



<b><u>Decision Ref:</u></b>	2021-0429
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to release security Delayed or inadequate communication Dissatisfaction with customer service
<b><u>Outcome:</u></b>	Partially upheld

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

This complaint concerns the Complainant's requests to the Provider to release charges held on three of his properties, the associated mortgage loans having been redeemed in **September 2018**.

#### **The Complainant's Case**

The Complainant contends that mortgage loans held with the Provider, and secured by three properties (hereinafter referred to as 'Properties 1-3'), were "*fully paid off*" on **20 September 2018**. He states that his solicitor contacted the Provider and "*requested the release of the charges*" that same day.

The Complainant submits that he contacted his Provider Relationship Manager in **October** and **November 2018** in this regard, but did not receive a response. He further submits that he emailed his Relationship Manager twice in **December 2018**, and again received no response.

The Complainant says that he received a letter from the Provider's solicitor on **19 December 2018**, stating that the requested charges would not be released until the liabilities relating to loans on another property (Property 4) were discharged. The Complainant states that Property 4 is jointly owned by him, along with two others, and that he holds a 25% share. He further states that no other properties were "*pledged as security*" for the loans relating to Property 4. The Complainant contends that "*these loans are performing as agreed....and there are no arrears on either loan*".

The Complainant submits that he has complained to the Provider about its refusal to release charges held on Properties 1-3, but that *“to date the matter has not been resolved”*. The Complainant contends that he has suffered financial loss due to the Provider’s *“obstructive actions, which have resulted in me not being able to use my properties as security to raise finance on the purchase of other investment properties”*.

The Complainant wants the Provider to release the charges it holds on Properties 1-3 and to pay him compensation in the amount of *“€175,200”*. The Complainant’s calculations of this amount are included in the submissions.

### **The Provider’s Case**

The Provider, in its Final Response Letter dated **4 July 2019**, states:

*“In accordance with the terms of the mortgage on the above properties [the Provider] continues to rely on these securities for outstanding liabilities. Unfortunately, until such time all liabilities outstanding to [the Provider] have been discharged, these securities cannot be released”*.

In its response to this Office, the Provider concedes that *“there have been occasions when its communication with the Complainant could have been clearer and more timely”*.

In recognition of this and taking into account *“the length of time that this matter has been outstanding for the Complainant, and the delays in getting the completed submission back to the FSPO”* the Provider offered the amount of **€6,500** as a *“gesture of goodwill”*. This offer was subsequently increased to **€7,750**.

### **The Complaint for Adjudication**

The complaint is that the Provider is wrongfully refusing to release charges it holds on three of the Complainant’s properties, and that it has proffered poor customer service throughout.

### **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 **27 October 2021**, outlining the preliminary determination of this office 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 substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant purchased properties 1-3 in the mid to late 1990s with the benefit of mortgage loans from the Provider. The Provider has furnished the Indenture of Mortgage in respect of each property and each of the said Indentures, which the Provider describes as "*all sums mortgages*". include the following at Clause 3.01:

*The Mortgagor hereby covenants with the Bank on demand to pay to the Bank all monies and discharge all obligations and liabilities whether actual or contingent now or hereafter due owing or incurred to the Bank by the Mortgagor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (and whether alone or jointly and in whatever style name or form and whether as principal or surety) when the same are due...*

I note that separately, in 2000, the Complainant along with two other individuals who are not party to this complaint, purchased property 4 with the benefit of two mortgages from the Provider. The Indenture of Mortgage relating to this property also includes a Clause 3.01, in identical terms to those set out above. The Complainant states that the two loans relating to property 4 are "*performing as agreed*" with "*no arrears on either loan*".

On **20 September 2018**, the Complainant redeemed the mortgages associated with properties 1-3 and requested the release of the Provider's charges over the said properties. Following a significant delay and multiple unanswered contacts, the Provider's solicitor wrote to the Complainant on **19 December 2018** stating as follows:

*We confirm that in accordance with the terms of these mortgages the Bank continues to rely on these mortgages as security for your liabilities outstanding to [the Provider].*

*In those circumstances, the Bank is not in a position to release these mortgages until such time as all liabilities outstanding to [the Provider] have been discharged.*

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The letter went on to request proposals for the discharge of the balances owing on the mortgage accounts associated with property 4. The Complainant spoke with the Provider's solicitor on **05 January 2019**, and was advised that the Provider's solicitors would henceforth be the Complainant's point of contact with the Provider.

I have viewed the Final Response Letter issued by the Provider on 04 July 2019 which puts the matter no further than the letter of 19 December 2018, stating that "*until such time all liabilities outstanding to the Provider have been discharged, these securities cannot be released*". I note that neither the letter of **19 December 2018** nor the letter of **04 July 2019** identified the precise term of the mortgage relied upon, by the Provider.

I note that it was in its response to this Office dated **10 August 2020**, that the Provider expressly invoked Clause 3.01 for the first time. This submission refers (also for the first time) to a 2018 Court of Appeal decision in the case of *AIB Mortgage Bank v O'Toole & O'Toole [2018] IECA 6*. The Provider submits that this decision is authority for the proposition that an 'all sums' clause is akin to a cross-securitisation provision, such that it is entitled to retain its security over properties 1-3, pending the repayment of the loan associated with property 4.

In the same letter of 10 August 2020, the Provider acknowledged that "*there have been occasions when its communication with the Complainant could have been clearer and more timely*". In recognition of this and taking into account "*the length of time that this matter has been outstanding for the Complainant, and the delays in getting the completed submission back to the FSPO*" the Provider offered the amount of €6,500 as a "*gesture of goodwill*". This offer was subsequently increased to €7,750 in a further submission to this office furnished on 02 October 2020.

In a further additional submission furnished on 19 October 2020, the Provider set out the following rationale for seeking 'all sums' security:

*The purpose of the all sums clause is to ensure that any property secured to the lender is available to meet the liabilities of the borrower irrespective of whether it was specifically provided as security for that lending.*

I have reviewed the decision in *AIB Mortgage Bank v O'Toole & O'Toole* in detail and whereas there is one significant difference between the respective factual matrices (because in *O'Toole* there was an event of default in respect of the unredeemed account) it seems to me that the gravamen of the court decision is that a lender is entitled to retain and enforce security held by it under an 'all sums' clause even where the secured property is not expressly cited in the mortgage documentation relating to the outstanding liability. The absence of an event of default, it seems to me, cannot in principle overturn this logic. The particular 'all sums' clause in question in the *O'Toole* case was identical to that under consideration here and, in analysing that clause, the Court of Appeal in *O'Toole* stated as follows:

*Is the language sufficiently clear and unequivocal such that the terms of the instruments as comprise the first loan are such that the second loan is effectively cross secured by the separate 'all sums due' provisions contained in each of the said mortgages? In my view the answer is demonstrably yes.*

It therefore seems to me that the Provider is legally entitled to refuse to release its security relating to properties 1-3.

The manner in which the Provider has addressed this issue has however, in my opinion, been notably deficient. In the first place, at the time when the Complainant was seeking redemption figures, I note that no indication was given to him that the Provider proposed to retain the security over properties 1-3 pending “proposals” regarding property 4. This may have prejudiced the Complainant who might not otherwise have redeemed the loans.

The Complainant explains that as a result of the position of the Provider, this has resulted in him not being able to use the properties in question as security to raise finance on the purchase of other investment properties. In addition, the Complainant says that he has incurred legal costs because the Provider chose to nominate a solicitors’ firm to communicate with him and he therefore had to engage a solicitor on an ongoing basis regarding this matter. It is particularly disappointing in those circumstances that having engaged the services of a solicitor to issue communications on its behalf, the Provider’s agent failed to specifically address the reason why the Provider was entitled to rely upon the “all sums” clause within the security documentation.

Although the loans associated with property 4 are apparently performing and the property itself apparently outvalues the extent of the liability. Nevertheless, that position could change at any point. The Provider is entitled, in its commercial discretion, to continue to hold the relevant security it has in place.

I note that there was initially a three-month delay in providing any response whatsoever to the Complainant’s request for the release of the security. The response that finally ensued was terse and devoid of anything approaching adequate detail. In particular, there was an inexplicable failure to refer to Clause 3.01 subsequently invoked by the Provider. There was also no mention of the Court of Appeal case.

A Final Response Letter took a further seven months to issue and, in my opinion, added nothing of substance. There was then a further two-month delay in providing a response to this Office when a reasoned position was finally advanced together with, for the first time, an acknowledgement of deficiencies in communication and response times.

I note that in maintaining this complaint the Complainant indicated in June 2019 that he sought a payment of €175,200 by way of compensation and loss of earnings in relation to this issue.

The Complainant calculated his losses in that regard as follows:

*“Current Market Value of the three subject properties: €1.6m  
Allowing 60% LTV on the value of the subject properties: €960k  
New Investment Property +3x subject properties  
(allowing for 60% LTV): €3.04m  
New Investment Property Value: €1.44m  
8% Yield on new investment property: €115,200 / annum  
Legal expenses : €10,000  
Compensation for stress, time and effort in trying to resolve this issue : €50,000  
Total: €175,200”*

The Provider has offered €7,750 by way of compensation as a “gesture of goodwill”, having explained in its response to this investigation that it acknowledged that its communications to the Complainant could have been clearer and more timely and it was conscious of the delays in responding to this Office. It sought to redress the inconvenience or upset that was thereby caused.

Having considered the matter at some length, I do not consider this compensatory proposal of €7,750 to be adequate in the circumstances. Quite apart from the fact that the Complainant was originally deprived of being placed in a more informed position, in order to decide whether he wished to redeem the loans in the circumstances, in addition, from the time he sought the release of the security on those 3 investment properties, it took almost 2 years (22.5 months) for a substantive reasoned response to issue from the Provider explaining why it did not consider it appropriate to release the security.

In my opinion, this delay was well beyond appropriate, in failing to offer an explanation when it was sought. I also take the view that this was unreasonable and unjust conduct on the part of the Provider, within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**. Accordingly, I consider it appropriate to partially uphold this complaint.

I am not however satisfied to accept the Complainant’s calculations of his losses. The Provider had a firm legal entitlement to refuse to release the security in question and it will be a matter now for the Complainant to make his decisions on the basis of that legal position. Nevertheless, in order to conclude this matter, I consider it appropriate to direct the payment of a compensatory amount by the Provider to the Complainant, uplifted from the figure of €7,750 which has been offered by the Provider, as specified below.

### **Conclusion**

- My Decision is that this complaint is partially upheld, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, on the grounds prescribed in **Section 60(2)(b)** and **(f)**.

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- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of **€10,000** to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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.



MARYROSE MCGOVERN  
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

18 November 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.