



<b><u>Decision Ref:</u></b>	2018-0012
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Refusal to grant mortgage Arrears handling - Mortgage Arrears Resolution Process Level of contact or communications re. Arrears
<b><u>Outcome:</u></b>	Partially upheld

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

##### **Background**

This complaint concerns the Complainants' mortgage loan previously held with the Provider.

The first complaint is that the Provider failed to enter into negotiations with the Complainants regarding the repayment of their mortgage, resulting in their ICB rating being affected. The second complaint is that the Provider unreasonably failed to honour its agreement to offer the Complainants' a mortgage loan after they sold their property and redeemed their mortgage loan.

The Complainants' mortgage loans were originally taken out with a financial service provider (hereinafter referred to as 'the former entity'). In 2011, all liabilities and assets of the former entity were transferred to the Provider.

##### **The Complainants' Case**

The Complainants submit that they had been receiving intimidating telephone calls from the former entity's Dublin Office and in writing to the Provider to try to come to a mutual arrangement it did not respond, however, the intimidating telephone calls continued. The Complainants submit that under intense pressure, in May 2010, they sold their family home in order to "*reconcile our outstanding large mortgage with the [former entity]*". The Complainants submit that prior to signing the final contracts the former entity offered them

half of the original mortgage in order that they would not be homeless. The Complainants state that *"Unfortunately this offer was not honoured"* by the former entity.

The Complainants state that they are paying €1,100 rent for a family of five and *"do believe that it is our families better interest to be paying a mortgage and finally be back in a home than to be renting. I feel embittered that I thought I was doing the correct thing to pay back [the former entity] €280,000 and that [it] did not honour [its] side of agreement"*.

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

The Provider submits that in 2010, due to the continuing arrears on the Complainants' mortgage loan account and other personal debt, the Complainants made a decision to sell their Principal Dwelling House (PDH) and clear the mortgage loan and other personal debt. The Provider states that *"According to the information provided by you to us, your personal debt had accrued to over €68,000 despite us issuing you with finance to clear your personal borrowing in May 2007"*.

The Provider states that *"I note from correspondence received from you in April 2009 that you had put your PDH on the market and although a sale was agreed, unfortunately this sale fell through as the purchaser's own property did not sell"*.

The Provider submits that its letter of 15 October 2010 advised the Complainants that upon the redemption of their mortgage loan account drawn down in September 1999 it would be prepared to consider an application for a further mortgage loan facility subject to the Complainants' locating a suitable property and its normal underwriting process and certain lending criteria. The Provider submits that its records show that no application was made by the Complainants after 15 October 2010. The Provider states that notwithstanding this, it on foot of legislation in 2011 *"was ordered... pursuant to section 7(4) of the Credit Institutions (Stabilisation) Act 2010 ('the Act') to cease new lending activities and its deposits were transferred to [another lending institution]. On 1 July 2011, all liabilities and assets of [the former entity] were transferred to [the Provider]... As a result of the Act, [the former entity] and [the Provider] were prevented from considering any further mortgage applications or renegotiating current loan facilities"*.

The Provider also states that *"While we have the greatest sympathy for the position you now find yourself in and the various concerns you have raised over the last years. We have always considered and where appropriate facilitated your loan requests in good faith having regard for the lending criteria with which any borrower must comply. For reasons beyond our control we are not in a position to consider any further loan applications"*.

### **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.

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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 29 January 2018, 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Before turning to the issue at hand, I would point out the following:

By way of letter dated 12 September 2017 this Office wrote to the Provider, setting out the following:

*“Owing to the nature of the Complainants’ grievances, it is necessary for this office to consider the jurisdiction of the Financial Services Ombudsman pursuant to the provisions of the **Central Bank Act 1942**, as inserted by Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004.*

*In that regard, I must advise that **Section 57BX (3)** of the Central Bank and Financial Services Authority of Ireland Act 2004 (as amended by the Financial Services Authority of Ireland (Amendment) Act 2017) prescribes as follows:-*

*“A consumer is not entitled to make a complaint if the conduct complained of-*

*(b) occurred more than 6 years before the complaint is made, or”*

*Section 57BX (5) of the Central Bank and Financial Services Authority of Ireland Act 2004 states:-*

*“(5) For the purpose of subsections (3) and (4), conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred.”*

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*In the light of this legislative provision, this office has formed the view that, in circumstances where there is a series of acts referred to, that is, the Provider's conduct in relation to four separate loans over an eight year period, this element of the complaint falls within the "continuing conduct" provision of the Central Bank and Financial Services Authority of Ireland Act 2004. Consequently, owing to Section 57BX (5) of the Central Bank and Financial Services Authority of Ireland Act 2004 it will be open to the Financial Services Ombudsman to examine and to adjudicate on the issue complained of, in respect of a period which may exceed the timeframe, as anticipated by Section 57 BX (3) of the Central Bank and Financial Services Authority of Ireland Act 2004."*

*The Financial Services and Pensions Ombudsman Act 2017 came into force on 1 January 2018. Section 51(5) of the 2017 Act provides the following: populating*

*"(5) For the purposes of subsections (1) and (2)—  
(a) conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred, and  
(b) conduct that consists of a single act or omission is taken to have occurred on the date of that act or omission."*

Bearing in mind the specific circumstances presented, that is, the Provider's conduct in relation to four separate loans over an eight year period, I consider this to be continuing conduct for the purposes of Section 51(5) of the Financial Services and Pensions Ombudsman Act 2017, and consequently this aspect of the matter falls within my jurisdiction.

**(1) The first issue to be determined is whether the Provider failed to enter into negotiations with the Complainants regarding the repayment of their mortgage loan, resulting in their ICB rating being affected.**

The Complainants submit that they were customers of the former entity from 1999 to 2010 and always met their monthly mortgage repayments.

In a letter to the former entity dated 30 August 2012 the Complainants state the following:

*"Please note reason for arrears:*

- 1. Bad chest infection as [the first Complainant] is an asthmatic and was unable to work for a few months.*
- 2. We had received unregulated monies as top ups on our mortgage to attempt to buy a second property as a potential investment for our children.*
- 3. Poor communication in [the former entity] responding to our written requests to discuss our top up mortgage repayment. We did receive intimidating phone calls".*

The Complainants submit that when they attempted to purchase a property in the South East, the Provider approved their mortgage loan *"and when we handed over the deposit for*

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*the house the [former entity] then refused to hand over the rest so we could proceed with purchase, this meant that we lost money on the signing of contracts and down payments". The Complainants state that "With relation to a mortgage approval for an investment property in [the South East] we were told by our branch manager in [another rural town] that [the former entity] would not be sanctioning the mortgage before the loan offer expired because of market changes, this resulted in us losing 22,500 euro in deposits to the builder. Only for our solicitor we could have been sued for the balance as we had signed the contracts".*

The Provider submits that in early 2007 the Complainants submitted an application to it for the purchase of a property in the South East. The Provider submits that the application was assessed and it issued a Letter of Offer on 11 April 2007. The Provider submits that the Letter of Offer sanctioned a loan of €176,000 and the loan offer was to expire after 6 months. The Provider submits that the Complainants did not exercise their option to draw down and the offer subsequently expired.

The Complainants, in their post Preliminary Decision submission dated 5 February 2018, state that *"We the Complainants did not opt out as the house was not completed, in order to draw down. The Bank were aware of this"*.

The Provider submits that on 27 February 2008 a new application for the purchase of the property in the South East was submitted. The Provider states that *"At this time, the maximum amount that we were willing to sanction was €165,000 and this loan offer expired on the 27<sup>th</sup> May 2008"*. The Provider submits that on 17 July 2008 the Former entity's representative wrote to the Complainants advising that due to changes in the market and subsequent increases in interest rates that the Complainants may not be successful in a further application as the criteria in relation to Residential Investment Properties had changed considerably.

The Provider has submitted a copy of the Complainants' solicitors' letter dated 18 December 2007 to the Former entity, which I note states the following:

*"Further to the above and to your letter of offer dated the 11<sup>th</sup> of April 2007.*

*We confirm that our clients have entered into a binding Contract for the purchase of the above property and that a deposit of €21,835.00 has been paid in this regard.*

*If you have any further queries please do not hesitate to contact us"*.

I note that the Letter of Loan Approval issued on 11 April 2007 and the Provider submits that the Letter of Offer was valid for 6 months, consequently the Letter of Offer had expired at the time that the Complainants' solicitors wrote to the former entity on 18 December 2007.

I note that the former entity's letter to the Complainants dated 17 July 2008 states, among other things, the following:

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*“We initially sanctioned €176K as requested to enable you to complete the purchase of [property in the South East] in April 2007 as per Letter of Offer dated 11/04/07. This loan expired after 6 months and when we re-submitted your details to the underwriters in Dublin the maximum amount that they were willing to sanction was €165K as per letter of offer dated 27/02/08. This loan offer expired on 27/05/08. Given the current market circumstances and subsequent increases in interest rates I am not confident in the present climate of giving you any guarantee of being successful in a further application. The criteria has changed considerably in relation to investment properties and I would urge you to strongly reconsider your purchase as I cannot confirm that you would be successful in any future application”.*

While I note that the Complainants signed and returned the Letter of Loan Offer dated 11 April 2007 for the sum of €176,000, the Complainants submit that the house was not completed in order to draw down the mortgage loan prior to the expiration of the Letter of Loan Offer. It is very disappointing that the Provider has not furnished a copy of the general conditions attached to the Letter of Loan Offer dated 11 April 2007 setting out that it was valid for six months only. I note, however, that the Complainants did make a subsequent application for the mortgage loan on 27 February 2008. I also note that the Provider has submitted a copy of the General Conditions attached to Letter of Offer dated 11 April 2007 for the sum of €85,000 which sets out, among other things, the following:

- “1. Sanction will automatically lapse if the loan is not drawn down within three months from date of this offer. The former entity may, at its absolute discretion, extend this period. This offer will be automatically cancelled if the acceptance form together with costs as set out are not returned within fourteen days from date of this offer. In the event of cancellation the administration fee can be refunded if the former entity is notified in writing directly to the Administration Office within four weeks from the date of this offer. The applicants must notify the former entity of any changes in their financial or personal circumstances prior to the date of the advance.*
- 2. The former entity reserves the absolute right to withdraw or alter the terms of the offer at any time.”*

The Provider states that *“Unfortunately due to the passage of time we were unable to retrieve... a copy of the letter of offer that issued to the Complainants on 27 February 2008”*. In this regard, it is very disappointing that the Provider has failed to maintain its records in compliance with provision 49 of the Consumer Protection Code 2006 (the CPC 2006), which provides the following:

*“CONSUMER RECORDS*

*49 A regulated entity must maintain up-to-date consumer records containing at least the following:*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*

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e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;  
f) all documents or applications completed or signed by the consumer;  
g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and  
h) all other relevant information concerning the consumer.  
Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends.”

I note that the Complainants’ letter to the Provider dated 20 April 2009 states, among other things, the following:

*“I am writing to you to attempt to find a solution to my current mortgage arrears. As you may recall we did get a top up on our mortgage last year whereby we lost a sum of money attempting to purchase a second house in [the South East]. Suppose judging by the current climate we are lucky that the [former entity] refused us the outstanding amount to complete the purchase...”*

I also note in a letter to the Provider dated 30 June 2011 the Complainants state, among other things, the following:

*“... we attempted to purchase a second property as an investment for our children. With the downturn in property we decided not to purchase the house however we did lose a significant amount of money by opting out of the contract.”*

The Complainants, in their post Preliminary Decision submission dated 5 February 2018 state:

*“Please note... my statement “With the downturn in property we decided not to purchase the house...” I phrased this incorrectly as we had no option other than opt out of the purchase of property in [the South East] as the Bank reduced the funding from 176K to 165K.*

*We understand there were mistakes made on both sides but the Bank being the professional body we thought [it] would work with us not against us, as the process had started. With the new mortgage offer the bank did know we could not afford the shortfall of 11,000€ hence losing 22,500€ deposit.”*

The Provider submits that on 2 July 1999 it received an application from the Complainants for finance to purchase a Principal Dwelling House (PDH). The Provider submits that the application was assessed by it and a Letter of Offer was issued on 4 August 1999. The Provider submits that the Letter of Offer was accepted and signed by the Complainants and subsequently IR£100,000 (€126,973.81) was drawn down on 22 September 1999.

The Provider submits that during the period July 1999 to April 2007 the Complainants received four separate loans from it. The Provider submits that the three loans drawn down

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in 2000, 2005 and 2007 were recorded separately on its system as sub-accounts attached to the Complainants' mortgage loan account drawn down in September 1999. The Provider submits that each sub-account was set up when a further loan was drawn down by the Complainants and each loan had a different interest rate applicable to it.

The Complainants submit that each time they re-mortgaged their home the former entity set up each application as a separate loan and each loan had a different interest rate which increased their monthly repayments. The Complainants state that *"what we wanted was just one mortgage and each time we rang to enquire why, we were dismissed and just told that this was normal practice which we accepted as professional advice"*. The Complainants also state that *"We did try to join these together but again [the former entity] failed to return with an answer"*.

In response, the Provider submits that on 20 April 2009 the Complainants wrote to the former entity's representative requesting a re-mortgage of €350,000. The Provider states that *"The purpose of this re-mortgage was to both consolidate your loans with ourselves and 'alleviate' your monthly outgoings. Due to your financial position at this time, we felt it was not appropriate to offer further finance"*.

The Provider submits that on 13 March 2000 a loan application was received from the Complainants for finance to carry out home improvements. The Provider submits that the application was assessed and a Letter of Offer was issued on 21 March 2000. The Provider submits that the Letter of Offer was signed and accepted by the Complainants and IR€10,000 (€12,697.38) was drawn down on 4 May 2000.

I note that the former entity's Letter of Offer dated 21 March 2000 is termed a *"Repayment Mortgage (annuity)... Additional Advance"* and is secured by way of *"First Legal Mortgage over Principal Private Residence"*.

The Provider submits that on 15 July 2005 a further loan application was received from the Complainants to refinance a Credit Union loan and carry out further home improvements. The Provider submits that the application was assessed and Letter of Offer was issued on 11 August 2005. The Provider submits that the Letter of Offer was signed and accepted by the Complainants and €70,000 was drawn down on 26 August 2005.

I note that the former entity's Letter of Offer dated 11 August 2005 is termed an *"Additional Advance Repayment Mortgage (annuity)"* and is secured by way of *"First Legal mortgage over Principal Private Residence"*. I note that this Letter of Loan Offer was signed in acceptance by the Complainants on 17 August 2005.

The Provider submits that on 2 April 2007 it received an application to refinance personal loans and release equity. The Provider submits that the application was assessed and a Letter of Offer was issued on 11 April 2007. The Provider submits that the Letter of Offer was signed and accepted by the Complainants and €85,000 was drawn down on 23 May 2007.

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I note that the former entity's Letter of Offer dated 11 April 2007 for the amount of €85,000 is also termed an *"Additional Advance Repayment Mortgage (annuity)"* and is secured by way of *"First Legal Mortgage over Principal Private Residence"*. I note that the Complainants signed the Letter of Loan offer on 25 April 2007.

I note that the Complainants wrote to the Provider on 25 April 2007 seeking to extend their mortgage loan by six years, and the Provider wrote to the Complainants on 22 May 2007 to confirm that *"the overall term on the above mortgage account has been extended by 6 years remaining"*.

The Provider submits that each mortgage loan was issued at the behest of the Complainants, who in each case signed a Letter of Offer. The Provider submits that it has been unable to locate any documentary evidence that the Complainant requested a re-mortgage rather than an advance during this period. This is most unacceptable.

Based on the documentation before me, I can find no evidence that the Complainants, on completing the loan applications, requested a re-mortgage rather than an additional advance, aside from when the Complainants were seeking a re-mortgage of €350,000 in April 2009. However, I note that the Complainants in accepting each of the offers signed Letters of Offer which clearly highlighted that these mortgage loans were additional advances. I can, therefore, find no wrongdoing on the part of the Provider in this regard.

The Complainants submit that they had been receiving intimidating telephone calls from the former entity's Dublin Office. They also submit that they had been writing to the Provider to try to come to a mutual arrangement it did not respond, however, the telephone calls continued. The first Complainant states that *"when I approached [the former entity] about not being able to repay the full monthly repayment [it was] not willing to negotiate even though I tried. Therefore my ICB rating has been affected for the year of non negotiation"*.

The Complainants submit that they contacted their branch manager to come to a suitable arrangement about their mortgage repayments *"only to be told that because we were in gainful employment head office would only accept the full monthly amount"*. The Complainants submit that they then contacted head office to no avail. The Complainants state that *"We rang consistently to try and come to an amicable situation but only to be rejected each time. The times they rang us was to be heavy handed and to demand our arrears but did not want to come to an arrangement"*. The second Complainant states that *"Through all this my wife's health was deteriorating and our kids were so upset that we took it upon ourselves to make the most horrible decision in our lives and sell, so at least we could stop intimidating phone calls"*.

The Provider submits that as it did not have call recording in its Residential Mortgage Division at the time, it is not in a position to comment on the Complainants' allegation of receiving intimidating phone calls from the former entity. The Provider states, in its final response letter dated 30 November 2012, that *"all staff members are required to communicate with all customers with both courtesy and due consideration. If you believed that any member of staff did not adhere to this standard when dealing with your concerns,*

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*will you please provide us with further details of the alleged incidents in order for this to be investigated fully”.*

The Provider has obligations pursuant to the Code of Conduct on Mortgage Arrears February 2009 (the CCMA 2009). Provisions 4(b) and 5 of the CCMA 2009 sets out the following:

*“b) Once contact has been established, and assuming co-operation from the borrower, a plan for clearing the mortgage arrears can be developed that is consistent with the interests of both the lender and the borrower. In this regard, all viable options open to the borrower must be examined during which consideration must be given to his/her repayment capacity, previous payment history and any equity remaining in the property.*

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#### *5. Addressing a Mortgage Arrears Problem*

*Lenders may distinguish between borrowers who are genuinely unable to pay – because of changed circumstances - and those who could pay some/all of the arrears but will not. All genuine cases must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower to meet his/her obligations.*

*In addressing a mortgage arrears problem, the following considerations apply:*

*a) As each arrears situation is different, the lender must examine each on its individual merits and the outcome is likely to differ as a result.*

*b) The lender must take into consideration the borrower’s overall indebtedness in establishing his/her ability to repay. This should include full details of household income and expenditure, as advised by the borrower.*

*c) The lender must explore with the borrower one or more of the following alternative repayment measures:*

- An arrangement on arrears could be entered into whereby the amount of monthly repayment may be changed, as appropriate, to help address the arrears situation.*

- Deferring payment of all or part of the instalment repayment for a period might be appropriate where, for example, there is a temporary shortfall of income.*

- Extending the term of the mortgage could be considered in the case of a repayment loan - although this may not make a significant difference to the monthly repayments.*

- Changing the type of the mortgage might be appropriate if this could give rise to a reduction in the level of monthly mortgage outgoings (i.e., mortgage and related assurance payments).*

- Capitalising the arrears and interest could arise where there is insufficient capacity over the short term to clear the arrears but where repayment capacity exists to repay the capitalised balance over the remaining term of the mortgage.*

*This measure may be considered where a pattern of repayment has been established and where sufficient equity exists.*

*The appropriateness of these measures must be determined by the factors of each individual arrears case. The borrower must be advised to take appropriate independent advice.*

*d) Whichever of the options outlined in (c) might be pursued, the lender must provide the borrower with a clear explanation, in writing, of the alternative*

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*repayment arrangement that is being agreed, together with details of any additional interest or administration charges that may arise.*

*e) The lender must continue to monitor the repayment arrangement. To this end, the borrower must be advised of a relevant contact point.*

*f) The lender must advise the borrower that it is in his/her own interests to ensure that his/her income is being maximised and that a budgeted approach to expenditure is maintained. Where circumstances warrant it, the lender must refer the borrower for guidance to his/her local Money Advice and Budgeting Service (MABS) or appropriate alternative.*

*g) At the borrower's request and with the borrower's written consent, the lender will liaise with a third party nominated by the borrower.*

*h) Where appropriate, the borrower must be made aware of other options such as trading down, voluntary sale or alternative refinancing through another lender."*

The Provider submits that on 20 April 2009 the Complainants wrote to the former entity requesting a re-mortgage of €350,000.00. The Provider submits that the purpose of this re-mortgage was to both consolidate the Complainants' mortgage loans with the former entity and to alleviate their monthly outgoings. The Provider has submitted internal communication dated 15 June 2009. The Provider submits that this internal communication "*outlines that due to the Complainants' financial position at the time, [the former entity] felt it was not appropriate to offer further finance*". The Provider has also submitted a copy of its letters dated 22 May 2009, 17 June 2009, 20 July 2009, 20 October 2009 and 18 November 2009 "*requesting that the Complainants contact [the former entity] to discuss both the arrears on their accounts and how the issue might be resolved*".

I note that the Complainants, in their letter to the former entity dated 20 April 2009, state, among other things, the following:

*"We are finding our monthly outgoings difficult presently [is] there any possibility that the [former entity] could agree to give us a remortgage to alleviate our monthly outgoings. This is the current state of our affairs...*

*We appeal to the [former entity] to allow us a mortgage of €350,000 over as long a period as possible to repay these shorter term loans and to have just one monthly payment..."*

I note that the Provider issued correspondence to the Complainants on 22 May 2009 setting out the amount of the arrears and stating the following:

*"I appreciate that these are difficult times and so would stress the importance to contact me... at your earliest convenience, to discuss how we might resolve this issue and come to a suitable arrangement".*

The Provider has submitted a copy of its printout dated 5 June 2009, which I note, states the following:

*“PLEASE INSTITUTE PROCEEDINGS IN RESPECT OF THE UNDERMENTIONED ACCOUNT”*

The Provider has submitted an internal email from one of its representatives to another dated 15 June 2009, which states, among other things, the following:

*“I enclose correspondence received from [the first Complainant] in April along with pay slips etc. asking me to arrange a re-mortgage for them if possible. Not possible, they owe us enough already.*

*Based on the P60's & pay slips enclosed approx. E4,824 Nett income coming into the house but the outgoings of E2,565 as outlined by [the first Complainant] having an effect. I can only surmise they have lifestyle issues.*

*These are the same people we gave E85k to in May '07 to clear amongst other things, 2 Credit Union loans, E20k & E8k, & a small [loan with another provider] E3.3k.*

*Here they are just a year later with even more debt around their necks.*

*Obviously some people never learn.*

*If you want to add this stuff to your file, feel free, or otherwise send it back to me or [the first Complainant] with your response”.*

The Complainants state that the former entity's *“unprofessional behaviour is clearly depicted in page 34 of the Provider's Company file whereby [the former entity's representative] states “will they ever learn”.*

I note that the former entity wrote again to the Complainants on 17 June 2009 setting out the arrears and stated, among other things, the following:

*“I appreciate that these are difficult times and so would stress the importance to contact me... to discuss how we might resolve this issue and come to a suitable arrangement.”*

I note that on 30 June 2009 the Complainants wrote to the former entity and submitted a form regarding the arrears on their mortgage loan account to the former entity. I note that this letter states, among other things, the following:

*“Please could you consider an interest only option for us. This would alleviate the problem and I would try my utmost to pay back arrears, as soon as possible. I await your reply, I would be sincerely grateful if we could have an interest only mortgage as we are so stressed by the situation.”*

I note that the former entity wrote to the Complainants on 20 July 2009 requesting that they contact its representative *“to discuss how we might resolve this issue and come to a suitable arrangement”.* The former entity also wrote to the Complainants on 22 July 2009

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acknowledging receipt of their income and expenditure review dated 30 June 2009 and stated, among other things, the following:

*"Your situation is noted however I regret to inform you that the former entity is unable to consider granting a moratorium on repayments at this time. The former entity requires that the full monthly repayment is maintained on the mortgage account going forward and all arrears discharged as soon as possible.*

*At present, your arrears balance is €9,033.76 and the monthly repayment is €1,325.79. It would be in your best interest to reduce the arrears balance outstanding should you be in a position to do so at any time either by paying something additional each month on top of the normal monthly repayment or by lump sum".*

The first Complainant subsequently issued a letter to the former entity stating:

*"In response to your letter dated 15/9/09, please find enclosed a copy of my recent correspondence with my employer. I have had some relief temporary holiday work at the end of August I am awaiting payment for same. Finally I have been appointed to increase my hours... I fully intend to recommence my mortgage repayments this month. I will attempt to pay back arrears as soon as I possibly can. Please accept this letter in recognition that I am addressing the issues in question, to the best of my ability".*

The former entity wrote to the Complainants on 24 September 2009 stating:

*"As you are aware, your account has been set up with our solicitors due to the level of arrears outstanding. The arrears balance currently amounts to €11,685.32 and the last repayment received from you was 29<sup>th</sup> January 2009 for €348.00.*

*The former entity requests that full repayments recommence immediately on the above account or we will have no alternative but to proceed further with legal action. The former entity hopes that further legal action will not be necessary. The current monthly repayment due is €1,325.79.*

*The former entity also requires firm proposals to be submitted regarding discharging the arrears outstanding within 5 working days".*

I note that the former entity wrote to the Complainants on 20 October 2009 and 18 November 2009 regarding the outstanding arrears on the mortgage loan account. In its letter dated 20 October 2009 it also stated:

*"I would appreciate if you could contact me, [the former entity's representative], to discuss the matter".*

I note that the Complainants again submitted an Income and Expenditure Form to the former entity with their letter of 18 March 2010 stating, among other things, the following:

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*"We would be very grateful in these difficult times to be allowed an interest only mortgage for as long as possible."*

The Complainants wrote again to the Provider in April 2010 stating, among other things, the following:

*"Further to our conversation last week on the telephone I have made contact with my local credit union to try to negotiate my loan repayments then I would appeal to you yet again to attempt to get me an interest only moratorium for 3 months to stop the arrears piling up and to allow me some time to sort out my finances. I have only just returned to work after a long period of ill health and I would appreciate some empathy at this time. I will of course pay my arrears to the [former entity] when I can and if my situation changes I will be the first to pay all of these arrears".*

The former entity has not provided any evidence to demonstrate that it responded to the Complainants' letter sent in April 2010 and I note that the Complainants wrote again to the former entity on 8 June 2010 stating, among other things, the following:

*"I have done my utmost to correspond with [the former entity] over the past year from the outset of my difficulties. I have repeatedly asked to pay interest only on my mortgage but no formal arrangement was set up for me. Also to show my willingness to clear my arrears I have put my house on the market. I again plea with you to look at my account and together could we please come to some arrangement."*

In relation to the Complainants' Income and Expenditure Form submitted to the Provider on 18 March 2010, the Provider has obligations pursuant to the Code of Conduct on Mortgage Arrears dated 17 February 2010 (the CCMA 2010). Provisions 4(b) and 5 of the CCMA 2010 provide the following:

*"b) Once contact has been established, and assuming co-operation from the borrower, a plan for clearing the mortgage arrears can be developed that is consistent with the interests of both the lender and the borrower. In this regard, all viable options open to the borrower must be examined during which consideration must be given to his/her repayment capacity, previous payment history and any equity remaining in the property.*

...

**5. Addressing a Mortgage Arrears Problem**

*Lenders may distinguish between borrowers who are genuinely unable to pay – because of changed circumstances - and those who could pay some/all of the arrears but will not. All genuine cases must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower to meet his/her obligations.*

*In addressing a mortgage arrears problem, the following considerations apply:*

*a) As each arrears situation is different, the lender must examine each on its individual merits and the outcome is likely to differ as a result.*

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b) *The lender must take into consideration the borrower's overall indebtedness in establishing his/her ability to repay. This should include full details of household income and expenditure, as advised by the borrower.*

c) *The lender must explore with the borrower one or more of the following alternative repayment measures:*

- *An arrangement on arrears could be entered into whereby the amount of monthly repayment may be changed, as appropriate, to help address the arrears situation.*
- *Deferring payment of all or part of the instalment repayment for a period might be appropriate where, for example, there is a temporary shortfall of income.*
- *Extending the term of the mortgage could be considered in the case of a repayment loan - although this may not make a significant difference to the monthly repayments.*
- *Changing the type of the mortgage might be appropriate if this could give rise to a reduction in the level of monthly mortgage outgoings (i.e., mortgage and related assurance payments).*
- *Capitalising the arrears and interest could arise where there is insufficient capacity over the short term to clear the arrears but where repayment capacity exists to repay the capitalised balance over the remaining term of the mortgage. This measure may be considered where a pattern of repayment has been established and where sufficient equity exists.*

*The appropriateness of these measures must be determined by the factors of each individual arrears case. The borrower must be advised to take appropriate independent advice.*

d) *Whichever of the options outlined in (c) might be pursued, the lender must provide the borrower with a clear explanation, in writing, of the alternative repayment arrangement that is being agreed, together with details of any additional interest or administration charges that may arise.*

e) *The lender must continue to monitor the repayment arrangement. To this end, the borrower must be advised of a relevant contact point.*

f) *The lender must advise the borrower that it is in his/her own interests to ensure that his/her income is being maximised and that a budgeted approach to expenditure is maintained. Where circumstances warrant it, the lender must refer the borrower for guidance to his/her local Money Advice and Budgeting Service (MABS) or appropriate alternative.*

g) *At the borrower's request and with the borrower's written consent, the lender will liaise with a third party nominated by the borrower.*

h) *Where appropriate, the borrower must be made aware of other options such as trading down, voluntary sale or alternative refinancing through another lender."*

I note that the former entity wrote to the Complainants on 21 June 2010 stating:

*"I have noted the contents therein and wish to advise that in order to review your request for a capital moratorium on your account, the former entity will require evidence that the property is currently on the market. On receipt of same your request will be reviewed with management"*

/Cont'd...

The Provider has submitted a copy of an internal email dated 16 July 2010 which states *“Can you send out a capital moratorium offer letter on this when you get a chance? 3 months, August, September, October”*. I note that the Complainants wrote to the former entity on 16 July 2010 stating, among other things, the following:

*“Many thanks for issuing us an interest only repayment plan on our mortgage this month. As you are aware I have been requesting a review of my mortgage for the past year. I have been struggling with additional loans and the top up I received on my mortgage. In order to attempt to restructure our finances we have put our house on the market. We have achieved a sale agreed and our contracts are ready to sign”*.

The Provider submits that the Complainant’s letter dated 16 July 2010 *“requested that [the former entity] issue them with either another mortgage or a re-mortgage of €200,000.00 to allow them to pay off their debts and purchase a new family home”*.

I note that the Complainants signed the acceptance of the three month capital moratorium on 21 July 2010.

The Provider submits that it is not in a position to change the details on the ICB profile. The Provider states that *“All lenders must provide an honest and truthful report of your loan repayment pattern. Although you have no outstanding debt with [the Provider], we cannot change or remove details from your report unless they are inaccurate. Your ICB profile reflects all your historic loan repayment patterns as reported to the ICB by all participating financial institutions”*.

The Provider, in its submission dated 21 November 2017 states that *“Internal communication dated 13 September 2010... shows that the recommendation was to give the Complainants a new mortgage on a property which was to be confirmed but to be valued at approximately €320,000. We enclose the Complainants’ mortgage application for €140,000... We refer to the [former entity’s] letter of 15 October 2010... advising the Complainants that upon redemption of their mortgage... [the former entity] would be prepared to offer them a further mortgage facility of €140,000 subject to a suitable property being located and [the Provider’s] normal underwriting process and certain lending criteria being met. The Complainants were advised to contact [the Provider] once a suitable property had been found, to allow the mortgage application to be processed...”*.

The Provider submits that the former entity was ordered in February 2011 pursuant to section 7(2) of the Credit Institutions (Stabilisation) Act 2010 (‘the Act’) to cease new lending activities and its deposits were transferred to another provider. The Provider submits that on 1 July 2011 all liabilities and assets of the former entity were transferred to the Provider. The Provider states that *“As a result of the Act, [the former entity] and [the Provider] were prevented from considering any further mortgage applications or renegotiating current loan facilities”*.

This Office can investigate the procedures undertaken by the Provider regarding the CCMA and its associated MARP, but will not investigate the details of any re-negotiation of the

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commercial terms of a mortgage which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints.

I must point out that the Provider is not obliged to provide the Complainants with an alternative repayment arrangement. The Complainants have a contractual obligation to repay the mortgage in full and in the terms originally agreed.

Having carefully considered all of the evidence before me, while I am of the view that the Provider did assess the Complainants' Income and Expenditure Forms and took their circumstances into consideration, the Provider has not submitted any evidence that it explored alternative repayment options as set out in Provision 5(c) of the CCMA 2009 and CCMA 2010 with the Complainants. Furthermore, I note that the Provider has not submitted any evidence that it referred the Complainants for guidance to their local Money Advice and Budgeting Service (MABS) or made the Complainants aware of other options such as trading down, voluntary sale or alternative refinancing through another lender as required pursuant to provisions 5(f) and 5(g) of the CCMA 2009 and CCMA 2010.

Furthermore, I am of the view that the Provider's comments in its internal email dated 15 June 2009, namely "*I can only surmise they have lifestyle issues*" and "*Obviously some people never learn*" was both unprofessional and inappropriate. It is not acceptable by any standards. The Provider has obligations pursuant to the CPC 2006. Provision 1 of Chapter 1 of the CPC 2006 sets out that:

*"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:*

*1. acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;"*

The Provider's comments in its internal email dated 15 June 2009 were entirely unacceptable, and can certainly not be described as professional and I am of the view that such statements do not meet the requirements of Provision 1 of Chapter 1 of the CPC 2006 in this regard.

Consequently, it is my Decision that this aspect of the complaint is partly upheld.

**(2) The second issue to be determined is whether the Provider unreasonably failed to honour its agreement to offer the Complainants a mortgage loan, after they sold their property and redeemed the mortgage loan.**

The Complainants submit that when they notified the former entity that they had put their property on the market, it was in favour of their decision to sell their home and offered them a mortgage facility on the redemption of their existing mortgage loans. The Complainants state that "*after paying back 283,000 euro only to be told when we rang one month later that [the former entity] was not in a position to lend anymore*".

The Complainants, in their post Preliminary Decision submission dated 5 February 2018, state that *“When we honoured our commitment to the bank and [it] did not, this (i.e. full repayment of debt) resulted amidst all the confusion us renting for four years at a cost of 52,800€”*

The Provider submits that its letter of 15 October 2010 advised the Complainants that upon the redemption of their mortgage loan account drawn down in September 1999 it would be prepared to consider an application for a further mortgage loan facility subject to the Complainants locating a suitable property and its normal underwriting process and certain lending criteria. The Provider submits that its records show that no application was made by the Complainants after 15 October 2010. The Provider states that notwithstanding this, it was ordered in 2011 on foot of legislation *“to cease new lending activities and its deposits were transferred to [another financial service provider]. On 1 July 2011, all liabilities and assets of [the former entity] were transferred to [the Provider]... As a result of the Act, [the former entity] and [the Provider] were prevented from considering any further mortgage applications or renegotiating current loan facilities”*.

I note that the Complainants, in their letter dated 16 July 2010 to the Provider, also stated the following:

*“I am requesting [the former entity] to issue us another mortgage or remortgage of 200,000€ to purchase a new family home. This will pay off my debts and allow me to pay my mortgage weekly as before.*

*As I am a longstanding customer with the [former entity] I hope that you will be sympathetic and agreeable to this arrangement. I hope that our records of repayments for the past twelve years will be considered.”*

The Provider has submitted a copy of the former entity’s internal “Memo” dated 1 September 2010, which states, among other things, the following:

*“I would be most obliged if you would please look at this case for me.*

*These customers are hugely in arrears. They have a sale agreed of €500k on their house and are very reluctant to take it as they are afraid they will remain homeless. I asked them would they consider renting again until such time as they are in a position to buy again and they are very nervous of giving up their family home.*

*They have now spotted a house for about €300k approx., which they would be perfectly happy with. To purchase this though they would require a mortgage of 200k. The balance would be realised from the sale of their own home after clearing all their debts.*

*...*

*After clearing all fees (Auctioneers, legal, engineers etc.) they would need €200k to purchase the new house.*

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*They got into arrears in the first place when they purchased a property in the South East and the deal fell through. They released equity on their PDH to finance this and lost funds on it.*

*They then concentrated on paying their loans and didn't pay the mortgage.*

*I put their figures through the mortgage calculator and they would qualify for this amount.*

*I am also sending you up some documentation on same.*

*When you get a chance you might let me know if there is any point in proceeding with same."*

I note that the former entity's internal notes dated 13 September 2010 state, among other things, the following:

*"... [the Complainants] have advised that they are at sale agreed with a prospective buyer and will require a decision from the former entity as soon as possible or the sale may fall through..."*

#### **Proposal**

*The borrowers have made the following proposal to the former entity. They intend to sell their PDH which is valued at €500,000 clear their existing mortgage (€283k) and unsecured debts (€50k) and downsize to a smaller property in the area valued at €320,000 approximately.*

*To complete the purchase of this new property the clients will require a mortgage of approximately €200,000 over 25 years. The proposed repayments are €1,026 per month, the borrowers current outgoings are €2,683 per month. The client's proposal results in a net saving for them of approximately €1,897 per month.*

...

#### **Points in Favour**

- *Reduction in the former entity's exposure of approximately €80,000*
- *Affordability evident based on Repayments to existing Loans*
- *Within NDI criteria*
- *Proposed new LTV of 62%*
- *Aside from the former entity's Mortgage the borrowers will have no other outstanding debt*
- *Both Borrowers are in permanent employment*
- *Reduced Outgoings on property upkeep*
- *Net monthly savings of €1,897 per month*

#### **Points Against**

- *High level of existing Arrears (€23,042.18)*

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- *The last repayment to former entity's mortgage was June 2010 (€100)*
- *Arrears on Credit Union loans*

#### **Recommendation**

*Recommend approval of a new mortgage on a property to be confirmed but to be valued at approx. €320,000 over twenty five years at standard home loan rate.*

*This recommendation is made on the basis of points in favour as detailed above but subject to all normal underwriting criteria (Completed Application form, full ICB and Judgment searches etc) and Credit Union statements for all loans showing a satisfactory repayment history"*

I note that the Complainants completed a mortgage application on 20 September 2010 and the former entity issued a letter to the Complainants dated 15 October 2010 setting out the following:

*"I refer to the above numbered mortgage account and to our recent discussion regarding same.*

*As discussed on redemption in full of the above account the former entity is prepared to consider your application for a maximum mortgage facility of €140,000. This application will be subject to the former entity's underwriting process which will require receipt of the following:*

- *The proposed new mortgage property must be valued at a minimum of €320,000*
- *Satisfactory statements for [third party lending institution loan]*
- *Satisfactory statement for [credit union loan]*
- *Satisfactory statement for [credit union loans]*
- *Confirmation of the balance of funds required to complete the purchase of the proposed mortgage property*
- *Up to date payslips for all proposed borrowers as confirmation of income*

*Please note that the loans detailed above will **not** be refinanced within the proposed new mortgage advance but statements will be required to demonstrate your capacity to service any outstanding debts.*

*When you have located a suitable property I would ask you to contact me on... so that this matter can be discussed further. At that time additional documentation may be required by our underwriting team to progress your application further."*

The former entity has submitted a copy of its letter to another lending institution dated 14 March 2011 which states:

*"I refer to our telephone conversation in relation to the above. As discussed and agreed I am now writing to you with some background on their relationship with [the former entity]."*

*[The Complainants] were mortgage customers of the former entity from 1999 until October 2010 when they discharged their total liabilities. Initially they had always met their liabilities as they fell due but the situation deteriorated when [the first Complainant] suffered an illness and this was exacerbated by a failed attempt to purchase another property in Tipperary, which cost them money. In addition they had personal loans with other financial institutions which they concentrated on to the detriment of their mortgage payment. As a result they fell into significant arrears on their mortgage.*

*It is fair to say that following full and frank discussions they came to their senses and decided that the only way to relieve some of the financial pressure was to sell their home, clear their mortgage and some unsecure personal debt. They did this in October 2011 and the former entity confirmed that it would consider an application for a new mortgage facility. Unfortunately due to a Direction Order the former entity is now prohibited from any new lending".*

Similar to the Provider's comments on 15 June 2009, I must again point out that the Provider's statement, in its letter to the third party lending institution dated 14 March 2011, that *"they came to their senses"* is neither professional nor acceptable, and in my view does not meet the requirements of Provision 1 of Chapter 1 of the CPC 2006.

I note that the third party lending institution wrote to the first Complainant on 30 March 2011 advising that it was not in a position to sanction the mortgage facility. The Complainants wrote two letters to the Provider on 30 June 2011. In one of these letters the Complainants were seeking for the Provider to reconsider *"the reduced mortgage offer which was offered initially to us"*. In the other letter the Complainants stated, among other things, the following:

*"I have tried to outline to you in this letter what we had hoped to achieve in selling our family home i.e. pay €280,000 back to [the former entity] to clear our debt and to obtain the new affordable mortgage of €148,000. We fully accept our debt was our responsibility as you can see by our actions however we sincerely believed the [former entity] would honour the smaller mortgage offer".*

In response to this the Provider wrote to the Complainants on 18 July 2011 setting out the following:

*"The Bank was ordered in February 2011 pursuant to section 7(4) of the Credit Institutions (Stabilisation) Act 2010 to cease new lending activities.*

*As such the Bank will not be in a position to consider further your request for mortgage facilities."*

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While I note that the Provider, in its letter to the Complainants dated 15 October 2010, advised that it would “*consider your application for a maximum mortgage facility of €140,000*”, I must accept the Provider’s submission that it was ordered on foot of legislation in 2011 to cease new lending activities. The Provider was therefore not in a position to provide the Complainants with a new mortgage loan.

Consequently, it is my Decision that this aspect of the complaint is not upheld.

To conclude, to mark the Provider’s failure to evidence that it complied with Provisions 5(c), 5(f) and 5(g) of the CCMA 2009 and CCMA 2010, its failure to maintain all of its records in line with Provision 49 of the CPC 2006 and its aforementioned lack of professionalism and lapses in customer service, I direct the Provider to make a compensatory payment of €3,500.00 to an account of the Complainants’ choosing within a period of 35 days.

### **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)(g)**.
- Pursuant to **Section 60(4)** of the ***Financial Services and Pensions Ombudsman Act 2017***, I direct that the Respondent Provider pay compensation in the amount of €3,500, as detailed above, to the complainants.
- Pursuant to **Section 60(6)** of the ***Financial Services and Pensions Ombudsman Act 2017***, I 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***, where the amount is not paid within 35 days of the Provider receiving account details from the Complainants.
- Pursuant to **Section 60(8)** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Respondent Provider is now required, not later than 14 days after the period specified above for the implementation of the direction pursuant to Section **60(4)** of the ***Financial Services and Pensions Ombudsman Act 2017*** to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction/s outlined above.

**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**

26 February 2018

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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) in accordance with the Data Protection Acts 1988 and 2003.

