An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0325
Sector:	Banking
Product / Service:	Interest Only
Conduct(s) complained of:	Level of contact or communications re. Arrears Delayed or inadequate communication Dissatisfaction with customer service Maladministration regarding voluntary sale
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants held several mortgage accounts with the Provider before their loans were sold to a third party Provider early in 2019. This complaint concerns a "Buy to Let" (**BTL**) mortgage loan which was cross charged against the Complainants' family home.

The Complainants' Case

The Complainants contend that, having made several attempts since April 2014 to contact the Provider regarding their arrears, they received a 10-day demand letter in June 2014 which prompted them to telephone the Provider. They submit that they were advised by the Provider during this call on 9 June 2014 that an Assisted Voluntary Sale (**AVS**) would be their "*best option*" for resolving the arrears on their BTL mortgage loan. They further submit that the Provider stated during this call that there would be "*a negotiation regarding the shortfall*" remaining when the mortgage loan was paid off and the Complainants agreed to the AVS on strength of the Provider's advice. The Complainant state that the Provider also told them during this call that once the AVS documents were signed and forwarded, their ICB record would be "*flagged as T, followed by C once completed*" and that the AVS would only apply to their BTL property. The Complainants contend that, based on the advice they received during the phone call, they signed the AVS form and returned it to the Provider the following day.

The Complainants submit that they received a telephone call on 3 July 2014 from the Provider's agent (Third Party Property Consultants) who related to them that it was contacting them to "*help start the process*" of the voluntary sale of both the BTL property and the Complainants' family home.

The Complainants submit that they telephoned the Provider a number of times to try and establish why their family home had been included on the AVS documentation, but the Provider did not clarify that their family home was not included in the AVS until 18 July 2014. The Complainants note in their submissions that [Third Party Property Consultants] had contacted them on 16 July 2014 to convey that the Provider had advised that the Complainants' primary residence was not included in the AVS.

The Complainants argue that if they had not engaged and allowed the property to be repossessed, that could be considered a normal collection with reliance on the full cross charge. The Complainants argue that by advising the AVS as a viable option, with no benefit to them as a result, this does not constitute best advice or remotely consider the best interests of the Complainants as borrowers. The Complainants argue that there was no evidence of a relationship manager being appointed to manage their situation. The Complainants argue that the Provider's advice was that the most appropriate option was to sell the mortgage property while being fully aware that there was a cross charge. They argue that the Provider's subsequent inaction regarding the assessment of the shortfall post-sale suggests that the Provider was endeavouring to look after its own interests rather than their interests as customers. The Complainants argue that the Provider had promised to agree a repayment schedule on the shortfall balance and that the shortfall would be assessed once the BLT was sold but they believe that the steps involved in the AVS process were not formally completed. The Complainants question that if it was not the Provider's intention to sell their family home during the AVS process, why did it continue to rely on the cross charge without limiting their exposure post-AVS.

The Complainants argue that the Provider's comments that no further funds were received to the account post-AVS suggests that they are non-engaging borrowers. The Complainants argue that they were borrowers who assumed that following the AVS, a meaningful assessment of the shortfall that the available on cross-charge would be assimilated into their existing family home mortgage and regular monthly repayments could start. They were advised that the sale had to close before a negotiation of the shortfall could begin.

The Complainants argue that the 2016 trial arrangement offered by the Provider was not sustainable. They argue that diverting funds from a performing home loan mortgage into a facility that had gone through an incomplete AVS process made no financial sense. They argue that they had contacted the Third Party Advisor and sought the advice of an insolvency practitioner, both of whom were horrified at the suggestion. The Complainants were also aware that they were facing possible forced redundancy in relation to the second Complainant at that point so could not commit to the proposal financially.

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They further argue that when they spoke to a representative of the Provider about what would happen after the proposed six month rescheduling, the Provider was non-committal about what would happen after this period and there was no concept of a sustainable offering being offered. Extending the term of the facility was not mentioned to them. They argue that this highlights the Provider's complete reluctance to provide long-term sustainable solutions to return their customers to financial stability.

The Complainants argue that if the Provider had formally assessed the shortfall and amalgamated a reasonable cross charge valuation with the family home mortgage, their ICB record would have begun the process of repairing itself. They argue that if a relationship manager had been appointed at the beginning of the entire AVS process, it should have been a seamless procedure with their best interests protected. The Complainants argue that their case was bounced between two or three different departments after the sale of the BTL, none of which took responsibility for seeing the process to its conclusion.

The Complainants argue that the part interest and capital repayment option offered to them in November 2016 was to divert funds from a performing home loan to a facility that had partially gone through an AVS process. They argue that an assessment of their full indebtedness was completed in 2014 prior to the AVS when the Provider advised that the only option was to sell the BLT property, despite its knowledge of the cross charge. By selling the property, the Complainants argue that the only party to benefit was the Provider and that they as customers were left with the indebtedness minus the property. They ask why they have done this if they were not assured of an assessment of the shortfall. They argue that an assessment of the shortfall is not SFS led; it involves a formal valuation of the family home and this was not done. They argue that they had no option but to decline the November 2016 ARA offer. The Complainants argue that the Provider should have independently valued their family home based on the available value to cover the cross charge and amalgamated that value into their family home mortgage. They argue that the monthly scheduled repayments could then commenced allowing the BTL to close and their ICB record to begin the process of repairing itself. They argue that this is based on advice received by the Third Party Advisor, their solicitor, and an independent insolvency practitioner.

The Complainants set out in their submissions the impact the Provider's alleged conduct has had on their lives and finances and state that "*it is unfathomable to us that despite engaging in a process that was to return us to financial stability, that we have ended up in an even more detrimental financial position*". They argue that the Provider was aware of the cross charge prior to advising the Complainants about the AVS and was aware of the significant negative equity on the BTL mortgage account. They also argue that the Provider was aware of the Complainants' desire to regularise their finances and return to financial stability. The Complainants submit that the Provider advised the Complainants that an AVS was the best option to achieve the above and assured the Complainants of the post-sale process but did not formally complete the post-sale process. The Complainants argue that the Provider has no concept of the effects on their ICB in that they cannot even provide a guarantee for a student loan or available car financing for a company car.

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They argue that they engaged in a process on the understanding that their ICB would reflect completion of the process but that the Provider has destroyed their financial future as a result of its mismanagement and obstructive approach to this case.

The Complainants want the Provider to:

1. Assess the cross charge on the basis of the value of their family home following the sale of the BTL property:

2. Facilitate the management of their residual balance within a Provider mortgage arrangement to ensure that they return to financial stability and their ICB record may begin to repair itself; and

3. Retain ownership of the mortgage loan subject to the dispute on the family home mortgage which is performing.

The Complainants argue that the fact that the Provider has not retained ownership of the mortgage has little bearing on how the case can be resolved. They argue that it can still be assessed as a brand-new mortgage facility of the Provider's to include the limited cross charge exposure and the facilities with the third party provider cleared from the proceeds. They have rejected the Provider's compensation offer in the sum of €2,000.

The Provider's Case

The Provider states that in April 2014 when the account was in arrears of approximately €6,000, it advised the Complainants that it was happy for the repayments on the account to remain on an interest-only basis and it would then capitalise the arrears after a six-month period but the Complainants advised the Provider that they were not in a position to meet the interest-only repayments. As a repayment less than the monthly interest-only amount was not considered sustainable, the Provider issued documentation relating to an Assisted Voluntary Sale (**AVS**) to the Complainants dated 2 April 2014. The Provider states that the proceeds of sale were received by it on the 16 October 2015, the arrears were cleared and the balance applied against the principal on 6 November 2015. The Provider states that a portfolio manager was initially appointed to the Complainants in February 2016 and the Complainants were contacted by telephone on 5 February 2016. The Provider states that the Complainants submitted a completed SFS for assessment. The Provider states that as the BTL property was cross charged against the family home, the remaining balance was still secured against the family home. Therefore the Complainants' accounts were dealt with through the normal collections process. The Provider acknowledges that it did not process the Complainants' SFS in a timely manner in February 2016.

In relation to the AVS documentation sent on 2 April 2014, the Provider highlights that the letter recommended that the Complainants receive independent legal and financial advice before accepting the recommendation to sell the mortgaged property.

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The Provider also highlights that the correspondence set out that the monthly repayments must be made and that missed mortgage repayments may be recorded on the Complainants' ICB profile. The Provider also highlights that the letter advised that once the property was sold, the Provider would agree a repayment arrangement to pay any shortfall should one exist at that point.

The Provider acknowledges that the Complainants' family home was initially included in its instruction to its Third Party Property Consultants as part of the AVS process but states that this inclusion was due to human error and it was never the Provider's intention to include the family home.

The Provider states that it contacted the Third Party Property Consultants on 16 July 2014 confirming that the family home was not to be included in the AVS process and that this was confirmed to the Complainants on the same day by the Third Party Property Consultants and reiterated by the Provider on 18 July 2014.

The Provider also accepts that information provided to the Complainants in relation to their ICB record on a telephone call dated 9 June 2014 was incorrect. The Provider states that the manner in which the Complainants' ICB profile would be affected was detailed in its correspondence to the Complainants dated 30 October 2014 which confirmed that the AVS would not impact on the ICB record and that payments made or not made would continue to be reflected. The Provider submits that no funds were received to the account after June 2014 prior to receipt of the sale proceeds and that no further funds were received by the account after receipt of the sale proceeds.

The Provider states that a further SFS was completed by the Complainants in October 2016. In November 2016, the Provider states that it offered a part capital and interest trial to the Complainants on all three accounts with balloon payments at the end of the term and a term extension on one of the accounts (the home loan). If the Complainants had accepted the offer and completed the six-month trial, the Provider states that any arrears would have been capitalised on a long-term treatment with similar repayments put in place. The Provider states that it received an email from the Complainants dated 15 December 2016 advising they wished to appeal the trial arrangement offered and that the mortgage was now being dealt with in conjunction with the Third Party Advisor. The Provider states that it responded to the Complainants on 12 January 2017 advising that its Appeals Board had declined their appeal on the basis that there was affordability for the level of repayment offered. The Provider states that in May 2017, the Complainants contacted it to advise that their financial circumstances had changed and an SFS was issued for completion. The Provider states that the completed SFS that was submitted was subsequently returned as all supporting documentation was not received. The Provider states that in August 2018, a short-term treatment was offered to the Complainants on their account and this was not accepted by the Complainants. The account was transferred to a third party provider in early 2019.

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The Provider states that it has no record of advising the Complainants that the Provider would possibly look at a write-down. In relation to the call of 9 June 2014 highlighted by the Complainants, the Provider highlights that the representative in question advised that "*with any shortfall the customers are still liable*" and that when "*it comes to the shortfall, I would imagine at some point that they would start negotiations*" and "*you would need to set up some kind a payment plan to start paying that off*". The Provider also points out that correspondence issued to the Complainants which clearly outlined that they would remain liable for any balance outstanding on the mortgage account once the property was sold and the proceeds of sale deposited. In the AVS acceptance form issued to the Complainant on 2 April 2014, the Provider argues that the Complainants acknowledged that they would remain liable to pay the outstanding liability on any shortfall.

They further acknowledged that they would enter into a repayment arrangement to repay the shortfall based on affordability and that missed mortgage payments may be recorded on their ICB profile.

The Provider also points to a letter of 4 September 2014 in which advised that after completion of the AVS process, "*any shortfall debt remains . . . charged against the family home along with the two primary stand-alone Home Loan debts*". The Provider finally highlights correspondence dated 13 February 2015 in which it advised that it was agreeable to the sale of the property for the sum of €40,000 and would release its charge on that property but highlighting that "*all parties to the mortgage will remain jointly & severally liable for the resulting shortfall on the account will continue to bill a monthly basis*".

The Provider states that as the Complainants' BTL property was cross charged against their family home, the remaining balance on the account was not classified as a shortfall balance and was still secured against the family home. The Provider states that an assessment of the Complainants' financial situation taking into account their full indebtedness to the Provider was completed and an alternative repayment arrangement (**ARA**) proposed. The Provider states that the part capital and interest trial offered to the Complainants in November 2016 was declined by the Complainants.

In terms of the length of the process to assess the shortfall, the Provider states that the Complainants completed and returned documentation regarding AVS in June 2014. The Provider then issued correspondence to the Complainants' solicitor in November 2014 advising that it was agreeable to consent to the sale of the property for the sum of €42,000 but that sale fell through. The Provider states that a second offer was received and it issued correspondence dated 13 February 2015 advising that it was agreeable to consent to the sale of the property for the sum of €40,000. The Provider states that the proceeds of the sale minus expenses were lodged to the account on 16 October 2015. It states that this cleared the arrears in the sum of approximately €24,000 and the remaining credit of over €11,000 was applied off the principal on 6 November 2015. The Provider states that a completed SFS was submitted by the Complainants in February 2016 but was not progressed in a timely manner.

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The Provider states that an up-to-date SFS was submitted in October 2016 and, following assessment of the information provided, an ARA was offered to them in November 2016 which was unsuccessful appealed and ultimately declined by the Complainants.

The Provider argues that based on the information furnished by the Complainants, the Provider was unable to identify a solution that was both affordable and sustainable for the mortgage account in 2014. Though the Provider states that it was happy for the repayments to remain on an interest-only basis resulting in the capitalisation of arrears after a six-month period, the repayment offered by the Complainants was less than the interest-only repayment and this was considered unsustainable by the Provider. It argues that the only alternative was AVS.

The Provider acknowledges that misinformation was given to the Complainants and that their telephone call requests were not returned. The Provider notes its correspondence dated 4 September 2014 in which it apologised for the service issues that had arisen and offered a goodwill gesture in the sum of €100. The Provider states that it endeavoured to find sustainable solutions for the Complainants on several occasions. The Provider argues that several SFS were submitted by the Complainants between June 2012 and August 2018 which were assessed in a timely manner, other than the SFS received in February 2016. The Provider states that all accounts were transferred to a third party provider in early 2019. The Provider states that in light of the shortcomings reviewed as part of the complaint, it was making an offer of €2,000 to the Complainants in compensation.

The Complaints for Adjudication

The complaints for adjudication are that the Provider:

1. Wrongfully advised the Complainants that the AVS process was their "best option";
2. Imparted incorrect information to the Complainants;
3. Mismanaged the Complainant's case to such an extent that they are now in a worse position financially than they were prior to taking the Provider's advice; and
4. Proffered below par customer service throughout.

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.

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

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

A Preliminary Decision was issued to the parties on 9 September 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

This is a complex complaint containing a large volume of evidence including 66 audio recordings. In this finding. For the purposes of clarity, I intend to focus in my Decision on the most pertinent aspects of the complaints and will not include every piece of evidence considered by me in the course of my adjudication. I also wish to highlight two limitations of the present adjudication from the outset. First, certain submissions were made in relation to data protection requests.

This Office is not in a position to investigate issues relating to data protection requests. Such complaints are more appropriate to the office of the Data Protection Commissioner. Secondly, this Office does not investigate the details of any renegotiation of the commercial terms of a mortgage as this is a matter between a Provider and a customer and does not involve this Office, as an impartial adjudicator of complaints. The Financial Services and Pensions Ombudsman 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 section 60(2) of the Financial Services and Pensions Ombudsman Act 2017.

The mortgage loan in question was offered to the Complainants by letter dated 24 November 2005. The letter of offer identified the mortgaged property as the BTL with a purchase price/estimated value of €188,000 with the loan amount of €211,000 to be repaid over 25 years. Special Condition G indicated that the properties to be mortgaged or charged were the mortgaged property as shown in the letter of offer (the BTL) and an identified property which is the Complainants' family home. The BTL mortgage loan was therefore cross-charged against the Complainants' family home. The account fell into arrears in 2012.

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By letter dated 29 August 2013, the Provider wrote to the Complainants indicating that their SFS had been assessed and that it was "*unable to offer an alternative repayment arrangement*" on the basis that the "*proposed arrangement amount is below the level considered sustainable for the repayment of the loan*."

I will firstly deal with the asserted provision of misinformation and inaccurate advice on the AVS option and process.

I will then deal with the issues of poor customer service and mismanagement of the account.

1. Asserted Misinformation and Inaccurate Advice on AVS Option and Process

Recordings of telephone calls have been provided in evidence. I have considered the content of these calls.

The three most important phone calls in relation to this dispute occurred on 2 April 2014, 9 June 2014 and 18 July 2014. On the call on 2 April 2014, the first Complainant indicated that she had no problem with an AVS as the mortgaged property was simply causing them stress. The Provider's representative indicated that if the interest-only repayments were not affordable (as she had indicated), that an AVS was the "*only realistic option*" available. He stated that he would send relevant documentation to the Complainants for them to read over in relation to the AVS. He wrongly indicated that in the event of a shortfall on the sale, the remaining shortfall would be unsecured.

In reality, the mortgaged account was secured against the Complainants' family home so any shortfall would remain secured against the family home. The Provider also furnished incorrect information to the first Complainant in relation to the effect of an AVS on their ICB record. The representative indicated that the arrears position would remain on the ICB record for three years after the debt was cleared and that an unsecured shortfall would not affect her ICB. This was completely incorrect and arrears continued to appear on the ICB record every month as no money was paid towards the shortfall after the sale.

There is no question therefore that two significant pieces of incorrect information were given by the Provider's representative to the first Complainant on this call of 2 April 2014 – first, that the shortfall on the mortgage account after the sale of the property would be unsecured, and second that the AVS and subsequent clearing of the debt would lead to an improvement of their ICB record within three years. In relation to the shortfall, however, the representative at no point promised or implied that the Provider would write down the debt. What he indicated was that the Provider would try to "*manage*" the shortfall with the Complainants, looking at whatever income they had. He indicated that the most important thing was to get the debt down and that an AVS seemed like the "*best option*" if they were unattached to the property and the interest-only payments were not affordable. The representative further indicated that as the Complainants were going to be working with the Provider, the Provider would work with them.

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I appreciate that these statements by the Provider's representative on the call of 2 April 2014 (and the later 9 June call) seem to have created an impression in the mind of the first Complainant that the Provider would offer them a write-down of the shortfall on their mortgage account. I have considered the recording of the call in great detail however, and I do not accept that this was a reasonable interpretation to take from the representative's words. As I have already acknowledged, there is no doubt that incorrect information was provided to the first Complainant on this call in relation to the security position of the shortfall and in relation to the impact that this shortfall would have on their ICB record.

In relation to repayment of the shortfall, however, the representative did nothing other than indicate that the Provider would work with the Complainants in relation to the shortfall and would seek to manage the shortfall with them in relation to their income. He further indicated that he would send documentation in relation to the AVS for them to read over.

By letter dated 2 April 2014, the Provider wrote to the Complainants recommending a voluntary sale of the mortgaged property. The Provider wrote in the following terms:

> "*We have reviewed the information that you have provided to us and we have tried to identify a solution that is both affordable and sustainable. Unfortunately this hasn't been possible based on the information provided. In light of this we believe that the most appropriate option for you, given your financial circumstances, is to sell your mortgage property. . . .*
>
> *We understand the stress that this recommendation may cause. However, in light of the level of repayments you can currently afford, we believe this is the best option for you.*
>
> *Selling your property will enable you to use the proceeds of the sale to clear your outstanding arrears and repay, or significantly reduce, your mortgage balance.*
>
> *In cases such as yours we believe that a private sale is preferable over the [Provider] selling your property. A private sale would generally allow you to maximise the sale price, reduce the amount of fees associated with sale, and retain control over the process.*
>
> *As part of the sales process the [Provider] will appoint a Property Sales Management Company who will assist you, the estate agent and your solicitor, with the sales process*."

The letter went on to set out a number of conditions of the agreement and then recommended under an emboldened sub-heading of "*Independent Advice*", "*We strongly recommend that you receive independent legal and financial advice before you accept this recommendation*." The letter set out next steps if the Complainants opted to accept the recommendation and then set out their options if they decided not to accept the recommendation. These options included commencing legal action on the basis of continued non-payment and non-cooperation, the fees of which would be billed to the account.

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The Complainants were encouraged to contact the Provider about any queries or if they wanted to discuss the matter on any further detail. The first Complainant rang the Provider on 9 May 2014 with a list of queries but was unable to speak to the correct department and was told she would receive a call back from that department. No call back was received. I will deal with this in greater detail later. The letter indicated that the Complainant had 30 days from the date of the letter to sign and return the AVS acceptance form.

The letter of 2 April 2014 therefore indicated that the reason why an AVS was being recommended was because of the inability of the Complainants to meet their monthly repayments and because no sustainable repayment solution could be offered in their circumstances. The letter highlighted that the sale of the property would be used to clear the arrears and reduce the mortgage balance. There was no mention of any negotiation or write-down of a remaining shortfall. The letter also encourages the Complainants to seek independent advice, a fact which has been highlighted by the Provider in its submissions. While I acknowledge this to be the case, I do not accept (if such is implied by the Provider), that the recommendation to seek independent advice somehow corrects any misinformation that was provided to the Complainants in the course of telephone calls with the Provider while they were trying to seek clarifications on the AVS process.

I appreciate that the Complainants are aggrieved that the Provider indicated to them that an AVS was their "*best option*" as they feel that they have seen no improvement in their circumstances as a result of the sale. They have not, however, outlined any better option that was in fact available to them in April 2014, other than arguing that the Provider ought to have concluded the AVS process by 'assessing' the shortfall (i.e. offering them a write-down on their shortfall).

It is common case that the interest-only repayments on the mortgage account in question were unaffordable for the complainants in 2014 and that the account was in arrears. The Provider was therefore entitled to issue a letter of demand (which it duly did and is a matter I will return to) and seek to repossess the property. If the Provider had proceeded with this option, this would not have improved the position of the Complainants. Rather, it would merely have increased the costs associated with the mortgage account and thereby increased the debt that was owed by the Complainants in relation to the mortgage account in question. It would not have affected the fact that there was a cross charge against the family home. The sale of the BTL property ultimately yielded only €40,000 (or a just over €35,000 net after expenses) but on the basis of the evidence of the estate agent's report, this was the best price reasonably available at the time and was an improvement on recent apartment sales in the area. It is not possible for me to determine what was the "*best option*" available to the Complainants in April 2014 in the absence of any information on any other potential options. Since the Provider had recently declined to offer a further ARA on the account as the debt was unsustainable, and as the interest-only repayments were unaffordable for the Complainants, there does not seem to me to have been many options open to them at that point in respect of the mortgage account. As between agreeing to an AVS or having the property repossessed by way of court proceedings, I am of the view that agreeing to an AVS was the better of those two options.

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On a call on 9 June 2014, the Provider's representative indicated that if the Complainants were happy to proceed with the AVS they should sign the document as soon as possible but if not, the account would go back to the collections department and go down the legal route. In relation to the question of the shortfall, the first Complainant refers to the cross charge on the family home (which she is obviously aware of despite the inaccurate information given on the 2 April call) and also states that the value of the BTL will not be close to the mortgage amount.

The Provider's representative states that with any shortfall, "*the customers still are liable*" and while he does not deal with those cases, he "*would imagine there would be a negotiation regarding the shortfall*" at some point and they would "*set up some sort of payment plan to start paying that off*". The Complainants have placed great emphasis on this statement by the Provider's representative. At best (and I am not of the view that the representative was so definitive), the Provider could be seen to committing to a negotiation of some kind between the parties in relation to the shortfall after the sale of the property, but without any firm promise as to the form that would take (e.g. term extension, write-down, interest rate reduction, etc.) Instead I am of the view that there was no commitment given that the individual in question merely "*imagined*" there would be a negotiation at that point. I appreciate that this kind of ambiguous statements is capable of meaning different things to different people, and it certainly appears on the basis of the present complaint that the first Complainant took the representative's words as a commitment by the Provider to writing down the whole or part of the shortfall. I do not believe, however, when viewed objectively that the representative's words are reasonably capable of that interpretation. In fact, the only specific guidance given by the representative is a reference to a payment plan to repay the shortfall.

The second aspect of the call of 9 June 2014 that merits discussion is the conversation in respect of how the AVS process would show on the ICB record of the Complainants. In response, the Provider's representative wrongly informed the first Complainant that once the AVS agreement was signed, the ICB "*would be flagged as "T" followed by "C" when it is actually completed*." As accepted by the Provider in its response to this Office, this information is incorrect. I am not even clear on exactly what designation "*T*" was supposed to imply. The first Complainant specifically asks if the designation "*C*" is used when the AVS goes through or when the shortfall is cleared.

The Provider's representative informs her that he does not know but then speculates it would be when the shortfall is "*completely cleared*" or when something is "*agreed*" or "*settled*" in relation to the shortfall. Thus although the information about a "*T*" designation was incorrect, the first Complainant was not left with the impression that it would be flagged as "*C*" upon the sale of the property but rather when the shortfall was cleared.

Following on from this conversation, the Complainants signed the AVS acceptance form on 9 June 2014 that was enclosed with the letter of 2 April 2014. By their signatures, the Complainants agreed to sell the properties subject to certain conditions of cooperation with the Provider.

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The form also contained a series of acknowledgements, the most pertinent being the following:

> *"(c) I/We will continue to be liable for any shortfall arising where the sale proceeds are insufficient to pay the outstanding loan amount in full;*
>
> *(d) Where money is still owing by you after the Property has been sold (that is, there is a shortfall), I/We shall enter into a repayment arrangement whereby I/We will repay the shortfall amount in accordance with such repayment arrangement which will be based on what I/we can afford to pay and as agreed with you;*
> *. . .*
>
> *(f) Missed mortgage repayments will be recorded on my/our Irish Credit Bureau (ICB) profile and affect my/our future ability to borrow;*
>
> *(g) I/We will continue to make my/our monthly repayments due under my/our mortgage . . . while the Property is for sale;*
> *. . .*
>
> *(j) I/We confirm that I/We have received independent legal and financial advice or have been given an opportunity to take such advice before signing this form*".

All of these acknowledgements were made by the Complainants in accepting the AVS offer. I believe that the Provider's inclusion of the acknowledgement. The overall picture which emerges from the documentation is that the Complainants agreed that they would be liable for the entirety of the shortfall after the sale of the property and agreed to enter into a repayment arrangement with the Provider based on affordability in relation to repayment of the shortfall.

This acceptance form was available to the first Complainant when she was discussing the AVS process with the Provider on 9 June 2014. At no point did she query any concern that the acknowledgements that they were being asked to sign differed in any way from the information being received from the Provider or as understood by her in relation to their liability to repay the shortfall.

The third crucial call took place on 18 July 2014, after the Complainants had agreed to the AVS process but before the property had been marketed for sale. On this call, the Provider's representative informed the first Complainant that he had researched the position of the Complainants and discussed it with his manager. He informed her that there was a cross charge on the mortgage so that when the property was sold with an expected shortfall, the shortfall would "*come against*" their main mortgage on their family home. The representative indicated that the Complainants were "*planning on selling*" the BTL or "*thinking of selling*" the BTL, underlining that the decision was reversible. He indicated that after the sale, there would be an assessment made by the Provider of the main mortgage and the shortfall together.

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He said that the Provider would assess what they were paying again in relation to the two mortgages on the main property and the shortfall would be added on. The Provider's representative indicated that at that point, there may be a need to extend the "*whole lot*" (i.e. the entire mortgage debt) and there would be a need for a restructure. At that point, the first Complainant indicated to the representative that the previous representative had stated that the remainder would be "*stand-alone*" and that the Provider would look at a write-down on it. This was a reference to the call of 9 June 2014 as I have set out above and is not an accurate reflection of what that representative said in that or the earlier April call in relation to the issue of the shortfall. On the call of 18 July 2014 and in response to this interjection, the representative indicated that he is always told that the Provider does not offer write-downs but he did not know and that maybe she had been misinformed on the previous call but there was a cross charge in place. He indicated that there could be a negotiation in relation to everything after the sale of the property.

The first Complainant requested a transcript of the previous call and indicated that she was going to make a formal complaint in relation to the difference between what she was told previously and what she was being told on July call. They also discussed the fact that the Third Party Consultants had indicated that they had been instructed by the Provider to take the family home out of the AVS and the representative was unable to confirm the position, despite the fact that the Third Party Consultants had already confirmed to the Complainants that the family home was unaffected.

The information provided to the Complainant on the call of 18 July 2014 was correct in all respects (other than the representative's failure to confirm that the AVS does not include the family home). On that call, the Provider's representative highlighted the fact of the cross charge and the impact this had in relation to the expected shortfall on the sale of the BTL. The representative also indicated that the amount of the shortfall would be added to the remainder of the main mortgage on the family home and that there would be a need to assess the entire debt owing at that point with a view to an extension of term or restructure if necessary. This is precisely what transpired in the offer of an ARA made in November 2016, though the ARA offered was not accepted by the Complainants.

If the first Complainant had been operating under the misapprehension that she had been informed on the April or June 2014 calls that there would be write-down of the shortfall, this issue was clarified in the clearest terms by the representative on the call of 18 July 2014 who indicated his understanding that the Provider did not write-down debt. Further, clarification was provided on the question of the cross charge and the first Complainant appraised that the shortfall would remain charged as against the family home. I appreciate that this clarification took place after the Complainants had agreed to the AVS process by way of signing the relevant AVS agreement on 9 June 2014. No concrete steps had been taken, however, in respect of the sale of the property and the Complainants could have changed their mind on the process at this point if the information that had now been provided to them fundamentally altered their view of the advantages of proceeding with a voluntary sale of the BTL.

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Further clarification in the same terms was provided in response to a complaint raised by the first Complainant at this juncture by letter dated 4 September 2014. In relation to the representative's comments from 9 June 2014 that he "*would imagine there would be a negotiation*" regarding shortfall, the Provider noted that *"this may be the process in some cases however the Buy to Let Team would look after each individual case and [the representative in question] would not have the relevant experience to address all queries in relation to Assisted Voluntary Sales*". This response could be considered somewhat ambiguous, but it certainly does not commit to a negotiation regarding the shortfall and does not mention anything about a write-down. The letter confirmed that the family home was inadvertently included in the AVS instruction to the Third Party Consultants due to the cross charge but that this was incorrect and that the AVS would only apply to the BLT property. The letter also stated that "*the AVS process when seen through to completion will result in whatever shortfall debt remains being charged against the family home along with the two primary stand-alone Home Loan debts*."

This confirmation that the entire amount would remain charged against the family home came well before the sale of the property. I also note that the letter in question accepted these shortcomings in addition to three occasions where the Complainants were not phoned back by the Provider when they should have been. By way of apology, the Provider offered €100 in compensation for these multiple failures. In my view, given the impact of the multiple failures outlined in the letter to the Complainants, they were deserving of a much higher compensation offer.

In a further letter to the Complainants dated 30 October 2014, the Provider advised as follows in relation to the shortfall:

> "*I wish to advise residual debt is currently dealt with by the Properties in Possession Department; they assess a customer based on their affordability to determine a sustainable repayment arrangement. In this case our Arrears Support Unit will assess the Mortgage and any shortfall once the Residential Investment Property is sold. A new Standard Financial Statements (SFS) will be required at a future date in order to complete this assessment as per your conversation with [the Provider's representative] dated 18th of July 2014*."

This letter of 30 October 2014 could again be considered of being deliberately ambiguous in relation to what would happen in relation to the shortfall, other than that a sustainable repayment arrangement would be assessed based on affordability. It certainly does not, however, make any commitment to the Complainants in respect of a write-down of the shortfall. In my view, it ought to have been clear at this point to the Complainants that if they had previously been under the mistaken impression that the Provider had agreed to a write-down of the shortfall, that this was not the case. I note that this second response letter also predated the sale of the property in question.

The letter of 30 October 2014 also corrected the misleading information that had been provided to the Complainants in relation to their ICB record. The letter confirmed that the AVS of the BTL property "*will not be indicated on your ICB*".

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It explained that as the property was cross charged with the family home *"your ICB profile will remain as normal, that is reflecting the payments made or not made to the Mortgage Account on the remaining balance*." Again this clarification is important as it occurred prior to the voluntary sale of the BTL property. The Complainants therefore were (or ought to have been) aware from this point that their failure to make any payments towards the shortfall after the sale of the property would reflect as missed payments on the mortgage account on the ICB record. As an aside, I accept the Complainants' argument that this clarification from the Provider also appears to have been based on an inaccurate query being raised internally as the query raised was in relation to the ICB effect of a repossession rather than AVS. This is suggestive of further failings in customer service but actually did not affect the accuracy of the information imparted.

Finally, in its letter dated 13 February 2015, the Provider stated that it was agreeable to the sale of the mortgaged property for the sum of €40,000, and would release its charge over that property. The letter further stated:

> "*Please note that all parties to the mortgage will remain jointly and severally liable for the resulting shortfall on the account will continue to bill on a monthly basis*."

Once again, this confirmation that the Complainants would be liable for the entirety of the shortfall was made prior to the sale of the property.

There was undoubtedly misinformation provided to the Complainants in relation to the effect of the AVS procedure on their ICB in April and June 2014. It appears that this information formed part of the basis of the Complainants' decision to agree to the AVS. I am unable to see, however, how any loss has been suffered by them on the basis of this misinformation. Even if the Complainants had refused the AVS option if they had known the true position in relation to their ICB, I do not see how their position would have been thereby improved. I also note that they could have withdrawn from the AVS process once the Provider clarified that the AVS would have no effect on their ICB record by letter dated 30 October 2014. If the Complainants had not agreed to an AVS, or opted to withdraw from it, it appears that the Provider would likely have proceeded to the issue of legal proceedings against them.

This is apparent from the decision of the Provider to issue a 10-day demand letter on the initial expiry of the AVS letter, from the content of the AVS letter of 2 April 2014, and from comments by the Provider's representative on 9 June call. This would not have improved their indebtedness position, other than to likely increase their debt due to legal costs.

There is no evidence before me to suggest that if the complainants had not sold the BTL property in 2015 through a voluntary sales process that their financial position would have improved in the intervening years such that they could have cleared the arrears on their mortgage account. Therefore, in my view, their ICB record would most likely have reflected the same position over the years, regardless of whether they agreed to the AVS in 2014 or not.

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While I therefore accept that the Provider furnished incorrect and misleading information to the Complainants in respect of their ICB record, I do not accept that this has caused them a loss. The only improvement that could have occurred in respect of their ICB record was if the parties had come to a mutually satisfactory agreement in respect of the repayment of the shortfall and this is not something I am in a position to require of the Provider as the terms of any renegotiation are a matter for the Provider's commercial discretion.

The same logic applies in respect of any suggestion by representatives of the Provider that it would manage the shortfall or there would be a negotiation in respect of the shortfall that the Complainants feel did not happen. There was no express or concrete commitment given to the Complainants that the Provider would write-down the debt or a portion of it. At best, there was a suggestion on the call of 9 June 2014 that a negotiation of some kind would occur post-sale between the parties in relation to the shortfall, but without any firm promise as to the form that would take (for example, an offer of a term extension, write-down, interest rate reduction, etc.) and a repayment plan was envisaged.

Although it was not offered until November 2016, the Provider eventually offered an alternative repayment arrangement (**ARA**) in respect of the total debt to the Complainants which involved part capital and interest repayment schedule for a six-month trial period. The Complainants have been very clear on their reasons why this offer was not viable for them and there was no obligation on them to accept it. However, even if the representative's words on the call of 9 June 2014 could be interpreted as a commitment to a negotiation (and as I have already stated, I do not think that the words were so definitive), I believe that this would have been fulfilled in the offer that was made in November 2016, albeit that the suggested arrangement was not acceptable to the Complainants. Further, the Complainants have not identified to me any particular loss that they have suffered as a result of agreeing to the AVS process, even if they did so on the mistaken understanding that the Provider had committed to writing down a portion of the shortfall on the mortgage debt. As previously mentioned, I am not aware that there was any other option open to them than either agreeing to a voluntary sale of the property or having that property repossessed through the courts and sold. As this latter option would have been more costly and thereby increased the debt that they owed, I do not think that this would have been a better option for them or led to any cost saving.

As frustrating as the situation must be for the Complainants, I do not believe that any commitment was made to them to write-down the shortfall and there is no evidence before me to suggest that they have suffered any loss by agreeing to the AVS process, even in the absence of a subsequent agreement in relation to the shortfall.

In their submissions, the Complainants return time and again to an argument that, in their view, the AVS process was not completed as the shortfall was not '*assessed*'.

They argue that the Provider cannot suggest the sale of the property at the most viable option "*without subsequently completing the process by formally assessing, addressing, limiting cross charge exposure and amalgamating the shortfall post sale*".

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This is the view of the Complainants on what ought to have happened in relation to the shortfall on their BTL property and, according to their submissions, the view of their solicitor, the Third Party Advisor and an independent insolvency practitioner. There is no legal obligation, however, on a mortgage holder in a situation where an investment property has been sold and is cross charged against another property to write-down the shortfall based on a valuation of the available equity in the other property, even if it is a family home. That would obviously have been an ideal solution for the Complainants as it would have allowed them to return to financial stability, which is clearly a huge concern to them, and would have involved considerable debt forgiveness by the Provider. But they have not identified the source of any legal obligation on the Provider to agree to such a proposal. I do not accept that the Provider's representatives made any statements to the Complainants before or during the AVS process that can be relied upon by the Complainants to force the Provider to write-down the shortfall in the manner that they suggest. I have been provided with no evidence that the Provider's representative ever promised the Complainants that by agreeing to the AVS process, they would return to financial stability, though it presumably what all parties would strive towards.

The Provider has argued that if the Complainants had agreed to its November 2016 ARA, a long-term solution in similar terms would have been applied to the account, though this solution was not to the Complainants' satisfaction. I have already outlined that the Provider imparted incorrect information to the Complainants on several calls at critical times and I will return to these failings by the Provider later. I do not accept, however, that the Provider's recommendation that the AVS process was the '*best option*' for the Complainants in 2014 meant that it was obliged to write-down the subsequent shortfall on the mortgage loan, as a percentage of the remaining equity or otherwise. As I have already outlined, the only other realistic option in 2014 was for the Complainants to refuse to engage with the Provider in relation to voluntary sale of the property and instead to have the property repossessed through the courts and sold. This, to my mind, was not a better option than the AVS option chosen by the Complainants.

The sad reality is that the Complainants had very little option in 2014 in respect of the mortgaged property in question. It was the fact that the BTL mortgage was in such serious negative equity, was in serious arrears, was not self-financing, and was cross charged against their family home that has led to the current situation. Although the Provider ought to have provided accurate information at all times to the Complainants and further ought to have assessed their financial position to include the shortfall sooner than it did, this office will not look into the details of commercial negotiations.

It would not be reasonable in these circumstances for this Office to direct the Provider to write-down a portion of the mortgage. Although the Complainants have taken issue with the repayment proposal that was made to them by the Provider in November 2016, and they were perfectly entitled to refuse to accept the proposed arrangement, the Provider did (albeit belatedly) fully assess their financial circumstances to include their obligations under the main mortgage and the shortfall on their BTL mortgage. I do not consider that the Provider's obligations went further than that.

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I therefore uphold the aspect of the Complainants' complaint in respect of the provision of incorrect and misleading information by the Provider. I do not, however, uphold the aspect of the complaint concerning any obligation on the Provider to write-down the shortfall. I have not found that the Provider's recommendation that the ''best option" for the complainants was that they should agree to a voluntary sale of the property in April 2014 constituted bad or negligent advice and/or has left the Complainants in a worse financial situation than they initially found themselves.

2. Customer Service Failures

There are numerous examples of customer service failures which occurred in this complaint. The incorrect information provided to the first Complainant on the calls of 2 April 2014 and 9 June 2014 has been dealt with above and I will return to it in the context of appropriate redress.

The following are the most significant of those failures:

No Call Back on AVS Queries and Premature Letter of Demand

After the AVS documentation was sent to the Complainants on 2 April 2014, it appears that the first Complainant called the Provider on 14 April 2014 and that the representative she was dealing with had insufficient information so she requested a customer call-back from the relevant department. This was never made. She also called the Provider on 9 May 2014 seeking further information in relation to the AVS process. When it was not possible to transfer her call to the relevant department (the ASU), it appears that she was informed that she would receive a call back. Despite the fact that the Provider has submitted 66 individual call recordings in response to the present complaint (not all of which are relevant to the complaint), no recordings of these conversations from 14 April or 9 May 2014 have been made available to me. It appears to be common case between the parties, however, that the request was made for the ASU to call the first Complainant in relation to the AVS offer and no call was in fact made. Instead, after 30 days had elapsed from the date of the AVS letter, the offer was considered to have expired, was "*moved along*" and a 10-day demand letter was sent to the Complainants dated 29 May 2014, calling in the entire mortgage debt.

This letter of demand is obviously very significant from a legal perspective as a failure to repay the debt within the stated period of the demand would then have allowed the Provider to proceed to litigation against the Complainants in respect of the debt. In response to this letter of demand, the first Complainant called the Provider questioning why the 10-day letter had been received when she had phoned with queries and had not received a call back.

The representative in question explained that the AVS offer had expired and that this was the reason why the demand letter had issued but accepted that a message had been forwarded on 9 May 2014 to the ASU to call the Complainant back.

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The Provider's representative gave the relevant number of the ASU department to the first Complainant and indicated that no action would be taken on foot of the letter of demand for present purposes.

The failure of the ASU to return the call of the Complainants in relation to their queries on the AVS is significant. The first Complainant was assured on the call of 2 April 2014 that if she had any queries on the process, they would be answered by the Provider. They were further encouraged to contact the Provider with queries in the AVS offer letter of 2 April 2014. The Complainants obviously did have queries on the process but were not able to get hold of the relevant department and that department failed to return their call on request. Further, the Provider's failure to return the call meant that the 30 day AVS offer period expired without the Complainants returning the relevant paperwork. The Complainants were obviously waiting for the promised call back and a response to their queries before deciding whether to proceed with the AVS option. The expiry of the AVS offer then led the Provider to taking the decision to move the Complainants' mortgage loan to a litigation phase and issue a 10 day demand letter.

Despite the fact that no proceedings were issued subsequent to this demand (as the Complainants agreed to the AVS process), it is unclear what bearing (if any) this demand letter had on the Complainant's decision to agree to the AVS process. There are therefore two failings by the Provider at this juncture – first the failure to respond to the Complainants queries on the AVS, and second, the issue of a formal demand in relation to their mortgage in circumstances where the Complainants were awaiting a call back in relation to the AVS offer that had been sent to them.

Inclusion of Family Home in AVS Instruction and Two Week Delay in Clarification

The next major failing was the Provider's error in instructing The Third Party Property Consultants that were appointed to manage the relevant AVS that the Complainants' family home was to be included in the AVS along with the BTL. This error was compounded by the Provider's lengthy delay in clarifying to the Complainants that this had been an error and that their family home was not included in the AVS.

After the Complainants agreed to a voluntary sale of their BTL on 9 June 2014, the Complainants received a call on 3 July 2014 while attending a family occasion from the Third Party Property Consultants to start the process of the voluntary sale of both the BTL and the family home. The Complainants have referred to the "*trauma*" that this phone call caused them and one can readily appreciate how upsetting it would be to receive such a phone call at any time, and especially when attending a family celebration. After several attempts to telephone the Provider, the first Complainant explains that she spoke to a representative on 3 July 2014 and explained what had happened. No recording of this call has been provided to me, but there is a system note and there does not appear to be a dispute between the parties in relation to what was said. The representative in question indicated that he would look into the query and call the first Complainant back later that day or the following day.

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The first Complainant had explained that they were deeply upset and needed immediate clarification on the issue. No call back was ever received by the Complainants from that representative. Rather, the Complainants themselves had to chase the Provider for the information. Further calls took place on 12 July, 15 July, 16 July and 18 July 2014. Even on the call of 18 July 2014, the representative in question was far from clear that the AVS did not include the family home, although by that point the Complainants had been told by the Third Party Property Consultants itself that the Provider had confirmed that the BTL only was included in the AVS process.

These errors on the part of the Provider, although admitted, are extremely serious. There has been no explanation provided as to how the Complainants' family home was inadvertently included in the AVS instruction to the Third Party Property Consultants. It appears from certain internal documentation (an internal email of 15 July 2014), however, that the issue had actually arisen before in relation to cases where a cross-charge was in place so the Provider ought to have known and remedied whatever system error was causing the problem before the issue arose in respect of the Complainants' account.

In any event, the situation could and ought to have been resolved on 3 July 2014 if the Provider had taken responsibility for clarifying the issue. Inexplicably, however, the Provider failed to contact the Complainants to clarify the position, despite the fact that it was made clear to the Provider that the Complainants were (understandably) extremely upset by the situation that had arisen. The Provider therefore left the Complainants for two full weeks thinking that they may have inadvertently agreed to the voluntary sale of their family home. It is not difficult to imagine what a stressful situation this would have been for the Complainants. The fact that the situation arose due to an error of the Provider, an error the Provider itself could at any time have resolved by simply clarifying the position to the Complainants is most unacceptable and completely unreasonable. Even after one department of the Provider had clarified the position to the Third Party Property Consultants some two weeks later and the Third Party Property Consultants itself had confirmed to the Complainants that the family home was not included, it appears that another department of the Provider which was looking into the cross-charge position was unaware of the clarification. This is an example of the type of mismanagement that the Complainants are concerned about, and which I will return to later.

Failure to Respond to Solicitor Queries re Cross-Charge Removal

In the course of the sale of the BTL property, solicitors acting on behalf of the Complainants wrote on several occasions to the Provider requesting confirmation that the cross charge would be released over the family home. I would point out that I can find no record of any such commitment ever having been made by the Provider to the Complainants, despite the wording of the solicitors' letters. No such confirmation was ever received from the Provider. That is not to say that the Complainants' solicitors received a rejection from the Provider which I would have expected but rather, no response whatsoever was received to the request in the numerous letters that were sent.

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In response to the Provider's agreement to the sale of the property in the sum of €40,000, the Complainant solicitors wrote to the Provider on 24 February 2015 referring to the fact that the property was cross charged with the family home and stating that "*we would be obliged for confirmation that on remittance of the sale proceeds . . . the Cross Charge will also be released over the [family home]*." Again by letter dated 14 May 2015, the solicitors indicated that *they had "now received signed contracts in respect of the sale of the property we would be obliged for confirmation that on remittance of the net proceeds . . . the cross charge will also be released over the [family home]*…" This letter is stamped as received by the collections department on 15 May and by the transfer, release and shortfall department on 29 May 2015. On 15 October 2015, a redemption cheque was sent in accordance with the Provider' letter of consent dated 13 February 2015 and the solicitors also sought "*confirmation as previously requested that the Cross Charge over the clients' [family home] will also be discharged*." By letter dated 16 October 2015, the Provider acknowledged receipt of the cheque but did not mention the cross charge query. Further requests for the removal of the cross charge was sent by the solicitors on 12 November 2015, 30 November 2015, and 21 November 2018. No response was ever made by the Provider until the position was clarified to the first Complainant on a telephone call in April 2016, more than a year after the first letter.

Failure to Assess SFS in February 2016

At the request of the Complainants' then portfolio manager, [PM], on a call on 5 February 2016, the Complainants completed and submitted an SFS by cover letter dated 23 February 2016 in addition to relevant supporting documentation. The Complainants were assured on the call of 5 February that PM would assess affordability in relation to their entire mortgage indebtedness and make a proposal for repayment which he would bring to credit committee, based on the completed SFS. It appears that over the course of the next few months, a decision was made that PM's department was not the appropriate department to deal with the Complainants' case and the case was moved on to a regular collections department (discussed further in next section). Regardless of this, there is no question but that the SFS submitted by the Complainants was never assessed. The Provider has accepted that it did not assess the SFS in what it describes as a "*timely manner*". This is something of an understatement. The February 2016 SFS was *never* assessed by the Provider and no explanation whatsoever has been provided as to why that was. This is simply unacceptable.

By the time another department took charge of the Complainants' account in October 2016, the SFS that had been completed in February 2016 had expired and a new SFS was required from the Complainants. The first Complainant was informed that she was not able to simply complete the form herself but rather she was required to make an appointment in branch to complete a new SFS with the assistance of the Provider's representative. She was informed that this would take approximately 60 to 90 minutes. Having therefore been left waiting between February and October 2016 for a proposal to come from PM in relation to the SFS that they have submitted, the Complainants were told that the promised assessment simply had not happened and that they have to start the process again, at some inconvenience to them.

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I uphold this aspect of the Complainants' complaint in respect of the receipt of poor customer service. A litany of fundamental and serious customer service failings were visited on the Complainants. The scale of poor service provided to the Complainants was worrying and unacceptable.

The Provider should ensure appropriate training has been given to its staff so that frontline staff dealing with borrowers in arrears or in pre-arrears are aware of the lender's policy for dealing with arrears and pre-arrears' cases and the relevant contact persons and process.

In relation to regulatory obligations, I am of the view that the Provider's conduct has breached the following provisions of the Code of Conduct on Mortgage Arrears 2013:

> Provision 35 – A completed standard financial statement must be assessed in a timely manner by the lender's ASU.

I am also of the view that the Provider's conduct has breached the following provisions of the Consumer Protection Code 2012:

> General Principles – A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:
>
> > 2.2 acts with due skill, care and diligence in the best interests of its customers;
> >
> > 2.3 does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service;
> >
> > 2.4 has and employs effectively the resources, policies and procedures, systems and control checks, including compliance checks, and staff training that are necessary for compliance with this Code.
>
> 4.1 A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.
>
> 10.1 A regulated entity must have written procedures in place for the effective handling of errors which affect consumers. At a minimum, these procedures must provide for the following:
>
> a) The identification of the cause of the error;
>
> b) The identification of all affected consumers;
>
> c) The appropriate analysis of the patterns of the errors, including investigation as to whether or not it was an isolated error;
>
> d) Proper control of the correction process; and

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e) Escalation of errors to compliance/risk functions and senior management.

It is beyond doubt that the various failings identified above caused significant stress, frustration and inconvenience for the Complainants, and will surely have greatly compounded the already very difficult financial position that they found themselves in. It is beyond question that it is appropriate for me to direct some considerable compensation to the Complainants in light of the provision of misinformation and the poor customer service received by them. The €2,000 offered to them by the Provider is wholly inadequate in my view.

3. Mismanagement

The Complainants assert that their account was mismanaged by the Provider from 2014 onwards. Indeed when one considers the litany of errors that occurred – including the extent of the misinformation provided and the April and June 2014 calls, the precipitous issue of the demand letter, the multiple examples of failures to return the Complainants calls and solicitor inquiries, the incorrect instruction to the Third Party Consultants to include the family home in the AVS process, and the failure to assess the SFS submitted in February 2016 all support the Complainants' assertion. I agree with the Complainants' assertion that there was a failure by any single department within the Provider to take charge of the Complainants' account. When one considers the content of the 2014 calls highlighted above, it is clear that the representatives in question did not really know which department ought to be dealing with the matter considering that the account was substantially in arrears but was cross charged against a performing family home mortgage. This may also explain (though certainly does not excuse) why the Provider at no time responded to letters from the Complainants' solicitors in 2015 requesting confirmation that the cross charged against the family home be removed upon the completion of the sale of the BTL.

The first time any individual appeared to take charge of the assessment of the Complainants' accounts was PM in February 2016. In a phone call between PM and the first Complainant on 5 February 2016, PM assured her that if she provided him with an SFS and supporting documentation, he would assess the entirety of their payments and indebtedness and make a proposal to put before the credit committee. He indicated that the Provider would come up with a proposal for money to be paid towards the shortfall and that he would be their main contact. PM indicated that a request would be made for the account to stop billing (which never occurred) and that the home loan would be prioritised in any future payment structure (which is not the restructure eventually offered). They had a follow-up call on 18 April 2016 in which the first Complainant indicated that her advice was that the cross charge should be removed once the property was sold and that her solicitor could not get an answer in relation to this. In response, PM informed her that this was not correct and the shortfall was due and owing in full.

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Despite the fact that the first Complainant appears to have sent reminder emails to PM over the following months, no further action appears to have been taken by PM and certainly no further contact was received by the Complainants from him directly. The SFS that was submitted by the Complainants in February 2016 was not formally assessed by the Provider and subsequently expired, thus necessitating an in-branch visit by the first Complainant to complete an SFS later in late October 2016.

The only explanation ever provided to the Complainants for PM's failure to assess their overall indebtedness was in a call with another representative dated 4 October 2016. On that call, the first Complainant was informed in a perfunctory manner that hers was "*not a case for insolvency*" but rather was a "*regular collections*" matter. She was also told that because of their other properties, PM's work on insolvency was "*inapplicable*".

I am not quite sure what relevance this information was supposed to have to the first Complainant – what difference it was supposed to make to her whether regular collections or insolvency were dealing with her case – but this conversation underlines the Complainants' impression that the Provider was unclear on what it was doing in their case. It is important to recall that PM was not appointed until February 2016 to deal with the matter, which is almost 2 years since the AVS process had been recommended to the Complainants and begun, and when none of the parties were in any doubt as to the fact that the shortfall was secured against the family home.

I have drawn attention on many occasions for greater and clearer communications from financial service providers. This is even more crucial where people are in arrears and the sale of a property is at stake.

I entirely agree with the Complainants that a named individual ought to have been appointed to their case at the beginning of the AVS process in 2014 to ensure that the process was managed in a more streamlined manner and better communication could have taken place. I do not understand why the Provider zigzagged between viewing the case as an insolvency case (when it was always aware of the cross charge) and insisting later (in the call of 4 October 2016) that it was not an appropriate matter for insolvency but one for regular collections. I note that on 10 November 2016, an internal email suggested that the outstanding balance on the family home was a mere €48,000, and that the property valuation of approximately €280,000, which *"means that there is no negative equity overall and the case should be assessed by the ASU*". This email overlooked the fact that there was a second family home mortgage of approximately €130,000 so if all three mortgage accounts (to include the shortfall account) had been added up, it was incorrect to say that there was no negative equity overall. It is unclear to me if this mistake formed the basis for the Provider's decision to move the case from insolvency to regular collections. It seems unlikely to have done so considering the fact that the email post-dated the call of 4 October 2016 but like many other aspects of this complaint it is troubling. This view that there was no negative equity overall appears to have been taken into account in the restructure ultimately offered in November 2016 as it appears in the notes.

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I am also unsure if the ARA that was to be offered to them would have been any different if the Complainants' accounts had remained in insolvency managed by PM or if the notes had not reflected the incorrect conclusion that there was no negative equity.

I think it was quite understandable that the Complainants were deeply concerned that the ARA eventually offered to them attempted to divert funds from their performing home loan to the shortfall from their BTL, though I accept that the ARA offered would have been a long-term solution if accepted. I am of the view, however, that the Provider failed to properly manage the Complainants' mortgage account from the commencement of the AVS process in around April 2014 until October/November 2016 when their overall indebtedness was finally assessed. This certainly made the process lengthier and more frustrating for the Complainants.

Therefore, I uphold this aspect of the complaint.

Redress

I substantially uphold the complaint on the basis of the provision of incorrect and misleading information, the provision of extremely poor customer service, and overall mismanagement of the Complainants' mortgage account from April 2014 to October 2016. I do not uphold the aspect of the complaint alleging that there ought to have been a write-down of the shortfall of the mortgage account after the voluntary sale of the property, that the Provider failed to assess the shortfall, or any complaint in respect of allegedly incorrect or misleading advice that a voluntary sale was the '*best option*' then available to the Complainants.

I note that the redress the Complainants are seeking is for the Provider to offer them a new mortgage to include some sort of write-down of the overall total. I do not make such a direction as I do not believe it is appropriate or reasonable for me to direct a write-down of the mortgage as I believe this was never promised to the Complainants. Further, I do not believe it would be appropriate to direct the Provider to make a mortgage available to the Complainants.

I am of the view that the most appropriate redress in the complaint is to direct a sum of compensation from the Provider to the Complainants to reflect the very serious failings of the Provider in the complaint. Due to the scale of the Provider's failings, the period of time over which they took place, and a significant impact that these failures had on the Complainants, it is appropriate, in my view, to direct that the sum of €15,000 in compensation be paid to the Complainants.

For the reasons outlined in this Decision, I substantially uphold this complaint and direct the Provider to pay the sum of €15,000 in compensation to the Complainants.

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Conclusion

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

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 €15,000, 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

1 October 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,

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and

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