An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0030
Sector:	Banking
Product / Service:	Mortgage
Conduct(s) complained of:	Level of contact or communications re. Arrears Delayed or inadequate communication Dissatisfaction with customer service
Outcome:	Partially Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants have a mortgage account with the Provider since **March 2006**. The account fell into arrears in **2010**. The Complainants are dissatisfied with the manner in which they been treated by the Provider in respect of their arrears, alternative repayment arrangements, and communications since **January 2015**.

The Complainants' Case

In their initial complaint, the Complainants state that the Provider incorrectly classified them as being non-cooperating on 1 July 2015 under the Mortgage Arrears Resolution Process (MARP) as it ignored their responses to letters from the Provider. The Complainants argue that they requested correspondence only by letter from the Provider and informed it that the first Complainant had difficulties with his hearing. Despite this, the Complainants argue that the Provider insisted on phone contact and threatened to classify them as not cooperating unless the Complainant spoke to the Provider over the phone. The Complainants successfully appealed the July 2015 decision to classify them as non-cooperating and were offered compensation by the Provider which they state they have not accepted.

The Complainants further state their belief that they received an excessive number of letters between January and July 2015 from the Provider which they regarded as abusive and intimidating. In subsequent submissions to this Office, the Complainants argue that the Provider consistently and persistently ignored their right to communicate in writing. They

noted commitments from the Provider in July 2015 to communicate only in writing going forward. They argue that the first Complainant is a vulnerable consumer within the meaning of the Consumer Protection Code 2012 due to a hearing impairment.

The Complainants refer to multiple letters received from the Provider in 2018 and 2019 requesting that they contact the ASU on a particular phone number to make arrangements to pay. The Complainants refer to a letter from the Provider dated 28 January 2018 requesting that the complete a financial assessment. They argue that they were not afforded sufficient time to provide the information sought and that they were not allowed to respond in any way other than telephone communication. The Complainants state that they were again classified as non-cooperating by letter dated **25 February 2019**, but argue that they were not given sufficient notice of this.

The Complainants take issue with the fact that their letter indicating their intention to appeal the classification within the prescribed period, was classified as an appeal in itself.

The Complainants state that the Provider is refusing to accept that there is an alternative repayment arrangement (ARA) in place between the parties. The Complainants argue that they sent a counteroffer to the Provider to pay €100 per month in response to the Provider's stated intention to recommence full mortgage repayments, in January 2015. They argue that as the Provider did not refuse this offer, a binding arrangement was thereafter in place. The Complainants seek the Provider to acknowledge that there is an ARA in place in relation to the account and to acknowledge the arrangement. They further seek additional compensation.

The Complainants further argue that the Provider is in breach of provision 17 of the Code of Conduct on Mortgage Arrears (CCMA) as the personnel that they were directed to in the Provider's arrears support unit were based in the UK. The Complainants argue that the Provider is using a legal entity based outside of Ireland in its dealings with them as regards their arrears. They argue that even if the call centres are part of the Provider's banking group, they are separate entities in law. They consider the Provider's use of call centres and personnel based in the UK to be in breach of the CCMA. They further argue that any evidence from personnel based in the UK constitutes inadmissible hearsay pursuant to the High Court decision of *Ulster Bank v Dermody* [2014] IECH 140.

The Provider's Case

The Provider has accepted that its decision to classify the Complainants as non-cooperating borrowers in **July 2015** was wrongful and it committed to reversing the classification. It further accepted that it ought to have complied with the Complainants' request that all communication be in written format.

In relation to the classification of the Complainants as non-cooperating on 25 February 2019, the Provider notes that it sent three letters in February 2019 explaining that the Complainants were to liaise with its ASU in regard to the mortgage account and explaining that forbearance discussions regarding arrears could not be dealt with by a customer care team as part of the complaint. The Provider draws attention to a letter from the

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Complainants dated 17 January 2019 in which the Complainants indicated that they were not in a position to discuss anything to do with the mortgage as they had a complaint before this Office.

The Provider is of the view that the fact that the Complainants have an open complaint does not preclude its Arrears Support Unit (ASU) from contacting them in relation to the mortgage arrears. The Provider states that if the Complainants wish to meet its Collections Account Manager regarding the mortgage account, the Manager would be happy to assist them on behalf of the ASU.

The Provider acknowledges receipt of a letter dated 4 March 2019 in which the Complainants indicated their intention to appeal the non-cooperation classification. The Provider states that the appeal was acknowledged by the ASU on 8 March 2019 and that further correspondence received from the Complainants dated 14 and 18 March 2019 was considered by the appeals board, as part of the appeal. The appeal decision issued on 5 April 2019.

The Provider states that it put several arrangements in place to assist the Complainants in respect of their financial situation. These were:

- reduced repayment arrangement from March to August 2011;
- reduced repayment arrangements from March to August 2012, broken by the Complainants in April 2012;
- a reduced repayment arrangement from July to December 2014.

The Provider states that the Complainants are not currently in an ARA and that the last forbearance arrangement expired on 25 December 2014. The Provider does not accept that the wording of its letter dated 25 December 2015 which referred to the existence of the ARA in anyway constituted an offer to continue with this ARA for the foreseeable future. While it accepts that there may have been some confusion in relation to the wording of its letter, it argues that a subsequent letter dated 12 January 2015 confirmed that the ARA had ended. The Provider states that payments of €100 per month are being made by the Complainants and the arrears balance on their account has increased each month by the difference between the amount due and the amount paid. The Provider counters the Complainants' assertion that they are not in a position to discuss the arrears while there is an open complaint with this Office.

The Provider confirms that its call centres are based in the UK but states that they are not a third-party company but are part of the Provider's wider banking group. The Provider argues that is entitled to utilise such a call centre based on the terms and conditions attaching to the mortgage which indicates that it is a member of the banking group. It states that the representatives are experienced collection agents and are trained in dealing with mortgage accounts and arrears.

The Provider confirms that it has offered compensation to the Complainants in the sums of €1,000 and €4,000 and that both offers remain open for acceptance by the Complainants. The €4,000 compensation offer was made by letter dated **1 March 2016** in which the

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Provider reiterated its commitment to considering a new ARA for the Complainants and noting deficiencies in customer service that were experienced in relation to the incorrect classification of the Complainants as non-cooperating in July 2015, as a result of the Provider's failure to communicate with them in writing. The Provider confirmed that its primary method of contact for its customers is via telephone and that it attempted to contact the Complainants in this manner various times, in order to ensure expediency and accuracy of information captured in respect of the financial information. It accepted that the Complainants have requested a number of occasions that all correspondence be in writing and it accepts that the Complainants did not receive the level of customer service that it would like to offer its customers. This offer of €4,000 in compensation represented an increase of €2,000 to an initial compensatory offer of €2,000 made in November 2015. The €1,000 compensation offer was made in relation to the Provider's failure to remove the non-cooperative status from the Complainants' account in July 2015 after having committed to doing so.

The Complaints for Adjudication

The complaint in the present case concerns the alleged maladministration of the Complainants' mortgage account in relation to the following three issues:

1. the failure of the Provider to comply with an ARA which the Complainants say was agreed in February 2015;
2. the wrongful classification of the Complainants as non-cooperating borrowers including communications by way of telephone rather than by letter; and
3. the location of the Provider's arrears support staff outside the jurisdiction.

Decision

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

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

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

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A Preliminary Decision was issued to the parties on 11 November 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below. The Complainants have raised a large number of wide-ranging concerns in respect of the conduct of the Provider. I have distilled the complaints into three separate elements which I consider to encompass the key concerns raised by them. Any failure to reference more minor complaints should not be viewed as a failure to consider those issues, however, and all of the complaints made by the Complainants have been considered in the course of this adjudication.

It should be noted that this Office is not in a position to consider any complaints raised by the Complainants in respect of suggested breaches of Data Protection legislation. If the Complainants wish to pursue these complaints, a complaint should be raised by them with the Data Protection Commission. It is further noted that the Complainants have confirmed that they are not advancing a complaint to this office that the mortgage agreement is null and void, as any such issue is a matter for the courts. It should be noted in that regard that this decision offers no opinion regarding the enforceability or otherwise of the contract between the parties.

1. **February 2015 Alternative Repayment Arrangement**

By letter dated **25 December 2014**, the Provider wrote to the first Complainant in the following terms:

> "*We agreed an alternative arrangement for you to repay your mortgage. Thank you for continuing with this arrangement.*
>
> *If your circumstances have changed, or if you feel that you may not be able to continue with this arrangement, please get in touch*."

By letter dated **12 January 2015**, the Provider wrote to the Complainants in the following terms:

> "*The reduced repayment arrangement on your mortgage account has now ended. The terms of your mortgage following this arrangement are:*
>
> - *Your new gross monthly payment: €1609.84*
> - *The date the new payment starts: 25/01/2015*
>
> *If you have any concerns about this change in your repayments, contact [the Provider] visit your local branch for alternatively contact us as soon as possible so we can help you reassess your financial situation*."

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By letter dated **19 January 2015**, the Complainants indicated that their circumstances had not improved and that they would continue paying €100 into the future. They also indicated that they would submit a new SFS if required. They requested that all correspondence be sent by letter.

By letter dated **6 February 2015**, the Provider indicated that it had been unsuccessful in its attempts to contact the Complainants to discuss matters raised in their letter of 19 January. The Provider requested that the Complainants contact it at their earliest convenience by phone. The Complainants responded by letter dated **16 February 2015** again stating that they would only deal with the Provider by letter. They indicated they were awaiting a response to the letter dated 19 January 2015.

I note that the terms of the letter dated **25 December 2014** were somewhat confusing in that the ARA was due to expire that day and yet the letter seemed to indicate that the ARA was continuing. There was no such confusion in the terms of the Provider's letter of **12 January 2015**, however, and it was clear that the Provider thereafter requested that full monthly repayments be resumed. This was also in accordance with the fact that the ARA that had been agreed the previous year between the parties was for a six-month period only.

A meeting was arranged on **5 January 2016** between the first Complainant and a representative of the Provider. The first Complainant indicated his belief that there was an ARA in place to pay €100 per month and the Provider stated that it did not agree with that. He was encouraged to complete a new SFS with a view to entering into an ARA but he was unwilling to do so due to his belief that there was an ARA already in place. The Provider advised him that standard arrears letters would continue to be sent to him and there was no arrangement in place. The notes of the meeting state that the options available to the Complainants were explained to them and the first Complainant was advised that the Provider could classify the mortgage as unsustainable.

By dated **14 January 2016**, the first Complainant sent an email to the representative he had met indicating he was happy to continue with the ARA in place. The representative responded by email dated **15 January 2016** to reiterate that there was no arrangement in place.

The crux of the Complainants' argument in relation to the ARA that they claim was agreed between the parties in January 2015 appears to be the failure of the Provider to formally respond to their statement that they were willing to pay €100 per month until their financial circumstances improved. It appears that the Provider attempted to contact the Complainants by phone in response to their letter of 19 January 2015 but did not send a formal letter refusing to put a new ARA in place.

I am not satisfied that the Complainants are correct as a matter of contract law, that silence on the part of the Provider in this instance led to the creation of the new ARA from January 2015. The Provider had indicated that full monthly repayments would commence from January 2015 after the six-month ARA had expired. The Provider's failure to formally

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respond to the Complainants' expressed intention to continue to pay €100 per month for the foreseeable future, does not amount to an acceptance of a counteroffer. Financial service Providers are not obliged to renegotiate the commercial terms of the mortgage agreement by putting in place any particular ARA that is requested by a borrower. In this case, there is no evidence that the Provider accepted the Complainants' offer to pay €100 per month from January 2015.

It would obviously have been preferable if the Provider had formally responded by letter to this request, rather than attempting to contact the Complainants by telephone. As will be discussed below, something of an impasse was created between the parties in relation to the form of contact that was appropriate for the next six months. Although the Provider ultimately accepted that it ought to have communicated with the Complainants in writing as requested by them, rather than over the phone, I am not satisfied that its failure in January 2019 to formally decline the Complainants' offer to make repayments of €100 per month amounted to a binding contractual commitment for an open-ended ARA to pay €100 per month. Accordingly, I am not willing to uphold this aspect of the complaint. For clarity's sake, it is my view that no ARA is currently in place between the parties.

2. Non-Cooperating Status

The Complainants have been classified as non-cooperating by the Provider on two occasions – first in July 2015 and the second in February 2019. I will deal with each of these in turn, in addition to the complaint regarding the April 2019 appeal. The complaint raised in relation to the Provider's alleged failure to communicate in writing with the Complainants is relevant to these issues, so will also be considered under this heading.

<u>July 2015</u>

The July 2015 classification was overturned following the appeal of the Complainants on the basis that they had persistently requested communication in writing only, but this was not facilitated. The Complainants drew attention to the numerous letters that they had sent to the Provider in response to the Provider's letters regarding the arrears, that were not responded to. They also drew attention to hearing difficulty of the first Complainant. I note in particular that the Complainant submitted two Standard Financial Statements (SFS) dated 6 March 2015 and 14 April 2015. The April SFS was acknowledged by letter dated 14 May 2015 but the Provider stated that it was not in a position to assess the situation and needed additional documentation in the form of "*further information required regarding monthly income/outgoings*". The Complainants were requested to call them to provide the additional information requested. By letter of response dated 21st May 2015, the Complainant pointed out that the request was made and asked the Provider to specify what it needed. It does not appear that this letter was responded to, and the next letter of significance from the Provider was a notification on 1 July 2015, stating that the Complainants had been classified as not cooperating and that they were now outside the protections of the MARP process.

By letter dated **31 July 2015**, the Provider acknowledged that the Complainants had requested that it "*communicate in writing only and for this reason we will arrange to conduct business in this manner going forward*." The letter acknowledges the Provider's acceptance

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that part of the reason why the Complainant had been unable to complete a Standard Financial Statement (SFS) was due to the first Complainant's inability to participate in a telephone-based SFS. The Provider apologised for any upset caused and confirmed that the ASU would make an exceptional arrangement to have a key account manager visit the Complainants to conduct an SFS. The letter urged the Complainant to make contact by telephone to make the appointment.

By letter dated **28 August 2015**, the Provider informed the Complainants that its Appeals Board had upheld their appeal in relation to the decision to classify them as non-cooperating. The letter confirmed that the non-cooperating status had been removed from the account. The letter reiterated the Provider's desire to organise a face-to-face meeting with the collections account manager to complete an SFS and provided a telephone number, correspondence address and email address to allow the Complainant to make contact with him.

As regards the Provider's decision to classify the Complainants as not cooperative and other subsequent complaint in relation to telephone communications, a letter dated **12 November 2015** from the Provider to the Complainants is pertinent. The letter states as follows:

> "*You have referred to [Ms M's] apology letter dated 11 November 2014 and your assertion that you gave [the Provider] notice that all correspondence be carried out via letter. You further add that you are entitled to have all information supplied to you by durable medium and on paper as per the Code of Conduct on Mortgage Arrears (CCMA). You affirm that we have persistently ignored this request.*
>
> *This particular issue was indeed raised prior to my resolution of 31 July 2015 and there is evidence in my colleague's letter of 24 June 2015. I have noted that you agreed with the assessment of your complaint, but that no resolution was given. I therefore acknowledge that the time of responding to you on 24 June 2015, this matter could have been resolved by placing a stop on any communication other than written medium.*
>
> *I also accept that you should not have been considered as non-cooperative, on the basis that you advised us that you are unable to respond to telephone contact and you specifically asked for all correspondence to be issued by mail.*
>
> *I stand by my assertion that our ASU was available to support you and help you to make a repayment arrangement that is suitable to both you and the bank. However, I cannot overlook the obvious failings in the service that you have been provided with and the fact that correspondence that you sent to the Bank was not responded to in the medium you had requested – being written format.*
>
> *I note that you again refer to your concerns that the recoveries process used by the Bank is excessive and harassing. You have provided specific detail which you extracted from a letter that was sent to you by [the Provider] dated 23 April 2015. The content is as follows:*

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URGENT NOTICE
IT IS VITAL THAT YOU CONTACT OUR ARREARS SUPPORT UNIT ON [XXX] TO MAKE ARRANGEMENTS TO PAY. IF WE DO NOT HEAR FROM YOU, WE WILL COMMENCE LEGAL ACTION AGAINST YOU WHICH MAY RESULT IN THE REPOSSESSION OF YOUR PROPERTY.

The above phrasing would be used for customers that may be considered as non-engaging. I strongly believe that you should not have received same, as it is apparent that you were writing to us during the course of the arrears recovery process and instead of writing back to you, we insisted on attempted telephone contact. In this regard, I agree that we did not take the full circumstances of you, the borrower, into consideration, as it is apparent that you have notified us of your hearing difficulty.

I am aware that you have asked why the Standard Financial Statement does not state written contact as the preferred contact method. I note that the document gives Telephony based contact or email. This particular contact method is for the purpose of assessing the document and ensuring that the information that we hold is accurate before a forbearance arrangement can be sought. I fully accept that you wish to communicate by writing; however, this method does not allow us to obtain the information necessary in an efficient manner and would delay the process of getting a repayment arrangement in place. In your circumstances, we should have therefore arranged a Key Account Manager (KAM) an earlier point."

A goodwill offer of €2,000 was made in consideration of the poor level of service.

By subsequent letter the Provider informed the Complainants that the outcome of their appeal was not applied to their account and as a result, a solicitors firm had been prematurely appointed to commence legal proceedings. The Provider informed the Complainants that it had instructed the solicitor to cease legal proceedings to recover possession of the property and that they were no longer deemed non-cooperating under the CCMA. The Provider apologised for the error and offered a compensation sum of €1,000 in respect of this.

It is apparent that the Provider failed to make sufficient arrangements for the Complainants to contact it by letter rather than by telephone in the period January to July 2015 when they were classified as non-cooperating. The Complainants sent multiple letters to the Provider during the period requesting again and again that communications should be in writing only and pointing out that the first Complainant had a hearing difficulty. I am satisfied that the Provider did not properly respond to those letters and instead continued to send arrears notifications requesting that the Complainants make contact with it by telephone. I am also concerned by the fact that the Provider failed to engage properly with the Complainants in relation to the SFS submitted to the Provider in March and April 2015.

The Provider has argued that it had additional listed queries in relation to these SFSs and that it attempted to contact the Complainants by telephone and letter in order to clarify the queries. Although an acknowledgement of the second SFS was sent to the Complainants

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with a request to provide further information regarding monthly income and outgoings, I agree with the Complainants that this request was vague in the extreme.

When the Complainants requested more specific detail on what the Provider needed, there does not appear to have been any response from the Provider. Instead, the Provider opted to classify the Complainants as non-cooperating in spite of the great many letters that had been written by the Complainants in the preceding months and the fact that two SFSs had been submitted by them.

I acknowledge that the Provider accepted full responsibility for the shortcomings in its customer service in this regard in November 2015 and that it made a goodwill offer of €2,000 to compensate the Complainants for the poor service they had received. It also acknowledges that commitments were made by the Provider in July and November 2015 that all future communications could be in writing and not by telephone. If this commitment had been adhered to by the Provider, I would consider that the offer of compensation made was reasonable in the circumstances, though not particularly generous. As I will discuss in more detail, however, the Provider did not meet its commitment in this regard.

I note that despite the commitment from the Provider that the non-cooperative status would be lifted from the Complainants' account in July 2015, this was not in fact done until August 2018. The Provider stated that this was an error on its part and that the classification has subsequently been removed. A sum of €1,000 in compensation was offered for this lapse. This three year delay is completely unacceptable. A non-cooperating classification has serious legal implications for a borrower. It does not appear, however, that there was any direct damage resulting from the incorrect classification as legal proceedings were not pursued during this time. On this basis, I am satisfied that the Provider's apology and the €1,000 compensation that was offered, was reasonable.

<u>February 2019</u>

By letter dated 14 January 2019, the Provider wrote to the Complainants in the following terms:

> "*We have been writing to you in attempting to contact you because you have fallen behind with your mortgage repayments.*
>
> *A relationship manager has been appointed your account and would like to arrange a meeting to see if we can work out the best way to deal with your arrears.*
>
> *A visit to your address was planned between 22/01/2019 and 01/02/2019 to discuss your options. However, if you would like to schedule an appointment date/time for this visit or if you would prefer to talk over the phone or meet in your local branch, we can do that instead. To arrange this, please call [XXX] within 10 working days of the date of this letter.*
> *. . .*

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If we cannot visit you, you must take action to avoid being classified as 'non-cooperating'. It has serious financial implications, but you can stop it happening if you do the following within 20 business days of the date of this letter:

1. *Demonstrate that you mean to engage with us about your mortgage loan arrears,*

and

2. *Make full disclosure of information to help us understand your financial situation and the reasons for your mortgage loan arrears,*

and

3. *Give us any additional information we ask for to allow us to complete a full assessment of your circumstances.*

If any of these actions are not undertaken at any point in future we may classify you as "not co-operating" without any further warning.

What steps do I need to take?

1. *Call us on [xxx-xxx-xxx] to discuss your mortgage loan arrears.*
2. *Fill out the enclosed standard Financial Statement (SFS) with your current financial information and return it to us. Call us if you need help completing it.*
3. *Provided with any extra information we have asked for*."

The letters outlined that it the Complainants were classified as non-cooperating, they would no longer be protected by MARP and their home could be repossessed.

By letter dated **17 January 2019**, the Complainants stated that they had no issue with meeting the relationship manager but were not in a position to discuss anything to do with the mortgage while a complaint to this Office was pending. The second Complainant rang the Provider on 18 January 2019 and indicated the Complainants' continued request for communications in writing. She noted that the line was bad and that the first Complainant was hard of hearing. She requested that the documentation required to be submitted by the Complainants for the purposes of the financial assessment, be sent by letter. The Provider's representative indicated that it would be, but that he had to read her a prepared script in that regard first. He stated that before a meeting could be arranged, full financial information had to be submitted from both Complainants. The second Complainant indicated that the first Complainant had no income. The Provider requested pay slips from the second Complainant, bank statements from both Complainants and any other evidence of income. He reiterated that the request would be sent in writing and that a meeting would be set up once the documentation was received. The second Complainant was advised that legal proceedings would ensue if the documentation was not received. The second Complainant rang later that day to again seek a meeting and the call was answered by the same representative. She was dissatisfied that the meeting was not arranged and that the documentation was requested instead. The Provider stated that she was in arrears, was not

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in an ARA and that the supporting documents were required before a meeting could be arranged, regardless of the complaint to this Office.

By letter dated 21 January 2019, the Complainants noted that the second Complainant had phoned the Provider to set up a meeting and that this request was refused on two separate phone calls. They further state that in a third phone call, the Provider's representative hung up on her. The Complainants reiterated their complaint about the use of third-party call centres outside the jurisdiction. The Complainants provided the mobile number of the second Complainant which they indicated could be given directly to the relationship manager to set up a meeting.

By letter dated 21 January 2019, the Provider wrote to the first Complainant stating that it required further information to complete an assessment and set out a list of information required by the Provider in that regard to include: two months of payslips, bank statements for three months, social welfare receipts, and any proof of other income that should be considered. The letter requested that the documentation be returned within 20 business days. The letter noted that:

> "*if you fail to send us the information required to complete the assessment you are at risk of losing the protection of the Mortgage Arrears Resolution Process (MARP), if you have not already lost his protection. This means that we may start legal proceedings to repossess your property*."

The second Complainant phoned the Provider on 28 January 2019 in response to a text message she had received. The Provider indicated that it had been awaiting supporting documentation since 18 January, but the second Complainant informed her that the promised letter itemising the required documentation had not yet been received. She was advised that the representative would arrange for the letter to be re-sent. The second Complainant referred to the request on the 14 January letter to ring the Provider to arrange a meeting. The Provider reiterated the list of documents required from the Complainants and noted the letter would be re-sent. The second Complainant was not satisfied that the documents had to be submitted before the meeting was arranged, in light of the 14 January letter. She was advised that she could arrange a meeting by phone or in branch once the documents were received.

By follow-up letter dated 28 January 2019, the Provider wrote to the first Complainant noting its requirement for additional information to enable it to complete a full assessment of his financial circumstances and requesting that he urgently contact the Provider on a given telephone number, to complete the assessment. The letter noted as follows:

> "*This matter requires urgent attention, if we do not hear from you, we may consider you as not cooperating under the Code of Conduct on Mortgage Arrears, the protection of the Codes Mortgage Arrears Resolution Process may cease (if you have not already lost this protection)*."

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By letter dated 5 February 2019, the Complainants responded to the Provider's letter dated 21 January attaching documentation which had been requested by letter and phone. It is unclear what documentation was sent with this letter as it has not been furnished to this office.

In relation to the letter dated 28 January 2019, the Complainants stated that they were declining the request to phone, on the basis of their entitlement to communicate in writing. By letter dated 5 February 2019, the Provider responded to the Complainants' letters of 17 January and 21 January 2019. The Provider noted that the second Complainant spoke to a staff member in the ASU on 18 January 2019 regarding the setting up of a face-to-face meeting with an account manager. The letter noted that the second Complainant was informed that the Provider would require supporting documentation to progress matters regarding the account. The letter advised that the ASU is the most appropriate department to deal with the mortgage and noted that the second Complainant had subsequently spoken to another staff member in ASU on 28 January 2019 about the account and the requirement for supporting documentation. By letter dated 12 February 2019, the Provider also responded to the letter of 5 February 2019 which it noted had been forwarded to the ASU.

By letter dated 14 February 2019, the Provider wrote to the second Complainant encouraging her to phone it to speak about the mortgage repayments. In response by letter dated 21 February 2019, the Complainants declined the request to phone the number on the grounds that they were entitled to communicate in writing. The Complainants reiterated their willingness to meet with the relationship manager in their local branch without prejudice to the ongoing complaint to this Office.

By letter dated 25 February 2019, the Complainants were notified that they had been classified as not cooperating. The letter stated that the Provider had made several unsuccessful attempts to contact them, and included warnings about the implications of classification. It stated that the Complainants were required to repay outstanding arrears balances and that legal proceedings could commence immediately and that they were outside the MARP process. The letter informed the Complainants that they had a right to appeal the decision in writing within 20 days of the date of the letter, explaining the reason for the appeal.

It is apparent from the letters and phone calls between the parties in January and February 2019 that the parties were going in circles. The Provider made it clear on several occasions that it required certain listed items of supporting documentation in order to consider the Complainants' financial circumstances. It is apparent that certain documentation was sent by the Complainants by letter dated 5 February 2019 but as stated above, it is unclear to me what documentation was sent. In circumstances where certain of the required documentation was in fact sent to the Provider at this time, the decision to classify the Complainants as non-cooperative by letter dated 25 February 2019 seems to me to have been unreasonable. If the Provider was dissatisfied with the documentation that it had received, it was incumbent on it to send a further letter to the Complainants indicating specifically the further documentation that it required. It appears from more recent correspondence with this Office that the first Complainant did not have any income at the

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time and does not have a bank account. I am satisfied that the Provider was informed by the second Complainant that the first Complainant did not have any income at that time.

I am of the view that it was unreasonable for the Provider to classify the Complainants as uncooperative without first having identified any alleged deficiency with the documentation that was sent, and given the Complainants a further opportunity to send additional documentation. My concern in this regard is compounded by the fact that the Provider's communications to the Complainants repeatedly insisted on discussing the outstanding arrears and documentation, even though they were aware that the first Complainant had difficulties with his hearing and had repeatedly requested that all communications be in writing. As set out above, the Provider had made a commitment to the Complainants in 2015 that future communications would be pursued in writing. In all the circumstances, the Provider's approach was unreasonable and unfair and the Complainants should not have been classified as uncooperative on 25 February 2019. This classification should therefore be removed from the Complainant account.

In relation to the suggestion by the Complainants that there were not in a position to discuss the mortgage arrears while a complaint to this Office was pending, I agree with the Provider that the terms and conditions relevant to the mortgage account continued to be applicable while the complaint is being investigated. It was therefore not appropriate for the Complainants to refuse to engage with the Provider in relation to their arrears, on this basis.

Communications More Generally

I am not satisfied based on the evidence before me that communications from the Provider to the Complainants, and in particular this telephone calls to the second Complainant, have been intimidating or harassing in nature. The Provider has submitted that telephone is the primary means by which it communicates with borrowers in arrears. From at least November 2015, however, it committed to the use of written communications with the Complainants in future. It is patently obvious that this commitment has not been met by the Provider. It appears that the second Complainant has been in a position to make some phone calls to the Provider and does not appear to have had any particular difficulty in this regard, other than perhaps when the line has been bad. There is no clear explanation from the Complainants as to why the second Complainant cannot communicate with the Provider by way of telephone. I accept that the first Complainant cannot do so due to hearing difficulties. In any event, the Provider made commitments to communicate with the Complainants by way of written communications only and it would not be reasonable for it now to renege on this commitment.

The Provider should therefore ensure that all communications with the Complainants should henceforth be by way of written communications and perhaps by the arrangement of meetings to discuss the Complainants' arrears position and current financial difficulties. The Complainants ought to comply with any requests to furnish information and documentation to the Provider in advance of any such meeting, to streamline the process. It is incumbent on both parties to cooperate with one another if there is any realistic possibility that a repayment arrangement can be agreed between them.

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The Appeal

By letter dated **4 March 2019**, the Complainants stated that

> "*we fully intend appealing the decision to classify us as non-cooperating, in this regard we now demand that you furnish us with a person's name who will act as our point of contact during our appeal*".

The Complainants refuted the assertion that they had not cooperated with the Provider and reiterated their entitlement to communicate with the Provider in writing. The letter also noted that the Provider was in breach of its own commitment from July 2015 that future communication be in writing only. An appeal acknowledgement letter was sent to the Complainants by letter dated 8 March 2019. In response, the Complainants wrote to the appeal point of contact by letter dated 14 March 2019 demanding that it cease the appeal until such time as the Complainants made a full submission. They noted that their letter of 4 March 2019 expressed their intention to make an appeal but stated that they had not yet submitted a written appeal and were still within the appropriate timeframe to do so. By letter dated **18 March 2019**, the Complainants appealed the non-cooperation decision, reiterating their entitlement to communicate with the Provider in writing and noting the Provider's failure to remove the original non-cooperating status in 2015 as promised. They also enclosed the correspondence file in 2018 which they argued clearly demonstrated that they engaged with the Provider and responded to all letters received. I note that this appeal letter was not formally acknowledged by the Provider, but that the initial letter of 4 March 2019 was so acknowledged as an appeal and that an appeal update letter was issued on 28 March 2019. By letter dated 5 April 2019, the Complainants were informed that the appeal had been considered but that it was not successful. The stated basis for this decision was that the Appeals Board found that the decision to classify the Complainants as non-cooperating borrowers was correct. The Complainants were asked to complete a Standard Financial Statement to assess their financial circumstances with a view to identifying a suitable ARA.

I accept that the Complainants did not wish for their letter of 4 March 2019 to be treated as appeal of the classification decision. However, due to the wording of the letter and by requesting the appeal point of contact, it is understandable that confusion arose on the part of the Provider. Considering that the Appeal Board took into account the formal letter of appeal subsequently submitted by the Complainants dated 18 March 2019 in considering the appeal, I am of the view that it would not be appropriate to uphold this aspect of the complaint. As is clear from the above, however, I am of the view that the appeal ought to have been upheld and the non-cooperative status removed from the account.

3. Location of Arrears Support Staff

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The complaint concerns the fact that the Provider's ASU appears to be located outside the jurisdiction. The Provider has not denied the fact that (at least some of) its arrears support staff are based in a call centre in the UK. It argues that the relevant staff are part of its wider banking group and are appropriately trained to deal with the arrears. It further appears that borrowers are not obliged to ring an international number to contact the ASU.

I note that under Provision 17 CCMA, a lender such as the Provider must establish a centralised and dedicated Arrears Support Unit (ASU), which must be adequately staffed, to manage cases under the MARP. It is clear that the Provider has such an ASU which handles accounts in arrears and to which borrowers in arrears are directed to discuss their financial circumstances. Numerous letters were sent to the Complainants from the Provider's ASU and several phone calls took place between the second Complainant and the Provider's ASU. There is nothing in the CCMA that mandates that an ASU must be located within Ireland. The essential issue is that all customers have access to the support and assistance of a dedicated ASU and that this ASU complies with the procedures and policies laid out in the CCMA. Other than in relation to the deficiencies in communications already outlined above, I am not satisfied that the Provider's ASU has failed to meet these criteria.

Further, and as already mentioned, I am not in a position to investigate whether the present position has resulted in any breaches of data protection legislation. I do not accept the Complainants' arguments that the fact that these arrears staff may be employed by a separate legal entity, results in any evidence that they wish to give amounting to inadmissible hearsay. It is unclear what, if any, submissions by the Provider the Complainants wish to exclude on this basis. In any event, I do not accept that a complaint can be upheld on this basis. Firstly, once of the principal functions of this Office is to investigate complaints in an appropriate manner proportionate to the nature of the complaint by informal means per ***Section 12*** of the ***Financial Services and Pensions Ombudsman Act 2017*** ("FSPO Act"). The conduct of investigations must be undertaken in a manner that this Office considers appropriate in all the circumstances of the case and in a manner that is appropriate and proportionate to the nature of the complaint per ***Section 56(1)*** of the ***FSPO Act 2017***. It would not therefore be appropriate for this Office to apply strict evidential rules of hearsay when adjudicating complaints. Secondly, the case of *Ulster Bank v Dermody* [20-14] IEHC 140 relied on by the Complainants is no longer considered to represent the position of the Court, in light of the Supreme Court decision in *Ulster Bank Ireland Ltd v O'Brien* [2015] 2 IR 656.

I am therefore not willing to uphold this aspect of the complaint.

As explained above, I consider it appropriate to uphold the complaints against the Provider in relation to its classification of the borrowers as non-cooperating and its ongoing failure to communicate with the Complainants in writing. I must reject the complaints in relation to the suggested existence of an Alternative Repayment Arrangement and the location of the Provider's arrears support staff outside the jurisdiction.

In relation to the Provider's suggested unreasonable classification of the borrowers as non-cooperating, I propose to direct that the Provider remove this classification from the

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Complainants' mortgage account. I further propose to direct that a sum in compensation be paid to the Complainants to reflect:-

- the two instances whereby they have been wrongfully classified as non-cooperative;

- the Provider's failure to remove the first incorrect classification for almost three years despite its commitment to do so; and

- the Provider's ongoing failure to comply with its own commitment to communicate with the Complainants in writing only.

It appears that it is this latter failure to communicate with the Complainants in writing, that led directly to the two incorrect non-cooperative classifications being made. I note that the Provider has accepted full responsibility for the wrongful July 2015 classification, its failure to remove this classification from the account, and certain instances of failure to communicate with the Complainants in writing. In that regard, it has offered a combined compensation figure of €5,000 to the Complainants. It has defended its decision to classify the Complainants as non-cooperative in February 2019 and it is unclear to me what position it is adopting in relation to its more recent failure to communicate with the Complainants in writing, in spite of the 2015 commitment. As I have made clear, it is my firm opinion that the February 2019 classification was also wrongful and the Provider is in ongoing breach of its commitment to communicate with the Complainants in writing only. It is on that basis that I am partially upholding this complaint.

When the Preliminary Decision was issued to the parties, I indicated my opinion that the sum of €5,000 was adequate compensation to the Complainants in relation to the admitted failures by the Provider, which it has repeatedly acknowledged. I also explained my opinion that an additional sum of compensation was appropriate for the Complainants regarding the additional failures of the Provider in wrongfully classifying the Complainants as non-cooperating in February 2019, and in its continued failure to communicate with the Complainants in writing. Accordingly, I indicated my intention to direct the Respondent Provider to remove the non-cooperating classification from the Complainants' mortgage account, as a priority, and in addition to make a total compensatory payment of €7,000 to the Complainants, by making that lump-sum payment to the Complainants' mortgage account, to be applied against the arrears outstanding.

Following the issue of a Preliminary Decision to the parties on 11 November 2019, the Complainants made a submission regarding the procedural requirements governing the conduct of mediation within this office and the limit of the scope of documentation available to the FSPO for the purpose of the formal investigation. The Complainants also suggested that it would represent a more equitable outcome if the compensation (which they believe ought to be at a higher level) was paid directly to them, rather than off-set against the arrears on the account.

The Provider, in its subsequent submission made it clear that it did not accept that there had been any breach of the terms of any confidential discussions at mediation stage. It

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pointed out that in its Final Response Letter of 12 November 2015, it had made a redress offer of €2,000 to the Complainants which was not accepted. It also pointed to Appendix M of its formal investigation response dated 2 February 2017 when it put an increased offer of €4,000 to the Complainants, in open correspondence. The Provider also referred to its letter of 25 July 2018 sent in open correspondence, when it made an offer of €1,000 to the Complainants (bringing its total offer to €5,000).

Subsequently, the Complainants made a further submission to the effect that

> "*surely the Adjudicator should have noted that these sums were offered under "mediation", and therefore should have immediately stopped the investigation, directed that the file be completely redacted of all monetary sums including all recent submissions that contain such monetary sums. It should then be handed to another Adjudicator for assessment who would not be familiar with our case."*

It is important for both parties to understand that the formal investigation file contained no details whatsoever of (i) any of the discussions between the parties or (ii) any offers made as between the parties, during the course of the mediation undertaken within this office, prior to the referral for formal investigation in January 2017. The revelation of any such detail outside of the confidential Dispute Resolution Services division of this office, would run completely contrary to the processes and practice of the FSPO, in ensuring very firm boundaries between informal mediation and formal investigation. If indeed any "off the record" offers were made during mediation, in the same or similar terms, as were subsequently made on the record by the Provider, within the communications which are detailed above, it is important to note that no person who played any part in the adjudication of this complaint, was aware of this coincidence.

Whilst I note that the Complainants believe that a higher sum of compensation should be directed by this office, I am satisfied that the overall figure of €7,000 is adequate in the circumstances outlined above.

In addition, whilst the Complainants would wish to receive that compensatory payment, I believe that in all of the circumstances, it is more appropriate to direct the Provider to apply that compensatory figure towards the arrears which currently stand on the account.

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld on the grounds prescribed in ***Section 60(2)(b) & (g).***

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €7,000, by making that lump-sum

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payment to the Complainants' mortgage account, to be applied against the arrears outstanding within a period of 35 days of today's date. 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 should confirm the application of that payment to the mortgage balance, by writing to the Complainants, once this has been put into effect.

- 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

20 January 2020

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.