An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0054
Sector:	Banking
Product / Service:	Commercial Mortgage
Conduct(s) complained of:	Arrears handling - buy-to-let Delayed or inadequate communication Level of contact or communications re. Arrears Maladministration
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainants' mortgage loan accounts held with the Provider.

The complaint is that between **2013** and **2016** the Provider dealt with the Complainants' mortgage loan accounts in an unacceptable manner, and failed in its duty of care to the Complainants.

The Complainants' Case

The first Complainant submits that he was an employee with the Provider from **1985** to **2000**. The Complainants state that in or about **1989** they took out a commercial mortgage account on a 'buy to let' property in Dublin 2 and, in or about **2003**, they took out another mortgage to buy an investment property in South East Ireland for €135,000, secured by a further charge on the first 'buy to let' property. The Complainants submit that they subsequently obtained a further loan of circa €12,000 to carry out repairs and refurbishment on the property in the South East, which was also secured by way of a further charge on the Dublin 2 property. The Complainants submit that all three loans were performing well.

The Complainants submit that in the late 1990s they applied to place all of their investment loans on an 'Interest Only' basis. The Complainants submit that this was accepted, initially for a five year period which was renewed, on expiration, for a further five years. The

Complainants contend that in or around **2008** there was difficulty with the property in the South East, stating:

> "*There were several void periods, some lasting several months. Sometimes we were depending on the income of the [Dublin 2] property to pay these loans. Reluctantly, [the Provider] agreed to renew the Interest Only period for a further six months. And equally reluctantly, [it] renewed for a further six months*".

The Complainants state that they made two proposals to address their situation. The first was to increase their monthly repayments by as much as they could afford, more than the interest due but not the full Capital and Interest sum. The Complainants contend that the Provider ignored this proposal. The second proposal was to sell one, if not both properties that they owned abroad, which had no mortgages. The Complainants contend that this proposal was also ignored by the Provider. The first Complainant submits that he received a telephone call from the Provider in *"early 2014"*, and states that the Provider's representative:

> "*…. said that my case had been reviewed and the decision made that we were to sell the [Dublin 2 property], and if this was not done within three months a receiver would be appointed and we would be liable for his costs. We were stunned at this approach and it was made clear that it was not up for discussion*".

The Complainants submit that the Provider asserted their loans were unaffordable, and that it had to realise the security in order to protect its position. The Complainants state that their property portfolio at all times was valued in excess of their liabilities.

The Complainants contend that:

> "*There was a cashflow squeeze following the financial crash around 2008. This was a nationwide phenomenon, that was totally unforeseen by anybody and was not just limited to me. Some forbearance was all that was required to allow the market to regain some equilibrium and all their loans would have been discharged. As a result of their unthinking and hasty actions, my pension plans are in ruins, and they have the makings of a bad debt*".

The Complainants state that the Provider acted unprofessionally by:

> *"Forcing the sale of the one property that was consistently producing good rental, which was the "jewel" in the portfolio".*
>
> They further state:
>
> *"It was the only property that [it] had a legal charge over, so [it] did not consider any other option, even though there were several alternative methods that would have ensured a happy outcome".*

/Cont'd…

"We were not allowed any input into this decision. We tried, at all times to be co-operative, and suggested other viable solutions. These were ignored or dismissed without consideration".

"The very fact that this dispute has dragged on for nearly three years is down solely to the behaviour of the [Provider]. [It has] ignored correspondence from me, from my solicitor… [Its] farcical behaviour in appearing to accept a genuine offer and then deciding that it was not acceptable after all, would not leave you believing you were dealing with an institution that is on top of its game".

The Complainants are also unhappy that they incurred a *"Significant Capital Gains liability"* when their Dublin property was sold, and that the Provider *"never mentioned"* this possibility during the sale process. The Complainants contend that in order to meet the cost of this liability, they had to sell their South East property *"for a sale price of €30k, when its then market value, even in a distressed market, was €55k"*.

The Complainants submit that a series of convoluted correspondence between them, their representative and the Provider ensued after the sale of the investment property in the South East. The Complainants state that:

"*It was protracted, because [the Provider] took an inordinate amount of time to respond to the most simplest of requests. That and the fact that the case seemed to be dealt with by a new official everytime, meant that what was a relatively simple problem has dragged out for several years. This refusal to engage reached a highpoint in early 2014, when our solicitor was forced to send a registered letter to [the CEO of the Provider] demanding a response at the pain of judicial proceedings*".

The Complainants submit that they subsequently received a letter from the Provider on **11 June 2014** which addressed up to seven points they had raised. The Complainants state:

"*The letter contains six separate apologies for the manner in which [the Provider] had acted to date. It also contained several inaccuracies or at least points on which we absolutely disagree. It finished off by saying that the account manager in [a branch of the Provider] would be in touch to arrange a meeting*".

The Complainants contend that when they met with two of the Provider's representatives in **June 2014**, the meeting was unsatisfactory as the representatives had nothing to offer. The Complainants state that they were asked at this meeting to complete another Standard Financial Statement (SFS) and then write to the Provider with proposals to conclude the issue. The Complainants submit that they subsequently offered €5,000 in full and final settlement, and that a representative of the Provider telephoned them to advise that the offer was unacceptable, and that it was offering no discount on the outstanding balance. The Complainants state:

"*The issue stood there, for several months, during which we continued to pay the interest portion on the outstanding loan we heard nothing further from [the Provider], other than automated arrears notices*".

/Cont'd…

The Complainants assert:

> "*Both of us were retired at this stage, and other than a small rental income, we relied on our savings until we reached an age when our pensions would kick in. This matter was hanging over us and showing no sign of being resolved, and affecting [the second Complainant's] mental well being*".

The Complainants submit that the second Complainant's family offered financial assistance to resolve the issue, and their representative wrote to the Provider on **21 September 2015** offering €28,000 in full and final settlement. The Complainants state that:

> "*Aware from previous experience, that this offer may well languish in somebody's In Basket for several months, we put a condition on it that if we failed to hear from [the Provider] within 14 days, we would assume that this was acceptable and proceed to lodge the funds in full and final settlement. We received an immediate response, requesting confirmation that our financial circumstances had not changed. We responded immediately, confirming no alternation in our material circumstances. Since we heard no further, after three weeks, in September 2015, we proceeded to lodge the €28,000, and our solicitor wrote to [the Provider], confirming this course of action and also confirming that her files on the matter were now closed*".

The Complainants submit that they subsequently received telephone calls from the Provider's arrears department *"at all hours of the day and night"*, and explained each time that the matter had been resolved and that they assumed this was an error on the part of the Provider. The Complainants state that:

> "*Eventually, after a few months of this we had to get [our solicitor] to contact [the Provider] and try to get them to stop phoning us. To our utter amazement it then transpired that [the Provider] had no knowledge or awareness of the above details and were insisting that we still owed the full amount. [The Provider] subsequently stated that our "tactic" of putting a time condition on the offer was unacceptable. That it was not open to one party to unilaterally dictate the terms of a settlement*".

The Complainants state:

"We wish to discharge all our liabilities. However, we feel the actions of the [Provider] has had a huge impact on our finances, and the final settlement figure should reflect this".

The Provider's Case

The Provider does not accept that the Complainants were forced to sell the property, and further submits that it was first recommended to the first Complainant to sell the property in Dublin during a conversation on **30 November 2010** when the Complainants were seeking a further interest only period. The Provider submits that since this date the Complainants have availed of further interest only periods across the three accounts that were secured on the property.

/Cont'd…

The Provider submits that the final period of 'interest only' applied to all of the accounts from **October 2012** was for a period of 6 months. The Provider stated in a letter to the Complainants' representative dated **11 June 2014**:

> "*It was discussed at the time this was approved that your clients would have to consider disposing of some assets during these 6 months*".

The Provider submits that it received a further request for interest only on expiry of this arrangement, and during the telephone call of **8 April 2013** it advised that it would not be willing to offer another period of 'interest only' as it was not a long term solution.

The Provider states in its letter to the Complainants' representative in **June 2014** that:

> "*At this time we were limited to the forbearance that we could offer on rental properties and [the first Complainant] was advised that he would have to consider selling the Irish property if there was difficulty selling the Spanish one. He was advised that if he was agreeable to the sale of the Irish property we would require a letter from an estate agent confirming estimated time to sell and guide price. [The first Complainant] was also advised that if he wanted we could look to put an interest only arrangement in place for 3 months to allow the property to sell and if it failed to sell after that [the Provider] would look to appoint a receiver to look after the sale. This call ended with [the first Complainant] agreeing to discuss it over with [the second Complainant] and that he would revert back*".

The Provider goes on to state that on the first Complainant's return call to the Arrears Support Unit (ASU) on **16 April 2013**, he advised that they had considered the matter and that they were going to go ahead and sell the property in Dublin. The Provider submits that the first Complainant:

> "*…. did state that he had hoped to keep on to this property but that the reality was selling [the property abroad and the property in the South East] would not generate enough funds and that there would be too much of a shortfall to reduce the debt down to an affordable level*".

The Provider issued a Final Response Letter to the Complainants on **11 June 2014** on foot of correspondence from them regarding a number of issues, including:

- The Capital Gains liability incurred by the Complainants after the sale of the Dublin property
- The delay in reducing the capital balance of the account (cheque received by the Provider on **23 September 2013**, but the balance on the account was not amended until **January 2014**)
- Lack of response from the Provider regarding the Complainants' proposal for a *"full and final settlement"* following the sale of the South East property
- The *"forced"* sale of the Complainants' properties

/Cont'd…

The Provider submits that it met with the Complainants **on 20 June 2014**, but that the Complainants *"had not submitted an SFS with supporting documents prior to this meeting"*. The Provider states that because the Case Managers were not supplied with the Complainants' financial information in advance, *"they were unable to look into what arrangement would suit the Complainants there and then"*. The Provider contends that it received a proposal on 27 June 2014 from the Complainants for *"€5,000 in Full and Final Settlement"* along with the required SFS, and that it reverted on **30 July 2014** to advise that *"there would be no compromise on the residual debt"*.
The Provider submits:

> *"The Case Manager advised that the previously agreed repayment of €500 was to be paid until the residual debt was paid off".*

The Provider contends that it received a letter from the Complainants' representative on **25 September 2014**, advising that the Complainants would pay the *"[interest only] and a little extra to cover the arrears at present"*, and also advising that the Complainants were prepared to sell one of their properties abroad *"and discharge the entire amount when it is sold"*. The Provider acknowledges that this letter was not responded to, and also acknowledges other service failings.

The Provider submits that it contacted the Complainants regarding the arrears on **18 May 2015**, and that the Complainants stated that they had been making repayments based on the above mentioned proposal rather than making the normal monthly repayments. The Provider states:

> *"This meant they were paying €200 per month rather than the €500 that they had requested in the past and was approved by [the Provider]"*.

The Provider submits that on **21 September 2015**, the Complainants' representative wrote to it in relation to the Complainants' mortgage loan account, The Provider submits that in this correspondence the Complainants proposed a lodgement of €28,000 in full and final settlement of the account and stated:

> "*If this is not acceptable I would like to hear from you, within 14 days, otherwise I will assume that it is in order to proceed*".

The Provider states it was an oversight that it didn't reply to this correspondence within the timeframe that had been requested. The Provider states:

> "*I apologise for this however, as you will appreciate it is not open to one party to unilaterally dictate the terms of a settlement. Accordingly, there is no settlement agreement in place and for the sake of clarity I can confirm that the Bank is not willing to accept the sum of €28,000 n full and final settlement of this matter*".

The Provider submits that any proposal submitted is subject to assessment, appropriate credit approval and is within the commercial discretion as to whether or not to accept a proposal submitted by customers.

/Cont'd…

The Provider submits that a lodgement in the amount of €28,000 was made to the Complainants' mortgage loan account on **29 October 2015**, and that correspondence was subsequently received from the Complainants' representative dated **29 October 2015** stating that this lodgement was made in full and final settlement of the residual debt outstanding. The Provider submits that the Complainants' representative confirmed that the Complainants had been advised to cease making repayments to the account and that their file was closed. The Provider submits that the payment of €28,000 was returned to the Complainants' representative on **18 December 2015.** It then received further correspondence from the Complainants' representative dated **8 January 2016** wherein the cheque for €28,000 was sent back to it and the Complainants' representative confirmed that the cheque would not be accepted as it had been paid in full and final settlement of the outstanding debt. The Provider submits that it again returned the cheque to the Complainants' representatives on **8 April 2016**.

The Provider submits that while it acknowledges that the Complainants are unhappy with calls from its ASU, the Complainants' account is "in arrears of over €30,000….. [the Provider] is obliged under legislation to contact the Complainants. The Provider states:

> "*The Complainants have not made any payments to the account, with the exception of the €28,000 lodgement that was returned to them, since 27 October 2015 when €200 was lodged to the account*".

The Provider submits that while the Complainants remain in arrears, and in the absence of payments being made to the account or a mutual agreement being reached, it will continue to make contact with the Complainants in relation to the arrears outstanding.

The Complaint for Adjudication

The complaint is that between **2013** and **2016** the Provider dealt with the Complainants' mortgage loan accounts in an unacceptable manner, and failed in its duty of care to them.

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

/Cont'd…

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 **13 January 2020**, 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.

The Complainants make the following arguments:

- The Provider *"forced"* the *"unnecessary sale"* of the Complainants' properties in Dublin and the South East;
- The Provider did not consider the alternative proposals put to it by the Complainants;
- The Provider did not inform the Complainants before the sale of their Dublin property that they would be subject to a Capital Gains liability;
- The Provider proffered poor customer service throughout.

The Complainants submit that they took out a commercial mortgage loan on a 'buy to let' property in Dublin in or around 1989, that the investment worked well and that all repayments were made as agreed. The Complainants contend that they took out another mortgage loan in or around 2003 to purchase another investment property for €135,000 in the South East, and that this mortgage loan was secured by way of a further charge on their Dublin investment property. They also contend that they offered the Provider further security of an equitable deposit of the title deed for the South East property, which was initially accepted by the Provider, but returned to them as unnecessary. The Complainants state that they subsequently took out a further loan of €12,000 to carry out repairs and refurbishment on the South East property, and that this loan was also charged on the Dublin investment property.

The Complainants submit that in the late 1990s they applied to place all of their investment loans on an 'interest only' basis. They further submit that this application was accepted by the Provider, initially for a five year period, and at the expiration of this period the agreement was renewed for a further five years.

The Complainants submit that by 2008, the economic downturn was affecting the performance of their 'buy to let' properties. They contend that the property in Dublin was in a prime letting area and was still performing well, but that there was difficulty with the property in the South East. The Complainants state that the Provider reluctantly agreed to renew the 'interest only' arrangement for two further six months periods, and submit that during this time they made several attempts to meet with a representative of the Provider

/Cont'd…

to discuss their situation. They submit that a meeting was not facilitated by the Provider. The Complainants contend that a representative of the Provider told them:

> *"… that he was not in a position to discuss our case or make any arrangements and would just submit any request up to the Underwriters. We were told to put anything we wished to discuss in writing and it would be considered*".

The Complainants submit that during this time they made two serious proposals to the Provider but received no response. The first proposal was to increase their monthly repayments by as much as they could afford; *"more than the interest due but not the full 'Capital and Interest figure"*. The second proposal was to sell one or both properties that they owned abroad with no mortgage loans attached. It is unclear precisely why the Complainants put such a *"proposal"* to the Provider. If the properties were unencumbered, it was at all times open to the Complainants to sell one or both, and to apply the proceeds to reduce their debts to the Provider without needing the Provider's permission to do this.

With regard to the forbearance granted to the Complainants, the Provider submits that the Complainants requested an 'interest only' repayment period on **16 August 2011** to allow them to sell their South East property. In this letter, which included financial information and a SFS, the Complainants stated:

> *"Revert the payment to 'Interest Only' and we will put the property on the market for €125k. This will result in a loss of c€25k. At that point we can discuss further the repayment of this amount over a long term loan"*.

The Provider's reply of **5 October 2011** stated:

> *"We confirm that the above mortgage account has been converted to interest only as requested. This adjustment has been backdated to September 2011…. This interest only period will end in May 2012"*.

In a letter to the Provider dated **22 May 2012**, the Complainants requested a further 'interest only' repayment period for twelve months, to allow them to sell a property abroad which they believed should sell *"within twelve months"*. They also stated that their South East property was currently rented. The Provider submits that it communicated to the Complainants at this point that it would only offer a further three months 'interest only' as the Complainants *"had been afforded significant forbearance prior to this"*.

The Complainants wrote again to the Provider on **25 June 2012**, asking the Provider to extend its offer of three months 'interest only' by *"at least six months"*. The Complainants state in this letter that there is *"nothing on the horizon that is going to change within three months….. This will simply result in us repeating this process again in three months' time"*. The Complainants went on to state that though the then current value of the South East property was *"€80/90k"* that they would, if the Provider wished, put that property on the market, in addition to the property abroad, *"to reduce the liabilities"*. The Complainants concluded their letter by stating that *"full repayments on these loans at this time, is simply impossible"*.

/Cont'd…

The Provider wrote to the Complainants on **19 July 2012**, approving 'interest only' repayments from **July 2012** to **September 2012**. The Provider submits that it expected the Complainants to revert to full capital and interest repayments after this time, but that when this 'interest only' period expired the Complainants requested a further 'interest only' period for between twenty four and thirty six months. The Provider contends that this was not acceptable, but that it did grant a six month 'interest only' period on foot of the Complainants' request, to allow the above mentioned properties to be sold.

The Provider submits that in **March 2013** the six month 'interest only' arrangement which had been in place on the mortgage loan account expired, and the account reverted to full capital and interest repayments of *"€1,701.76"* per month. The Provider states that its Arrears Support Unit (ASU) received a further application for forbearance from the Complainants on **8 April 2013**, and its ASU agent telephoned the first Complainant that day to discuss the application. The Complainants submit that they were informed by the Provider that their case had been reviewed and a decision made that they were to sell their investment property in Dublin. They further submit that the Provider stated that a receiver would be appointed, if the Dublin property was not sold in three months, and they would be liable for the costs.

The Dublin property was held as security over three separate mortgage loan accounts held by the Complainants.

The Complainants state:

> "*We were stunned at this approach and it was made clear that it was not up for discussion. Subsequently, [the Provider] suggested that the idea of selling the property came up in passing. This is not the case and [the Provider's representative] rang us with the express and only intention of informing us that the property had to be sold*".

The Complainants further state:

> "*It never made sense to sell the one property which was producing a steady cashflow. The rent received from this property – which was rising all the time – was more than sufficient to pay the interest on all our loans. It was, however, the only property over which the [Provider] had a legal charge*".

and:

> *"Technically, the Provider is correct in saying that it was our decision to sell the property…. In truth we were left with no option but to decide to sell, as they would appoint a Receiver within 3 months".*

The Complainants submit that as they had no alternative they sold their investment property in Dublin. The Complainants submit that:

/Cont'd…

> *"…the sale was completed within a matter of weeks and it subsequently transpired that we were facing a significant Capital Gains liability which was never mentioned by [the Provider] in our contacts during the sale process. There were three options "a) pay this liability from the proceeds of the sale, b) obtain a further loan from [the Provider] or c) sell another property and offset the loss against this liability. This had to be effected within the same tax year". The Complainants submit that as the first two options were not on offer, their investment property in the South East was sold in December 2014 for €30,000 when its market value, even in a distressed market, was €55,000, leaving an unsecured total debt of approximately €48,000"***.***

I have considered the telephone call between the Provider and the First Complainant on **8 April 2013** (submitted in evidence), wherein the first Complainant advised the Provider that he could not afford 'capital and interest' repayments, and stated that he planned to sell a property abroad, once the tenant's lease expired *"in ten months' time"*. During this call, the Provider stated that it wanted *"at least one of the Irish properties"* to be sold with a view to bringing the balance down to such a level that the Complainants would be able to meet full capital and interest repayments. The first Complainant stated that there were tenants in both the Dublin and South East properties, and that he would be prepared to sell the property in the South East *"if it comes to that"*. The Provider asked how much this property would be worth, and the first Complainant stated that it was worth *"€45,000"* according to his auctioneer. The first Complainant also stated *"If it has to go it has to go, but it'll hardly make a dent in what I owe overall"*, and that he *"[had] no problem selling it"* but the property was then currently rented with a rental income of €100 per week. The first Complainant stated that this was *"a good return"* and pointed out that the Provider was *"getting all that"*. When the Provider then stated that the rental income on the South East property was not meeting the repayments due, the first Complainant responded that the answer was the property abroad, stating *"if I discount it substantially, I should get about €165,000, it would solve all our problems"*.

The Provider stated during this call that the sale of the Dublin property would clear *"the entirety"* of the Complainants' loans, and further stated that it was not prepared to offer an 'interest only' arrangement to the Complainants. The Provider stated it would require 'capital and interest' repayments going forward, and that *"asset disposal needs to start"*. The call ended with the Provider outlining to the first Complainant what would be required if the Complainants decided to proceed with selling a property, and stating that once the Provider received a letter from the Complainants' auctioneer with the requested information that it should be possible at that point to secure *"three months interest only"* to allow the Complainants to sell property/properties in order to bring their loans down to a level whereby they could afford 'capital and interest' repayments. After this time, the Provider would appoint a receiver to the properties. The first Complainant then stated he would speak with his wife and contact the Provider the following day.

I have also considered the call between the first Complainant and the Provider on **15 April 2013** (submitted in evidence), wherein the first Complainant stated that he had spoken to his wife and that they had decided to sell the Dublin property. He also stated during the call that he had hoped to *"hold on to"* this property, describing it as *"a cash cow"* and the *"jewel in the crown"*. The first Complainant stated that he had spoken with estate agents abroad

/Cont'd…

and in the South East regarding his other properties, and that there would still be a significant shortfall if these properties were sold. He stated that that the best that could be hoped for from a sale of the South East property was €30,000-€35,000. The Provider stated that it would need *"a two-liner from the auctioneer"* setting out the guide price and the estimated time it would take to sell the property. There was a brief discussion regarding the tenants in situ, and the first Complainant stated that he had contacted his solicitor about the tenancy and was awaiting a response.

I note that the first Complainant stated during his call with the Provider on **8 April 2013** that he could not afford 'capital and interest' repayments. A number of options were discussed during the call, including the possibility of the Complainants selling a property abroad or their South East property, as well as a possible sale of their Dublin property which the Provider stated *"alone will clear…. the entirety of what you owe"*. It is apparent from this call that the Provider favoured the sale of the Dublin property, however I do not agree with the Complainants' contention that they *"received an ultimatum"* from the Provider. In a subsequent call on **15 April 2013** between the first Complainant and the Provider, the first Complainant stated that he had since spoken to agents regarding his properties and that there would likely be a significant shortfall, even if he sold both the South East property and one of the properties abroad. It is apparent from the call that the Complainants consulted their solicitor (regarding the tenancy for the Dublin property) and agents in the South East and abroad in the course of making the decision to sell the Dublin property. The call concluded with the Complainant asking the Provider if it had any recommendations for auctioneers in Dublin. I cannot find any evidence or indications in these calls that the Complainants were *"bullied into selling the property"* (as suggested by the Complainants' representative in her letter to the Provider a year later, on **28 April 2014)**.

The Complainants emailed the Provider on **22 April 2013**, advising that they had discussed the sale of the Dublin property with several auctioneers, and that these auctioneers were *"all in agreement that the market price is in the region of €175k….. that it should sell relatively easily, and expect to go in about 6 weeks"*. The Complainants also advised the Provider in this email that the tenants had co-operated and that no difficulties were anticipated in that regard.

The Complainants' email to the Provider dated **22 April 2013**, updating the Provider on the sale of the Dublin property, stated that it *"should sell relatively easily"* and that *"Happily, the tenants have cooperated"*. I cannot find any evidence in this email that the Complainants felt *"forced"* or *"bullied"* into selling the property. While I accept the Complainants' submission that their Dublin investment property was consistently producing a good rental income, they were still not in a position to make full 'capital and interest' repayments on their loans at that time as their borrowings were greater than could be fully supported by their income.

It is important to emphasise that the Complainants' 'interest only' repayment arrangement, beginning in or around the late 1990s, was for an initial period of 5 years, and was renewed by the Provider for a further 5 years. The Complainants state that their loans were performing well up until 2008 (during these reduced 'interest only' arrangements), when they ran into difficulties with their property in the South East. They submit:

/Cont'd…

> *"Reluctantly, [the Provider] agreed to renew the Interest Only period for a further six months. And equally reluctantly, [it] renewed for a further six months*".

The Complainants contend that *"there were several alternative options that would have ensured a happy outcome".* The Provider, however, is entitled to exercise its commercial discretion when considering a request for forbearance. It is important to note that the Financial Services and Pensions Ombudsman will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is found to be unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of *Section 60 (2) (b) of the Financial Services and Pensions Ombudsman Act 2017*.

Notwithstanding the above, I note that the Provider approved further 'interest only' repayment arrangements, requested by the Complainants to allow them sell a property/properties in order to reduce their liability to the Provider, from September 2011 onwards. The Complainants contend that:

> *"Some forbearance was all that was required to allow the market regain some equilibrium and all [the Provider's] loans would have been discharged".*

The Provider contends that it actively tried *"to assist [the Complainants] through a difficult period but was limited in what could be done based on the precarious position the Complainants found themselves in"*. The Complainants have taken issue with the Provider's description of their situation as *"precarious"*; they maintain that they were *"in a quite financially healthy position, but were experiencing a cash flow issue, brought about by the sudden demand for full repayments on all [their] loans"*. While I appreciate that the Complainants were in a difficult position, the 'interest only' repayment arrangement for the first five years of the loan term represented a forbearance measure in itself. Thereafter, the Provider was entitled to exercise its commercial discretion with regard to whether the arrangement would be approved for a further period or periods. Having approved several extensions of the 'interest only' period to allow the Complainants time to address their liability, which they were unable to do within these timeframes, the Provider advised the Complainants in **April 2013** that full capital and interest repayments were required, and indicated that it expected some definitive action from the Complainants in this regard.

The Complainants also submit that the Provider was *"hasty and unthinking"* in asking them to sell *"at least one of the Irish properties"* when they had *"suggested other viable solutions"*, contending that they were not allowed any input into the Provider's decision. I cannot agree with the Complainants' assertion that there was *"no consultation"*, given that the Provider approved several 'interest only' repayment arrangements from 2011 in order to allow the Complainants time to sell some of their other properties. I note that when the first Complainant telephoned the Provider in **April 2013**, those properties were still unsold and the South East property was rented, over eighteen months after the first 'interest only' repayment arrangement had been approved with a view to allowing the Complainants time to address their liability.

/Cont'd…

With regard to the handling of the Complainants' mortgage account, the Consumer Protection Codes set out that a regulated entity must seek to agree an approach that will assist the consumer in resolving any arrears. I take the view that the Provider, in approving several further 'interest only' periods for the Complainants from 2011 onwards, met its obligations in this regard.

The Complainants submit that as a result of the sale of the Dublin property, they incurred a Capital Gains liability, and they contend that the Provider *"never mentioned"* this possibility prior to the sale of the property. The Complainants further submit that the sale of their investment property abroad would not have produced a Capital Gains Tax issue and contend that the Provider *"quite clearly put [its] own interest first"*. While I accept that the Capital Gains liability was an unwelcome expense for the Complainants during a difficult time, it is important to clarify that the Provider was not responsible for offering tax advice to the Complainants regarding disposal of any asset or assets from their investment portfolio. Given that the Complainants had a considerable property portfolio, it would have been prudent for them to have consulted an accountant when considering any asset disposal – though I note the Complainants' submission that had they done so, they would have been advised not to sell the property. I note too from the Complainants' submissions that they contacted their solicitor before the sale, with regard to the tenants in situ, and I accept therefore that they had access to legal advice at that time.

The Complainants state in their submission to this office dated **21 August 2016** that in order to address the Capital Gains liability incurred as a result of the sale of the Dublin property, they had to sell their South East property *"for a sale price of €30k, when its then market value, even in a distressed market, was €55k".* I would note that in his telephone call with the Provider dated **8 April 2013**, the first Complainant states that his auctioneer had valued the South East property at €45,000. In his call with the Provider a week later on **15 April 2013**, the Complainant stated that he had been advised by an agent in the South East that the best price he could hope to achieve for the property was €30,000-€35,000, which was in line with the eventual sale price achieved. While I appreciate that the Complainants were in a difficult position, the Provider was not responsible for the Capital Gains liability which the Complainants submit necessitated the sale of the South East property.

The Complainants submit that they wrote to the Provider on **21 September 2015**, offering €28,000 in full and final settlement of their liability, and that they *"put a condition on it"* that if they did not hear from the Provider within 14 days that they would *"assume that this was acceptable and proceed to lodge the funds in full and final settlement".* They further submit that they received *"an immediate response"* requesting confirmation that their financial circumstances had not changed. The Complainants contend that they replied, *"confirming no alteration"* in their financial circumstances, and, having not heard from the Provider three weeks later, they *"proceeded to lodge the €28,000"* and assumed that the matter was settled. They submit that their solicitor wrote to the Provider at that time, *"confirming this course of action and also confirming that her files on the matter were now closed"*.

I would note that, at law, there must be some act on the part of the party receiving an offer to indicate acceptance in order for a binding agreement to be created. The party making the

/Cont'd…

offer cannot impose a condition, without the other party's consent, that silence shall constitute acceptance. While the Provider should have responded to the Complainants' offer, which was made by their solicitor, its lack of response did not constitute a valid acceptance and the Complainants were incorrect in their assumption that the matter was settled.

The Provider states that the payment of €28,000 was returned to the Complainants' solicitor on 18 December 2015. The Complainants, in turn, wrote to the Provider in **January 2016** advising that they were not accepting the cheque. The Provider wrote again to the Complainants in **April 2016**, returning the cheque to the Complainants and stating that if the cheque were again returned to the Provider that it would be *"accepted as a lodgement to [the Complainants'] loan account on the basis of a part payment of the current outstanding balance due and owing by them"*. The Provider also stated in this letter:

> *"Please note that the current outstanding balance due and owing is the sum of €50,326.59 which includes arrears of €11,467.60"*.

I accept that the Provider's lack of response to the Complainants' proposal, sent to the Provider by their solicitor in **September 2015**, did not constitute an acceptance, and that the Provider would have been correct in returning the funds to the Complainants once it had reviewed the offer and rejected it. However, the Provider did not submit in evidence the correspondence that accompanied the funds, and the Complainants' letter to the Provider dated **8 January 2016**, wherein they advise that they *"are not accepting this cheque"*, makes no reference to the Provider's response to their offer of settlement. The Provider states in its letter to the Complainants' solicitor dated **8 April 2016**:

> *"Accordingly, there is no settlement agreement in place and for the sake of clarity I can confirm that [the Provider] is not willing to accept the sum of €28,000 in full and final settlement of this matter". As [the Provider] had not agreed the settlement proposal put forward by you, the payment for €28,000 was returned to you on 18th December 2015"*.

There is no evidence before me that the Provider advised the Complainants of its decision to reject their settlement offer of €28,000, in **September 2015**, at any time until **April 2016** – a delay of over six months. I consider this to be an unacceptable delay, given that the Complainants were trying to bring the matter to a conclusion, and the Provider should have actively engaged during this period.

The Complainants are also unhappy with the Provider's communication and customer service throughout. In particular, they refer to:

- Communications/proposals not acknowledged or responded to by the Provider;
- Two incidences of delays in reducing capital balances on their accounts on foot of payments made by the Complainants;
- Calls from the Provider's Arrears Support Unit
- A meeting that took place at a Provider branch on **20 June 2014**.

/Cont'd…

I note that there were arrears totalling €11,467.60 on the Complainants' loans in **April 2016**, and that by **August 2017**, the arrears had risen to €23,571.28. The Provider, in its submission dated **4 August 2018**, states that the Complainants were, at that time, in arrears of over €30,000. The Provider submits:

> *"While the Complainants remain in arrears, and in the absence of payments being made to the account or a mutual agreement being reached, [the Provider] will continue to make contact with the Complainants in relation to the arrears outstanding"*.

In their submission dated **5 July 2019**, Complainants state that they *"erroneously though that once the dispute was accepted by [the FSPO] that repayments and interest were suspended…. Hence repayments were not picked up again"*. It is unclear why the Complainants came to this belief, but it is important to note that it is not the case that contractual arrangements between the parties are in any way suspended or set aside while a complaint is ongoing. Unless the parties come to an agreed alternative arrangement, loan repayments fall due and must be made during this time.

I accept that in circumstances where repayments have not been made, and where an account is in arrears such as these of over €30,000, the Provider may contact the account holder regarding the arrears. I note that the Provider, in its submission to this office dated **29 July 2019**, states that it *"would like to work with the Complainants in order to come to an arrangement that addresses the residual debt appropriately"*.

It is apparent from the submissions that the Complainants had previously requested a meeting with the Provider in order to discuss a proposal they had made. The Provider submits that it could not locate a copy of this proposal, but agreed to meet with the Complainants on the above date at a Provider branch to discuss it *"in more detail"*. It is unfortunate that the Provider did not request a current SFS from the Complainants (and a copy of the proposal, if applicable) in advance, so that some tangible progress might have been made at the meeting. The Provider submits:

> *"The SFS was requested at this meeting in order for a Case Manager to explore the proposal's viability. If the SFS was supplied at, or prior to this meeting, then [the Provider's] staff members and the Complainants may have been able to go into more detail but the staff members would not have been in a position to agree to anything on the day regardless"*.

While I accept that the individual staff members would not have been in a position to agree a resolution on the day with the Complainants, I am not satisfied that the Provider met its obligations under the Consumer Protection Codes with regard to seeking from the Complainants information relevant to the product/service requested by them. Furthermore, I am not satisfied that the Provider disclosed all relevant, material information when it did not clarify before the meeting that it would not be possible to resolve the matter on the day, given that no SFS had been requested from the Complainants.

/Cont'd…

The Provider has acknowledged its customer service shortcomings with regard to its poor communication with the Complainants, particularly with regard to proposals made, and the occasions in **September** and **October 2013** where it did not reduce in a timely fashion the capital balances on the Complainants accounts on foot of payments made by the Complainants.

I note that the Provider offered a gesture of goodwill to the Complainants, in the amount of €1,000, in its formal response to this Office dated **2 August 2017**. The Complainants, in their submission dated **21 August 2017**, stated that they did not wish to accept this offer. The Provider made a further offer to the Complainants, in the amount of €5,000, in its submission to this Office dated **27 June 2019**. The Complainants advised on **27 July 2019** that they did not wish to accept this offer. The Provider has since confirmed that this offer remains open to the Complainants.

On the basis of the sums offered by the Provider as outlined above, I consider that €5,000 is a more than appropriate amount of compensation for the Provider's acknowledged customer service shortcomings. Given that this offer is still open to the Complainants, I do not therefore consider it necessary or appropriate to uphold this complaint. It will be a matter for the Complainants to make contact directly with the Provider if they decide that they wish to accept the compensatory figure, which is available to them. In that event, they should proceed expeditiously, as the Provider cannot be expected to hold that compensatory offer open indefinitely.

Conclusion

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

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

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUCATION AND LEGAL SERVICES

4 February 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

/Cont'd…

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