



<u>Decision Ref:</u>	2020-0032
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Increase in interest rate Lost or mislaid title deeds Maladministration
<u>Outcome:</u>	Partially upheld

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

In February 2004, the Complainants took out a loan with a Third Party on foot of a Facility Letter dated **03 February 2004**. An amount of €250,000 was advanced, to be repaid within a period of 18 years. This loan is now owned by the Provider, following the sale of the loan by the Third Party to the Provider against which this complaint is made on **20 February 2015**.

The Complainants state that they had an arrangement with the Third Party that they paid an amount of €800 per month covering interest and part capital only. This payment was made on the basis that the Complainants planned to put their home on the market in 2016. It was the Complainants' intention to use the proceeds from the sale of the house to pay the remaining capital sum outstanding to the Provider.

The Complainants' Case

The Complainants submit that they have made every effort to engage with the Provider in order to reach an arrangement in relation to their mortgage repayments. However, they state that the Provider has failed to engage with the Complainants satisfactorily.

The Complainants received a letter dated **01 May 2015** from the Provider to inform them that:

“As at the 1st of this month your account is now a total of €27,276.59 in arrears which is the equivalent of 6.42 current payments missed”.

The Complainants responded to the Provider by letter dated **12 May 2015** setting out the repayment arrangement they had with the previous owner of the loan. The Complainants requested that the Provider accept their proposal to continue monthly repayments of €800 per month until their house is sold. It was the Complainants' intention upon the sale of their house to pay the Provider the remaining capital sum outstanding.

The Complainants received a letter from the Provider dated **13 May 2015** enclosing a Standard Financial Statement for the Complainants to complete.

The Complainants wrote a letter to the Provider on **31 May 2015** requesting a reply from the Provider in relation to their repayment proposal. The Complainants put forward an alternative option to the Provider to negotiate a reduced loan.

The Complainants wrote to the Provider on **27 July 2015** enclosing a copy of their completed Standard Financial Statement and again requested a reply to their proposals.

The Complainants received a letter from the Provider dated **13 November 2015** requesting additional information from the Complainants in order to progress a full assessment of the Complainants' case.

The Complainants wrote to the Provider on **05 January 2016** in relation to the lack of engagement by the Provider. The Complainants had not received any response to their letters dated **12 May 2015** and **31 May 2015**. The Complainants state that they did not receive a response to their Standard Financial Statement until **18 November 2015**. The Complainants further state that they received an arrears letter dated **01 November 2015** from the Provider. The Complainants state that they do not accept that they were in arrears.

The Complainants received a letter dated **11 January 2016** from the Provider requesting further information to complete its assessment of their financial circumstances.

The Complainants wrote to the Provider by letter dated **07 January 2016** to complain about the management of their account and the time it has taken for the Provider to respond.

The Complainants received a letter dated **11 February 2016** from the Provider:

“We have completed our assessment of your Standard Financial Statement (SFS) and conclude that we are unable to offer you an alternative repayment arrangement (AFA) or restructuring of your mortgage for the following reason(s):

Your SFS shows that you can afford to pay €949.67 towards your monthly mortgage repayments of €4,242.90”

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The Complainants received a letter dated **02 March 2016** from the Provider in relation to the complaint made by the Complainants on **07 January 2016**.

The Provider accepted that the Complainants did not receive an adequate level of service and a lengthy delay in responding to the Complainants' first Standard Financial Statement.

The Provider's Case

The Provider states that the Complainants were dissatisfied with the completeness of its responses and delays in responding to correspondence, in particular, the request to put an arrangement in place in May 2015.

The Provider further states that the Complainants were dissatisfied that the Provider was unwilling to offer a reduced payment arrangement in the absence of a completed Standard Financial Statement.

The Provider accepts that on occasion there were delays in responding to the Complainants' correspondence and have apologised for this delay.

In relation to the refusal to accept the Complainants' proposal for reduced payments of €800, the Provider submits that it explained to the Complainants that before any arrangement could be established, it is obliged to assess the Complainants' affordability and the suitability of the available options within its Mortgage Arrears Resolution Process.

The Provider states that the Complainants were aware that it was not in a position to agree to their proposal to pay €800 per month until the Complainants completed the Standard Financial Statement assessment process. The Provider continued to accept the amount of €800 while the Standard Financial Statement was being progressed.

The Provider states that it is satisfied that it followed the Code of Conduct on Mortgage Arrears in that a full assessment was made against the information provided by the Complainants in the context of the available options and the conclusion was that no sustainable options were available. This outcome was communicated to the Complainants.

The Provider states that the Complainants' submission relating to its failure to accept an offer of a discounted settlement figure is based upon a belief that the Provider is obliged to accept a discounted settlement figure. The Provider does not accept this is the case and its credit policy is based upon achieving repayment in full where the proceeds of sale of the security address exceed the outstanding balance.

The Provider states that the Complainants were dissatisfied with the level of engagement with the Provider. The Complainants state that the Provider's engagement with them had blighted their lives with unceasing stress through phone calls, arrears letters and requests for continuous information. The Provider states that its review does not bear out these assertions and the Provider is satisfied that all of its engagements with the Complainants have been courteous and professional at all times.

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The Complaint for Adjudication

The complaint for adjudication is that the Provider did not engage in a satisfactory manner with the Complainants to come to an arrangement in relation to their mortgage repayments. The Complainants further complain that the Provider caused stress due to unceasing phone calls, arrears letters and threats of extra interest and charges.

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.

A Preliminary Decision was issued to the parties 12 December 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 issue of my Preliminary Decision, the following submissions were received from both parties:

1. Letter from the Provider to this Office dated 3 January 2020, together with attachments.
2. E-mail from the Complainants to this Office dated 13 January 2020.
3. Letter from the Provider to this Office dated 28 January 2020.

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The above submissions were exchanged between the parties.

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

Before turning to the issue at hand, I must point out the jurisdiction of this Office in complaints regarding the Code of Conduct on Mortgage Arrears (CCMA) and Mortgage Arrears Resolution Process (MARP). This Office can investigate the procedures undertaken by the Provider regarding the MARP, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of 60(2)(b) of the Financial Services and Pensions Ombudsman Act 2017.

The Complainants submit that following the sale of their loan to the Provider they attempted to engage with the Provider to reach an agreement to pay a monthly re-payment of €800. It was their intention to put their house on the market in March 2016 and use the proceeds from the sale of the house to clear their mortgage with the Provider.

The Provider accepts that there were delays in responding to the Complainants correspondence. However, I note from the documentary evidence before me that the Provider submits:

“Reviewing the interactions with the Complainants between the initial contact and the subsequent responses we believe that the team members understood that the borrowers were aware that the proposals made could not be considered and that the Complainants understood that the proposals in their letters would be subject to the subsequent SFS assessment”

The Provider has obligations pursuant to the Code of Conduct on Mortgage Arrears 2013 (the CCMA 2013). Provisions 36, 37, 39 and 40 of the CCMA 2013 state that:

“36. A lender’s ASU must examine each case on its individual merits.

37. A lender’s ASU must base its assessment of the borrower’s case on the full circumstances of the borrower including:

- a) the personal circumstances of the borrower;*
- b) the overall indebtedness of the borrower;*
- c) the information provided in the standard financial statement;*
- d) the borrower’s current repayment capacity; and*
- e) the borrower’s previous repayment history.*

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39. *In order to determine which options for alternative repayment arrangements are viable for each particular case, a lender must explore all of the options for alternative repayment arrangements offered by that lender. Such alternative repayment arrangements may include:*

- a) interest only repayments on the mortgage for a specified period of time;*
- b) permanently reducing the interest rate on the mortgage;*
- c) temporarily reducing the interest rate on the mortgage for a specified period of time;*
- d) an arrangement to pay interest and part of the normal capital amount for a specified period of time;*
- e) deferring payment of all or part of the scheduled mortgage repayment for a specified period of time;*
- f) extending the term of the mortgage;*
- g) changing the type of the mortgage;*
- h) adding arrears and interest to the principal amount due;*
- i) equity participation;*
- j) warehousing part of the mortgage (including through a split mortgage);*
- k) reducing the principal sum to a specified amount; and*
- l) any voluntary scheme to which the lender has signed up e.g. Deferred Interest Scheme.*

40. *A lender must document its considerations of each option examined under Provision 39 including the reasons why the option(s) offered to the borrower is/are appropriate and sustainable for his/her individual circumstances and why the option(s) considered and not offered to the borrower is/are not appropriate and not sustainable for the borrower's individual circumstances."*

The Complainants submitted a standard financial statement to the Provider on 27 July 2015 with a specific request to continue the arrangement that was in existence prior to the sale of the loan to the Provider until the Complainants sell their home.

It is not a requirement of the CCMA that all of the options listed in Provision 39 be considered by the lender, but rather that all of the options "*offered by that lender*" be considered. In my Preliminary Decision, I stated, "*I have no evidence that the Provider did in fact explore all of the options for alternative repayment arrangements offered by that lender*"

In its post Preliminary Decision submission dated 3 January 2020, the Provider took issue with this statement and in doing so, drew attention to a report attached to its submission but also submitted in previous evidence and titled "*MARP Review Detail Report*" which it had undertaken in relation to the Complainants' loan. The Provider submits that "*the report is used as part of our Standard Financial Statement assessment process for the purpose of evidencing our considerations in accordance with Provision 39 and documenting those considerations in accordance with Provision 40*".

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Having considered the Provider's post Preliminary Decision submission and the document referred as previously submitted in evidence, I accept that the Provider did in fact explore all of the options offered by it in terms of alternative repayment arrangements in considering the Complainants' loan account.

I note that the Provider's letter to the Complainants sets out:

"We have completed our assessment of your Standard Financial Statement (SFS) and conclude that we are unable to offer you an alternative repayment arrangement (AFA) or restructuring of your mortgage for the following reason(s):

Your SFS shows that you can afford to pay €949.67 towards your monthly mortgage repayments of €4,242.90".

Accordingly, I now accept that the Provider has adequately documented its consideration of each option under Provision 39 to the Complainants and complied with the requirements of Provisions 39 and 40 of the CCMA 2013.

I note the Complainant in a post Preliminary Decision submission dated 13 January 2020 in reference to the documentation outlined above states *"their report which we haven't seen until now was signed on 10th February 2016. It was our intention to sell at the best time from our financial point of view because of the stress caused by our dealings with [Provider] we sold in February 2017 (not to our advantage) and paid the mortgage in full"*.

I would point out that the report was in fact exchanged with the Complainants on 18 August 2017.

The Complainants also point out that the Provider has stated that the mortgage was on a standard variable rate when it was in fact on a tracker mortgage rate. The Provider accepts that the mortgage was on a tracker mortgage rate. This is not, in any event, material to the dispute in hand.

Provision 45 of the CCMA 2013 provides that:

*"45. If a lender does not offer a **borrower** an alternative repayment arrangement, for example, where it is concluded that the mortgage is not sustainable and an alternative repayment arrangement is unlikely to be appropriate, the lender must provide the reasons, on paper or another **durable medium**, to the **borrower**. In these circumstances, the lender must inform the **borrower** of the following:*

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

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

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

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

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

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

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

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

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

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

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

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

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

I accept that the Provider's letter dated 11 February 2016 complied with its requirement under Provision 45 of the CCMA 2013.

Having considered the documentary evidence before me, I accept that there is no obligation on the Provider to accept a proposal put forward by a customer. However, the Provider did not engage in an efficient manner with the Complainants. The Provider could have provided clearer information to the Complainants to ensure that the Complainants understood that their proposals could not be considered until the standard financial statement had been received by the Provider.

I partially uphold the complaint in that while I accept the Provider complied with its obligations under the CCMA, it did not engage in a satisfactory manner with the Complainants.

In my Preliminary Decision, I indicated my intention to direct the Provider to make a compensatory payment of €3,000 to the Complainants for the inconvenience caused. However, as I now accept that the Provider did meet its obligations under the CCMA, I believe a more appropriate amount of compensation for the lapses in communication is €2,500.

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), (f) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €2,500, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

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

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

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

26 February 2020

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Pursuant to *Section 62 of the Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,
and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.