



| | |
|---|--|
| <u>Decision Ref:</u> | 2021-0274 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Debt Management |
| <u>Conduct(s) complained of:</u> | Application of interest rate Arrears handling Level of contact or communications re. Arrears |
| <u>Outcome:</u> | Rejected |

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

The Complainant is a company. The complaint relates to the management and administration of the Complainant's loan account by the Provider. The Complainant entered into a loan agreement with the original loan owner in 2009 in the sum of €1,525,000. The original loan offer letter dated 18 June 2009 sets out the terms of repayment to be 240 monthly instalment of €8,566.99 per month. The Complainant's loan was transferred from the original loan owner to its current owner on 15 March 2017 and the Provider, against which this complaint is made, has been administering the loan since that date.

The Complainant's Case

The Complainant argues that since it began administering the loan, the Provider has wrongfully stated the loan account be in arrears of varying amounts and at varying times. Another element of the complaint is that the Provider furnished inconsistent and confusing information regarding the status of the loan account. The Complainant further argues that the Provider failed to address repeated queries and requests and that it failed to provide detailed information or records regarding the status of the loan account.

The Provider and the Complainant met on 15 May 2017 to discuss the loan account. Following the meeting, the Provider wrote to the Complainant and the Complainant responded by email dated 24 May 2017, stating that it was confused by the respondent's request for proposals to address the repayment of the full loan and requested that the Provider clarify this position directly to the Complainant's appointed representative, a financial consultant.

The Complainant's representative queried the Provider in respect of the loan account on 25 May 2017. He asked the Provider as to why the loan owner sought to demand a proposal to repay the debt, which appeared to be performing in line with the contract. He argued that this approach was inconsistent with what the Complainant was told at the meeting of 15 May 2017. The Provider, by email dated 26 May 2017, stated that the loan was not in arrears as of 15 May 2017 and if the Complainant complied with the terms of the loan facility, it would be regarded as performing. The Provider stated the reason that its letter of 15 May 2017 had issued was because the Complainant had advised it at the meeting on 15 May 2017 of the possibility of a partner of the Complainant going into bankruptcy. The Provider stated that the letter of 15 May 2017 offered an opportunity to propose a repayment proposal which would address the Complainant's total indebtedness to the loan owner but stated that whether or not the Complainant was to make a proposal for repayment, was a matter for the Complainant. On 21 June 2017, the Complainant's representative again sought confirmation as to the detail and status of the loan account and whether it was in surplus or in arrears and by what amounts, if any.

On 17 July 2017, the Provider wrote to the Complainant's representative stating that the account was in arrears in the sum of €2,507.20. The Complainant's representative queried the arrears figure and stated he had previously sought confirmation regarding the status of the loan account and details of any surplus or arrears but there had been no response from the Provider. The Complainant's representative stated that from his calculations, he could not derive an outstanding shortfall of €2,507.20 and again requested detailed information and calculations regarding the status of the loan.

By email of 21 July 2017, the Provider responded that the loan account had fallen into arrears at the time of migration to the current loan owner. It stated that the total arrears outstanding were €11,020.05. By email dated 25 July 2017, the Complainant's representative requested that the Provider furnish detailed information in relation to the arrears on the loan account. He stated that the arrears were unsubstantiated, and he intended making a formal complaint if his request continued to go unanswered.

The Complainant's representative again requested that the Provider furnish detailed information regarding the status of the account on 17 August 2017, 18 August 2017 and on 6 September 2017. The Complainant's representative questioned the Provider's position due to the absence of detailed information and he disputed the arrears. The Complainant's representative stated that the Complainant had repaid €42,952.55 between 1 April 2017 and 17 August 2017. He stated that the agreed repayment of the loan facility was €8,500 per month and that therefore the payment obligations from 1 April 2017 to 17 August 2017 amounted to €42,000. He stated that the Complainant had therefore paid a sum in excess of the contractual repayments amount due and it was his firm contention that the Complainant's loan account was in surplus of the 17 August 2017.

By letter dated 15 August 2018, the Provider responded that the Complainant's account was in arrears and that it had fallen in and out of arrears during its management of the account. It stated that some months were overpaid, and some months were underpaid. It stated that to ensure that arrears did not accrue on the account, the Complainant needed to ensure that the scheduled repayment of €8,500 per month on before the 17th of each month.

/Cont'd...

A further aspect of the complaint is that the Provider repeatedly overcharged interest on the loan account. The Complainant argues that the Provider failed to adequately address numerous queries and requested detailed information such as calculations and records regarding the interest rate being applied to the account. It is further argued that the Provider applied an interest rate to the loan account on a monthly basis which was at variance with the terms of the agreement in that interest was to be applied on a quarterly basis. The Complainant argues that this change in the regularity of interest being charged from quarterly to monthly occurred without notification to the Complainant and without the Complainant's consent.

The Complainant's representative argues that the interest rate according to the original loan agreement was "*Cost of funds +1.7% (variable)*". He argues that the interest rate actually applied by the Provider, however, has been fixed at 2.45%. The Complainant's representative argues that "*cost of funds*" was defined by the original loan owner and that this is a cost that can only be set by the original owner, and by reference to Euribor rates. The Complainant's representative has submitted various Euribor rates from the last several years which indicate that the rate has been negative and extrapolates from this that the interest rate applicable to the loan account should be a fluctuating amount, and a rate less than the margin of 1.7% rather than a higher rate.

The Provider stated by email dated 4 December 2017 that interest will capitalise quarterly in line with the terms and conditions of the loan account. As part of its review, the Provider identified that an additional €45.37 in interest was applied on the account between 17 March 2017 and 7 December 2018 and posted an adjustment of €51.34 to the account to put the loan account back in the position it would have been had the error not occurred.

A further aspect of the complaint is that the Provider has failed to provide loan account statements whereby the Complainant and its representative had made numerous requests for such statements. The Complainant argues that the Provider failed to execute a request for regular monthly loan account statements.

The Complainant was not willing to accept a settlement offer of €20,175 offered by the Provider to reflect service failures in respect of the account on the basis that the Provider would not commit to a "*cost of funds*" rate in line with that of the original loan owner.

The Provider's Case

The Provider submits that the loan account first fell into arrears in March 2017 following its transfer from the original loan owner to the new loan owner. The Provider states that the account fell into arrears on 18 March 2017 and arrears remained on the account until they were paid in full on 25 July 2017. It states that non-payment in August 2017 led to further arrears and the loan account showed an arrears balance every month thereafter until February 2019.

The Provider states the following the transfer of the loan account from the original loan owner, the scheduled monthly repayment was €8,500. It states that the repayment history shows that in some months, the scheduled amount was underpaid, and this has led to arrears the account. The Provider states that on 18 March 2018 the loan account billed for €8,500, but no payment was received. It states that an underpayment of €7,134 was received in April 2017 and the arrears increased to €9,876.80. Overpayments of €8,924, €8,343.47 and €19,760.55 were made in May, June and July 2017 respectively and resulted in the loan account being overpaid by €1,606.50. However non-payment in August 2017 led to arrears of €6,899.42. The Provider argues that in the period September 2017 to November 2018, underpayments and overpayments were received intermittently each month.

The Provider argues that in November 2018, the Complainant's authorised representatives informed the Provider that a payment of €7,134 was made on 9 March 2017 – that is, prior to migration loan from the original loan owner. This was meant to be lodged against the scheduled payment for March 2017. The Provider states that once this was brought to its attention, the arrears were reduced by this amount.

The Provider argues that even taking the payment made on 9 March 2017 into account, the loan would have been in arrears between March and July 2017 and it quotes figures to support this argument. The Provider accepts that when the Complainant's payments were received in July 2017, there would then have been no loan account arrears taking into account the March 2017 payment.

The Provider accepts that the loan facility letter dated 18 June 2009 confirms that the interest rate was set at the original loan owner's cost of funds rate plus 1.75%. It states that on the transfer date from the original loan owner to the new loan owner, the original loan owner's cost of funds rate was 0.7% and the margin of 1.75% also remained (giving a total of 2.45%).

The Provider argues that the interest rate on the loan account is no longer set by the original loan owner following that provider's commercial decision to sell the loan account. It argues that that entity no longer has any legal input and the responsibility to set the rate now rests solely on the new loan owner. The Provider argues that it is at the discretion of the new loan owner if it changes the prevailing cost of funds rate but argues that, since the transfer, the interest rate has not changed because the new loan owner's cost of funds are higher than the interest rate that was set by the original loan owner on the date of transfer.

The Provider argues that since March 2017, the interest rate is being charged at a rate of 1.75% over the prevailing cost of funds of 0.7% at the date of transfer that is, 2.45%. It argues that was the new owner decided not to offset its cost of funds as it would be to the detriment to the Complainant resulting in significantly greater accrual of interest. The Provider points to its letter dated 30 March 2017 which states that the cost of funds rate would henceforth be set by the new loan owner.

The Provider argues that pursuant to provision 9.7 of the terms and conditions of the loan account, interest accrues on the balance of the loan outstanding each day but the interest charged appears as a debit on the loan account once every quarter. It accepts that on the transfer in March 2017, the application of interest was switched from to monthly but this was later switched back to quarterly in December 2017 when the initial error was fixed.

The Provider accepts that it did not issue any notification to the Complainant regarding the switch to monthly interest as a result of the error which was retrospectively identified and which was reported to the Central Bank. The Provider accepts that the change as to the frequency with which interest was applied to the account represented a change to the terms and conditions of the loan account. It states that despite a retrospective consent recovered from the Complainant to the frequency change, the Provider amended the error in December 2017 and put the loan account back into the position it should have been in had the error not occurred. The Provider apologised to the Complainant for the stress and inconvenience caused by its error. The Provider explains that the change occurred because of system could not facilitate different dates for the application of interest and scheduled billing dates.

The Provider states that an apology letter dated 13 December 2017 was sent to the Complainant. It argues that this letter explained what had gone wrong in respect of the application of interest and the steps taken to fix the error. To ensure there was no negative financial impact, the Provider states that €51.34 was applied to the loan account.

The Provider does not dispute the Complainant's contention that it has repeatedly failed to address numerous queries and requests for detailed calculations and information regarding the interest rate being applied to the account. The Provider apologised for these failings of service. The Provider accepts that the initial error regarding the application of interest prompted considerable engagement from the Complainant's representative.

In respect of the contention that the Provider repeatedly failed to provide loan account statements, the Provider argues that it issued annual statements on 8 March 2018, 11 February 2019 and 2 March 2020. It explains that its system is not set up to automatically issued statements on a monthly basis. It states that it has issued statements to the Complainant intermittently but accepts this has not been done on a monthly basis in line with its original request. It states the following recent engagement with the Complainant's representative, the Complainant has sought statements on quarterly basis and the Provider states that it will endeavour to facilitate the request.

The Provider argues that it is obliged under the SME regulations to issue statements at least once a year. It argues that it fulfilled its obligations with regard to this and requests for additional statement were then made on an ad hoc basis.

In respect of the March 2017 payment, the Provider refers to provision 4.8 of the terms and conditions of the account which deals with early repayments and prepayments being treated as permanent reductions on the account.

The Provider accepts that it appears that the Complainant paid more than the total sum due between December 2016 and March 2017 but that this did not necessarily mean that the loan account would be in credit and that the overpayment was used against the next billing cycle that is, in March 2017. The Provider argues that overpayments are offset against the capital balance and are not used against any future billing cycles as the Complainant is expected to pay the scheduled monthly repayment each month. It argues that given the payment history and the disputes that have arisen regarding the accumulation of arrears, however, it is working with the Complainant to mitigate any further accrual of arrears. The Provider argues that this requires a considerable level of attention and manual intervention to override the system to ensure that overpayments are offset against the next billing cycle. The Provider requests that the Complainant consider setting up a standing order each month. It argues that it was not informed by the original loan owner that a payment of €7,134 was to be off-set against the scheduled March 2017 payment but, as a courtesy, it reduced the arrears figures by the relevant sum in November 2018.

The Provider has acknowledged its service failings in respect of the Complainant and offered it €20,175 in compensation. However, it does not accept that the new loan owner cannot set the “cost of funds” interest rate applicable to the account. It points to several provisions of the general terms and conditions which, it argues, suggests that the rate can be set by an assignee of the loan in the event of assignment.

The Complaints for Adjudication

The complaints for adjudication are that the Provider failed to administer and manage the Complainant’s loan accounts in an appropriate manner and specifically that it:

1. Applied an incorrect interest rate of 2.45% to the loan rather than the “cost of funds” rate of the original loan owner plus a 1.7% margin;
2. Charged interest on a monthly rather than a quarterly basis;
3. Failed to provide account statements regularly and on request; and
4. Incorrectly sent arrears notifications letters and correspondence to the Complainant and its representatives.

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.

/Cont’d...

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 23 July 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Interest Rate

The primary issue in dispute between the parties to this complaint is the appropriate interest rate that is applicable to the account. The letter of loan offer dated 18 June 2009 provided that the interest rate applicable to the loan was:

*“The [Provider’s] Cost of Funds Rate varying plus 1.75% per annum currently 3.15% per annum. Debit interest will be charged to the Borrower’s loan account Account Number (not yet opened) Sort Code ****50 [Branch] as per the General Conditions”.*

The interest rate is therefore a ‘cost of funds rate’ plus a 1.75% margin. The “Costs of Funds” rate is defined in the general terms and conditions applicable to the loan account as follows:

“a) the rate of interest per annum calculated by the [Provider] on a weekly basis as the average of the one month euribor rates at or about 11am on each of the preceding five days on which the one month euribor rate is available on the Reuters Euribor screen designated EURIBOR01 or on the equivalent Telerate service page or such other page as may replace these pages on these services (as converted to a 365 day rate); and

b) the rate of interest per annum determined by the [Provider], in its absolute discretion, to compensate it for the costs of complying with any reserve asset and/or special deposit or liquidity or funding requirements (or other requirements having the same or similar purpose) whether direct or indirect and whether of any Regulatory Authority (whether or not such requirements have the force of law) or otherwise and any such other costs (direct or indirect) as the Bank may incur in raising funds in the market with the total of (i) and (ii) being rounded down to the nearest one twentieth of one percent”.

I am satisfied that this is a variable rather than a fixed rate and is made up of three components:

- (i) The Euribor rate;
- (ii) The [Provider’s] costs of funds as determined “*in its absolute discretion*”; and
- (iii) A margin of 1.75%.

The Complainant’s representative has made various arguments that as the Euribor rate has been negative in recent years, the interest rate applicable to the account should be less than the 1.75% margin. This would be the case if the interest rate applicable to the account was a tracker rate. It is not. The complainant’s arguments completely overlook component (ii) above, that is, the Bank’s cost of funds, which is an amount or rate to be fixed at its discretion.

The Complainant’s representatives have argued that even where, as here, the loan has been sold, it is the ‘*costs of funds*’ as determined that the original owner of the loan that should form the basis of the interest rate. Based on the other terms and conditions applicable to the loan, I do not accept that this is a correct interpretation of the clause in question.

The Supreme Court has confirmed that the proper approach to the construction of contractual documents is one of ‘text in context’; *Jackie Greene Construction Ltd v IBRC* [2019] IESC 2. This requires a court (or other adjudicative body) to consider the text used in the context of the circumstances in which the document concerned was produced, including the nature of the document itself.

In *Law Society v MIBI* [2017] IESC 31, para 5.3, the Supreme Court explained that:

“the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.”

The context that is relevant, in my view, includes the entitlement of the original loan owner to assign its interest in the loan to another entity and the fact that the definition of the original loan owner includes its successors or assignees. The general terms and conditions provide as follows:

- *“Bank” is defined as the original loan owner, “and its successors, transferees and assignees in accordance with their respective interests”; and*
- *Clause 11.32 provides that the “Bank shall have the right to assign, transfer or sub-participate the benefits and/or obligations under all or any part of any Facility to another entity without the prior consent of the Borrower and the Bank may disclose to a prospective assignee or at any other person who may propose entering into contractual relations with the Bank in relation to this Agreement such information about Borrowers as the Bank shall consider appropriate.”*

The original loan owner was entitled to assign its rights in the loan account to another entity, which it did. The definition of the *‘cost of funds’* interest rate is premised on the *“Bank”* setting the cost of funds rate but the definition of *“Bank”* includes assignees of the loan. In my view, this means that where the loan was assigned, it is for the loan assignee to set cost of funds rate after assignment.

If one were to accept the arguments of the Complainant’s representative in this case (that is, that the original loan owner alone sets the *‘cost of funds’*), this would, in my view, substantially hinder the provisions allowing for the assignment of the loan. If the original loan owner was wound down and the loans transferred to a successor entity, for example, would the *‘cost of funds’* component (that is, component (ii) above) of the interest rate definition simply fall away, leaving behind a simple tracker rate? I cannot accept that this is the case. The definitions applicable confirm that references to *‘Bank’* include all successors and assignees and so, for the purposes of calculating the *‘costs of funds’*, this includes a rate determined at the discretion of any such successor or assignee.

The Complainant’s representative has suggested that this rate cannot be set by an unregulated entity who has purchased the loan but there is nothing in the agreement between the parties that suggests that this is the case. The benefit of a loan contract, as with other contracts, can be legally assigned to a third party. The loan contract expressly provides for assignment and there is no limitation in respect of the entities to which the loan can be assigned.

I accept and appreciate that borrowers in the position of the Complainant should not be negatively impacted by a loan assignment to an unregulated entity but it has not been established that this is the case in the present complaint.

/Cont’d...

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 introduced an authorisation regime for credit servicing firms to ensure that when an authorised bank sold a loan portfolio comprising borrowers who were entitled to the protection of the Consumer Protection Code 2012 (**CPC**) and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 (**SME Regs**), that they effectively continued to enjoy that protection because that 2015 Act requires the authorised credit servicing firm to observe the codes when they perform their functions.

Further, the current loan owner has applied the '*cost of funds*' rate that was applied by the original owner at the time of the transfer of the loan to ensure that the Complainant was not negatively affected by the assignment. The Provider has submitted that the new loan owner's costs of funds are higher than would be the case for a bank and, so, the interest rate that has been applied reflects the original loan owner's rate cost of funds rate on the day of transfer.

The Complainant's representative seems to be arguing that the '*cost of funds*' rate applied by the original loan owner could and should have decreased in recent years due to the negative Euribor rate but has not provided evidence to support this assertion.

Even if true, this is not determinative of the situation as the fact that the March 2017 rate is being applied by the new loan owner may benefit the Complainant at various times over the lifetime of the loan agreement. In other words, it is possible that the interest rate applied by the new loan owner may be higher or lower than the costs of funds rate applied by the original loan owner at differing times over the course of the loan. It is further noteworthy, in my view, that this is a variable rate which was to be set at the discretion of the original loan owner so it was not bound to reduce or increase its rates in line with Euribor fluctuations.

The Complainant never had any guarantees when it came to the rate to be applied to its account – it was a variable rate.

I accept that the new loan owner is entitled to step into the shoes of the original loan owner in respect of the setting of the '*cost of funds*' interest rate applicable to the Complainant's loan account. I am not satisfied that the Complainant has demonstrated any wrongdoing by the Provider in applying a rate of 2.45% to the account since the transfer in March 2017 as the definition of the '*costs of funds*' rate makes it clear that one of the three components of the interest rate is to be determined by the original owner or its assignees at their absolute discretion. That discretion has been exercised in the present case to mirror the interest rate applicable to the account at the time of the assignment that is, 0.7% plus the margin. I have been provided with no evidence that the Provider acted unreasonably in this regard.

I now turn to the application of interest to the loan account. It is not in dispute between the parties that the Provider wrongfully applied interest on a monthly basis rather than quarterly between March and December 2017. It is accepted that the loan agreement of 2009 provided for a quarterly interest charge but when the Provider took over as the administration of the loan, it applied interest on a monthly basis.

/Cont'd...

The Provider investigated this issue following emails of July and August 2017 from the Complainant's representative. The Provider accepted by letter dated 13 December 2017 that it ought to have charged interest to the account on quarterly rather than a monthly basis. It calculated that a refund of €51.34 by way of interest adjustment was due to the Complainant due to the manner in which it has been charging interest to the account. It also explained that the issue has been fixed and interest would henceforth be billed quarterly. There is nothing before me to suggest that interest has been debited other than quarterly since that time.

I accept that the Provider comprehensively dealt with this issue in December 2017 and that interest has been applied to the account on a quarterly basis since that time. I will, however, bear in mind this error in the overall determination of the complaint.

Arrears

The Complainant received ad hoc notification of arrears on the account at certain points in 2017 and 2018. On 17 July 2017, for example, an email was sent from the Provider to the Complainant's representative noting arrears on the account of €2,507.20, though several days later the same writer indicated arrears on the account of over €11,000. By letter dated 12 April 2018, a letter was sent from the Provider to the Complainant in respect of arrears of €4,820.66 as of March 2018.

There are various communications between the parties in 2017 whereby the Complainant's representatives disputed that there were any arrears on the accounts and repeatedly sought account statements in respect of the loan account, including information on interest charge repayments due and payments made.

These are dealt with below. In response to the letter of 12 April 2018, the Complainant's representative wrote to the Provider seeking clarification in respect of the alleged arrears of €4,820.60 and indicating that, despite commitments, it only received occasional statements from the Provider. The letter indicated that the fixed monthly repayment of €8,500 had been in place for several years and that the Complainant's records indicated that the loan was in credit as of 20 March 2018.

By letter dated 9 May 2018, the Provider wrote to the Complainant noting arrears of €5,047.66 on the account. By letter dated 8 August 2018, a letter to the Complainant noted arrears of €6,202.73 on the account

In a final response letter dated 15 August 2018, the Provider set out a table summarising the Complainant's payment history with the new loan owner between March 2017 and July 2018. This table showed that despite an amount due in March 2017 of €8,500, no payment was made to the account in that month. The remainder of the table shows varying repayment amounts having been made in different months, such as €7,134 in April 2017, €19,760.55 in July 2017 with no payment made in August 2017.

/Cont'd...

On that basis, a varying arrears sum was present on the account by the Provider's calculation during all months except July 2017. The Provider stated that the summary shows that "*some months have been overpaid and others underpaid*" and argues that the arrears figures quoted in correspondence dated 12 April 2018 was correct and correlated with the total arrears due at the end of March 2018. The Provider stated that:

"to ensure no arrears accrue on the account, the Borrower needs to ensure that the full scheduled repayment of €8500 is met on or before the 17th of each month. To ensure it is set up, we recommend a Direct Debit and or a standing order is set up with their own bank."

The difficulty with the Provider's summary in its letter of 15 August 2018 is that it failed to take account of a payment that was actually made by the Complainant in March 2017. It appears that the March 2017 payment was made by the Complainant on 9 March 2017 to the original loan owner rather than the new owner (though there is no suggestion that the sum was not applied in reduction of the overall balance of the loan account). While the Provider was doubtless sincere in its understanding in August 2018 that the summary set out showed a complete picture of the arrears on the account, it was its obligation to ensure that all payments made by the Complainant were accounted for.

It is not satisfactory or sufficient for the Provider to indicate that it relied on up-to-date information from the original loan owner. The payment was made by the Complainant on 9 March 2017 and ought to have been properly reflected on the Complainant's statement of account. As a result of the Provider's failure to credit the Complainant's loan with a March 2017 payment, arrears appeared on the account in the majority of months in 2017 and 2018 where no arrears should have appeared.

While I accept that based on the account information before me that payments made to the account were somewhat erratic in respect of the date or dates of each payment made, and while this may have allowed the account to fall into a low level of arrears on occasion, the biggest problem was the missing March 2017 payment.

I find it quite extraordinary that the Provider would state that it has credited a payment, made by the Complainant to his loan, as a courtesy.

In its submissions dated 23 June 2020, the Provider seeks to argue that the Complainant was obliged to make its monthly payment on the 17th of each month and that payments made before that date are not offset against the future billing cycle. It points to provision 4.8 of the terms and conditions which states that early repayments and prepayments are treated as permanent reductions. I am not satisfied that the Provider has demonstrated that it was an agreed term of the loan that the Complainant was obliged to make one payment each month and only on the 17th day of each month.

/Cont'd...

I am not satisfied that it has demonstrated that it was entitled to offset payments made before the 17th of each month as a capital reduction on the account and still seek full monthly repayments of €8,500 on the 17th day of the same month, flagging anything not received as “*arrears*”. In my view, some common sense and flexibility have to be applied to the repayment of loans. The Complainant has transferred all rent received from its lease of commercial units to the Provider to meet its loan obligations. The fact that the rent payments are made on different days of the month appears to be the reason why different amounts are paid on different dates. Overall, however, these rental payments are sufficient to meet the Complainant’s monthly obligations. Where payments are made several days before the 17th of each month, there is no question but that they should be applied to that month’s repayment.

I am not satisfied that the Provider can hide behind the kind of language set out provision 4.8 of the general terms and conditions to attempt to argue that all of the difficulties that have been experienced in the reconciliation of arrears since March 2017 have been the fault of the Complainant.

The Provider should look to its own systems and interrogate whether its systems are the real cause of the problems in the present case, both in respect of calculation of arrears and the provision of statements (which I will deal with below). If the Provider’s system requires as much intervention and manual override as seems to be case to simply reconcile payments being made by the Complainant on different days of the month, it is my view that it is the system that is the problem rather than the fact that repayment dates are somewhat erratic.

It was very difficult for the Complainant to identify where the problem was arising in respect of its arrears balance when, despite numerous requests for calculations and statements made by it during 2017, the Provider failed to send accounts statements on a regular basis and, when sent, those accounts statements were devoid of the details required to clarify the arrears position.

Further, by letter dated 30 March 2017, the Complainant was informed that although the loan had transferred to the new loan owner on 19 December 2016, during the transitional period, customers were to continue directing repayments to the old provider.

The letter stated that the transitional period ended on 17 March 2017 and from this point forward, customers were required to redirect their payments into the new bank account set up by the new loan owner. This new loan number was provided.

I find the letter dated 30 March 2017 confusing in that it instructs that payments due from 17 March (that is, two weeks prior to the date of the letter) to be sent to a new account number only provided in the letter dated 30 March 2017. On that basis, there was no way for a customer in the position of the Complainant to make the payments into the new loan account prior to April 2017. On that basis, any payments made by customers axiomatically had to be made to the old provider in March 2017. The Provider ought to have been alive to the potential for difficulties to arise in this regard.

/Cont’d...

On top of this, the Complainant's representative had advised the Provider on numerous occasions in 2017 and 2018 that, based on its own reconciliation of its remittances, the account should not have been in arrears. There is no suggestion from the evidence before me that the Provider looked into this potential issue (that is, payments made to the original loan owner around the time of the transfer period) at any stage.

I accept that the arrears information provided to the Complainant throughout this period was incorrect and misleading as it did not reflect the payment made by the Complainant against the loan balance on 9 March 2017 to the old owner of the loan. I further accept that the Provider sent several arrears letters to the Complainant during the period 2017 and 2018 which were incorrect and inaccurate in that those arrears should have not appeared on the Complainant's accounts in the first place.

The Provider has further admitted that an arrears letter dated 9 December 2019 was issued in error.

Because of the potential that other accounts managed by the Provider could be impacted by the Provider's method of crediting accounts, I am bringing this matter to the attention of the Central Bank of Ireland.

Account Statements

A meeting was held between the Complainant, a representative of the Provider and the new loan owner and 15 May 2017. Although the Complainant's representative has made submissions in respect of this meeting and in particular argued that records of the meeting taken by each side do not correlate, I do not think anything turns on this issue. I accept for present purposes that the Complainant made its position clear to the Provider and the new loan owner at the meeting on 15 May 2017 that (a) payments on the account were up-to-date but that (b) the Complainant had not had access to a statement of account since December 2016.

By email to the Provider dated 25 May 2017, the Complainant's representative indicated that the Complainant had been advised on 15 May 2017 that the loan was not in arrears and was not in default and asked for confirmation of that fact. By email dated 20 May 2017, the Provider confirmed that the loan was not in arrears as at 15 May 2017 and that if the Complainant complied with the terms of the loan facility, the loan facility would be regarded as performing.

On 13 June 2017, the Complainant's representative wrote to the designated contact of the Provider on the account indicating that the Complainant had not received a bank statement in respect of the account for many months and requesting a statement on the loan account for the previous 12 months. He also sought a mechanism for statements on an agreed basis in the future, such as monthly, quarterly or annually or by request. By email dated 21 June 2017, the Provider attached a certificate of balance as of 12 June 2017 and an account statement of 14 June 2017.

/Cont'd...

The account statement dated 14 June 2017 purported to show repayments made and interest due on the account between March and June 2017, though the transactions were not set out in date order and the payment of 9 March 20217 was not visible. An account balance was provided but there was no indication of whether there were any arrears on the account and no confirmation of required repayment amounts. The certificate of balance dated 14 June 2017 indicated the balance on the account as of 12 June 2017 and an interest accrued amount from an unknown date but nothing further.

By email dated 26 June 2017, the Complainant's representative responded with a number of queries to the Provider's representative including:

- Why interest was being charged monthly instead of quarterly as that had previously been;
- Why such a high level of interest was charged against the account in March 2017;
- Whether a standard monthly statement could be issued in respect of the account every month; and
- Whether the account was in surplus or deficit and details regarding the amounts relative to the agreed monthly schedule as the certificate of balance supplied by the Provider did not provide that information.

By email dated 17 July 2017, the Complainant's representative wrote to the Provider in response to a notification from the Provider that the Complainant's account was €2,507.20 in arrears. The representative referred back to his email of 26 June 2017 in which he requested receipt of monthly statements on the account. The Complainant's representative set out his understanding of the payments recently made by the Complainant to the account and explained that his office could not derive an outstanding shortfall of €2,507.20 from the numbers. He requested that the Provider review its records and reply immediately so that his office had the necessary financial information to appraise the Complainant of its financial circumstances. The Complainant's representative indicated his opinion that the Provider's non-cooperation or non-compliance with requests for information was making it impossible for him to fulfil his role. He stated that he was seeking receipt of very basic information on the account.

By email dated 21 July 2017, the Provider confirmed that interest is charged monthly so that all interest and principal amount falls due on the same day. It stated that this was approved and implemented internally by the Provider. The Provider stated that the loan had been in arrears upon migration so interest entries from March and April had to be reflected in the entry for 31 May 2017. The Provider noted the Complainant's request for a monthly statement and indicated that the total arrears outstanding were now €11,020.05.

In a follow-up email dated 25 July 2017, the Complainant's representative indicated that the Provider's response had been very limited in detail, though it had confirmed that the Provider changed the terms of the loan without advising or receiving consent from the Complainant.

/Cont'd...

It stated that the representative had no idea of the interest charged for June and July 2017 and noted that the Provider was now advising that there were arrears of €11,020.05 on the account. The Complainant's representative stated that based on the information available to the representative, the Complainant's loan account was currently in surplus and noted that the Provider had previously stated that the account was in order with no arrears. It stated that the non-provision of a regular loan statements for the account as requested by email dated 26 June 2017 was making the job of reconciling payment made and repayment due very difficult. The representative set out his understanding of remittances made by the Complainant in July 2017 and requested that the Complainant be provided with a copy of the loan statement on the account to determine if all remittances made to date had been properly recorded.

In a further email of the same date, the Complainant's representative disputed the Provider's ability to change the accrual date of the interest due on the account and requested the reinstatement of quarterly interest payments. He argued that the Provider had not advised the Complainant of the time periods the various interest charges related to and requested full details of these. He further requested full details of alleged arrears on the account and reiterated his earlier request for a monthly loan statement which had not yet been provided.

The Complainant's representative indicated that the was at a loss to explain and advise the Complainant on its financial exposure and again requested appropriately detailed statements of account to allow the representatives to track the financial position. The Complainant's representative further argued that prior to 17 July 2017, the Complainant was never informed of any arrears on the account when it migrated and again requested confirmation of the accuracy of the calculations. The representative indicated that the Complainant disputed the claims of interest arrears, and the manner of application calculation of same. The representative stated that unsubstantiated declarations of arrears on the account were unacceptable. The Complainant's representative queried why an apparently fixed rate of 2.45% interest was being charged on the account as this was not agreed in the original loan agreement.

In an email dated 18 August 2017, the Complainant's representative sent its own reconciliation of payments made on the account between 1 April 2017 and 17 August 2017 to demonstrate their understanding that the account should be in surplus by €452.55. It requested that the Provider confirm the accuracy of the record by providing an up-to-date statement of the loan account for period 1 April 2017 to date, with monthly statements to be provided thereafter.

A further reconciliation of payments made to the account was sent by the Complainant's representatives dated 6 September 2017, again seeking confirmation of those numbers from the Provider.

/Cont'd...

By email dated 7 September 2017, the Provider requested the Complainant's agreement to have interest charged monthly on the loan account and offered a reduced rate on the account. The email indicated that if the Complainants were happy with this change, the writer would request the workings and statements as promptly as possible. By email dated 7 September 2017, the Complainant agreed to the monthly interest charge. It also indicated that it did not understand the interest rate difference between the old loan owner and the new loan owner.

By email dated 18 September 2017, a statement of account was sent by the Provider dated 14 September 2017. This indicated the credit transfers made and interest due on the account between 31 May and 8 September 2017 but did not provide arrears balances or information regarding required repayments to the account. More detailed workings in respect of the interest charged was also provided by way of an excel document.

By letter dated 13 December 2017 in response to the complaint on the charging of interest on a monthly basis, the Provider stated that its failure to provide statements between September and December 2017 was due to a fix being implemented on the loan account to apply interest on a quarterly rather than monthly basis. It indicated that it would endeavour to send statements to the Complainant every month henceforth.

A formal complaint was made by letter dated 11 January 2018 in respect of the Provider's inability or unwillingness to provide monthly statements on the account, and the above history was set out in detail. By letter dated 21 February 2018, the Complainant's representative referred to the formal complaint made by letter dated 11 January 2018 and stated that since the Provider took over the loan from March 2017, the Complainant had not received accurate loan statements. It argued that while two one-page statements were provided in early September 2017, both were inaccurate and incomplete and that subsequently, the Provider had agreed that interest should be charged quarterly rather than monthly. The representative pointed out that the Complainant was placed in a position where it does not know its liability to the Provider without substantive and consistent responses in the form of bank statements.

It appears from the evidence submitted that account statements were sent by the Provider periodically but not monthly as requested. For example, I have reviewed statements dated 8 March 2018 (from 31 May 2017), 19 April 2018 (from 4 Jan 2018), 11 February 2019 (from 7 April 2017) and 28 February 2019 (from 8 Jan 2019). The statements give debit credit balance information but do not indicate what if any arrears are present on the account by reference to a required repayment.

Considering the numerous requests made of the Provider to send detailed information to the Complainant's representative (that is, a record of the repayments due, the remittances made to the account, the interests billed and the arrears that had arisen) it is readily apparent that the Provider's responses fell far short of what was requested and what could be reasonably required.

/Cont'd...

As is apparent from the communications from the Complainant's representative at the relevant time, the Complainant could not reconcile the information that was coming from the Provider in respect of interest and arrears amounts with the repayments that were being made to the account and the monthly repayments that were required of it.

The Provider has indicated that its system does not automatically generate statements other than annual statements in respect of customer accounts but this is a problem for the Provider and not a disadvantage that should be borne by its customers. Where a customer requests information in respect of its account, this ought to be provided promptly and clearly. This has not been done in respect of the Complainant's account. I appreciate that intermittent and annual statements were provided during the relevant period, but the statements generated did not actually provide all the information that was being sought by the Complainant's representative.

In my view, if the Provider had furnished the information requested promptly and at a much earlier stage, the error that was made in respect of the Provider's failure to credit the Complainant's account with the 9 March 2017 payment would have been realised much sooner and would have avoided numerous arrears letters being generated and sent to the Complainant. It further could have avoided the level of fees which the Complainant incurred by engaging a representative to investigate the information being received from the Provider in respect of arrears, interest and account balances.

Given the numerous mistakes that were made by the Provider, and the incomplete and confusing information being sent by the Provider, it is very understandable that the Complainants was not in a position to decipher these issues itself and felt compelled to engage a professional to do so.

Complaint and the Provider's Resolution

By letter of complaint dated 11 January 2018, the Complainant's representative wrote to the Provider in respect of its unwillingness to provide monthly statements on the account. The letter of complaint outlined the requests made by the Complainant's representative between May and July 2017 for clarity in respect of the payments to the account, any arrears and the interest being charged. The letter indicated that the Complainant had engaged the services of a regulated debt management service to monitor and confirm the liability and manage and validate the debt. It noted this was inappropriate and unnecessary and the costs incurred by the Complainant in that regard should not have been required. The Complainant requested that the Provider supply monthly statements on the loan accounts on an ongoing basis and further requested compensation for the financial cost of engaging its representative to verify and validate the statements.

By letter dated 7 March 2018, the Provider responded to the Complainant acknowledging that it had on several occasions requested the issue of loan statement on a monthly basis.

/Cont'd...

The letter noted that its system was not set up to automatically issues statements on a monthly basis and required manual intervention from the case management team on an ad hoc basis. It explained that the request had not been honoured for two key reasons – first as remedial works for being completed to fix the manner in which interest was charged to the account, and second, annual statements issued to all customers. The letter indicated that the Complainant's case manager had set monthly reminders, and it will issue a statement to the Complainant every month henceforth. In respect of the interest issues raised, the Provider indicated that this is being dealt with under a separate complaint but acknowledged that an error had occurred on how interest was charged, but that the account had been remediated and the interest was now being charged on quarterly basis. The Provider rejected the request for compensation to reflect the cost associated with the Complainant's financial representatives.

Further complaints were made on 24 April and 23 May 2018 and a response letter issued from the Provider dated 15 August 2018. The Provider stated that the Complainant was disputing receipt of arrears related correspondence in respect of the account and argued that it is obliged to communicate with borrowers in a timely manner where arrears accrue on accounts. As set out in some detail above in respect of the arrears on the account, the Provider set out a supposed summary of the Provider's payment history with the new loan owner which failed to recognise the repayment made by the Complainant on 9 March 2017.

As a result, all of this information was incorrect. Based on this inaccurate summary, the Provider argued that the account had been in arrears since March 2017 and that the Complainant needed to ensure that scheduled repayments of €8,500 per month are made on or before the 17th of each month. The Provider indicated (incorrectly) that the Complainant originally sought statements each month because interest had been incorrectly billed every month instead of every quarter. It argued that the error in respect of the billing of interest that now been rectified. It stated that if the Complainants wish to receive a further statement, it could contact the Complainant's dedicated case manager. As is apparent from the above, this final response letter was inaccurate and inadequate.

By letter dated 30 January 2020 in response to another email complaint from the Complainant's representatives dated 19 December 2019, the Provider acknowledged that it sent an arrears letter in error to the Complainant on 9 December 2019. It acknowledged that the repayment history on the account up to December 2019 was not in arrears. It explains that the arrears letter wrongly issued because the reallocation of payments received against the scheduled November 2019 payment had not been completed in advance of the letter being issued. The Provider explained that as the Complainant does not have a direct debit set up to pay the scheduled repayment every month, it is paying varying amounts by electronic fund transfer before and after the scheduled billing dates. The Provider assured the Complainant that its repayments are offset against the outstanding debt once received but that its systems does not automatically recognise the payments received prior to the schedule billing days are to be offset against the next billing amount.

/Cont'd...

It explains that this requires a level of manual intervention to ensure the payments received are offset against the billing amount but that it has measures and controls in place to ensure this is completed in respect of the Complainant's account each month. The Provider upheld the complaint in full, apologised for the upset caused by it issuing an incorrect arrears letter and offered €500 in compensation.

In its response to queries raised by this office and in particular further submissions from the Complainant, the Provider has apologised for its service failings in respect of the provision of up-to-date and accurate account statement information and its initial error in respect of frequency of billing interest. It has offered a sum of €20,175 in settlement to the Complainant. This offer has not been accepted, principally on the basis of the disagreements in respect of which party is entitled to set the cost of funds interest rate applicable to the account.

Other Complaints

The Complainant raised several further complaints by letter dated 11 May 2020 in respect of the actions of the Provider. While I note that the Provider has attempted to respond to these additional complaints, I am not satisfied that they form part of the present complaint and, accordingly, I do not have sufficient evidence before me to determine these complaints.

It appears that there is a dispute between the parties as to whether the loan agreement commenced in June or September 2009. The Complainant has strenuously argued that drawdown did not take place until 17 September 2009, and accordingly the term of the loan did not commence until that date. The Provider has responded that it has acted on information received from the original loan owner that the loan ran from June 2009 onwards, though has ultimately agreed to amend the end date of the loan account in accordance with the Complainant's wishes. On that basis, there does not appear to be any further dispute between the parties in this regard and, as previously noted, it is not possible for me to make a determination on this issue as it has not been investigated as part of this complaint.

Further, I do not intend to make a determination on the allegations made by the Complainant that the Provider and/or the new loan owner has attempted to trigger an event of default in respect of the Complainant's account as it has not been investigated as part of this complaint. I do not have sufficient information available to make a determination on this issue which was not part of the original complaint made to this office. Therefore, I do not propose to make any further observations other than to note that this is denied by the Provider and there is no evidence that the loan has been demanded by the Provider.

Finally, there is complaint raised about the length of time that it took for the Provider and/or the new loan owner to approve the rental of one of the secured properties on the loan account. Once again, this complaint was not part of the original complaint submitted to this office and has not been investigated as part of this complaint.

/Cont'd...

I therefore do not propose to make further observation on it.

The Complainant is entitled to raise a separate complaint with this Office in respect of any of these issues if it so desires as these matters have not been adjudicated on.

Summary

In light of all of the above, I am of the view that the new loan owner is entitled to determine, and the Provider is entitled to apply, a cost of funds interest rate to the Complainant's account which is at the discretion of the new loan owner and is not tied to the current rate used by the original loan owner. Further, I accept that the current rate of 2.45% - which reflects the rate applicable at the time of the loan transfer rather than a recalibrated rate to take into account the new owner's (higher) cost of funds – is reasonable in its application to the Complainant.

I am satisfied, however, that the Provider has failed to properly administer and manage the Complainant's loan in other respects. First, it charged interest on a monthly and not a quarterly basis for a period of almost 9 months from March 2017, though I appreciate that it has rectified this issue and compensated the Complainant for the additional interest applied to the account as a result of its error. Second, it failed to give the Complainant credit for a payment made by it on 9 March 2017 which resulted in inaccurate and misleading arrears notification emails and letters issuing to the Complainant during 2017 and 2018. Third, the problems caused by the Provider's failure to account for the March 2017 payment was compounded in large part by the Provider's failure to provide clear and comprehensible information to the Complainant's representatives in relation to the account. There was an ongoing and persistent failure by the Provider to furnish regular statements of account to the Complainant which contained the information identified by and required by its representatives to allow it to attempt to reconcile the payments made to the loan accounts with the repayments due, interest billed and stated arrears.

Under Reg 10 of the SME Regs:

“(1) A regulated entity shall ensure that information provided to a borrower is clear and comprehensible and that information of material importance is specifically brought to the attention of the borrower.

(2) A regulated entity shall not present information in a way which disguises, diminishes or obscures information of material importance.”

I am not satisfied that the Provider has complied with these obligations as it failed to respond to multiple requests for statements and in that many of the statements provided did not contain sufficient information. While I acknowledge that the SME Regs oblige a Provider to furnish a statement of accounts “*at least once a year*”, I do not think its obligations are limited to this where specific information is requested from a customer on a more regular basis particularly when the parties are in dispute.

/Cont'd...

In respect of arrears, I acknowledge that the SME Regulations require that contact is made with a borrower that has been in arrears 15 working days after the arrears first arose but in the present case, the arrears notifications were based on inaccurate information held by the Provider who had failed to credit the Complainant's accounts with the March 2017 payment and despite numerous notifications from its representative that the figures were not reconciling.

Further, I am of the view that the Provider has breached a number of provisions of the Consumer Protection Code 2012 in respect of its dealings with the Complainant, as follows:

"4.1 A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.

4.2 A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following:

- a) the urgency of the situation; and*
- b) the time necessary for the consumer to absorb and react to the information provided."*

I am satisfied that due to the persistent breaches of the above regulatory provisions and the ongoing service failings experienced by the Complainant, substantial compensation is merited. While I acknowledge that the Provider has accepted many of its failings, it has also sought to excuse them, by trying to hide behind its obligation to send annual statements of account, for example, and attempting to blame the issue of inaccurate arrears correspondence on an alleged overpayment by the Complainant in March 2017 premised on its alleged failure to pay the precise repayment amount on the 17th day of each month. I am therefore not of the view that the Provider has properly accepted its failures or moved quickly enough to offer compensation.

I acknowledge that the Complainant had little choice but to engage the services of a professional to assist it in reconciling the inconsistent and confusing figures being furnished to it. I accept that it should not have taken a period of approximately two years for the issue in respect of March 2017 payments to be discovered and dealt with. Further, it would seem that despite the Provider's 'best endeavours' to provide regular account statements, its provision of statements has remained ad hoc. Having said that, these failures do not appear to have resulted in any financial loss to the Complainant, other than the professional fees indicated. The Complainant has already been compensated for the overcharging of interest resulting from the monthly rather than quarterly accrual of interest. The Complainant has not been successful in its argument on the inability of the Provider to apply a cost of funds interest rate the figure of 2.45%.

I consider the Provider's offer of €20,175 to be reasonable in all the circumstances. Therefore, 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**

18 August 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.