



<u>Decision Ref:</u>	2018-0142
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling - Mortgage Arrears Resolution Process Level of contact or communications re. Arrears
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The Complainants entered into the mortgage loan with the Provider pursuant to a "*LETTER OF OFFER OF MORTGAGE LOAN*" dated 6 June 2001. The mortgage loan in the sum of £250,000.00 was for a period of 20 years. The mortgage loan is secured over the Complainants primary residence.

The complaint is that the Provider failed to comply with the Code of Conduct on Mortgage Arrears 2013 (the CCMA 2013) and its associated Mortgage Arrears Resolution Process (MARP).

The Complainants' Case

The Complainants' representatives submit that the Provider did not follow the CCMA 2013 and its associated MARP. The Complainants' representatives also submit that the Provider did not make every reasonable effort under the CCMA 2013 to agree an alternative arrangement with the Complainants or their nominated representatives.

The Complainants state that they are seeking for the Provider "*to comply with conditions of CCMA 2013 – to fully consider and comprehensively document reasons why all other alternative repayment arrangements were not considered in this case*".

The Provider's Case

The Provider submits that it has sanctioned the following periods of short-term forbearance on the Complainants' mortgage loan account since drawdown:

- Twelve months 'interest only' repayments from April 2010
- Six months 'interest only' repayments from April 2011
- Twelve months 'interest only' repayments from November 2012
- Twelve months 'interest only' repayments from September 2014

The Provider submits that following its investigation of this matter, it is satisfied that no breach has occurred, and that it has fully complied with all of its obligations under the CCMA 2013 in respect of the Complainants' mortgage loan account. The Provider submits that the Complainants' account had been in significant arrears for a number of years and all alternative repayment arrangements had been explored. The Provider submits that it has fully assessed the Complainants' mortgage loan account and is satisfied that the decision to deem the account unsustainable was the correct one.

The Provider submits that its letter dated 23 July 2015 to the Complainants, suggested options for consideration by them such as trading down or a voluntary sale. The Provider submits that no alternative repayment suggestions were forthcoming so the Complainants were classified as not co-operating. The Provider states that *"following this, the Bank formally demanded on them on 14 June 2016 by issuing a Demand Letter... which stated that the Bank reserves it's right to consider a number of options open to it including but not limited to the appointment of a Receiver"*. The Provider submits that the suggestion that a Receiver could be appointed was only one of a number of options, if appropriate, being considered by it to recoup the outstanding debt.

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.

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A Preliminary Decision was issued to the parties on 10 September 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.

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

This Office can investigate the procedures undertaken by the Provider regarding the MARP, but will not investigate the details of any re-negotiation of the 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. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant.

The Complainants' representatives have raised the following issues in relation to the Providers dealing with the Complainants' mortgage loan account:

1. ***"This Mortgage Arrears Case was dealt with by [the Provider's] Financial Solutions Group and never was referred to the ASU of the Bank for its specialised understanding of these cases".***

The Complainants' representatives states that *"We believe that this case has been dealt with by the Financial Solutions Group... and not by the mortgage provider — [the Provider] Mortgage Bank Limited"*. The Complainants' representatives also states that *"The Mortgage Arrears in respect of the Clients' Principal Private Residence was not dealt with by the [the Provider's] Mortgage Bank ASU as recommended for MARP cases per Section 17 CCMA."*

Provision 17 of the CCMA 2013 provides:

"17. A lender must establish a centralised and dedicated Arrears Support Unit (ASU), which must be adequately staffed, to manage cases under the MARP."

The Provider submits that from the outset the Complainants' case was handled by its Financial Solutions Group (FSG). The Provider submits that the ASU is part of the FSG and follows the same policies and procedures. The Provider submits that in the Complainants' case, their account was being managed by its FSG due to the wider connection and associated accounts. The Provider states that *"The case was sent to the ASU, together with all relevant information to enable the ASU consider the case and ratify the FSG decision, which it did on 03/07/2015"*.

In response, the Complainants' representatives submit that the Complainants' mortgage arrears case was dealt with by the Provider's Financial Solutions Group and was merely

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ratified 4 days after the decision of the FSG on 25 June 2015. The Complainants' representatives state that *"The CCMA 2013 states the case must be dealt with by Arrears Support Unit – [the Provider] Mortgage Bank has set a designated ASU Unit which is not the [Provider's] Financial Services Group. The fact that [the Provider] states that it referred the decision for ratification by ASU – is a prima facie acknowledgement that these are two separate units and that therefore the case was not dealt with by ASU and that only the decision of FSG was rubber stamped and ratified by ASU after a full [Provider] decision had been made in this case"*.

The Complainants' representatives state that:

"The ASU Ratification only confirms "... based on assessment of the information provided that this application is compliant with the Code of Conduct on Mortgage Arrears". This is a clear indication that ASU is responsible for handling MARP cases but it did not do so in this case and that it only ratified the decision of FSG. The ASU is relying on file evidence of FSG whereas under the CCMA Legislation it should have directly conducted the negotiations and discussions."

The Complainants' representatives also state that *"The Bank did not pass the clients' completed standard financial statement to its Arrears Support Unit (ASU) as specified in Section 32 of CCMA."* The Complainants' representatives state the following:

"In the Schedule of [Provider] Documents they confirm that correspondence as follows;

08/10/2013 – Complaint Advisor Submission of Net Worth Statement

This Net Worth Statement which is effectively the equivalent of an SFS was not dealt with nor forwarded to [the Provider's] ASU.

08/04/2015 – SFS Submitted to FSG [Provider] Bank

03/07/2015 – This SFS was reviewed and assessed by [the Provider's] FSG – it was only sent to ASU and ratified by them on 3rd July 2015.

We can in no circumstances agree that a period of 3 months could be considered immediately and therefore this action is in Breach of Provision 32 CCMA 2013."

Provision 32 of the CCMA 2013 provides:

"32. The lender must pass the completed standard financial statement to its ASU immediately on receipt and provide a copy of the standard financial statement to the borrower."

The Complainants' representatives submit that Provision 35 of the CCMA 2013 also states that:

"A completed standard financial statement must be assessed in a timely manner by the lenders ASU"

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The Complainants' representatives state that *"This provision does not state that an SFS must be considered by any Department of a Financial Institution and then sent to ASU for ratification. This would defeat the whole underlying rationale of the Central Bank of Ireland for the CCMA 2013 whereby it required Financial Institutions to establish dedicated ASU units to deal with consumer family home mortgages"*.

The Complainants' representatives submit that Provision 36 of the CCMA 2013 provides that:

"A lenders ASU must examine each case on its merits"

The Complainants' representatives state that *"This provision clearly states that ASU must examine each case and not that an FSG Department should assess and review and seek a rubber stamp ratification of its decisions from its ASU"*.

The Provider submits that it is satisfied that the ASU was in receipt of all financial information, including the Standard Financial Statement (SFS), to enable them consider the case in full and reach their decision in compliance with the CCMA 2013.

The Provider has submitted a copy of the MARP Decision Ratification Form dated 3 July 2015. I note that this states, among other things, the following:

"Business Unit

FSG Commercial

ASU Decision Ratification

ASU Recommendation

"Ratified"

I confirm based on an assessment of the information provided above that this application is compliant with the Code of Conduct on Mortgage Arrears.

ASU Assessor Name:..."

While I note that the Provider was assessing the Complainants' application for an alternative repayment arrangement in respect of their primary residence, given that the Complainants had other associated accounts I consider that the Provider was entitled to have the Complainants' application assessed by the Financial Solutions Group. While I note that the Provider submits that the Arrears Support Unit is part of the FSG, I take the view that they are separate units. That said, I note that the Provider submits that the Arrears Support Unit follows the same policies and procedures as the Financial Solutions Group.

Based on the evidence before me, I accept that the Provider's Arrears Support Unit considered and ratified the application. I note the Complainants' representatives' submission that *"The CCMA 2013 states the case must be dealt with by Arrears Support*

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Unit”, however the CCMA 2013 does not specifically state that the assessment of a case must be dealt solely by the ASU, rather “A lender must establish a centralised and dedicated Arrears Support Unit (ASU), which must be adequately staffed, to manage cases under the MARP”.

With regard to Provision 32 of the CCMA 2013, while I note that the completed SFS was initially passed to the FSG and not the Provider’s ASU, given that the Provider’s FSG was dealing with the Complainants’ case, I can find no wrongdoing on the Provider’s part in this regard.

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

2. “The Client did not receive the required letter in respect of arrears which are over 31 days in arrears under Section 23 of CCMA”.

The Complainants’ representatives submit that the Complainants did not receive any letter providing them with the requisite information as set out in Provision 23 of the CCMA 2013. The Complainants’ representatives also submit that the Complainants were not provided with an Information Booklet providing details of the Provider’s MARP as detailed in Provisions 14 and 23 of the CCMA 2013.

Provision 23 of the CCMA 2013 provides:

“23. When arrears arise on a borrower’s mortgage loan account and remain outstanding 31 calendar days from the date the arrears arose, a lender must:

- a) inform each borrower and any guarantor on the mortgage, unless the mortgage loan contract explicitly prohibits such information to be given to the guarantor, of the status of the account on paper or another durable medium, within 3 business days. The letter must include the following information:*
- (i) the date the mortgage fell into arrears;*
- (ii) the number and total monetary amount of repayments (including partial repayments) missed;*
- (iii) the monetary amount of the arrears to date;*
- (iv) confirmation that the lender is treating the borrower’s situation as a MARP case;*
- (v) relevant contact points (i.e., the dedicated arrears contact points not the general customer service contact points);*
- (vi) an explanation of the meaning of not co-operating under the MARP and the implications, for the borrower, of not co-operating including:*
- A) the imposition of charges and/or surcharge interest on arrears arising on a mortgage account and details of such charges;*
- B) that a lender may commence legal proceedings for repossession of the property immediately after classifying a borrower as not co-operating; and*
- C) a warning that not co-operating may impact on a borrower’s eligibility for a Personal Insolvency Arrangement in accordance with the Personal Insolvency Act 2012;*

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(vii) a reminder that borrowers who have purchased payment protection insurance in relation to the mortgage account which subsequently went into arrears may wish to make a claim on that policy;

(viii) how data relating to the borrower's arrears will be shared with the Irish Credit Bureau, or any other credit reference agency or credit register, where permitted by contract or required by law, and the impact on the borrower's credit rating; and

(ix) a link to any website operated by the Insolvency Service of Ireland which provides information to borrowers on the processes under the Personal Insolvency Act 2012.

and

b) provide the borrower with the information booklet required under Provision 14."

Provision 14 of the CCMA 2013 provides:

"14. A lender must prepare and make available to borrowers, an information booklet providing details of its MARP, which must be drafted in accordance with the requirements set out in Provision 12 above and must include:

a) an explanation of its MARP;

b) an explanation of the alternative repayment arrangements available to borrowers, how these arrangements work, the key features of the arrangements and an outline, in general terms, of the lender's criteria for assessing requests for alternative repayment arrangements;

c) a statement that the availability of alternative repayment arrangements (as provided for in Provision 39) is subject to an individual assessment of each case and meeting the lender's criteria;

d) an explanation of all options offered by the lender, (other than alternative repayment arrangements) such as voluntary surrender, voluntary sale, mortgage to rent and trading down and a statement that the availability of these options are subject to an individual assessment of each case and meeting the lender's (or a third party's) criteria;

e) if the lender makes use of a confidentiality agreement or similar agreement, in circumstances where an alternative repayment arrangement or an option, other than an alternative repayment arrangement, is offered to a borrower, summary information on the lender's potential use of such agreements;

f) an explanation of the meaning of not co-operating under this Code and the implications, for the borrower, of not co-operating including:

(i) the imposition of charges and/or surcharge interest on arrears arising on a mortgage account,

(ii) that a lender may commence legal proceedings for repossession of the property immediately after classifying a borrower as not co-operating,

(iii) a warning that it may impact on a borrower's eligibility for a Personal Insolvency Arrangement in accordance with the eligibility criteria set out in the Personal Insolvency Act 2012;

g) information about the potential availability of relevant State supports such as mortgage interest relief or Mortgage Interest Supplement;

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- h) a reminder that borrowers who have purchased payment protection insurance in relation to the mortgage account which subsequently went into arrears may wish to make a claim on that policy;*
- i) how data relating to the borrower's arrears will be shared with the Irish Credit Bureau or any other credit reference agency or credit register, where permitted by contract or required by law;*
- j) relevant contact points (i.e., the dedicated arrears contact points not the general customer service contact points);*
- k) a statement that the borrower may wish to seek assistance from Money Advice and Budgeting Service (MABS) and contact details for the MABS National Helpline and links to relevant website(s) operated by MABS;*
- l) a link to www.keepingyourhome.ie;*
- m) a summary of the lender's policy regarding communications with borrowers, required in accordance with Provision 22;*
- n) information regarding the borrower's right to appeal a decision of the lender in accordance with Provision 49, including the procedure and timeframe for submitting an appeal;*
- o) information regarding the borrower's right to make a complaint in accordance with Provision 55, including the procedure and timeframe for submitting a complaint; and*
- p) with regard to the potential for legal proceedings, a statement that, irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case."*

The Provider submits that it is satisfied that all of the regulatory arrears letters have been issued to the Complainants regarding their mortgage loan accounts. The Provider submits that the first letter dated 3 November 2011 was sent when the Complainants' mortgage loan reached 31 days in arrears and in full compliance with the CCMA 2013. The Provider submits that the MARP Booklet was also enclosed with its letter dated 3 November 2011.

In response, the Complainants' representatives state that *"The letter dated 3rd November 2011 was issued by the [Provider's] Mortgage Bank Arrears Support Unit which confirms our complaint that this matter should have been dealt with by this ASU Unit rather than FSG. This first letter was the only dealing with this case by the Arrears Support Unit"*.

The Provider has submitted a copy of its letter dated 3 November 2011 to the Complainants. I note that this letter sets out that the mortgage loan account went into arrears on 27 October 2011. At this time the Code of Conduct on Mortgage Arrears 2010 (CCMA 2010) was in force.

Provision 12 of the CCMA 2010 provides the following:

"12. A lender must prepare and make available to borrowers, an information booklet providing details of its MARP, which must be drafted in accordance with the requirements set out in provision 10 above and must include:

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- a) an explanation of its MARP, including the alternative repayment measures available to borrowers and outline in general terms, the lender's criteria for assessing requests for alternative repayment measures;
- b) a statement that the borrower will not be required to change from an existing tracker mortgage to another mortgage type;
- c) information about the potential availability of relevant State supports such as mortgage interest relief or Mortgage Interest Supplement;
- d) relevant contact points (i.e., the dedicated arrears contact points not the general customer service contact points); and
- e) reference to relevant website(s) operated by the Money Advice and Budgeting Services (MABS)."

Provision 22 of the CCMA 2010 provides:

"22. When arrears arise on a borrower's mortgage loan account and remain outstanding 31 days from the date the arrears arose, a lender must:

a) inform each borrower and any guarantor on the mortgage, unless the mortgage loan contract explicitly prohibits such information to be given to the guarantor, of the status of the account in writing, within 3 working days. The letter must include the following information:

- i) the date the mortgage fell into arrears;*
 - ii) the number and total amount of full or partial payments missed;*
 - iii) the monetary amount of the arrears to date;*
 - iv) confirmation that the lender is treating the borrower's situation as a MARP case;*
 - v) the importance of the borrower co-operating with the lender during the MARP process and notification that, if co-operation ceases, the protections of the MARP no longer apply and that the lender may start legal proceedings for repossession;*
 - vi) a statement that fees, charges and surcharge interest in relation to the arrears will apply, where the borrower does not co-operate with the lender;*
 - vii) details of any fees and charges in relation to the arrears that may be applied if the borrower does not co-operate with the lender;*
 - viii) a general statement about the impact of missed mortgage repayments and repossession on the borrower's credit rating,*
- and*

b) provide the borrower with the information booklet required under provision 12."

I note that the Provider's letter dated 3 November 2011 sets out, among other things, the following:

"Our records show that your mortgage payments are in arrears as shown above.

Under the Central Bank's Code of Conduct on Mortgage Arrears (the Code), we have introduced a process called the Mortgage Arrears Resolution Process (MARP) to help support mortgage customers who are in arrears, or are at risk of going into arrears. We are treating your arrears as eligible for this process.

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We enclose a copy of the [Provider's] Mortgage Arrears Resolution Process booklet which explains the process.

We are required by the Code to point out that your co-operation in the Mortgage Arrears Resolution Process as set out in the booklet is vital. If you cease to co-operate in the process, then

- (i) surcharge interest (suspended during the Mortgage Arrears Resolution Process) at the rate of 6% per year, in addition to the loan interest rate, may apply to the amount of the arrears until the arrears are repaid,*
- (ii) we may report the arrears to the Irish Credit Bureau,*
- (iii) we may have to start legal proceedings for repossession (this could cost you €2,500 and may be higher in certain circumstances) and*
- (iv) your credit rating will be damaged.*

...

You might find it useful to contact your local Money Advice and Budgeting Service (Helpline...) or an appropriate alternative that may be able to help you to manage your finances.

Your next step is to make an appointment to discuss your situation with your branch Mortgage Co-ordinator or Relationship Manager.

If you have any questions about your loan or your arrears, or about the Mortgage Arrears Resolution Process, please contact our Mortgage Arrears Support Unit at the number above."

I note that the Provider's letter to the Complainants dated 27 March 2015 states, among other things, the following:

"I now require the following information:

- 1. Standard Financial Statement (template enclosed, incl. MARP booklet)*

..."

While I note that the Complainants' mortgage loan account had not been in arrears by 31 days at the time the Provider issued its letter of 3 November 2011, I note that the Provider continued to issue arrears correspondence in line with its obligations pursuant to the CCMA 2010.

I note the Complainants' representatives' submission that the CCMA was revised in 2013 and no MARP Booklet was issued to the Complainants in respect of the CCMA 2013. Based on the evidence before me, I must accept that the Provider furnished the Complainants with a MARP information booklet when it issued its letter of 3 November 2011, and an updated information booklet on 27 March 2015 in compliance with the CCMA 2010 and 2013.

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

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3. "The Bank did not make its assessment of the clients case on their full circumstances as provided in Section 37 of CCMA"

In relation to the Complainants' current repayment capacity the Complainants' representatives state "We believe that an overall Bank decision was made in respect of all the Liability of this Corporate and Personal Connection and that the decision in respect of the Mortgage was not taken on its own merits as provided under Section 36 of the CCMA".

Provision 36 of the CCMA 2013 provides:

"36. A lender's ASU must examine each case on its individual merits."

Provision 37 of the CCMA 2013 provides:

"37. A lender's ASU must base its assessment of the borrower's case on the full circumstances of the borrower including:

- a) the personal circumstances of the borrower;*
- b) the overall indebtedness of the borrower;*
- c) the information provided in the standard financial statement;*
- d) the borrower's current repayment capacity; and*
- e) the borrower's previous repayment history."*

The Provider submits that following receipt of the Complainants' SFS dated 8 April 2015 it conducted a review of their financial circumstances taking into account the wider connection. The Provider submits that based on the information provide, it determined that the Complainants' mortgage loan account was unsustainable.

The Provider states that it "calculated the Complainant's income at €3,270 and their expenditure at €2,237. This left the Complainants with €800 to service the mortgage repayments of €2,339. As evidenced from these calculations, the Complainants had no affordability to meet their contractual repayments in line with the mortgage contract and the account was therefore deemed unsustainable. This decision was then referred to the ASU for ratification. The ASU agreed with the decision made that the mortgage was unsustainable".

The Complainants' representatives submit that the Complainants were in a position to offer additional security to the Provider by way of an unencumbered property asset and to restructure the loan to ensure full repayment over an extended term. The Complainants' representatives submit that the Provider made no assessment of this, other than stating that it was not permitted to take this course due to Central Bank Guidelines. The Complainants' representatives submit that this is not a matter prohibited by Central Bank Guidelines.

The Provider submits that the decision reached to deem the Complainants' mortgage loan unsustainable due to a lack of affordability was taken on its own merits. The Provider submits that it did make its assessment on the full circumstances of the Complainants, and was fully aware of the unencumbered property held in the second Complainants name,

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however following its detailed assessment it determined that the Complainants' mortgage loan was unsustainable due to a lack of affordability. The Provider states that during two of the interest only periods that it had previously granted, *"The Complainants failed to meet these interest only repayments which is another indicator to the Bank that the mortgage is unsustainable"*.

In response, the Complainants' representatives submit that there is no indication that this matter was in fact considered as there is no mention of the security of a second property, both as to income and capital, on the MARP Ratification Form provided by the Provider. The Complainants' representatives state that *"if this matter had been considered then the Bank would have agreed with our conclusion which we have articulated at meetings, phone calls and written correspondence of the personal circumstances of [the Complainants]"*.

The Complainants' representatives state that *"We do not accept that the decision to deem the Complainants' mortgage was unsustainable on its own merits – when clearly we have financially demonstrated that this mortgage could then have been paid in full with Property Security in excess of €1 Million in respect of a mortgage of €226,000 approx"*.

The Complainants' representatives submit that in relation to the Complainants previous repayment history, they have a long standing relationship over 30 years with the Provider and prior to the Economic Crash in 2008 honoured all repayments and financial undertakings which have in the past been considerably in excess of the current mortgage repayments. The Complainants' representatives state that *"We complain on the basis that this condition was not documented nor given adequate consideration by [the Provider] as required under Section 37 of CCMA"*.

The Provider states, in its final response letter dated 7 December 2015, that it *"acknowledges the Complainants' repayment history prior to going into arrears in 2011 with current arrears of €54,149 outstanding. However, this alone is not sufficient for the Bank to determine a customer has capacity to repay; such a decision is reached having considered the full personal circumstances and financial information provided"*.

In response, the Complainants' representatives submit that the arrears of €54,149 are only outstanding since the Economic Crash and they have honoured all interest repayments since 2011. The Complainants' representatives submit that the arrears are only a technical balance resulting from capital payments in respect of the period of the Irish economic crash.

I note that the Provider's letter dated 4 February 2015 to the Complainants' representatives state, among other things, the following:

"With regard to the matter of [the Complainants'] Home Mortgage; your proposal to convert their Home Mortgage to an Investment Property Mortgage, taking both the Principal Dwelling House ("PDH") and Investment Property as security is unacceptable, as inclusion of the PDH as security would bring it within scope of our policies regarding PDH lending. In addition, the Bank would not consider converting the Home Mortgage to an Investment Property Mortgage on a standalone basis as it would weaken our current security position".

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I note that the Complainants signed an SFS on 8 April 2015. The Provider, in its letter to the first Complainant dated 23 July 2015, states, among other things, the following:

"... we are writing to advise you that we are not in a position to offer you an alternative repayment arrangement as your mortgage is unsustainable.

In assessing your case we used the information you provided in your Standard Financial Statement together with any accompanying documentation. Based on your financial circumstances we do not believe that you will be able to return to full contractual repayments in the foreseeable future. However, we are committed to working with you and there are a number of options available to you in your circumstances and we would ask you to consider them".

The Provider has submitted a copy of its "MARP Appeals Board Summary Appeal Sheet" which I note states, among other things, the following:

"Date of Appeal Received 13/08/2015

...

Rationale:

Note: FSG Case – Please read all material provided.

...

Restructure proposed IO, pending receipt of €140,000 from sale of unencumbered BTL, IO cover UTD... issued Side Letter of Undertaking relating to agreement to sell the BTL and allocation of SSP. These were never accepted, however Home Mortgage Dept had implemented the PDH IO period on foot of closing team instruction. MARP Advice obtained was to re-assess the PDH decision. The re-assessment did not alter the decision; the mortgage is still unsustainable, and therefore not offering an ARA. Bwrs have an unencumbered asset which they can sell to resolve PDH mortgage issue.

...

If an agreement is not reached on sale/clearance of debt, legal action to commence 3 months after date of P45 letter. Bwrs are not eligible for Advance forbearance (PESS) given unencumbered BTL OMV €250,000. BTL must be sold to repay/substantially reduce debt or PDH to be sold as mortgage is unsustainable. As bwrs unwilling to do so, legal action now required. Personal facility noting Borrower non acceptance of PDH solution and proposed legal action, limit to be withdrawn.

Per FSG Credit application, mortgage unsustainable and legal action required as borrowers are unwilling to sell BTL. Per MARP Decision Ratification Form voluntary sale is recommended as the assessment of the bwr's financial information has identified that the current mortgage is not sustainable.

BASIS OF APPEAL

See appeal letter from bwr and TP dated 12/08/2015."

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I note that the Provider's "Mortgage Appeals Board Minute" dated 29 September 2015 sets out, among other things, the following:

"Original Decision:

Decline Unsustainable

Bank Original Alternative Offer:

...

Mortgage Appeals Board Decision:

The Board has agreed with the original FSG decision and declined customers' appeal.

Rationale for Decision:

Mortgage is deemed unsustainable.

The Board has noted that the Borrowers have unencumbered BTL which can be sold to fund the PDH debt.

PDH property is also in positive equity."

I must accept that the information and documentation submitted in evidence indicates that the Provider complied with the requirements of Provisions 36 and 37 of the CCMA 2013 in respect of the Complainants' application in April 2015, and in so doing, the Provider has considered the Complainants' request for an alternative repayment arrangement. While the Provider has not furnished its FSG notes wherein it based its decision that "*An assessment of the borrower's financial information has identified that the current mortgage is not sustainable*", it is evident from the "*MARP Appeals Board Summary Appeal Sheet*" that the FSG had based its assessment of the Complainants' case on their full circumstances. This was ratified by the Provider's ASU. It is clear that the Provider was of the opinion that based on the information furnished by the Complainants that it was not in a position to offer an alternative repayment arrangement.

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

4. "The Bank did not consider and explore all the options for alternative repayment arrangements specified by Regulation 39 of CCMA"

The Complainants' representatives submit that the Provider did not make every reasonable effort under the CCMA 2013 to agree an alternative repayment arrangement with the Complainants or their nominated representative. The Complainants' representatives submit that the Provider did not consider and explore all the options for alternative repayment arrangements and "*simply ticked No*" on the MARP Decision Ratification Form.

The Complainants' representatives submit that an arrangement to pay interest and part of the normal capital amount for a specified period of time or deferring payment of all or part of the scheduled mortgage repayment for a specified period of time were clearly affordable and sustainable. The Complainants' representatives submit that they recommended extending the term of the mortgage to the Provider, however it stated in a telephone

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conversation that this was not permitted under the Central Bank Guidelines as a mortgage could not extend beyond the age of 70 in respect of the eldest mortgage party. The Complainants' representatives submit that this is an incorrect interpretation of the guidelines as it is permitted to have the mortgage loan term extended to age 70 of the youngest party to the mortgage. The Complainants' representatives state that *"In addition, where there are additional circumstances such as the provision of another property for income or capital repayments then it is permitted that the technical final date of mortgage repayment may exceed the age of 70"*.

Provision 39 of the CCMA 2013 provides:

39. In order to determine which options for alternative repayment arrangements are viable for each particular case, a lender must explore all of the options for alternative repayment arrangements offered by that lender. Such alternative repayment arrangements may include:

- a) interest only repayments on the mortgage for a specified period of time;*
- b) permanently reducing the interest rate on the mortgage;*
- c) temporarily reducing the interest rate on the mortgage for a specified period of time;*
- d) an arrangement to pay interest and part of the normal capital amount for a specified period of time;*
- e) deferring payment of all or part of the scheduled mortgage repayment for a specified period of time;*
- f) extending the term of the mortgage;*
- g) changing the type of the mortgage;*
- h) adding arrears and interest to the principal amount due;*
- i) equity participation;*
- j) warehousing part of the mortgage (including through a split mortgage);*
- k) reducing the principal sum to a specified amount; and*
- l) any voluntary scheme to which the lender has signed up e.g. Deferred Interest Scheme.*

The Provider submits that it did consider all options as can be seen on the MARP Decision Ratification Form dated 3 July 2015, however the decision reached was that the Complainants' mortgage was unsustainable.

In response, the Complainants' representatives submit that the Provider's MARP Decision Ratification Form states that the total connected exposure amounts to €2,588,000 of which the largest proportion relates to a corporate debt which the Complainants provided no personal guarantee and its inclusion in respect of same is in breach of the CCMA in respect of the family home mortgage loan arrears. The Complainants' representatives state that *"The total MARP Mortgage in this case amounts to €226,000 whereas the Connected Exposure referred to is over 10 times higher at €2,588,000"*.

The Provider must base its assessment of the Complainants' case on their full circumstances to include their overall indebtedness. I must accept that the information and documentation submitted in evidence indicates that the Provider complied with the requirements of

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Provision 39 of the CCMA 2013 in respect of the Complainants' application in April 2015. As set out above, this Office can investigate the procedures undertaken by the Provider regarding the CCMA 2013 and its associated MARP, but will not investigate the details of any re-negotiation of the 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.

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

5. *"The Bank did not offer [The Complainants] an alternative repayment arrangement as it concluded that the mortgage is not sustainable. The Lender did not as required under Section 45 of the CCMA provide the detailed reasons for this decision."*

Provision 45 of the CCMA 2013 provides that:

45. If a lender does not offer a borrower an alternative repayment arrangement, for example, where it is concluded that the mortgage is not sustainable and an alternative repayment arrangement is unlikely to be appropriate, the lender must provide the reasons, on paper or another durable medium, to the borrower. In these circumstances, the lender must inform the borrower of the following:

a) other options available to the borrower, such as voluntary surrender, trading down, mortgage to rent or voluntary sale and the implications of each option for the borrower; and his/her mortgage loan account including:

(i) an estimate of associated costs or charges where known and, where not known, a list of the associated costs or charges;

(ii) the requirement to repay outstanding arrears, if this is the case,

(iii) the anticipated impact on the borrower's credit rating, and

(iv) the importance of seeking independent advice in relation to these options;

b) the borrower's right to appeal the decision of the lender not to offer an alternative repayment arrangement to the lender's Appeals Board;

c) that the borrower is now outside the MARP and that the protections of the MARP no longer apply;

d) that legal proceedings may commence three months from the date the letter is issued or eight months from the date the arrears arose, whichever date is later, and that, irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case;

e) that the borrower should notify the lender if his/her circumstances improve;

f) the importance of seeking independent legal and/or financial advice;

g) the borrower's right to consult with a Personal Insolvency Practitioner;

- h) the address of any website operated by the Insolvency Service of Ireland which provides information to borrowers on the processes under the Personal Insolvency Act 2012; and*
- i) that a copy of the most recent standard financial statement completed by the borrower is available on request.*

The Provider submits that its letter dated 23 July 2015 fully satisfies its obligations pursuant to Provision 45 of the CCMA 2013.

In response, the Complainants' representatives state that *"this letter dated 23rd July 2015 issued and the letter requests the Complainants to consider – Trading Down/Downsizing – Voluntary Sale – Voluntary Surrender – Mortgage – The Bank did not offer a borrower an alternative repayment arrangement as required under Section 45 of the CCMA"*.

The Provider's letter dated 23 July 2015 states, among other things, the following:

"... we are writing to advise you that we are not in a position to offer you an alternative repayment arrangement as your mortgage is unsustainable.

I must point out that Provision 45 of the CCMA 2013 does not require the Provider to offer a borrower an alternative repayment arrangement. I am of the view that the Provider's letter dated 23 July 2015 complies with the requirements of Provision 45 of the CCMA 2013.

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

6. *"We seriously question the consideration of this Appeal under the MARP procedures and whether any adequate alternative arrangement was considered"*

The Complainants' representatives submit that they received a letter from the Provider's Mortgage Appeals Office dated Tuesday 29 September 2015 confirming that the appeal was currently being processed and received a subsequent letter dated Thursday 31 October 2015 advising that the appeal was not upheld. The Complainants' representatives state that *"We seriously question the consideration of this Appeal under the MARP procedures and whether any adequate alternative arrangement was considered and that from a Tuesday to a Thursday that this matter was fully determined. We will probably expect to receive from the Bank minutes of a General Appeal Hearing ticking all the relevant boxes on a pre-prepared form – however we do not consider same to be adequate proof of the detailed consideration of every case under the MARP Procedures"*.

The Provider submits that it is satisfied that the Mortgage Appeals Process was fully adhered to. The Provider has submitted a copy of its letter to the Complainants' representatives dated 1 October 2015. I note that this letter states, among other things, the following:

"We regret to inform you that your clients' appeal has not been upheld by the Mortgage Appeals Board.

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The Mortgage Appeals Board assessed the case using the information provided via the Standard Financial Statement and any accompanying documentation in conjunction with the recommended levels of expenditure. Based on your clients' financial circumstances we do not believe that they will be able to return to full contractual repayments in the foreseeable future".

The Provider has submitted a copy of its "MARP Appeals Board Summary Appeal Sheet" and its "Mortgage Appeals Board Summary Appeal Sheet" dated 29 September 2015. On examination of these documents, I consider that the Provider adequately assessed the Complainants' appeal.

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

7. The Provider has breached its obligations under the CCMA 2013 with regard to its communications with the Complainants.

The Complainants' representatives submit that the Provider has breached Provisions 12, 21 and 22 of the CCMA 2013. Provision 12 of the CCMA 2013 provides:

"12. A lender must ensure that:

...

b) all information relating to a lender's handling of arrears and pre-arrears cases must be presented to the borrower in a clear and consumer friendly manner..."

Provisions 21 and 22 of the CCMA 2013 provide:

"21. A lender must produce and implement a policy regarding communications with borrowers. That policy must be approved by the board of directors and must ensure that the requirements of Provision 22 are met.

22. A lender must ensure that:

...

*b) **communications** with **borrowers** are not aggressive, intimidating or harassing;*

..."

The Complainants' representatives state "We would stringently contend that the threat of a Receiver over ones Family Home is not a consumer friendly manner. This is clearly a tactic to threaten and intimidate clients and is also factually not an option to the Bank as it is a Family Home which can only be taken possession of by a Receiver or a Bank through an Application to the Courts".

The Complainants' representatives state that "We believe that the Financial Services Ombudsman should enquire and seek a copy of the Communication Policy adopted by the Board of Directors of [the Provider] – we could not envisage such an 'appalling vista' that the Board of Directors would approve such a Policy of threats of a Receiver in a Family Home

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case which they would clearly know was in Breach of the Code of Conduct on Mortgage Arrears. Consequently, the threat of a Receiver is likely to be outside the Banks own Policy as approved by [its] Board of Directors”.

The Complainants’ representatives also state *“the threat of a Receiver over ones Family Home is the very epitome of aggressive, intimidating or harassing behaviour. This is clearly a tactic to threaten and intimidate clients... The threat of Receiver – which means repossession of a property without notice or reference to the borrower is an extremely aggressive tactic”.*

The Provider submits that its communication with the Complainants was not in breach of the CCMA 2013, nor was it in any way aggressive, intimidating or harassing but merely stating that it would be exploring all potential legal avenues open to it. The Provider submits that it is satisfied that all communication has been in accordance with provisions 21, 22, 23, 24, 25 and 27 of the CCMA 2013.

The Provider submits that the suggestion that a Receiver could be appointed was only one of a number of options, if appropriate, being considered by it to recoup the outstanding debt. The Provider submits that it issued the full suite of MARP letters and tried to come to a solution with the Complainants. The Provider submits that as the loan had been deemed unsustainable, it offered a number of options to the Complainants, all of which were declined. The Provider states that *“In addition, no new solutions were forthcoming from the Complainants so having exhausted all the possible outcomes available, the Bank had no other option but to demand on the loan. Furthermore the Bank does not simply demand on a loan, the process leading up to that point is a lengthy one with... various solutions being offered before the point of demanding on the loan is reached”.*

Having carefully considered all submissions from both parties, I can find no evidence that the Provider breached Provisions 12, 21 or 22 of the CCMA 2013.

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

Conclusion

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

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

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

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3 October 2018

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.

