An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0227
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Errors in calculations Incorrect information sent to credit reference agency
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint refers to the calculation of arrears on the Complainants' mortgage loan account with the Provider.

The Complainants' Case

The Complainants state that they received a letter from the Provider's legal representatives in January 2017 regarding alleged arrears on their mortgage account. The Complainants dispute that the mortgage loan account was in arrears of over €15,000 at the time in question.

The Complainants state that the Provider informed them by letter dated 3 January 2017 that the arrears on their mortgage loan accounts amounted to €15,366.16. Later correspondence received from the Provider on 1 December 2017, however, stated that the arrears were €451.33. The Complainants contend that the Provider miscalculated the arrears or mixed them up with another account holder of the same name.

The Complainants further argue that the threat of legal action caused stress and financial hardship to the Complainants and are concerned that the Provider made an error in relation to their credit rating.

The Complainants object to the Provider using what they see as a litigation "*shock and awe tactic*" against them in the same calendar year that it introduced a new calculation methodology in respect of arrears.

They argue that if the recalculation methodology had occurred earlier, their account would not have been sent to litigation. They argue that the "*pending litigation*" designation on their credit report since January 2017 has had a severe and adverse impact on their children's third level education requirements and their day-to-day lives.

The Complainants argue that through its actions, the Provider has created a significant event for their family finances as they are no longer in a position to raise money. They further argue that the commencement of litigation by the Provider caused them tremendous stress and trauma but was unnecessary. They argue that there was no new arrangement put in place in January 2018 as claimed by the Provider but rather the Complainants were to continue with their normal monthly repayments to avoid further litigation, so they question why the Provider placed them in litigation in the first place.

The Complainants argue that they have not been informed of the information regarding the changes in methodology that was sent to the Central Bank. They further argue that the letter received from the Provider in November 2017 reportedly explaining the situation was "*gobbledie gook*". They do not accept that the explanation provided had been clear. The Complainants argue that the Provider basically "*capitalised*" the "*arrears*" on their account in November 2017 without any explanation.

By way of redress, the Complainants want the Provider to "*refund professional legal fees*" of approximately €2,500 plus VAT. They are also seeking €20,000 in compensation for stress and financial hardship and want their Irish Credit Bureau record to be repaired to its original position prior to the miscalculation of their arrears.

The Provider's Case

The Provider states that the Complainants entered into an interest only mortgage loan in September 2005 for a term of 30 years. It states that the mortgage loan balance as of 31 January 2017 was €361,350.16 inclusive of €15,336.16 arrears. The Provider argues that the Complainants' account first fell into arrears in April 2011 and remained in arrears up to and including January 2018.

The Provider argues that as a member of the Irish Credit Bureau (**ICB**), it reports the status of all loan accounts to the ICB on a monthly basis. It argues that the number of missed payments was reported to the ICB accordingly, however the maximum amount of missed payments which can be reported to the ICB is '9'. As such, when the Complainants exceeded the equivalent of 9 missed payments, the Provider could only report the account as '9' until the arrears reduced.

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In respect of the significant reduction to the stated arrears balance in November 2017, the Provider argues that the methodology previously used to recalculate the Complainants' monthly mortgage repayments (or Contractual Monthly Subscription (**CMS**)) when it was last calculated effective from 1 May 2016 included the accumulated arrears on the mortgage account on the date of recalculation.

The Provider argues that, as advised in its letter to the Complainants on 6 November 2017, a revised monthly mortgage calculation methodology was adopted with effect from 1 November 2017 which ensures that the Complainants' arrears figures remain independent of the CMS should it be recalculated in the future, for example if the interest rate changes.

The Provider argues that as part of this process, it recalculated the arrears figures in November 2017 by calculating the difference between the total CMS due since the CMS was last calculated and the total payments actually made since the CMS was last calculated. Prior to the recalculation, their arrears figure comprised the shortfall between the total monthly repayments due since the loan was drawn down and payments actually made by them since the loan was drawn down.

The Provider argues that as the Complainants had total monthly mortgage repayments of €6,769.78 and the payments actually made to the account was €6,318.65 since the date of the CMS recalculation on 1 May 2016, the arrears were calculated as €451.33 (that is, €6,769.98 minus €6,318.65) in November 2017. The Provider argues this change in methodology did not alter or impact upon the overall indebtedness of the Complainants to the Provider. It further asserts that the Complainants' account was not miscalculated or mixed up with another client's account.

The Provider argues that the Complainants were informed of the change in methodology by letter dated 6 November 2017. The Provider argues that this clarified how the arrears and outstanding balances had been calculated. The Provider states that it is satisfied that it clearly and unambiguously clarified the new calculation methodology in its letter of 6 November 2017.

The Provider argues that the Complainants' loan account fell under their Mortgage Arrears Resolution Process (**MARP**). It states that an assessment of a Standard Financial Statement (**SFS**) provided by the Complainants was completed by it in January 2016. It states that an arrangement was offered to the Complainants on 15 February 2016 but the relevant paperwork was not returned by the Complainants within the designated time frames and so they fell out of MARP. The Provider states that a letter issued to the Complainants on 30 March 2016 stating this. The Provider states that a further assessment under MARP took place in July 2017, with the assessment concluding that the Complainants could afford the full contractual monthly repayment and an arrangement was put in place.

The Provider argues that all members of the ICB, including the Provider, are obliged to report the status of all loan accounts to the ICB at the end of every month. The Provider states that the Complainants' total loan account balance was reported to the ICB on a monthly basis following the transfer of the loan to it in February 2015.

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The Provider states that the Complainants' mortgage loan account first fell into arrears in April 2011 and the number of missed payments was also reported to the ICB by the Provider following the transfer of the loan. The Provider states that in January 2017, the Complainants' file was passed to its litigation department as a formal demand for repayment had been made. It further clarified that the account was sent to its solicitors in January 2017. The account was then reported to the ICB as 'Pending Litigation' or "P" in line with ICB rules.

The Provider states that proceedings were never issued on this case and the file was removed from litigation in January 2018. The Provider states the Complainants have since brought their account up-to-date and arrears have not been reported to the ICB since January 2018.

In respect of the Complainants' objection that they were not informed of the information submitted to the Central Bank, the Provider argues that the Central Bank was provided with information regarding the change in methodology and provided input to the letter it issued to its borrowers in November 2017. It argues that its interactions with the Central Bank are all confidential and the Provider is unable to provide further detail regarding the engagement.

The Complaint for Adjudication

The complaint is that the Provider:

1. Wrongly assessed the Complainants in January 2017 of having arrears on their mortgage loan account in excess of €15,000;

2. Incorrectly engaged in legal action against the Complainants in January 2017 which caused a lot of stress and upset; and

3. Negatively interfered with their credit rating with the Irish Credit Bureau.

The Complainants notified this Office on 14 September 2020 of correspondence received from the Provider in relation to purported arrears on their account.

The Provider responded to the Complainants by way of Final Response Letter on 22 September 2020. I note the Complainants are unhappy with the response received. As this matter was raised at an advanced stage in the adjudication of this complaint, it has not formed part of the investigation of this complaint and is therefore not dealt with in this Decision.

It is open to the Complainants to make a separate complaint to this Office with regard to this matter should they so wish.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence.

The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on 5 October 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.

Following the issue of my Preliminary Decision, the Provider made a submission under cover of its letter to this Office dated 27 October 2020, a copy of which was transmitted to the Complainants for their consideration.

The Complainants have not made any further submission.

Having considered the Provider's additional submission and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

The Recalculation of the Arrears Balance

The kernel of this complaint is a recalculation of the arrears balance on the Complainants' mortgage loan account with the Provider which occurred in November 2017. The Complainants are aggrieved that the Provider (in their view) overstated the level of their arrears prior to this adjustment and argue that the overstatement of their arrears balance has had a number of knock on consequences on their credit rating.

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They argue that the misleading arrears position resulted in the Provider wrongly sending their account to litigation and thereby negatively affecting their ability to obtain family finance, as well as causing huge stress to them. The Provider denies that the arrears were overstated and argues that the Complainants' mortgage balance has remained static at all times. It argues that the recalculation of the arrears balance was due to a change in the methodology by which it calculates a borrower's monthly repayment amount. It argues that it was entitled to send the Complainants' account to litigation as a demand for repayment issued in January 2017 due to the level of arrears.

By letter dated 1 August 2017, the Complainants were informed that the total monetary amount of missed payments on their mortgage account was €15,366.16 which reflected the arrears outstanding on the account and missed monthly repayments on 35 occasions. By letter dated 6 November 2017, the Complainants were informed that "*the arrears figure applicable to [their] account had reduced to €827.44*". The following was the explanation provided for this reduction:

> "*While the arrears figure on your account has been recalculated, your overall level of indebtedness and monthly repayment figure (Contractual Monthly Subscription/CMS) remain unaffected. Your mortgage balance is €361,575.53 as at 06 November 2017.*
>
> *The methodology we previously used to recalculate your CMS included the accumulated arrears on your mortgage account up to the date of recalculation to ensure that you would clear the mortgage within the remaining term.*
>
> *We have adopted a revised calculation methodology with effect from 01 November 2017 which will ensure your arrears figure remains independent of your CMS should it be recalculated in the future, for example if your interest rate changes.*
>
> *As part of this process we have also recalculated your arrears figure. The recalculated arrears figure now comprises the shortfall, if any, between; (i) your total monthly repayments due since your CMS was last calculated and (ii) the payments actually made by you since your CMS was last calculated.*
>
> *We apologise for any confusion which this change in methodology may cause, however, we believe the revised methodology will provide greater clarity to our customers. We iterate that your overall mortgage balance and your current CMS remain unaffected. . . .*
>
> *Your recalculated arrears figure will be reflected in our credit reporting to the Central Credit register (CCR) and the Irish Credit Bureau (ICB).*"

In a letter dated 1 December 2017, the Provider indicated that the Complainants had not made their full monthly repayment on 35 occasions but that the monetary amount of their missed payments and their arrears balance was €451.33.

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A complaint was raised on behalf of the Complainants by letter dated 8 March 2018. The Complainants indicated that they had received a legal letter from a solicitors' firm in January 2017 stating that they were commencing legal proceedings due to arrears on the account which were miscalculated and which ultimately put the account into default. The Complainants argued that the Provider mixed the Complainants up with another individual in stating that their arrears were over €15,000 when the Provider stated from December 2017 that their arrears were only €451.33.

The Complainants argued that the Provider's miscalculation hampered the negotiation process to come to a settlement arrangement due to the fact that the Complainants' credit rating has been negatively affected as the credit rating indicated '*pending litigation*' and nine payments in arrears on their ICB payments profile. The letter of complaint indicated that the wrongful placement of the account into litigation resulted in a deterioration in the first Complainant's health and future career prospects. It appears that this letter was received by the Provider on 14 March 2018 and an acknowledgement letter was sent on 20 March 2018. A holding letter was sent on 12 April 2018.

By final response letter dated 26 April 2018, the Provider responded to the complaint in relation to the recalculation of the arrears. The letter provided as follows:

> "*We confirm that your clients have not been mixed up with another customer. Their arrears were €15,366.16 of 31 October 2017 and €451.33 as at 30 November 2017. As advised in our letter of 06 November 2017, we have adopted a revised monthly mortgage payment ("Contractual Mortgage Subscription"/CMS) calculation methodology with effect from 1st November 2017.*
>
> *Our credit reporting to the Central Credit Register and the Irish Credit Bureau in respect of your clients' account reflects the recalculation of arrears. [The Provider] has advised the Central Bank of Ireland of the change in our methodology.*
>
> *Your clients file was passed to [a solicitors' firm] as a formal demand for repayment had been made. In our letters of 03 January 2017 on 13 January 2017 we confirmed that their arrears as at 31 December 2016 were €15,742.27 and that the solicitor's role was to Institute legal proceedings. However, proceedings were never issued and the file is no longer with [the solicitors firm].*
>
> *We regret that our letter of 06 November 2017 has caused your clients any stress or anxiety however there has not been an error in interpretation or calculation. As advised in our correspondence dated the 06 November 2017, [the Provider] elected to change methodology so as to provide greater clarity to customers. There has been no change in their overall indebtedness*."

By letter dated 5 June 2018, the Complainants wrote the Provider indicating that, in error, their ICB credit rating will still showing as 'pending litigation' and nine months in arrears historically. While they accepted that the Provider had amended the profile in the previous three months, they requested that it repair their credit rating in the short term due to the fact that the litigation should not have been commenced.

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The Complainants argued that the arrears were created by the Provider's miscalculation of the account. They further argued that their credit rating had been totally destroyed which was having a huge impact on their ability to raise finance. By letter of response dated 7 June 2018, the Provider referred back to its final response letter dated 26 April 2018 and indicated that it had nothing further to add.

The Provider has submitted account statements into evidence which it argues demonstrates that there was no miscalculation of the arrears position, merely a change in methodology of calculation. It appears from the account statement in question that the Complainants' account fell into arrears in April 2011 and that arrears on the account rose rapidly from April 2011 until early 2013. Arrears increased much more gradually thereafter due to the expected payment on the account reducing in line with the tracker interest rate and an improvement in the Complainants' payment history. When the loan was assigned to the Provider in February 2015, the arrears balance was about €15,000.

It is not disputed between the parties that the Complainants fell into arrears with the previous Provider nor that they were unable to meet their monthly repayments prior to February 2015. The "expected payment" on the account was €391.07 until May 2016 and €376.11 per month from May 2016. The account statement shows that sporadic payments were made on the mortgage loan from February 2015: with full monthly payment made in certain months while nothing was paid in other months.

The statement indicates as follows for the period late 2016/early 2017, late 2017/early 2018 and April 2019:

Date	Transaction Type	Debit	Credit	Balance
30/11/2016	EXPECTED PAYMENT	376.11		
30/11/2016	ARREARS BALANCE			15,366.16
31/12/2016	EXPECTED PAYMENT	376.11		
31/12/2016	ARREARS BALANCE			15,742.27
31/01/2017	EXPECTED PAYMENT	376.11		
31/01/2017	ARREARS BALANCE			15,366.16
…				
30/09/2017	EXPECTED PAYMENT	376.11		
30/09/2017	ARREARS BALANCE			15,366.16
31/10/2017	EXPECTED PAYMENT	376.11		
31/10/2017	ARREARS BALANCE		`	15,366.16
30/11/2017	EXPECTED PAYMENT	376.11		
30/11/2017	ARREARS BALANCE			451.33
31/12/2017	EXPECTED PAYMENT	376.11		
31/12/2017	AREARS BALANCE			451.33
31/01/2018	EXPECTED PAYMENT	376.11		
31/01/2018	ARREARS BALANCE			451.33
28/02/2018	EXPECTED PAYMENT	376.11		
28/02/2018	ARREARS BALANCE			
…				

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30/04/2019	EXPECTED PAYMENT	376.11		
30/04/2019	ARREARS BALANCE			
	Totals:	**€123,332.72**	**€5,670.45**	**€0.00**

It is readily apparent why the Complainants would be confused by such a transaction history when a stated arrears balance decreases by almost €15,000 without any payment having been made. It must also be noted that the overall presentation of the statement of account is highly unusual since it fails to indicate where payments have been made by the Complainants. Instead, one is forced to simply assume that an "expected payment" has or has not been made in any given month based on the increasing, decreasing or static arrears balance. I fail to understand why some payments appear in the 'credits' column as 'card payments' while many other payments are simply left blank. This is in addition to the very substantial question as to the dramatic decrease in the arrears balance that occurred in November 2017 and whether it indicates a previous miscalculation of arrears by the Provider.

A second transaction history in a different format has also been submitted into evidence which sets out the following information for the periods set out above:

Date	**Transaction Type**	**Debit**	**Credit**	**Balance**
17/11/2016	CARD PAYMENT		376.11	361,010.76
30/11/2016	INTEREST DEBIT	355.96		361,366.72
31/12/2016	INTEREST DEBIT	367.83		361,734.55
06/01/2017	CARD PAYMENT		376.11	361,358.44
27/01/2017	CARD PAYMENT		376.11	360,982.33
. . . .				
25/09/2017	CARD PAYMENT		376.11	360,856.75
30/09/2017	INTEREST DEBIT	355.96		361,212.71
25/10/2017	CARD PAYMENT		376.11	360,836.60
31/10/2017	INTEREST DEBIT	367.83		361,204.43
24/11/2017	CARD PAYMENT		376.11	360,828.32
30/11/2017	INTEREST DEBIT	355.96		361,184.28
21/12/2017	CARD PAYMENT		376.11	360,808.17
31/12/2017	INTEREST DEBIT	383.45		361,191.62
25/01/2018	CARD PAYMENT		376.11	360,815.51
31/01/2018	INTEREST DEBIT	383.45		361,198.96
19/02/2018	CARD PAYMENT		451.33	360,747.63
26/02/2018	CARD PAYMENT		376.11	360,371.52
28/02/2018	INTEREST DEBIT	346.22		
…				
26/04/2019	CARD PAYMENT		376.11	360,344.20
30/04/2019	INTEREST DEBIT	370.60		360,714.80

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This second format of account statement demonstrates the payments made to the account and correlates with the arrears balance in the first format of account statement, other than the November 2017 arrears reduction. It also demonstrates that the Complainants repaid their remaining, recalculated arrears in January 2018 and have made consistent monthly repayments since then on their interest-only mortgage.

The balances as set out in the balance column of the second format of account statement appear to accurately reflect all payments made into the account. It would also appear that the balance due and owing on the loan was appropriately reduced with each payment, while interest charged was added back to the balance.

On the basis of these mortgage account statements, I accept that the Provider has properly credited the Complainants with the payments made to their account, and that the statement accurately portrays payments made and interest charged on the account in the same period. There is no evidence of any overcharging on the account.

In respect of the November 2017 change in methodology in the calculation of arrears, my understanding of the Provider's position is as follows:

A. Prior to the recalculation, the arrears figure comprised the shortfall between the total monthly repayments due *since the loan was drawn down* and payments actually made by the Complainants *since the loan was drawn down*;

B. Following the recalculation, the arrears figure comprises the shortfall between total monthly repayment due *since the CMS was last calculated* in May 2016 and the payments actually made by the Complaints *since the CMS was last calculated* in May 2016; and

C. This change in methodology did not alter or impact upon the overall indebtedness of the Complainants to the Provider.

In the case of the Complainants, on the basis of total monthly mortgage repayments of €6,769.78 and payments actually made to the account of €6,318.65 since the date of the CMS recalculation on 1 May 2016, the arrears were calculated as €451.33 (that is, €6,769.98 minus €6,318.65) in November 2017. The previously advised arrears balance of more than €15,000 reflected the total missed payments on the account since drawdown in October 2005. There has been no evidence submitted that suggests this this calculation of missed repayments on the loan between October 2008 and October 2017 was incorrect. There is evidence of significant under- and non-payment in 2011 and 2012 during which time the majority of the arrears balance on the account accumulated.

Perhaps somewhat surprisingly, there is no clear definition of "*arrears*" that applies to all mortgage cases or any defined methodology for the calculation of arrears. As generally understood, arrears mean the part of a debt that is overdue after missing one or more required payments.

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Under the Code of Conduct on Mortgage Arrears 2013 (**CCMA**), "*arrears*" are said to "*arise on a mortgage loan account where a borrower has not made a full mortgage repayment, or only makes a partial mortgage repayment, in accordance with the original mortgage contract, by the scheduled due date*."

The CCMA does not define how "*arrears*" are to be calculated, however, nor does the CCMA provide any guidance on the calculation of a monthly repayment due under a mortgage. A similar definition of arrears is set out in the Consumer Protection Code 2012 (**CPC**).

As there is no mandated method by which arrears are to be calculated, and there is no evidence of miscalculation of the arrears prior to and subsequent to the change in methodology in November 2017 when one applies the two methodologies in question, there is no evidence of any wrongdoing on the part of the Provider in adopting the new methodology in November 2017. I therefore have no evidence that the arrears notified to the Complainants in January 2017 of over approximately €15,000 were overstated or miscalculated. The new methodology portrays the Complainants' account in a better light. Furthermore, when it was applied, the Complainants were able to clear their remaining arrears in January 2018 and offset the threat of any litigation due to the drastic reduction in their arrears balance.

The issue here is why the two different methodologies were applied and why the change was implemented. There is a question to be resolved as to whether there are any cost implications for the Complainants in terms of the new methodology applied, or whether there were cost implications for them under the old methodology. It is not clear to me why arrears can simply disappear as they have. These are not matters which this Office can resolve, though I note the Provider states that it has advised the Central Bank of Ireland of the change in its methodology. It appears to me that these issues should be considered by the Central Bank of Ireland.

Insofar as this Office can resolve the issues arising in this complaint, I am concerned about the manner in which the Provider explained the new methodology to the Complainants. In its letter of 6 November 2017, it explained that it was adopting a new methodology which impacted the arrears balance but did not affect the monthly repayments due or the overall mortgage account balance. It explained in general terms that this was to keep the question of the calculation of the monthly repayments due separate from the arrears balance. It then went on to explain how customer arrears were to be calculated from November 2017. This explanation was comparatively clear. The difficulty is that the Provider did not take the opportunity to explain how the arrears balance had been calculated prior to November 2017. Without any information or explanation on the previous methodology, I do not know how the Provider expected the Complainants to understand the difference between the old arrears balances and the new. Without an ability to compare the two methodologies to understand how such a significant reduction could occur, it is readily apparent to me how the Complainants would be wholly confused by the change in methodology and would jump to the conclusion that there had been a miscalculation in the arrears.

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The Provider was given a further opportunity by the Complainants to properly explain the change in methodology when a complaint was raised on the Complainants' behalf in March 2018. In its final response letter in April 2018, it failed to provide any further explanation and simply reiterated points made in the November 2017 letter, such as that there had been a change of methodology and it had not affected the overall balance. In my view, this was insufficient as there was a fuller and clearer explanation called for in November 2017 and, more particularly in March 2018, but it was not provided.

It was not until it replied to queries raised by this Office that the Provider explained the previous methodology for the calculation of arrears as well as the new methodology, such that a proper comparison could be made between the two in an attempt to bring clarity to the radical change in the arrears balance position. By that point, the Complainants had been forced to go through an internal complaints process with the Provider and to make a complaint to this Office in order to seek clarity on the pre-November 2017 arrears situation.

In a submission dated 27 October 2020 in response to my Preliminary Decision of 5 October 2020, the Provider submits that I have fallen into error in drawing the above conclusions. The Provider argues that the "*6 November 2017 Letter made it clear that the Complainants' arrears figure has been recalculated*" and it is satisfied that "*it clearly and unambiguously clarified the new calculation methodology*" in the letter. As set out above, I accept that the new methodology was clarified in the letter of 6 November 2017, but it is my continued view that the letter failed to explain the old methodology for the calculation of arrears. The submission of 27 October 2020 goes on to argue that the letter of 6 November 2017 "*clearly set out the previous approach*" and then recites the portion of that letter which explains the previous method by which the CMS was calculated to include accumulated arrears. I accept that the letter of 6 November 2017 provides an explanation of the previous method by which a customer's CMS was calculated but this is not the same thing as explaining how the arrears were calculated prior to November 2017. Without an explanation of both methodologies for the calculation of arrears (as distinct from the calculation of the CMS), there is no way for the Complainants to understand what had changed such that they could reconcile the drastic decrease in their arrears balance. Further, the Provider's own letter of 6 November 2017 stated that the Provider "*apologise[s] for any confusion which this change in methodology may cause, however, we believe the revised methodology will provide greater clarity*". It therefore knew and accepted at the time that confusion would arise.

While I have carefully considered the Provider's post Preliminary Decision submissions in this regard, I do not accept its position and it remains my view and it is my decision that its letter of 6 November 2017 (and indeed its final response letter of 26 April 2018) failed to provide a full and clear explanation to the Complainants of how €15,000 in arrears could simply disappear from their account.

In its submission dated 27 October 2020, the Provider also makes several references to its interactions with the Central Bank of Ireland in respect of the change in its methodology. It argues that it "*advised the Central Bank of Ireland prior to making the change and shared proposed customer communications with the Central Bank of Ireland*."

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It argues that the "*6 November 2017 Letter was issued with the knowledge of the Central Bank of Ireland*" and considering that it engaged with and shared proposed customer communications with the Central Bank of Ireland "*prior to issuing these to borrowers*", it submits that I have erred in reaching the conclusion that it did not meet its obligations under the Consumer Protection Code 2012.

There are two observations I will make in response to these submissions. First, I am unaware of the circumstances surrounding or the detail of the Provider's interaction with the Central Bank in this regard.

I am unaware whether the change in methodology was directed by the Central Bank due to concerns it held in respect of the previous methodology, or if the change was precipitated by the Provider. The Provider has opted for reasons of confidentiality not to submit evidence of these interactions in the present adjudication. The Provider is entitled to so decide. It cannot, then however, seek to rely on such interactions, having chosen not to submit them into evidence. I can only take into account evidence made available to me as part of this investigation. Furthermore, the Complainants are entitled to have sight of and consider any evidence I would take into account in arriving at my Decision.

Second, this Office is independent of the Central Bank of Ireland and the remit of this Office is different to that of the Central Bank. The fact that a particular approach was acceptable to the Central Bank (without any indication of what the Central Bank's involvement was concerned with) does not limit the jurisdiction of this Office or prevent me from forming my own view on the Provider's conduct when adjudicating an individual consumer's complaint pursuant to the ***Financial Services and Pensions Ombudsman Act 2017.*** As a result, I do not accept that I have fallen into error in reaching the conclusion that I have in the present complaint based on the Provider's selective account of its interactions with the Central Bank of Ireland in respect of its methodology change.

Finally, the Provider points to a previous decision of this Office in which it was noted that the Provider had set out the recalculation of arrears in "*clear terms*" in the letter of 6 November 2017. While I accept this, I note first that the details of that complaint were different and indeed the complaint for adjudication was different. Therefore, there was little emphasis on the letter of 6 November in that context. Second, I am bound to consider each complaint on its own merits. I do not consider that I am bound by previous decisions where there is a similarity in the matters to be adjudicated on. While this Office strives for consistency in its approach to complaints, each individual complaint requires and deserves individual consideration. Based on the submissions of both parties in relation to this complaint, I am of the view that the Provider failed to properly or adequately explain to the Complainants how their arrears balances reduced so dramatically in November 2017. It is apparent that despite the Provider's letter of 6 November 2017, the Complainants did not understand what had occurred and assumed there had been a mistake or mix-up. I have identified above the shortcomings of that letter, as I see them. On that basis, it is my decision that the Provider failed to provide a sufficient explanation of the change in methodology that was applied to the Complainants' account. I therefore reject the Provider's submission that I have fallen into error on the basis of any previous decision.

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As noted above, in addition to my finding that the Provider failed to provide an adequate explanation to the Complainants in respect of the change in methodology for the calculation of arrears, I have a wider concern in respect of the matters raised. It is my view that issues remain as to why the methodology change was implemented, and whether there are any cost implications for the Complainants and other consumers in a similar situation in terms of the new methodology applied, or indeed previous cost implications from the old methodology.

It is still unclear to me why arrears can simply disappear as they have but, as these are not matters which this Office can resolve, I will refer my Legally Binding Decision to the Central Bank of Ireland so that it can take any action it may deem necessary in relation to the matter.

Commencement of the Litigation Process

The Complainants have argued that the Provider incorrectly engaged in legal action against them in January 2017 which caused a lot of stress and upset. This argument seems to be based on the assumption that the arrears balance of approximately €15,000 that they were advised was due and owing in January 2017 was miscalculated or inaccurate. As set out above, it does not appear that the level of arrears as advised to the Complainants in January 2017 was incorrect. It appears to me that, based on the methodology of calculation of arrears used by the Provider at that time (that is, the total missed payments on the account since drawdown), the level of advised arrears was correct.

I also accept that when the total balance due on the account was demanded before the account was sent to litigation, the Complainants were outside of the Mortgage Arrears Resolution Process (**MARP**). By letter dated 15 February 2016, and having reviewed the Standard Financial Statement (**SFS**) submitted by the Complainants in January 2016, the Provider offered the Complainants an alternative repayment arrangement (**ARA**) in the form of the capitalisation of arrears on the account. The letter indicated that the offer would expire on 29 February 2016. The letter also indicated that the Complainants had a right to appeal the decision in writing by 30 March 2016. A copy of the ARA offer letter was also sent to a third party acting on behalf of the Complainants at that time.

On a phone call on 29 February 2016, the Provider's representative indicated her concern that the ARA offered had not yet been accepted by the Complainants and informed the first Complainant that the offer was due to expire that day. The representative explained to the first Complainant that if the offer was not accepted, the Complainants' account would fall outside the protections of the MARP. The first Complainant tried to accept the capitalisation option on this phone call but was informed that this would have to be accepted in writing. The first Complainant was encouraged to return the relevant paperwork immediately if he intended to accept the ARA, which he indicated he would do.

Two follow up calls were made by the Provider to the first Complainant in this regard when the relevant paperwork had not been received the following week. Despite these warnings to the first Complainant and attempts to contact the third party adviser by letter and phone call, the ARA offered by the Provider was not accepted by the Complainants.

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I acknowledge that in the meantime, a settlement offer in relation to the account was made on behalf of the Complainants but this was a separate issue to the ARA and the settlement offered was rejected by the Provider on 10 March 2016, well in advance of the expiry of the appeal date on the ARA offer letter. No appeal was submitted by the Complainants and the ARA was not accepted.

By letter dated 30 March 2016, the Provider wrote to the Complainants referring to the ARA offer letter of 15 February 2016 and indicating that the offer had expired. The letter gave a further opportunity to the Complainants to accept the ARA and stated that "*if you have overlooked accepting and returning the documentation to us, we urge you to contact our Arrears Support Unit . . . as soon as possible to explain the delay in accepting the offer*".

The balance of the letter set out the consequences of deciding not to enter into the proposed ARA, including the fact that the Complainants were now outside of the protections of the MARP and that the Provider was able to commence legal proceedings against them to repossess the property from 1 July 2016 onwards. This letter was written in compliance with Provision 45 CCMA.

By letter dated 3 January 2017, the Provider wrote to the Complainants indicating that the account was in arrears of €15,742.27 as at 31 December 2016 which constituted an event of default. The letter formally demanded payment of the balance due on the mortgage amounting to €361,734.55 within seven days. The letter indicated that if the Complainants failed to pay the balance before 12 January 2017, it would instruct solicitors to institute legal proceedings for the possession of the mortgaged property. The letter provided further information in relation to the litigation process. It appears that the Complainants' loan account was sent to a solicitors' firm acting on behalf of the Provider after the expiry of the demand period and that certain correspondence issued from that firm to the Complainants. This correspondence was not submitted in evidence. I note proceedings did not ultimately issue.

I can appreciate the frustration of the Complainants that the litigation process was commenced in January 2017 if the November 2017 methodology had been applied at that stage, their arrears would have been at such a low level that it seems litigation would not or could not have been pursued. On the basis of the methodology being utilised in January 2017, however, the arrears balance was significant, the Complainants were outside of the MARP, a letter of demand had issued, and the Provider was entitled to send the account to its solicitors. The Complainants might also feel aggrieved that they were exited from the MARP in March 2016 for failing to accept an ARA involving the capitalisation of arrears when a very similar result (that is, the clearing of the arrears balance) was caused by the Provider itself some 18 months later by way of the change of methodology in the calculation of the arrears balance.

While I understand the Complainants' frustration in this regard, I am of the view that the Provider was entitled to exit them from MARP in March 2016 and that the Provider was entitled to seek to commence litigation against them in January 2017.

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Inaccurate Credit Rating

The final aspect of the complaint is that the Provider negatively interfered with the credit rating of the Complainants with the Irish Credit Bureau.

Again, this argument seems to be based on the assumption that the arrears balance of approximately €15,000 that they were advised was due and owing in January 2017 was miscalculated or inaccurate, and, further, that the Provider was not entitled to commence the litigation process against them in January 2017. As set out above, I have no evidence before me currently to indicate that the level of arrears as advised to the Complainants in January 2017 was incorrect. If that position were to change, the Complainants would be entitled to raise a further complaint on that specific point.

The following is the ICB Profile history submitted by the Provider in respect of the Complainants' mortgage loan account for the impugned period:

Profile Indicator	**Date Created**
9	Nov-16
9	Dec-16
P	Jan-17
P	Feb-17
P	Mar-17
P	Apr-17
P	May-17
P	Jun-17
P	Jul-17
P	Aug-17
P	Sep-17
P	Oct-17
P	Nov-17
P	Dec-17
1	Jan-18
0	Feb-18

In this context, '9' indicates nine missed repayments, 'P' indicates pending litigation, '1' indicates one missed repayment, and '0' indicates no missed repayments (as opposed to √ which indicates that the account is up-to-date).

In terms of the reporting of the profile indicator '9' until December 2016, I accept that the level of arrears then present on the account could have justified the designation in question.

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In respect of the reporting of the profile indicator 'P' between January and December 2017, I accept that a letter of demand issued against the Complainants in January 2017 and that their account was subsequently sent to a solicitors' firm for the commencement of legal proceedings against them.

I am unaware of whether a final decision had been made to issue proceedings against the Complainants or not, and of how close the Complainants came to having proceedings issued against them, so I am not making a formal decision in relation to whether the designation 'P' for 'pending litigation' (which ought to have been imminent to justify the designation) was appropriate or not. I am prepared to accept, however, that the account was with solicitors acting on behalf of the Provider with a view to the issue of proceedings during the relevant period and that there was no impediment to the issue of proceedings from the perspective of the level of arrears or the protections of the MARP. The profile indicator '1' was justified in January 2018 due to an arrears balance of approximately €450 which equated to a little more than one monthly repayment due. Thereafter, there were no arrears on the account and the ICB profile was appropriately updated.

There does not appear to be any evidence of misreporting of the status of the Complainants' account to the ICB on the basis that the Complainants have argued. I do not, however, have sufficient information in relation to the litigation process to make a full decision on the question of whether it was appropriate for the Provider to have used the 'P' designation for 2017. The alternative of '9' up to November 2017, however, would not have represented a great improvement to their overall credit profile.

On the basis of the evidence available to me, it does not appear that the Complainants' mortgage loan status was misrepresented in the ICB profile indicators submitted by the Provider.

The Consumer Protection Code 2012 (CPC) imposes the following obligations on a regulated entity in all its dealings with customers and within the context of its authorisation:

> 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.
>
> 4.2 A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following: a) the urgency of the situation; and b) the time necessary for the consumer to absorb and react to the information provided.

It is my view that the manner in which the Provider has dealt with the Complainants' arrears and subsequent requests for an explanation falls short of what is required of it under the CPC.

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In all of the circumstances of this complaint, I am of the view that the Provider did not properly or adequately explain how its change of calculation methodology in November 2017 resulted in a decrease in the Complainants' arrears balance of more than €15,000 until a complaint was submitted to this Office.

Such an explanation was required from the outset due to the significant change in the arrears balance and was further required once the Complainants raised a complaint in respect of the calculation of arrears in March 2018. I am of the view that it was not until its response to queries raised by this Office that the Provider even attempted to explain the reason for the change to the arrears balance. I am of the view that even in its responses to this Office, the Provider failed to clearly or adequately explain the change to the arrears balance that occurred in 2017.

In those circumstances, I partially uphold the complaint on the basis that an explanation for the conduct complained of was not given by the Provider when it should have been given. I direct the Provider to pay a sum of €3,000 in compensation to the Complainants to reflect this failure.

I am bringing my Legally Binding Decision to the attention of the Central Bank of Ireland for any action it may deem necessary.

Conclusion

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

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 €3,000, 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.***

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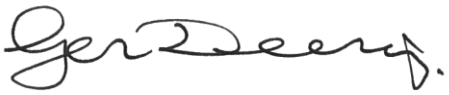
The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

29 June 2021

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

(a) ensures that—

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

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

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