An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0167
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Arrears handling - Mortgage Arears Resolution Process
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants hold a mortgage loan account with the Provider, drawn down on 10 May 2002. The Complainants, who are now separated and living apart, had a number of alternative repayment arrangements (ARAs) in place in respect of their mortgage loan account between 2011 and 2014/2015, under the Mortgage Arrears Resolution Process (MARP).

In January 2015, following an assessment of the first Complainant's circumstances, the Provider declined to offer the Complainants a further ARA in respect of their mortgage loan account and deemed the mortgage unsustainable. This decision was affirmed, upon appeal, by the Mortgage Appeals Board, in March 2015.

The complaint is that the Provider has treated the Complainants unfairly under the MARP, in circumstances where the first Complainant states that he had received a number of assurances from representatives of the Provider, since January 2012, that certain repayment options, including a capitalisation of arrears and a split mortgage, would be offered upon completion of a number of 6 month repayment arrangements. The first Complainant states that, despite completing the arrangements, these other repayment options were not made available by the Provider, and that the Provider continued to offer only interest only arrangements.

The complaint is also that the Provider acted unfairly in declining to offer an ARA to the first Complainant in January 2015, following the submission of a completed Standard

Financial Statement in November 2014, and acted unfairly in deeming the mortgage loan unsustainable in January 2015, in circumstances where the Provider had been willing to offer the Complainants an ARA some six months earlier, the first Complainant's financial circumstances had not deteriorated, and the first Complainant had "*co-operated with the Bank in every way*".

The Complainants further complain that the Provider has displayed poor and/or inappropriate customer service in its phone communications with the first Complainant, seeking payments to the account at times when the first Complainant was actively engaged with the Provider in seeking an ARA, and neglecting to respond to telephone messages.

The Complainants' Case

The Complainants drew down a mortgage loan with the Provider in May 2002, in the sum €245,314.00, secured on their primary residence in Dublin. The Complainants are now separated and living apart. This complaint is brought by both Complainants in their capacity as joint mortgage holders.

The Complainants submit that over the course of a two year period from January 2012 to February 2014, they had completed three 6 month repayment arrangements agreed with the Provider in respect of their mortgage loan account. The Complainants state that, during this period, they abided by the rules of the MARP in submitting Standard Financial Statements and supporting documentation at the request of the Provider.

The Complainants submit that, prior to entering into each of these arrangements, they had been assured by a Provider representative that, at the completion of the 6 month interest only arrangement, they would be offered one of a range of repayment options, including a capitalisation of arrears, a split mortgage, a term extension, or a restructure of the mortgage with long term reduced payments. The Complainants state that, although they completed three such 6 month interest only arrangements, this range of alternative repayment options was never offered to them by the Provider. The Complainants state that the Provider continued to offer them ARAs based on interest only repayments, with the result that their arrears continued to increase during this period.

The first Complainant states that, in February 2014, the Provider offered him a new ARA over a 3 year period. The first Complainant states that his financial adviser recommended that he seek further information from the Provider in respect of the ARA offered, and the implications for the mortgage at the end of the 3 year period. He submits that he queried whether the repayment was part capital, what the repayments and the outstanding balance would be at the end of the 3 year period, and whether there would be the option of a split mortgage at the end of the term of the arrangement. The first Complainant states that the Provider responded that it could not calculate what the repayments would be at the end of the 3 year period, or indeed what the outstanding balance would be, as the rate could change and other variables might impact on the figures.

/Cont'd…

The first Complainant states that he subsequently received a letter from the Provider offering him another 12 month interest only repayment arrangement, with reduced repayments of €1,386.00 per month. The first Complainant states that he agreed to this, signing the Mortgage Form of Authorisation on 26 June 2014, and that the ARA was put in place.

The first Complainant submits that subsequently he was required to discharge a substantial debt to a government department, and that he requested the Provider to grant him a 6 month moratorium on his mortgage repayments to enable him to discharge this debt, or face prosecution. The first Complainant states that he furnished a completed SFS in September 2014, and again in November 2014, along with supporting documentation, to enable the Provider to consider his request. The first Complainant states that he was advised by the Provider representative who was assisting him in this process that "*the best offer he could probably get from the Bank was reduced payments of 900 a month".*

The first Complainant states that he was informed in January 2015 that the Provider was not willing to offer an ARA, and that the mortgage had been deemed unsustainable. The first Complainant submits that he cannot understand how, in circumstances where the Provider had been willing to offer an ARA in July 2014, the mortgage could be deemed unsustainable only 5 or 6 months later in circumstances where his financial situation had not deteriorated.

The first Complainant states that, at the time of the Provider's decision in January 2015, he had been on Interest Only mortgage repayments for 2.5 years without the Provider offering him any long term resolution to his arrears situation, with the result that his arrears had increased significantly during that period.

The first Complainant seeks a resolution to the mortgage arrears on the joint mortgage loan account. The first Complainant states that he wishes to continue making mortgage repayments, but states that if he continues making interest only repayments, his arrears will never reduce.

The Provider's Case

The Provider submits that, having reviewed the Complainants' account history, it is satisfied that it has at all times accommodated the Complainants within the Mortgage Arrears Resolution Process (MARP), and that it has treated the Complainants sympathetically and positively in this regard.

The Provider states that the Complainants have availed of 30 months (2.5 years) forbearance on their mortgage account since April 2011. The Provider states that the Complainants have failed to maintain the agreed monthly payments and that their account has remained in arrears since December 2002.

The Provider does not accept that the first Complainant was given any assurances by its representatives regarding the availability to him of certain ARAs, such as Capitalisation of Arrears, Term Extension and/or restructure of arrears with long term reduced repayments.

/Cont'd…

The Provider submits that the first Complainant has provided no evidence to support this claim. The Provider submits that the role of the representatives with whom the first Complainant met, on various occasions throughout the MARP process, was to assist him in preparing the SFS and to provide him with all relevant information, including discussing potential ARAs offered by the Provider. The Provider states, however, that these representatives were not in a position to make any decision on the availability of a particular repayment option or options, or to influence the decision of the Provider's Credit Department in this regard. The Provider submits that it is the role of the Provider's Credit Department to assess and examine each case on its individual merits based on the full circumstances of the borrower and to make credit/forbearance decisions following assessment of the SFS.

The Provider submits that a capitalisation of arrears might have been possible in February 2015 as a follow on from the ARA approved in February 2014, provided all monthly repayments had been met during this 12 month period. The Provider states, however, that this was not the case, and that the terms of this ARA were not met.

The Provider submits that it had completed an assessment of the first Complainant's circumstances under MARP in February 2014, and that it had made an offer of reduced payments to the first Complainant on the basis that it provided the basis for a long term sustainable solution. The Provider indicates that the first Complainant subsequently sought independent financial advice in respect of this ARA, and that the Provider re-offered the reduced payment arrangement to the first Complainant in May 2014. The Provider states that the first Complainant signed the MFA and in doing so agreed to be bound by its Terms and Conditions. The Provider states that "*no payments were made to the mortgage in accordance with the agreement or otherwise*". Indeed, no payments had been made to the Complainants' mortgage loan account since January 2014.

The Provider submits that the first Complainant contacted the Provider in August 2014 to advise of a change to his circumstances, ie. that he had a Social Welfare debt that needed to be prioritised above his mortgage, and that the first Complainant had stopped making payments to the mortgage loan account. The Provider states that the first Complainant was asked to submit another SFS, which he did in September 2014, with further supporting information, and that this gave rise to a further assessment in January 2015. The Provider states that, on assessment, the mortgage was deemed to be unsustainable based on the financial information provided by the first Complainant.

The Provider wrote to each of the Complainants on 28 January 2015 to advise that it was unable to offer an alternative repayment arrangement (ARA) and that the mortgage had been deemed unsustainable. The Provider submits that the Complainants' repayment history was considered poor in circumstances where the last payment to the mortgage account at that time had been made in January 2014, and the level of arrears on the account at that time was €79,309.64. The Provider states that, taking these circumstances into consideration, and in compliance with the Code of Conduct on Mortgage Arrears 2013 (CCMA), it was not in a position to offer the Complainants any form of forbearance.

/Cont'd…

The Provider acknowledges that the Complainants appealed this decision to the Mortgage Appeals Board, and notes that the Appeals Board confirmed the decision of the Arrears Support Unit (ASU) in March 2015, on the basis that it could not identify a long term sustainable solution.

The Provider rejects the Complainants' allegation that it has treated the Complainants unfairly under the MARP and that it has failed to offer any resolution in respect of their mortgage loan difficulties. The Provider submits that the forbearance arrangements put in place demonstrate the consideration given to the Complainants' circumstances at each juncture, pursuant to MARP. It is the Provider's position that it made all reasonable efforts to work with the Complainants in order to agree a sustainable solution but that, having fully reviewed their financial circumstances, it concluded that the mortgage loan was unsustainable.
In response to the Complainants' complaint about the telephone contact received from the Provider's Arrears Support Unit during the time that the first Complainant was engaged with the Provider in seeking an ARA, the Provider states that it is obliged under the CCMA 2013 to make contact with customers and inform them of arrears, missed payments and any outstanding balance on their accounts. The Provider expresses regret if the Complainants were upset by these communications, but states that, while an account registers arrears, the Provider is obliged to maintain contact with the customer.

The Provider notes that the first Complainant requested telephone calls to be returned by one of its representatives, with whom he had been dealing in respect of the completion and submission of an SFS in February/March 2014, and acknowledges that the representative in question was not in a position to return these calls as she was out of the office for some time. The Provider notes that the Complainants' case was assigned to another representative shortly afterwards.

Decision

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

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

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

/Cont'd…

In considering the grievances raised by the Complainants, and the documentary evidence available, it was noted by the FSPO that the Provider had commenced legal proceedings against the Complainants seeking repossession of the mortgaged property on 16 January 2017. In those circumstances, owing to the provisions of ***Section 50(3)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, it was not possible for the FSPO to investigate or make a decision on this complaint, in the absence of a Court Order granting a "*stay*" pursuant to ***Section 49*** of the ***Financial Services and Pensions Ombudsman Act 2017***. To facilitate the investigation of this office, a "*stay*" was granted by the Circuit Court to 5 October 2018. Accordingly, a Preliminary Decision was issued to the parties 14 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.

Thereafter, the Circuit Court granted a further "*stay*" of the legal proceedings to 8 February 2019. In those circumstances, in the absence of additional submissions from the parties, the final determination of this office is set out below.

By way of background to this complaint, the Complainants drew down a mortgage facility with the Provider on 10 May 2002 in the sum €245,314.00, secured on their primary residence in Dublin.

The submissions show that arrears first started to accrue on the account in December 2002. The first Complainant refers to having completed a number of "*interest only payments*" over a period of two and a half years. The evidence before me indicates that the Complainants
availed of the following alternative repayment arrangements between 2011 and 2014:

- February 2011: 6 months Interest Only.
- January 2012: 6 months Reduced Repayments of €1,100pm
- August 2012: 6 months Reduced Repayments €1,100pm
- June 2013: 6 months Minimum Reduced Repayments €900pm
- February/May 2014: 12 months Reduced Repayments €1,386pm

The subsequent monthly payment amount due was €1,572.39, pursuant to the terms and conditions of the Mortgage Loan Offer Letter. Arrears have continued to accrue on the account since December 2002.

The complaint is that the Provider treated the Complainants unfairly under the MARP, in circumstances where the first Complainant states that he had received a number of assurances from representatives of the Provider, between January 2012 and February 2014, that certain repayment options, including a capitalisation of arrears and a split mortgage, would be offered to the Complainants upon completion of a number of 6 month repayment arrangements. The Complainants state that, despite completing the

/Cont'd…

arrangements, these other repayment options were not offered to them, and that they continued to be offered only interest only arrangements.

The complaint is also that the Provider acted unfairly in declining to offer an ARA to the first Complainant in January 2015, following the submission of a completed Standard Financial Statement in November 2014, and acted unfairly in deeming the mortgage loan unsustainable in January 2015, in circumstances where the Provider had been willing to offer the Complainants an ARA some six months earlier, the first Complainant's financial circumstances had not deteriorated, and the first Complainant had "*co-operated with the Bank in every way*".

The Complainants further complain that the Provider has displayed poor and/or inappropriate customer service in its phone communications with the first Complainant, seeking payments to the account at times when the first Complainant was actively engaged with the Provider in seeking an ARA, and neglecting to respond to telephone messages.

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 parameters on the jurisdiction of this Office in complaints regarding the MARP were brought to the Complainants' attention, in writing, by letter dated 22 June 2015. The Financial Services and Pensions Ombudsman may investigate the procedures undertaken by the Provider regarding the MARP process, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the 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 Provider has submitted that the forbearance application which is the subject of this complaint was 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 first Complainant informed the Provider on 24 May 2013 that he and the second Complainant had separated, and that the first Complainant submitted a "Confirmation of Status" form to the Provider, confirming that this was the case. 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)."*

For this reason, the Complainants have been treated as separate borrowers for the purposes of assessment under MARP from that date on. The Provider has sought to remind the Complainants, however, that both of the borrowers named on the mortgage loan account are jointly and severally liable in relation to the mortgage debt.

1. **That the first Complainant received verbal assurances from the Provider, which were subsequently broken, that he would be offered certain repayment options upon completion of a number of 6 month ARAs.**

The first Complainant submits that he had received a number of verbal assurances from representatives of the Provider, between January 2012 and February 2014, that certain repayment options, including a capitalisation of arrears and a split mortgage, would be offered to him upon completion of a number of 6 month interest only repayment arrangements. The first Complainant states that, despite completing three such repayment arrangements, the other repayment options were never offered to him. The first Complainant submits that the Provider continued to offer him interest only repayment arrangements, which the first Complainant feels did little to solve the problem of the growing arrears on the account.

(i) ARA January 2012: 6 months Reduced Repayments of €1,100pm

By way of background, I note from the submissions that the Complainants had completed an SFS on 28 November 2011 and submitted an application for forbearance to the Provider. The Provider has submitted a copy of the Financial Review Assessment Form, dated 17 January 2012, which details the credit decision made in response to the Complainants' application at that time, as follows:

> *"Fixed repayments of €1,100/month for 6 months from Jan 2012, with surplus above interest to reduce capital balance. PDH needs to be prioritised over other debts. If no payments made by the end of Feb 2012, ASU to issue proceedings threat letter & commence legal proceedings".*

/Cont'd…

It is evident from this assessment record that the approved ARA was not a 6 month interest only arrangement, as submitted by the Complainants. The fixed repayment of €1,100.00 per month for 6 months was a reduced repayment which was to be used to repay any interest due under the loan, with the surplus to be used to reduce the capital balance. This is also evident from the terms of the Mortgage Form of Authorisation (MFA) signed by the Complainants on 27 January 2012, which states that:

> *"…during the Agreed Period, I will pay reduced repayment instalments as set out in this Form. The lender will use the reduced repayment instalments as follows: firstly to pay any interest due from me under the loan; secondly, towards repayment of the capital amount of the loan; and thirdly, in payment of any sum I owe concerning the loan".*

It is evident, therefore, that this was not an Interest Only Repayment Arrangement under which the payment would be used to discharge only the interest accruing on the loan. It was a 6 month Reduced Repayment Arrangement designed to pay the interest accruing on the loan, plus a portion of the capital outstanding. The Complainants signed the Mortgage Form of Authorisation (MFA) accordingly, on 27 January 2012, for reduced payment instalments of €1,100.00 per month for a period of 6 months, and thereafter this arrangement was put in place.

There is no evidence that the Complainants were advised by the Provider, either prior to or upon agreeing the terms of this MFA, that any particular repayment option would be made available to them upon completion of the 6 month ARA.

(ii) ARA August 2012: 6 months Reduced Repayments of €1,100 pm

On 1 June 2012 the Complainants completed an updated SFS, and submitted a further application for forbearance to the Provider.

The Provider has submitted a copy of the Standard Financial Statement (SFS) Assessment Form dated 30 July 2012, which details the Provider's consideration of the Complainants' application at that time, and records the following decision:

> ***"Recommendation/Decision:***
> *History of missed repayments and broken promises. From information to hand, repayment capacity is evident. Should be making full repayments here but not paying anything. Prepared to offer one further forbearance period – repayments of 1,100 for 6 months (in line with agreement 01/12, which was not adhered to). Following expiry of this, would expect step up to be made to full C+I repayments. Next repayment is due on 20.08.2012. If this, or any other forbearance repayment arrangement is missed, legal action to continue. Feel that this should be the final forbearance agreement. Customers' co-operation is essential."*

I note from these records that the Complainants had failed to adhere to the terms of the previous ARA, but that the Provider was willing to extend a further 6 month ARA on similar

/Cont'd…

terms to the ARA which had been agreed with the Complainants in January 2012 (that is, fixed repayments of €1,100.00 per month for a period of 6 months).

On 27 August 2012 the Complainants signed a Mortgage Form of Authorisation (MFA) for reduced payment instalments of €1,100.00 per month for a period of 6 months.

There is no evidence in the documentation submitted that the Complainants received any assurance from the Provider, either prior to or upon agreeing this 6 month ARA, that any particular repayment option would be made available to them upon completion of the agreed terms of this ARA. Indeed, it is recorded in the Standard Financial Statement (SFS) Assessment Form, dated 30 July 2012, that upon expiry of this 6 month ARA, the Complainants would be expected to resume full Capital and Interest Repayments and that, if any repayment was missed, legal action would proceed.

(iii) ARA June 2013: 6 months Minimum Reduced Payments of €900 pm

The evidence submitted shows that the Complainants completed an updated SFS on 29 May 2013, and that they submitted a new application for forbearance to the Provider. The Provider has submitted a copy of the Branch SFS Checklist which was completed by a Provider representative on 4 June 2013, and attached to the Complainants' SFS for submission to the Provider's ASU for assessment. I note that the Branch Checklist contains the following recommendation:

> "[The first Complainant] *is not interested in short term I/O. He would like the bank to offer him some long term options. Discussed term extension and capitalising of the arrears.* [The first Complainant] *is insistent the bank is obliged to offer him few solutions to chose from. Optionslink printout is showing term extension + split. Customer wants to know exact details of any solution the bank can come up with".*

The Provider has submitted a copy of the SFS/ Product Amendment Assessment Form dated 11 June 2013 which details the ASU's consideration of the Complainants' application, and records the following decision: "*Fixed repays of 900 per month approved on this account for 6 months*". The strategy behind this decision is explained as follows:

> ***"Strategy:***
> *Fixed repays at 900 per month approved for 6 months. On expiry and if all repays made, would envisage arrears capitalisation and max term extension and split. However, given history on the account (arrears since 03), recommending that account be assessed after 6 months, to ensure all is in order, prior to capitalisation and split. If repays not met, other options will have to be considered. Both* [Complainants] *remain jointly and severally liable on the mortgage."*

On 2 July 2013 the Complainants signed a Mortgage Form of Authorisation (MFA) for reduced payment instalments of €900.00 per month (the "Minimum Payment") for a period of 6 months.

/Cont'd…

From a review of these records, I accept that the first Complainant had discussed with the Provider representative who had assisted him in completing the SFS and submitting his application for forbearance to the Provider's ASU, that he wished to obtain a long term solution to his mortgage arrears. It is evident that the Provider's ASU, although at that time approving a further 6 month ARA on the basis of reduced repayments of €900.00 per month, envisaged the possibility of "*arrears capitalisation and a max term extension and split*" on expiry of the 6 month ARA. However, this was subject to adherence to the terms of the ARA, and subject to a re-assessment of the mortgage after 6 months.

(iv) ARA February/May 2014: 12 months Reduced Repayments of €1,386 pm

The submissions show that the First Complainant completed another SFS on 20 January 2014. I note that, in the Branch SFS Checklist, completed on 7 February 2014, the Provider representative concerned recorded the following:

> ***"Recommendation and Rationale***
> *I have discussed all long term options and sought payment off the arrears – customer states he can't clear the arrears and wishes to capitalise same. Max term ext/split at 34% and cap would see repayments at €1427 pm. Based on current income/outgoings this is possible if credit union reduced further. I discussed this with customer and he is confident he can meet same. Not MTM 34%, current value of property approx. €279k therefore split part would equate to current ltv at 31%. Note concern over the level of arrears and that they are evident since 2003, however arrangement has been maintained at €900pm and with rental income it seems feasible to step up to the level of repayment."*

The first Complainant's application was assessed by the Provider's ASU on 13 February 2014. It is recorded in the ASU's Case Assessment Record that "*cust wants arrears capitalised but he has not met capitalisation criteria*". Reference is made in the Credit Notes to, among other matters, outstanding debts to Revenue, Social Welfare and a Credit Union. I note that it is recorded in the Credit Notes that "*based on figures provided cust cannot afford C&I of €1,700 which is the figure for a 4 yr term extension & capitalisation of arrears*. [Provider representative] *states cust can afford 34% split figure of €1,427 but am reluctant to approve a split as cust does not appear to be paying into a pension, so not apparent take out. The split figure leaves a deficit of €40.07 as the €200 deducted for SW was not included on SFS."*

The ASU's Case Assessment Record records the decision to approve "*12 months reduced payments @ €1386. On expiry, if all repays made, would be prepared to cap arrears and approve further 2 years fixed repays @ 1386 with conditions (ref. below). Income 3250 – 1539 exps leaves 1711 for repays. Allowing 200 priority for Minister & 125 for CU Loan leaves 1386. Reduced repays @ 1386 therefore appr for 12 mths. Extension for further 2 years and arrears cap dependant on full 12 mths repays being made".*

Having reviewed these records, I accept that the Provider's ASU considered the first Complainant's circumstances and his request for a long term repayment option, and determined that a term extension and capitalisation of arrears was unsuitable at that time.

/Cont'd…

It is noted in the Assessment Record, however, that the Provider was willing to approve 12 months reduced repayments at €1386, upon expiry of which the Provider would be prepared to capitalise the arrears and approve a further two years of fixed repayments at €1386, conditional on all the repayments being made.

I note that a MFA issued to the first Complainant on 27 February 2014, for signature. The first Complainant advised the Provider that he wished to seek independent advice before signing the MFA. The MFA was subsequently re-issued to the first Complainant on 28 May 2014, after a delay of some four weeks on the part of the Provider in responding to certain queries in respect of the MFA, raised by the first Complainant in a letter to the Provider dated 19 May 2014.

I note that, on 26 June 2014, the first Complainant signed a Mortgage Form of Authorisation (MFA) for reduced payment instalments of €1,386.00 per month (the "Minimum Payment") for a period of 12 months, thereby agreeing to abide by the terms set out within the MFA. I note that the Provider had advised the first Complainant, in the MFA, that "*as we have been unable to engage with* [the second Complainant]*, we will accept the attached MFA signed by* [the first Complainant] *only*". This arrangement was thereafter put in place.

The first Complainant completed an updated SFS on 23 August 2014 (later re-dated and resubmitted on 18 November 2014). I note that in the Branch SFS Checklist, the Provider's representative recorded as follows:

> "[The first Complainant] *has a court mandated payment for a social welfare debt. He was in court today to answer charges in relation to that. He was warned in court that the outstanding balance would have to be cleared by 01/04/2015. He doesn't have the wherewithal to make sufficient payments to comply. He asks that we agree to a further 6 months of interest only which will allow him to use the additional funds to pay the debt. His solicitor advises him that non-compliance might result in a custodial sentence. He has 3 more payments to a* [Provider] *Grade 7 account. Once the Dept of Soc Welfare and the Grade 7 account are paid he will be able to return to full C & I and also deal with the arrears on a recap basis."*
>
> ***Branch Recommendation and Rationale:***
> *"If he is committed he loses his job and as* [the second Complainant] *is non coop the likelihood is that we will have to sell the property. Whereas if we agree to a final 6 months of IO and the grade 7 and court debt are cleared then he can get to a full payment on the mortgage. I am happy to recommend that."*

The Provider's ASU subsequently refused to approve an ARA for the first Complainant and deemed the mortgage unsustainable.

Having considered the evidence submitted by both parties to this complaint, I accept that the first Complainant was openly interested in obtaining a long term solution to his mortgage arrears and that he discussed the possibility of a capitalisation of arrears and/or maximum term extension and split mortgage with the Provider representatives with whom

/Cont'd…

he was in contact during his application for forbearance in June 2013, and during his application for forbearance in January 2014.

I accept the Provider's position that the role of the representatives with whom the first Complainant met on these occasions was to assist in the preparation of the SFS and to provide relevant information, including in relation to potential ARAs offered by the Provider. I accept that it was not their role to make any decision on the availability of a particular repayment option or options, and that it was the function of the Credit Department to make credit/forbearance decisions following assessment of the SFS.

I note that in June 2013, following assessment of the first Complainant's SFS, the Provider's ASU envisaged the possibility of "*arrears capitalisation and max term extension and split"*, but that this was subject to adherence to the terms of a 6 month Reduced Repayment Arrangement, and subject to re-assessment of the mortgage at the end of the 6 month period. There is no evidence that the first Complainant was told otherwise by the Provider representative with whom he was dealing at that time in respect of his application.

In January 2014, and during the discussions between the parties that ensured in respect of the terms of the MFA issued in February 2014, and re-issued in May 2014, it is evident that the Complainant was informed that, upon expiry of the 12 month ARA, the Provider would be willing to capitalise the arrears, but that this would be conditional on full adherence to the repayments required under the ARA.

In the event, the submissions indicate that the first Complainant was unable to adhere to the terms of the ARA agreed in June 2014, in circumstances where he had a Social Welfare debt which needed to be prioritised above his mortgage, and that, in these circumstances, he did not satisfy the criteria for a capitalisation of his mortgage arrears.

While I accept the first Complainant's disappointment in this regard, I do not find any evidence that the Provider misled the first Complainant, or gave the first Complainant any undertaking or promise in respect of a future ARA to which it did not adhere. I accept that, where the Provider had discussions with the first Complainant in relation to a long term arrangement, it was on the basis of repayments being fully met on existing ARAs and any potential future offer being fully assessed and approved. There is no obligation on the Provider to make an offer of an ARA where it is not considered appropriate.

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

2. **That the Provider acted unfairly in declining to offer an ARA to the first Complainant in January 2015, and in deeming the mortgage unsustainable.**

The first Complainant states that the Provider's actions in assessing his application for forbearance in November 2014, in refusing in January 2015 to agree to an ARA, and its decision to deem the mortgage unsustainable, were unfair in circumstances where the first

/Cont'd…

Complainant's financial circumstances had not deteriorated, and the first Complainant had "*co-operated with the Bank in every way*" under the MARP process.

As previously set out, 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 submissions show that the first Complainant submitted a completed Standard Financial Statement to the Provider in November 2014. The Provider has stated that it had had no communication with the second Complainant, and that it assessed the first Complainant based on his own circumstances as a separate borrower under MARP.

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:*
>
> *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 1 December 2014, of the first Complainant's request for an ARA. The ASU assessment notes show its consideration of the personal circumstances and employment details of the Complainants, incorporating repayment capacity, the repayment history on the account, and the level of cooperation demonstrated by both Complainants.

I note that the ASU assessment notes consider the overall indebtedness of the Complainants, and record details in respect of a "*court mandated debt with €8,600 o/s & paying €400 pm. This relates to a claim for SW while working over a protracted period. He has been warned by the court that he needs to be cleared by 1/4/15 and his solicitor advised that non compliance could lead to a custodial sentence*." The assessment notes record that "*there is also a CU loan for €8500 & [Bank] debt of €1600 approx. but neither has been paid*". The assessment notes record that "*Custs had 5 periods of forbearance totalling 30 mts but did not adhere to most recent agreement. In Feb 2014, 12 mts reduced repayments at €1386 pm were approved with a view to approving a further 2.5 yrs at the same amount. No funds have been lodged since 8/1/14…"*

It is evident from this that, at date of assessment of the first Complainant's request for an ARA in December 2014, the Complainants had made no payments to their mortgage loan account since January 2014, some 12 months earlier.

/Cont'd…

Having considered the first Complainant's proposal for an ARA "*for 6 mts I/O until he clears the SW debt*", the ASU's decision on 1 December 2014 is recorded as follows:

> "*Decline unsustainable.* [The first Complainant] *has had plenty of time to address the SW debt & lodge agreed funds to the mortgage but it appears that he has totally ignored both debts.* [The second Complainant] *is not co-operating & she needs to be made aware that she cannot walk away from this debt. On checking* [the first Complainant's] *a/c there is a lot of online activity which could be the route of his financial problems & needs to be addressed. On one day, 9/12/14, €670 was paid out.*"

The assessment notes comment as follows:

> *"Mortgage is unsustainable. If cust sorts out* [the first Complainant's*] SW debt & can afford to address the mortgage arrears, we may review out decision but will need an up to date SFS with supporting documentation. A/c to be referred to MRT."*

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 his 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, interest only, reduced repayments, arrears capitalisation, moratorium, deferred interest scheme, term extension, split mortgage, trade down mortgage, long term reduced payments, and long term interest only.

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;*
> *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);*

/Cont'd…

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 potential ARAs considered by the ASU on 1 December 2014, 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 28 January 2015 the Provider's Arrears Support Unit wrote to both Complainants, in accordance with Provision 45 of the CCMA 2013, setting out its decision as follows:

> *"We have now completed an assessment of your full circumstances including:*
> a) *Your personal circumstances*
> b) *Your overall indebtedness*
> c) *The information you provided in the standard financial assessment form (SFS) or subsequently submitted*
> d) *Your previous repayment history*
> e) *Your current repayment capacity*
> f) *Each alternative repayment arrangement (ARA) we currently have available…*
> g) *The effect of the ARA on your financial circumstances.*
>
> *We have decided not to offer you an ARA because your mortgage loan is not sustainable.*
>
> *For a mortgage to be sustainable you have to be able to meet all of your mortgage repayments in full and on time so that the mortgage is repaid in full over the life of the mortgage.*
>
> *It is unlikely, based on our assessment of your circumstances, that you will be able to repay the mortgage loan in full over its life. We do not believe any ARA we offer will change that position (for example, even if we used an ARA to reduce your payments to the maximum you can afford).*

/Cont'd…

> *You have the right to appeal this decision to our Mortgage Appeals Board within the next 25 business days. This is our internal appeals board, which will consider and independently review the decision made about your mortgage loan…*
>
> *Your mortgage loan is now being dealt with outside of MARP and the protections of MARP no longer apply. This means that where arrears exist and you do not repay them, we are entitled to commence legal proceedings for possession of the property three months from the date of this letter or eight months from the date the arrears arose, whichever date is later…"*

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

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, moratorium, term extension, 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 letter of appeal from the first Complainant, addressed to the Provider's Mortgage Appeals Board, on 4 March 2015, submitted on the basis that the first Complainant had "*been unfairly treated by the Bank under the MARP rules*", setting out a history the Complainants' dealings and communications with the Provider in respect of their mortgage arrears and the ARAs which had been put in place up to that date, and querying "*how my mortgage loan can be not sustainable if I was offered numerous arrangements from the MARP over the last two years and my financial situation has not deteriorated".*

The matter was subsequently brought before the Provider's Mortgage Appeals Board on 20 March 2015. The Provider has submitted the Mortgage Appeals Board Case Summary, and 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:

> ***"Board Decision:***
> *Appeal outcome – original ASU decision appropriate.*
>
> ***Rationale for Determination made by the Board***
> *The original ASU decision to decline am ARA based on Borrowers' previous repayment history noting high level of accrued arrears & that* [the second

/Cont'd…

Complainant] *is not contributing to repayments, was appropriate and was confirmed by the Board as appropriate based on the information provided."*

The decision of the Appeals Board was communicated to the first Complainant on 23 March 2015 in the following terms:

> *"Our Mortgage Appeals Board has completed its consideration of your letter of appeal received on 4 March 2015 and has confirmed the previous decision of the Arrears Support Unit (ASU) and decided not to change it.*
>
> *We have made this decision because, having considered all the facts of your case and based on your full circumstances including the information provided in your Standard Financial Statement (SFS) and your previous repayment history, the Board concluded that there is insufficient income evident, now or in the foreseeable future, to allow us to offer an alternative repayment arrangement to you or to identify a long term sustainable solution. It is the Board's strong view that given your current financial circumstances this debt is unsustainable."*

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 first Complainant dated 23 March 2015, the Board further advised the first Complainant as follows:

> *"The Board wish to remind you that both of the borrowers named on the above home loan account are jointly and severally liable in relation to same. Accordingly, the Bank is entitled to pursue any one borrower and it is the responsibility of the borrowers themselves (and not the Bank) to sort out each borrower's respective proportions of liability and payment. This means that if the Bank receives payment from one borrower, then it is up to that borrower to then pursue the other borrower for a contribution to their share of liability".*

At that point the Appeals Board advised the first Complainant of his 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 January 2015, and upon appeal in March 2015, 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 Provider's ASU or 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 intend to uphold this aspect of the complaint.

3. **That the Provider has displayed poor and/or inappropriate customer service in its telephone communications with the Complainants**

/Cont'd…

The Complainants complain that the Provider has displayed poor and/or inappropriate customer service in its phone communications with the first Complainant, seeking payments to the account at times when the first Complainant was actively engaged with the Provider in seeking an ARA, and neglecting to respond to telephone messages.

The Provider rejects this allegation and submits that there was regular and appropriate contact between the first Complainant and the Provider, in line with the requirements of the CCMA 2013, and that continuity of service is evident from its records.

Chapter 3 of the Consumer Protection Code 2012 (as amended) sets out the parameters within which the Provider is permitted to make telephone contact with a consumer who is an existing customer and holds a product which requires the Provider to maintain contact with that consumer in relation to that product.

Provision 3.43 of the Consumer Protection Code 2012 (as amended) provides that:

> *"Telephone contact, made in accordance with this Code, may be made only between 9.00 a.m. and 9.00 p.m. Monday to Saturday (excluding bank holidays and public holidays), unless otherwise agreed with the consumer."*

In addition to the requirements of Chapter 3 of the CPC 2012 (as amended), Provision 22 of the CCMA 2013 provides that:

> *"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..."*

The Provider has submitted a copy of its case management system notes for the period May 2010 to February 2016, which set out a history of the communications in respect of the mortgage account, and which include, among other things, correspondence sent and received, payments received and payments returned, information requested, financial reviews and updates, and incoming and outgoing calls.

I note that there was an unusual delay on the part of the Provider is responding to a letter from the first Complainant dated 19 May 2014, in which he set out his queries in relation to the terms of the MFA that he wished to discuss before signing. Although the Provider acknowledged receipt of this letter in writing on 21 May 2014, and advised that a representative would be in contact in due course to arrange a meeting to discuss these queries, it is evident that the first Complainant had to follow this up by telephone in order to obtain a return call from the Provider. It was not until 23 June 2014 that the Provider contacted the first Complainant by telephone to talk him through his queries. This was an unfortunate delay. However, while undoubtedly inconvenient, it is not evident that this had a material impact on the first Complainant. I note the Provider's explanation that a

/Cont'd…

staff member had been out of the office for an extended period of time and that the first Complainant's queries had been assigned to another staff member for response.

With respect to the first Complainant's complaint that the Provider made inappropriate telephone calls seeking payments to the mortgage account at times when the first Complainant was engaged with the Provider in seeking an ARA, it is important to remember that the Complainants are obliged to continue to make mortgage repayments under the terms of an ARA or, if there is no ARA in place or the ARA has expired, under the terms of the mortgage loan agreement into which they have entered. The obligation to make mortgage repayments continues irrespective of any ongoing engagement between the borrower and the Provider in respect of a new ARA. I accept that the Provider was entitled to expect the Complainants to continue to make these repayments and that it was entitled to maintain contact with the Complainants in this regard, albeit in a manner which was not disproportionate or excessive.
Having reviewed the content of the Provider's records, in particular the nature and frequency of the telephone communications with the first Complainant during the periods of time that he was engaged with the Provider in seeking an ARA, I am of the view, based on the evidence before me, that the level of communications from the Provider was proportionate and not excessive.

For these reasons, I do not intend to uphold this aspect of the complaint.

Conclusion

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

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

6 December 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—

/Cont'd…

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.