



<u>Decision Ref:</u>	2018-0177
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Delayed or inadequate communication Dissatisfaction with customer service
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The complaint is that the Provider unfairly refused to allow the Complainants to sell their property and pay the balance of the mortgage loan, that is, the shortfall, in instalments on a tracker rate, as the Complainants believe was agreed in February 2016.

The Complainants' Case

The Complainants submit that the Provider gave them permission to sell their house in February 2016, and that any negative equity remaining on the mortgage loan could be paid back over a reasonable term while continuing on their tracker rate, and this could be negotiated with the Provider when they had received an acceptable offer on their home.

The Complainants submit that in January 2017 they received an offer of €215,000 for their home which they believed was the best price that they could achieve in the then housing market. The Complainants state that *"This Gross Amount will be paid over to the Bank. We have made it clear to the Bank that we will bear all the outstanding costs of sale. The maximum shortfall will be approx. €50,000 which we have proposed to repay in full on the Tracker Mortgage Terms – everything continuing as before other than the loan would be unsecured"*. The Complainants submit that they have never missed a payment on their mortgage loan and have the ability to repay the outstanding €50,000, but not redeem the entire amount in one lump sum. The Complainants state that *"We will continue to make*

repayments of €1,000 per month and have the negative equity cleared IN FULL in 50 months”.

The Complainants state that the Provider has *“releged on [its] initial position in allowing us to put the house on the market in February 2016 under the pretext that we could pay off the negative equity over a reasonable term at the tracker rate. The Bank has not also provided us with any alternative resolution to paying off the negative equity other than in a lump sum, which is not within our capabilities at this time”.*

The Complainants also state that *“We feel we are being unfairly treated by the Bank and, in effect are being “imprisoned” in our house even though we have shown we are trustworthy candidates with an excellent credit rating and have made it abundantly clear that we will cover the shortfall IN TOTAL in just over four years”.*

The Complainants state that they are seeking for this Office *“to help us in dealing with [the Provider] to come to a reasonable resolution that will enable us to sell our house as soon as possible and pay off our negative equity in a fair and timely manner while retaining our tracker mortgage rate, which was initially permitted by the bank when allowing us to put our home on the market”.*

The Provider’s Case

The Provider submits that it entered into a mortgage loan agreement with the Complainants in April 2008 under which it advanced the sum of €318,250 in order to fund the purchase of the property. The Provider submits that the property is a specific component of the security and the overall mortgage loan, and that the terms of the loan provide for definite security over the property identified in the letter of loan offer until such time as the loan is redeemed in full.

The Provider submits that mortgage lending offers relatively low interest rates over the term of the agreement when compared to unsecured lending. It submits that the provision of security until the loan is repaid is part of the reason which facilitates lower interest rates.

The Provider refers to general condition 2(a) and 2(d) which provide that:

“2 Security and Valuation

(a) The “[Provider’s] Security” is (i) a first legal mortgage or charge over the property described in Part 2; ...”

...

(d) The Lender shall have the right to possession of the documents of title to any Property over which it has a first legal charge described in Part 2 for so long as any amount or liability secured by the mortgage or charge remains outstanding...”

The Provider submits that the terms of the mortgage deed set out that the mortgage property shall be released and discharged from the security following repayment of the secured money. The Provider states that *“Typically, where a borrower is seeking to dispose*

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of the property, it is necessary to redeem the loan prior to the sale (or provide an undertaking that the loan will be redeemed) such that the property can be transferred without the burden of the security attached to the land”.

The Provider submits that where the proceeds are insufficient to discharge the loan, it is not required to release security. It submits that the proposed shortfall constitutes a residual balance which remains outstanding over which it would have no security. The Provider submits that where a borrower is seeking for it to release the security without clearing the loan, it is necessary to obtain its consent and agreement to the terms on which the security will be released.

The Provider states that *“In a sale at shortfall situation the Bank must agree to the sale price being offered (because it is insufficient to clear the mortgage) and agree to provide a vacate on the mortgage in order to facilitate the sale”.*

Decision

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

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

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

A Preliminary Decision was issued to the parties on 18 October 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

Before turning to the issue at hand, I must point out the jurisdiction of this Office in complaints regarding the CCMA and MARP. This Office can investigate the procedures undertaken by the Provider regarding the MARP, but will not investigate the details of any

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re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of 60(2)(b) of the Financial Services and Pensions Ombudsman Act 2017.

The issue to be determined is whether the Provider unfairly refused to allow the Complainants to sell their property and pay the balance of the mortgage loan, that is, the shortfall, in instalments on a tracker rate without security.

The Complainants submit that the Provider gave them permission to sell their house in February 2016, and that any negative equity remaining on the mortgage loan could be paid back over a reasonable term while continuing on their tracker rate, and this could be negotiated with the Provider when they had received an acceptable offer on their home. The Complainants state that the Provider has *“reneged on [its] initial position in allowing us to put the house on the market in February 2016 under the pretext that we could pay off the negative equity over a reasonable term at the tracker rate”*.

The Provider states that it *“does not accept the Complainants allegation that they were given permission to sell their property in February 2016... The Bank did not enter into any agreement with the Complainants for dealing with the residual balance in an unsecured manner and any discussions in this regard were simply that, a discussion”*.

The Complainants telephoned the Provider on 16 February 2016 to enquire about the potential sale of their property in negative equity. The Complainants’ representatives state that *“The Bank... said yes Borrowers could go ahead with Sale but would be subject to Application to Credit Team as to how the shortfall (€50K) would be dealt with”*.

While I note during the telephone conversation on 16 February 2016 that the Provider’s representative advised the second Complainant that consent to the sale of the property leaving a shortfall would need to be approved by the Provider, I am of the view that the Provider’s representative could have been clearer in explaining the process to the second Complainant, to avoid misinterpretation. I cannot accept, however, the Complainants’ submission that *“We were given permission to sell our house from [the Provider] in February 2016 and at that time we were informed that any negative equity remaining on the mortgage could be paid back over a reasonable term while continuing on the tracker rate, which could be negotiated with the Bank when an acceptable offer had been made on our home”*. While the Provider’s representative confirmed that they could go ahead and put the property on the market, she also stated that *“you don’t always have to go through with it... you can put it up for sale, you can get the solicitors to say look it is actively up for sale, they want to sell and we are looking for the consent of sale from you. Sometimes that works in your favour too”*.

Furthermore, I note that on receipt of the Complainants’ Solicitors’ letter dated 18 February 2016 advising that the Complainants wished to put the property up for sale, the Provider wrote to the Complainants and the Complainants’ Solicitors on 23 March 2016 setting out

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its requirements for consideration to be given to a sale at shortfall request. This letter set out, among other things, the following:

“Please note where a property is sold and the sale proceeds do not cover the outstanding mortgage balance the customer remains fully liable for the residual debt. Where it is proposed that a property be sold but the proceeds do not cover the outstanding mortgage balance and permission is required from [the Provider] to release the Title Deeds, the proposal on both the offer and plans for the outstanding balance will receive full consideration and a decision on same will issue to you.

If you have an offer on your property we need the following documentation sent in to us:

...

When all of these above points are confirmed your case will be presented for consideration to decide if we can accept the offer and plans for the outstanding balance. It is not the Bank’s policy to write off any debt so you must be prepared to come to an agreement.”

I must accept that the Provider clearly outlined that consent to the sale at a shortfall would require its approval.

The Complainants’ representatives, in a submission to this Office dated 26 April 2018, state, among other things, that:

“1. The Borrowers have a Tracker Mortgage on the above property for 35 years which commenced in May, 2008 and would complete in 2043. At considerable financial struggle they have a perfect repayment record since May 2008 – almost 10 years.

2. The property was in negative equity of about €50,000 (‘€50K’). Repaying the mortgage was a considerable burden and they had the opportunity to move in with the parents of the 1st Named Borrower who lived nearby. In mid Feb 2016 they asked the Bank if it would consent to the Sale and have [an] arrangement where the outstanding €50K would continue on Tracker and they would be able to handle that and pay off within so many years as might be agreed with the Bank...”

The Provider submits that following notification of the potential for arrears in correspondence, it attempted to contact the Complainants by telephone on 25 February 2016 and issued a Standard Financial Statement (SFS) to the Complainants thereafter on 23 March 2016. The Provider submits that the Complainants did not avail of the invitation to submit a SFS in 2016.

The Provider submits that on 9 January 2017 it received a letter from the Complainants’ Solicitor dated 6 January 2017 acknowledging its letter of 23 March 2016 and confirming an

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offer had been made on the property. The Provider submits that the Complainants confirmed an offer of €215,000, which they wanted it to consider.

I note that the Complainants' Solicitors' letter dated 6 January 2017 states, among other things, the following:

"At last, through the Agents... our Clients have received an offer of €215,000.00 with which they would hope to proceed. With the current balance due on their mortgage, less the net proceeds from the sale of their house, there might be a balance of about €50,000. Our Clients would continue to pay off same on continuing Mortgage Tracker basis.

...

We would be glad to hear from you as to whether our Clients can obtain the Bank's consent to so proceed."

The Provider submits that it wrote to the Complainants' Solicitor on that same date enclosing the previous correspondence which outlined the criteria for consideration to be fulfilled prior to consideration of the sale at shortfall. The Provider submits that on 15 February 2017, it received correspondence from the Complainants' Solicitors enclosing the documentation for consideration of the sale at shortfall, and it reviewed the Complainants' application on 23 February 2017. I note that the Provider's assessment record sets out, among other things, the following:

"Approver's rationale:

Borrowers have full affordability for mortgage repayment and on this basis approval will not be sanctioned to allow an unsecured residual. Borrowers need to review their circumstances to see if they can avail of any personal funds, or borrow to ensure that any residual balance is cleared in full on or before the sale. The bank will only issue a vacate on this basis. Alternative is that the borrowers continue to pay down the loan until it returns to positive equity and progress sale at that point. Hold Grade given borrowers have full capacity to amortise mortgage over remaining term."

The Provider states that *"At all times the Bank reserve the right to not accept the Complainants' proposal for a sale at shortfall. In this instance the Bank sought information from the Complainants with regard to their financial information/circumstances and that of the property. Upon receipt of that information the Bank conducted a full assessment of the information provided and decided not to accept the Complainants proposal"*.

The Provider submits that on 27 February 2017 it contacted the first Complainant to confirm the outcome of the assessment and that the request for a sale at shortfall had been declined. The Provider submits that on 7 March 2017 it received a call from the Complainants and their Solicitor, and its agent confirmed that the decision was as previously advised and that they could submit a letter appealing the decision.

The Provider submits that it received correspondence from the Complainants' Solicitors on

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10 March 2017 which set out an appeal to the decision not to allow a sale at shortfall, which was registered as a complaint. The Provider submits that it issued a Final Response Letter confirming the decision not to accede to the request for the proposed sale at shortfall.

In a letter to the Provider dated 23 March 2017 the Complainants' representatives state, among other things, the following:

- “4. The Bank made no alternative proposal – it is unrealistic to expect that the Borrowers can immediately come up with c. €50,000.00 to pay off the final balance;
5. Even though the Borrowers appear to have met all criteria for continuation and payment off of the Mortgage in full, what was the point of the Borrowers being put to the expense and time of furnishing all the information which the Bank required, if the Bank were going to say no in any event?”

The Provider, in its letter to the Complainants' representatives dated 2 May 2017 states, among other things, the following:

“From the outset it is important to state that [the Provider] review all requests from borrowers on an individual basis and it is disingenuous to suggest that rather than assess the borrower’s application for a sale at shortfall ‘it would have been much easier to advise them from the outset that they had no chance’. The Bank must strongly refute your inference of an immediate decline without benefit of a full assessment of their particular circumstances.”

The Provider submits that at no time were the borrowers advised that approval was granted to sell their property at less than the amount required to redeem the outstanding loan. The Provider states *“That they evidently placed the property on the market in the absence of prior approval from the Bank has resulted in their now being wholly responsible for the position they now find themselves in. That they are in negative equity is not a reason for the bank to consent to their request for sale of the property. The borrowers have not presented the Bank with alternative proposals and it is not the Bank’s place to provide them with a suite of options or alternatives to consider”*.

The Complainants' representatives state that *“The Borrowers did provide the Bank with 3 different options for security the shortfall, but all were rejected”*.

The Provider has obligations pursuant to the Code of Conduct on Mortgage Arrears 2013 (the CCMA 2013). Provisions 36, 37, 39 and 40 of the CCMA 2013 state that:

“36. A lender’s ASU must examine each case on its individual merits.

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

- a) the personal circumstances of the borrower;*
- b) the overall indebtedness of the borrower;*
- c) the information provided in the standard financial statement;*

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- d) the borrower's current repayment capacity; and
- e) the borrower's previous repayment history.

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

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

40. 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."

The Provider submits that on 15 February 2017 it received an SFS from the Complainants with a specific request for consideration to be given to a sale at shortfall. The Provider submits that its assessment confirmed that the Complainants had sufficient affordability to maintain the mortgage without the requirement of an Alternative Repayment Arrangement. The Provider states that "a sale at shortfall is not an Alternative Repayment Arrangement for consideration in accordance with the requirements of provision 39, CCMA".

The Provider states that "Provision 39, lists 12 options that the Bank 'may' offer but none of them are compulsory. The Bank did consider the relevant options. Although the Assessor was satisfied the Complainants had sufficient repayment capacity to repay the mortgage". The Provider submits that in compliance with Provision 40 of the CCMA 2013 "matters were properly considered and the reasons for refusal are set out beside each option".

I accept that the information and documentation submitted in evidence confirms that the Provider complied with the requirements of Provisions 36, 37, 39 and 40 of the CCMA 2013. It should be emphasised that the Provider is under no obligation to offer a customer a specific option, as per Provision 39 of the CCMA 2013, there is only an obligation to "explore"

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each option and I accept that the Provider has adhered to the CCMA 2013, in this regard. There is also no obligation on the Provider to accept a proposal put forward by a customer. It is clear that the Provider was of the opinion, based on the information furnished by the Complainants, that the Complainants had sufficient repayment capacity to repay the mortgage.

I note that the Complainants' Solicitors' letter dated 9 March 2017 states, among other things, the following:

"we understand by way of phone call to our Client on 27th ult., and letter sent to them on same date (returning their SFS) that their Application has been declined. Our Clients wish to hereby appeal against that. We understand that the Assessment of the Application is done on a very detailed basis by an Independent Group of Assessors. However, no reasons have been given in the letter for the refusal of the Application which makes it difficult for us to set out specific Grounds of Appeal since we do not know specifically what we are appealing against"

I note that the Complainants' representatives, in a letter to the Provider dated 9 March 2017 state *"Our Clients must also express their disappointment that despite the Authorities which have been furnished to the Bank that you have replied to them rather than to us as requested"*.

Provision 8 of the CCMA 2013 provides that:

"8. At the borrower's request and with the borrower's written consent, the lender must liaise with a third party nominated by the borrower to act on his/her behalf in relation to his/her arrears situation. This does not prevent the lender from contacting the borrower directly, in relation to other matters, or issuing communications required under this Code directly to the borrower."

Provision 45 of the CCMA 2013 provides that:

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

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

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

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

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

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

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- b) the **borrower's** right to appeal the decision of the lender not to offer an alternative repayment arrangement to the lender's Appeals Board;
- c) that the **borrower** is now outside the **MARP** and that the protections of the **MARP** no longer apply;
- d) that legal proceedings may commence three months from the date the letter is issued or eight months from the date the **arrears** arose, whichever date is later, and that, irrespective of how the property is repossessed and disposed of, the **borrower** will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case;
- e) that the **borrower** should notify the lender if his/her circumstances improve;
- f) the importance of seeking independent legal and/or financial advice;
- g) the **borrower's** right to consult with a **Personal Insolvency Practitioner**;
- h) the address of any website operated by the Insolvency Service of Ireland which provides information to **borrowers** on the processes under the Personal Insolvency Act 2012; and
- i) that a copy of the most recent **standard financial statement** completed by the **borrower** is available on request."

While I note that the Provider telephoned the first Complainant on 27 February 2017 to confirm the outcome of the assessment and that the request for a sale at shortfall had been declined on the basis that the Complainants had sufficient capacity to repay the mortgage loan, it is disappointing that the Provider did not outline the reasons for the decline in writing in compliance with Provision 45 of the CCMA 2013. The Provider should have issued this letter to the Complainants' Solicitors, as the third party nominated by the Complainants, rather than corresponding with the Complainants themselves.

Provision 49 of the CCMA 2013 provides that:

- "49. A lender must have an appeals process to enable a **borrower** to appeal in relation to a decision of the lender, including:
- a) where an alternative repayment arrangement is offered by a lender and the **borrower** is not willing to enter into the alternative repayment arrangement;
 - b) where a lender declines to offer an alternative repayment arrangement to a **borrower**; and
 - c) where a lender classifies a **borrower** as **not co-operating**, and for this purpose must establish an Appeals Board to consider and determine any such appeals submitted by **borrowers**."

The Provider submits that on 7 March 2017, it received a call from the Complainants and their Solicitor, and its agent confirmed that the decision was as previously advised and the Complainants were advised that they could submit a letter appealing the decision. The Provider submits that it received correspondence dated 9 March 2017 from the Complainants' Solicitor on 10 March 2017, which set out an appeal to the decision not to allow a sale at shortfall, which was registered as a complaint. The Provider submits that it issued a Final Response Letter confirming the decision not to accede to the request for the

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proposed sale at shortfall. The Provider states that *“the sale at shortfall is not one of the options for alternative repayment arrangements offered by the Bank which could have been appealed to the mortgage appeals board prescribed under the Code of Conduct on Mortgage Arrears”*.

While I note the sale of a property at shortfall is not one of the options for alternative repayment arrangements offered by the Provider, I do not accept the Provider’s submission that *“the sale at shortfall is not one of the options for alternative repayment arrangements offered by the Bank which could have been appealed to the mortgage appeals board prescribed under the Code of Conduct on Mortgage Arrears”*. I am of the view that the Provider should have assessed the Complainants’ appeal, and it is most disappointing that the Provider did not do so.

Having carefully considered all of the evidence before me, I must accept that the Provider’s actions have been, for the most part, satisfactory, and the substantive complaint is, therefore, not upheld. That said, given that the Provider could have provided clearer information at the outset in the initial telephone conversation, later failed to assess the Complainants’ appeal, and failed to issue the Complainants’ representatives with a letter outlining the reasons for the decline of the Complainants’ application in compliance with Provision 45 of the CCMA 2013, I direct the Provider to assess the Complainants’ appeal and to make a compensatory payment in the sum of €500.00 to an account of the Complainants’ choosing within a period of 35 days.

Consequently, this complaint is partially upheld.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to to assess the Complainants' appeal and to make a compensatory payment 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**

13 November 2018

Pursuant to Section 62 of the Financial Services and Pensions Ombudsman Act 2017, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—**
 - (i) a complainant shall not be identified by name, address or otherwise,**
 - (ii) a provider shall not be identified by name or address,****and**
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.**