



<u>Decision Ref:</u>	2022-0027
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling - Mortgage Arrears Resolution Process Disputed transactions Errors in calculations Fees & charges applied (mortgage) Maladministration (mortgage)
<u>Outcome:</u>	Partially upheld

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

This complaint relates to a mortgage loan account and the Bank's asserted maladministration, overcharging and poor arrears handling.

The Complainant's Case

The Complainants took out a mortgage loan with the Provider in the amount of €186,500 on 5 July 2006.

The Complainants state that when they entered into the mortgage contract, it provided that monthly repayments would be €1,121.81. The Complainants assert that on 18 June 2018, the Provider completed and returned an account information form, which advised that monthly repayments were €1,812.42. It is submitted that when the mortgage was drawn down in 2006 the interest rate was 3.70% and when the account information form was completed in June 2018, the interest rate was 2.70%. The Complainants submit that the monthly repayments increased by €691.24, notwithstanding the fact that the interest rate had fallen.

MABS, on behalf of the First Complainant, queried this in August 2018 and the Provider responded on 20 September 2018 advising that the monthly repayments had been increased to ensure that the balance on the mortgage was cleared within the remaining contractual term, given there had been periods of underpayment. The Complainants assert that there is no provision in the mortgage contract permitting the lender to unilaterally increase monthly repayments to take account of missed payments and that it is contrary to contract law that a contract would be altered unilaterally, without the consent of both parties.

It is also submitted by the Complainants that section 42 of the Central Bank Code of Conduct on Mortgage Arrears (CCMA) provides that prior to applying any long-term solution to a mortgage account, the lender must write to the borrower, setting out in detail the proposed arrangement, and advising them to take the appropriate legal or financial advice.

The Complainants also assert that unauthorised mortgage charges were made to the account and demands for payment of a monthly sum were made which the Complainants believed the Provider had no authority to demand.

The Provider's Case

The Provider rejects any wrongdoing and states that the calculated repayment amounts as of May 2016 are correct. The Provider also asserts that the arrears figure on the mortgage is correct and that there has been no miscalculation affecting the Complainants' account and mortgage balance. The Provider also rejects that it put in place a long-term arrangement without consulting the Complainants and it states that a Standard Financial Statement was completed and was assessed by the Provider in September 2015 but that the Provider was unable to offer an alternative repayment arrangement and therefore, the Provider states that it did not put in place an alternative repayment arrangement with the Complainants at any time. The Provider also states that the Complainants remains outside the protection of the mortgage arrears resolution process (MARP).

The Complaint for Adjudication

The complaint is that:

1. That the Provider made unilateral and unauthorised changes to the terms of the mortgage contract.

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2. That the Provider has capitalised the arrears on the account and that the account is showing arrears of over €30,000 currently outstanding on this account, the Complainants believe the arrears and the account should have been reset to zero as a result of the capitalisation.
3. That the Provider has miscalculated the arrears because the Provider based this on a monthly repayment sum which the Provider had no authority to demand.

Decision

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

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

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

A Preliminary Decision was issued to the parties 2 December 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 Provider made a submission under cover of its letter to this office dated 22 December 2021, a copy of which was transmitted to the Complainants for their consideration.

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The Complainants have not made any further submission.

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

A copy of the loan offer has been provided to this office. It sets out, among other things, that the loan offer was made on 5 July 2006 and provides for an amount of credit advanced of €168,500 over 20 years. It provided for interest only payments for the first 6 months and thereafter capital and interest for the balance of the instalments. The APR was stated to be 3.70%. The terms of the loan have also been provided. Among other things, it provided as follows:

6.2 annuity loans

(a) If the loan is scheduled to be repaid on an annuity/repayment basis, we will calculate suitable monthly repayments designed to repay the loan by the end of the term of the loan.

(b) These monthly repayments will, with your interest payments, be collected by direct debit from your bank account.

11. The payment rates in this housing loan may be adjusted by the lender from time to time. (Does not apply while the loan is at fixed rate).

What happened thereafter was on about 16 May 2007, the Complainants took out a further loan of €60,000 to be repaid over a 19 year period on a capital and interest basis.

The documents furnished also evidence consistent correspondence issued from the Provider to the Complainants through 2015, 2016, 2017 and 2018 setting out the increasing arrears as a result of missed monthly mortgage repayments.

On 23 June 2015, MABS wrote to the Provider on behalf of the First Complainant advising, among other things, that she had separated from the Second Complainant requesting that any recovery actions be frozen and that the First Complainant wished to be treated as a single borrower. In response, by letter dated 25 June 2015, the Provider wrote to MABS enclosing a completed account details forms and also enclosing a copy of the MARP booklet and a Standard Financial Statement. The Provider requested that the Standard Financial Statement together with the repayment proposals be returned to the Provider.

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MABS furnished a completed Standard Financial Statement to the Provider on 16 July 2015 and stated that the First Complainant wished to apply for forbearance under the provisions of the CCMA. MABS stated that their review indicated that the First Complainant requested a forbearance arrangement based around the sum of €678 per month.

On 20 October 2015, the Provider wrote to the First Complainant stating that it had completed the assessment of her case and was unable to offer her an alternative repayment arrangement or restructuring of the mortgage. This was said to be as a result of a review and assessment of her circumstances which indicated that her circumstances would not improve in the short to medium-term and that entering into any arrangement that would see her arrears situation deteriorate each month would not be appropriate. The letter went on to state that in accordance with the CCMA, the Complainant was being informed that she was outside of MARP.

On 29 August 2016, the Provider wrote to the Second Complainant enclosing a Standard Financial Statement and asking him to complete it and return it before 12 September 2016. It would appear that he has not engaged with the Provider in this process based on the papers furnished.

The Complainants have queried why their monthly repayments increased notwithstanding the fact that at time of drawdown the monthly repayments were approximately €691.24 less and the interest rate at that time was higher.

The Provider explains that since the Complainants drew down the loan in 2006, they added a further €60,000 to the loan and, they fell into arrears. The Provider explains that while the interest rate reduced, the monthly repayment required to clear the outstanding mortgage liability in full within the remaining term was calculated in May 2016 at €1,812.42. The Provider states that this is in line with the terms and conditions of the mortgage and that as there has been no further interest rate change in the interim, this amount remained unchanged. The Provider makes the point that in May 2016, the account balance, the term remaining on the loan and the interest rate differed to those that prevailed in the original loan offer.

A copy of the statement and transaction history for the mortgage account has also been furnished dating from August 2006 up to 31 December 2019. In addition, a mortgage arrears statement for the period to August 2006 to 31 March 2020 has been furnished and that demonstrates arrears beginning to accrue in around November 2008 which then appear to have been cleared in November 2010 and arrears then began to accrue again from June 2011 onwards where the increase in arrears starts to steadily climb. The arrears balance as of 11 November 2019 was stated to be €43,709.64.

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In relation to the first and second aspect of the complaint, namely that unilateral and unauthorised changes were made to the Complainants contractual monthly payment and that the arrears were capitalised on the mortgage, I do not propose to uphold these complaints. This is because the terms and conditions of the mortgage clearly provide that the Provider will calculate suitable monthly repayments designed to repay the loan by the end of the term of the loan.

The terms and conditions of the mortgage state that the contractual monthly payments will change based on, among other things, the prevailing interest rate at the time, the outstanding balance of the mortgage and the appropriate monthly repayment based on that in order to bring the term of the loan to an end on the date scheduled in the mortgage agreement. There were no unauthorised or unilateral changes of the contract as asserted. It follows from this finding that there is also insufficient evidence to support the assertion that the arrears were capitalised as asserted. The arrears on the mortgage are clear from the statements and it is also clear from the documentation that the Provider was writing to both Complainants setting out the arrears. The increased monthly payments reflected both the shorter term left on the mortgage, the extra €60,000 that had been borrowed since inception and it included the arrears as they existed at the time.

Clearly, the arrears and the additional credit of €60,000 would not have been factored in at the inception of the loan. There is no basis therefore to assert that the arrears balance should be set to zero because the Complainants remained in arrears during the material times and the reasoning and logic behind the increased monthly repayments was to ensure that the loan term came to an end at the date specified in the mortgage account.

What the Provider has stated and explained is that its methodology previously used to recalculate the Complainants monthly repayments included the accumulated arrears on the mortgage account up to the date of recalculation and that this was done to ensure that the Complainants would clear their mortgage within the remaining term of the loan. I accept that this is in line with the terms and conditions of the loan agreement which have been quoted above.

The Provider explains that in November 2017, it revised its methodology in calculating the monthly repayments. It explained that the revised calculation methodology with effect from 1 November 2017 ensures that arrears figures remain independent of the monthly repayments should they be recalculated in the future, for example if the interest rate changes.

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It asserted that this methodology was brought in to provide greater transparency and clarity for customers in relation to monthly repayments and their arrears and that the Provider advised the Central Bank prior to making the change and shared the proposed customer communications with the Central Bank. The Provider states that it sent a letter to the Complainants outlining the change on 6 November 2017.

The account notes and diaries provided show an entry on 2 November 2017 which states "arrears adjusted due to change in CMS recalculation methodology".

A copy of the letter dated 6 November 2017 addressed to the Complainants has been furnished and it demonstrates that the Provider wrote to the Complainant to inform them of a change "in the level of arrears on your mortgage account." The letter states:

"While the arrears figure on your account has been recalculated, your overall level of indebtedness and monthly repayment figure (Contractual Monthly Subscription/CMS) remain unaffected. Your mortgage balance is €202,485.16 as at 6 November 2017.

The methodology we previously used to recalculate your CMS included the accumulated arrears on your mortgage account up to the date of recalculation to ensure that you would clear your mortgage within the remaining term.

We have adopted a revised calculation method with effect from 1 November 2017 which will ensure your arrears figure remains independent of your CMS should it be recalculated in the future, for example if your interest rate changes.

As part of this process, we have also recalculated your arrears figure. The recalculated arrears figure now compromises the shortfall, if any, between; (i) your total monthly repayments due since your CMS was last calculated and (ii) the payments actually made by you since your CMS was last calculated.

We apologise for any confusion which this change in methodology may cause, however, we believe the revised methodology will provide greater clarity to our customers. We reiterate that your overall mortgage balance and your current CMS remain unaffected. We confirm that if you have entered into any temporary arrangements with us, these arrangements remain unaltered, continue to apply and you are fully entitled to rely on them.

Your recalculated arrears figure will be reflected in our credit reporting to the Central credit register (CCO) and the Irish credit bureau (ICB)".

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In relation to the third ground of complaint, namely that the arrears were miscalculated because the monthly repayments sums were demanded without authority, and this was as a consequence of the Provider miscalculating the arrears. It was asserted that the Provider miscalculated the arrears because it calculated the shortfall between the actual repayments made and the increased monthly repayments whereas according to the Complainants, what the Provider should have been doing was calculating the shortfall between the actual repayments made and the repayments specified in the mortgage contract. This proposition ignores the additional €60,000 credit that was applied to the account in 2007 and it also disregards the entitlement of the Provider to adjust the monthly repayments amounts to reflect the outstanding balance, the prevailing interest rate and the time left on the term of the loan in order to ensure that the term of the loan concludes at the specified contractual date.

In relation to the arrears, as there is no mandated method by which arrears are to be calculated, and there is no evidence of miscalculation of the arrears prior to and subsequent to the change in methodology in November 2017.

I am concerned about the manner in which the Provider has explained the new methodology to the Complainants. In its letter of 6 November 2017, it explains that it was adopting a new methodology which impacted the arrears balance but did not affect the monthly repayments due or the overall mortgage account balance.

It explained in general terms that this was to keep the question of the calculation of the monthly repayments due separate from the arrears balance. The Provider went on to explain how customer arrears were to be calculated from November 2017. This explanation was comparatively clear. The difficulty is that the Provider did not take this opportunity to explain how the arrears balance had been calculated prior to November 2017. In the absence of such information or explanation on the previous methodology, it is difficult to see how the Provider could have expected the Complainants to understand the difference between the old arrears balances and the new. Without an ability to compare the two methodologies in order to understand how such a significant reduction could occur, it is readily apparent to me how the Complainants could be confused by the methodology.

In addition to my concerns that the Provider has failed to provide an adequate explanation to the Complainants in respect of the change in methodology for the calculation of arrears, I have a broader concern in respect of the issue. The issue remains as to why the methodology change was implemented and whether there are any cost implications for the Complainants.

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It remains unclear to me why arrears can simply disappear as suggested in the letter of 6 November 2017, but these are not matters which this office can resolve, accordingly, I am referring my Legally Binding Decision to the Central Bank of Ireland so that can it take any action it may deem necessary in relation to the matter.

In all of the circumstances, I am of the view that the Provider did not properly or adequately explain how its change of calculation methodology in November 2017 resulted in a decrease in the Complainants' arrears balance of more than €50,000. In those circumstances, I partially uphold the complaint on the basis that an explanation for the Provider's conduct was not given by the Provider when it should have been given.

The Provider has, in its post Preliminary Decision submission, stated that I have fallen into error in drawing the above conclusion. The Provider reiterates that it:

"believes that it has appropriately notified the Complainants of the change in approach and has always sought to explain the changes in plain English. In communications with the Complainant subsequent to the 6 November 2017 Letter, the Provider sought to provide a clear and consistent explanation using language that had been provided to the Central Bank of Ireland in advance of the issuance of the initial letter to the Complainant".

At a later point in the Provider's post Preliminary Decision submission, it is detailed that the:

"approach was taken in subsequent communications with the Complainant, where in explaining what happened to the Complainant, the Provider sought to provide a clear and consistent message in using language that had been shared with the Central Bank of Ireland and that sought to explain matters in as simple and as clear a way as possible. Notwithstanding this, the Provider would contend anyway that where a new methodology is being adopted that the primary focus should be on explaining same – in that regard the Provider notes that the Ombudsman accepts "...this explanation was comparatively clear".

In communicating with borrowers as outlined above, the Provider contends that the Ombudsman made an error of fact in reaching the conclusion that the Provider "did not take the opportunity to explain how the arrears balance had been calculated prior to November 2017."

It should be noted that I am unaware of the full circumstances surrounding or the precise detail of the Provider's interaction with the Central Bank in this regard. The Provider has opted not to submit evidence of these interactions in its response to this complaint. The Provider is entitled to do so but it cannot, however, seek to rely on such interactions having chosen not to submit them into evidence during the investigation of this complaint.

Further to the above, I remain unaware whether the change in methodology was directed by the Central Bank due to concerns it held in respect of the previous methodology, or if the change was precipitated by the Provider. As the Provider has opted not to submit evidence of these interactions, I can only take into account evidence made available to me as part of this investigation.

I would also highlight to the parties that this Office is independent of the Central Bank of Ireland and the remit of this Office is different to that of the Central Bank. The fact that a particular approach was notified to the Central Bank does not limit the jurisdiction of this Office or prevent me from forming my own view on the Provider's conduct when adjudicating an individual consumer's complaint pursuant to the ***Financial Services and Pensions Ombudsman Act 2017***. As a result, I do not accept that I have fallen into error in reaching the conclusion that I have.

I further note that in the course of its post Preliminary Decision submission, the Provider highlights a previous decision of this Office in which it was noted that the Provider had set out the recalculation of arrears in "*clear terms*" in the letter of 6 November 2017. While I accept this, it should first be noted that the details of that complaint were different and indeed the complaint for adjudication was different. Therefore, there was little emphasis on the letter of 6 November in that context. Secondly, I am bound to consider each complaint on its own individual merits. I do not consider that I am bound by previous decisions simply because there is a similarity in the matters to be adjudicated.

While this Office strives for consistency in its approach to complaints, each individual complaint requires and merits individual consideration. Based on the submissions made by both parties in the course of this complaint, I am of the view that the Provider did not properly or adequately explain how its change of calculation methodology in November 2017 resulted in a decrease in the Complainants' arrears balance of more than €50,000.

The final aspect of the complaint is the assertion that the Provider put in place a repayment arrangement or a long-term arrangement without consultation with the Complainant. There is no evidence to suggest that this took place. In fact, what is outlined above is that the First

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Complainant applied for a repayment arrangement and submitted a Standard Financial Statement and the Provider did not accede to the request.

The Standard Financial Statement was considered by the Provider's Arrears Support Unit (ASU) and arising out of this assessment, the Provider wrote to the First Complainant declining the proposed repayment arrangement for the reason outlined therein and as set out above. The documentation provided to me exhibits that the Provider examined and assessed the First Complainant's Standard Financial Statement, and I accept on the evidence before me that the Provider dealt with the First Complainant's application in accordance with its own policy, including an individual assessment and on the basis of its affordability criteria and that it has not acted unreasonably in doing so.

I also accept that the Provider adhered to the Central Bank Code of Conduct on Mortgage Arrears and the related MARP process during this time.

For the reasons set out in this Decision, I partially uphold this complaint, as an explanation for the conduct complained of was not given when it ought to have been. I also direct the Provider to pay a sum of €3,000 in compensation to the Complainants.

Conclusion

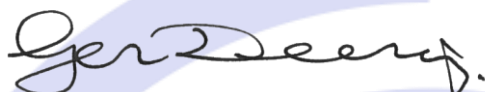
My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(f)**.

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 Complainants in the sum of €3,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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.



Ger Deering

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

20 January 2022

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.