An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0369
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Arrears handling - Mortgage Arears Resolution Process Dissatisfaction with customer service Maladministration (mortgage)
Outcome:	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant and her estranged partner held a joint mortgage account with the Provider. They separated in **2010** and the Complainant's former partner lived in the secured property, while the Complainant rented a property with the couple's two children. Mortgage payments since 2010 have been paid by the Complainant's former partner, though the account has been periodically in arrears. On two occasions, in **2014** and **2015**, an Alternative Repayment Arrangement (ARA) was put in place between the Provider and the Complainant's former partner but the Complainant objected and requested the removal of the ARAs. The initial ARA in 2014 was removed promptly upon the objection of the Complainant but the Provider refused to remove the second ARA in 2015. It is this refusal that forms the basis of the present complaint. It is noted by the FSPO that whilst both the Complainant and her former partner who were joint borrowers on the loan account, have signed the FSPO Complaint Form, it is the Complainant only who is pursuing this complaint, and her former partner who signed the Complaint Form is not a co-Complainant.

The Complainant's Case

In **2005** the Complainant and her former partner entered into a mortgage loan with the Provider. They separated in 2010 and initially decided to move out of the mortgaged property in order to rent it. A few months later, however, the Complainant's former partner moved back into the property.

The Complainant states that in late **2011**, a request was made to the Provider to change the mortgage repayments to an interest only basis, which request was duly granted. Following the expiry of the interest only period in November 2013, the mortgage repayments reverted back to a capital and interest repayment basis. The Complainant states that after a period of months, the mortgage loan began to accumulate arrears. The Complainant explains that her relationship with her former partner deteriorated significantly, resulting in huge difficulties negotiating the mortgage. The mortgage and the property were the subject of legal intervention between them.

The Complainant states that in **October 2014**, the Provider agreed to extend the term of the mortgage without consulting her and without her consent. The Complainant states that she contacted the Provider upon being made aware of the term extension and she asked that the Provider cancel the agreement with immediate effect. She states that the Provider acceded to her request and the forbearance agreement was reversed.

Subsequently in **April 2015**, the Complainant was notified that a term extension of 11 years had once again been agreed without her input, agreement, consent or authorisation. The Complainant wrote to the Provider immediately to advise that she was not consenting to the arrangement and to lodge a complaint. The Complainant states that in **June 2015**, she received a letter from the Provider stating that the Provider had considered the matter and that a decision had been made to keep the arrangement in place. The Complainant explained that she subsequently received a letter from the Provider dated 16 July 2015 which explained that it proceeded with Single Party Voice Authority (SPVA) in circumstances where one of the parties to the mortgage was engaging and had proposed putting a repayment arrangement in place. The Provider explained further that the purpose of its acceptance of an SPVA on a joint mortgage is to keep as many cooperating borrowers in their homes as possible.

The Complainant states that she responded to the Provider's letter on **28 July 2015** having identified, what she believes, were compliance failures on the part of the Provider with the Code of Conduct on Mortgage Arrears (CCMA). In response, the Provider wrote on **1 September 2015**, reiterating that the forbearance agreement would remain in place but also offering a goodwill gesture the amount of €500.

The Complainant wrote to the Provider again on **14 September 2015** and argued that she should have been contacted prior to any forbearance of arrangement being agreed on the joint mortgage account and pointing out that the Provider was in possession of her current contact details.

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The Complainant states that she did not receive a reply to a letter of **14 September 2015** and instead received correspondence dated **February 2016** which indicated that the Provider was going to investigate her complaint. Eventually by letter dated **26 August 2016**, the Complainant was advised that the Provider had agreed to reverse the term extension of 11 years. The Provider conceded that it had been unable to locate any evidence that she had been telephoned prior to the forbearance agreement being applied to the mortgage. The Provider outlined it was increasing its previous goodwill gesture offer to €1,500.

The Complainant is extremely annoyed and disappointed at the manner in which she was treated. She argues that the Provider took approximately 14 months to remove the term extension from her mortgage account, notwithstanding her immediate notification to the Provider that she was not in agreement with the arrangement. She is of the view that by agreeing a forbearance arrangement without her consent, the Provider effectively facilitated her former partner in residing in the mortgaged property on a reduced mortgage, while she had to live elsewhere with her children, one of whom has a serious medical condition, necessitating her paying rent of €1,300 per month. The Complainant submits that due to her son's medical condition, she has to reside close to a children's hospital and has documentation from his doctors to that effect. It was never an option, therefore, for her to remain in the mortgaged property. The Complainant further argues that the Provider's facilitation of her former partner remaining in the property, has frustrated her attempts to provide a permanent home for her children. The Complainant states that she has been attempting to procure her former partner's consent to sell the property since 2012, to no avail.

The Complainant argues that the fact that it took so long to resolve the complaint added to the pressure that she was already under, in attempting to resolve the legal issues surrounding the house which has resulted in her becoming very depressed, anxious and stressed. She requests acceptable compensation for what she perceives as her mistreatment by the Provider.

The Provider's Case

The Provider accepts that two term extension arrangements were placed on the account. The first was due to start from **1 November 2014** with a monthly repayment amount of €804.50 for 126 months. It states that this was reversed on **23 October 2014** and did not have any impact on the account.

The second term extension was arranged from **1 May 2015** with a repayment amount of €758.85 per month for 132 months and was in place until **18 August 2016**.

In relation to the October 2014 term extension, the Provider states that the Complainant's former partner contacted it in April 2014 to confirm that the Complainant had left the property and was no longer contributing to the mortgage. This was confirmed by the Complainant in a call on 5 June 2014 in which she indicated that she would complete a standard financial statement (SFS) but there was no further contact in relation thereto. The Provider notes that an agent of its Arrears Support Unit (ASU) met with the Complainant's former partner to complete an SFS and a proposal was put forward for a term extension

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based on the details provided. The Provider states that this was put in place using Single Party Voice Authority (SPVA), a process that allows the ASU to put in place an Alternative Repayment Arrangement (ARA) on an account where the parties to the account are separated and only one party is engaging. It states that a confirmation letter dated **21 October 2014** outlining the details of the term extension was issued to the Complainant at the correspondence address on file.

In relation to the April 2015 term extension, the Provider notes that an SFS was completed by the Complainant's former partner and again put in place using SPVA. Following the extension being applied to the account, confirmation of the ARA was issued to the Complainant to the correspondence address, by letter dated 21 April 2015.

The Provider notes that when the parties to a mortgage are separated, it follows a single party contact strategy in an attempt to come up with an ARA on the account. It accepts that it is unable to evidence any contact attempts made to the Complainant in relation to the second term extension that was applied to the mortgage account.

The Provider states that the Complainant has not made any repayment to the mortgage since 2014 and has refused to allow an ARA to be put in place since 2015. As the Complainant's former partner was making repayments and engaging with the Provider, however, the borrowers were not classified as "not-cooperating".

The Provider accepts that correspondence relating to Provision 47 CCMA was not issued to the Complainant as the Complainant's former partner had engaged with the Provider with regard to the mortgage. Provision 47 provides that where a borrower is not willing to enter into an ARA offered, the lender must inform the borrower of other options available to the borrower such as voluntary surrender, trading down, mortgage to rent or voluntary sale, and other matters. In relation to the complaint regarding the appeals process, the Provider notes that no letter of appeal was received from the Complainant, but rather a complaint was raised in relation to the matter following receipt of a letter from the Complainant dated 30 April 2015, received by the Provider on 7 May 2015.

The Provider acknowledges that there is no evidence of any attempt to contact the Complainant in relation to the second term extension that was applied to the account in 2015. It also acknowledges the time taken to respond to the Complainant regarding the subject of the complaint. The Provider states that in making a redress offer of €1,500, the Provider took into account the overall customer experience that the Complainant received in relation to the complaint.

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The Provider reiterates that it is satisfied that its ASU acted within the parameters of its process when agreeing and applying the term extension to the joint account. It notes that the Complainant was issued with a letter dated 21 April 2015 from ASU outlining the details of the arrangement and the options available to her. Following confirmation from the Complainant that she was unhappy with the second term extension, a complaint was raised and an investigation was carried out. The Provider states that regulatory letters were issued to the Complainant regarding the complaint when it was under investigation. On consideration of the facts of the case, the Provider states that it was decided in an effort to ensure the debt remained at a minimum, that the debt extension would remain in place.

The Provider asserts that it has no record of receipt of the Complainant's letter dated 14 September 2015 and that it did not receive the Complainant's letters of 18 September 2015 or 11 February 2016 until 12 February 2016 as evidenced by the date stamp on the letter. The Provider has acknowledged that it took more time to respond to the complaint that it would have liked and has apologised to the Complainant for this.

In the circumstances of the case and as the Complainant was unhappy following the completion of the investigation, the Provider states that the case was reviewed by its legal department who advised that although the Provider was acting in the best interests of the borrowers by attempting to assist them in keeping the family home, in an attempt to resolve the complaint it would be best to reverse the term extension and this was completed on 18 August 2016.

The Provider emphasises that the Complainant and her former partner had a responsibility to the mortgage as it remained in joint names until it was redeemed in February 2018. While the Provider states that it is sympathetic to the Complainant's situation, it was obliged to assist any borrower who attempted to maintain the mortgage repayments on the joint account. The Complainant's former partner was engaging with the Provider and wished to remain in the property. It notes that the Provider did not stop or attempt to stop any attempt by the Complainant and her former partner to sell the property, and that this was a matter for them to agree between themselves. The Provider notes that it was aware that they had separated in 2010 and that the Complainant was pursuing her former partner through the courts, in an effort to come to an arrangement regarding the property.

The Provider states that the second term extension of 11 years was put in place from May 2015 to August 2016. When the extension was removed from the account, the term was reduced by 11 years (i.e. back to the applicable term before the extension). It states that the application and removal of the extension did not affect the term of the loan, prior to the loan being redeemed in February 2018 and therefore did not affect the mortgage protection. Reversal of the term extension meant that the normal monthly repayment was increased to €1,130.14 to ensure that the balance of the mortgage would be repaid on the expiry of the loan account.

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The Provider confirms that the goodwill gesture of €1,500 remains open for the Complainant to accept.

The Provider concludes that the Complainant did not contribute to the mortgage repayments in any way since at least 2014. It noted that following the removal of the term extension, there was no further ARA put in place. It notes that repayments on the account continued to be made by the Complainant's former partner but arrears of approximately €12,000 accrued, prior to the loan being redeemed in February 2018.

In a further submission, the Provider notes that the Complainant had consented to an ARA in 2013. In relation to the April 2015 term extension, the Provider noted that the Complainant was not making any contribution to the normal monthly payments in 2014 and all repayments had been made by her former partner. The Provider notes that had such repayments not been made, the final mortgage redemption figure is likely to have been much higher. Repayments made by the Complainant's former partner since 2014, totalled over €28,000. The Provider confirms that at no point were any arrears on the account capitalised.

The Provider notes that it received a letter from the Complainant's solicitor dated **18 March 2016**, seeking information in relation to the ARA agreed with her former partner. The Provider states that in line with its process at the time, it required authority from all parties named on the mortgage, before providing the information to a third party and issued a letter dated 6 April 2016 to both borrowers at the correspondence address. In July 2017, the Provider received a redemption request from the solicitor acting on behalf of the Complainant's former partner. The Provider noted that this request was for redemption figures which any customer has the right to request at any time and a redemption statement accordingly issued. It states that likewise had it received a request for a redemption statement from the Complainant, this would have been processed without the authority of her former partner.

In relation to systems note dated 6 October 2014 – which noted that the Complainant's former partner was "*separated with two children, living in the property*" – the Provider states that it was aware that he was residing in the property while the children were residing with the Complainant. It apologises if the note was misleading but states that it is evident from phone calls with the Complainant's former partner that it was aware of the reality of the situation.

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The Complaint for Adjudication

The complaint is that the Provider was guilty of maladministration of the joint mortgage account, insofar as it:

1. The altered of the terms of the joint mortgage without the consent of the Complainant, on two occasions;
2. Breached the provisions of the CCMA due to communications failures by the Provider to the Complainant; and
3. Provided a deficient customer service to the Complainant.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties. In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

This has been a very challenging complaint. The background to the complaint is an acrimonious relationship breakup. In addition, the Complainant and her former partner have a very sick child, who requires a large amount of hospital care and which necessitates the child concerned living near a children's hospital. Following their separation in 2010, the Complainant's former partner lived in the mortgaged property and made payments towards the mortgage account. It is not in dispute that the mortgage fell into arrears on a number of occasions throughout the period, despite the best efforts of the Complainant's former partner to meet the monthly repayments. The Complainant was renting another property for approximately €1,300 per month and the two children reside with the Complainant. I wish to acknowledge from the outset that the situation has clearly been very stressful for

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both the Complainant and her former partner and I have no doubt that each of them have been doing their best to meet their various financial and family commitments, throughout the difficult position they found themselves in.

I also wish to acknowledge the tremendous support and sympathy displayed by various representatives of the Provider during phone calls with the Complainant's former partner when he was experiencing significant levels of stress and challenges to his mental health. Regardless of the outcome of this investigation, the sympathetic and supportive attitude adopted by the Provider's representatives during various phone calls throughout the period, was in my opinion, an admirable one. Financial institutions are regularly accused of being unsympathetic in the face of the challenging personal circumstances of their customers but in the present case at least, the Provider could not have been more sympathetic, supportive and encouraging in its dealing with the Complainant's former partner. The individual representatives concerned, and the reflected culture of the Provider, should be commended for this approach.

There are three elements to the Complainant's complaint relating to:

1. The alteration of the terms of a joint mortgage without the consent of the Complainant on two occasions;

2. The suggested breach of provisions of the CCMA due to communications failures by the Provider to the Complainant; and

3. The suggested provision of deficient customer service toward the Complainant.

I propose to deal with the first complaint initially and then to consider complaints 2 and 3 together.

Alteration of the Mortgage Terms without Consent of Complainant

The original term of the mortgage was 30 years from January 2005. An interest only period was agreed with all parties for two years between 2011 and 2013, when then the mortgage reverted to full interest and capital repayments. The Complainant and her former partner had separated in 2010, with the Complainant moving to rented accommodation with the couple's two children.

The Provider was notified of the separation and further notified that the Complainant's former partner would be making future repayments in a solo capacity but wished to enter an ARA in that regard, to ensure that the repayments were affordable. On 5 June 2014, the Complainant called the Provider to confirm that the couple had separated, that she did not wish to be considered as non-cooperative, and, importantly, that she did not want to prolong the duration of the debt, by way of a further interest-only period. She was encouraged to complete an SFS and it was apparent that she was interested in surrendering the property.

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October 2014 Term Extension

By letter dated 6 October 2014, the Provider wrote to the Complainant and her former partner noting that following the recent review of the personal circumstances as set out in their standard financial statement, it had agreed an ARA to extend the mortgage term by 10 years and six months with a new monthly repayment of €804.50. The letter confirmed that all the terms and conditions of the mortgage would remain the same. The letter noted that as the arrangement allowed the Complainants to pay the mortgage over a longer period of time, the monthly repayments would be lower but they would pay more interest as the mortgage would be payable over a longer period of time. The letter noted that *"If you not happy with this arrangement, you have the right to appeal*."

The Complainant called the Provider on 10 October 2014 querying how the terms of the mortgage could be changed without her consent. She was assured by the Provider's representative that the term extension could be made without her authority. The Complainant made it clear that she was not in agreement with the term extension and was advised that she could need to contest it in writing. A letter of complaint was sent on 24 October and by letter dated 27 October 2014, the Provider agreed to remove the term extension from the joint mortgage.

Contrary to the Provider's stated position that contact will always be sought to be made with the other party to a joint mortgage prior to entering an ARA with an engaging borrower, there is no evidence of any attempt to contact the Complainant prior to the Provider agreeing the term extension with her former partner. The first time the Complainant was contacted was the Provider's letter of 6 October 2014 informing her of the fact of the new arrangement, and noting her right to appeal the decision. There is no suggestion that the Provider did not have full contact details available for the Complainant at the time. The Provider's failure to contact her is surprising in light of the fact that she was a joint mortgage holder; that the term extension had a financial implication for both borrowers in terms of an overall higher interest repayment; in light of its stated policy in respect of separated borrowers; and in light of the fact that the Complainant had been in contact with it in June 2014, to indicate that she was not agreeable to the mortgage period being prolonged.

April 2015 Extension

By letter dated 21 April 2015, the Provider wrote to the Complainant and her former partner referring to its recent review of their personal financial circumstances as set out in their SFS. It noted that it had agreed to offer an ARA to help with their financial difficulties which would involve a period of term extension of 11 years and the new monthly repayment of €768.85. It noted that as the monthly repayment would be reduced, the outstanding balance would take longer to pay off which would result in them paying more interest. It further noted that all of the other original terms and conditions of the mortgage remained the same. The letter stated that

> *"As you have agreed to this Arrangement during a phone conversation we will now proceed to put this Arrangement in place*." (emphasis added)

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The letter further advised that

> "*If you are not happy with this Arrangement you have the right to appeal it*."

As with the attempted October 2014 term extension, and contrary to the Provider's stated position that contact will be made with the other party to a joint mortgage prior to entering an ARA with an engaging borrower, there is no evidence of any attempt to contact the Complainant prior to agreeing this second term extension with her former partner. The first time the Complainant was contacted, was the Provider's letter of 21 April 2015 informing her of the fact of the new arrangement, and noting her right to appeal the decision. Again, there is no suggestion that the Provider did not have full contact details available for the Complainant at the time. The Provider's failure to contact her in this case is even more surprising in light of the fact that she had complained just six months earlier when a term extension was applied without her approval. It is also very odd that the letter of 21 April 2015 indicates that the borrowers had agreed to the ARA during a phone call. While this may have been true for her former partner (who understandably was attempting to agree an ARA with the Provider to ensure affordability of repayments) it was manifestly untrue in respect of the Complainant – who had made her feelings clear in respect of a term extension on the mortgage.

Furthermore, in a call between the Provider and the Complainant's former partner on 15 April 2015, the Provider indicated that it was unsure how to stop the Complainant from contesting the application of a second term extension, as it was in her rights, as a party to the mortgage to do so. It is clear from this call that while the Provider was (admirably) trying to assist the Complainant's former partner in any way it could, since he was doing everything in his power to meet the mortgage repayments, the Provider was aware before the application of the term extension that the Complainant would be opposed to it, and would likely contest it.

Despite this, the Provider failed to contact the Complainant to seek her approval before applying the extension and it then refused to remove the term extension at her request, for a period of 14 months.

In the course of the dispute, the Provider suggested that its actions were explicable in light of its obligations to separated borrowers, under the Code of Conduct on Mortgage Arrears (CCMA). Under CCMA 2013, the Provider has the following obligation in the case of separated borrowers:

> "*(ii) In the case of joint borrowers who notify the lender in writing that they have separated or divorced, the lender should treat each borrower as a single borrower under this Code* (*except to the extent that an action requires, as a matter of law, the agreement of both borrowers*). "
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> (emphasis added)

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It was appropriate, therefore, that the Provider engaged with the Complainant's former partner in respect of an SFS in a solo capacity and attempted to agree an affordable ARA with him since he was making the mortgage repayments at the time and fully engaging with the Provider. This does not mean however that the Provider was entitled to deal only with him to the exclusion of the Complainant in renegotiating the terms of the joint mortgage given that she was in contact with the Provider.

As is made clear from the terms of the CCMA itself, the obligation on the Provider to treat a separated borrower as a single borrower for the purposes of the CCMA, does not and cannot over-ride general principles of contract law. It is a general principle of contract law that:

> "*A party to a contract cannot have his position under the agreement altered to his detriment by means of a further agreement to which he was not a party and pursuant to which he could assert no rights*."
>
> McDermott and McDermott, *Contract Law* (2nd ed, Bloomsbury, 2017) [19.01]

There is no question of the Complainant's former partner having acted as the agent of the Complainant in light of their separation and her clear and repeated opposition to the term extension arrangements. Further, it is clear that the term extensions at issue altered or potentially altered the Complainant's position under the contract to her detriment, in terms of the extra 11 years duration of the mortgage and the additional interest payable.

In a telephone discussion with the Complainant, the Provider referenced the fact that she was jointly and severally liable for the debt, as a justification for its ability to alter the contractual term without her consent. In contract, joint and several liability arises when two or more persons jointly promise in the same contract to do the same thing, but also separately promise to do the same thing. For example, if A and B promise jointly and severally to pay £100 to C, then they are together under an obligation to pay £100 to C, but they are also individually under an obligation to pay the money to C. Performance by A or B discharges the obligation. In such a case, C is entitled to £100 in total and can enforce the obligation in full against A or B or both. If C sues A and not B, it is open to A to claim a contribution from B.

This joint and several liability has no relevance to the question of contractual amendments; it simply means that the Complainant was liable individually and jointly to repay the mortgage debt to the bank, as was the Complainant's former partner. I do not accept that the concept of joint and several liability could in some way authorise the Complainant's former partner to amend the joint contract and thereby bind the Complainant without her consent. This justification from the Provider to the Complainant was therefore, in my opinion, misleading in the extreme.

A specific question was raised by this Office to the Provider in relation to any contractual authority that it might have to liaise with just one party to a mortgage where a mortgage variation is being sought. In its response, the Provider has not identified any relevant terms and conditions in the mortgage which would authorise it to liaise with one party only.

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Instead the Provider simply referred to its SPVA procedure without providing any further details in relation to it, than is set out above. To my mind, the failure of the Provider to identify any basis for its variation of the terms of the joint mortgage with the consent of just one of the two joint parties thereto, is notable. The Provider was afforded a specific opportunity to justify its position in this regard and its failure to do so leads me to the conclusion that it cannot validate its actions in that respect.

I am of the view that it was not open to the Provider to agree to vary the terms and conditions of the joint mortgage with just one party to it, in all of the circumstances of the present case. I therefore propose to uphold this aspect of the complaint.

It is important to note that this office does not wish to discourage the Provider from attempting to agree an ARA with one party to a joint mortgage where only that party is cooperating and making payments. There may be circumstances where prudence dictates an agreement to vary the repayment schedule, pending contact being made with a separated partner who is not contactable over a certain period. But this was not the situation in the present case.

Firstly, the Provider at all times had the Complainant's contact information and failed or chose not to contact her. Secondly, the Complainant made contact with the Provider in June 2014 to confirm the separation and to ensure she was not being treated as non-cooperative, even though she would not be contributing to the mortgage for present purposes. She at all times made her opposition to a term extension clear. Thirdly, although the Provider has emphasised the failure of the Complainant to make any mortgage repayments during this time, she made it clear to the Provider that she was responsible for the couple's children, that they were living in rented accommodation which she was financially responsible for, and in that context, she wished to rent out or sell the mortgaged property to clear the mortgage debt, and that she had issued court proceedings against her former partner to resolve the situation. It appears that she was paying a greater sum in rent than her former partner was contributing to the mortgage during the relevant period. Although she remained accountable for the debt, her former partner alone was living in the property and his refusal to vacate it meant that the property could not be rented out or sold to make payment to the Provider, as desired by the Complainant. This was a difficult set of circumstances.

The Complainant's former partner was clearly anxious to remain in the property and the Provider was anxious to assist him in doing so by preventing the accrual of arrears potentially leading to legal action. This however was not in the interests of the Complainant as she perceived them, and her attitude was not taken into account by the Provider in agreeing and applying the term extensions with her former partner.

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This was not an appropriate way for the Provider to treat its customer, the Complainant, who was jointly and legally liable for the mortgage debt, no matter how well intentioned the Provider's actions may have been, with respect to assisting the Complainant's former partner during a particularly difficult period of his life. Further, the Provider's actions were not permissible as a matter of contract law. The Provider did not even abide by its own procedures in dealing with a single engaging party. Accordingly I consider it appropriate to uphold this aspect of the complaint.

Customer Service Lapses and CCMA Breaches

October 2014 Extension

By letter dated 6 October 2014, the Provider wrote to the Complainant and her former partner informing them of the term extension of 10 years and six months with a new monthly repayment of €804.50. The letter confirmed that all the other terms and conditions of the mortgage would remain same. The letter noted that as the arrangement allowed them to pay the mortgage over a longer period of time, the monthly repayments would be lower but they would pay more interest as the mortgage is payable over a longer period of time. *The letter noted that "If you not happy with this arrangement, you have the right to appeal*."

The Complainant called the Provider on 10 October 2014 to register her objection to the ARA. On this call, she was assured by the Provider's representative that it was within its rights to vary the term of the mortgage contract without her authority. As set out above, this information was misleading as it is simply incorrect as a matter of contact law. It was also in breach of Provision 2.6 of the Consumer Protection Code 2012 (CPC) which mandates that regulated financial service providers makes full disclosure of all relevant material information in a way that seeks to inform the customer. The provision of inaccurate information does not meet this standard. Of further concern is the fact that the Complainant was told that she had to contest the application of the term extension in writing and that her phone call of complaint in this regard was insufficient. It is not at all clear to me why a complaint could not have been raised by the Provider on the back of the phone call without requiring a formal letter from the Complainant. Moreover, there was confusion as to whether the Provider required a formal appeal from the Complainant as per the terms of the letter of 6 October 2014. It appears at this remove that despite the appeal wording of the letter, the Complainant's opposition to the two incidents of term extension were treated as complaints and not appeals. By letter of complaint dated 24 October 2014, the Complainant noted that she was not in agreement with the proposed extension of the mortgage for 10 years and six months and that she was not involved in any discussions leading to the alleged agreement. She noted that the mortgage and property was the subject of court proceedings which she had already advised the Provider of. An online complaint was submitted in similar terms on 15 October 2014.

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By letter dated 27 October 2014, the Provider accepted that the term extension was applied to the account without the consent of the Complainant. It noted that the extension was agreed with her former partner, that it was aware that the parties had separated, and that there were legal proceedings in being in relation to the property. It noted that the term extension had been cancelled and apologised for the inconvenience caused. The Provider's letter noted that an arrangement could be applied to a joint account if agreed with one party to the mortgage but that there is a period from when the arrangement was applied to the account, where the second party can agree or disagree to this. There was no basis for this proposition set out in the letter and no subsequent attempt by the Provider to back up this position from a legal perspective. While I acknowledge that the Provider's response to the Complainant's opposition to the October 2014 terms extension was prompt and decisive, I consider its letter of 27 October 2014 should have been phrased more accurately in order to comply with Provision 2.6 CPC.

April 2015 Extension

By letter dated 21 April 2015, the Provider wrote to the Complainants informing them that it had agreed to a term extension of 11 years with a new monthly repayment of €768.85. It noted that as the monthly repayment would be reduced, the outstanding balance would take longer to pay off which would result in them paying more interest. It further noted that all of the other original terms and conditions of the mortgage remained the same. The letter stated that *"As you have agreed to this Arrangement during a phone conversation we will now proceed to put this Arrangement in place*." (emphasis added) The letter further advised that "*If you are not happy with this Arrangement you have the right to appeal it*." As noted above, there is no question that the term extension had been agreed by the Complainant as set out in this letter.

The Complainant submitted a letter of complaint of 30 April 2015 regarding the Provider's application of the forbearance arrangement without her consent. She noted that she had no contact dealing with anyone from the Provider, had not completed an SFS and had not agreed to an ARA. She referred to previous correspondence in which she outlined that the mortgage and property were the subject of court proceedings between her and her former partner. She noted that this was the second time that a forbearance arrangement had been applied without her consent. She stated that it was unacceptable that the same thing would happen again and that it was causing her great stress and anxiety.

By letter of response dated 15 June 2015, the Provider noted that a term extension of 11 years had been agreed on the mortgage and had been put in place following completion of the SFS with the Complainant's former partner. The Provider stated that it appreciated that this was the second instance of this nature but that cases are "*assessed on an individual basis*" and the mortgage had been reviewed at a higher level. It noted that "*the decision has been made and the arrangement will remain in place*." In my opinion, this response to the complaint was woefully inadequate. The short letter failed to deal with the substance of the complaint (ie the Complainant's lack of consent) and failed to explain or justify the actions of the Provider in agreeing the term extension without her approval. I also consider it to be in breach of the Provider's obligations under Provision 10.7 CPC as a regulated entity "must seek to resolve any complaints with consumers". I am not satisfied that this response from the Provider sought to resolve the substance of the complaint.

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Thereafter, by letter dated 25 June 2015, solicitors acting on behalf of the Complainant requested clarification from the Provider as to the basis for its decision and the mortgage conditions it relied on to make changes without her consent. The Provider responded directly to the Complainant by letter dated 16 July 2015 and noted that when the mortgage fell into arrears, it wrote to the correspondence address and the Complainant's former partner engaged with it by telephone in October 2014 to arrange a repayment arrangement. It stated that the repayment arrangement was granted but as the arrangement had been consented to by just one of the parties, it arranged to contact the Complainant for acceptance. It noted that it was informed that the Complainant was unhappy with the fact that the arrangement had been made and requested that it be cancelled. The Provider stated that the application was withdrawn as a result. It noted that as the account was without a repayment plan and arrears were growing, it had returned to its recoveries procedures to arrange a repayment arrangement. Once again the Provider stated that the Complainant's former partner engaged and a repayment arrangement that was suitable to him was approved in May 2015.

The Provider acknowledges that the Complainant was again unhappy with the decision to apply a forbearance arrangement without her consent. The Provider has stated that in the event of a separation where one party proposes a repayment arrangement, the Provider advises the engaging party that the Provider will not submit a proposal for approval until it speaks with the other party named on the loan and it will then attempt to contact the other party. If no contact can be gained, the Provider states that it is permitted to proceed with a single party voice authority (SPVA) and put a repayment arrangement in place. It states that by removing the repayment vehicle in this case, it would not have been acting in the best interests of the engaging party as he was still resident in the property. The Provider noted that it understood that the repayment arrangement had been made without the Complainant's consideration and that it would welcome her interaction if she was in a position to agree with her former partner to reach an amicable resolution. The Provider concluded that in an effort to ensure that the debt would remain at a minimum, and until it made an alternative arrangement with both parties, the existing plan would remain in place.

This 16 July 2015 letter is puzzling in a number of respects. Although it sets out the SPVA procedure (ie that the other party to the mortgage will be contacted before an ARA is put in place at the behest of the engaging party), it made no attempt to consider whether it followed its own procedure in this regard or to engage with the Complainant's assertion that she was not contacted. Secondly, it is difficult to reconcile the stated SPVA procedure and commitment to seek the other party's approval, with its refusal to remove the ARA that was effected without the consent of the Complainant and in the face of her opposition to it. While I appreciate that the Provider was attempting to keep arrears to a minimum in reaching the ARA with the Complainant's former partner, it is clear that it took no consideration of the interests of the Complainant or indeed her legal rights.

The Complainant responded by letters dated 28 July 2015 and/or 7 August 2015 noting that despite the stated policy of the Provider, it had not contacted her before applying a forbearance arrangement, even though the Provider had her contact details. She argued that the Provider's utilisation of the SPVA was therefore inappropriate, in error and possibly illegal.

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She questioned whether she had been classified as a non-cooperating borrower and further questioned whether she had been informed of her repayment options in accordance with article 47 CCMA. She questioned whether a review of the ARA had been carried out by the appropriate appeals board.

By letter of response dated 1 September 2015, the Provider noted that where joint mortgage holders have separated, both parties are written to and that where any one of the named parties engages, the Provider conducts a financial review and discusses possible options for repayment. It noted that:

> "*We also advise the engaging party that the [Provider] will not submit a proposal for approval until we speak with the other person/s named on the loan. We then attempt to contact the other account holder/s immediately after the call or meeting has ended.*
>
> *In the event that we are unable to reach the other account holder/s, we will enter into a contract strategy . . .*
>
> *[The Provider] will always try to engage all borrowers and make a furtive effort to assist those who are willing to meet the mortgage commitments, resolve any arrears support those at risk of, or are already in financial difficulties. If no contact can be gained after this process has been carried through, we are permitted to proceed with the Single Party Voice Authority (SPVA) that the engaging party has proposed for the repayment arrangement in place.*
>
> *In this regard, I have asked that ASU call upon any information pertaining to contact made with you. We have not been able to source any details of call attempts made to you in relation to accepting a forbearance arrangement. I would like to apologise in the event that we either failed to record such information or that we failed in making the necessary contact arrangements with you. This detail has been fed back to our ASU so that the relevant action can be taken. The call should have been made prior to the issue of our Single Party Voice Authority letter, which was sent on 20 October 2014. This would have informed you of the arrangement*."

In response to the Complainant's query about the classification as being non-cooperative, the Provider confirmed that she had not been classified as non-cooperative. The Complainant also requested copies of any notification letters of her options regarding repayment of the mortgage in accordance with Provision 47 CCMA. In this regard the Provider confirmed that the Provision 47 CCMA correspondence had not been issued to her. It stated that her former partner had consulted with the Provider and measures regarding repayment of the mortgage had been arranged. The Provider stated that it appreciated that the parties had separated and that any arrangement made with either party, may be fractious to the other but that

> "*one of our aims is to ensure that customers are not left in a vulnerable position where the only option we have left is to go through the repossession process and leave them with no place to live*."

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The Provider confirmed that it had not conducted any appeals over the forbearance decisions made. It noted that the Complainant was given the option to apply to have any existing deal removed if she disagreed that same, which was included in the letter sent on 20 October 2014. The letter continued as follows:

> "*Once again, I do appreciate the difficulties you are having in reaching an arrangement over the mortgage with your estranged partner, and I understand how implementing a repayment arrangement without your joint consent may give you the impression that we do not value your position as a customer. However, as I have stated in previous correspondence, in removing the repayment arrangement, it will allow the account to fall into further difficulty and will inevitably mean that the property will be forced into sale or repossession.*
>
> *Ideally the best solution in this matter is that you and* [the Complainant's former partner] *are able to meet with an amicable resolution or for one of the parties to take on the mortgage as a sole applicant. However, this will be subject to our lending criteria and will require proof of affordability by the applicant.*
>
> *After due consideration and in an effort to ensure that the debt remains at a minimum, until we are in a position to make an alternative arrangement with both you and* [the Complainant's former partner]*, the existing forbearance plan must remain in place*."

The Provider noted that in light of the '*possibility*' that it failed to contact the Complainant by telephone in October 2014, it offered her a goodwill gesture of €500.

As with the earlier 16 July 2016 letter, this letter of 1 September 2015 is also puzzling. The Provider again set out the SPVA procedure (ie that the other party to the mortgage will be contacted before an ARA is put in place at the behest of the engaging party) and it accepted that it could not locate any evidence that this had occurred in the present case. The Provider however again refused to remove the ARA in the face of the Complainant's opposition to it, even though the Provider effectively acknowledged that she had never consented to it and that the appropriate procedure was not followed.

The Provider referred to the fact that the Complainant could object to the application of the ARA as per the notification to her and yet it refused to entertain her objection when she sought to utilise this procedure to have it removed. These various positions adopted by the Provider in this and other response letters, appear to me to be incongruous. Moreover, this was now some four or five months since the Complainant had contested the application of the ARA which the Provider now seemed to accept she had not consented to. As set out above, the legal basis for the Provider's position in this regard is entirely unclear. When this correspondence is viewed in conjunction with the audio recordings of telephone calls with the Complainant's former partner, one might be left with the impression that the Provider was attempting to leave the ARA in place through any means necessary, and regardless of the Complainant's position.

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By letter dated 14 September 2015, the Complainant wrote to the Provider setting out a chronology of the two term extensions and her attempts to have these remedied. She argued that as the letters sent to her had been received by her, it was clear that the Provider had ample contact details on file and therefore had no excuse for the lack of consultation in relation to the forbearance agreements. She noted that the Provider had stated that it would not submit a proposal for approval until it spoke to the joint mortgage holder and she questioned why it failed to do so on this occasion. She further noted that the Provider had stated that a call should have been made to her prior to an SPVA letter issuing, but that in fact, she received neither call nor letter. In response to the Provider's statement that its policy was to prevent customers being without a home, she stated that she and her two children were without a home due to being unable to extradite herself from the mortgage. She noted that they were in rented accommodation, paying very high rent with no security and that the stress of the situation was being added to by the Provider's actions. She stated that her liability in respect of a house that she had no access to, was being increased without her consent, in what appeared to her to be a totally improper and possibly illegal manner. She noted that her former partner was the only person who wished to continue the mortgage and suggested that if the Provider's preference was to deal solely with him, as it appeared, that she should be removed from the mortgage. The Provider states that it has no record of having received the letter in question and that it did not receive the letter until it was re-sent by the Complainant in February 2016. The complaint was acknowledged on 18 February 2016 and regular update letters were sent thereafter noting that the investigation was continuing, but the Provider did not respond to the complaint until 26 August 2016.

No explanation has been given by the Provider in this regard. Whether the September 2015 letter was received by the Provider when it was sent, or in February 2016, the period of time taken by it to respond to the complaint was completely inadequate, particularly in light of the fact that the original complaint was raised in May 2015 and the September letter was merely a continuation of the same objection.

By letter dated 26 August 2016, the Provider wrote to the Complainant outlining her complaint in relation to a second term extension being applied to the mortgage. The Provider stated as follows:

> "*Based on the information available to me, as discussed, I am fully satisfied that response was issued to you, accurately reflected the [Provider's] position, at the time. The Arrears Support Unit acted within the parameters of their process when agreeing and applying a forbearance agreement to your jointly held mortgage in April 2015. I fully accept that this was not the response that you were hoping for in relation to this point.*
>
> *In saying that, while I am satisfied that you were issued a letter dated the 21 April 2015 from the ASU outlining the details of the forbearance agreement and the options available to you in this regard, I have been unable to locate any evidence that you are telephoned prior to the arrangement being applied to your mortgage. This lapse in service has been taken into account when considering the outcome of your complaint.*

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As you are aware, due to the length of time this matter is been ongoing and for the purpose of providing you with the [Provider's] Final Response Letter, I forwarded the details of your complaint to our Legal Department for further review to be carried out; taking into account that you are/were not agreeable to the term extension being applied to the jointly held mortgage, the [Provider] agreed on this occasion*, to reverse the term extension of 11 years, which was applied to the jointly held mortgage in April 2015.*

…

While I am satisfied that the ASU operated within the parameters of their process, at the time in 2015, when agreeing an alternative forbearance arrangement, it is apparent that you have gone through great lengths to resolve this matter with us and that you have not received the level of customer service that we would normally like to offer our customers. I sincerely apologise to you for this and any additional distress this may have caused you."

The Provider concluded that it had partially upheld the complaint and increased its previous offer of €500 to €1,500.

The Provider therefore reversed the term extension some 14 months after it had applied it, and after the Complainant had written numerous letters of complaint over the period. In doing so, the Provider seemed to 'double down' on its assertions it had been entitled to vary the term, without the Complainant's consent and suggested that the reversal was being effected as some sort of gesture to the Complainant, when in fact in my opinion, it should never has been applied. Although the Provider offered a sum of €1,500 to the Complainant in recognition of its failures, the tone of the letter was one of the Provider vindicating its own actions. Again, the attitude set out in the letter was incongruous as it both accepted that it failed to contact the Complainant prior to applying the ARA while insisting that the ASU acted in accordance with its procedure, which procedure included contacting her prior to the application of an ARA agreed with a joint mortgagor.

I am satisfied that the Provider was guilty of multiple customer service inadequacies and regulatory breaches in the manner in which it dealt with the Complainant as set out above, centring on the following:

- Failing to contact the Complainant as per its own stated procedures prior to agreeing an ARA on her joint mortgage, on two separate occasions;
- Providing misleading information to the Complainant as regards the Provider's authority to vary the term of her joint mortgage account without her consent;
- Failing to seek to resolve her complaint appropriately;
- Failing to resolve her complaint in a timely manner;
- Failing to comply with Provision 47 CCMA regarding correspondence to the Complainant as to her options for repayment in light of her rejection of the proferred ARA.

I therefore consider it appropriate to uphold this aspect of the complaint.

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On the whole, and while I would reiterate my commendation of the Provider for the assistance it provided to the Complainant's former partner during the relevant period, I do not believe that the competing interests of the Complainant were adequately considered in the process. In light of the Provider's actions in agreeing contract variations without the consent of the Complainant and given also, its various customer service and regulatory lapses towards her, I consider that a compensatory measure of compensation is required in the present case.

I note that €1,500 has been offered by the Provider in this regard and while the evidence indicates that the Complainant suffered no specific financial loss in the present case, I do not believe that this sum is adequate in all of the circumstances. Arguably, the mortgaged property might well have been sold at an earlier stage, if the second ARA had not been put into place by the Provider, or indeed, if the Provider had reacted more quickly to the Complainant's objections to that ARA. Of course, one can only speculate as to whether or not such a potential earlier sale would have yielded greater or lesser sale proceeds, even if the joint loan account had been redeemed at an earlier time, thereby saving on the accrual of interest on the loan amount due and owing. It is unclear as to whether or not such a development would have benefitted the Complainant and her former partner, financially.

In all of the circumstances, I take the view that it is appropriate to direct the Provider to make a compensatory payment to the Complainant in the sum of €4,000.

I am concerned by what I perceive to be a significant misunderstanding by the Provider of its entitlements in relation to the variation of contracts where joint mortgagors are separated or, at a minimum, its failure to properly apply its own procedures in relation to such circumstances. For that reason, I also intend to furnish a copy of my Decision in this complaint to the Central Bank of Ireland, for such action as it considers to be appropriate.

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Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is upheld on the grounds prescribed in ***Section 60(2) (a)(b)*** 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 Complainant in the sum of €4,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

23 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.