



<b><u>Decision Ref:</u></b>	2021-0338
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Commercial Mortgage
<b><u>Conduct(s) complained of:</u></b>	Arrears handling - commercial lending
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to a commercial loan. The complaint is made on behalf of a Limited Company (the Complainant Company) by its two Directors.

**The Complainants' Case**

The Directors state that in **October 2018**, they had arranged a loan of €4,000,000 with the Provider. The Directors state that it was their original intention to take a variable rate loan for the full amount. The Directors submit that following discussions with the Provider and the information it provided, they decided to avail of a fixed term loan for €3,500,000 and a variable loan for the remaining €500,000.

The Directors state that on **1 November 2018**, they received a fixed rate confirmation form which they were required to sign immediately so that they could meet their funding deadline schedule. The Directors submit this document referenced that the fixed rate loan facility may include a '*fixed funding break charge*'. The Directors submit that despite reference of this charge within the documentation, the Provider at this stage did not issue any examples of how any such amount would be calculated.

The Directors state that upon learning of potential charges, they contacted the Provider to seek clarification on the terms and conditions. The Directors state that in particular, they sought clarity on the '*funding sum penalties*.' The Directors state that they received a response from the Provider and they contend that its explanation relating to potential charges was '*not explained in a clear, concise and accurate manner*.'

The Directors state that they queried the term '*cost of funds*' as laid out in the Provider's response, and they were advised by the Provider that there were various margins to be considered when calculating this figure. The Directors state that the Provider also stated in an email that '*the funding sum would only become payable when the prevailing rates for the term remaining at that time are below the fixed rate interest.*' The Directors contend that this terminology is confusing because the illustration issued by the Provider by way of an example, refers to the deposit rates, whereas previously held discussions with the Provider led the Directors to believe these were based on changes in the fixed interest rate.

The Directors submit that if they had been aware at the time of application that the funding sum penalty would have been enacted as a result of changes between the fixed term loan rates and the deposit rates, then they would never have agreed to the fixed rate loan element and rather would have taken the total amount out as a variable loan.

The Directors contend that the examples issued with the terms and conditions of the loan were misleading and do not represent a true reflection of the funding sum payable upon an early repayment of a loan. The Directors submit that one of the examples provided shows '*a fixed loan of €1M fixed for three-year period was repaid after 19 months, only incurred a funding sum penalty of €212.47.*' The Directors state that the funding sum fee they were issued was **€66,241.27** and given the disparity between the example provided and their fee, they raised issue with the bank and sought to ascertain the breakdown of the rate used by the Provider for '*R*' and '*R1*' as laid out in the example formula.

The Directors state that they encountered various issues with the Provider when it sought to '*justify a funding charge of €66,241.27.*' The Directors state that the Provider handled this issue in an '*unprofessional manner*' and submit that the Provider initially issued a funding sum based on incorrect figures. The Directors further submit that the Provider was too slow in providing an explanation of how charging rates are calculated and add that this was further frustrated by their numerous requests through email and phone calls that went unanswered.

The Directors state that they had a business opportunity which involved funding from a third party financial provider and this opportunity was reliant on the Provider releasing title deeds. The Directors state that the Provider refused to do so until such time as the funding fee was paid in full. The Directors state that they attempted to negotiate a partial percentage of the fixed sum, as a means of securing the release of the title deeds whilst setting aside the full funding sum until such time as their query was resolved. The Directors state that the Provider refused and consequently they were left no choice but to pay the full figure of **€66,241.27** because a failure to do so would have resulted in them missing out on a lucrative business opportunity.

The Directors state that despite being charged for the full amount for the funding fee, they did not receive details of how this fee was calculated until four days after the amount was debited from their account. The Directors contend that given the value of the repayment, the Provider should have had this information immediately to hand.

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The Complainant Company sets out in submissions its expectations in relation to the Provider's response to its complaint and reference the Provider's final response letter in particular. The Complainant Company states that it would have expected a reply or received contact from an independent party and did not expect the Provider's own investigation to be carried out by a person who was personally involved in some of the conduct complained about namely the *'funding sum calculations and rates used'*.

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

The Provider issued its Final Response Letter on **13 May 2019**. The Provider, referring to the fixed rate loan, states that at no point during the application for the business loan did the Complainant Company indicate the possibility that this loan might have been re-financed during the course of the fixed rate period. The Provider submits that the Complainant Company had advised of a possible capital reduction to the €500,000 and that was the reason that this was left as a variable rate.

The Provider refers to an email dated **1 November 2018** and states this email confirmed that a *'funding sum'* was payable in the event that the loan was cleared or reduced during the fixed term period. The Provider also states that this email references two working examples as detailed in the loan offer letter and, furthermore, that an extract from the original offer letter was attached to the email. The Provider states that this email, as well as the documentation signed on behalf of the Complainant Company, contained the necessary warnings confirming a funding sum would be payable in the event of an early repayment of this loan.

The Provider submits that the cost of funds rate is explained in the Terms & Conditions of the Complainant Company's accepted offer letter. The Provider states:

*'The relevant clause advises that fixed rates are determined by the Bank with reference to (1) Bank Cost of Funds, (2) Liquidity Costs and (3) Lending Margins. Whilst the Cost of Funds rate advised to you did not provide a breakdown of these individual elements, the Terms & Conditions do disclose the different elements which make up the Cost of Funds rate.'*

The Provider states in regard to the Complainant Company's assertion in relation to being advised that the funding sum would be based on the deposit rate, the email, dated **1 November 2018**, provides an example taken from the loan terms and conditions which detail how the funding sum is calculated. The Provider submits that this example shows that *'R1% = the annual percentage rate available to us for an equivalent deposit of an amount equal to A for a period for D'*. The Provider also submits that on this same email this clause is *'clearly'* referenced with an extract taken from the offer letter showing this calculation and this was attached to the email.

The Provider states it was aware that the Directors made several phone calls and emails as a means to ascertain clarity on how the breakdown of charges was calculated and the Provider submits that whilst every effort was made to respond to these queries in a timely manner, there were instances where its response was delayed due to unforeseen circumstances and it acknowledges its shortcomings on this element of the complaint.

The Provider also states that whilst the first calculation of the funding sum confirmed the correct amount, the underlying calculation provided was incorrect. The Provider states that this was as a result of human error and was corrected as soon as it became aware, and the Provider states it advised the Directors accordingly.

### **The Complaints for Adjudication**

The complaint is that the Provider:

Issued unclear and misleading information regarding what rates are required to trigger funding sum penalties and provided examples that did not accurately reflect the full extent of the amount that could be charged upon early repayment of a loan;

Debited **€66,241.27** from the Complainant Company's account without providing the relevant paperwork explaining how this fee was calculated;

Delayed in responding to the Complainant Company's request for an explanation of how the funding fee/sum was calculated;

Did not comply with the Complainant Company's request for the release of title deeds that it held which could have compromised '*...a very profitable business opportunity*';

Issued out a funding sum fee to the Complainant Company using incorrect figures.

The Complainant Company wants the Provider to issue a '*significant reduction in the penalty funding sum charge to a fairer amount*'.

### **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.

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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 8 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.

Following the issue of my Preliminary Decision, the Complainant Company made a further submission under cover of its e-mail to this Office dated 29 July 2021, a copy of which was transmitted to the Provider for its consideration.

The Provider advised this Office under cover of its e-mail to this Office dated 11 August 2021 that it had no further submission to make.

Having considered the Complainant Company's additional submission and all submissions and evidence furnished to this Office by both parties, I set out below my final determination.

The Complainant Company's directors have, as part of their post Preliminary Decision submission, detailed their dissatisfaction that their complaint with the Provider was *"managed by a colleague of the individuals involved in the loan drawdown where we were told any penalty charge related to ECB rates dropping. In our opinion as these people worked in the same branch the chances of them being compromised increases. A bank [of the Provider's] size should have a separate department to handle such complaints so colleagues are not looking into possible errors of other colleagues where work friendships could exist. As a company is investigating themselves it would be interesting to know how many complaints have they found in favour of their customers as a percentage of overall complaints made"*.

In relation to this I note that the Provider had as part of its formal response to this office responded to this matter.

The Provider has detailed that it *"is satisfied that the representative who investigated the Complainant's complaint and issued the Final Response Letter of 13 May 2019 was not involved in the majority of the key conduct that led to the Complainant's complaint"*.

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It is further detailed by the Provider that its *“representative was not involved in the original application and drawdown of the loan, being the time, the Complainant contends that sufficient information on the breakage fee was not furnished to the Complainant by the Provider. Similarly, the representative was not involved in the initial redemption query, and subsequent breakage fee quotation. The representative in question only took a role in the Complainant’s business loan account further to the Complainant’s queries on the calculation of the breakage fee, and assisted in the investigation of and response to those queries”*.

The Provider submits that in consideration of this it *“is satisfied that the specific representative who issued the Final Response Letter of 13 May 2019 was the appropriate person to issue same. The representative was not involved at the inception of the loan, nor managed it actively until such time as the Complainant began querying the breaking fee calculation, which in turn led to the complaint to this office. The representative therefore was not investigating his own actions over the lifetime of the loan, however had an in depth knowledge of the queries and issues surrounding the loan account. This in the Provider’s view meant that the representative who issued the Final Response Letter was the most appropriate person to do so, having sufficient knowledge of the issues, whilst being independent of same”*.

I do not find that the Provider breached its complaint handling obligations imposed by the Consumer Protection Code. Further to this I accept the arguments of the Provider that *“the representative therefore was not investigating his own actions over the lifetime of the loan, however had an in-depth knowledge of the queries and issues surrounding the loan account”* which would be of assistance in addressing the Complainant Company’s complaints.

Prior to considering the substance of the further elements of complaint, it will be useful to set out the relevant terms and conditions of the account.

### **Account Terms and Conditions**

The Provider furnished the Complainant Company with a ‘Letter of Offer’ dated 25 May 2018. This letter was signed on behalf of the Complainant Company on the same date, the terms thereof, as well as those of the enclosures, thereby becoming part of the terms and conditions of the account. The ‘Letter of Offer’ enclosed the account terms and condition, including Section 6 which addressed early repayment in the following terms:

#### **6. Early Repayment (1) Variable Rates**

*Repayments in respect of interest or capital in excess of those stated in this Offer Letter may be made at any time during the term of a variable rate advance, without penalty. Except in the case of an uncancelled overdraft facility any amount repaid will not be available for redrawing.*

#### **(2a) Fixed Rates/ Market Related Rates**

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*Early repayments in minimum amount of EUR10,000 or multiples thereof, are allowed on market related and fixed rate facilities/loans, subject to the provisions under "Funding Sum" clause below, and to the Borrower providing 3 Business days prior notice, in writing, to the Bank. Any such notice shall be irrevocable and shall oblige the Borrower to repay the amount, on the date specified.*

*Early repayments will be applied in inverse order of maturity and amounts repaid will not be available for redrawing.*

### **(2b) Funding Sum**

*There will be a funding sum payment by the borrower in the events of:*

- *early repayment in full (whether on a Bank demand or otherwise)*
- *partial early repayment(s)*
- *conversion to a variable interest rate*
- *conversion to another fixed interest rate, within the initial fixed rate period or any further fixed rate period*
- *failure to drawdown a facility for which the rate has been booked with the Bank in advance*

*The funding sum will be the amount calculated by the Bank of all losses, costs and expenses arising from such events. A certificate of an officer of the Bank as to the amount of the funding sum shall be conclusive in the absence of manifest error.*

*The funding sum will be equal to C where:*

$$C = \frac{A \times D \times (R\% - R1\%)}{365}$$

*A = the amount repaid early (or the amount which is changed from the fixed rate to a new rate) averaged from the date of early repayment (or rate change) to the end of the fixed rate period to allow for scheduled repayments (if there are any) and interest charges.*

*R%= The annual percentage interest rate which was the cost to us of hedging an amount equal to A for the originally intended fixed-rate period.*

*R1%= The annual percentage interest rate available to us for an equivalent deposit of an amount equal to A for a period equal to D.*

*D= the number of days from the date of early repayment (or rate change) to the end of the fixed period.*

There followed two sample calculations in respect of early repayment of circa €705k and €100k in relation to which the respective 'funding sums' were calculated to be €1,498.28 and €212.47.

### **Analysis**

The Complainant Company takes issue with the manner in which the break fee, otherwise described as the 'funding sum', was calculated and the manner in which it was communicated/explained to it when queries were raised. The Complainant Company highlights a number of communications on 01 November 2018 in this regard as well as a two-month period prior to the Provider's provision of the final break fee calculation.

The mechanism for calculating the 'funding sum' is set out in the terms and conditions of the account as contained in the Letter of Offer dated 25 May 2018. This letter was signed on behalf of the Complainant Company and indeed it is apparent, from a review of later communications, that the Complainant Company was aware that a break fee of some description would apply in the event that early repayment was made in respect of any fixed rate period.

These later communications relate to 01 November 2018. On the morning of this date, the Provider emailed the Complainant Company the documents that would require to be executed in order to fix the interest rate on €3.5M of the €4M loan for a five-year period. This had been requested by the Complainant Company which viewed this as a commercially prudent course of action. It is common case that a phone call was made on behalf of the Complainant Company following receipt of this email in the course of which a number of matters were discussed including the break fee or 'funding sum' that might apply in the event that it was sought to repay the loan early.

In response, the Provider stated as follows in an email on the afternoon of 01 November 2018:

*On a fixed rate loan, if the loan is cleared or a lump sum made during the term there is a "Funding Sum" payable. This only applies when the prevailing rates for the term remaining at that time are below the fixed rate interest amount. There are 2 worked examples in your offer letter in Section 6(2B) showing how this is worked out in the case of rates moving lower. I attach a copy of this page for convenience.*

A short time following the sending of this email, completed forms were returned on behalf of the Complainant Company.



The Complainant Company states that the documentation furnished in the first email of 01 November 2018 *“mentioned this facility may include a fixed funding break charge but provided no examples of how this amount would be calculated”*. In the first instance, it is apparent that, even if the first email of 01 November 2018 did not include the ‘examples’ referenced by the Complainant Company, the second email sent less than two hours later did include examples in the attachment to the email. In addition, the Complainant Company had been notified of the break fee calculation formula, together with the two calculation examples, several months earlier in May 2018.

The Complainant Company states, with regard to the second email of 01 November 2018 (the relevant passage of which is quoted above) *“the description used for costs of funds and margins are not explained in a clear, concise and accurate manner”*. It is apparent however that the email attached a scan of the relevant page of the terms and conditions of the account which explained precisely the manner in which the break fee was calculated. Insofar as the Complainant Company is stated not to have been aware of the fact that the break fee would be calculated by reference to *“changes between the fixed term loan rates and the deposit rates”*, this is plainly provided for in the formula stipulated by the Provider.

Therefore, I accept, by reference to the documentation furnished to it, that the Complainant Company was adequately notified about the existence of the ‘funding sum’ penalty and the manner in which it would be calculated. I might also note that the Complainant Company is a commercial enterprise which was engaging in commercial activity with the benefit of a *“financial advisor”* as set out in the Complainant Company’s Summary document dated 24 May 2019. I also note that the signed letter of offer confirmed that the Complainant Company was not relying on any advice from the Provider, that *“independent investigation and appraisal”* had been made, and that the Provider had recommended the seeking of independent legal and financial advice. In these circumstances, it is difficult to accept the suggestion that the Complainant Company was ambushed by the ‘funding sum’.

The Complainant Company also takes issue with the manner in which the Provider addressed its queries. The Complainant Company highlights the fact that the Provider furnished an incorrect calculation (albeit setting out the correct final figure) and it also criticises *“the whole timeframe it has taken to received (sic) explanations and rate calculations back from”* the Provider. With regard to the latter, it is apparent that the Complainant Company sought repeated and regular updates as to the precise break fee on different days. This is entirely unsurprising given that the Complainant Company was evidently anxious to reduce the costs to which it would be exposed and given that both variations to interest rates and the effluxion of time would impact the break fee on any given day. It is evident that the Provider was entirely prompt in providing updated figures between 25 March 2019 and 07 May 2019. During this period, the Complainant Company sought an updated break fee on 10 separate occasions and on each of those occasions, the updated figure was provided on the same day.

Separately, the Complainant Company raised a number of queries regarding the precise manner in which the figure was calculated. These queries, and the responses provided, are detailed in email exchanges dating from March and April 2019. On 12 March 2019, the Complainant Company requested a breakdown of the break fee calculation.

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This was provided on 19 March 2019. A query was raised on this calculation on 22 March 2019 and a response was provided on 01 April 2019. The Complainant Company raised a further query later that day to which the Provider responded on 02 April 2019. The Complainant Company's advisor then sought a breakdown of certain components of the calculation on 03 April 2019. Further queries were raised on 04 April 2019 and a reminder was sent on 08 April 2019. A substantive response was then furnished by the Provider the same day. There followed five emails between the parties on 09 April 2019 and a further email from the Provider on 11 April 2019 wherein an apology was offered for being unavailable for the previous "*couple of days*". On the following day, 12 April 2019, the Complainant Company responded indicating that it wished to lodge a formal complaint.

Before addressing the timeframe within which the complaint was addressed, I consider the timeframe evidenced above within which the Provider addressed the Complainant Company's queries to be reasonable. The single largest period taken to respond substantively to a request was the delay between the query raised on 22 March 2019 and the response provided on 01 April 2019.

This amounted to a period of six working days, and I am not satisfied that the Complainant Company has substantiated any unreasonable delay in this regard notwithstanding the imperatives of commercial transactions.

I might note that the earliest reference that I can find to the closing of the transaction with the third party is contained in an email of 01 April 2019; the transaction ultimately closed in May 2019. Subsequent to 01 April 2019, the longest delay in responding was three working day which again I consider to be reasonable.

Once the formal complaint was made on 12 April 2019, the Provider issued an update two weeks later before providing a Final Response Letter on 13 May 2019. I am satisfied that this constituted a reasonable and indeed prompt timeframe within which to address a formal complaint.

With regard to the acknowledged error made by the Provider in furnishing an incorrect calculation to the Complainant Company, whilst this was clearly regrettable, it is important to point out that while the underlying calculation furnished was incorrect, the actual breakage fee quoted was correct. In its final response letter, the Provider acknowledged this error and apologised for it. The Provider noted that the error was corrected "*as soon as possible*" and that the Complainant Company was advised of this "*at the earliest possible opportunity*". I view this to have been a proper and satisfactory response.

Finally, with regard to the Complainant Company's contention that the Provider delayed in the release of the title deeds to the secured property, the Provider has clarified that the deeds were in fact released very early in the process in March 2019.

The Provider's insistence on full repayment of the loan prior to issuing a 'Deed of Final Release' is normal and not unreasonable. Equally, I am satisfied that in furnishing final figures to the Complainant Company within three working days of redemption, the Provider acted reasonably promptly.

The Complainant Company's directors have, as part of their post Preliminary Decision submission, detailed that *"If you look at the examples given and sorry to repeat myself we were told the funding penalty would only apply if ECB rates dropped directly by a bank official but if we are saying this example was to be relied upon. As a customer not only can we not see the rates of R or R1 as mentioned above, the R (cost of hedging which includes a margin) is -0.05% in both examples. In our calculation its 0.41% so the difference of 0.46% which is huge. We have no way to confirm any of these rates are correct?. I don't mean to be rude but banks in the past have made errors that resulted in overcharging and it's not beyond possibility that this happened here"*.

The submission continues and it is stated that *"If we look at the first example provided a company borrow €1M and paid back after 19 months the funding penalty was **€1,498.28**. If we inserted our numbers into this and R% and R1% were as per the example we would have expected of penalty of **€16,881.36** our funding sum penalty was **over €66K** almost four times more".* The Complainant Company's directors then states that they *"can't see how a customer or a financial advisor has the capacity to fully understand this complex transaction. Does the financial regulator check the rates being charge [sic] to customers in this situation to ensure everything is being done correctly? We also feel an example should be relevant to the real world and in our case it was not. Personally I think an example should show a worse case scenarios [sic] like in some home loans state "if you don't keep up your repayments you could lose your home' etc not a token example that uses rates that are no longer relevant. How is this not misleading added to the fact we were incorrectly told it would be based if ECB rates dropped?"*.

While I note the post Preliminary Decision submission of the Complainant Company, it remains that the Complainant Company had the ability to avail of legal and or financial advice prior it agreeing to the loan terms if it had difficulties in understanding the calculations or potential implications. I note that the Offer Letter of 25 May 2018 stated the following under the heading *"Independent Review and Customer Declaration"*:

*"By agreeing to the terms of this Offer Letter you signify that you have made your own independent investigation and appraisal of the benefits and obligations of receiving monies pursuant to this Offer Letter and are not relying on advice or recommendations of the Bank. If the Borrower is an individual he/she confirms that they are entering into this Offer Letter for business reasons and therefore they are not a Consumer within the meaning of the Consumer Credit Act 1995"*.

Further to the above, I am cognisant that under the heading “*Form of Acceptance*”, the following is stated in the Offer Letter:

*“I/We understand that it is in my/our interest to seek independent legal and financial advice and that the Bank recommends that I/we should do this prior to signing and returning this Offer Letter to the Bank”.*

For the reasons set out in this Decision, I do not uphold this complaint.

### **Conclusion**

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

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

28 September 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.**