Decision Ref: 2018-0149

Sector: Banking

Product / Service: Repayment Mortgage

Conduct(s) complained of: Arrears handling - Mortgage Arears Resolution Process

Outcome: Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to the Provider's assessment of the Complainants' applications for forbearance under the Mortgage Arrears Resolution Process (MARP) in 2013 and again in 2015.

In December 2006 the Complainants drew down a mortgage facility with the Provider in the sum €230,000.00, secured on their primary residence in the west of Ireland. In October 2007 the Complainants drew down a top up facility in the sum €15,000.00. Both Complainants were resident and working in Ireland at that time.

In 2008/2009 the second Complainant was made redundant from his job in the construction industry in Ireland, and arrears started to accrue on the mortgage loan account.

In 2009 the second Complainant emigrated to the Middle East in order to take up employment, while his wife the first Complainant remained in Ireland where she continued to live in the primary residence and work as a teacher in third level education.

The second Complainant states that he suffered a work-related accident while in the Middle East in 2009, which resulted in a loss of income, and ongoing surgery between 2009 and 2012. He subsequently took up employment again, and in 2014 moved to a new position in the Middle East. The second Complainant states that payment of his salary

while working abroad has been irregular and sporadic, but has been more stabilised since early 2015.

The Complainants separated during this time and subsequently divorced. The second Complainant has re-married and remains living and working in the Middle East. The first Complainant remains in the primary residence in Ireland.

In late 2013 the Complainants submitted an application for forbearance in respect of their mortgage under the Provider's MARP, requesting an alternative repayment arrangement (ARA). Their application was declined by the Provider on 30 October 2013 on the grounds that "*there is no indication that your circumstances will improve in the short or medium term and entering into any arrangement that will see your arrears situation deteriorate each month is not appropriate*".

The Complainants submitted an appeal under the MARP on 4 December 2013. The Provider rejected the Complainants' MARP appeal on 27 January 2014.

The Provider re-assessed the Complainants' mortgage in July 2015, but declined to restructure the mortgage or to offer an ARA.

The Complainants submitted an appeal under the MARP in August 2015. The Provider rejected the Complainants' MARP appeal on 7 October 2015.

The Complainants continued to put proposals to the Provider for a sustainable long term solution to their arrears, but the Provider has declined to put an ARA in place.

The complaint is that the Provider has wrongly failed under its Mortgage Arrears Resolution Process, both in 2013 again in 2015, to agree an ARA in accordance with the Complainants' means, and that it has acted in an unfair, unreasonable and discriminatory manner, in a number of respects, in its communications with the Complainants and in its assessment of the Complainants' financial circumstances.

The complaint is also that the Provider failed fully to consider the Complainants' continuing proposals to the Provider in 2016 for a sustainable solution to their arrears.

In addition, the Complainants dispute the rate of interest applied to their mortgage loan account, describing the level of interest charged on their borrowings as "*usurious*".

The Complainants' Case

There are a number of aspects to the Complainants' complaint:

Complaint A

The Complainants submit a complaint (**Complaint A**) relating to the Provider's assessment of their application in 2013 under the Provider's Mortgage Arrears Resolution Process

/Cont'd…

(MARP) requesting an alternative repayment arrangement (ARA), and the rejection of their subsequent MARP appeal in January 2014.

The Complainants also complain about the Provider's refusal to communicate with the second Complainant by ordinary email, rather than by encrypted email, and the level of contact the Provider had in 2013 with the first Complainant.

(i) Application for ARA 2013

The Complainants complain that the Provider's assessment of their application for forbearance in 2013, and its refusal to agree to their repayment proposal at that time, was unfair and discriminatory and not in line with the requirements of the Mortgage Arrears Resolution Process.

The Complainants state that the Provider failed to communicate adequately with the second Complainant when coming to a decision on their application for an ARA in 2013/2014, and that the Provider failed to take account of the specific circumstances of the second Complainant despite having been made fully aware of his work situation in the Middle East and the irregular nature of salary payments made by his employer.

(ii) Communication by encrypted email

In support of the complaint, the second Complainant states that between 2009 and 2012, during the time that he was living and working in the Middle East, the Provider had communicated with him regularly by ordinary email, but that from 2012 onwards it refused to continue this means of communication.

The Complainants state that since 2012 the Provider has insisted on communicating with the second Complainant by postal service or by secure/encrypted email, and that this is where the problem has arisen.

The second Complainant states that the postal delivery service in the Middle East is unreliable and significantly delayed, both incoming and outgoing, and that there are restrictions on accessing encrypted email.

The second Complainant states that he has given his express permission to the Provider to communicate with him by normal email rather than by secure encrypted email, but that the Provider has declined to do so. The second Complainant states that as a result he has been unable to access encrypted emails sent to him by the Provider and that receipt of postal correspondence from the Provider has been unreliable and delayed.

The second Complainant states that, consequently, any delays in responding to the Provider's inquiries about his financial circumstances cannot be blamed on him.

(iii) Level of communication with the first Complainant

/Cont'd…

The Complainants allege that the Provider consistently and regularly, throughout 2013, harassed the first Complainant, who remained living in the mortgaged property in Ireland, while the second Complainant worked abroad. The second Complainant states that despite specifically requesting the Provider several times to desist from harassing the first Complainant, it continued to put pressure on her in relation to their mortgage repayments and the future of their family home.

The Complainants submit that, irrespective of the Provider's decision in 2013 to assess each of them separately on the grounds that they were at that time separated (and subsequently divorced), their legal liability for the mortgage is a joint one and that, if payments from one mortgagor cover all or most of the mortgage liability, then it is not right for the Provider to threaten the other mortgagor with sanctions and the possible loss of the family home.

Complaint B

The Complainants submit a further complaint (**Complaint B**) relating to the Provider's assessment of their subsequent application in 2015 under the Provider's MARP requesting an ARA, and relating to the manner of transmission of an Offer of Supported Voluntary Surrender to the Complainants in 2015.

(i) Application for ARA 2015

Both of the Complainants submitted updated Standard Financial Statements (SFS) to the Provider in June 2015 in order to be re-assessed for an ARA. The applications were unsuccessful and both Complainants were advised by the Provider on 1 July 2015 that the Provider was unable to offer an ARA or restructuring of the mortgage.

The Complainants submitted appeals under the MARP in August 2015, querying the data upon which the Provider had based its decision to decline an ARA, and proposing a combined monthly mortgage repayment of €1,700.00 (€1,300.00 to be paid by the second Complainant, in addition to a sum of €400.00 being paid by the first Complainant).

The Complainants were advised by the Provider, in individual letters dated 7 October 2015, that their appeals had been unsuccessful.

The Complainants dispute the findings of the Provider, and argue that at no time did the Provider communicate to them the level of affordability upon which it relied in its assessment of their circumstances. The Complainants submit that the sum of €1,300.00 proposed by the second Complainant, in addition to the €400.00 being paid by the first Complainant, amounted to a proposed monthly repayment of €1,700.00, which the Complainants feel is very close to the amount the Provider was seeking.

The first Complainant queries why the income of the second Complainant, in addition to the repayments made by him, was not taken into consideration in the Provider's assessment of her application. The first Complainant submits that the second Complainant

/Cont'd…

is a joint party to the mortgage and that his payments and income must be considered, in addition to her own.

(ii) Offer of Supported Voluntary Surrender

The Complainants are unhappy with the Provider's actions in contacting the first Complainant's solicitor in October 2015, by telephone, to make a verbal offer relating to the voluntary surrender of the property by the Complainants. The Complainants are also unhappy that this Offer of a Supported Voluntary Surrender was transmitted to the first Complainant's solicitor in October 2015, but that it was not transmitted to the second Complainant until December 2015.

Furthermore, the second Complainant states that he has been advised by the Provider that he is not eligible for relocation assistance under the terms of the Offer of Supported Voluntary Surrender, which he submits that he requires to support the removal of his personal effects from the mortgaged property in Ireland to his new home in the Middle East. The second Complainant contends that, in this respect, the Provider has acted disingenuously and with the intention of deceiving him, in making him an Offer of Supported Voluntary Surrender from which he believes that he cannot fully benefit.

The second Complainant submits that, if the Provider were to offer him some financial assistance to relocate his personal belongings from the mortgaged property to his new home in the Middle East, he would consider accepting the Provider's Offer of a Supported Voluntary Surrender of the mortgaged property.

Complaint C

The Complainants have raised additional elements of complaint (**Complaint C**) in relation to their ongoing communications with the Provider to date, and the rate of interest charged to their mortgage loan account.

(i) Continuing communications in relation to further options

The Complainants submit that the Provider did not fully consider the request by the first Complainant in April 2016 that her existing regular monthly repayments be applied to the capital balance on the mortgage loan as a sustainable long term solution. The Complainants submit that the Provider's failure in this regard displayed an unwillingness to engage with them in a meaningful way to come to a mutually agreeable solution.

The Complainants also submit that the Provider failed to respond to the first Complainant's request for confirmation that she remains entitled to the protection of the Provider's MARP and, if she does, whether she qualifies for the various ARAs outlined in the Provider's MARP brochure, and in particular a reduction of the interest rate applicable to her mortgage, a term extension, or a capitalisation of arrears, or a combination of all three, as a long term solution.

/Cont'd…

The first Complainant submits that the Provider has a discretion to combine the options specified in its MARP brochure under a Permanent Alternative Repayment Arrangement, and that options such as a Rate Restructure, a Term Extension or Capitalisation of Arrears may be offered as a standalone arrangement or as a combination of all three to form one ARA depending on the circumstances and requirements to reach a sustainable solution. The first Complainant contends that the Provider has not addressed the reasons why a combination of these options is not available to her, yet the Provider "*was prepared to accept a voluntary surrender of my home and a write-off of the residual debt*". The first Complainant queries whether this is because of her age, and states as follows:

> *"I fail to understand why* [the Provider] *does not accept my payments of €470 per month, paid without fail and pursue* [the Second Complainant] *for additional monthly payments".*

The first Complainant states that, once she reaches the age of 66, she will receive her state contributory pension, and that she will continue working and continue dedicating all her surplus income to her mortgage repayments, "*over and above the frugal subsistence level I am used to, in order to secure my home*".

The first Complainant also wishes to point out that she has made arrangements to keep her Mortgage Protection Assurance Policy payments up to date, and that this policy has the Provider's interest noted as beneficiary. The first Complainant states that, in the event of her death, the Provider would receive payment from this source.

The first Complainant submits that she is a customer in difficulty. She argues that the absence of any change to her financial circumstances is not a valid reason why she should not be afforded the benefit of a forbearance measure such as those proposed.

(ii) Rate of interest applied to the account

As a separate issue, the Complainants have raised a query with the Provider regarding the rate of interest charged to the account. The Complainants believe that their interest rate should be lower than it has been, as a result of European Central Bank (ECB) rate cuts, and complain that the Provider has acted in breach of their mortgage loan conditions, specifically Special Condition 402, by failing to adjust interest rates to reflect the fall in ECB rates.

In a letter to the Provider dated 13 June 2016, the first Complainant described the level of interest charged on their mortgage borrowings as "*usurious*".

<u>The Provider's Case</u>

The Provider states that in June 2010 the Complainants' mortgage account began to go into arrears despite having been granted a capitalisation of arrears accrued from April 2008 to March 2010. The Provider states that the arrears have continued to accrue since that date.

/Cont'd…

The Provider states that the Complainants' mortgage account reverted from interest only repayments back to capital and interest repayments with effect from 1 April 2013, and that the current monthly payment amount due is €2,838.27.

Complaint A

(i) Application for ARA 2013

The Provider states that it was made aware by the second Complainant in May 2013 that he and the first Complainant had separated. The Provider states that, since that date, the Provider has had to treat the Complainants as single borrowers as required under the provisions of the Code of Conduct on Mortgage Arrears (CCMA).

The Provider states that it is satisfied that it complied with all of its obligations in terms of its engagement with the first Complainant in 2013 under the CCMA and its MARP.

The Provider indicates, however, that it was still in the process of carrying out a separate assessment of the second Complainant and was awaiting his reply to queries regarding the information in his Standard Financial Statement dated 14 April 2013 before proceeding with an assessment of his financial information at that time.

The Provider states that, for that reason, the first Complainant was assessed on her own circumstances under MARP in October 2013. The Provider states that, based on the financial information provided by the first Complainant in her Standard Financial Statement, the mortgage amount and the overall payment history on the account, the Provider's Arrears Support Unit (ASU) determined that she was not in a position to make a sustainable financial contribution to the mortgage account due to the seasonal nature of her employment and that, based on her affordability, there was no alternative repayment option that the Provider could offer her.

The Provider states that, following its assessment, it wrote to the first Complainant on 30 October 2013 as required by Provision 45 of the CCMA and informed her of her right to appeal the decision. The Provider states that the MARP Appeal was carried out in compliance with the Code, and that upon review of the SFS and supporting documentation the Appeals Board found that the decision of the ASU was correct based on the first Complainant's level of affordability. The Provider has submitted a copy of the Appeal Board minutes and a copy of the first Complainant's SFS used in the assessment of her case.

(ii) Communication by encrypted email

In response to the Complainants' complaint that the Provider failed to communicate adequately with the second Complainant when coming to a decision on their application for an ARA in 2013/2014, the Provider submits that it has been challenging to engage with both borrowers due to the communication restrictions imposed by the second Complainant's residence, for employment reasons, in the Middle East.

/Cont'd…

The Provider states that by 2013 it had availed of encrypted email software as it was not satisfied that the level of protection offered by normal email was sufficient to protect its borrowers' data. The Provider acknowledges that the second Complainant has had difficulty accessing the encrypted information sent to him while in the Middle East, but submits that it is unable to facilitate his request for unencrypted account information.

(iii) Level of communication with the first Complainant

In response to the Complainants' allegation that the Provider consistently and regularly harassed the first Complainant, the Provider rejects these accusations. The Provider submits that it showed a high level of forbearance towards the Complainants but that, by the beginning of 2013, their mortgage account was the equivalent of 16 payments in arrears.

The Provider states that it spoke to the first Complainant regularly during 2013, while working through the MARP procedures, and submits that its contact with the first Complainant has been within its internal contact policy in accordance with Provisions 21 and 22 of the CCMA.

The Provider states that it also issued correspondence to the first Complainant as required under Provisions 23, 25 and 27 of the CCMA. The Provider does not accept that its level of contact with the first Complainant was disproportionate or excessive.

Complaint B

(i) Application for ARA 2015

In response to the Complainants' complaint regarding the Provider's assessment of their further application in 2015 for an ARA, the Provider states that it received an updated SFS from each of the Complainants in June 2015, and that it carried out a further assessment under its MARP of each of the Complainants' requests for an ARA.

The Provider states that, on 1 July 2015, it issued a "No Options" letter to each of the Complainants advising that it had completed the assessment of each of their cases and that it was unable to offer an ARA or restructuring of their mortgage, on the grounds that the mortgage was unsustainable. This correspondence informed each of the Complainants that, in accordance with the CCMA, the Complainants were now outside the MARP and that the protections of the MARP no longer applied. The Complainants were advised that they might wish to consider other options that might be available to them, including Voluntary Surrender, Trading Down, Voluntary Sale, and Mortgage to Rent. The Complainants were also advised that, notwithstanding the Provider's decision, the Complainants had the right to appeal the decision.

The Provider subsequently, on 12 August 2015, received an appeal from each of the Complainants against the "No Options" letters issued by the Provider on 1 July 2015. The Complainants' appeals were considered by the Provider's Mortgage Appeals Board, and a

/Cont'd…

decision was made by the Board to uphold the decision of the ASU on the basis that the mortgage was not sustainable.

The decision of the Appeals Board was communicated to each of the Complainants on 7 October 2015.

The Provider states that its letter to the first Complainant dated 7 October 2015 stated its belief, based on an assessment of her updated SFS, that the mortgage was not sustainable given the level of arrears on the account and the first Complainant's level of affordability. The Provider acknowledged in this letter that the first Complainant had been making regular payments of €470.00, but stated that her SFS did not indicate that she would be in a position to increase this repayment and return to the full monthly repayment of €2,838.27 in the near future.

The Provider states that its letter to the second Complainant dated 7 October 2015 stated its belief, based on the SFS provided by him, that the second Complainant could afford the full contractual repayment amount of €2,838.27 if he reviewed his current levels of expenditure. The Provider submits that the SFS provided by the second Complainant confirmed that he had approximately €2,085.07 remaining each month after meeting monthly expenses in the amount of €3,663.49, in addition to payment of other debts in the amount €1,500.00. The Provider believes that, if these figures were reviewed, the second Complainant could afford the full contractual monthly repayment amount of €2,838.27.

The Provider states that the second Complainant had offered a repayment of €1,300.00 against the monthly repayment of €2,838.27. The Provider states that at time of assessment in June 2015 the Complainants' mortgage account was the equivalent of 28 payments in arrears with an arrears balance outstanding of €79,955.17. The Provider states that the Complainants' mortgage account had begun to go into arrears in June 2010 despite having been granted a capitalisation of arrears accrued from April 2008 to March 2010. The Provider states that it is not prepared to accept a reduced level of payment indefinitely in circumstances where the SFS provided by the second Complainant indicates that the loan may be affordable.

In response to the second Complainant's contention that the Provider did not communicate to them the level of affordability upon which it relied in its assessment of their case, the Provider states that a copy of the second Complainant's completed SFS, with a calculation of the affordability figure of €2,085.07, was sent to the second Complainant on 16 June 2015. The Provider states that this amount was also quoted in its letter to the second Complainant dated 23 January 2015, with a query why the Complainant was offering a lower repayment than the amount his SFS indicated was affordable at that time.

The Provider acknowledges that it has been difficult to communicate with the second Complainant as a result of being resident in the Middle East. The Provider submits that it has been unable to speak to the second Complainant over the telephone for several years, and that the fact that he is unable to access encrypted email is outside the Provider's

/Cont'd…

control. The Provider states that the only option remaining is to correspond with the second Complainant by post.

In response to the first Complainant's query about the separate assessment of the two Complainants, and her contention that the income and repayments of the second Complainant should have been taken into consideration by the Provider in its assessment of her own circumstances, the Provider submits that the CCMA requires it to treat separated or divorced borrowers as single borrowers. The Provider states that this means that it is unable to share any information, financial or otherwise, with the other party named on the mortgage. The Provider states that each party is separately assessed based on his or her own affordability, but remains jointly and severally liable for the mortgage.

(ii) Offer of Supported Voluntary Surrender

In response to the Complainants' complaint relating to the Provider's actions in contacting the first Complainant's solicitor in October 2015 by telephone to make a verbal offer relating to the voluntary surrender of the property by the Complainants, the Provider states that where it is unable to offer an ARA, Provision 45 of the CCMA requires that it makes borrowers aware of other options that may be open to them, one of these options being the voluntary surrender of the mortgaged property. The Provider states that in some cases, it is willing to accept the surrender of the property in full and final settlement of the mortgage, with a financial contribution towards relocation costs.

The Provider states that, as the first Complainant had appointed a third party representative to act solely on her behalf, the Provider made her third party representative aware of this option with the appropriate documentation subsequently issued to each of the Complainants by post.

The Provider states that separate letters relating to the Offer of Supported Voluntary Surrender (SVS) were issued separately to each of the Complainants because the Complainants are divorced. The Provider states that the difference in timing of these letters of offer was due to the differing dates of communication which the Provider had with each Complainant. The Provider explains that the first Complainant had been pro-active in contacting the Provider, and that this had accelerated the Offer of SVS to her in October 2015, whilst the offer to the second Complainant was prompted by contact from him on 30 November 2015. The Provider submits that the timeline for each offer was both reasonable and appropriate to the relevant chain of correspondence with the borrower concerned. The Provider states that each offer was in effect a separate offer which was open for acceptance by both of the Complainants.

The Provider states that, in order to avail of this Offer of SVS, and in order to proceed with a surrender of the property, the consent and signature of both parties to the mortgage was required. The Provider submits that, notwithstanding this, it is correct that, in circumstances where borrowers are separated or divorced, each process should run separately until legal or regulatory requirements indicate that the activity should align. The Provider suggests that, in this instance, this would have occurred had both parties indicated that they wished to accept either of the Offers of SVS made.

/Cont'd…

In response to the second Complainant's complaint regarding his eligibility for relocation assistance under the terms of an SVS, the Provider submits that relocation assistance will only be paid when the borrower relocates. The Provider submits that, as the second Complainant does not reside in the property, he would not incur such relocation costs, and that as a result this aspect of the SVS offer does not apply to his circumstances.

In a letter to this Office dated 5 December 2016, the Provider submits that, even though the Offers of SVS made to the first Complainant and to the second Complainant expired, on 30 December 2015 and 27 January 2016 respectively, "*we would of course consider such an approach if the borrowers were to engage in a meaningful way with the process at this stage*".

In conclusion, the Provider notes that the first Complainant is in a position to maintain a monthly repayment amount of €400.00 and that this amount, in addition to the figure of €1,300.00 offered by the second Complainant, amounts to a total monthly repayment figure of €1,700.00. The Provider submits that, given the status of the account and the fact that the full contractual monthly repayment amount is €2,838.27, it is not in a position to accept a monthly payment of €1,700.00, leaving a monthly deficit of €1,138.27, in circumstances where the SFS provided by the second Complainant suggests that the loan may be affordable.

The Provider submits that, while its Appeal Board agreed with the decision of the ASU, the Provider remained willing to consider any new proposals the Complainants might wish to make.

Complaint C

The Provider acknowledges that the Complainants have raised additional elements of complaint in relation to their ongoing communications with the Provider following their application for an ARA in 2015, and the rate of interest charged to their mortgage loan account.

(i) Continuing Communications in relation to Further Options

In response to the complaint that the Provider has not fully considered the First Complainant's request in April 2016 to have her regular monthly repayments applied against the capital balance on the mortgage loan account, the Provider submits that the regular monthly repayments are applied against the outstanding balance on the mortgage, but that the repayments being made are not sufficient to cover the interest element, and are not sufficient to sustain any available ARA.

The Provider states that it has carried out another review of the Complainants' mortgage account and advises that any proposals such as those being made by the first Complainant would be considered for reassessment once there had been a material change to her circumstances. In its Final Response Letter dated 7 June 2016, in relation to this aspect of the complaint, the Provider states that "*we cannot assess your proposals as there has been*

/Cont'd…

no change in your affordability. It is not appropriate to enter into an arrangement that will see your arrears situation deteriorate further".

The Provider states that it considered the options of a Term Extension and Rate Reduction for the Complainants' mortgage, but submits that the mortgage is already at the maximum term, and that a Rate Reduction would not result in an affordable repayment for the first Complainant.

With respect to the option of a Capitalisation of Arrears, the Provider states that in order to qualify for this option the Complainants would have to meet the full contractual monthly repayment of €2,838.27 for a period of six months. The Provider states that the first Complainant does not have affordability for this and her monthly repayments of €470.00 per month represent only 16% of the contractual monthly repayment.

The Provider denies that the age of the first Complainant was a barrier to the assessment of the suitability of the arrangements, save as to the application of the Provider's policy regarding consideration of the maximum term which could have been applied to a term extension.

It is the Provider's position that it cannot put an arrangement in place that will result in the arrears continuing to accrue on the account and where the affordability is not evident. The Provider states that as of 19 August 2016 the mortgage was 39 months is arrears at €112,308.60.

In response to the first Complainant's contention that the Provider should accept the current payment being made by her and seek the remaining payment from the second Complainant, the Provider states that both borrowers are jointly and severally liable for the entire debt outstanding. The Provider states that, if the contractual monthly repayment is not made in full, its recourse is to both borrowers.

In response to the complaint that the Provider has failed to respond to the first Complainant's request for confirmation that she remains entitled to the protection of the Provider's MARP, the Provider recognises that it did not explicitly confirm in 2016 that the first Complainant no longer had the protection of MARP. The Provider submits, however, that it did write to the first Complainant on 16 August 2016, advising that the position remained as outlined in the No Options Letter which issued to the First Complainant dated 1 July 2015. The Provider submits that the No Options Letter dated 1 July 2015 clearly stated that the first Complainant did not enjoy the protection of MARP from July 2015 and that, consequently, the Provider was in a position to commence the litigation process from that date.

The Provider wishes to point out, nonetheless, that it continues to apply the principles of MARP to its borrowers, even once they no longer formally qualify for the protection of MARP.

The Provider states that, in the event that a borrower's circumstances change following the withdrawal of the protections of MARP, the options within the Provider's MARP

/Cont'd…

booklet would be considered and, where appropriate, offered to a borrower. In this context, the Provider confirms that these options, individually or combined (if appropriate), continue to be available as a long term solution should the criteria for such an outcome be present.

The Provider states, however, that the suitability of an ARA depends upon sufficient income being available which the borrower is willing to allocate to the mortgage payments to ensure that the mortgage can be restructured in a manner which is both affordable and sustainable in the long term. The Provider submits that, while the first Complainant has sought the application of these options to the loan, she has been unable to demonstrate that sufficient income is available to meet the mortgage obligation in a sustainable manner. The Provider states that it is satisfied that there is insufficient income available to allow a successful ARA to be established in this case.

In response to the first Complainant's argument that the absence of any change to her financial circumstances is not a valid reason why she should not be afforded the benefit of a forbearance measure such as those proposed, the Provider submits that this:

> *"…would appear to ignore the basic principle of the Code which is set out in the introduction which states its "objective of assisting the borrower to meet his/her mortgage obligations". The [first] Complainant has been unable to demonstrate that sufficient income is available to meet the mortgage obligation in a sustainable manner".*

The Provider submits that there was the potential to service the loan in a sustainable manner within the combined income levels of both borrowers when the assessment was completed in 2015.

The Provider states, however, that the amount the Complainants indicated was available to service the loan within their respective SFS submissions did not provide the basis for the Provider to offer a sustainable arrangement.

The Provider submits that payment experience prior to the assessment did not demonstrate a willingness to allocate sufficient income to the loan which, it states, is a key factor in the
assessment of the sustainability of a proposed arrangement when considering an arrangement under Provision 38 of the CCMA.

The Provider states that the assessment of the Complainants' case included consideration of the potential that a bespoke solution comprising multiple elements including rate reduction, term extension and capitalisation could have achieved, and that the assessment concluded that such a solution was not possible. The Provider rejects any suggestion by the Complainants that a product which could have been offered to the Complainants was overlooked. The Provider submits that the suitability of all the options which it offers was considered and that none was considered suitable to the circumstances of this case.

/Cont'd…

The Provider states that the first Complainant did not provide a revised Standard Financial Statement in 2016, but that her professional advisor informed the Provider, during a telephone call in March 2016, that there was no change in her circumstances. The Provider states that this was subsequently confirmed by the first Complainant in a letter to the Provider's ASU dated 12 July 2016, in which she advised that her financial circumstances had not changed in the previous 12 months. The Provider submits that, in these circumstances, a further assessment was not necessitated. The Provider states that, in the event that the first Complainant had indicated that the circumstances had changed, a new SFS would have been sought and the process of assessment repeated. The Provider states that it had no further contact from the second Complainant during this period and that, therefore, the decision not to complete a further assessment was based on the information provided by the first Complainant.

In conclusion, the Provider submits that it is not in a position to provide the Complainants with sustainable payment options based on the information held.

(ii) Rate of interest applied to the account

In response to the concern expressed by the Complainants regarding the rate of interest charged to the Complainants' mortgage loan account, the Provider states that the rate of interest charged to the account is determined by the contract between the Complainants and the Provider. The Provider submits that it has managed the Complainants' account in accordance with the contract terms at all times. The Provider states that the Complainants' mortgage is a variable rate loan, and that the interest rate is charged in accordance with the terms and conditions of the loan and current market conditions.

The Provider submits that, in June 2016, it appointed a firm of solicitors to act on its behalf to institute legal proceedings for the possession of the mortgaged property. The Provider states that these legal proceedings are currently on hold pending the outcome of this adjudication by the Financial Services and Pensions Ombudsman.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant 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

/Cont'd…

Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 3 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.

Following the issue of my Preliminary Decision, an additional submission was received from the Complainants under cover of their letter to this office dated 18 September 2018.

Having considered that submission, my final determination is set out below.

The complaint is that the Provider has failed wrongfully under its Mortgage Arrears Resolution Process, both in 2013 **(Complaint A)** and in 2015 **(Complaint B),** to agree an alternative repayment arrangement in accordance with the Complainants' means, and that it has acted in an unfair, unreasonable and discriminatory manner, in a number of respects, in its communications with the Complainants and in its assessment of the Complainants' financial circumstances.

As part of **Complaint B**, the Complainants are also unhappy that an offer of voluntary surrender of the property was transmitted to the first Complainant's solicitor in October 2015, but that it was not transmitted to the second Complainant until December 2015.

The complaint is also that the Provider failed fully to consider the request of the first Complainant, in April 2016, to have her existing regular monthly repayments applied to the capital balance on the mortgage loan as a sustainable long term solution **(Complaint C);** and, as part of Complaint C, that the Provider failed to respond to the request of the first Complainant for confirmation that she remained entitled to the protection of the Provider's MARP and, if so, whether she qualifies for the various ARAs outlined in the Provider's MARP brochure.

The first Complainant submits that the absence of any change to her circumstances is not a valid reason why she should not be afforded the benefit of a forbearance measure such as those proposed by her.

As a preliminary issue, it is important to set out the limitations of the jurisdiction of this office in complaints of this kind. In relation to Mortgage Arrears Resolution Process (MARP) complaints, where issues of sustainability/repayment capacity are in dispute, the Financial Services and Pensions Ombudsman is only in a position to investigate whether the Provider, in handling the mortgage arrears issue, correctly adhered to its obligations pursuant to the Central Bank's Code of Conduct on Mortgage Arrears (CCMA).

The Financial Services and Pensions Ombudsman may investigate the procedures undertaken by the Provider regarding the MARP process, but will not investigate the

/Cont'd…

details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the customer, and does not involve this office, as an impartial adjudicator of complaints. The Financial Services and Pensions Ombudsman 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, within the meaning of Section 60 (2) (b) of the Financial Services and Pensions Ombudsman Act 2017.

The Complainants were advised by this office in writing, by letter dated 17 February 2014, of such limitation on the investigation of their complaint, and I note that the second Complainant acknowledged this in writing by letter to this Office dated 19 February 2014.

By way of background to this complaint, the Complainants drew down a mortgage facility with the Provider in December 2006 in the sum €230,000.00, secured on their primary residence in the west of Ireland. They subsequently drew down a top up facility in the sum €15,000.00 in October 2007. Both Complainants were resident and working in Ireland at that time.

The Complainants have set out the circumstances which led to the emigration of the second Complainant to the Middle East in 2009 for employment purposes, a subsequent work-related accident while in the Middle East in 2009 which resulted in a loss of income over a number of years, and a gradual accrual of substantial arrears on the Complainants' mortgage account.

The first Complainant has remained living in the mortgaged property in Ireland.

The submissions show that arrears first started to accrue on the account in 2008, and that the Complainants were offered the option of switching to an interest only repayment which was implemented with effect from 1 September 2009. Six months later the Complainants were granted a capitalisation of arrears accrued from April 2008 to March 2010. The arrears were capitalised on 11 March 2010. The Complainants' mortgage account reverted from interest only repayments back to capital and interest repayments with effect from 1 April 2013. The current monthly payment amount due is €2,838.27. Arrears have continued to accrue on the account since 2010.

The complaint taken to this office is in respect of forbearance applications made by the Complainants in 2013 and 2015. The Provider has submitted that the forbearance applications which are the subject of this complaint were considered under the Code of Conduct on Mortgage Arrears (CCMA) 2013, which was effective from 1 July 2013, and which was the prevailing Code at the time of assessment. This Code replaced the previous Code of Conduct on Mortgage Arrears 2010, which had been effective since 1 January 2011, and sets out how mortgage lenders must treat borrowers in or facing mortgage arrears, with due regard to the fact that each case of mortgage arrears is unique and needs to be considered on its own merits. This Code sets out the framework that lenders must use when dealing with borrowers in mortgage arrears or in pre-arrears.

/Cont'd…

As a preliminary matter, I note from the submissions that the second Complainant had submitted a Standard Financial Statement to the Provider dated 14 April 2013 in which he confirmed that his marital status was "separated". With respect to the application of both the CCMA 2010 and the CCMA 2013, Chapter 1 of both Codes provides as follows:

> *"…in the case of joint borrowers who notify the lender in writing that they have separated or divorced, the lender should treat each borrower as a single borrower under this Code…"*

The CCMA 2013 makes the following exception to this:

> *"…(except to the extent that an action requires, as a matter of law, the agreement of both borrowers)."*

The Provider submits that, for this reason, the Complainants have been treated as separate borrowers for the purposes of assessment under MARP from that date on.

Complaint A

(i) Application for ARA 2013

The Complainants state that the Provider's assessment of their application for forbearance in 2013, and its refusal to agree to their repayment proposal at that time, was unfair and discriminatory and not in line with the requirements of the Mortgage Arrears Resolution Process.

The Complainants state that the Provider failed to communicate adequately with the second Complainant when coming to a decision on their application for an ARA in 2013/2014, and that the Provider failed to take account of the specific circumstances of the second Complainant despite having been made fully aware of his work situation in the Middle East and the irregular nature of payments made by his employer there.

The submissions show that the first Complainant submitted a Standard Financial Statement to the Provider in September 2013.The Provider assessed the first Complainant based on her own circumstances as a separate borrower under MARP.

The submissions show that the Provider did not have sufficient up to date financial information from the second Complainant at that time, despite having requested an up to date SFS by letter dated 23 August 2013, to enable it to carry out an assessment of the second Complainant's circumstances at that time.

Provision 37 of the CCMA 2013 sets out the circumstances which must be taken into account by the lender in its assessment of a borrower's case:

> *A lender's ASU must base its assessment of the borrower's case on the full circumstances of the borrower including:*

/Cont'd…

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;*
e) *The borrower's previous repayment history.*

The Provider has submitted documentary evidence of the Arrears Support Unit's assessment, dated 30 October 2013, of the first Complainant's request for an ARA, including its consideration of current and future affordability, incorporating repayment capacity, overall indebtedness, health, and employment details, an assessment of the customer's level of cooperation, the property in question, and a consideration of the customer's proposal for an ARA. The assessment notes refer to the second Complainant as follows:

> "[The second Complainant] *has moved back to* [the Middle East] *and will not be considered in this assessment. He is not in contact via any of the international telephone numbers provided and has failed to respond to a bespoke letter issued…on 20/08/2013.* [The first Complainant] *advised that they are not judicially separated and he has left his belongings in the mortgaged property. He is not making any contributions towards the mortgage at present despite the fact that* [the first Complainant] *confirmed that he is working."*

I accept that, on the basis of the evidence submitted and quoted above, the Provider did base its assessment of the first Complainant's case on her full circumstances, in compliance with the requirements of Provision 37.

The Provider submits documentary evidence of the ASU's consideration of the ARA Options available and their suitability to the first Complainant's case including, among others, capitalisation, term extension, interest only, reduced payment, full deferral, term/rate restructure, interest only/rate restructure, split mortgage, mortgage to rent, and repossession.

Provision 39 of the CCMA states that:

> *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;*

/Cont'd…

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 eg. Deferred Interest Scheme.

Provision 40 of the CCMA states that:

> *A lender must document its considerations of each option examined under Provision 39 including the reasons why the option(s) offered to the borrower is/are appropriate and sustainable for his/her individual circumstances and why the option(s) considered and not offered to the borrower is/are not appropriate and not sustainable for the borrower's individual circumstances.*

It is not a requirement of the CCMA that all of the options listed in Provision 39 be considered by the lender, but rather that all of the options "*offered by that lender*" be considered. Having reviewed the submissions of the Provider, in particular the "Arrangement Options" considered by the ASU on 30 October 2013, as recorded in the Assessment Details document of the same date, I accept that the Provider's ASU did "*explore all of the options for alternative repayment arrangements offered by that lender*", and that the ASU did document its considerations of each of the options examined under Provision 39, including the reasons why the options considered, but not offered to, the first Complainant were not appropriate and not sustainable for the first Complainant's circumstances.

On 30 October 2013 the Provider's Arrears Support Unit wrote to the first Complainant, in accordance with Provision 45 of the CCMA 2013, setting out its decision as follows:

> *We have completed the assessment of your case and regretfully we are unable to offer you an alternative repayment arrangement or restructuring of your mortgage for the following reason(s):*
>
> *The review and assessment of your circumstances concludes that there is no indication that your circumstances will improve in the short or medium term and entering into any arrangement that will see your arrears situation deteriorate each month is not appropriate.*
>
> *In accordance with the Code of Conduct on Mortgage Arrears we wish to inform you of the following:*
>
> 1. *You are now outside of the MARP and the protections of the MARP no longer apply.*

/Cont'd…

a. *We are now free to commence legal proceedings against you to repossess your property…*
b. *We are free to impose the fees, charges and surcharge interest set out in Appendix 1 to this letter.*

The correspondence then set out a number of other options available to borrowers, such as Voluntary Surrender, Trading Down, Voluntary Sale and Mortgage to Rent, and the implications of each option for a borrower.

In summary, pursuant to the CCMA 2013 the Provider is obliged to "*complete an assessment of a borrower in financial difficulties for an alternative repayment arrangement".* It is clear that the Provider did consider a variety of "*alternative repayment arrangement"* options as can be seen from the documentation submitted where the Provider's considerations of interest only, reduced repayments, arrears capitalisation, and split mortgage, among other options, are detailed. The assessment for an alternative repayment arrangement must consider the full circumstances of the borrower in financial difficulties; it is clear from the documentation submitted that the Provider did consider the first Complainant's full financial circumstances.

The submissions show that the Provider received a MARP Appeal Request Form from the first Complainant on 5 December 2013, submitted on the basis that the decision of the ASU was "*not made with full consideration of all facts leading to the arrears situation, ie. accident of* [the second Complainant] *in 2009…and subsequent time off work and unemployment. 2. No regard for future potential to resolve the present situation for both parties. 3. I* [the first Complainant] *am employed on a part time basis and am making regular payments according to my earnings…"*

The first Complainant further submitted, as part of her appeal, that her case had not been properly treated under the Mortgage Arrears Resolution Process, with specific reference to unnecessarily aggressive communications from the Provider and unnecessarily frequent telephone calls.

In addition, the first Complainant complained that the Provider had failed to comply with the requirements of the Code of Conduct on Mortgage Arrears on a number of grounds, including failure to continue to communicate by email with the second Complainant while in the Middle East, "*refusal to make provision for the special situation*" of the second Complainant in the Middle East, and failure to consider the full range of options as detailed in Provision 39 of the CCMA 2013.

The first Complainant requested a restructuring of the mortgage for the next 2 years, including interest only payments from January 2014 until December 2015, capitalisation of arrears, and a moratorium from mortgage repayments for the summer months of June, July and August as she would not be in paid employment at that time.

The matter was subsequently brought before the Provider's Mortgage Appeals Board in January 2014. The Provider states that three members of its Appeal Board with no prior involvement in the case were selected to adjudicate on the decision of the ASU. The

/Cont'd…

Provider has submitted the Minutes of the Meeting of the Appeals Board, which record the
matters considered by the Board, and the outcome of the Appeal. The minutes, which are undated, record the Board's finding as follows:

> *The Board unanimously agree that the ASU have completed an accurate and comprehensive assessment of the borrower's situation. Because of the lack of contribution from* [the second Complainant] *the mortgage is not sustainable on a long term basis. It has been recognised that* [the first Complainant] *has been making payments of €700 in October, November and December 2013; it is understood she is able to do this as she was in employment at the time but…the borrower has advised that she would not know what she could pay after this, as she wouldn't be working.*
>
> *The borrower's past repayment history shows a lack of affordability to make a continuous substantial payment towards the mortgage. Also her circumstances do not show any indication of her financial situation improving in the future; not having a permanent guaranteed income, and on a long term basis, a pension that would not provide a sufficient income to service a mortgage of this size.*

The decision of the Appeals Board was communicated to the first Complainant on 27 January 2014 in the following terms:

> *Having investigated your case, the Appeals Board has decided to uphold the decision of the Arrears Support Unit. Each of the points highlighted as part of your appeal have been considered individually as follows:*
>
> - *The 'No Options' decision of the Arrears Support Unit is correct in light of the information provided by you in the Standard Financial Statement;*
> - *Both you and* [the second Complainant]'s *full circumstances have been taken into account at all times in the assessment on the account;*
> - *Future plans and proposals have been taken into account in making the decision;*
> - *The payments you have been making have been taken into account, but indicate the mortgage is not affordable on a sustainable level on a long terms basis;*
> - *We believe your case has been handled professionally and in line with Central Bank regulations throughout by our Arrears Support Unit;*
> - *The Arrears Support Unit are actively working on evaluation of* [the second Complainant's] *situation at present; and*
> - *The full range of options had been considered by the Arrears Support Unit before the decision was made that none would be suitable or affordable in light of the information you provided in your Standard Financial Statement. Please note that there is no regulatory requirement for* [the Provider] *to provide a breakdown of options considered.*

/Cont'd…

I accept from the documentary evidence that the considerations of the ASU were reviewed by the Appeals Board and I note that, in its letter to the Complainants dated 27 January 2014, the Appeals Board addressed each point of appeal raised by her, and set out its reasons for not agreeing to her repayment proposal. At that point the Appeals Board advised the Complainant of her right to refer the matter to the then Financial Services Ombudsman, and provided the appropriate contact details.

For these reasons, I find that the evidence supports the Provider's position that its decision not to offer the Complainants an alternative payment arrangement in October 2013, and upon appeal in January 2014, was in compliance with the requirements of the provisions of the CCMA 2013, and I find no breaches of the CCMA 2013 on the part of the ASU or the Appeals Board in this regard. Nor is there evidence that the Provider has acted in a manner in its assessment of the application for forbearance in question, either by its ASU or by its Appeals Board, which may be considered unfair or discriminatory in its application to the Complainants.

For the reasons set out above, I do not uphold this aspect of the complaint.

(ii) Communications by encrypted email

I am aware that the Complainants strongly dispute the Provider's actions in 2012/2013 in declining to continue communicating with the second Complainant in the Middle East by ordinary email, in circumstances where the Complainants have submitted that all of the Provider's communications with the second Complainant had been by ordinary email between 2009 and 2012. The second Complainant submits that he has given his express permission to the Provider to communicate with him by normal email rather than by secure encrypted email, but that the Provider has declined to do so. The second Complainant states that as a result he has been unable to access encrypted emails sent to him by the Provider and that receipt of postal correspondence from the Provider, while in the Middle East, has been unreliable and delayed.

The Provider's position is that by 2013 it had availed of encrypted email software as it was not satisfied that the level of protection offered by normal email was sufficient to protect its borrowers' data. The Provider acknowledges that the second Complainant has had difficulty
accessing the encrypted information sent to him while in the Middle East, but submits that it is unable to facilitate his request for unencrypted account information.

It is relevant that Chapter 4 of the Consumer Protection Code 2012, which imposes certain binding requirements upon regulated financial service providers which must, at all times, be complied with when providing financial services to a consumer, provides at 4.3 as follows:

> ***4.3***. *A regulated entity must ensure that, where it communicates with a consumer using electronic media, it has in place appropriate arrangements to ensure the security of information received from the consumer and the secure transmission of information to the consumer.*

/Cont'd…

In light of this obligation on the Provider, when communicating with a customer by electronic media, to ensure the secure transmission of information to the customer, I do not consider it unreasonable of the Provider to insist on communicating with the second Complainant by secure encrypted email, or by postal service, in relation to his mortgage loan account and to decline to continue to communicate with him by way of ordinary email.

I consider that, in circumstances where the Provider had availed of encrypted email software for the protection of its customers' personal financial data, this was and is of benefit to all of its customers, including the Complainants, albeit that this may present challenges to a customer resident in the Middle East.

For the reasons set out above, I do not uphold this aspect of the complaint.

(iii) Level of communications with the first Complainant

An additional aspect of the Complainants' complaint relates to the level of contact the Provider had in 2013 with the first Complainant, who remained living in the mortgaged property in Ireland, while the second Complainant worked abroad. In a letter to this office dated 19 February 2014, the second Complainant alleged that "*during 2013* [the Provider] *consistently and on a regular basis harassed* [the first Complainant] *with sometimes daily phone calls pressing for payments, when they were well aware of the situation as regards to my* [Middle East] *work position and the irregular nature of payments due from my … employer*".

It is the Provider's position that it showed a high degree of forbearance to the Complainants during 2011, and only began to make outbound calls to the first Complainant after April 2012, by which time the mortgage loan account was seven payments in arrears. The Provider states that by the beginning of 2013, the mortgage account was the equivalent of 16 payments in arrears, and that the levels of payment received from, and contact with, the second Complainant at that time were sporadic.

Both the CCMA 2010 and the CCMA 2013 place a requirement on lenders to ensure that the level of contact and communications from the lender, or any third party acting on its behalf, is proportionate and not excessive, while ensuring that lenders can make the necessary contact to progress resolution of arrears cases.

Provision 21 of the CCMA 2013 provides that:

> *"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".*

Provision 22 of the CCMA 2013 provides that:

/Cont'd…

"A lender must ensure that:

a) the level of communications from the lender, or any third party acting on its behalf, is proportionate and not excessive, taking into account the circumstances of the borrowers, including that unnecessarily frequent communications are not made;

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

c) borrowers are given sufficient time to complete an action they have committed to before follow up communication is attempted. In deciding what constitutes sufficient time, consideration must be given to the action that a borrower has committed to carry out, including whether he/she may require assistance from a third party in carrying out the action; and

d) steps are taken to agree future communication with borrowers."

These provisions allow for an approach to lender and borrower communications, both spoken and written, that is suited to individual needs and circumstances, while still facilitating the resolution of arrears cases. In a letter to this office dated 17 April 2014, the Provider states that:

"we spoke with [the first Complainant] *regularly throughout 2013 and worked through the Mortgage Arrears Resolution Process (MARP) with her. We strenuously deny the accusation of harassment. Over 2013/2014, we have made outbound calls to* [the first Complainant]*] an average of 1-2 times a month. The highest number of outbound contact attempts made in a single month was 6 attempts during the month of October 2013. There were a higher number of calls than usual that month as we were working through* [the first Complainant's] *Standard Financial Statement (SFS). It should be noted that 2 of these attempts were text messages; our call of 01/10/2013 was driven by correspondence received from* [the first Complainant] *and our subsequent attempt of the 17/10/2013 was agreed in advance. Calls have never been made on a daily basis as alleged."*

The Provider has submitted records of all its telephone contacts with the Complainants during 2013, in compliance with its obligations under the CCMA in respect of record keeping. I accept that it was necessary for the Provider to remain in contact with the first Complainant, particularly in circumstances where contact with the second Complainant in 2013 was irregular, in order to progress the resolution of the substantial arrears on the mortgage account. There is no evidence of daily calls being placed to the first Complainant during that time. The evidence presented does not indicate that the level of telephone contact with the first Complainant in 2013 was excessive, particularly in circumstances where the first Complainant was cooperating with the MARP and the Provider was assisting her through this process and in the completion of her Standard Financial Statement.

The submissions show that, in addition to these telephone calls, the Provider continued to issue written correspondence to the Complainants in relation to arrears on their account, as required by the CCMA. The submissions show that in April 2012 the Complainants'

/Cont'd…

account was seven monthly payments in arrears. By the beginning of 2013 the Complainants' account was the equivalent of 16 payments in arrears.

Echoing the requirements of Provision 22 of the CCMA 2010, Provision 23 of the CCMA 2013 provides that:

> *"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;*
> >
> > *(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*

/Cont'd…

(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."

Similarly to the requirements of Provision 24 and 25 of the CCMA 2010, Provision 25 of the CCMA 2013 provides that:

"Where arrears exist on a mortgage loan account, an updated version of the information specified in Provision 23(a) (ii) and (iii) and (v) above, must be provided to the borrower on paper or another durable medium, every three months."

In addition, Provision 27 of the CCMA provides that:

"Where three mortgage repayments have not been made in full in accordance with the original mortgage contract and remain outstanding and an alternative repayment arrangement has not been put in place, the lender must notify the borrower, on paper or another durable medium, of the following:

a) the potential for legal proceedings for repossession of the property where a borrower is not co-operating, together with an estimate of the costs to the borrower of such proceedings;

b) the importance of taking independent advice from his/her local MABS or an appropriate alternative; and

c) 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 continued to issue these written communications to the Complainants during the period of time that arrears were accruing on their mortgage loan account. In doing so, the Provider was complying with its obligations under the CCMA.

For the reasons set out above, I do not uphold this aspect of the complaint.

Complaint B

The Complainants submit a further complaint relating to the Provider's assessment of their subsequent application for an ARA under the Provider's MARP in 2015, and relating to the manner of the Provider's transmission to the Complainants of an Offer of Supported Voluntary Surrender of the property in 2015.

(i) Application for ARA 2015

/Cont'd…

The submissions show that both Complainants submitted separate updated (albeit undated) Standard Financial Statements to the Provider in June 2015 in order to be re-assessed for an alternative repayment arrangement. The Complainants continued to be assessed by the Provider under MARP as single borrowers on the grounds that their marital status was recorded as "separated". Both applications were unsuccessful, on assessment by the Provider's ASU, and subsequently on appeal to the Provider's Mortgage Appeals Board.

The Complainants dispute the findings of the Provider, and argue that at no time did the Provider communicate to them the level of affordability upon which it relied in its assessment of their case (€2,085.00). The Complainants submit that the sum of €1,300.00 proposed by the second Complainant in his application, in addition to the sum of €400.00 being regularly paid by the first Complainant, amounted to a proposed monthly repayment of €1,700.00, which the Complainants feel is very close to the amount the Provider was seeking.

I note that the Provider has submitted documentary evidence of the ASU's assessment, dated 16 June 2015, of the Complainants' request for an ARA, including its consideration of the payment history on the account, expenditure issues, current and future affordability, incorporating repayment capacity, overall indebtedness, and employment details, an assessment of the Complainants' level of co-operation, the property in question, and a consideration of the Complainants' proposal for an ARA.

In the context of the ASU's consideration of the Complainants' current and future affordability, "*current affordability*" is noted to incorporate current repayment capacity, expenditure reductions required, and overall indebtedness. A full and detailed assessment of the financial circumstances of both Complainants in this regard is recorded, including the amount each Complainant proposed to pay towards the monthly mortgage repayment sum (CMS €2,838.27), and the affordability for same.

With respect to the affordability of the first Complainant, the assessment of the ASU records as follows:

> "[The first Complainant] *is offering repayments of €400/month, the SFS completed for* [the first Complainant] *does not support payments of €400 per month and is leaving her in a deficit position of €308.67 per month. We have been unable to get a clear indication from* [the first Complainant] *on how these payments are possible each month from the details provided for the SFS"*

With respect to the affordability of the second Complainant, the assessment of the ASU records as follows:

> "*We have completed an SFS with* [the second Complainant]. *This is showing an affordability for the mortgage of €2085.07. He is only offering €1300 and not willing to increase payments. Expenditure has been challenged and is appearing very high. Borrower advised the cost of living in* [the Middle East] *is very high. Borrower is also renting in* [the Middle East] *at €1152.92. Borrower has 5 debts outstanding…"*

/Cont'd…

The ASU notes that:

> *"…the arrears continue to accrue on the account because* [the first Complainant] *only gets paid during the academic year and not during the summertime/mid-term breaks, during which she struggles to meet even her basic household bills. The SFS does not show affordability for the mortgage for* [the first Complainant] *and is running at a deficit of €308.67.*
>
> *The SFS shows affordability of €2085.07 for* [the second Complainant], *but he is only willing to pay €1,300 towards the mortgage. The combined payments of €1700 is equal to 59.9% of CMS."*

The decision of the Provider's Credit Committee, dated 23 June 2015, comments as follows:

> *"Approved No Options – This SFS has been opened for 12 months as we were unable to bring to assessment due to lack of engagement from customers and inconsistency in the information provided for the assessment.* [The second Complainant] *has requested no contact by letter or phone and will only engage through email. Big inconsistencies with SFS in regards to affordability.* [The first Complainant*] is contributing €400.00 to mortgage repayments however we are unable to establish how she is making these payments as her affordability is only €91.33 as per SFS. Her expenditure is also extremely low so very unclear as to how she is living week to week.* [The second Complainant's] *affordability however is €2085.07 although he has confirmed he is not willing to pay this and is only willing to make payments of €1300. However, he has not managed to maintain this agreement as only 1 payment received at this level in last 5 months. Concerns as* [the second Complainant] *has confirmed he has no intention of returning to Ireland and he is advising that they are separated although* [the first Complainant] *disputes this.* [The second Complainant] *is also maintaining payments to other debt in the amount €1450.00. Property in high negative equity with LTV 128% based on today's HPI."*

It would appear that the Provider received additional information from the first Complainant on 24 June 2015, showing an increased income. The Credit Committee noted on 25 June 2015 that, although the first Complainant's income had increased "*and she is now showing affordability of €470.55…based on the payment pattern on the account, engagement from borrowers and* [the second Complainant's] *lack of commitment to the mortgage, No Options to issue*".
The submissions show that the first Complainant was advised by the Provider on 1 July 2015 that the Provider was unable to offer her an ARA or restructuring of the mortgage on the grounds that "*the assessment of your circumstances concludes that there is no indication that your circumstances will improve in the short or medium term and entering into any arrangement that will see your arrears situation deteriorate each month is not*

/Cont'd…

appropriate". The first Complainant was advised that she was now outside the Mortgage Arrears Resolution Process and that the protections of the MARP no longer applied.

The submissions show that the second Complainant was advised by the Provider on 1 July 2015 that the Provider was unable to offer him an ARA or restructuring of the mortgage on the grounds that "*we have completed the assessment of your current circumstances detailed in your Standard Financial Statement and are of the opinion that you have the ability to meet your monthly contractual payment*". The second Complainant was advised that he was now outside the Mortgage Arrears Resolution Process and the protections of the MARP no longer applied.

The Complainants submitted two separate appeals under the MARP, in August 2015, against the No Options Letters issued by the Provider on 1 July 2015. The first Complainant, in her appeal dated 11 August 2015, raised a number of queries in relation to the Provider's examination of her circumstances, and expressed her desire to reach a negotiated settlement with the Provider and to remain within the MARP process. The second Complainant's appeal, dated 6 August 2015, argued that the Provider's decision was "*not based on factual data*" and that it did not take into account "*the special situation…re past history and future affordability*".

The submissions show that the two appeals were brought before the Provider's Mortgage Appeals Board on 6 October 2015. The Provider has submitted the Minutes of the Meeting of the Appeals Board, which record the matters considered by the Board, and the outcome of the two Appeals.

The minutes show the consideration given to the background to the first Complainant's appeal, and record the Board's finding as follows:

> "*The Board discussed options and affordability and agreed that there was no affordability evident for any of the options including an RPA. It was noted that* [the first Complainant's] *income is difficult to confirm.*
>
> *The Board also noted the high level of arrears and the past performance of any arrangements. Two previous ATPs did not perform.*
>
> *The Board felt that given the level of arrears, income and current affordability, that the mortgage is not sustainable.*
>
> ***Actions:***
>
> *It was unanimously agreed by the Board to uphold the decision of the Arrears Support Unit.*"

The minutes also show the consideration given to the background to the second Complainant's appeal, and record the Board's finding, in relation to the appeal of the second Complainant, as follows:

/Cont'd…

"The Board discussed options and affordability and agreed that there was affordability evident for full CMS if there was a reduction in discretionary expenditure and a restructure of secondary debt.

The Board also noted the high level of arrears and the past performance of any arrangements. Two previous ATPs did not perform.

The Board felt that the mortgage is not being given priority and is not sustainable given the level of arrears and the inconsistent and varied amount of the payments being received.

Actions:

It was unanimously agreed by the Board to uphold the decision of the Arrears Support Unit."

The decision of the Appeals Board was communicated to the first Complainant on 7 October 2015, in the following terms:

"… our investigation has found that the mortgage is not sustainable given the level of arrears on the account and your current level of affordability. We acknowledge that you have been making regular payments of €470.00. We do not feel, however, based on the last assessment of your Standard Financial Statement that you will be in a position to increase your repayments and return to your full monthly repayment of €2,838.27 in the near future."

I note that the Appeals Board, in its letter dated 7 October 2015, responded to a number of additional issues raised by the first Complainant in her appeal. The Appeals Board confirmed to the first Complainant that its ASU had documented its consideration of each option examined under Provision 39, including the reasons why each option was or was not appropriate to the first Complainant. In its letter, the Appeals Board set out the 11 different options which had been considered in the first Complainant's case, and the reasons why each had been found to be inappropriate. The Appeals Board confirmed that the first Complainant had not been considered for a Mortgage to Rent – *"it appears that you are not eligible to apply, as under the Housing Agency requirements, the property is under accommodated."*

I note that the Appeals Board also acknowledged that the first Complainant had updated the information contained in her SFS in July 2015, and that once this updated information had been received, the ASU had updated its records accordingly.

The second Complainant was advised of the decision of the Appeals Board in a letter dated 7 October 2015, as follows:

… our investigation has found that the mortgage is not sustainable given the level of arrears on the account. We have found that based on our assessment of your Standard Financial Statement (SFS) that you are in a position to meet your monthly

/Cont'd…

contractual repayment of €2,838.27. Your monthly expenditure is shown as €3,663.49. If you were prepared to review your discretionary expenditure, we believe you could meet your full contractual repayment. You have stated that you are prepared to pay €1,300.00 per month towards the mortgage. However, our assessment shows affordability based on your figures (including the above expenditure) for €2,085.07."

I note that the Appeals Board, in response to the second Complainant's complaint that the Provider's decision to issue a No Options Letter "*is not based on factual data*", stated as follows:

"Our review and assessment is based on the information provided by you in the Standard Financial Statement. We note also that your actual repayments over the last nine months are not paid consistently and vary in amount as shown below:

30 January 2015	*€1151.44*
13 March 2015	*€500.00*
29 April 2015	*€1400.00*
30 June 2015	*€1250.00*
10 August 2015	*€1055.00"*

Both Complainants were advised that, if there was any change in their financial circumstances, they should make contact with the ASU.

I accept that, on the basis of the evidence submitted, the Provider based its assessment of the Complainants' case on their full circumstances, in compliance with the requirements of Provision 37 of the CCMA.

The Provider has submitted documentary evidence of the ASU's consideration of the ARA options available and their suitability to the Complainants' case including, among others, capitalisation, term extension, interest only, reduced payment, full deferral, full and part payment, interest only/rate restructure, term/rate restructure, split mortgage, mortgage to rent, and repossession.

I note that the "Options Assessment and Recommendation" records as follows:

*"**Options Assessment***
16/06/2015

The CMS-Plus, CMS-only, Interest only, Rate Restructure and Split Mortgage options are not within the borrower's affordability at present and as the borrower has not paid at least CMS for the last 6 months she does not qualify for capitalisation. The mortgage is already at the maximum term and so the Term Extension and Term/Rate restructure options are not available. The borrower does not qualify for an Interest Only and Rate Restructure option because her household income is not of a permanent source/paid regularly and the borrower has better affordability for

/Cont'd…

all other options, leaving the RPA as proposed the only viable option on the basis of the figures provided."

Having reviewed the submissions of the Provider, I accept that the Provider's ASU did "*explore all of the options for alternative repayment arrangements offered by that lender"*, as required by Provision 39 of the CCMA, and that the ASU did document its considerations of each of the options examined under Provision 39, including the reasons why the options considered, but not offered to, the Complainants were not appropriate and not sustainable for the Complainants' circumstances.

I consider that the evidence supports the Provider's position that its decision not to offer the Complainants an alternative payment arrangement in July 2015, and upon appeal in August 2015, was in compliance with the requirements of the provisions of the CCMA, and I find no breaches of the CCMA on the part of the ASU or the Appeals Board in this regard.

Nor is there evidence that the Provider has acted in a manner in its assessment of the application for forbearance in question, either by its ASU or by its Appeals Board, which may be considered unfair or discriminatory in its application to the Complainants.

For the reasons set out above, I do not uphold this aspect of the complaint.

(ii) Offer of Supported Voluntary Surrender

The Complainants have disputed the Provider's actions in contacting the first Complainant's solicitor in October 2015 by telephone to make a verbal offer relating to the voluntary surrender of the property by the Complainants. The Complainants are unhappy that this offer was transmitted to the first Complainant's solicitor in October 2015, but that it was not transmitted to the second Complainant until December 2015.

Provision 45 of the CCMA requires that, where 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 borrower with certain information, including 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…"*

One of the options listed in the Provider's letters to each of the Complainants dated 1 July 2015 had been the voluntary surrender of the mortgaged property.

The submissions show that the first Complainant received a letter from the Provider dated 22 October 2015 providing her with information in relation to a proposed Supported Voluntary Surrender option, which stated that "*this option enables you to voluntarily surrender your property to us, whereupon we intend to sell the property and bear all the costs associated with the sale*". This letter set out the benefits and implications of accepting the offer, and the supports which the Provider would provide during that

/Cont'd…

process, including a financial contribution towards relocation costs on vacating the property, and a financial contribution towards legal and financial advice.

The submissions show that the first Complainant was issued with the Supported Voluntary Surrender Offer documentation, in the name of both Complainants as joint borrowers, on 25 November 2015. The offer expiry date was 30 December 2015.
The submissions show that the second Complainant received a letter from the Provider dated 2 December 2015, in the same terms as the letter to the first Complainant dated 22 October 2015, providing him with information in relation to a proposed Supported Voluntary Surrender option, and setting out the benefits and implications of accepting the offer, and the supports which the Provider would provide during that process.

The second Complainant was issued with the Supported Voluntary Surrender Offer documentation, in the name of both Complainants as joint borrowers, on 22 December 2015. The offer expiry date was 27 January 2016.

The Provider has submitted, in a letter to this office dated 5 December 2016, that "*the difference in the timing of these offers was the result of the pro-active contact from* [the first Complainant], *which accelerated the offer of voluntary surrender to her, whilst the offer to* [the second Complainant] *was prompted by contact from him on the 30 November 2015 when* [the first Complainant] *made him aware of the offer*". It is the Provider's position that the timeline for each offer was both reasonable and appropriate to the relevant chain of correspondence with the borrower concerned, and that each offer could be considered a separate offer which was open for acceptance by both Complainants.

It is an aspect of this complaint that the Complainants, who have lived apart in different countries since 2009, while joint borrowers in the context of the mortgage loan which is the subject of this complaint, have been treated by the Provider as single borrowers under the CCMA, since the second Complainant advised the Provider in April 2013 that his marital status was "separated". The Provider has communicated separately with each of the Complainants, and has treated the Complainants separately for the purposes of assessment under the MARP, since that date.

I accept that certain discussions which had taken place between the Provider's ASU and the third party representative acting for the first Complainant had prompted the Provider to write to the first Complainant on 22 October 2015, and again on 25 November 2015, with details of a proposed Supported Voluntary Surrender of the mortgaged property. However, in circumstances where the Offer of Supported Voluntary Surrender was in the names of both Complainants jointly, and indeed the signed consent of both Complainants was required in order to proceed with the voluntary surrender, it would have been prudent of the Provider, and indeed helpful to the Complainants, to issue the terms of the Offer to both of the Complainants simultaneously, for consideration, albeit in separate communications. This would have enabled the Complainants to consider and respond to the terms of the proposed SVS at in or around the same time, and consult with each other as required. There is no clear reason why this was not done. I accept, and understand, the second Complainant's dissatisfaction that it was not until 2 December 2015 that the

/Cont'd…

Provider issued him with information in relation to the proposed SVS, followed by the required documentation on 22 December 2015.

The second Complainant has queried his eligibility to benefit from the relocation assistance made available by the Provider under the terms of the Offer of SVS. The second Complainant submits that he requires this assistance to support the removal of his personal effects from the mortgaged property in Ireland to his new home in the Middle East, but that the Provider subsequently advised him that, because he does not reside in the mortgaged property in Ireland, the relocation assistance does not apply to his circumstances. The second Complainant has raised a particular complaint in this regard and contends that, in this respect, the Provider acted disingenuously and with the intention of deceiving him, in making him an Offer of Supported Voluntary Surrender, including relocation assistance, from which he could not fully benefit.

Upon reviewing the content of the Offer of Supported Voluntary Surrender, I note that the Offer was made in the names of both Complainants. It set out the details of the mortgage loan account, including the current interest rate, the current contractual repayment, the current mortgage balance and the outstanding arrears.

It stated as follows:

> *"Following a review of your financial situation, as detailed in your most recently completed Standard Financial Statement,* [the Provider] *is pleased to advise that the following offer is available to you ("the Borrower(s)"):*
>
> *Supported Voluntary Surrender with a Full & Final Settlement*
>
> *Based on the estimated value of your property,* [the Provider] *believes that there may be a shortfall following the sale of the property. Taking into account your affordability, as outlined in your Standard Financial Statement,* [the Provider] *would be prepared to accept the fully executed "Surrender of Vacant Possession" deed as full and final settlement of the loan facility. Hence you would owe nothing further on your loan facility with* [the Provider]."

This offer was subject to, and conditional on, the offer being accepted by both Complainants, and the offer document being signed by both Complainants and returned to the Provider. It was also conditional on the Complainants vacating the property, and signing and returning the "Surrender of Vacant Possession" deed within 3 months of the acceptance date of the Offer Document.

It was a term of the Offer that, subject to certain conditions, the Provider would make a contribution towards the relocation expenses incurred by the Complainants in vacating the mortgaged property. This was set out within the "*General Conditions*" of the Offer, as follows:

/Cont'd…

4. Assistance

"…

Once [the Provider] *has taken vacant possession of the property* [the Provider] *shall pay relocation costs of:*

- *€5,000 (max.) if the "Surrender of Vacant Possession" deed is signed and returned, and the property is vacated all within 10 business days of accepting this Offer Document.*

  or

- *€2,500 (max.) if the "Surrender of Vacant Possession" deed is signed and returned, and the property is vacated all after 10 business days and before 3 months of accepting this Offer Document.*

…"

Relocation assistance is a contribution offered by a Provider towards the expenses incurred by a borrower (or borrowers) who succeed(s) in giving up vacant possession of a mortgaged property to the Provider, as a result of a voluntary surrender, within a specified timeframe.

The amount of the contribution may vary at the discretion of the Provider, depending on the circumstances of the borrowers concerned, but the sum offered is generally intended as a contribution towards the expense of relocation, and not full coverage of the costs incurred.

On the basis of the evidence before me, it would appear that, having issued both Complainants with the terms of the Offer of SVS (albeit 8 weeks apart), including the offer of relocation assistance, the Provider subsequently informed the second Complainant that "*as you do not reside in the property you would not have relocation costs so this aspect of the SVS offer does not apply to your circumstances".*

I have considered the content of the Offer of SVS, which was made jointly and in the same terms to both Complainants. It is not clear to me, from the wording of the provision relating to relocation assistance, that the relocation costs were intended to apply to the circumstances of the first Complainant only, and not to the circumstances of the second Complainant. In general terms, in the absence of an express intention to the contrary, one would expect that the relocation assistance would be paid to the borrowers jointly, as a contribution towards the expenses involved in vacating the mortgaged property, and that it would then be a matter for the borrowers jointly to decide how to put that monetary contribution to use. If it had been the intention of the Provider, in this instance, that the relocation assistance applied only to the first Complainant who was residing in the property, and that it did not apply to the second Complainant, who no longer resided in

/Cont'd…

the property but still had personal possessions remaining in the property which required relocation, I would expect this to have been set out more clearly within the terms of the offer made.

In summary, I accept that the inappropriate delay by the Provider in issuing the terms of the Offer of Supported Voluntary Surrender to the second Complainant, in circumstances where these terms had been issued to the first Complainant several weeks beforehand, and the Provider's failure to explain (within the terms of the Offer) any intended limitation on the second Complainant's eligibility to avail of the relocation assistance offered as part of the SVS, evidently caused a degree of confusion and upset on the part of the Complainants, and required a number of attempts to clarify the terms of the offer extended to them. I accept that this impacted negatively on their ability fully to consider and make a decision whether or not to avail of the terms of the proposed SVS which had been extended to them.

I note that the Provider, in a letter to this Office dated 31 January 2017, expressed itself willing to consider the then current circumstances of the Complainants with a view to issuing a new SVS offer in accordance with its current SVS product if both Complainants indicated that they would like to explore that option. The second Complainant in turn stated that he, too, would be interested in exploring this option further, but requested that any such offer should focus on his current circumstances, namely, his location in the Middle East. If this remains an option to date, which both the first and second Complainant, and also the Provider, remain interested in considering, I would urge the parties to engage further in this regard.

In the meantime, I consider that a compensatory payment of €500.00 is merited in favour of the Complainants, for the failings on the part of the Provider in the manner in which the terms of the Offer of a Supported Voluntary Surrender, and any limitations thereon, were communicated to the Complainants.

For the reasons set out above, I partially uphold this aspect of the complaint.

Complaint C

The Complainants have raised additional elements of complaint in relation to their ongoing communications with the Provider to date, and the level of interest charged to their mortgage loan account.

(i) Continuing communications in relation to further options

The Complainants submit that the Provider's ASU did not fully consider the request by the first Complainant on 11 March 2016, and again on 8 April 2016, that her existing regular monthly repayment of €470.00 (which she states was the maximum she could afford at that time) be applied to the capital balance on the mortgage loan as a sustainable long term solution.

/Cont'd…

The Complainants also submit that the Provider has failed to respond to the first Complainant's request for confirmation that she remains entitled to the protection of the Provider's MARP and, if she does, whether she qualifies for the various alternative repayment arrangements outlined in the Provider's MARP brochure, and in particular a reduction of the interest rate applicable to her mortgage, a term extension, or a capitalisation of arrears, or a combination of all three, as a long term solution.

Provision 45 of the CCMA 2013 provides that, 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 provider the borrower with certain information, including the following:

> *"c) that the **borrower** is now outside the **MARP** and that the protections of the **MARP** no longer apply".*

The submissions show that the Provider's ASU wrote to each of the Complainants on 1 July 2015, following an assessment of each of their circumstances at that time, to advise them that the Provider was unable to offer an alternative repayment arrangement or restructuring of the mortgage. In each of these "No Options" letters, the Provider informed each of the Complainants, in accordance with Provision 45 of the CCMA, as follows:

> *"You are outside of the Mortgage Arrears Resolution Process (MARP) and the protections of the MARP do not apply.*
>
> *a. We are free to commence legal proceedings against you to repossess your property 3 months from the date of this letter or 8 months from the date the arrears arose (whichever is the later). The costs of any such possession proceedings will be added to your mortgage debt.*
>
> *b. We are free to impose the fees, charges and surcharge interest set out in Appendix 1 to this letter…"*

I note that, following the subsequent appeal by each of the Complainants against the ASU's decision to issue the "No Options" letter, the Provider wrote to each of the Complainants on 7 October 2015 to advise that the appeal had been unsuccessful and that the ASU's decision to issue the No Options Letter had been upheld.

I accept that, in these circumstances, the position remained that the Complainants were outside the MARP as of 1 July 2015 and that, in accordance with Provision 45 of the CCMA, the protections of the MARP no longer applied to the Complainants as of that date.
I also accept that the Complainants were advised of this fact in writing by the Provider.

/Cont'd…

In the circumstances of this case, it is evident that the first Complainant continued to communicate with the Provider's ASU seeking a long term solution to her mortgage arrears
situation. The first Complainant has referred to her recurring request that the Credit Committee agree to have her existing regular monthly repayment of €470.00 applied to the capital balance on the mortgage loan. I note that the first Complainant wrote to the Provider's ASU on 11 March 2016, in the following terms:

> *"I am paying every month without fail the maximum that I can afford and again I ask that* [the Provider] *apply this amount of €470.00 per month to the principal balance…*
>
> *Please put my request again to your Credit Committee and note my request on my file."*

The submissions show that the Provider's ASU responded to the first Complainant on 24 March 2016, as follows:

> *"I refer to your letter dated 11 March 2016, and in particular your request to have your circumstances reassessed.*
>
> *I note that you have confirmed in your correspondence your circumstances have not changed since the previous assessment, and your affordability remains the same.*
>
> *The assessment of your SFS and circumstances concluded that the amount that you can pay is not sufficient to sustain any of the ARAs which we have to offer. In addition, there is no evidence that your financial circumstances will improve in the short to medium term. Given these circumstances, entering into an ARA which is not sustainable, and which will see your arrears situation deteriorate each month, is not appropriate".*

I note that the first Complainant wrote to the Provider's ASU on 8 April 2016, and again on 15 April 2016, expressing her dissatisfaction with the ASU's response to her request, and requesting again that the Credit Committee agree to apply her regular monthly repayment against the capital balance on the mortgage.

The submissions show that this correspondence was logged by the Provider as a complaint, and that, following an investigation in line with the Provider's complaints procedure, the Provider issued its Final Response on the matter to the first Complainant on 7 June 2016, in the following terms:

> *"… we have carried out a review of your account and we wish to advise that any proposals such as the one contained in your letter dated 11 March 2016 would be considered for reassessment once there had been a material change in the customer's circumstances. Our letter of 24 March 2016 was sent to advise you that we cannot assess your proposals as there has been no change in your affordability.*

/Cont'd…

It is not appropriate to enter into an arrangement that will see your arrears situation deteriorate further.

Please note that your repayments are applied against the outstanding balance on your mortgage. However, your repayments are not covering interest and are not sufficient as outlined in our letter of 24 March 2016 to sustain any Alternative Repayment Arrangement".

The submissions show that the first Complainant continued to query with the Provider why she was not afforded the benefit of the long term arrangements detailed in its MARP brochure, in particular a combination of three options, i.e. term extension, interest rate reduction and capitalisation of arrears. In a letter dated 13 June 2016, the first Complainant asked the Provider why the absence of a change in her financial circumstances prevented the Provider from assessing her for any further alternative repayment options. In a letter dated 12 July 2016, the first Complainant advised the Provider that "*while my circumstances have not changed in the last 12 months my circumstances will certainly improve in the future*". The first Complainant submitted that it was within the Provider's discretion to consider a combination of all three options for her as one ARA, and stated that she failed to see why the Provider could not offer her this combination of ARAs which she considered would make her mortgage sustainable.

I note that the Provider responded to the first Complainant on 19 August 2016, referring to the Standard Financial Assessment carried out in June 2015, the outcome of the MARP Appeal in October 2015, the options considered during the assessment, and the Provider's communications with the first Complainant on 4 December 2015 and 24 March 2016 confirming that the Provider was unable to offer an ARA and the reasons for this. The Provider's letter continued as follows:

"Please note that a Term Extension and Rate Reduction were considered. However, your mortgage is already at the maximum term and even if we did consider reducing your rate to 1%, it will not result in an affordable repayment for you as per your Standard Financial Statement. You also raise the option of capitalisation of the arrears on your account. As indicated in our letter stated dated 7 October 2015, in order to qualify for this option your full contractual monthly repayment must be made for a period of six months and you do not have the affordability as evidenced by both your last SFS assessment and your recent payments of €470.00 which is 16% of your contractual monthly repayment of €2,838.27.

To summarise, a combination of rate reduction, term extension and capitalisation of your arrears will not result in an affordable monthly repayment to you. We cannot put an arrangement in place that will result in the arrears continuing to accrue on the account and where the affordability is not evident. Your mortgage is 39 months in arrears at €112,308.60.

… We would like to draw your attention to the fact that payments of €470.00 since September 2015 are not sufficient to sustain your mortgage or result in an affordable Alternative Repayment Arrangement for you"."

/Cont'd…

The Provider has submitted that, in general terms, it continues to apply the principles of MARP to its borrowers, even once they no longer formally qualify for the protection of MARP, and that, in the event that a borrower's circumstances change following the withdrawal of the protections of MARP, the options within the Provider's MARP booklet would be considered and, where appropriate, offered to a borrower. In this context, the Provider submits that these options, individually or in combination where appropriate, continue to be available to borrowers as a long term solution should the criteria for such an outcome be present. The Provider states, however, that the suitability of an alternative payment arrangement depends upon sufficient income being available which the borrower is willing to allocate to the mortgage payments to ensure that the mortgage can be restructured in a manner which is both affordable and sustainable in the long term.

In the circumstances of this complaint, it is the Provider's position that, while the first Complainant has sought the application to the loan of certain options contained within the Provider's MARP booklet, she has been unable to demonstrate that sufficient income is available to meet the mortgage obligation in a sustainable manner. The Provider states that it is satisfied that there is insufficient income available to allow a successful alternative repayment arrangement to be established in this case.

I am cognisant of the fact that the Complainants' case was the subject of a full assessment in July 2015, including on appeal in October 2015, and that this assessment had considered the potential that a solution comprising multiple elements, including rate reduction, term extension and capitalisation, could have achieved and had concluded that such a solution was not possible. In circumstances where the first Complainant confirmed in July 2016 that her financial circumstances had not changed in the previous 12 month period, I accept that the underlying position remained the same, and I find no wrongdoing on the part of the Provider in declining to carry out a further assessment at that point, in the absence of any change in circumstances.

It is important for the Complainants to be aware that they have a contractual obligation to repay the monies borrowed to the Provider; this was agreed when they entered into the mortgage agreement with the Provider. While the Provider is obliged to comply with the Code of Conduct on Mortgage Arrears and have "a *flexible approach in the handling of these cases*" and to assist "*the borrower as far as possible in his/her particular circumstances*", there is no regulatory requirement for financial institutions to agree to a particular demand from a borrower regarding changes to agreed mortgage repayments. The Provider has a commercial discretion in determining the outcome of any application to amend the mortgage agreement.

While I appreciate that the first Complainant has limited financial means, the Provider is not required to agree to her request for a specific combination of options for her as one ARA, or to have her existing regular monthly repayment of €470.00 applied to the capital balance on the mortgage loan. While the first Complainant is certainly making efforts to repay and co-operate with the Provider within her financial means, this does not take away from her joint and several liability, with the second Complainant, to repay the mortgage in full and in the terms originally agreed.

/Cont'd…

For the reasons set out above, I do not uphold this aspect of the complaint.

(ii) Rate of interest applied to the account

As a separate issue, the Complainants have raised a concern about the rate of interest applied to their mortgage loan account. The Complainants believe that their interest rate should be lower than it has been, as a result of European Central Bank rate cuts. In a letter to the Provider dated 13 June 2016, the first Complainant described the level of interest charged on their mortgage borrowings as "*usurious*".

The second Complainant, in a submission to this office dated 10 December 2016, has submitted that the Provider is "*acting outside the currently accepted general market environment (of zero/negative interest rates) but is using its terms and conditions to enforce excessive interest charges*" and queries "*the legality of variable interest rates chargeable under the mortgage when the Central Bank/ECB InterBank rates are actually negative*".

The Provider has submitted, in a response dated 31 January 2017, that "*the rate of interest charged to the account, currently set at 5.25% variable, is determined by the contract between* [the Provider] *and the Complainants and we have managed the account in accordance with the contract at all times. We are satisfied that the rate of interest charged to the account reflects the risks associated with the loan and is appropriate to the loan*".

The second Complainant, in a submission dated 2 February 2017, has contended that "*charging 5.25% is not within the intended purpose of the contract as variable interest rate mortgages are deemed to be linked to the ECB base rate as reflected in InterBank lending rates*." In support of this argument, the second Complainant refers to Condition 402 of the Special Conditions of the mortgage loan, in respect of the variable interest rate, and contends that this condition clearly states that the variable interest rate will be "*directly affected by the rise and fall of the Euro Interbank Offer Rate*". The Complainants submit that the Provider has failed to reflect prevailing ECB interest rates in the level of interest being applied to their mortgage borrowings.

The Provider, in a submission dated 9 June 2017, states that "*the rate of interest applicable to this loan is a variable rate of interest, as is clearly set out in the loan documentation. The reference to the Euro InterBank Offer Rate is a reference to one of the factors which affects the determination of the variable rate on the account.*" The Provider submits that it has reviewed the rate of interest applied to the Complainants' account and is satisfied that it is correct and in accordance with the contract. It is the Provider's position that the Complainants' loans are variable rate loans and that the rate of interest does not track the ECB rate or any other reference rate.

I note that the details relating to the mortgage facility drawn down by the Complainants in December 2006, as set out in the Letter of Loan Offer dated 20 November 2006, are as follows:

Amount of Credit Advanced	€230,000.00

/Cont'd…

Period of Agreement	18 Years
Amount of Each Instalment	€1,943.44
Interest rate	7.50%
Type of Interest Rate	Standard Variable Rate

Part 4 of the Letter of Loan Offer (at page 3), entitled "*Special Conditions*", contains the following special condition:

> *"**Condition 402**:*
> *The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the European Central Bank Rate."*

Part 5 of the Letter of Loan Offer (at page 5), entitled "*General Loan Conditions*", contains the following provisions under Section 4:

> *"The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer ... this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with changes in the applicable interest rate..."*

I note from the submissions furnished by the Provider that the variable interest rate for this mortgage loan has moved from 7.50% in November 2006, to 5.25 % in December 2013, where it currently remains. The interest rate changes which have applied during the term of this mortgage loan are set out as follows:

Mortgage Rate for Account Number 8012***** (Initial Mortgage):

Effect Date	**Calc Rate**
14.12.2006	7.65%
01.03.2007	7.90%
01.06.2007	8.15%
01.09.2007	8.55%
01.03.2008	8.45%
01.06.2008	8.90%
01.12.2008	8.15%
01.02.2009	7.15%
01.03.2009	6.65%
01.04.2009	6.15%
01.06.2009	5.90%
01.09.2009	6.00%
01.12.2010	6.40%
01.07.2011	6.90%

/Cont'd...

01.11.2011	6.40%
01.05.2012	5.85%
01.09.2012	5.65%
01.01.2013	5.45%
01.12.2013	5.25%

In October 2007, the Complainants drew down a top up facility in the sum €15,000.00. The following details relating to the top up mortgage, as set out in the Loan Offer Letter dated 20 September 2007, are relevant:

Amount of Credit Advanced	€15,000.00
Period of Agreement	17 Years, 3 months
Amount of Each Instalment	€138.80
Interest rate	8.55%
Type of Interest Rate	Standard Variable Rate

Part 4 of the September 2007 Letter of Loan Offer (at page 3), entitled "*Special Conditions*", contains the following special condition:

> ***"Condition 402:***
>
> *VARIABLE RATE: The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the Euro Interbank Offer Rate."*

Part 5 of the Letter of Loan Offer, entitled "*General Loan Conditions",* contains the following provisions under Section 4:

> *"The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer ... this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with changes in the applicable interest rate..."*

I note from the submissions furnished by the Provider that the variable interest rate for this mortgage loan has moved from 8.55% in September 2007, to 5.25 % in December 2013, where it currently remains. The interest rate changes which have applied during the term of this mortgage loan are set out as follows:

Mortgage Rate for Account Number 9001***** (Top Up Mortgage):

/Cont'd...

Effect Date	Calc Rate
02.10.2007	8.55%
01.03.2008	8.45%
01.06.2008	8.90%
01.12.2008	8.15%
01.02.2009	7.15%
01.03.2009	6.65%
01.04.2009	6.15%
01.06.2009	5.90%
01.09.2009	6.00%
01.12.2010	6.40%
01.07.2011	6.90%
01.11.2011	6.40%
01.05.2012	5.85%
01.09.2012	5.65%
01.01.2013	5.45%
01.12.2013	5.25%

I note the Complainants' reference to the gap between ECB rates and the variable interest rate that they have been paying, and I accept that the Complainants are concerned by the level of interest applied to their mortgage borrowings. The Complainants make particular reference to the provisions of Special Condition 402 in respect of each mortgage.

It is provided in Special Condition 402 in respect of the re-mortgage facility drawn down by the Complainants in December 2006, that the rate would be "*directly affected by the rise and fall of the European Central Bank Rate*", and in respect of the top up mortgage loan drawn down in October 2007, that the rate would be "*directly affected by the rise and fall of the Euro Interbank Offer Rate".*

This office requested the Provider, in a letter dated 20 April 2018, to set out how the rates of interest applicable to each of the Complainants' mortgage accounts since draw down had been "*directly affected by the rise and fall of the European Central Bank Rate*" (in the case of the initial re-mortgage) and *directly affected by the rise and fall of the Euro Interbank Offer Rate*" (in the case of the subsequent top up mortgage), as set out in Condition 402 of the Special Conditions pertaining to each mortgage.

In its response, dated 6 June 2018, the Provider submitted that, when setting variable interest rates, it considers the terms and conditions of the mortgage, the requirements of applicable law and regulation, market interest rates, and commercial factors including the cost of funding the loan. The Provider submits that:

> *"Market interest rates and the cost of funding are influenced by the European Central Bank Rate ("ECB") and/or the Euro Interbank Offer Rate ("Euribor") as appropriate.*

/Cont'd…

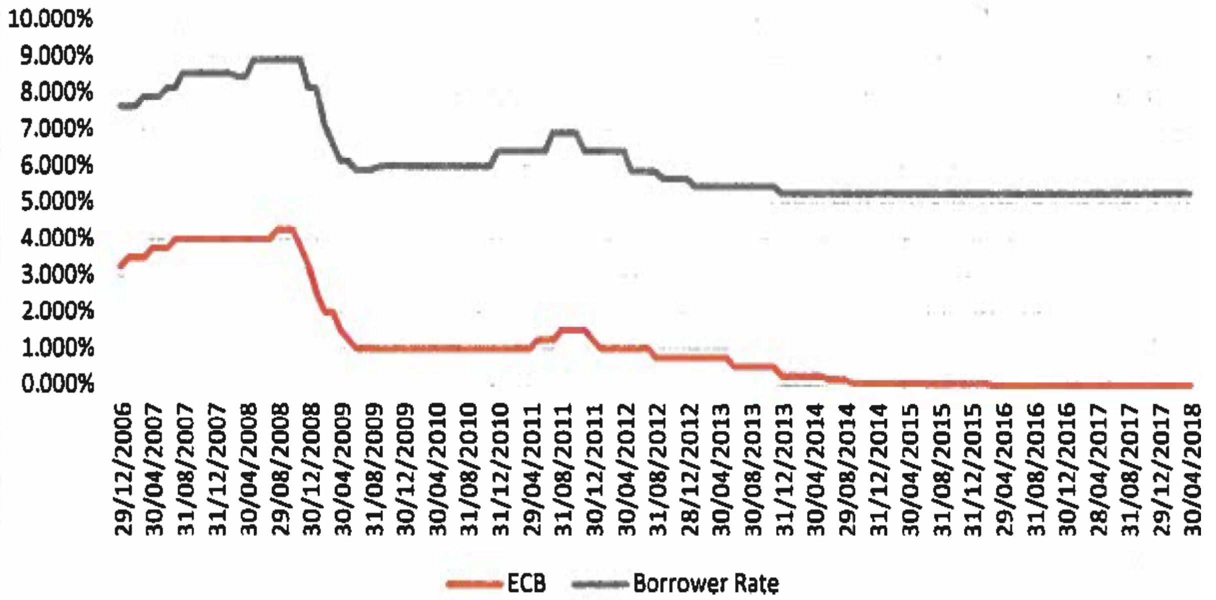
> [The Provider's] *variable rate mortgages by their nature move up and down in line with market rates. However, while a variable rate is likely to show some correlation with ECB/Euribor rates (as implied by Condition 402), a variable rate loan is not bound by a fixed percentage or "margin" above either rate and therefore is not required to move on a point by point basis in line with ECB/Euribor movements. We consider the changes in interest rates applied to the account to be in accordance with the terms of the facility."*

The Provider has submitted data for both the Complainants' initial re-mortgage account, and their top up account, illustrating the month by month interest rate applied to these accounts and the month by month ECB and/or Euribor rates as appropriate.

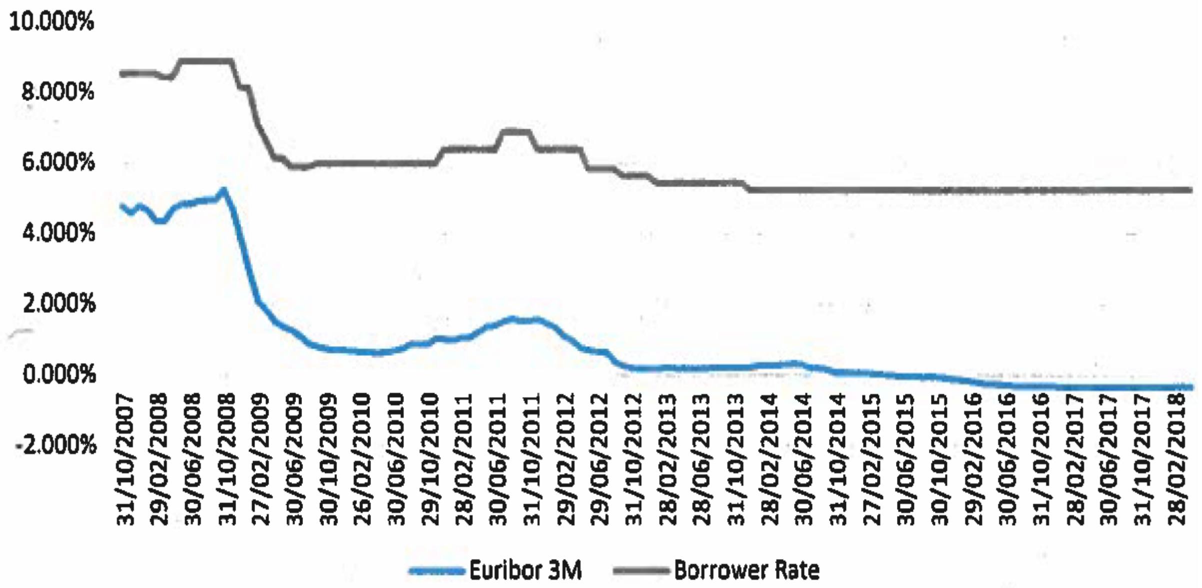
This data is set out in the graphs below:

/Cont'd…

Parent account [redacted] vs. ECB



Top up account [redacted] vs. Euribor



/Cont'd...

The Provider has also submitted, for information purposes, its "Variable Rate Policy Statement", which sets out the rate setting policy for such a loan, and the relevant considerations taken into account by the Provider when setting variable interest rates. It is acknowledged that this Variable Rate Policy Statement did not form part of the Complainants' original loan documentation, as it was published some years later, in accordance with the requirements of the Consumer Protection Code. Nonetheless, the Provider has submitted the Policy Statement for information purposes, and to set out the Provider's considerations when setting variable interest rates. These factors include the terms and conditions of the Letter of Loan Offer, the requirements of applicable law and regulation, market interest rates, and commercial factors such as changes in the cost of funding the loan.

Upon review of the data set out in the graphs reproduced above, I accept that the data indicates the relationship between the contractual rate of interest charged to the Complainants' initial and top up mortgage accounts, and the Euribor/ECB rates referred to in the respective contract documentation. I accept that the data demonstrates that the variable interest rate in respect of each of the Complainants' mortgage loan accounts, although not priced at a fixed margin over a particular index, has been clearly affected by, and has fluctuated in accordance with, the rise and fall of the European Central Bank Rate (in the case of the initial re-mortgage) and the rise and fall of the Euribor (in the case of the subsequent top up mortgage) from the date of drawdown to current date.

Having considered the mortgage documentation, I am satisfied from the provisions contained in the Letters of Offer relating to both mortgage loans (as quoted above), that the Complainants were put on notice from the outset that each of the mortgage loans was to be a "*Standard Variable Rate*" mortgage and that the rate would *"vary in line with market interest rates"* and would be *"subject to variation throughout the term".*

It is evident that the Complainants' mortgage loan accounts were influenced by fluctuations and changes in market interest rates, including the rise and fall of the ECB rate (in the case of the initial re-mortgage) and the rise and fall of the EURIBOR (in the case of the subsequent top up mortgage), as set out in Special Condition 402 in respect of both mortgage loan accounts. However, neither mortgage loan was priced at a fixed margin over a particular index.

The Provider may review its variable rates in accordance with its interest rate policy, which is impacted by a number of factors, not limited to ECB and Euribor Rates, and is a matter which falls within the commercial discretion of the Provider, and is not a matter in which this office will interfere.

For the reasons set out above, I do not uphold this aspect of the complaint.

/Cont'd…

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).***

I direct pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** that the Respondent Provider pay an amount of compensation to the Complainants in the sum €500.00 for the loss, expense or inconvenience sustained by them as a result of failings identified on the part of the Respondent Provider in the manner in which the terms of the Offer of a Supported Voluntary Surrender, and any limitations thereon, were communicated to the Complainants in 2015.

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €500.00 to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

16 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—

/Cont'd…

(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.