An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0186
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Arrears handling - Mortgage Arears Resolution Process
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The Complainants were on an alternative repayment arrangement on their primary dwelling home mortgage for the period 1 March 2014 to 1 March 2017, whereby a reduced monthly mortgage repayment of €1,700 and reduced interest rate was agreed with the Bank for that period of time. The Complainants were to return to full contractual repayments after 1 March 2017. The Complainants sought a further alternative repayment arrangement in early 2017 but this was refused, firstly by the Bank and then by the Bank's Appeals Board.

The Complainants' Case

The Complainants submit that prior to their alternative repayment arrangement ending on 1 March 2017, they approached the Bank in October 2016 seeking a review of their repayment arrangement. The Complainants say that they were not granted this review by the Bank in October 2016, in breach of Provision 44 of the CCMA 2013. The Complainants state that the Bank did not contact them in relation to a review in 2017 but they themselves submitted an SFS.

The Complainants submit that the Bank, in assessing their application for an alternative repayment arrangement, failed to comply with Provisions 3(a), 3(b), 30, 36, 37, 44 and 45 of the Code of Conduct of Mortgage Arrears 2013 (CCMA 2013).

The Provider's Case

The Bank accepts that there was initially a time delay in arranging a Standard Financial Statement (SFS) with the Complainants. The Bank agrees that it should have acted on information provided by the Complainants on 25 September 2016 sooner as it highlighted a change in their personal circumstances, regardless of the fact that they were still in an arrangement at that time. The Bank apologises for this.

The Bank states that an SFS was completed and signed by the Complainants in January 2017 while the Complainants were still on the existing arrangement. The Bank states that the arrears support unit did not accept the Complainants' proposal and the reason outlined was that the Complainants' expenditure was high and needed to be reduced. It was the opinion of the arrears support unit that if the Complainants reduced their expenditure, then their mortgage repayments would be affordable. The Complainants appealed this decision. The Bank states that the appeal was reviewed on 11 April 2017, and the reason ticked on the Bank's documentation for why the Complainants were raising their appeal was "*Lender declines to offer an alternative repayment arrangement to a borrower*". The Bank submits that the appeals board declined the appeal because firstly the customer expenditure is high in some non-essential expenditure areas and needs to be reduced and secondly term extension is not an option.

The Complaint for Adjudication

The complaint is that the Bank failed to assess the Complainants' application for an alternative repayment arrangement in an acceptable manner.

Decision

During the investigation of this complaint by this Office, the Bank was requested to supply its written response to the complaint and to supply all relevant documents and information. The Bank responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Bank's response and the evidence supplied by the Bank. 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

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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 6 March 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issuing of my Preliminary Decision, both parties made further submissions as follows:

1. E-mail from the Bank to this Office dated 28 March 2019.

2. Letter from the Complainants to this Office dated 3 April 2019.

3. E-mail from the Bank to this Office dated 15 April 2019.

4. E-mail from the Complainants to this Office dated 16 April, confirming that they have nothing further to add.

Following consideration of these further submissions, together with all the submissions and evidence furnished, I set out below my final determination.

I have considered the content of the recorded telephone conversations and all of the documentation supporting this complaint as submitted by both parties to the Complaint. I note that the alternative repayment arrangement which started on 1 March 2014 finished on 1 March 2017 and not in April 2017.

As a preliminary issue, it is important to set out 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 in a position to investigate whether the Provider, in handling the mortgage arrears issue, correctly adhered to its obligations pursuant to the Central Bank's Code of Conduct on Mortgage Arrears (CCMA).

The Financial Services and Pensions Ombudsman may investigate the procedures undertaken by the Bank 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 Bank 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

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Complainant, within the meaning of Section 60(2)(b) of the Financial Services and Pensions Ombudsman Act 2017, as amended.

The issue to be determined is whether the Bank failed to assess the Complainants' application for an alternative repayment arrangement in an acceptable manner.

The Complainants submit that the Bank has breached Provisions 3(a), 3(b), 30, 36, 37, 44 and 45 of the CCMA 2013.

Provisions 3(a) and 3(b) of the CCMA 2013 states:

> "*A lender must draw up and implement procedures for dealing with each of the following types of borrowers - those in mortgage arrears, those in pre-arrears and those who fall under the MARP. Such procedures must:*
>
> *a) allow for a flexible approach in the handling of these cases;*
>
> *b) be aimed at assisting the borrower as far as possible in his/her particular circumstances;"*

The Complainants submit that given they have proved that their circumstances have deteriorated, the Bank has not been flexible in approach "*and in fact has been intransigent in its determination of our position. [It is] certainly not assisting us in our current circumstances*".

The Bank submits that it has offered flexibility in dealing with the Complainants' situation, as the history of reduced repayments, interest only arrangements, decreased interest rates and the term extension will show. The Bank submits that the forbearance arrangement provided to the Complainants show that it has not breached this provision.

I consider that the Bank has attempted to assist the Complainants since 2014 when they first went on an alternative repayment arrangement. I accept that the Complainants do not agree with the Bank's assessment of their SFS and its refusal to offer an alternative repayment arrangement in March/April 2017, however I note the Bank has continued to work with the Complainants to reach an agreement.

Provision 30 of the CCMA 2013 states:

> "*A lender must use the standard financial statement to obtain financial information from a borrower in arrears or in pre-arrears*."

Provision 36 of the CCMA 2013 states:

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

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Provision 37 of the CCMA 2013 states:

> *"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."*

When the review occurred in January 2017, the Complainants were advised that the Bank was benchmarking their expenditure to the Insolvency Service of Ireland (ISI) guidelines on reasonable expenditure, rather than using the information set out in their SFS. The Complainants state that this is in breach of Provision 37 of the CCMA 2013. The Complainants submit that they have ongoing medical expenses and need to maintain their private health insurance as a result of various conditions. The Complainants submit that the Bank was fully aware of their overall financial position including their projected liability to the Revenue Commissioners going forward. The Complainants state that "*We have 2 Investment property mortgages with [the Bank] that we were allowed to use the rental income to meet our Family Home Mortgage payments, this income source will no longer be available to us"*.

Further the Complainants submit that when assessing their repayment capacity, the Bank failed to take account of child care costs of €800 per month when they calculated €2,912 (income less expenditure including €2,014 repayment) - €2,148.61(ISI guidelines living expenses). The Complainants state that child benefit should not be included in household income and that ISI does not factor in such payments into household income. The Complainants state that by including it in household income it increased their repayment capacity and that the Bank's guidelines are €84.00 per month more onerous on them than the ISI.

The Bank states that it always uses the information contained in the SFS to obtain information from its borrowers and it did so for the Complainants. The Bank submits that it examined the Complainants' case on its own merits and, for the reasons outlined in the Appeal Board minutes and letters issued, the Bank declined the Complainants' proposal for forbearance. The Bank submits that it based its assessment on the full circumstances of the Complainants on each occasion that it reviewed the financial arrangements.

The Bank states that the SFS is the primary document assessed by it when reviewing an application for a forbearance arrangement. The Bank states that it does use the ISI guidelines as a benchmark for income and expenditure. The Bank submits that the ISI figure for a couple with children is €1,420.83, and that its expenditure figure for a couple with children is €1,704.99 per month, which takes account of €280 per month child benefit. The

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Bank notes the Complainants were allowed an additional amount for medical expenditure per month.

The Bank states that the income less expenditure for the Complainants was €2,912 per month, this living figure was substantially higher than ISI guidelines of €2,148.61 per month.

I note that the Bank did use the SFS to obtain information from the Complainants. While the Bank did use the ISI Guidelines, I accept that it did also take into account the individual circumstances of the Complainants, to include child care costs. I do not find the use of the ISI Guidelines to be contrary to the CCMA. However, the individual circumstances of the mortgage holders must be taken into account by the lender in arriving at its decision. I note the Bank provided an "*uplift*" which is €284.16 per month on the ISI Guidelines which it states counteracts the inclusion of child benefit.

In this regard, I note the Bank did make adjustments to the Guidelines' figure to allow for the specific monthly costs outlined in the Complainants' SFS.

In a review carried out by the Bank in 2015, the Bank's Credit Analyst had the following opinion regarding the Complainants' expenditure: *"Expenditure is kept to a minimum and is in line for a family of 4 in Dublin if not on the low side".* The Complainants state that the Bank later ignored this opinion. The Complainants question how a case manager can consider expenditure to be low in 2015 and a different case manager considers the expenditure to be high in 2017 when they have actually reduced expenditure in the intervening period.

The Bank states that a borrower's personal and financial circumstances are subject to frequent change. The Bank submits that review and assessment is made based on the most up-to-date information as provided by the borrower in the current SFS and supporting documentation. The Bank states that it does not consider that such a comment as quoted by the Complainants is relevant to the subject matter of this complaint.

I find the Bank's response to this aspect of the complaint that "*it does not consider such a comment as quoted by the Complainants is relevant to the subject matter of this complaint*", to be unacceptable. I believe the Complainants were entitled to expect some level of consistency in how they were being assessed by the Bank and I believe the Bank should have explained why such a different view was taken of their circumstances and their ability to pay.

The Complainants state that the Bank calculated the mortgage repayment as €2,014.23 per month at an interest rate of 1% but that repayments should be €2,118.59 per month as the interest rate was 1.1% and 1.25%. The Complainants say that by doing this the Bank underestimated the required repayments and capacity to repay and that the Appeal Board used the wrong information when assessing the appeal. The Complainants say that the Bank put them on a repayment arrangement of €2,014.23 for the period April to May 2017, without advising them of this. The Complainants say that this was to cover up the mistake made in calculating repayments.

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The Bank states that when the Complainants' mortgage proposal was reviewed by the Arrears Support Unit and the Appeals Board in 2017, they used the effective interest rate on the mortgage at that time of 1%, this equated to a full monthly repayment of €2,014. The Bank accepts that the interest rate applicable to the mortgage loan did increase to 1.1% and 1.25% shortly thereafter. The Bank states that the interest rate did not have any significant bearing on the ultimate decision to decline the Complainants' request for forbearance. The Bank states that the reason for the decline was that the Bank deemed the Complainants' expenditure to be high; the Bank states that if expenditure was cut regular monthly repayments would be affordable. The Bank notes that the difference between the two repayment figures is approximately €104 per month. The Bank states that taking account of €104 there was still a surplus of €1,982 per month and that the difference would not have made a material change to the Bank's consideration or the outcome of the case.

The Bank submits that the original repayment arrangement included a reduced repayment of €1,700 per month, which included the repayment taken on 1 March 2017. The Bank submits that the next mortgage repayment which fell due was for €2,014.23 on 3 April 2017. The Bank states that "*This was based on full mortgage repayment at a rate of 1.00% (because this was the effective interest rate at that point…)*". The Bank submits that the next repayment which fell due on 2 May 2017 was also for €2,014.23 as the interest rate had not changed at that point, and was calculated also on the interest rate of 1.00%. The Bank submits that the interest rate changed from 1.00% to 1.10% on 4 May 2017. The Bank submits that when the interest rate increased with effect from 4 May 2017, this increased the monthly repayment due to €2,118.59 for repayments beginning from 1 June 2017.

The Bank states that "*As the Alternative Repayment Arrangement expired after the March 2017 repayment… but no new arrangement had been agreed at that point, the Complainants were placed on a temporary arrangement pending further agreement with the Complainants regarding future deals. The temporary arrangement was for a monthly repayment of €1,400.00, starting on 1 August 2017 and ending on 1 October 2017, This was communicated to the Complainants in the Bank's letter of 20 August 2017*".

The Complainants submit that their mortgage loan account is divided into two parts with two different rates of interest applying, that is, 1.10% and 1.25%. The Complainants state they *"don't know how much of our mortgage is on the higher rate and how much is on the lower rate as these figures are not broken down on the statements we receive from [the Bank]. They amalgamate the balances into one…. However the larger part of the Mortgage attracts the highest rate of 1.25%..*". The Complainants submit that on 1 March 2014 they entered into a fixed payment arrangement of €1,700.00 per month at a rate of 1% for 3 years. The Complainants submit that on 1 March 2017 their payment arrangement came to an end, and with it the concession on the lower rate of interest, and therefore the higher rates of 1.10% and 1.25% should have been re-applied to their accounts from this date.

The Complainants submit that the lower rate of 1% continued to apply to both parts of their mortgage loan account and therefore the contractual full capital and interest repayments were calculated as €2,014.23 based on the incorrect lower rate of 1%. The Complainants

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state that "*The issue surrounding all of the above is communication. None of the Banks correspondence confirms the rates of interest applying to the facilities. We never received a letter to confirm that our payments were increasing to €2,014.23 initially from the 1st March 2017. If we did and the rates were quoted as 1% I would have known there was an error and could have put [the Bank] on notice of this. If [the Bank] had realised that our payments were going to be at the higher level of €2,118.59 from March 1st as they contractually should have been, then the outcome of our initial application and subsequent appeal to the appeals Board may have been different*".

The Bank submits that the Complainants' mortgage loan account is split into two sub-accounts, and the balances and interest rates applicable as at 17 January 2019 are as follows:

> *"1. Sub Account 1: Balance outstanding €347,369.58; Interest Rate 1.25%*
>
> *2. Sub Account 2: Balance outstanding €108, 060.50, Interest Rate 1.10%"*

The Bank submits that the interest rate applicable to both sub accounts are noted on the Annual Mortgage Statement.

I note that the Bank's letter to the Complainants dated 16 May 2017 states:

> *"We wrote to you recently in relation to the imminent expiry of the alternative repayment arrangement on your mortgage account. This arrangement has now expired and the terms of your mortgage following this expiry are:*
>
> - *Your new monthly repayment* *€2,118.59**
> - *The date the new payment starts* *01/06/2017*
>
> *…"*

The Bank has submitted a copy of its correspondences sent to the Complainants in January 2014 relating to a temporary repayment arrangement. The Bank has not submitted a copy of the agreement signed by the Complainants which sets out that the temporary arrangement was to expire on 1 March 2017. I note that the Bank's letter to the Complainants dated 20 January 2014, agreeing to a temporary arrangement sets out, among other things, the following:

> *"We agreed a temporary arrangement for you to pay your mortgage, and have now put that arrangement in place for you.*

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Your new repayments

Under this arrangement you will pay a fixed monthly repayment. The interest rate on the mortgage will be reduced to 1% that will be fixed until 20/04/2017. After this date your interest rate will change to the rate for each sub account listed below.

Sub Account	***Product Code***	***Product Description***
01	*…*	*…Tracker ECBR+ 1.25% for term*
02	*…*	*… Tracker ECBR+ 1.10% for term*

It is clear from the evidence before me that it was a condition of the agreement entered into in 2014 that the interest rate was to revert to ECB +1.25% for sub account 1 and ECB +1.10% for sub account 2 after the expiration of the temporary arrangement. The evidence before me indicates that the Bank in error did not increase the interest rate as agreed until 4 May 2017.

I accept that the reason that the Bank declined to offer forbearance in 2017 was that expenditure was deemed too high, however I find it unacceptable that a Bank would make a fundamental error of this nature, that is, fail to increase the interest rate on the expiration of the alternative repayment arrangement on 1 March 2017 and communicate this to the Complainants. This led to the Banks failure to calculate the monthly repayments on the basis of the higher interest rates, a difference of €104.00 per month. I do not find it acceptable that the Bank in reply to this Office states that this difference would not have made "*any material change to the Bank's consideration and subsequent outcome of this case*" in circumstances where the independent Appeal Board may have taken a different view.

I consider that this is a breach of Provision 37(b) of the CCMA in that the *"overall indebtedness of the borrower*" was not assessed correctly in circumstances where the incorrect interest rate was applied to the debt. Furthermore, I consider an amount of €104 per month to be material to a borrower who is in financial difficulty.

I note in its post Preliminary Decision submission of 28th March 2019, that the Bank points out that the Complainant benefited from a lower rate of interest for one month. The Complainants in the post Preliminary Decision submission of 3rd April state that the Economic Concession rate came to an end on the 1st March 2017, not the 1st April 2017. The Provider counters in its final submission that the last payment at the concessionary rate would have been in March and therefore the next payment due, in April, would have been at the contractual rate of interest. Neither party is incorrect in this regard, it would appear they are looking at the same facts from a different angle. In similar vein, the difference in dates between the 1st and the 4th of the month, appears to be the date the rate actually changed and the date the payments fell due, respectively.

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Provision 44 of the CCMA 2013 states:

> *"A lender must carry out a review of an alternative repayment arrangement at any time, if requested by the borrower."*

The Complainants state that prior to the alternative repayment arrangement ending on 1 March 2017 they approached the Bank, in October 2016, seeking a review of their current repayment arrangement.

The Complainants say that they were not granted this review by the Bank in October 2016, in breach of Provision 44 of the CCMA. The Complainants state that the Bank did not contact them in relation to a review in 2017 but the Complainants themselves submitted an SFS.

The Bank accepts that there was initially a time delay in arranging a SFS with the Complainants. The Bank states that it is unable to explain why a SFS was not arranged with the Complainants sooner, following on from the e-mail from the first named Complainant to the Bank on 25 September 2016. The Bank agrees that it should have acted on information provided on 25 September 2016 sooner as it highlighted a change in the Complainants' personal circumstances, regardless of the fact that they were still in an arrangement at that time, the Bank apologises for this.

The Bank states that a SFS was completed and signed by the Complainants in January 2017 while the Complainants were still on the existing arrangement. The Bank says that the decision to refuse the Complainants' proposal was communicated to them on 23 February 2017. The Bank states that it conducted the review within 30 days of the end of the current arrangement.

The Bank in its reply to this complaint, has accepted that it breached Provision 44 of the CCMA and it apologised for this. It would be preferable if the Bank also noted that the Complainants themselves submitted the SFS in January 2017 and that it was the Complainants who moved this along so that the Bank was in compliance with the requirement to contact the Complainants 30 days before the end of the alternative repayment arrangement, in line with Provision 43 of the CCMA 2013, which states, among other things, that "*A lender must review an alternative repayment arrangement at intervals that are appropriate to the type and duration of the arrangement, including at least 30 calendar days in advance of an alternative repayment arrangement coming to an end*".

Provision 45 of the CCMA 2013 states:

> *"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:*

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

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

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

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

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

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

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

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

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

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

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

*h) the address of any website operated by the Insolvency Service of Ireland which provides information to **borrower**s on the processes under the Personal Insolvency Act 2012; and*

*i) that a copy of the most recent **standard financial statement** completed by the **borrower** is available on request."*

The Complainants, in their submission to this Office dated 4 May 2017, state that "*Although we have received the decline letter to our application for an alternative payment*

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arrangement which allowed us to appeal the decision of the Banks ASU Dept we have yet to receive an official Provision 45 letter advising us of our options".

The Bank rejects that it has breached this provision.

I note that by letter dated 23 February 2017 the Bank advised the Complainants that it declined to offer an alternative repayment arrangement because expenditure is high and needs reducing. The Bank provided the reasons for declining to offer an alternative repayment arrangement, and advised the Complainants of their right to appeal its decision. At the time I issued My Preliminary Decision, the Bank had not yet made available verification of compliance with Provision 45 of the CCMA 2013, as it had not provided evidence that it had met all the requirements of this provision.

However, following receipt of my Preliminary Decision, the Bank submitted a copy of a letter dated 2nd May 2017 to the Complainants which demonstrated compliance with Section 45 of the CCMA. It is most disappointing that this letter was not included within the original evidence submitted to this Office and was only furnished in response to my Preliminary Decision.

The Complainants state that the Independent Appeals Board Case sheet dated 4 April 2017 states; "*an alternative payment arrangement is offered by the lender and the Borrowers are not willing to enter the alternative repayment arrangement*" and that this is incorrect.

The Bank stated that the reason that is recorded on the Appeals Board case report, for why the case was under review by the Board on 11 April 2017 was that the "*Lender declines to offer an alternative repayment arrangement to the borrower".* This reason, it states, was in line with the decision of the Arrears Support Unit, as communicated to the Complainants in the Bank's letter of 23 February 2017.

The issue here is that there are two Appeals Board review documents, one which the Complainants' obtained when they completed a Subject Access Request under Data Protection legislation, dated 4 April 17, which states "*an alternative payment arrangement is offered by the lender and the Borrowers are not willing to enter the alternative repayment arrangement*". A second dated 11 April 2017 which, the Bank refer to, states that the *"Lender declines to offer an alternative repayment arrangement to the borrower".* The Complainants claim never to have seen the sheet dated 11 April 2017, which was provided to this Office in evidence, as it was not sent to them in the Subject Access Request.

The Bank states that "*This office* [the Bank] *is not familiar with an Appeals Board review document dated 4 April. The records retrieved during the investigation of this complaint show that the Complainants' appeal regarding the forbearance proposal was reviewed by the Appeals Board on 11 April 2017*".

The Bank had, prior to the issuing of my Preliminary Decision failed to explain why there were two different documents, with two different dates for this Appeals Board decision. The document dated 4 April 2017 is not exhibited by the Bank in its reply to this Office's Schedule of Evidence Required and this Office was left in the dark as to why there are two different

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documents. This is a most unsatisfactory situation and justifiably a cause of serious concern. In its post Preliminary Decision submission of 1 April 2019, the Bank has given a further explanation for the troubling different versions of the document submitted to this Office to the one furnished to the Complainants. The Provider has stated that this Office was given an 'early draft' of the document which was subsequently put before the Appeals Board. That Board actually considered a 'final version' of the document on the 11th April 2014. The 'final version', it states, correctly noted the reason for the appeal as, 'lender declines to offer an alternative repayment arrangement to a borrower.' The Provider states that the decision of the Appeal Board was based on correct information.

The Bank has obligations pursuant to provisions 39 and 40 of the CCMA 2013, which provide that:

> *"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."*

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> *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 Bank submits that it conducted a SFS with the Complainants in January 2017, and the situation was fully reviewed by its Arrears Support Unit at that point. The Bank states that "*Although the Complainants' proposal of January 2017 was declined by the Bank's Arrears Support Unit and subsequently by the Bank's Appeals Board, the Complainants were placed on a three-month reduced repayment on their Personal Dwelling Home mortgage as well as a twelve-month Interest Only repayment agreement on their Buy to Let mortgages following another review in June 2017*".

The Bank submits that following a further review on the Complainants' mortgage loan in November 2017, a long term financial arrangement was made with the Complainants in respect of the mortgage loan, which has changed the monthly repayment to €1,695.95 per month, effective since December 2017. The Bank states that "*The mortgage repayment was extended by a further 6 years and 3 months to align with the 70th birthday of the Second Named Complainant. Please note that under the Bank's Credit Policy, the maximum age for mortgage repayments by a borrower is 70 years*".

The Bank states that under its *"normal Credit Policy, term extensions to the age of 70 are only granted to the main income earner. In the Complainants' case, the main income earner is the First Named Complainant. However, on an exceptional basis, the Bank agreed the term extension based on the age of the Second Named Complainant. This arrangement was agreed as an exception to the Bank's normal credit policy, in an effort to assist the Complainants in trying to resolve their financial difficulties and to give them a longer-term solution to which they had originally proposed (i.e. reduced repayments until September 2020)*".

The Bank goes on to state that it "*considers that the above actions demonstrate that the various options were explored for the Complainants and the most appropriate options were offered to them, based on their personal and financial circumstances and in consideration of the long-term sustainability of the mortgage account. The Bank is not always in a position to assist its customers to the extent that they may wish. However, considerations are made in the best interest of customers and the Bank and therefore the Bank offer(s) of financial arrangements may differ from those requested by our customers*".

The Bank also states that "*The main crux of this complaint, being the fact that the Bank did not agree to the Complainants' proposal that their monthly repayments be reduced to €1,215.00 until September 2020, was documented in the Appeals Board paper of 11 April 2017. The rationale for declining the proposal was also outlined in that paper*".

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The Complainants state that "*In relation to the payment arrangement from August – October 2017 at €1400.00 per month the bank has advised that this was granted so that a further review could be carried out. This is incorrect as we had submitted a further SFS document to the Bank at a meeting in June and the result was the same as before in relation to our family home Mortgage. The decision was that [it] had deemed that we could pay the full contractual mortgage payments and we were granted 3 months of a reduced payment arrangement (€1400 pm) so that we could adjust our costs downwards, which the Bank considers too high, and revert to full capital and interest payments on our family home mortgage from the 1st November 2018*".

The Complainants submit that they had to go through a six month test of their repayment capacity from December 2017 to June 2018 before the Bank would agree to capitalise the arrears on their mortgage loan account.

In response, the Bank submits that short term payment arrangements can be put in place by its Arrears Support Unit in order to give its customers time to review their financial circumstances. The Bank states that "*If there is a change in those financial circumstances during that period, the Bank can then review the case on expiry of the temporary arrangement in order to establish the most appropriate course of action for our customers going forward*". The Bank submits that its lending policy with regard to Capitalisation of Arrears is that the full Capital and Interest mortgage repayments must be paid for 6 consecutive months in order for its customers to be eligible to be considered for Capitalisation of arrears. The Bank states that *"There is no guarantee that capitalisation of arrears will be agreed by the Bank – this is a commercial lending decision and based on a customer's particular circumstance".* The Bank submits that after the 6 month period, the situation is reviewed to establish if the repayments after Capitalisation are affordable and sustainable for its customers.

Having carefully considered all of the evidence before me, while I accept that the Bank considered the Complainants' proposal that their monthly repayments be reduced to €1,215.00 until September 2020, it has failed to evidence that in February 2017 it firstly, considered all options for alternative repayment arrangements that it offered and secondly, that it documented its considerations of each option examined. That said, while the Bank must explore each option for an alternative repayment arrangement that it offers, the Bank is not obliged to offer a borrower an alternative repayment arrangement.

There are a number of aspects to this complaint and the Bank's responses to the Complainants and to this Office that I find unacceptable. In particular, I note that this Office has been given documents that appear to conflict with those provided to the Complainants under a data access request and subsequently provided to this Office by the Complainants in evidence. I note the Bank's explanation as set out above. It is disappointing that this explanation was not forthcoming until after I issued my Preliminary Decision. I am also concerned as to why the Bank has offered no credible explanation for certain aspects of its conduct.

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I do note, as outlined above, the Bank did provide some additional material after I issued my Preliminary decision. The submission by the Bank, albeit at a very late stage in the investigation, of the copy of the letter dated 2nd May 2017 of the Final Decline letter does indicate compliance with the CCMA. It is disappointing that this was not provided as part of the original evidence submitted.

For the reasons set out above, I substantially uphold this complaint. To mark the Bank's lapses in service and the inconvenience caused to the Complainants, I direct that the Bank pay a sum of €5,000 to the Complainants in compensation.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld, on the grounds prescribed in ***Section 60(2) (b), (f) and (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 Complainants in the sum of €5,000, 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)*** and ***(f)*** 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

17 June 2019

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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.