in respect of the lodgement of the Second Complainant's salary. This correspondence suggests that a response to the Provider's queries had not been received.

/Cont'd...

The Provider emailed the Complainants' solicitors on **11 June 2015**, forwarding an email from the ASU requesting two most recent bank statements dated within the previous 8 weeks and 3 months current bank statements in respect of the Second Complainant. The Complainants' solicitors responded on **16 June 2015**, expressing their dissatisfaction with the Provider and adopted the position that the Provider's questions were irrelevant and that it already had the requested information. Responding to this email on **22 June 2015**, the Provider indicated it would be in a position to revert regarding the sale of the property in the coming days and additional information may be sought.

The Provider wrote to the Complainants' solicitors by email on **26 June 2015** attaching a letter outlining the information required by the Provider to assess the offer available on Property 2. The email also contained the contact details of a Portfolio Manager who could be contacted to arrange a meeting with the Complainants.

The attached letter which is also dated **26 June 2015** states:

*"Please note in order to consider the voluntary sale proposal we require the following documentation:*

- *Full Valuation carried out on the property by [Valuer] ...*
- *Details of the marketing campaign from the selling agent to include how the property was marketed, date of taking instructions & number of enquiries & viewings of the unit*
- *Confirmation of any outstanding property charges to include NPPR, Local Property Tax, Management fees etc if applicable, along with evidence of the conveyancing & selling agent's fees.*
- *Proposal from the clients confirming how they intend to repay the remaining shortfall if the property sold.*

*On receipt of the documents outlined above the Bank will consider discharging the property from the Mortgage to allow the sale to proceed.*

*Both parties will remain jointly and severally liable for the resulting shortfall should the property be sold."*

The Complainants' solicitors wrote to the Provider on **25 August 2015** identifying a number of issues which are also the subject of this complaint. A further letter was sent to the Provider on **17 September 2015** pointing out that a response had not been received to the August letter and that the Complainants had accepted an offer of €177,000.

The Complainants wrote to the Provider's CEO on **23 September 2015** expressing their frustration with the manner in which the Provider was dealing with their loans and the sale of their properties. This letter was responded to on **24 September 2015** and appears to have been treated as a formal complaint by the Provider. A further holding letter was issued on **9 October 2015**.

/Cont'd...

It appears the Complainants' solicitors furnished the Provider with a marketing report and invoices from the Complainants' sales agent by email dated **1 October 2015**. The Provider wrote to the Complainants' solicitors on **16 October 2015** consenting to the sale of the property subject to the following conditions:

"...

- *Solicitor to forward written confirmation that this is an arms length transaction.*
- *Clients to forward a written proposal in relation to payment of the resultant shortfall prior to completion of the sale.*
- *Net sales proceeds to be received by the Bank within 5 days of completion of the sale.*
- *Receipts confirming payment of associated fees to be submitted to the Bank with the sale proceeds.*

...

*Please note that all parties to the mortgage will remain jointly & severally liable for the resulting shortfall of €29,273.74 and the account will continue to bill on a monthly basis. ..."*

The Complainants' solicitors responded to the Provider's conditions on **3 November 2015**.

### **The First Complaint**

#### **Consent to Sale: Property 1**

Clause 5.11 of the Mortgage Conditions states that the Complainants were not permitted to make any dispositions of the mortgaged properties without the prior written consent of the Provider.

Approval for the sale of Property 1 was sought on **20 August 2013**. A *Request for Release* was issued by the Provider on **22 August 2013**. The Complainants notified the Provider of their formal acceptance of an offer of €197,500 on **27 August 2013** and returned the *Request for Release* on **30 August 2013**. The Provider wrote to the Complainants on **5 September 2013** indicating it was prepared to consent to the sale subject to certain conditions. This appears to have been followed by the request for a meeting on **26 November 2013**.

In **December 2013**, the Complainants' solicitors requested the Provider's consent to the sale of Property 1 and requested the Provider engage with the Complainants. This letter does not appear to have been responded to and was followed by two further letters in **January 2014**. However, it is important to note that consent had already been provided in **September 2013**.

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The Complainants' solicitors wrote to the Provider's solicitors on **1 May 2014** requesting its consent to the sale of Property 1 noting that the previously issued consent had expired. While there was certain correspondence in the intervening period, the Provider wrote to the Complainants' solicitors on **6 June 2014** indicating it was prepared to consent to the sale of Property 1 but this consent was subject to certain conditions. The Complainants' solicitors responded on **19 June 2014** advising, in particular, that the Complainants would not be in a position to proceed with the sale as they did not have the funds to discharge the arrears as per the Provider's conditions of **6 June 2014**. The Provider set out its position further and its requirements for considering the sale on **25 June 2014**.

In a submission dated **24 January 2018**, the Complainants' solicitors state that:

*"[t]he 2014 permission granted by [the Provider] was subject to a number of conditions which our clients simply could not meet. We as their Solicitors pointed that out at the time and ultimately our clients were permitted to sell without onerous conditions."*

Having considered the conditions contained in the Provider's letter of **6 and 25 June 2014**, I am not satisfied these conditions were onerous, unreasonable or disproportionate. Furthermore, the Complainants have not identified which conditions were onerous or what rendered them onerous. In addition, there is also evidence to suggest that the Complainants or their solicitors may have misunderstood the Provider's conditions. A file note in respect of a call (a recording of which does not appear to have been provided) which took place with Second Complainant on **23 July 2014** states that:

*"... confirmed once the net sales proceeds are recd from the sale of the property, the main conds on the consent will be complied with. her sol was confused and thought the arrears needed to be lodged before the sale closed. ..."*

Having considered the circumstances surrounding the requests for the Provider's consent to the sale of Property 1 and the communications detailed above, I am not satisfied there was any unreasonable delay on the part of the Provider in consenting to the sale.

### Consent to Sale: Property 2

The Complainants' solicitors wrote to the Provider on **5 January 2015** advising that a sale of Property 2 had been negotiated and requested the Provider's consent to the sale. There appears to have been a delay on the part of the Provider in responding to this request as the Provider does not appear to have emailed the Complainants' solicitors until **20 February 2015** explaining that in order for it to consider the Complainants' application for the sale of Property 2 and resulting shortfall, the completion of an SFS together with the supporting documentation was required. It was also stated that following the Provider's assessment, it may revert and seek additional information.

The SFS was returned on **4 March 2015** and the request for consent to sale was repeated on **12 March 2015**. However, contrary to the Complainants' position that the Provider demanded that Property 2 be vacated, the Provider was advised in this letter that it was a requirement of the prospective purchaser that Property 2 be vacated.

The Provider responded on **13 March 2015** advising that while it would consider a proposal to sell, there was no blanket guarantee that it would consent to such a proposal. It was also stated that the Provider was assessing the SFS and when that was complete, the Provider would be in a position to revert but may require additional information.

The Complainants' solicitors highlighted a delay on the part of the Provider in an email on **18 May 2015** referring to a letter sent to the Provider on **21 April 2015** addressing a number of queries previously raised. As noted above, I am not satisfied the correspondence issued to the Provider on **21 April 2015** was received and this appears to have been due to an addressing error. This likely delayed matters which was beyond the Provider's control.

Further information was sought by the Provider on **11 June 2015** which was questioned by the Complainants' solicitors. The Provider wrote to the Complainants' solicitors by email on **26 June 2015** attaching a letter outlining the information required by the Provider to assess the offer secured on Property 2. Having considered this letter, it does not appear to me that the information sought by the Provider was unreasonable and it was information which I accept the Provider was legitimately entitled to request. However, it is not clear when the information sought was in fact furnished. It appears that correspondence sent to the Provider following this email/letter expressed the Complainants' dissatisfaction at, for instance, the Provider's delay in consenting to the sale of Property 2. However, it seems the Provider was only provided with a marketing report and sales agent invoices on **1 October 2015**. The Provider wrote to the Complainants' solicitors on **16 October 2015** consenting to the sale of the property subject to certain conditions. The Complainants' solicitors responded to this on **3 November 2015**.

While consent was initially requested in **January 2015**, certain matters were required to be addressed and certain information was required before the Provider consented to the sale. This unfortunately took time. However, there were delays. In this regard, I note the Provider's delay in responding to the initial request for consent. Equally, there were delays on the Complainants' part also. However, looking at the sale of Property 2 as a whole, and the various delays and issues that arose, I am not satisfied the Provider unreasonably delayed in providing consent to the sale

#### Meeting Request

Separate correspondence between each parties' solicitors regarding a meeting with the Provider was exchanged in **December 2013** and continued into **2014**. There appears to have been certain delays in respect of the receipt of this correspondence.

/Cont'd...

The Complainants' solicitors advised the Provider's solicitors on **1 May 2014** that due to a recent offer in respect of Property 1, the need for an immediate meeting was not necessary at that point in time and would be somewhat premature. It is clear from the correspondence outlined above that up to the May 2014 letter, there were delays, for whatever reasons, in responding to and receiving correspondence regarding the requested meeting. However, it can also be seen that the Provider's solicitors were attempting to assist in arranging a meeting.

The request for a meeting appears to have been renewed on **1 September 2014** with a follow up letter being issued on **18 September 2014** and again on **20 October 2014** with the Provider's solicitors responding on **28 October 2014**. Further references were made to a need for a meeting to discuss matters in **January 2015**. The Provider wrote to the Complainants' solicitors by email on **26 June 2015** which contained the contact details of a Portfolio Manager who could be contacted to arrange a meeting with the Complainants.

There appears to have been a lack of engagement with the requests for or references to a meeting on the part of the Provider and/or its solicitors after **September 2014**. Further to this, the meeting does not appear to have taken place. In light of this, while I do not accept, on the evidence presented, consent to the sale of Property 2 was agreed on the basis that a meeting would be arranged between the parties, I am not satisfied that there was sufficient engagement on the part of the Provider with the Complainants' solicitors regarding the request for a meeting.

### **The Second Complaint**

It is stated that the Provider charged an unreasonable rate of interest in respect of the Complainants' arrears and that interest rates were charged at unreasonable levels due to the arrears. The Complainants' rely primarily on a report prepared by a firm of chartered accountants and register auditors dated **3 July 2017** (the **Report**). The basis of the Report and its findings are as followings:

*"I have examined the above two loan accounts for the calendar years 2009 to 2015 inclusive and I have computed the amount of additional interest paid on these accounts taking into consideration the average Euribor Rate for those years and granting the Bank a margin on this rate of 3%. ...*

*The average rates charged by [the Provider] are way in excess of the Euribor rate plus a margin of 3%. The margin of 3% would be considered more than reasonable by any financial institution when considering a mortgage during years 2009 to 2015. Therefore any balance that is currently left outstanding on the loan accounts is as a result (as well as other matters) of the bank charging penalty interest over the period 2009 to 2015 as detailed on schedules A and B attached."*

As noted above, this aspect of the complaint is premised on the position that unreasonable rates of interest were charged on the Complainants' arrears and appears to be confined to the periods from when consent to sale was sought. However, the Report does not specifically deal with or address the arrears on either of the loan accounts or how arrears triggered or resulted in unreasonable levels of interest. It is simply an estimation of the level of interest that should have been charged on each loan between 2009 and 2015 by reference to what is considered, from the Complainants' perspective, to be a reasonable rate of interest. Further to this, it seems arrears were present on Loan 1 in or around **June 2011** and Loan 2 in or around **September 2012**, but the Report deals with overall interest charged to the accounts from **2009** when there does not appear to have been any arrears.

Separately, there has been no engagement either in terms of the Report or the Complainants' submissions with the terms on which the loans were offer and/or accepted. The Letters of Approval and accompanying contractual documents clearly set out the relevant interest rates and how interest would be charged.

The Complainants were free to accept or reject the loans on those terms. However, the Letters of Approval were signed by the Complainants expressly acknowledging the various terms had been explained to them by their solicitors at the time.

Furthermore, the Complainants' have not established that the interest rate applicable to their loans were subject to, linked to, or tracked the Euribor rate or that the Provider was obliged to charge a rate of interest by reference to the Euribor rate. Simply because the interest charged to the loans was higher than the rate advanced in the Report does not mean it was unreasonable or was not applied in accordance with the terms and conditions of the loan. For instance, the Report attributes a static margin for the 7 year period it covers, stating this as a reasonable margin. However, no evidence has been advanced to support this statement. It is simply the view expressed by the author(s) of the Report.

In the context of the terms of the loans, Special Condition A of Loan 1 (which is similar for both loans) states:

*"General mortgage loan approval condition 5 'Conditions Relating to Fixed Rate Loans' applies in this case. The interest rate specified above may vary before the date of completion of the mortgage."*

Clause 5.4 of the General Mortgage Loan Approval Conditions in respect of both loans states:

*"... [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable interest rate loan agreement which will carry no such redemption fee."*

Additionally, the Mortgage Conditions state at clause 4:

*"4.1 Interest will be charged by [the Provider] at the Appropriate Rate ...*

*4.2 The Appropriate Rate may include one or more differentials.*

/Cont'd...

4.3 *Unless otherwise provided interest payable under or in accordance with the provisions herein shall be computed according to the current practice of [the Provider] ...*

...

4.8 *The Mortgagor at the discretion of [the Provider] shall be liable to pay a late charge or commission of 2% for every Month or part of a Month that may elapse between the due date and the date of payment of any Monthly Repayment, instalment of interest, fine, insurance premiums, fees, costs, late charges or commissions and expenses upon the whole amount of such Monthly Repayment or amount in arrears. ...”*

With the *Appropriate Rate* being defined as:

*“1.10 ... the rate or rates of interest per centum per annum for the Advance as specified in the Letter of Approval, or such increased or reduced rate or rates of interest as may from time to time be payable on the Advance and any Additional Advance under the terms hereof.”*

These are the terms which dictate the manner in which interest was to be applied to the loans. However, the Complainants have not made any submissions or advanced any evidence to impugn these or any other relevant terms or to show they were not properly applied to the loan accounts when calculating interest. Moreover, having considered the above passages from the Report, it suggests the basis for the position that penalty interest was applied to the loan accounts arises from a comparison between the Euribor rate plus 3% and the actual rate charged by the Provider. This is without any reference to the contractual terms governing the loan agreements.

Taking the foregoing into consideration, I have been provided with no evidence that the Provider charged unreasonable, excessive or penal rates of interest in respect of the arrears which arose on either Loan 1 or Loan 2.

### **The Third Complaint**

Clause 2.11 of the Mortgage Conditions states:

*“2.11 If on the sale of the Property by the Mortgagor with the consent of [the Provider] the net proceeds are insufficient to discharge the Total Debt the Mortgagor will immediately pay the amount of the deficiency with interest until fully discharged ...”*

/Cont'd...

The Complainants dispute that a balance remains outstanding on Loan 2 following the lodgement of the proceeds of sale from Property 2. However, the Provider outlines that approximately €194,400 plus arrears of approximately €7,600 was outstanding on Loan 2 prior to the sale of Property 2. This would give an overall balance outstanding of about €202,000. Following the sale of Property 2 and the payment of the agreed costs associated with the sale, approximately €171,500 was paid towards Loan 2, leaving an outstanding balance of around €30,500 (due to rounding, my figure is slightly different to the figures furnished by the parties).

The basis for the Complainants' position that a shortfall does not exist is premised on their contention that the loans have been subject to excessive levels of interest. However, as I have stated above, I do not accept this to be the case. The Complainants have not established that the residual balance claimed by the Provider is not due and owing. Accordingly, I am satisfied that the evidence supports the situation that a residual balance in excess of €30,000 existed following the lodgement of the proceeds from the sale of Property 2.

#### **The Fourth Complaint**

This aspect of the complaint is based on the Provider applying incorrect rates of interest to the Complainant's loan account, in particular the arrears that accrued on those account.

However, taking into consideration the circumstances underpinning this aspect of the complaint, I am not satisfied that it has been established that the Provider's conduct wrongfully and/or unreasonably contributed to the accrual and/or accumulation of arrears on the Complainants' loans. In light of this and my findings in respect of the first, second and third complaints, there is insufficient evidence to support this aspect of the complaint.

#### **Goodwill Gesture**

The Provider "... appreciates that delays did occur in the assessment of the Complaints/Solicitors request." The Provider further states that:

*"In an effort to resolve the matter the Bank would like to offer an ex gratia payment of €750.00 together with the opportunity previously offered to meet with a Portfolio Manager to discuss their issues in respect of interest rate, remaining balance outstanding and ICB rating."*

I consider this goodwill gesture offered by the Provider to be a reasonable sum of compensation for the customer service failings on the part of the Provider. In these circumstances, on the basis that this offer remains available to the Complainants, I do not uphold this complaint.

/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.



**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

21 December 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.**