



<u>Decision Ref:</u>	2019-0002
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Interest Only
<u>Conduct(s) complained of:</u>	Failure to provide correct information Maladministration (mortgage)
<u>Outcome:</u>	Partially upheld

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

Background

This complaint concerns the Complainant's mortgage loan account held with the Provider. The Complainant entered into the mortgage loan in the amount of €1,445,000 for a term of 20 years pursuant to Letter of Offer dated 12 October 2006.

The Complainant's Case

The Complainant submits that the interest only period for his mortgage loan account held with the Provider was 7 years from drawdown. The Complainant submits that in all his dealings with the Provider, he was led to believe that the interest only period would be 10 years. The Complainant submits that in November 2013, prior to the expiration of the seven year interest only period, he wrote to the Provider with a proposal, however he received no formal response from the Provider until 18 August 2014.

The Complainant submits that a second Letter of Offer issued from the Provider on 4 March 2015, which was subject to the Provider obtaining a first legal charge over his property abroad, which he was attempting to sell. The Complainant states "*I was obliged to refuse this offer as it is my wife's case that she is entitled to half of the proceeds of the [property abroad]*". The Complainant submits that he appealed this and received a third Letter of Offer from the Provider in May 2015, which was conditional on the Provider receiving letters of authority to liaise with his Lawyer and Selling Agents abroad. The Complainant states that he explained to the Provider that "*this would seriously hamper my ability to achieve the best*

possible price for the property [abroad] if the Agents were aware of the fact that I had financial difficulties with [the Provider]”.

The Complainant submits that he has continued to make the interest only payments on his mortgage loan account. The Complainant states, *“I have now withdrawn the offer made to the Bank in November 2013 due to the Bank’s failure to accept same. If I had received the 10 year interest only period I would not be in this position”.*

The Complainant states that he is seeking *“the provision of the 10 year interest only period or the award of a sum of money to recognise same”.*

The Provider’s Case

The Provider submits that the mortgage loan account was drawn down on 22 November 2006 over a 20 year term, with the first 7 years repayments at interest only. It submits that the Offer Letter dated 12 October 2006 set out the interest only loan term clearly and unambiguously, and was signed by the Complainant on 16 October 2006.

The Provider submits that when the mortgage loan account reverted to full capital and interest repayments, arrears began to accrue. The Provider submits that the Complainant sought forbearance and was not satisfied with any of the three offers of alternative repayment arrangements it made. The Provider submits that it appointed a receiver in November 2016 and the property was sold in May 2017. It submits that the proceeds of sale of the property were remitted to the mortgage loan account and there remains an unsecured residual debt of €830,518.57 as at 3 July 2018.

The Complaints for Adjudication

The first complaint is that the Provider incorrectly failed to extend the interest only period on the mortgage loan account for an additional three years to expire in November 2016, as he believed to be the case from the outset, which resulted in arrears accruing on the account. The second complaint is that the Provider delayed in responding to the Complainant’s proposal submitted in November 2013. The third complaint is that the Provider failed to accept the Complainant’s offer submitted in November 2013.

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 was 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.

/Cont’d...

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 4 December 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.

A submission dated 21 December 2018 was received from the Complainant by this Office. This submission was exchanged with the Provider and an opportunity was made available to it for any additional observations arising from the said additional submission.

I note that the Complainant, in his submission dated 21 December 2018, states that *"I made numerous attempts to resolve this matter with [the Provider] and indeed first approached [it] before the 7 year interest only period expired, when they would not entertain any proposal from me at all. Subsequently in all further negotiations they had an absolute pre-condition that they would only accept a proposal from me on the basis that I gave up my tracker mortgage, which is interesting in view of the other cases that have come to light in recent years, whereby the Bank have attempted to force people to give up their right to a tracker mortgage"*.

While the Code of Conduct on Mortgage Arrears 2013 sets out that, a lender may only offer a borrower an alternative repayment arrangement which requires the borrower to change from an existing tracker mortgage to another mortgage type in certain circumstances, there is no equivalent provision in the Consumer Protection Code 2012 for buy to let mortgages.

My final determination is set out below:

- (1) The first issue to be determined is whether the Provider incorrectly failed to extend the interest only period on the mortgage loan account for an additional three years to expire in November 2016.**

The Complainant submits that the interest only period for his mortgage loan account held with the Provider was 7 years from drawdown. The Complainant submits that in all his dealings with the Provider, he was led to believe that the interest only period would be 10 years. The Complainant submits that at all times he dealt with a named representative of the Provider, and *"he assured me categorically that "it would not be a problem" to have the interest only period extended from seven years to ten years"*. The Complainant also states that *"It appears that [the Provider's representative] was very eager to have the loan approved... so convinced me to take up the loan as offered with a 7 year interest only period"*

whilst assuring me that he would have the interest only period extended to 10 years after the drawdown of the funds”.

The Complainant submits that he proceeded with the mortgage loan on the basis that the Provider’s representative *“would attend to whatever paperwork was required post the drawdown of the funds and I could not be expected to know the details of the actual procedure involved”*. The Complainant submits that it was only when a representative of the Provider contacted him in January 2012 with regard to the mortgage loan that he became aware that the interest only period had not been altered by the Provider’s representative.

The Complainant has enclosed a copy of an email to a representative of the Provider dated 6 November 2013 detailing conversations in relation to the interest only period with the Provider’s representative who he dealt with at mortgage loan application stage.

The Provider states that it *“notes the Complainants comments in his letter of 6 November 2013 to the Bank. The Bank submits that it has checked its records in its entirety and there is no evidence whatsoever, to show that the Complainant was ever offered a 10 year interest only repayment schedule. The Bank submits that if such an offer was made to the Complainant, that there would be a trail from the decision to offer such a facility, the actual offer, the signed acceptance of the offer and also instructions to apply the facility to the mortgage loan account, none of which exist. The Bank submits that the Complainant has failed to provide any documentary evidence or otherwise to the contrary”*.

The Provider submits that the Complainant signed and accepted the Offer Letter dated 12 October 2006 on 16 October 2006 and the funds were drawn down in full on 22 November 2006. The Provider submits that the Offer Letter provided for 7 years interest only repayments with annuity repayments thereafter and when the mortgage loan account reverted to full capital and interest repayments, arrears began to accrue.

The Provider submits that the Credit Application Form dated 5 October 2006, wherein its representative submitted a mortgage loan application to its credit Department for assessment, states on page 3 that:

“6. PURPOSE

- 1. [€1,445,000.00] requested to assist with the purchase of RIP at [named property]. PP over 20 yrs term. Interest only over 10 yrs...”*

The Provider submits that its Credit Department assessed the Complainant’s application for the mortgage loan, including the financial information and circumstances of the Complainant together with the Complainants request for a 10 year interest only repayment schedule, and made its decision, based upon the information provided by the Complainant. The Provider submits that it did not offer the Complainant a 10 year interest only repayment schedule and instead offered the Complainant a 7 year interest only repayment schedule reverting to annuity repayments thereafter. The Provider submits that a Decision Memo dated 11 October 2006 was issued to the Complainant. I note that this states, among other things, that:

/Cont’d...

“The facility requested is approved on the basis proposed subject to:-

...

- Interest only for 7 years.*

...”

I note that the Mortgage Loan Offer Letter dated 12 October 2006 sets out the following:

**PART 1
(THE STATUTORY LOAN DETAILS)**

IMPORTANT INFORMATION AS AT: 12/10/2006			
1. Amount of credit advanced:		€1,445,000	
2. Period of Agreement:		240 months	
3. Number of Repayment Instalments		4. Amount of each Instalment	...
<u>Instalments</u>	<u>Type</u>		<u>Instalment</u> ...
84	Interest Only Payments @ 4.15%	€4,997.29	
156	Capital & Interest Repayments @ 4.15%	€11,990.51	...
...			

**PART 2
The Additional Loan Details**

11. Type of Loan	7 Years Interest Only; Annuity thereafter
...	

The Provider submits that the Complainant signed the Offer Letter, indicating his agreement to these terms, on 16 October 2006 as follows:

“I confirm that I have read and fully understand... the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions.”

The Provider submits that the following warning is contained in the Offer Letter, which makes it clear to borrowers that they are strongly recommended to seek independent legal advice prior to signing the Offer Letter:

This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.

/Cont'd...

The Provider states that *“the Complainant’s solicitor had a clear duty to explain in detail, the full implications of the Complainant’s commitment in respect of this transaction. If the Complainant had any doubt about the contents of the Offer Letter and the implications of same, he should have raised this with his solicitor at the time”*.

The Complainant submits that a previous mortgage loan taken out with the Provider was for a ten year interest only period *“and that was another reason why I was very clear with [the Provider’s representative] that I required a ten year interest only period on this product as well”*. The Complainant states that *“I proceeded at all times on the basis that [the named Provider’s representative] would attend to whatever paperwork was required post the drawdown of the funds and I could not be expected to know the details of the actual procedure involved”*.

In response, the Provider states, *“Your reference to a previous unrelated loan, which was sanctioned with a longer interest only term, was approved at the Bank’s discretion. This was not related to this loan. In this instance the interest only approval was for a 7 year interest only term”*. The Provider submits that the representative no longer works for it and cannot be contacted. The Provider submits that there is no record on file relating to a discussion, between the Complainant and its representative in December 2009, where there was an agreement to provide the Complainant with 10 years interest only on his mortgage loan account. The Provider states *“Regardless as to any conversation which occurred in the past, the terms and conditions as sanctioned and accepted within the Offer Letter stand”*.

The Complainant states that the Provider’s representative *“still resides in [a named location] as he did whilst in the employ of the Bank, plays golf regularly at the local Golf Club and is readily contactable by phone or in person should “one” want to”*.

The Complainant submits that on 8 December 2009 he received an email from another of the Provider’s representatives which stated:

“...I can confirm the following:

...

...interest only ends on 22/11/2013 and the loan ends 22 /11/2026 repays 2288.43 rate 1.9%.”

The Complainant states that once he received this email he telephoned the Provider’s representative *“to explain that I understood that the documents which I had signed in [named branch] related to the change of interest-only period. She informed me that she would bring it up with [another named representative] and have the adjustment made immediately”*.

In response, the Provider states that it has *“been unable to locate a copy of the call referred to by the Complainant owing to the lapse of time (almost 9 years)”*.

The Provider submits that there is no record that any request was submitted to extend the interest only term between loan drawdown on 22 November 2006 and termination of the

/Cont’d...

initial interest only term in late 2013. The Provider submits that any amendment to the loan terms required its consent, and the Complainant's agreement in writing. The Provider states that *"No such document exists, nor is there any evidence that same was requested at any time"*. The Provider submits that in the absence of an agreed alternative repayment arrangement, the Complainant is required to maintain the repayments in accordance with the Mortgage Loan Letter of Offer. The Provider states that *"If as is the case here, there is no formal arrangement in place to alter the agreed repayment due, then arrears will accrue where the contractual repayment due in accordance with the original terms of the Mortgage Loan Letter of Offer are either not met, or partially met"*.

The Provider states that *"at its discretion [it] may consent to an interest only term. Each application is assessed on its own merits and the prevailing credit criteria applicable at that time. It therefore follows that a previous loan approved with a 10 year interest only term, does not imply that the Bank must replicate those conditions on subsequent loan facilities. Particularly in circumstances where there is a substantial increase in loan exposure, and reliance on existing security"*.

The Provider submits that at no time did an 'Area Manager' have discretion to amend the contractual loan terms following drawdown. The Provider submits that where any borrower seeks an amendment to the terms of a mortgage loan, the proposed amendment must be submitted in writing to its Credit Department for review and approval. The Provider states *"Typically a 'Financial Review Form' (FRF) would be requested, with up to date income details for the borrower"*. The Provider also states that *"In this instance given the Complainant's overall exposure to [the Provider] at approximately €2.4 million at that time (2008-2013) any request to amend the terms would only be approved at a very senior (executive) level. This means an audit trail of the request and the response would be clearly marked to the account"*.

The Provider submits that in circumstances where it agrees to the proposed amendment, in full or in part, the borrower must be provided with an agreement setting out the amendment to the mortgage loan Offer Letter for acceptance. The Provider submits that it is only with the signed acceptance of an agreement that it could implement such an amendment, including the extension of an interest only period. The Provider submits that this is provided for at *"PART 3 – THE GENERAL AND SPECIAL CONDITIONS"* of the mortgage loan Offer Letter, which states:

"4. Repayment

...

(d) The Bank may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amounts payable in respect of the Loan."

The Provider states *"Given that you accepted the offer letter on 16th October 2006, and loan drawdown did not occur until 22nd November 2006 (noting the cheque issued on 16th November 2006) it would appear that had the matter been raised then, there was ample time to address the issue"*.

/Cont'd...

The Complainant states that “On 27th May 2014 [the Provider’s representative] stated that she had checked with [a branch of the Provider] with regard to the documents I signed in the presence of [a named representative] and which I believed to relate to a change of interest rate and a change of the interest period from 7 to 10 years. In view of the fact that the [named branch] closed on the 7th August 2009 I do not understand how any check could have been made of these documents”.

In response, the Provider submits that this branch did close in 2009. The Provider states that its “email to the Complainant confirms that the Bank checked its files. Upon checking the file with the Banks Business Centre, the files would have been subsequently returned to an offsite storage facility. Any reference made to the [named branch] was a reference to where the files had originally been stored”.

With reference to the Complainant’s contention that in all his dealings with the Provider, he was led to believe that the interest only period would be 10 years, I would note that there is a generally accepted position at law regarding the introduction of oral evidence to vary the terms of a written agreement. Generally speaking, it is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement. This position was re-iterated recently by McGovern J., in **Promontoria (Arrow) Ltd. v Mallon & anor** [2018] IEHC 145. In that case, one of the Defendants, who had agreed to the loan, sought to argue that there was an oral agreement between the parties which was not included in the facility letter. His position was that the facility letter did not comprise the whole of the agreement but rather that there was “another key term...which was not reduced to writing”. I note that in the course of pronouncing judgment in the matter, the Court held that:

“For reasons of public policy, the courts will not permit oral evidence to be admissible if it is introduced for the purpose of contradicting the terms of a written agreement between the parties.”

In coming to his decision, the Judge referred to the following case law:

*“In **Ulster Bank v. Dean** [2012] IEHC 248, this Court rejected the defendant's contention that a collateral contract had varied the express terms of a loan facility. At para. 6, the court stated:-*

*‘...The defendants have not produced any written documentation to support this claim. It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the “parol evidence” rule. See **Macklin v. Graecen & Co.** [1983] I.R. 61 and **O’Neill v. Ryan** [1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement.’*

In Tennants Building Products Limited v. O'Connell [2013] IEHC 197, Hogan J. at para. 13 summarised the modern jurisprudence on collateral contracts as follows:-

*'The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and in Galvin) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in **Deane**.'*

[my emphasis]

The **Tennants** case was recently cited by the Court of Appeal in the case of **AIB Mortgage Bank -v- Hayes & Anor** [2018] IECA 152. The High Court, in that case, had found as a matter of fact that:

"There is sufficient written evidence of a collateral agreement between the parties ..."

The Court had nonetheless applied a strict interpretation of the parol evidence rule and granted judgment to the Bank. The Court of Appeal held that the written and oral representations by the Bank (which had been found by the High Court to be fact) had to be complied with. The appeal was thus allowed. Notably, in reaching that decision, Gilligan J. identified that, *"In the present case, the documentation relied on [sic] the High Court showed that the promise of the five year review was a critical factor in the defendant's decision, so that the "cogent evidence" required in Tennants Building Products is satisfied in the present case"*. [my emphasis]

Having regard to the entirety of the evidence before me, I have not been provided with any such *"cogent evidence"* in the Complainant's instance, such as would bring the matter within the terms of the above Court of Appeal decision. I therefore consider that it is reasonable, in examining this complaint, to proceed on the basis of the principles enunciated by the Courts in this regard. I accept, therefore that, in the absence of any written evidence to the contrary, the written terms and conditions of the mortgage loan agreement which was put in place between the parties, in 2006 are the terms which governed the relationship between the parties, therefore, an interest only period of 7 years applied to the mortgage loan.

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

(2) The second issue to be determined is whether the Provider delayed in responding to the Complainant's proposal submitted in November 2013.

The Complainant submits that he submitted a proposal to the Provider in November 2013, however he received no formal response to this until 18 August 2014.

/Cont'd...

I note that the Complainant's proposal dated 6 November 2013 set out, among other things, the following:

"In any event my proposal to the Bank now is as follows:

- (1) I will sell the property [abroad] and the proceeds will be used to service loan [the subject of this complaint].*
- (2) [Named mortgage loan account] will continue as heretofore and I will sell the property in early 2015 and repay the Bank in FULL.*
- (3) Request the Bank to extend the present interest only payment period for loan [the subject of this complaint] for a further 2 years and based on the property market I will either sell the property and repay the Bank in FULL or continue with the existing loan on interest and capital repayments."*

The Provider submits that it emailed the Complainant a Financial Review Form (FRF) in August 2013, and requested him to return the documentation for assessment. The Provider submits that the Complainant was advised that any application for an alternative repayment arrangement would be subject to its pricing policy for Non CCMA Buy to Let Tracker Mortgages. The Provider submits that it contacted the Complainant on 6 November 2013 to see if an alternative repayment arrangement was required and when it could expect to receive the completed FRF. The Provider submits that it received the Complainant's FRF and some supporting documentation on 13 November 2013, and it emailed the Complainant on 15 November 2013 seeking further information from him.

The Provider submits that the Complainant emailed it on 18 November 2013 confirming that he would not accept its pricing policy for Non CCMA Buy to Let Tracker Mortgages and confirmed that his request was for an interest only repayment extension.

The Provider states that *"where a borrower seeks to amend the repayment schedule on an existing Non CCMA Buy to Let Tracker Mortgage, thereby altering the terms and conditions of their original mortgage agreement, it will be subject to the Bank's pricing policy for Non CCMA Buy to Let Tracker Mortgages. In effect, it will mean replacing the present ECB tracker rate of interest of 0.9% with an Investment Variable Interest Rate (then priced at 2.15%) for the remaining term of the mortgage. This new rate of interest increase compares very favourably to today's standard Investment Variable Rate offered by the Bank i.e. 5.65%".* The Provider goes on to state that it *"regards this as a very fair offer, and in the circumstances, it was a reasonable response to the Complainants request for amended loan terms. It is important to note that the Bank's pricing policy reflects the increased cost and risk attaching to such loans; it is open to borrowers to accept or reject the new terms. Unfortunately there are no exceptions to the Bank's pricing policy regarding residential investment property tracker mortgages on properties not covered by the CCMA. The Bank submits that it fully engaged with the Central Bank in implementing this policy"*.

The Provider submits that on 4 December 2013 it raised a number of queries with the Complainant in relation to the FRF, in particular to the income on the property and sought a Notice of Assessment for 2012 to confirm the rent/income. The Provider states that it *"sought clarity on the breakdown of the rental income submitted by the Complainant as his*

/Cont'd...

rental summary submitted rent of €48,180 per annum. compared to the rental of the Dublin properties which were evidencing an income of €29,400. The Bank also sought clarification on any rental income from the [Complainant's property abroad] and if it was let on a seasonal basis. The Bank also sought clarity on the Complainant's wife and the value and mortgage outstanding on their PDH (which is in her sole name). This information was sought for background purposes only. The Complainant was also advised that if any further interest only period was agreed that it would be at a variable rate of 2.15% equating to repayments of €2,515 per month plus the existing mortgage of €633 per month totalling €3,148 per month. The Bank also sought details relating to the sale of the [Complainant's property abroad] and a web link to view [this] property".

The Provider submits that the Complainant responded on 9 December 2013 with some clarifications as requested and confirmed that he would not accept its pricing policy for Non CCMA Buy to Let Tracker Mortgages. The Provider submits that the Complainant's case was sent to its Credit Department for review and assessment on 19 December 2013. It is surprising therefore that the Provider submits that it contacted the Complainant on 13 February 2014 to "*discuss the proposal to be put forth to the Banks Credit Department and the possibility of selling his property [abroad] and a property in Dublin over the following 6 months*", in circumstances where it had sent the Complainant's case to its Credit Department for review and assessment on 19 December 2013. In this regard, I consider that there was a delay on the part of the Provider in reviewing and assessing the Complainant's case during the period 19 December 2013 and 13 February 2014, when it had been sent to the Provider's Credit Department.

The Provider submits that the Complainant responded by email on 13 February 2014 to advise that he would consider the proposed options and would revert shortly. The Provider submits that it contacted the Complainant on 20 February 2014 to advise that its Credit Department would not be able to assess his proposals without a certified Statement of Affairs, and upon receipt of this, his proposal would be re-submitted for review. The Provider submits that the Complainant emailed it on 28 February 2014 to advise that he had no accountant but that he would complete and sign the Statement of Affairs himself detailing all of his assets and liabilities. The Provider submits that the Complainant emailed it on 19 March 2014 to advise that he had requested the current value from his pension and that he would forward it to the Provider upon receipt. The Provider submits that the Complainant sought an update on 12 and 19 May 2014.

The Provider submits that when the Complainant contacted it on 19 May 2014 he advised that he would not agree to its pricing policy for Non CCMA Buy to Let Tracker Mortgages and that his proposal was to continue with interest only until the property abroad was sold, at which point he would clear the arrears and revert to capital and interest repayments until the value of the property was enough to sell with no shortfall. The Provider submits that it again requested the Complainant to forward details of his pension and advised that it required this to have complete information to make an informed decision when assessing his case and the Complainant advised that he would revert in the coming days.

The Provider submits that the Complainant wrote to it on 20 May 2014 and enclosed an email from an insurance company confirming the value of his pension fund as at 19 March

/Cont'd...

2014 was €823,758.20. The Provider states that the Complainant emailed it on 28 May 2014 and *"sought copy documentation relating to information he claimed to have signed changing the interest rate on the mortgage loan account and a change in interest only period from 7 years to 10 years. The Complainant also confirmed that he had agreed an offer on the sale of another Dublin property"*. The Provider also states that *"As a result and following the completion of the sale of the Complainants other Dublin property, this would mean that the Complainant's mortgage loan account would then fall within the remit of CCMA as it would be the only residential property owned by the Complainant in the State"*.

The Provider submits that it responded to the Complainant on 28 May 2014 and advised that *"in the event [that] such an interest only offer and change of interest rate was made, there would be a trail from the decision to offer the facility, the actual offer, the signed acceptance of the offer and also instructions to apply the facility to the mortgage loan account, none of which exist. He was also advised that his proposal would now be sent to the Credit Department"*. The Provider goes on to state that *"As a result of the Bank receiving this information, the Complainants proposal was sent to the Bank's Credit Department for assessment on 28 May 2014 as his mortgage loan account would now not fall within the scope of the Bank's pricing policy for Non CCMA Buy to Let Tracker Mortgages"*.

The Provider submits that on 1 August 2014 it issued a Decision Memo on the Complainant's proposal. I note that the Provider submits that it received all of the required documentation to enable it to complete its assessment of the Complainant's proposal on 20 May 2014. It is therefore disappointing that the Provider took over two months to reach a decision on the Complainant's proposal.

I note that the Provider's Decision Memo agreed to the following:

"11 months interest only plus repayments of €1,500 per month subject to:

- *Covenant from the borrower that full sale proceeds from the sale of the [property abroad] or a minimum of €600k reduction will be provided within 18 months. If sale proceeds are < €600k the surplus is to come from the borrowers Pension lump sum.*
- *Letter of authority to liaise with the sales agent.*

Should sale of [property abroad] not complete within 11 months arrangement to be extended for a further 7 months.

Arrears are not to be capitalised."

The Provider states that its alternative repayment arrangement was based upon an affordability assessment, taking into account the Complainant's current financial situation and his ability to service the mortgage loan into the future. The Provider states that had it *"extended the interest only period for a longer period than that offered, the repayment schedule in respect of the outstanding loan balance would be progressively compressed into an ever reducing timeframe, which would result in escalating and possibly unaffordable capital repayments required redeeming the loan within the original terms"*.

The Provider submits that this decision was communicated to the Complainant on 1 August 2014 and a Mortgage Form of Authorisation (MFA) issued to him on 18 August 2014, giving four weeks from this date to accept the offer. The Provider submits that the Complainant emailed it on 23 September 2014 and advised that he would not be in a position to accept its offer and reiterated that he wanted the Provider to again review his proposal of 6 November 2013. The Provider submits that it emailed the Complainant on 23 September 2014 and advised that his proposal had been reviewed by its Credit Department and that was the offer which they had reverted with.

The Provider submits that it wrote to the Complainant on 26 September 2014 to advise that as he did not wish to take up the offer, it took this as meaning he was not willing to enter an alternative repayment arrangement, and also to advise of his right to appeal to the Mortgage Appeals Board.

While I note that there were some delays on the part of the Provider, that is between the period 19 December 2013 and 13 February 2014 and 20 May 2014 and 1 August 2014, it is clear from the evidence before me that the Provider was awaiting receipt of all requested documentation from the Complainant before it could assess the Complainant's proposal. In relation to the Provider's delays, it is my Preliminary Decision that the Provider should make a compensatory payment.

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

(3) The third issue to be determined is whether the Provider failed to accept the Complainant's offer submitted in November 2013.

The Complainant submits that a second Letter of Offer issued from the Provider on 4 March 2015 which was subject to the Provider obtaining a first legal charge over his property abroad, which he was attempting to sell. The Complainant states "*I was obliged to refuse this offer as it is my wife's case that she is entitled to half of the proceeds of the [property abroad]*". The Complainant submits that he appealed this, and received a third Letter of Offer from the Provider in May 2015.

The Complainant submits that the third Letter of Offer was conditional on the Provider receiving letters of authority to liaise with his Lawyer and Selling Agents abroad. The Complainant states that he explained to the Provider that "*this would seriously hamper my ability to achieve the best possible price for the property [abroad] if the Agents were aware of the fact that I had financial difficulties with [the Provider]*".

The Provider submits that it again reviewed the Complainant's request for forbearance and gave his proposal due consideration, and as a result it issued the Complainant a MFA on 4 March 2015 offering him interest only repayments for 24 months conditional upon the Complainant putting a charge over his property abroad in favour of the Provider. The Provider states that it "*does not accept that its offer was unreasonable, unjust or oppressive. The Complainant had clearly requested a 2 year interest only period and had also advised the Bank that he was indeed selling the [property abroad]*". The Provider submits that it contacted the Complainant on 27 February 2015 advising him of its decision.

/Cont'd...

The Provider states that the Complainant subsequently advised that *“he was going [abroad] the following week until 17 April 2015 and he believed there would be a buyer for the [property abroad] shortly at €650,000. He advised that he was not agreeable to providing the Bank with security over the [property abroad] as it would be sold within the following few months, he would then clear the arrears and pay annuity on the mortgage until the Property was sold. It was agreed that the Bank would have a meeting with the Complainant when he returned from his holiday and he could review the Banks offer in the interim”*.

The Provider submits that on 19 March 2015 the Complainant contacted it regarding its offer of 4 March 2015 and confirmed that he was committed to selling the Property the subject of the mortgage loan, and as a result did not want to agree a charge on the property abroad as it would be sold in the following 6 months. The Provider states that *“He again advised that the arrears would be cleared within 6 months from the sale of the [property abroad]”*.

The Provider states that on 31 March 2015 it emailed the Complainant to confirm that *“there was no route to clear the mortgage unless the Bank secured the [property abroad]. The Bank confirmed that it required an update in relation to views/offers in relation to the [property abroad] and for his solicitors to confirm that the funds would clear the arrears on the mortgage loan account. The Complainant confirmed that there had been 3 viewings that week since he went over and that there was a clear possibility of sale over the next few months. The Complainant stated that he had clearly set out how he would clear the arrears on the mortgage loan account and that he required more time in order to get the [property abroad] sold. The Bank agreed to revert to its Credit Department on this basis”*. The Provider submits that its Credit Department again assessed the Complainant’s case and it declined to offer any forbearance to the Complainant.

The Provider has submitted a copy of its Decision Memorandum dated 20 April 2015, which I note sets out the following beside the heading *“DECISION”*:

- *“PTL, CID to issue followed by the appointment of a receiver.*
- *Judgement proceedings to be instigated over the borrower’s property [abroad]...*
- *...”*

The Decision Memorandum also sets out the following beside the heading *“COMMENTS”*:

- *Borrower [sic] has failed to accept forbearance offered with position continuing to deteriorate. Position of [non] adherence to FLC over property [abroad] is not acceptable and as such enforcement now to commence.*
- *The property is on the market at least 30 months, advised that the borrower rejected an offer of €550,000 March 2015.*
- *Borrower has a pension with [named company] with a value of €823,758.20 as of 19/03/14 however [the Provider] cannot seek funds without Borrowers consent or by way of Garnishee order over lump sum.*
- *No other assets held except [Provider] Security and the property [abroad] noting that the PDH where the borrower resides was transferred to his spouse in the 1990’s.”*

/Cont’d...

The Provider submits that the Complainant appealed its decision by letter dated 29 April 2015. The Provider states that *"The Complainant was appealing the special condition contained in the Banks MFA on the grounds that his wife believes she has an interest in the [property abroad] but he has agreed that the arrears can be cleared and capital and interest repayments paid from the proceeds of the sale of the [property abroad] until the Property is sold and the account cleared in full"*.

The Provider submits that on 27 May 2015 the Mortgage Appeals Board approved fixed reduced repayments of €2,000 for a period of 6 months to afford the Complainant an opportunity to sell the property abroad as based on his rental income of €2,300 per month he can maintain repayments at this level if the Principle Dwelling House is prioritised over other expenditure. The Provider submits that it was seeking a letter of authority from the Complainant's solicitor and estate agent abroad for it to liaise directly in relation to the sale of the property abroad. The Provider submits that the Board noticed that this was the final period of forbearance and the sale of the Property must be progressed. The Provider submits that it issued a MFA to the Complainant in this regard on 28 May 2015.

The Provider submits that the Complainant did not accept its offer, and a letter of decline issued on 25 June 2015. The Provider states that *"Subsequent to this the Bank held a meeting with the Complainant in November 2015 wherein the Complainant confirmed that the [property abroad] was sold for €550,000 and the majority of the proceeds went to the Complainants wife and he would not be submitting any of the proceeds to the Bank as the Bank had declined his proposal"*.

The Provider states that it *"engaged with the Complainant since his proposal in November 2013 which clearly stated "I will sell the property [abroad] and the proceeds will be used to service loan..."*, in an attempt to reach a solution and even when the Complainant failed to accept any of the alternative repayment arrangements offered by the Bank, the Bank continued to attempt to find a resolution in 2014/15, none of which the Complainant would accept".

The Complainant states that *"In May 2014 I had 2 properties - however one of the properties was "sale agreed" (the Bank were well aware of this and had in fact given their consent for the sale). The sale completed in early June 2014"*.

The Provider submits that when it carried out its full assessment of the Complainant's circumstances on 28 May 2014 this assessment was carried out under the Consumer Protection Code 2012 as the Complainant still held two properties in the state. The Provider states that *"Therefore Provisions 39 and 40 of the Code of Conduct on Mortgage Arrears 2013 is not applicable to this assessment"*.

The Provider states that it *"acknowledged that the Complainant confirmed that he agreed to an offer on the sale of one of his Buy to Let properties and on 01 August 2014, the Bank issued its Decision Memo... This Decision Memo confirms the assessment was carried out as a Buy to Let assessment. In light of the sale of the property the Bank issued a CCMA Mortgage Form of Authorisation (MFA) to the Complainant on 18 August 2014. Please note with the previous forbearance request in August 2013, the Complainant was advised that any*

/Cont'd...

application for an alternative repayment arrangement would be subject to the Bank's pricing policy for NON CCMA Buy to Let Tracker Mortgages. The MFA of the 18 August 2014 did not have this condition".

The Provider submits that as the Complainant was not willing to enter into the alternative repayment arrangement offered by it, it issued correspondence to the Complainant on 26 September 2014, which stated that *"your mortgage loan is now being dealt with outside of MARP and the protections of MARP no longer apply"*.

Provisions 26, 37, 39 and 40 of the Code of Conduct on Mortgage Arrears 2013 (CCMA 2013) provide the following:

"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;*
- 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."

Having carefully considered all of the evidence before me, I am of the view that the Provider should have assessed the Complainant's application for an alternative repayment arrangement under the CCMA 2013, given that the Complainant's application was with the Provider's Credit Department at the time of the sale his other property, and the Provider was aware of this sale. While I note that the Provider submits that the proposal was sent to its Credit Department for assessment on 28 May 2014, the documentation before me indicates that the Complainant's proposal was not assessed until a later stage. Indeed, the Provider's Decision "*Retail Credit (MARS) Assessment*" is dated 1 August 2014 and the "*Decision Memorandum*" is also dated 1 August 2014.

Based on the evidence before me, while I am of the view that the Provider examined the Complainant's application for an alternative repayment arrangement on its individual merits and based its assessment on the Complainant's full circumstances, the Provider should have considered each option for an alternative repayment arrangement that it offered and documented its considerations of each option examined. It is disappointing that the Provider did not do so. That said, while the Provider must explore each option for an alternative repayment arrangement that it offers, the Provider is not obliged to offer a borrower an alternative repayment arrangement.

This Office can investigate the procedures undertaken by the Provider regarding the CCMA 2013 and its associated MARP, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints. The Complainant has a contractual obligation to repay the mortgage in full and in the terms originally agreed.

While I accept that there was no obligation on the part of the Provider to accept the Complainant's proposal put to it in November 2013, to mark the Provider's failure to carry out its assessment of the Complainant's application for an alternative repayment arrangement on 1 August 2014, it is my Preliminary Decision that the Provider should make a compensatory payment to the Complainant.

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

To conclude, it is my Decision that this complaint is partially upheld. I direct the Provider to make a total compensatory payment of €500.00 to the Complainant in respect of the delays in assessing the Complainant's application for an alternative repayment arrangement and its failure to assess the Complainant's application on 1 August 2014 under the CCMA 2013.

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 make a compensatory payment to the Complainant in the sum of €500.00, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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

21 January 2019

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.