An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0353
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Maladministration Delayed or inadequate communication Level of contact or communications re. Arrears Dissatisfaction with customer service
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants hold two mortgage accounts with the Provider; one in respect of their private dwelling house (PDH mortgage) and one in respect of a buy to let property (BTL mortgage). A tracker mortgage interest rate applies to both mortgage accounts. The BTL mortgage was originally the private dwelling house of the Complainants. When the PDH mortgage account fell into arrears, the Complainants requested an alternative repayment arrangement (ARA) in the form of interest-only repayments for a period of 5 years in relation to the PDH mortgage. This application was rejected by the Provider which instead offered different ARAs in respect of both the PDH mortgage (in the form of an over-payment plan for 6 months followed by capitalisation of arrears) and the BTL mortgage (in the form of interest-only payments for the period one year). As part of the ARA offered in relation to the BTL mortgage, the Complainants would agree to come off their tracker rate applicable to the BTL mortgage. Both ARAs were rejected by the Complainants. Possession proceedings have been issued in respect of the Complainants' private dwelling house and a stay was granted by the High Court pursuant to ***Section 49*** of the ***Financial Services and Pensions Ombudsman (FSPO) Act 2017***, to permit the determination of this complaint by this Office.

The Complainants' Case

The Complainants are aggrieved that their proposal for a 5-year interest-only period in respect of the PDH mortgage was refused and they are concerned that they were instead offered interest-only payments in respect of the BTL mortgage, which they had not requested. They also have concerns in relation to communication and also the Provider's offer to amend their tracker interest rate.

These complaints are rejected by the Provider which argues that all of the financial circumstances of the Complainants had to be taken into account in considering ARAs and a reasonable proposal was made to the Complainants, which they have refused.

The first named Complainant is an employee of the Provider against which this complaint is made, and the second named Complainant is a civil servant.

The Complainants make a number of complaints against the Provider. The Complainants state that the Provider failed to respond to their request for forbearance which sought interest-only payments in relation to their PDH mortgage. They also contend that an alternative offer of an ARA was made in relation to their BTL mortgage (or what they term their commercial mortgage) which they had not requested. The Complainants say that details of their signed statement of financial affairs were altered without their authority or without explanation. The Complainants say that the first Complainant ought to have been treated as a vulnerable customer under the Code of Conduct on Mortgage Arrears (CCMA) due to hearing difficulties, ought to have been contacted by mail only, and should have had his phone details removed from the account record. The Complainants further say that the Provider has sought to exploit them by offering conditional forbearance on the BTL mortgage which would increase the interest payable by more than €16,000 over the remaining term.

The Complainants are concerned that the Provider has recorded an adverse report with the Irish Credit Bureau (ICB) which has prevented them from reorganising their personal debt and has cost them additional interest of €3,650 over 18 months. They say that the ICB record has prevented them from obtaining bridging finance to fund the reinstatement of the BTL property which was destroyed by flooding in 2009. The Complainants state that they are now at risk of losing the retention amount of €15,000 in relation to the BTL property as this amount is only payable when the property is habitable again. They are seeking forbearance on their PDH mortgage to be backdated to the date of their application for forbearance as they contend that this was agreed with an official of the Provider in May 2014. They also want to have their credit status corrected with the ICB.

The Complainants explain that in April 2014, a network area manager (NAM) was assigned by the Provider to liaise with them under the CCMA protocol as their PDH mortgage was in arrears. Following discussions with the NAM official, the Complainants submitted a Standard Financial Statement (SFS) and requested forbearance with interest-only payments to apply for 60 months in order to allow them to pay college fees and to restructure their personal liabilities over a 5-year period. The Complainants state that all of the discussions that took place were specific in relation to the mortgage in arrears, that is the PDH mortgage under

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the CCMA. It was the understanding of the Complainants that the tracker rate applicable to that PDH mortgage would continue to apply. The Complainants indicate that it was specified in the SFS that contact was to be by post. The Complainants say that they did not receive any written response following submission of the forbearance request with accompanying SFS. They claim that they did not receive any response to advise the application for forbearance on the PDH mortgage had been declined.

The Complainants state that they have continued to make all payments in relation to their BTL mortgage in accordance with the terms and conditions of the mortgage. They say that the proposed ARA in respect of the BTL mortgage would incur additional interest payable to the Provider. The first Complainant states that he is deaf and hence a vulnerable customer and that the Provider failed to give him appropriate protection under the CCMA. He claims that his request in the SFS that correspondence take place by way of post, was ignored. The first Complainant states that his numerous requests to remove his mobile phone number from the Provider's records were refused and he states that it is impossible for a hearing-impaired customer to converse with the person operating in a call centre environment where there are multiple background conversations in progress. He further alleges that the Provider made attempts to call him at work which infringed his right to privacy. The Complainants say that the number of calls made were in excess of CCMA limits.

The Complainants state that the Provider has sought to impose a solution which is not the long-term sustainable solution they discussed and agreed with the Provider's NAM official. They claim therefore that the Provider is acting outside the intention and spirit of the CCMA and attempting to use the code to extract additional interest by tempting them to terminate the tracker interest rate on the BTL mortgage. The Complainants state that they believe they were entitled to forbearance on the PDH mortgage to fund their children's education during the following 5 years based on the repayment capacity being shown on the SFS submitted. They say that the proposed ARA and its imposition of additional interest of €14,138.58 on the related mortgage is unjust and not in keeping with the intention and spirit of the CCMA.

The Complainants argue that the Provider did not issue a decline letter on the application for interest-only payments in respect of the PDH mortgage and simply offered an overpay arrangement in respect of that mortgage together with forbearance arrangement in respect of the BTL mortgage which was not applied for. The alternative offered was not acceptable to them as it would lead to a substantial increase in interest on the BTL mortgage. The Complainants claim that as the Provider failed to advise them that the application for forbearance on the PDH mortgage to cover their children's third level education was declined, they did not have the opportunity to source funding elsewhere. The Complainants are aggrieved that the Provider referred only to the €15,000 needed to render the flooded property habitable and not to the fact that the forbearance was required to fund education. The Complainants claim that the application was therefore not assessed on the basis of an application for forbearance to fund their children's education. This, they say, is clear from the assessor's notes which refer to renovation of the BTL property only. The Complainants argue that the alternative offered by the Provider is not sustainable while the alternative that they proposed is sustainable. The Complainants state that their SFS was wrongfully altered by the respondent at a number of places to add "*14K to finish BTL*" at C35(b), a

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reduction in B2 from €3,060 to €2,810, and a reduction in the children's allowance amount in B4 by €130.

The Provider's Case

The Provider states that the security property in relation to the BTL mortgage was initially the Complainants' primary residence but it has been confirmed that the Complainants now reside in the property secured by the PDH mortgage.

The Provider states that arrears accrued on the PDH mortgage from **February 2014** and that it made efforts to engage with the Complainants in accordance with provision 9 of the CCMA. As arrears were continuing to accrue, the Provider states that it appointed a network account manager (NAM) to engage with the Complainants. The Provider states that the involvement of this NAM official is to assist borrowers in preparing their Standard Financial Statement (SFS) and providing all relevant information. The Provider states that this official is not in a position to make the decision or influence the bank's credit department. The Provider notes that it is the role of the underwriters within the credit department to assess and examine each case on its individual merits based on the full circumstances of borrowers and subsequently to make credit forbearance decisions following assessment of the relevant SFS.

The Provider states that on 2 February 2014, the NAM official concerned contacted the Complainants by telephone to inform them of the CCMA process and the Complainants agreed to complete an SFS. An email was sent from the NAM official on 16 February 2014 acknowledging receipt of the SFS but noting that supporting documents were outstanding. The NAM official confirmed on 1 July 2014 that the supporting documents had been received and a telephone call was made by the NAM to the Complainants explaining the CCMA and Mortgage Arrears Resolution Process (MARP). The Provider states that available notes show that the Complainants requested interest-only repayments in relation to the PDH mortgage and that the matter was being referred to the Provider's Arrears Support Unit (ASU) for a decision.

The Provider states that its ASU assessed the Complainants' full circumstances in accordance with the MARP on **8 July 2014**. The full circumstances of the borrowers included their personal circumstances, overall indebtedness, information provided in the SFS, repayment capacity and previous repayment history. The Provider says that the assessment carried out calculated sufficient repayment capacity to meet the mortgage obligations on the PDH without restructured alternative repayment arrangement. It claims that the assessor's decision was based on consideration and analysis of the relevant financial factors. The Provider notes that the CCMA lists certain options that a lender *may* offer to a borrower in arrears but that none of these options are compulsory in that the lender is not obliged to consider all the ARAs listed in the CCMA. It notes that the assessor was satisfied that the Complainants had sufficient capacity to repay the mortgage. On that basis, the Provider notes that it offered the Complainants an overpay arrangement for 6 months with a view to capitalisation on the PDH mortgage. Further it notes that it offered a 12 month interest-only

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period in respect of the BTL as it was considered to be affordable and appropriate to the Complainants' circumstances.

According to the Provider, this ARA would facilitate the required works which its NAM official had recorded as required to bring the BLT property to a habitable residential standard. The Provider states that it fulfilled its obligations to consider all ARAs within the assessment criteria set down in the CCMA.

The Provider notes that the Complainants have suggested that their BTL mortgage should not be included in the CCMA process as this is unjust. In response, the Provider argues that it is obliged under the CCMA to take into account the Complainants' full circumstances when considering the best course of action for a mortgage account. In that regard, the SFS template required under the CCMA clearly requests details of the borrowers' mortgage debt on property other than their primary residence, in addition to their overall indebtedness. As a result, the Provider argues that it is appropriate and necessary to consider other mortgages when assessing their circumstances. The Provider points out that the Complainants are maintaining payments on their BTL mortgage. The Provider argues that it is not obliged to provide the Complainants with an ARA of their preference or indeed to provide any arrangement at all, if it does not consider one appropriate. The Provider argues that acceptance of any proposal from a borrower is at the Provider's commercial discretion and decisions are based on certain criteria, including its regulatory obligations. The Provider argues that when faced with the choice of assisting a borrower in relation to preserving only one property, a family home mortgage should be given the utmost priority.

The Provider states that when the Complainants did not accept the alternative repayment proposals made to them, it issued a borrower decline letter in respect of both accounts on 28 October 2014. In the absence of an agreement, the Provider states that the Complainants are required to maintain the payments in accordance with their mortgage offer letters of 2004 and 2008.

In respect of the allegation that the SFS was unilaterally altered, the Provider states that the amendment to C35(b) represents the discussion between the NAM official and the Complainants. The Provider states that the Complainants confirmed income for the assessment in the sum of €3,384. In relation to the removal of child benefit, the Provider notes that it interpreted this to have been included twice and argues that its removal would have lowered the assessed overall repayment capacity so this could not have impacted the assessment in circumstances where the Provider was satisfied that the Complainants had repayment capacity to maintain the mortgage payments.

In respect of the suggestion that the Complainants were not notified that the request for interest only was declined, the Provider states that arising from the assessment, the Complainants were offered an interim overpay arrangement to address the arrears on the account with a view to capitalisation and that the CCMA does not require a specific decline letter to the Complainants' preferred arrangement. The Provider states that it is under no obligation to make any particular offer of an ARA but that it offered an ARA on the BTL mortgage which was considered to be prudent and both fair and reasonable. As this offer of an ARA related to a non-CCMA mortgage property, it states that it was entitled to require

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the removal of the tracker rate from the BTL mortgage in the context of restructuring the offer. It states that the Complainants were under no obligation to accept the offer.

The Provider states that there is no record of it being advised that the first Complainant has hearing difficulties. As it has no record confirming these difficulties, the Provider rejects the Complainants' allegation of a failure by it to assist a vulnerable customer. The Provider argues that if the Complainants had confirmed that the first Complainant had hearing difficulties, it would have taken such necessary steps to assist him, as were required.

In respect of the complaint regarding their ICB record, the Provider states that the Complainants have not maintained a schedule of payments on their PDH mortgage account. In the absence of an agreed ARA, the Complainants are contractually obliged to maintain the payment schedule provided for in the letter of offer of 2008. The Provider states that as a member of the ICB, it must register information on the performance of credit agreements on a monthly basis. In accordance with that obligation, the Provider states that the Complainants' repayment history on the mortgage was recorded with the ICB and that the arrears notified to the ICB were an accurate reflection of the repayment history.

The Provider states that the Complainants cannot reasonably interpret their meeting with the NAM official as constituting an arrangement or agreement. It argues that the Complainants' proposed resolution is seeking to impose an ARA of their own preference.

The Complaints for Adjudication

The primary complaint for adjudication is that in July 2014 the Provider wrongfully failed to offer the Complainants an alternative repayment arrangement comprising interest-only payments for five years in relation to their PDH mortgage, as requested by them in May 2014. It is suggested by the Complainants that the alternative arrangement proposed by the Provider was inappropriate as it also concerned a second BTL mortgage on which no ARA had been requested. The Complainants say that the Provider sought to exploit them as the arrangement proposed would have resulted in the loss of their tracker mortgage on the BTL property. The complaint also concerns alleged failures in communication, both in respect of a failure to properly respond to the requested forbearance on the PDH mortgage and in relation to excessive and inappropriate contact in respect of arrears.

Decision

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

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

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

Following the issue of my Preliminary Decision the following submissions were received from the parties:

1. Letter from the Provider to this Office dated 23 April 2019.

2. E-mail from the Complainant to this Office dated 7 May 2019.

3. Letter from the Provider to this Office dated 9 May 2019.

Copies of these submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

Jurisdiction

A Circuit Court Civil Bill for Possession issued in relation to the Complainants' private dwelling house on **4 November 2015** and the complaint to this Office was made thereafter. Pursuant to section 50(3) of the Financial Services and Pensions Ombudsman Act 2017 (FSPO 2017), the Ombudsman shall not investigate or make a decision on a complaint where *"(b) there are or have been proceedings (other than where the proceedings have been stayed under section 49) before any court in respect of the matter that is the subject of the investigation*."

Section 49 FSPO 2017 provides as follows:

> "*Where—*
>
> > *(a) a complaint has been made to the Ombudsman, and*
> > *(b) any party to the complaint subsequently commences proceedings in any court against any other party to the complaint in respect of any of the matters which are the subject of the complaint,*

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then, any party to the proceedings may at any time after an appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings and the court, if it is satisfied that—

(i) there is no sufficient reason why the matter in respect of which the said proceedings have been commenced should not be investigated by the Ombudsman, and

(ii) the party that commenced the proceedings was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the investigation,

shall make an order staying the proceedings.

The jurisdiction of this Office is set out in section 50 as follows:

". . .

(2) Where a question arises as to whether the Ombudsman has jurisdiction, under this Act, to investigate a complaint, the question shall be determined by the Ombudsman whose decision shall be final.

(3) The Ombudsman shall not investigate or make a decision on a complaint where—
. . .

(b) there are or have been proceedings (other than where the proceedings have been stayed under section 49) before any court in respect of the matter that is the subject of the investigation".

A preliminary view was reached by this Office in **September 2017** that the present complaint fell outside the jurisdiction of the Office owing to the issues raised in the Circuit Court proceedings. However, a stay on the proceedings was subsequently granted by the High Court pending the resolution of the complaint submitted to this Office. The wording of that stay specifically indicates that the proceedings are stayed "*to enable the Defendants to continue with the complaint before the Financial Services and Pensions Ombudsman*" subject to repayment condition. I have not been informed of any failure by the Complainants to abide by the condition that a payment of €1,336 is made by the Complainants to the Provider each month. The current stay is in place until 8 October 2019.

The Complainant, in a post Preliminary Decision dated 7 May 2019, sets out in some detail the costs he has accrued "*in defending ourselves, attendance/legal costs of Circuit Court Hearings, attendance in Four Courts/Central Criminal Court on 12 occasions, to file papers/attend Call Overs/Hearings*".

I must point out that these are matters relating to the legal proceedings in being and are more appropriately a matter for the Courts.

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This complaint concerns issues of compliance with the CCMA which issues are regularly reviewed by this Office and the High Court has considered it appropriate to stay the repossession proceedings pending the adjudication of the complaint by this Office. In such circumstances, I am satisfied that this Office currently has jurisdiction to determine the complaint by proceeding with the adjudication.

Requested Forbearance

This Office can investigate the procedures undertaken by the Provider regarding the MARP but will not investigate the details of any renegotiation of the commercial terms of the mortgage which is a matter between the Provider and the Complainants and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants, within the meaning of ***section 60(2)(b)*** or ***60(2) (c)*** of the ***FSPO Act 2017.***

The Complainants have indicated their understanding that interest-only repayments on their PDH mortgage were agreed with the NAM official of the Provider who assisted them in preparing their Standard Financial Statement (SFS) in early 2014. The Complainants are also concerned about the Provider's handling of the application for forbearance and possible breaches of the CCMA.

A contemporaneous note of the discussion which took place between the Complainants and the NAM official indicates that the BTL property was badly damaged in 2009 due to flooding and that an estimated €14,000 was needed to repair the property to a residential standard.

The note states that €500 per month was needed to pay for these works and this was included in the household expenditure segment of the SFS as it was a priority to restore the BTL property for renting. The contemporaneous note further indicated that only 1 of the Complainants' 3 dependents had completed third level education, with another due to start third level in September 2014. The note indicated that the debt generated (arrears accruing) was funding college and education fees and that the Complainants were looking to restructure this. This note suggests that the rationale for the Complainants' request for a 5-year interest-only repayment period on their PDH mortgage was brought to the attention of the ASU for assessment, despite the concern of the Complainants that the Provider was unaware of their concern in respect of education expenses, in seeking forbearance.

A copy of the assessment record in relation to the Complainants' mortgage arrears has been furnished in evidence. The decision is noted to have declined the Complainants' proposal on the basis that the PDH mortgage was affordable. Instead it offered an overpayment arrangement at €1,105 per month for 6 months, with arrears to be capitalised after 6 months. The assessment record also indicated an agreement to offer interest-only repayments for 12 months on the BTL mortgage with the Provider's tracker policy to apply.

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In relation to sustainability, the assessment record noted that the PDH mortgage was deemed to be sustainable. It also noted that the proposed ARAs would allow the borrowers to renovate the BTL property and to rent it and then to return to full capital and interest payments on all accounts, after the interest-only period.

It is clear from the record that the approver agreed with the assessor's rationale to decline the proposed ARA on the basis that the PDH mortgage was affordable, subject to the overpayment arrangement proposed.

The approver also approved the suggested 12 month interest-only repayment period on the BTL property to allow renovation of the property to take place, subject to the tracker pricing policy. The assessment record contains a list of all ARA options offered by the Provider and the Provider's decision on each potential arrangement based on the Complainants' circumstances. While the record available to me prior to reaching my Preliminary Decision was somewhat difficult to read in places, the Provider, in its post Preliminary Decision submission of 23 April 2019, enclosed the Full Assessment Record which was fully legible. I accept that all of these options were considered by the Provider and the reason for declining or offering each option was set out on a number of different bases, such as that the borrowers could afford the mortgage repayments. The mortgage was therefore deemed to be sustainable in the Provider's assessment.

From the documentation supplied in evidence, it is clear that the two proposed ARAs referred to in the assessment record were offered to the Complainants in July 2014. In respect of the BTL mortgage which had no arrears balance, the Provider offered an interest only period of 12 months coupled with conversion from a tracker rate mortgage to a BTL variable rate. In respect of the PDH mortgage, the Complainants were offered a 6-month over-payment period with a view to capitalising the arrears at the end of the 6-month period.

Provision 39 of the CCMA lists 12 alternative repayment arrangements which may be considered by a lender. I accept that the Provider was not obliged to evaluate the Complainants for every ARA listed under provision 39 and is only obliged to consider ARAs "*offered by that lender*".

From a review of the assessment record provided to me as outlined above, I accept that the Provider evaluated the Complainants for the ARAs offered by it and therefore provision 39 of the CCMA was complied with in respect of the Complainants.

Provision 40 CCMA provides the following:

> "*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*".

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I am of the opinion that the assessment record submitted in evidence shows that the Provider was in compliance with Provision 40 and did in fact document its considerations of each option examined under Provision 39.

I accept that there was no regulatory obligation on the Provider to offer the Complainants the forbearance option that they had requested. I also accept that there is no evidence that the Provider's NAM official agreed that a 5-year interest-only repayment period would be offered to the Complainants, nor would such an official have had the authority to do so.

It was not open to the Complainants to determine or dictate the type of forbearance, if any, to be offered. The thorough analysis of the Complainants' circumstances, as provided for in the CCMA , was undertaken and directed by the Provider's ASU in compliance with Section 40, referred to above. This was not the responsibility of the NAM official who instead offered guidance and help to the Complainants in preparing their SFS to be submitted to the ASU.

I do not accept that the Provider wrongfully refused the Complainants forbearance in the form of a five-year interest-only period on their PDH mortgage.

I note that the Standard Financial Statement (SFS) submitted by the Complainants was in the format required by the CCMA. The SFS sought information in relation to the overall indebtedness of the Complainants, including any mortgage obligations in respect of properties other than their principal private dwelling. The standardised SFS appended to the CCMA included a section under the section D on debt, seeking information on "*mortgage debt on property other than primary residence*". The level of monthly mortgage repayments relating to such property assets was to be included. Section E seeks information on property assets other than primary residence. Further, Provision 37 CCMA obliges a lender's ASU to base its assessment of an ARA on the borrower's full circumstances, 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.

The Provider was required to take into account all the financial circumstances of the Complainants in considering an ARA and must take into account the details provided in the SFS. It cannot be the case that the Provider in the present case was precluded from considering the Complainants' BTL mortgage in assessing whether or not to offer an ARA in respect of their PDH mortgage.

The Complainants did not seek an ARA in relation to their BTL mortgage and in July 2014 their BTL mortgage was not in arrears. I do not believe this this of itself precluded the Provider from considering an ARA in relation to the BTL mortgage while it was considering the Complainants' financial circumstances as a whole in relation to their PDH mortgage. This is particularly so if it was the case that the ARA offered to the Complainants in respect of the BTL mortgage was approved in order to facilitate the Complainants' overall indebtedness and financial situation.

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The Complainants were under no obligation to accept the ARA on offer, either in relation to their BTL property or their PDH property. In this case however, the Provider has stated that it considered that the mortgage on the Complainants' PDH was sustainable and affordable on the basis of their overall financial circumstances, which circumstances must surely have included the fact that the Complainants were making full mortgage repayments on a second property.

In my Preliminary Decision I stated that it was not clear to me why the Provider decided to offer the Complainants an ARA in respect of their buy to let mortgage and I expressed a concern that the Provider may have seen this as an option to entice the Complainants off the BTL Tracker Mortgage.

In its post Preliminary Decision submission of 23 April 2019, the Provider states:

> "*The decision to offer forbearance on the BTL mortgage loan was taken because the financial difficulty seemed to stem from the problems identified by the Complainants that pertained to the BTL property. It was damaged by flood and was not then suitable for rental thus depriving the Complainants of a potential rental income. The decision recognised that the Complainants stated that they needed funds to return the BTL property to rent. The Bank made an offer on the mortgage loan secured on the BTL property which was in keeping with credit principles of granting assistance to suit the purpose.*
>
> *The Bank maintains that it was a reasonable decision to prioritise repayments on the PDH and not to promote arrears on the Complainants' Principal Private Residence in support of an uninhabitable investment property.*
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> *…*
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> *The Bank submits that the full assessment record now available [to the FSPO] disproves the idea that the Complainants were being enticed away from their tracker mortgage. At the time of the application the Complainants' PDH mortgage was in arrears. The Bank was presented with the Complainants' circumstances which included a finite income. In directing that income to maintain the payments on the BTL in priority over their PDH, the Complainants were accruing arrears on their PDH mortgage loan. The Bank maintains that this is contrary to the spirit of CCMA which creates a special status for the Complainants' principal private residence and demonstrates the need to prioritise the PDH. The Bank respectfully submits that the CCMA should not be interpreted to provide the Complainants a right prioritise an investment property [sic] in order to apply the protections of CCMA.*
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> *The Bank made an offer which in the Bank's view allowed the Complainants to maintain all of their mortgage commitments and address the deficit in the mortgage loan secured BTL property; and also the need to invest money to repair the BTL property.*

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The Bank made two distinct offers to the Complainants both of which were separate and distinct and neither of which was conditional upon acceptance of the other. The Bank refers to the FRL dated 3 October 2014 which confirms that the offer relating to the PDH could be accepted separately. The assessment record confirms that the Complainants could have maintained both repayments in full and therefore it cannot even be said that both offers had to be accepted as a matter of practical necessity. The Bank's decision to make an ancillary offer on the BTL was a simple offer of a possible path to returning the property to a rentable condition; which offer was then open to the Complainants to accept or not".

The Central Bank has clearly set out in relation to the implementation of the CCMA that all cases must be handled sympathetically and positively with the objective at all times of assisting the borrower to meet his or her mortgage obligations.

I note the ARA offered included, among other things, in the Terms & Conditions:

"B1 <u>ANY COMMITMENT TO A TRACKER RATE</u>

Any commitment or obligation in your Mortgage Loan Offer Letter or otherwise to provide you with a tracker variable rate in the Loan, now or in the future, will end once you complete and return this Form".

I fully accept that the protections in the CCMA that extended to the Complainants' private dwelling did not extend to their buy to let property and mortgage.

There is no doubt that the BTL is a commercial venture and, in the event that the Complainants had sought forbearance from the Provider in relation to that property, it would have been open to the Provider, and indeed an entitlement on its part, to negotiate new terms for the repayment of that mortgage, which could include the proposed termination of the tracker rate of interest. In this instance however, the Complainants did not seek any forbearance regarding the property, and payments on the BDH property were not in arrears.

As I pointed out earlier, the Provider was required to take into account all the financial circumstances of the Complainants in considering an ARA. While the Complainants did not seek an ARA in relation to their BTL mortgage as it was not in arrears, this did not preclude the Provider from considering an ARA in relation to the BTL mortgage while it was considering the Complainants' further correspondence as a whole in relation to their PDH mortgage.

I accept, based on the evidence before me, that the Complainants were under no obligation to accept the ARA on offer, either in relation to their BTL property or their PDH property. I also accept, based on the evidence and submissions, that the ARA offered to the Complainants in respect of the BTL mortgage was a reasonable offer in order to facilitate the Complainants in renovating that property to a habitable standard. Further, I accept that both ARAs were offered independently of each other and it was open to the Complainants to accept or reject either or both.

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It is clear that the Provider considered that the mortgage on the PDH was sustainable and affordable on the basis of the Complainants' overall financial circumstances, which circumstances included the fact that the Complainants were making full mortgage repayments on a second, vacant, property.

Therefore, having reflected on the entirely of the submissions and evidence, I do not accept that there was anything unjust, improper or discriminatory in the Provider offering an interest-only repayment period in respect of the BTL mortgage to facilitate the renovations even though this was not specifically requested by the Complainants.

Notwithstanding that, accepting the ARA on the BTL would have involved the Complainants forfeiting their tracker interest rate on the BTL mortgage, there was no obligation on the Complainants to accept this offer and the Complainants did in fact reject the offer.

Irish Credit Bureau

In the absence of any ARA, I accept the Complainants were obliged to meet the terms of the mortgage offers of 2004 and 2008. In respect of the PDH mortgage, it is not in dispute between the parties that the mortgage was in arrears. I accept that as a member of the ICB, the Provider is obliged to report on a monthly basis the status of any credit agreement to the ICB and must do so accurately. The ICB record indicates that the Complainants' PDH mortgage is in arrears, this is an accurate reflection of the status of the mortgage account. It would not therefore be appropriate for me to direct the Provider to amend the ICB record.

Standard Financial Statement

Under the CCMA, the Provider is obliged to use an SFS to obtain financial information from a borrower in arrears and must offer to assist the borrower with completing the SFS. Assistance in this case was provided by the NAM official appointed by the Provider.

It appears to be accepted by the Provider that the Complainants' SFS was amended by the Provider after it had been signed by the Complainants. These amendments concerned a reduction in income and a note in relation to required renovations to the BTL mortgage property.

In respect of the required renovations, I accept that this simply reflects the conversation that occurred between the Complainants and the NAM official assisting them with their SFS. I believe it was in the Complainants' interest to have this information recorded and taken into account in the assessment of their request.

In respect of the reduction of income and the Provider's reading of the child support section to have contained a duplication, it might be considered more appropriate for the Provider to have contacted the Complainants to clarify any discrepancy that it noted on the SFS prior to altering the relevant figures rather than proceeding to alter the figures itself.

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I accept, however, that the Provider was acting in good faith in this regard and was simply remedying what it thought was an error on the form in light of information provided by the Complainants. I further accept that since the Complainants' PDH mortgage was ultimately deemed to have been sustainable, the fact that the SFS as assessed contained a lower income amount than that inserted by the Complainants did not ultimately affect the decision that was made by the Provider in respect of the ARA. The situation may have been different if the mortgage was deemed to be unsustainable as a lower income amount could be deemed to have had an impact in such circumstances. Given that the mortgage was deemed to be sustainable, I am of the view that there was no prejudice suffered by the Complainants in relation to these necessary charges.

While I am of the view that it would be best practice for the Provider to discuss amendments with the Complainants prior to amending figures in a signed SFS, I am conscious that the Provider is obliged to work with a borrower in arrears to ensure that the information contained in an SFS is accurate and to determine the most appropriate and viable repayment option in each case as expeditiously as possible.

Communication of Decision of Assessment

Provision 42 CCMA obliges a lender to provide a borrower with certain information where an ARA is offered and must advise the borrower to take appropriate independent legal and/or financial advice. A clear written explanation must be provided of how the ARA offered works, including, among other things:

a) the reasons why the ARA offered is considered to be appropriate and sustainable for the borrower, including demonstrating, by reference to the borrower's individual circumstances, the advantages of the offer for the borrower and explaining any disadvantages;

b) the new mortgage repayment amount;

c) the term of the alternative repayment arrangement; and

d) the implications arising from the ARA for the existing mortgage.

If a borrower is not willing to enter into an ARA offered by the lender, Provision 47 CCMA obliges the lender to inform the borrower, among other things:

- of other options available to the borrower, such as voluntary surrender, trading down, mortgage to rent or voluntary sale;

- of the borrower's right to appeal the lender's decision on the ARA to the Appeals Board;

- that the borrower is now outside the MARP and that the protections of the MARP no longer apply; and

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- 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.

There is no specific obligation under the CCMA to inform the borrower that a proposal for an ARA made by the borrower has been rejected or the reasons for the refusal to offer the requested ARA. I note that the Consumer Protection Code 2012 (CPC) – which in the present case would apply to the Complainants in respect of the BTL property – contains an obligation under provision 8.12 whereby a regulated entity must document and communicate to a consumer the reasons for rejecting an offer of a revised repayment arrangement. This does not apply in respect of the PDH mortgage.

I note that by letter dated 24 July 2014, the Provider wrote to the Complainants in relation to their PDH mortgage indicating that its ASU had assessed their mortgage loan to see if there was an ARA suitable for the individual circumstances. The letter notes that the Provider had determined that the most appropriate ARA for the Complainants' current circumstances was to agree an overpayment period of 6 months with the capitalisation of arrears at the end of this period. Full details of the ARA offered were enclosed with the letter, as required by Provision 42 CCMA. The letter explained that the ARA on offer was considered the most suitable and sustainable for the Complainants based on an assessment of their circumstances, overall indebtedness, and the information provided in the SFS. The letter further recommended that the Complainants get independent financial and legal advice to help them to decide whether or not to accept the ARA on offer. I note that a further letter was sent to the Complainants on 15 September 2014 in similar terms.

I accept that these letters did not specifically refer to the ARA proposed by the Complainants in the form of a 5-year interest-only repayment plan. I consider, however, that the Provider's decision not to offer this requested proposal was clear from the wording of the letters of July and September 2014 which made an offer of a different ARA and cited reasons why this particular ARA was being offered.

By letter dated 28 October 2014, the Provider wrote to the Complainants noting that the Complainants had advised that they did not wish to take up the offer of an ARA and that they had the right to appeal the decision to offer an ARA within 25 business days.

The letter further noted that as the Complainants were not willing to enter the ARA offered, the mortgage loan would now be dealt with outside of MARP and the protections of the MARP would no longer apply. The letter informed them that this meant that legal proceedings for possession of the property could be commenced after the mandatory moratorium. I accept that this letter was in compliance with Provision 46 CCMA.

It is clear that the Complainants had the opportunity to appeal the Provider's decision not to offer them the ARA that they requested but opted not to do so. I accept that had there been any lack of clarity in relation to the ARA that was offered, or whether the requested ARA had been declined, the Complainants could have contacted the Provider to seek clarification or indeed could have appealed the decision.

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I accept that the Provider communicated its assessment in accordance with its obligations under the CCMA.

Telephone Calls

In respect of contact with the borrower in arrears, a regulated entity is obliged by the CCMA to communicate promptly with such a borrower but to ensure that the level of communications is not excessive.

Under the CPC, a 'vulnerable consumer' is defined as a "*natural person who a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons*)". Where a regulated entity has identified that a personal consumer is a vulnerable consumer, Provision 3.1 CPC obliges the regulated entity to ensure that the vulnerable consumer is provided with such reasonable arrangements and/or assistance that may be necessary to facilitate him or her in his or her dealings with the regulated entity.

Further under Provision 3.40 CPC, a regulated entity may make telephone contact with a consumer who is an existing customer, only if:

> "b*) the consumer holds a product, which requires the regulated entity to maintain contact with the consumer in relation to that product, and the contact is in relation to that product;*
> *. . . or*
> *d) the consumer has given his or her consent to being contacted in this way by the regulated entity*."

It is unclear from the evidence before me how frequently the Provider was in contact with the Complainants in respect of their mortgage arrears. It is most disappointing that the Provider has not furnished a record of the calls between the Provider and the Complainants. The first Complainant has not been clear as to whether he informed the Provider of his hearing impairment. He has not specifically stated that he did so and it has been specifically denied by the Provider that it was on notice of any hearing impairment.

I accept that a provider cannot be expected to treat a customer as a vulnerable customer in the absence of the requisite information being provided to it.

I note that in a final response letter from the Provider dated 20 April 2015, the Provider accepts that the first Complainant requested the removal of his mobile phone during a phone conversation on 25 March 2014. The Provider states that in the absence of an alternative phone number, he was advised by staff member that the number could not be removed as the Provider required a phone number with which to contact him in relation to mortgage arrears. The Complainants were advised that should they wish to provide an

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alternative contact number, the Provider would remove the mobile phone number as requested. The Provider further noted that it recognises that it can be difficult at times to take a phone call and that its staff are always willing to arrange a callback to a more suitable time. The Provider notes that it staff made a number of callback arrangements with the first Complainant when it was not convenient to talk at the initial time of contact.

The Complainants have not suggested that they attempted to provide an alternative contact number nor that the Provider did not facilitate the first Complainant with callback arrangements on request. I further note that there are references in the documentation provided to me of phone calls being made by the first Complainant to the Provider (such as on 14 August 2014 in relation to a mortgage form of authorisation).

I accept that the conduct of the Provider in relation to the Complainants has, in the main, been reasonable. I also accept that the negotiation and acceptance of any ARA falls within the commercial discretion of the Provider. In this regard, I accept that the Provider was not required to accept the Complainants' proposal for a 5 year interest free ARA nor was it an automatic entitlement of the Complainants to be granted an ARA to fund their children's third level education fees. I also accept that it was open to the Complainants to accept or reject any ARA put forward by the Provider in respect of either mortgage.

In my Preliminary Decision, I indicated my intention to partially uphold the complaint and direct the Provider to reassess the Complainants' application for forbearance for the period from 2014 to date. However, in its post Preliminary Decision, the Provider has stated:

> "*The Complainants provided financial information and supporting documentation on 22 January 2019 as directed by the Court. The Bank conducted an assessment and made the following offers to the Complainants:*
>
> - *Account *****616 - Agreement to Amend Mortgage Loan Offer Letter dated 28 February 2019 allowing for the capitalisation of the arrears, signed by the Complainants on 18 March 2019.*
>
> - *Account *****531 - Agreement to Amend Mortgage Loan Offer Letter dated 28 February 2019 allowing for the capitalisation of the arrears provided that the Complainants maintain repayments in the amount of €1,002.86 for an interim period of 6 months, signed by the Complainants on 24 March 2019.*

The Complainants were provided with a copy of the Provider's submission and have not disputed that these agreements have been reached and furthermore copies of the signed agreements have been provided in evidence.

I note the Complainant, in a post Preliminary Decision submission of 7 May 2019, states:

> "*In issuing the ARAs on 28 February 2019 [the Provider] has done a u-turn as we have been allowed retain our Tracker Interest Rate on both mortgages.*

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I note the Provider has indicated its intention, on foot of those agreements, to seek to have the proceedings struck out as the arrears have now been addressed.

I welcome the fact that these agreements have been reached. I therefore see no need to make any direction in relation to any assessment or any matter relating to the arrears generally. I would urge the parties to continue to communicate and work together in dealing with this matter.

For the reasons out lined above, this complaint is not upheld.

Conclusion

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

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

7 October 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.