An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0228
Sector:	Banking
Product / Service:	Commercial Mortgage
Conduct(s) complained of:	Fees & charges applied Level of contact or communications re. Arrears Complaint handling (Consumer Protection Code) Failure to provide product/service information Mis-selling
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant entered a commercial loan agreement with the Provider, against which this complaint is made, in **May 2002**. The loan was restructured in **July 2010** and again in **March 2011**. The Complainant requested that an interest only arrangement be put in place in **April 2013**. A capital payment holiday was offered to the Complainant in **November 2013** and the Complainant's loan was sold during **2015**.

The Complainant's Case

The Complainant's brother has completed the Complaint Form on his behalf and explains the Complainant is not very literate and has dyslexia but is nonetheless excellent at his trade. The Complainant is a sole trader with a total turnover of less than €80,000 per annum. It is stated on the Complainant's behalf that the Complainant *"… deals very much on a one to one basis with his customers and relies on human interaction and face to face communication rather than reading or dealing with complex legal documents or papers."*

In **2002**, the Complainant purchased a commercial property and took out a commercial mortgage loan with the Provider in **July 2002** in the amount of €190,460, and proceeded over the following years to reduce the debt down to a balance of €50,000 in **2011**. The Complainant's brother explains the Complainant *"… then hit a bad patch …"* by injuring his back. This, coupled with the recession, meant the Complainant could not meet his loan repayments.

The Complainant's brother advises that:

> *"Without any meaningful communication and certainly never any offers of face to face meetings or communication on the phone, charges unknown to him were mounting up on the account from August 2011 to the extent that in 2014 the balance had now reached almost €82k at which stage the debt was sold to [the Purchaser] without any offer to [the Complainant] to try and settle the account."*

The Complainant's brother submits that the sole objective of the Purchaser was to take possession of the commercial property. However, with the help of family, the debt was repaid on **26 February 2017**.

The Complainant's brother then wrote to the Provider's CEO in **May 2018** but did not get a response until **6 March 2019**. The Complainant's brother states that the response contains almost 70 pages of very small print designed to confuse.

It is stated on the Complaint Form that:

> *"Whilst it was always accepted that the outstanding balance plus interest had to be repaid, what we are objecting to is the 'late charge fee' which [the Provider] started to apply to the account in July 2011 through to December 2014 when they sold the debt …."*

A spreadsheet outlining the fees charged to the Complainant's loan account totalling €12,086.59 has been supplied in evidence.

In addition to this, the Complainant's brother explains that the Complainant's wife had a savings account with the Provider and home loan (which has been fully repaid). The savings account had a balance of over €30,000 *"… earning little or no interest, whist at the same time [the Complainant] was being crucified with charges which he knew nothing about."* The Complainant's brother continues by stating that *"… nobody in [the Provider] ever suggested that this was bad financial management or spoke to them about it but continued to apply the charges on a balance a little over what they had on deposit whilst the account was earning nothing."*

The Provider's Case

The Provider explains that the Complainant drew down a commercial loan on **29 July 2002** with a 10 year term. In **July 2010**, the term of the loan was extended by 35 months, bringing the loan's expiry date to **May 2015**. The Provider also refers to the Complainant's signing of the Acceptance of Loan Offer accepting the Letter of Offer, Commercial Mortgage Loan Approval Conditions, and Commercial Mortgage Conditions.

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Referring to clauses 4.5, 4.6 and 4.9 of the Mortgage Conditions, the Provider states that a late charge applies where a payment is late or not made to the loan account. This charge will apply to the amount of the monthly repayment or arrears. Late charges were applied to the loan account as the repayment agreement was not adhered to and arrears accumulated. The Provider states that no payments were made to the account from **May 2011** and arrears accrued on the account.

The Provider explains that late charges charged to the loan account reflect interest on arrears, and the interest being charged from the incoming payments assumes a decreasing balance even when a payment has not been made. To adjust for interest not being charged on the arrears portion of the loan, a separate charge is made and referenced as a late charge.

The Provider explains that the *Bank charges* detailed on the account statements relate to unpaid direct debit charges. The Provider states that this is applicable to all loan account types and is detailed in the Provider's fees and charges brochure. This fee was initially €4.44 for each unpaid direct debit and increased to €10.00 in **2009**. As the monthly repayments were returned unpaid from **May 2011**, unpaid direct debit charges applied.

The Provider submits that it endeavoured to assist and engage with the Complainant on several occasions throughout the term of the loan.

On **7 July 2010**, the Complainant attended a meeting with the Provider to discuss his finances. On **19 July 2010**, correspondence issued to the Complainant advising him that monthly repayments had been amended to interest only and the monthly billing amount of €1,500 would apply from **July 2010** to **December 2010**. Following this period, arrears would be capitalised. The letter also advised that the remaining term had been extended from 25 to 60 months. The Provider remarks that no payment was made in **September 2010**.

In **February 2011**, a direct debit mandate and form detailing the new repayment amount and arrears to be capitalised were issued to the Complainant. These were returned on **25 February 2011** and the arrears were capitalised on **1 March 2011**. The Provider explains that following capitalisation, arrears began to accrue on the account with no repayments being received from **May 2011** to **October 2015**.

On **19 March 2013**, the Complainant contacted the Provider and requested a branch appointment to complete a Standard Financial Statement (**SFS**). An appointment was arranged for **28 March 2013** at 10:30am. However, the Complainant did not attend, and a subsequent appointment was made for **8 April 2013**.

On **8 April 2013**, the Complainant attended the branch appointment and completed a SFS. The branch forwarded the SFS and account statements to the relevant department and advised that financial accounts for the Complainant's business would be forwarded when received.

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The Provider telephoned the Complainant on **26 April 2013**, regarding a request for forbearance. The Complainant was advised that a 12 month interest only repayment period and capitalisation of arrears would be requested after 6 months if repayments were met, but this was strictly subject to approval from the Provider's Credit Committee. The last set of audited accounts for the Complainant's business was requested to aid with the proposed request.

On **27 May 2013**, the Provider emailed the Complainant and provided him with relevant contact details for the Provider. The email also referred to the need for up to date accounts and the need to recommence repayments to establish a current repayment history of 6 months for the purpose of submitting a proposal to the Credit Committee.

The Provider states that it telephoned the Complainant on **21 October 2013** with queries in respect of the SFS. The Complainant advised that he was not in a position to talk but took the Provider's contact details and advised he would return the call. The Complainant returned the call on **23 October 2013**. The Provider explains the Complainant was informed that correspondence would be sent to him requesting a number of items of information but the Provider's agent wished to confirm some details. The Provider states that the Complainant confirmed his business was operating from the secured property and business was improving. Therefore, he would be in a position to resume payments the following month. The Provider states the Complainant confirmed that he would be able to service the interest only payment and would source up to date accounts for the business in the next few weeks. The Complainant also confirmed that commercial rates and property insurance were paid and up to date.

The Provider explains this call also included a discussion of the sale of the unencumbered assets detailed in the SFS and the specifics of the property. The Complainant stated he wished to proceed with his request for interest only repayments. The Provider's agent advised the Complainant that it would require engagement from him to include resuming repayments and providing the required information. The Provider advises that the Complainant agreed to resume payments and stated he would respond to the letter requesting information.

The following day, on **24 October 2013**, the Provider says it issued correspondence to the Complainant referring to the previous day's conversation and detailing the requirements in order to assess the Complainant's request for a 12 month interest only period. The Provider has also set out the information required in the letter.

On **6 November 2013**, in an effort to encourage engagement, the Provider advises that correspondence issued to the Complainant offering an interest only capital repayment holiday for a period of 18 months. By way of follow-up, the Provider telephoned the Complainant on **5 February 2014**, but the Complainant explained he did not receive the Provider's November letter. The Provider states the Complainant advised its agent that he would consult his records and revert to the Provider the following day and stated he would sign the interest only agreement. The Provider explains its agent informed the Complainant that the Provider would enquire as to what was required to re-issue the November letter.

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The Complainant telephoned the Provider on **7 February 2014**. The Provider explains the Complainant advised that he had located the letter and would return it that day. The Complainant informed the Provider's agent that he may be coming into funds that would clear the loan and queried the process for paying off the loan.

On **27 February 2014**, the Provider telephoned the Complainant to follow-up with him as a signed restructure letter remained outstanding. The Provider states the Complainant advised that he would review the documentation on his return to his office and call the Provider.

The Provider explains it telephoned the Complainant on **6 March 2014** but the Complainant advised he was unable to talk and would call the Provider. The Provider states it attempted to telephone the Complainant on **19 August 2014**. The Provider advises the Complainant was not available on his landline number and his mobile number was disconnected.

The Provider says correspondence issued to the Complainant on **19 May 2015** advising that the term of the loan had expired. The letter detailed the Provider's willingness, in principle, to restructure the residual debt on a principal and interest basis over a term suitable to the Complainant's financial needs. The letter further added that should the Complainant wish to avail of a restructure on this basis, he should provide a proposal within 30 days. A SFS and Statement of Assets (**SoA**) was also enclosed with this letter.

On **23 July 2015**, correspondence issued to the Complainant advising that the Provider had contracted to transfer his loan to a third party with correspondence issuing on **15 October 2015** confirming the transfer.

On **21 March 2016**, the Provider received a telephone call from the Complainant's accountant requesting a breakdown of any/all late charges applied to the loan account since drawdown. The Provider issued correspondence to the Complainant addressing this query on **24 March 2016**. The letter advised that the late charge fee represented an interest charge on the arrears balance which was applied to the loan account on the 10th day of the following month together with an additional surcharge.

On **22 May 2018**, the Provider received a letter of complaint from the Complainant's brother dated **17 May 2018**. This letter enclosed a letter of authority, however, it was not updated on the account record as the Provider was no longer the legal owner of the loan. Therefore, it was not reviewed and correspondence issued directly to the Complainant. The Provider apologises for any inconvenience this caused.

Separately, the complaint was logged and an acknowledgement letter issued on **28 May 2018**. A Final Response letter issued on **7 March 2019**. The Provider states it *"… regrets that it was unable to issue a response to the Complainant in the timeframe it had hoped and would like to apologise for same."* The Provider explains this was due to an unprecedented volume of queries at that time.

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The Complaints for Adjudication

The complaints are that the Provider:

> Applied late charge fees to the Complainant's loan account and failed to notify him of these fees;
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> Failed to communicate, contact or engage with the Complainant; and
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> Failed to respond to and/or delayed in responding to a letter of complaint dated **17 May 2018**.

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.

A Preliminary Decision was issued to the parties on 29 April 2021 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.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. E-mail from the Complainant's representative to this Office dated 2 May 2021.

2. Letter from the Provider to this Office dated 28 May 2021.

Copies of these submissions were exchanged between the parties.

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Having considered these additional submissions and all submissions and evidence furnished to this Office by both parties, I set out below my final determination.

The First Complaint

The Loan Agreement

The Complainant entered a commercial loan agreement with the Provider in **May 2002**. Pursuant to a Letter of Approval dated **15 May 2002**, the Provider offered the Complainant a loan in the amount of €190,460 at an interest rate of 5.95% to facilitate the purchase of a commercial unit to be used as the Complainant's business premises. It was also a term of the loan that the Provider would take a charge over the premises as security for the loan.

The Complainant signed an Acceptance of Loan Offer on **15 May 2002**. In signing this, the Complainant accepted the loan on the terms and conditions set out in the Letter of Approval, the Commercial Mortgage Loan Approval Conditions, and the Commercial Mortgage Conditions 1999 for Natural Persons (the **Mortgage Conditions**).

Clause 4.9 of the Mortgage Conditions states:

> *"The Mortgagor shall pay the [Provider] a late charge or commission of 2 per cent 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 premium, fees, costs, late charges or commissions and expenses upon the whole amount of such Monthly Repayment or amount in arrears. Other sums (save principal due or payable by reason of Conditions 6 or 7) payable under or by virtue of these conditions where they have fallen into arrears shall at the discretion of the [Provider] be subject to the said late charge or commission."*

Following certain requests from the Complainant regarding interest and charges on the loan account, the Provider wrote to the Complainant on **24 March 2016**. The second paragraph of this letter states:

> *"I refer also to a query submitted by your accountant regarding the application of "Late Charges" in respect of the Loan Account. Please be advised that the Late Charge fee represents an interest charge on the arrears balance of a loan account which is applied to a loan account on the 10th day of the following month together with an additional 3.0% surcharge."*

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The Law on Surcharge Interest Clauses

According to **Breslin and Corcoran** in ***Banking Law*** (4th ed., Round Hall, 2019, para. 8-037):

> *"A clause in a loan agreement to the effect that the amount of interest payable upon a default by the borrower is automatically increased, may be unenforceable if, properly construed, it is a penalty."*

The leading Irish authority is the Supreme Court decision in ***Pat O'Donnell & Co Ltd v Truck and Machinery Sales Ltd*** [1998] 4 IR 191, which discussed the distinction between a permissible genuine pre-estimate of damage and an impermissible sum in excess of any actual damage that would possibly or probably arise from a breach.

In ***ACC Bank Plc v Friends First Management Pension Funds Ltd*** [2012] IEHC 435, the question of whether default interest in a loan contract was a penalty was considered by Finlay Geoghegan J. On the evidence, each side's expert agreed that where a facility goes into default, it would be re-categorised as impaired. This classification had cost implications for the lending bank because it will need to set aside an increased level of capital for the anticipated loss. It appears also to have been agreed that the actual cost to the bank would vary according to the nature of the default. Finlay Geoghegan J concluded that the surcharge interest of 6% per annum could not be considered a reasonable pre-estimate of loss. The application of surcharge interest trebled the margin on the facility, and almost doubled the applicable interest rate, and the entire surcharge rate was triggered even if one interest payment fell into arrears. This was not, therefore, akin to the minimal 1% additional interest found to be acceptable and enforceable in the UK decision of ***Lordsvale Finance Plc v Bank of Zambia*** [1996] QB 752.

At paragraph 79 of her judgment, Finlay Geoghegan J expressed the basic rule, as endorsed in ***Pat O'Donnell***, as requiring the court to determine whether or not the additional sum payable is a genuine pre-estimate of the probable loss by reason of the breach. The court should determine whether the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach, by comparing the amount that would be payable on breach with the loss that might be sustained if a breach occurred.

In ***AIB v Fahy*** [2014] IEHC 244, O'Malley J accepted that *"a bank is entitled in principle to charge surcharge interest where a borrower is in default"* but held the surcharge interest rate of 12% to be a penalty where a bank offered no evidence as to the basis for its calculation so it could not be seen as a genuine pre-estimate of loss.

Most recently, in ***Sheehan v Breccia*** [2018] IECA 286, the clause under scrutiny before the Court of Appeal provided for a 4% per annum uplift in interest payments. Expert banking evidence was led in the High Court to show that while it was not possible to accurately predict the level of loss that would be incurred on default, banks are likely to incur additional risk and administrative costs when a loan goes into default.

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The default or surcharge rate was almost double that of the normal interest rate applying under the loan. The creditor, a co-shareholder in the underlying business, argued that where a precise pre-estimate of damage was impossible and the provision was commercially justifiable, the bargain made between the parties should be respected provided the surcharge was not extravagant or unconscionable. This approach was rejected by the Court of Appeal who indicated that only the Supreme Court could reconsider principles as to whether a surcharge interest clause is or is not a penalty.

Speaking on behalf of the Court of Appeal, Finlay Geoghegan J noted (at paragraph 22) in essence that:

1. The onus of establishing that a clause is a penalty rests on the party alleging this.

2. The question of whether a clause is penal must be assessed at the time the agreement was entered not at the date of breach.

3. While there is a reluctance on the part of the Courts to interfere with the terms of a contract agreed between two parties of equal bargaining power, the willingness to do so in relation to a clause which is determined to be a penalty is an exception to the general rule.

Finlay Geoghegan J held (at paragraph 40) that the question for the court to determine was *"whether or not the additional sum payable is a genuine agreement for the payment of liquidated damaged."* This question then turns on whether or not the additional sum payable represents a genuine pre-estimate of the probable loss to the innocent party by reason of the potential breaches of contract to which the clause applies.

The judge accepted that latitude ought to be applied where there is a difficulty in a pre-estimate of the damage suffered where there is probable variation in what loss and damage will in fact be suffered. As a result, Finlay Geoghegan J held (at paragraph 44) that the question could be phrased as a determination of whether *"the clause is a genuine attempt by the parties to estimate <u>in advance</u> the loss which will result from the breach."* (emphasis added).

Finlay Geoghegan J concluded that the 4% surcharge interest clause in question was not a genuine attempt to agree upon liquidated damages or estimate the loss which the original lender might suffer by reason of a relevant default. In reaching this conclusion, the judge noted that the clause was contained in the bank's general terms and conditions. Accordingly, it could not have been a genuine advance estimate of the bank's loss arising on a breach of the specific loan agreement between the bank and the borrowers. It was further noted that expert evidence established that the probable loss depends on an interplay between the amount outstanding at the time of default, the value of the security ultimately realised, and the cost in time or effort in achieving these outcomes. Finlay Geoghegan J further accepted that the experts were in agreement that the pre-estimate of probable loss in the event of default formed part of the analysis which the bank did prior to determining the general interest rate to be applied to the facility.

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Analysis

Clause 4.9 of the Complainant's Mortgage Conditions provides for a late charge of 2% in respect of missed payments which is chargeable on the whole amount of the monthly repayment or amount in arrears. This is, in effect, akin to a default/surcharge interest clause. Such clauses are permissible in principle, and a considerable body of judicial authority has been developed in respect of clauses of this nature.

The Complainant simply disputes the Provider's entitlement to apply a late charge and states that he was not notified of the charge. The Complainant has not identified why the Provider was not entitled to apply a late charge. This is important as the Complainant bears the burden of establishing that clause 4.9 is a penalty.

The Provider has not referred to the above legal principles, but its evidence is that clause 4.9 reflects the fact that interest is not charged on the arrears portion of the loan. However, it is not clear from the evidence why a rate of 2% was chosen at the time the loan agreement was entered into.

The question of whether the agreement provides for the repayment of liquidated damages normally falls to be decided by determining whether the clause is construed as a genuine pre-estimate of loss. Little assistance can be gleaned from the wording of clause 4.9 or clause 4 in general. The Provider has not made any submission or furnished any evidence in relation to an advance estimate of the costs or losses that might be occasioned on foot of the Complainant's default.

Further to this, the Provider has not identified the factors, if any, that were considered by it when determining that a 2% late charge was appropriate to the Complainant as an individual borrower to compensate for whatever costs/losses might arise in the event of a missed payment or arrears accumulating.

Clause 4.9 appears to give the Provider a discretion to apply the 2% charge on either the monthly repayment amount or the amount in arrears (although it is not clear if this is a reference to accumulated arrears). However, the criteria or circumstances which dictate the relevant amount to which the late charge is applied is unclear. Given the likely difference between the amount of the monthly repayment and the arrears balance, this could lead to the application of two quite different late charge fees with no apparent justification as to why it was calculated by reference to the monthly repayment or the arrears balance. This seems somewhat arbitrary. However, the evidence in this complaint suggests that the late charge fee was calculated by reference to the Complainant's arrears balance and not the monthly repayment amount.

It is recognised that latitude ought to be applied when there is a difficulty in a pre-estimate of the damage suffered where there is probable variation in what loss and damage will in fact be suffered. Equally, it cannot be denied that there is a difficulty or likely to be difficulty associated with estimating the probable damage that will be suffered by a lender should a borrower default on a loan facility.

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This is because probable damage depends on an interplay between regulatory capital requirements, the amount outstanding at the time of default, the extent of the breach, the value of any security ultimately realised, and the cost in time and effort in remedying the default position. I would also accept the observations by ***Breslin and Corcoran*** (at paragraph 8-044) that *"[a] default interest rate addresses the borrower's impaired credit, the true cost of which is normally impossible to quantify precisely."* Therefore, while latitude should be applied, I would expect some form of explanation from the Provider, who set the rate in clause 4.9, for its rationale in attributing a 2% late charge to the Complainant's loan. As the matter is phrased in ***Breccia***, there is no evidence before me of *"a genuine attempt of the parties to estimate in advance the loss which will result from the breach."*

The fact clause 4.9 is contained in the Provider's standard form Mortgage Conditions would tend to show that it was not a genuine advance estimate of the Provider's loss arising from missed payments or arrears. This would also suggest it was not individually negotiated. Additionally, the Provider's Final Response letter is highly suggestive of the fact that clause 4.9 was not individually negotiated, as it is stated that:

> *"… your application for this mortgage facility was made through your chosen Broker …. Please note, as your mortgage facility was processed through a Broker, the Bank did not have any direct contact with you when you were negotiating the terms of the mortgage. …."*

While the courts had the benefit of expert evidence in the cases referred to above as to whether the clauses in question were penalties, no such evidence has been tendered by the parties to this complaint.

However, I believe that I am entitled to have regard to the nature of the evidence required by the courts and tendered by the parties to those cases, to assist me in my consideration of this complaint.

The interest rate contained in clause 4.9 is 2%. This is significantly below the rates that have been struck down by the courts and almost 4% lower than the interest rate applicable to the Complainant's loan.

In the circumstance, I accept that clause 4.9 is not a penalty clause and provides for the application of a late charge more in line with a liquidated damages clause.

The Complainant accepted the loan on the terms as set out in, amongst other documents, the Mortgage Conditions. It also appears that the Complainant was in receipt of account statements which clearly state a *Late Charge* was being applied to the loan.

Therefore, I accept that the Provider was entitled to apply a late charge to the Complainant's loan account in accordance with clause 4.9 of the Mortgage Conditions.

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I had detailed in my Preliminary Decision, that notwithstanding the preceding discussion, I have certain reservations in respect of the totality of the charges applied to the loan account. While I accept, on the basis of the evidence that the Provider was entitled to invoke clause 4.9, it appears to be the case that an additional surcharge of 3% was applied to the loan account on top of the 2% late charge contained in clause 4.9.

The Provider has, in its post Preliminary Decision submission, sought to provide a clearer and more detailed response to the charges applied. The Provider submits that neither its response to this office, nor its letter to the Complainant dated **16 March 2016** "*clarified that even though* [the Provider] *was permitted to charge these fees, the actual fees charged* to [the Complainant] *were less"*.

However, it remains in my view that there does not appear to be a clause in the Mortgage Conditions permitting the Provider to apply such a charge and a copy of the Commercial Mortgage Loan Approval Conditions has not been furnished by the parties. It is also not clear if this charge was incorporated into the *Late Charge* amount as it appears on the loan account statements.

I had also detailed in my Preliminary Decision that by applying a 2% late charge and a 3% surcharge effectively means the Provider applied two separate interest charges to the Complainant's arrears totalling 5%. In light of the case law referred to above, the Provider has not demonstrated its entitlement to do this.

The Provider has, in its post Preliminary Decision submission, stated that it "*has approval under s149 of the Consumer Credit Act to charge*" the surcharge interest rate of 3% and that it had "*notified*" the Complainant of the "*fee in arrears letters that were sent"* to the Complainant while his account was in arrears.

I note that the Provider details it is unable to submit a copy of the letters sent as it details "*the arrears letters were system generated so* [the Provider] *cannot produce a copy of the Complainant's specific letter*" and has instead supplied a template of the letter which it states was issued.

While I acknowledge that the template submitted, notifies a customer that "*interest will continue to accrue on the outstanding balance at the interest rate applicable to* [the customer's account] *as noted above plus a further 3%".* It remains my view that in light of the case law referred to above, the Provider has not demonstrated its entitlement to apply a 2% late charge and a 3% surcharge, which effectively means the Provider applied two separate interest charges to the Complainant's arrears totalling 5%.

<u>The Second Complaint</u>

A number of telephone conversations took place between the Complainant and the Provider between **2011** and **2015**. The Provider has only furnished a recording of one telephone call which took place on **14 March 2016**. However, the Provider has furnished copies of its system notes (the **Notes**) maintained in respect of the Complainant's loan account.

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These Notes record a number of telephone conversations. The Complainant has not taken issue with the accuracy of these Notes.

The Provider spoke with the Complainant on **7 November 2011**. This call involved a discussion of the arrears. It was also noted that the Complainant *"… is going to look at his finances and call me back with a proposal by the end of the week …."*

The Complainant telephoned the Provider on **11 November 2011**. The Notes of this call state that the Complainant *"… said he can have 1500 lodged next week, told client to call me when he has lodged and we will discuss remaining arrears from there …."* There is no evidence of the Complainant lodging this money to the account or that he telephoned the Provider to discuss the arrears after this call.

The next contact seems to have been a telephone call to the Complainant on **16 February 2012**. This call discussed the Complainant's financial position. The Complainant was advised to lodge as much as he could to the loan account as no lodgements were being made and arrears were accumulating. The Complainant telephoned the Provider on **17 September 2012**, to advise he was calling to a branch to address his arrears. It is not clear whether this branch visit occurred.

On **19 March 2013**, the Complainant contacted the Provider to make a branch appointment. The Notes indicate the Provider's agent advised the Complainant where to find a SFS on the Provider's website and about the supporting documentation that should accompany the SFS. The appointment was arranged for **28 March 2013**; however, the Notes indicate that the Complainant did not attend this appointment.

The Complainant attended one of the Provider's branches on **8 April 2013** and completed a SFS and also provided bank statements. However, the Notes indicate that the Complainant's accounts were outstanding. It is not clear whether or when these accounts were furnished by the Complainant.

During a telephone conversation on **26 April 2013**, the Complainant requested a 12 month interest only arrangement. The Complainant was advised that a request would be made for the interest only arrangement together with a capitalisation of the arrears. The Complainant was advised that the request was subject to approval from the Credit Committee and that a set of audited account was also required.

The Provider's Notes indicate that an email was sent to the Complainant on **27 May 2013**. Although a copy of this email has not been furnished, the Notes appear to contain the text of this email. This email refers to the author's contact details and the Complainant's previous request for an interest only arrangement. The email emphasised the need to begin making payments to the loan account to establish a current repayment history.

Once the Complainant was in a position to demonstrate an ability to sustain payments for 6 months, the email explained that the Provider's agent would be in a position to write *a paper for consideration* by the Credit Committee. The email also requested a set of audited accounts.

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The Provider wrote to the Complainant and a third party on **2 September 2013**. The subject line referenced the loan account the subject of this complaint and a second account held jointly with the third party. However, the main body of the letter only addressed the Complainant's loan account. In this letter, the Provider referred to the Complainant's **April 2013** request for an interest only arrangement.

The letter recommended that the Complainant begin making payments to establish a recent payment history to demonstrate that monthly interest only payments could be sustained. The letter also advised that a draft trading statement for the year end **30 April 2011** had been received but as this was over 2 years old, the Provider queried if more recent accounts were available.

The parties spoke again on **21** and **23 October 2013**. On the second call, the parties discussed the Complainant's business, the secured property, that the Provider would be requesting certain information to assist with the preparation of a report, and up to date accounts. The Complainant explained that he would like to proceed with the interest only request. The Complainant was advised that the Provider would need to see some engagement from him including restarting repayments and the provision of information. The Notes state the Complainant agreed to restarting payments and that he would respond to the Provider's correspondence as soon as it was received.

A letter issued to the Complainant on **24 October 2013**, explaining that in order to be assessed for the interest only arrangement, the Complainant would need to provide certain information. This included a SFS, SoA, financial statements, confirmation that the Complainant's tax affairs were in order, proof of insurance in respect of the secured property, and a breakdown of all costs and expenses relating to the secured property.

The Provider wrote to the Complainant on **6 November 2013** approving an 18 month capital payment holiday meaning the Complainant's monthly repayments would be approximately €409.63.

On **5 February 2014**, the Provider telephoned the Complainant as it had not received a response to the capital payment holiday offer. The Complainant explained that he could not recall receiving the Provider's letter but he would check his records and revert to the Provider. The Complainant telephoned the Provider on **7 February 2014** to advise that he had located the Provider's letter and that he would sign and return it that day. The Complainant also advised he may be coming into funds which would allow him to clear the loan. The Provider telephoned the Complainant on **27 February 2014** to follow-up on the November letter as it remained outstanding. The Complainant advised he was not in the office and would check to see whether he returned the letter.

The Provider telephoned the Complainant again on **6 March 2014** but the Complainant was unable to speak as he was going to a funeral but advised the Provider he would call back. However, the Provider's Notes do not show that the Complainant contacted the Provider in response to this call.

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On **19 August 2014**, the Provider telephoned the Complainant's landline number but was informed that the Complainant was not available. The Provider also contacted the Complainant's mobile phone number but, according to the Notes, this number was disconnected.

The next form of contact was a letter from the Provider dated **19 May 2015** advising the Complainant that the loan had expired. The letter also explained that the Provider was willing, in principle, to restructure the residual debt on a principal and interest basis over a term suitable to the Complainant's financial needs. The Complainant was advised that should he wish to avail of a restructure, he should provide a proposal to the Provider within 30 days. A SFS and SoA was also enclosed which the Provider requested be completed and returned. The Complainant does not appear to have responded to this letter.

Finally, the Provider wrote to the Complainant on **23 July 2015** to inform him of the sale of his loan to a third party. This was followed by a letter on **15 October 2015** advising that the transfer completed on **14 October 2015**.

Analysis

The correspondence between the parties, as outlined above, shows that the Provider endeavoured to engage with the Complainant. In particular, the loan was restructured in **March 2011**. This was followed by an assessment of the Complainant's request for an interest only arrangement in **April 2013** and the offer of a capital payment holiday in **November 2013**. However, it is clear from the evidence that the Complainant failed to respond to the offer of the capital payment holiday or follow-up with the Provider despite his indications that he would.

Having considered the evidence, I accept the Provider made reasonable efforts to engage with the Complainant. However, the evidence shows that the Complainant did not make reasonable efforts to engage or co-operate with the Provider. While certain efforts were made by the Complainant, it can be seen that calls were not returned, information was not furnished, and correspondence was not replied to.

Further to this, the Complainant did not make any form of payment towards the loan account, despite the Provider advising the Complainant on several occasions of the need to establish a repayment history and the importance of this when it came to assessing the Complainant for the interest only arrangement.

While I note that the Complainant's representative has submitted in his post Preliminary Decision submission that, had the Provider "*withdrew the 6 month non achievable high repayments of interest plus arrears and allowed the new reduced repayments to commence things would have worked out differently"* and that "*what this account needed at the time was the personal human touch, a reassuring arm that there were alternatives and options and assistance trying to find a solution that would work*".

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From my review of the Complainant's file, it is difficult to see what more the Provider could have done in terms of engaging with the Complainant when he failed to demonstrate or make any effort to show an ability to make some form of payments to the loan account.

Separately, several requests were made for financial accounts. These do not seem to have been supplied, and while a trading statement was submitted, this appears to have been two years old at the time it was furnished to the Provider.

Therefore, I am not satisfied that it has been established that there was a failure on the part of the Provider to communicate or engage with the Complainant. I accept that the Provider made reasonable efforts to engage with the Complainant.

The Third Complaint

The Complainant's brother wrote to the Provider's CEO on **17 May 2018** making a formal complaint on behalf of the Complainant. This letter was acknowledged by the Provider on **28 May 2018**. This was followed by monthly update letters advising the Complainant that the Provider hoped to be in a position to issue a Final Response the following month. A Final Response letter issued on **6 March 2019**.

It took over 10 months for the Provider to issue a Final Response to the Complainant's complaint. The Provider explains this delay is attributable to an unprecedent number of queries. While this may be the case, I am not satisfied the complaint was responded to within a reasonable timeframe. However, it is noted that regular updates were issued to the Complainant each month.

Goodwill Gesture

The Provider states it:

> *"… acknowledges some shortcomings occurred in this instance and would like to apologise for same. We appreciate correspondence was issued to the Complainant and another party with whom he held a joint account in September 2013, the response to the Complainant's complaint was not issued in a timely manner and this was issued directly to the Complainant as opposed to a third party.*
>
> *The Bank has reviewed the Complaint and in light of the shortcomings would like to offer an amount of €1,000 to the Complainant in full and final settlement of the complaint …."*

I consider this goodwill gesture to be a reasonable sum of compensation for the Provider's failings. In these circumstances, on the basis that this offer remains available to the Complainant, I do not uphold this complaint.

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Conclusion

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

30 June 2021

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.