An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0278
Sector:	Banking
Product / Service:	Tracker Mortgage
Conduct(s) complained of:	Level of contact or communications re. Arrears Incorrect information sent to credit reference agency Premature ceasing of arrears negotiations Wrongful consideration of forbearance request
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the Provider's management of the Complainants' mortgage loans.

The Complainants' Case

The Complainants submit that their mortgage loan is *"currently subject to forbearance"* and is on an *"interest only schedule"* due to expire in 2021. The Complainants set out in their submissions their application to the Provider to restructure one of their mortgages over a twenty-year term. The Complainants submit that the Provider declined their proposal without explaining why and issued a counter proposal in its place.

The Complainants set out the reasons for their dissatisfaction with the Provider's counter proposal in their submissions to this office and contend that they sought clarity from the Provider without success. They submit that they were told by an agent of the Provider during a call on **30 January 2020** that there may have been a misunderstanding on the part of the underwriter and that *"a reassessment would be carried out"*. The Complainants submit that they made a formal complaint to the Provider in order to avail of their *"only course of appeal"*.

The Complainants state that:

> *"…. no one…. took the time to engage with us. No one…. looked at our long term position and suggested a sustainable solution.*
>
> *The solution suggested…. pushes us towards a certain arrears situation with the prospect of a significant unsecured residual debt post asset disposal. This is not the way cooperative borrowers should be treated".*

The Complainants state that a decision on their original request should be made *"now rather than kicking the can 5 years down the road"*.

The Complainants want the Provider to apologise and to pay them compensation.

The Provider's Case

In its Final Response Letter, the Provider acknowledges the Complainants' dissatisfaction with its decision in relation to their original request and sets out its interactions with the Complainants in early 2020.

The Provider submits that on receipt of the Complainants' complaint in **February 2020**, their accounts were reassessed. The Provider acknowledges that *"it appears that there was in fact a misunderstanding with regards to your original request for forbearance and we regret any inconvenience that this may have caused you"*. The Provider stated its approval of a new repayment arrangement and set out the details in its Final Response.

The Complaints for Adjudication

The complaint is that the Provider has poorly administered the Complainants' mortgage loans, including proffering poor communication and customer service.

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.

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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 21 June 2021, 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 parties made the following submissions:

1. Letter from the Provider to this Office dated 9 July 2021.

2. E-mail from the Complainants to this Office dated 9 July 2021.

Copies of these submissions were exchanged between the parties.

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

Analysis

The Complainants held two mortgage loan accounts with the Provider both secured over the same buy-to-let property; for the purposes of this decision, I will refer to Account A (account number ending 537) and Account B (account number ending 917). It will be useful to set out a brief summary of the relevant developments on these accounts giving rise to the complaint under consideration.

At the beginning of January 2020, Account A was operating on an interest only basis pursuant to a capital moratorium Alternative Repayment Arrangement which was due to expire in 2021. The monthly repayments on the account were approximately €342 at the time. Account B, which had the benefit of a tracker variable rate, was operating on a full interest and capital basis with monthly repayments of approximately €447. There were no arrears on either account. The combined monthly payments across both accounts amounted to approximately €789.

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On 20 January 2020, the Complainants contacted the Provider by email to request a return to capital and interest repayments on Account A by way of the "*terming out of the full balance of this account over twenty years with immediate effect*". Such an extension to the term of the loan (in effect a ten-year extension to 2040 given that the loan term still had ten years to run) would bring the First Complainant to over 65 years of age at loan maturity and the Second Complainant to over 60. Supporting documentation was provided. The proposal entailed a proposed increase to the repayments on Account A by approximately €675 to €1,017. The proposal did not reference Account B; the Complainants did not want any amendment to Account B. Under this proposal, the combined monthly payment across both accounts would amount to approximately €1,464.

On 29 January 2020, the Provider issued letters to the Complainants making no reference to the Complainants' proposal but detailing its own proposal (the 'counterproposal') whereby reduced payments on Account A would be accepted in the amount €734 for a period of 5 years and reduced payments on Account B would be accepted in the amount €212 for a period of 5 years. Under this counterproposal, the combined monthly payment across both accounts would amount to approximately €946 or approximately €518 per month less than the Complainants had proposed. The counterproposal in respect of Account B was stated to entail the removal of this account from a tracker rate and a move to a higher variable interest rate.

On 30 January 2020, the Provider called the Complainants. A recording of this call has been furnished in evidence. During this call the Provider communicated the terms of the counterproposal to the First Complainant. In the course of this phone call, the First Complainant expressed his bewilderment that the Provider appeared to be proposing overall repayments in an amount significantly less than he had proposed. The First Complainant emphasised his desire to act proactively to reduce his debt.

The First Complainant also noted that Account B was already on capital and interest repayments and was "*performing*" and that he did not "*want to touch*" this account in the context of any proposal to change the terms of Account A; the Complainants' proposal had been to tackle Account A only, namely the sole account at the time on interest-only terms. The Provider's agent indicated that there may have been a misunderstanding and undertook to revert to the First Complainant.

The Provider did not revert to the Complainants leading to the First Complainant calling the Provider on 13 February 2020. I have considered the recording of this call in the course of which the Provider communicated that the original decision (the counterproposal) "*still stands*". The First Complainant sought an explanation for the stance of the Provider but was simply told that the decision of the underwriter was final. The First Complainant was further told that there was no appeal process available and that if he wanted to take the matter further, he would have to make a complaint in writing. The First Complainant also took issue with the fact that this decision to stand over the counterproposal had not been communicated to him and had required his making contact with the Provider for him to discover the fact.

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On 14 February 2020, the Complainants set out their position/complaint in writing in a very clear and measured manner (as indeed the First Complainant had done in the phone call of 13 February 2020). Thereafter, on 26 March 2020, an offer of a new alternative repayment arrangement was made to the Complainants. This correspondence made no reference to the Complainants' letter of 14 February 2020. The new alternative repayment arrangement related to Account A only and provided for monthly payments of €1,001 for a period of 5 years.

On 15 April 2020, a Final Response Letter issued to the Complainants in respect of their letter of complaint of 14 February 2020. This letter stated that there had been a "*misunderstanding*" with regard to the original 20 January 2020 request and that, following "*a new assessment*", a new offer had been advanced as per the terms of the letter of 26 March 2020. It was noted that Account B would remain unchanged and would retain its tracker rate. The letter stated that the new proposed repayment amount (€1,001) was "*in line with a 10 year term extension*" which would enable the Complainants "*to demonstrate repayment capacity at this level for the period of the Forbearance"* implying that a further arrangement could be agreed at the end of, or prior to the end of, the 5-year period. The decision was said to be final.

The offer contained in the letter of 26 March 2020 was not accepted by the Complainants and a complaint was made to this office. Thereafter, on 31 July 2020, a fresh alternative repayment arrangement offer was advanced by the Provider in respect of Account A offering a term extension of 10 years (with the new loan maturity date stretching to 2040) and entailing monthly repayments in the estimated amount of approximately €1,009. This offer was accepted by the Complainants in August 2020 and implemented in September 2020.

By way of submission dated 25 September 2020, the Complainants summarised their complaint as follows:

> *Please note our gravest concern is that* [the Provider] *chose to offer an alternative solution that included the unsolicited restructure of a performing loan.*
>
> *This would disadvantage us as follows:*
>
> - *CCR record*
> - *Removal of tracker product and increased margin*
>
> *I want your office to establish how this proposal came to be. It made no sense from my perspective. Is there a systemic policy within* [the Provider] *to eliminate tracker mortgages where possible to the determinant of borrowers?*
>
> *Their assertion of a misunderstanding doesn't stand up to scrutiny.*
>
> *Our treatment typifies that of many people where pillar Banks don't take the time to understand borrowers requirements.*

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> *The uncertainty and delay has caused stress to us both and we want* [the Provider] *to be held responsible for their failings.*
>
> *Their unwillingness to discuss/agree a long term solution prevented me from obtaining a mortgage to facilitate the purchase of a PDH.*
>
> *We want an apology and to be compensated.*

In its response to this office of 30 October 2020, the Provider acknowledged certain shortcomings and offered certain compensation. Specifically, the Provider accepted a failing to communicate to the Complainants prior to the phone call of 13 February 2020 the fact that the underwriters had decided that the original decision (the counterproposal) "*still stands*". Compensation of €250 was offered in respect of this failing. A further offer of €500 was advanced "*in recognition of the inconvenience caused by the misunderstanding of the original proposal*". With regard to the Complainants' correspondence of 25 September 2020, the Provider stated, in reference to the 31 July 2020 offer, "*that this has resolved this portion of the complaint*" insofar as a "*mutually agreeable outcome has been achieved*". The Provider further indicated that adequate apology (which was repeated) and compensation had been offered.

In a final submission to this office, the Complainants pointed out that the Provider's response to this office of 30 October 2020 appears to incorrectly characterise the 20 January 2020 proposal as a request for a 20-year extension to the term of the loan. The proposal was in fact a request for a 10-year extension such that the balance would be paid off over 20 years given that the term of loan, at that point, had 10 years left to run.

This was made entirely clear in the correspondence of 14 February 2020 which expressly referred to the age the Complainants would be at the end of the loan should their request be granted.

The Provider states that a decision over whether to accede to or refuse a request for restructuring is a matter wholly within the competence of the Provider. It is not the function of this office to act as a final appeal for applications for restructuring that have been properly refused. I 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 or otherwise contrary to ***Section 60(2) of the Financial Services and Pensions Ombudsman Act 2017***.

In my Preliminary Decision, I had stated that I found the explanation offered by the Provider as to how the alternative repayment offers of 29 January 2020, which proposed a restructuring of a performing account including its removal from a tracker rate came to be advanced, to be completely lacking. The Provider has simply and baldly said that this was the result of a "*misunderstanding*". No further explanation whatsoever has been provided. It is very difficult to conceive of how a request for restructuring on a single account which was already the subject of an ARA could be interpreted or 'misunderstood' to constitute a request in respect of this account *and* a separate performing account.

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If a reasonable explanation exists, it is wholly unsatisfactory that the Provider has opted to limit its explanation to a sole reference to a misunderstanding.

The Complainants' submission of 25 September 2020 (reproduced above) concisely identified the issue, an issue which the Provider has conspicuously failed to address or engage with in any manner. The same issue had been described as "*sinister*" in the Complainants' complaint form and in their email of 14 February 2020. It would have been far preferable had the Provider addressed the clear question posed by the Complainants as to the possible existence of a "*systemic policy … to eliminate tracker mortgages".* I find the Provider's conduct in this regard to be unreasonable.

Whether or not this is some sort of systemic policy on the part of the Provider is not something I can determine. However, such a possibility is not something I can ignore. For this reason, I propose to refer my Legally Binding Decision on the matter, when I issue it, to the Central Bank of Ireland, for any action it may deem appropriate.

A number of apologies have now been provided. However, despite this office specifically calling on the Provider to provide an "*explanation as to why the Provider's counter proposal referred to a second mortgage loan held with the Provider, but which was not included in the Complainants' original application*" a satisfactory response has not been provided.

In response to my Preliminary Decision the Provider has, in its post Preliminary Decision submission, sought to furnish an explanation which it "*hopes will bring clarity on a number of issues".* In particular, the Provider wished to "*set out in its response to* [my] *Office the circumstances that led to its misunderstanding of the Complainants original submission which resulted in our original offer of forbearance on 29 January 2020*".

The Provider details that "In summary, this *misunderstanding was based on a mistaken but bona fide belief that the Complainants had sought a term extension on both mortgage accounts* [Account A] *and* [Account B]". The Provider's submission continues, and it gives a more detailed explanation for this error. It details that while the Complainants email request had specified the account, which their request was in relation to in the email subject title, the Provider states that "*In line with procedures, the Provider updates its mortgage notes systems (redacted) with the customer request which is then reviewed by the Providers underwriter. In copying the email across, the subject line referring to mortgage [Account A] was not included*".

A statement from the underwriter who was involved is then supplied by the Provider. This statement included the Provider's further points of clarification on why the underwriter was not aware that the request related to Account A only.

The Provider has detailed in its post Preliminary Decision submission that it "*would like to make absolutely clear that the offer of an alternative repayment arrangement on (performing)* [Account B] *was based on this misunderstanding and not as part of a systemic policy to eliminate tracker mortgages as alleged by the Complainants. Neither is there such a systemic policy in place within the Provider.*

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The Providers practice is to minimise the instances of Tracker removal where alternative solutions can be found where the customer retains a tracker rate of interest".

The Provider concludes its post Preliminary Decision submission by stating that it "*again apologises sincerely for its failure to correctly manage their application for forbearance and to communicate with them in a timely manner to address their dissatisfaction with the forbearance offered to them at that time"* and that it "*would also like to apologise to* [this Office] *and the Complainants for not providing a detailed explanation of the misunderstanding before".*

While I welcome that the Provider has offered a further explanation as to how this error occurred, it is regrettably that such an explanation was only provided at this late stage. The Provider's further explanation also does not take away from the seriousness of the error or customer service shortcomings experienced by the Complainants.

While I had indicated in my Preliminary Decision, that I would be bringing this Legally Binding Decision to the attention of the Central Bank of Ireland, in consideration of the Provider's further explanation, I accept that the conduct of the Provider was the result of a serious failing by the Provider in updating its system notes and customer service failings rather than a "*systemic policy … to eliminate tracker mortgages****".***

The Provider has offered €250 for the failure to promptly communicate the underwriter's decision following the call of 30 January 2020. I do not find this at all adequate.

For the reasons set out in this Decision, I partially uphold this complaint and direct the Provider to pay a sum of €5,000 in compensation to the Complainants. For the avoidance of doubt, this sum of €5,000 is inclusive of the €250 already offered by the Provider.

Conclusion

My Decision is that this complaint is partially upheld pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, on the grounds prescribed in ***Section 60(2)(b), (d), (f) and (g)*** because of the unreasonable and improper conduct of the Provider and for not providing an explanation for the conduct when it should have.

I direct pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** that the Respondent Provider make a payment of compensation to the Complainants in the amount of €5,000, to be made 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.

For the avoidance of doubt, this sum of €5,000 is inclusive of the €250 already offered by the Provider.

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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

19 August 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.