



<u>Decision Ref:</u>	2021-0327
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Fixed Rate
<u>Conduct(s) complained of:</u>	Maladministration (mortgage)
<u>Outcome:</u>	Partially upheld

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

The complaint concerns the calculation of arrears in respect of the Complainants' mortgage loan with the Provider and subsequent reports to a credit reference agency in respect of those arrears.

The Complainants' Case

The Complainants, who are farmers, took out a mortgage loan with the Provider's predecessor in 2008. The mortgage loan was secured on the Complainants' primary residence. The Provider subsequently purchased the Complainants' mortgage loan and, according to the Complainants, the conduct complained of has occurred since the Provider purchased the mortgage loan.

The Complainants argue that the Provider had indicated for a period of years that arrears on the account amounted to €35,000 but then indicated that arrears were €15,000. The Complainants argue that if they had known that the arrears were much lower than they were, they could have sold stock to repay the arrears.

The Complainants have submitted a "*transaction history*" for the mortgage loan account for the period of time from 18 June 2008 to 1 December 2017. This shows three transactions on the account, described as "*arrears adjustments*" that the Complainants say points to the arrears on their mortgage loan having been overstated in the past.

They Complainants argue that the reporting by the Provider of the overstated arrears to the Irish Credit Bureau (ICB) has had a number of negative consequences which has affected their ability to carry on their business.

The Complainants do not accept the explanation provided in the final response letter of the Provider dated 25 January 2018 that the transactions in question were the result of a change of the methodology for indicating the amount of arrears but that there was no miscalculation affecting the account balance.

The Complainants are of the view that the Provider has wrongfully overstated the level of arrears on the Complainants' mortgage account by approximately €30,000, and that it has failed to give them an adequate explanation for a number of adjustments to the stated arrears. They are further of the view that the overstated arrears have seriously affected the Complainants' credit rating and their ability to properly fund their business as farmers.

The Complainants argue that they are anxious to protect their credit rating and avoid arrears as they need stocking loans each year to run their business. They argue that since the Provider took over, it has consistently claimed that the arrears are very high level and when a third party bank saw the high level of arrears, it refused to give the Complainants stocking facilities and reduced their overdraft from €40,000 to €20,000. The Complainants argue that this meant that they could not buy livestock at the correct time and missed out on opportunities. Further they had to raise family finance to keep going. They argue that this would not have happened if the Provider had not reported incorrect information to the ICB. They further argue that they panicked when they were informed that arrears were between €25,000 and €30,000 as they felt they did not have a hope of paying off the arrears at this level. If they had known the true position, however, they could have tried to clear off smaller sums of €6,000 or €7,000. They further argue that the level of arrears made them afraid to take calls from the Provider.

The Complainants argue that they have suffered enormously due to the Provider's actions and have been unable to obtain farm finance as a result. They further argue that they have suffered a lot of mental stress as the Provider has been threatening legal proceedings for over two years.

By way of remedy, the Complainants are seeking that the Provider:

1. recapitalise current arrears;
2. extend the term to 30 years at a 2% fixed rate of interest i.e. €794 per month for €215,000;
3. pay €20,000 in compensation for the damage arising from the inaccurate ICB report and the financial difficulties caused by the Provider's errors;
4. immediately amend their ICB record;
5. confirm that the Mortgage Arrears Resolution Process (MARP) will apply to the account immediately; and
6. confirm the level of arrears (if any) on the account when the Provider bought the debt from the Provider's predecessor.

The Provider's Case

The Provider states that the Complainant's outstanding mortgage balance as of the date of transfer of the loan to it in February 2015 was €219,983.25. The Provider states that the arrears figure outstanding at the date of transfer was €12,525.06, which was equivalent to 11 months of arrears. The Provider states that at the date of transfer, the Complainants had failed to meet their monthly payment amount (or Contractual Monthly Subscription (**CMS**)) in full on 43 occasions.

Since the date of transfer, the Provider states that the Complainants have failed to meet their CMS in full on a further 39 occasions. The Provider states that the CMS was due to be paid from the date of transfer to 31 October 2017 was €38,432.52. It states that the total payments actually made by the Complainants for the period was €12,266.01. The Provider states the net of total CMS due less total payments made for this period is €26,166.51 of further missed payments. The Provider argues that this resulted in the Complainants' arrears figure increasing from €12,525.06 on the date of transfer to €38,703.31 at 31 October 2017, which is equivalent 32 months in arrears.

The Provider states that in November 2017, it made a decision to change the methodology used to recalculate the CMS. It states that the revised calculation methodology ensures the arrears figure remains independent of the CMS should it be recalculated in the future. The Provider argues that this change in methodology did not alter impact upon the overall indebtedness of the Complainants and has not resulted in any credit being due to the Complainants.

The Provider argues that as part of this process, it recalculated arrears figures in November 2017 by calculating the difference between the total CMS due since it was last calculated and the total payments actually made since the CMS was last calculated. It states that the net of total CMS due less total payments made for the period became the revised arrears figure.

The Provider argues that the Complainants' CMS was last calculated effective from 1 May 2016 when the interest rate changed from 1.15% to 1.1%. The total CMS due from 1 May 2016 to 31 October 2017 was €21,542.22. It states that the total payments made by the Complainants for this period was €8,369.04. The net of total CMS due less total repayments made for the period was €13,173.18 which became the Complainants' revised arrears figure, the equivalent to 11 months in arrears.

The Provider argues that it furnished a detailed explanation of the change in methodology in a letter to the Complainants dated 6 November 2017.

The Provider states that since November 2017, the Complainants have accrued a further €7,965.74 in arrears and the arrears figure as of 31 August 2018 is €21,138.92, equivalent to 17 months in arrears. The Provider argues that this is a true and accurate statement of the Complainants' arrears.

/Cont'd...

It states that a full arrears statement showing the amount of payments due to be paid on the mortgage each month and the actual payments made together with the resultant arrears accruing each month for the lifetime of the account has been submitted into evidence.

The Provider disagrees with the Complainant's assertion that the arrears on their account have been overstated. It argues that it has given a comprehensive explanation of how the Complainants' arrears figure has been calculated and is satisfied that the arrears figures reported by its systems are at all times correct.

In terms of 3 entries on the transaction statement that titled "*arrears adjustment*", the Provider argues that the arrears adjustment transactions dated 31 January 2014 and 28 February 2014 were made by the previous loan owner prior to the transfer of the loan. It states that the arrears adjustment dated 28 February 2014 appears to be a reversal of the adjustment dated 31 January 2014 so they net to nil. In relation to the arrears adjustment of €25,530.13 on 2 November 2017, the Provider explains that this was applied to revise the Complainant arrears figures of €38,703.03 as of 31 October 2017 to the revised arrears figure of €13,173.18 as detailed above to reflect the new methodology of calculation.

The Provider disagrees that any arrears figures have been overstated by it to the ICB at any time. The Provider argues that the highest ICB profile value for arrears is '9', which the ICB Technical Manual indicates is applicable where the loan is "*at least nine payments in arrears*". The Provider argues that the Complainants' arrears figure has not fallen below a level equivalent to at least 11 months in arrears at any time following the date of transfer of the loan to the Provider. For this reason, the Provider argues that it correctly submitted an ICB profile value of '9' since the date of transfer.

In respect of the adverse effects that the Complainants submit that they have suffered as a result of the overstatement of arrears to the ICB, including a refusal to provide restocking facilities and a reduction in the overdraft, the Provider indicates that it disagrees with the assertion that the arrears figure has been overstated to the ICB at any time. It argues that it is not responsible for the actions of the Complainants or other financial institutions in respect of the Complainants' affairs.

The Provider states that it is satisfied that all the information provided to the ICB was accurate and reflective of the information being given to the Complainants and the arrears figures held within its system. The Provider argues that it does not consider it necessary or appropriate to adjust any of the information provided to the ICB and the information provided to it has been an accurate reflection of the Complainants' account at all times.

The Provider disagrees that the Complainants have been threatened with legal proceedings. It states that the Complainants' loan has not been referred to its legal representatives and that no instructions regarding the issuance of proceedings against the Complainants for the recovery of the debt have been made since the date of transfer.

The Provider argues that where it has issued correspondence indicating that the Complainants are at risk of legal proceedings, it is done so in accordance with specific regulatory obligations. It argues that letters are required to issue under Provision 25, 27 and 45 of the Code of Conduct on Mortgage Arrears (**CCMA**), for example, which require that borrowers be made aware if there is a risk of legal proceedings if certain key events occur.

The Provider argues that arrears figures have been and continue to be calculated using the same method since the date of transfer. It argues that the arrears figure is made up of the difference between the total CMS due and the total payments made to the account. It argues that a recalculation of the arrears figures was carried out in November 2017 but this does not reflect the change in the method used to calculate the arrears figures. It states that the revised arrears figure comprises the shortfall between: (i) total monthly payments due since the CMS was last calculated in May 2016 and (ii) the payments actually made to the account since the CMS was last calculated. It states that its letter to the Complainants dated 6 November 2017 confirms that there is no impact on the Complainants' mortgage balance and the Complainants' monthly repayment remains unchanged.

The Provider argues that the Complainants were deemed to be outside the MARP in October 2015 following the assessment of their Standard Financial Statement (**SFS**). This was communicated to them by letter dated 25 October 2015 which issued pursuant to Provision 45 CCMA. The Provider argues that this letter set out that the Provider was unable to offer any restructuring options to the Complainants and outlined the other options available to them in accordance with Provision 45. The Provider argues that its letter of 7 December 2016 reflected this position and was issued to ensure that the Complainants understood the options available to them post MARP and the additional support offered by the Provider to enable the Complainants to consider their next appropriate course of action.

The Complaints for Adjudication

The complaints are that:

1. The Provider has wrongfully overstated the level of arrears on the Complainants' mortgage account;
2. The Provider has failed to give the Complainants an adequate explanation for a number of adjustments to the stated arrears; and
3. The overstated arrears have seriously affected the Complainants' credit rating and their ability to properly fund their business and/or to raise funds to clear the arrears.

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 parties made the following submissions:

1. E-mail, together with attachment, from the Provider to this Office dated 27 October 2020.
2. E-mail from the Complainants to this Office dated 30 October 2020.

Copies of these submissions were exchanged between the parties.

On a preliminary note, an additional complaint was raised by the Complainants by letter dated 16 October 2018. This concerned a request from the Provider to supply it with supporting documentation showing evidence of source of funds for a cheque for €5,000 received on 12 October 2018. The Provider responded that this was a standard request for such a cheque to enable it to comply with its anti-money laundering and counterterrorism financing legislation. This constitutes a new complaint and therefore this matter does not form part of this investigation and adjudication.

/Cont'd...

It is of course open to the Complainants to make a separate complaint to this Office regarding this matter.

The Recalculation of the Arrears Balance

The kernel of the complaint is a recalculation of the arrears balance on the Complainants' mortgage loan account with the Provider which occurred in November 2017. The Complainants seem to accept that their account has been and is in arrears but are aggrieved that the Provider (in their view) overstated the level of their arrears after their debt was assigned to it in February 2015. They argue that the overstatement of their arrears balance has had a number of knock on consequences as their credit rating has been adversely affected which has had a negative impact of their ability to obtain 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.

By letter dated 1 September 2017, the Complainants were informed that the total monetary amount of missed payments on their mortgage account was €37,950.56 which reflected the arrears outstanding on the account and missed monthly repayments on 39 occasions. The stated arrears figure had increased steadily from February 2015 when the Provider took over the loan in question. By letter dated 6 November 2017, the Complainants were informed that the arrears figure applicable to the account had reduced to €13,173.18. 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) remains unaffected. Your mortgage balance is €215,592.74 as at 6 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 1 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. . .

/Cont'd...

Your recalculated arrears figure will be reflected in our credit reporting to the Central Credit register (CCR) and the Irish Credit Bureau (ICB)."

By letter dated 21 November 2017, the Complainants requested the exact workings of how the Provider came to the revised figures and questioned how the arrears could have dropped from €35,000 to €13,000. They further asked what the daily accrual rate was and whether the Provider was applying their payments to the arrears or to the overall balance. The Complainants requested a month by month breakdown of the arrears since the loan was transferred to the Provider. The letter was acknowledged as a complaint by letter dated 4 December 2017 and an apology made for the delay in issuing the acknowledgement. The Provider sent a holding letter dated 21 December 2017 indicating its hope to be in a position to provide a full response within 20 working days.

In its final response letter dated 25 January 2018, the Provider stated as follows:

"In considering your complaint, we would like to confirm that there has been no miscalculation affecting your account and your mortgage balance is unaffected by the revised methodology. Your mortgage balance increases on a monthly basis as interest continues to accrue and reduces by the amount of payments made by you.

The methodology we previously used to recalculate your monthly payment amount (the "Contractual Monthly Subscription "/"CMS") included the accumulated arrears on your mortgage account up to the date of recalculation to ensure that you would clear your mortgage within the remaining term. We have adopted a revised calculation methodology with effect from 1st November 2017 which will ensure your arrears figure remains independent of your CMS should it be recalculated, for example if your interest rate changes.

As part of this process, we have recalculated the arrears figure your mortgage account. The revised arrears figure now comprises the shortfall between; (i) your total monthly repayments due since the CMS was last calculated and (ii) the payment actually made to the account since the CMS was last calculated.

Your CMS was last calculated effective from 01 May 2016 when the interest rate changed from 1.15% to 1.1%. The arrears figure as of the 06 November 2017 was €13,173.18. This is comprised of the total monthly repayments due since the CMS was last calculated of €21,542.22, less the payments actually made to the account since the CMS was last calculated of €8,369.04.

The methodology we previously used did not amount to overcharging on the mortgage account. This is evidenced by the fact that there has been no change to your overall indebtedness.

Please note that all payments are applied against the balance on your mortgage. Interest accrues at the rate of 1.10% which is calculated on a monthly basis and is based on the balance on the last day of the previous month.

/Cont'd...

Please find enclosed an arrears statement as requested. You will note that the amount required to clear the arrears as at the 31 December 2017 is €15,564.68."

The enclosed mortgage arrears statement is for the period from 18 June 2008 to 31 December 2017 and indicates a balance of €215,792.08 and an arrears balance of €15,564.68. The statement indicates that the account is in arrears for the equivalent of 13.01 months. The transaction history indicates that an arrears balance began to accumulate from January 2013, with intermittent payments over the next number of years, sometimes in regular monthly sums of €500 or €800.

The final section of the transaction history bears setting out in full:

Date	Transaction Type	Debit	Credit	Balance
27/10/2017	CHQ PAYMENT		800.00	
31/10/2017	EXPECTED PAYMENT	1,196.79		
31/10/2017	ARREARS BALANCE			38,703.31
02/11/2017	ARREARS ADJUSTMENT		25,530.13	
30/11/2017	EXPECTED PAYMENT	1,196.79		
30/11/2017	ARREARS BALANCE			14,369.97
20/12/2018	TAX RELIEF		2.08	
31/12/2017	EXPECTED PAYMENT	1,196.79		
31/12/2017	ARREARS BALANCE			15,564.68
Totals:		€146,551.97	€132,717.57	€15,564.68

It is readily apparent why the Complainants would be confused by such a transaction history when a stated arrears balance decreases by more than €25,000 without any payment having been made.

The Provider has submitted mortgage statements for the years 2015, 2016 and 2017 into evidence. These mortgage statements set out the following information for each calendar year:

Expected Payment	Date	Description	Credits	Debits	Balance
------------------	------	-------------	---------	--------	---------

I have calculated the total credits received for each calendar year between 2015 and 2017 and the total interest charged in each year. I accept that the balances as set out in the balance columns accurately reflect all payments made into the account (assuming this is an accurate record of the transactions) and that the balance due and owing on the loan was appropriately reduced with each payment, while adding back the interest charged.

/Cont'd...

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 from the date that the loan was transferred to the Provider, and that the balance due and owing on their account accurately portrays payments made and interest charged on the account in the same period. I have been provided with no evidence that there has been overcharging on the account.

The question remains, however, how a change in methodology in calculating a monthly payment amount (or Contractual Monthly Subscription (**CMS**)) can have resulted in so drastic a change to the arrears figure that the Complainants were advised of prior to and subsequent to November 2017.

The Provider has argued that there was no change to the methodology by which it calculates arrears. It argues that arrears figures have been and continue to be calculated using the same method since the date of transfer, and the arrears figure is made up of the difference between the total CMS due and the total payments made to the account. The Provider has argued that since November 2017, its revised calculation methodology ensures that arrears figures remain independent of a borrower's CMS should it be recalculated. It argues that the revised arrears figure now comprises the shortfall between; (i) total monthly repayments due since the CMS was last calculated and (ii) the payment actually made to the account since the CMS was last calculated. In the Complainant's case, the CMS was last calculated in May 2016. What is missing from the Provider's explanation, however, and has been missing from its explanation since November 2017, is precisely how the arrears were calculated prior to November 2017.

In response to queries raised by this Office, the Provider has submitted that the Complainants' arrears figure at the date of transfer of the loan in February 2015 was €12,525.06. The Provider states that the CMS was due to be paid from the date of transfer to 31 October 2017 was €38,432.52. It states that the total payments actually made by the Complainants for the period (that is, February 2015 to October 2017) was €12,266.01. The Provider states the net of total CMS due less total payments made for this period is €26,166.51 of further missed payments. The Provider argues that this resulted in the Complainants' arrears figure increasing from €12,525.06 on the date of transfer to €38,703.31 at 31 October 2017. Though not clearly explained, what I understand from these figures is that the Provider's pre-November 2017 methodology of calculation of arrears is that the arrears figure of €38,703.31 as of October 2017 comprised the total missed payments on the Complainants' account since the *drawdown* of the loan.

On this basis and 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*;

/Cont'd...

- 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 Complainants *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.

Despite the Provider having furnished an explanation of the change of methodology on three occasions – the original letter of 6 November 2017, the final response letter of 25 January 2018, and its response to queries raised by this Office – I do not accept that the Provider has given a sufficient or clear explanation of how the change in methodology described by the Provider has resulted in such a significant change to the stated arrears balance on the Complainants' account.

The wording of the explanation has been consistent but seems to omit the key information that would allow the Complainants to understand how the arrears were previously calculated versus how they are now calculated, such that the huge difference in the arrears balance can be understood. As indicated above, I am satisfied that the Provider has properly credited the Complainants with all payments made so they have not been overcharged by the Provider. Rather, confusion has been created by the Provider as to the methodology of arrears calculation and a failure to fully explain the reason for the significant arrears adjustment that occurred in November 2017.

Perhaps somewhat surprisingly, there is no clear definition of "*arrears*" that applies to mortgage accounts 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. 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 pre-November 2017 were overstated or miscalculated. The new methodology leaves the Complainants' account in a far better light in that their arrears balance was substantially reduced without any additional payments being made by them.

/Cont'd...

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 methodologies applied. It is not clear to me why arrears can simply disappear as they have.

These are not matters which this Office can resolve.

Therefore, I am referring this matter to the Central Bank of Ireland so that it can take whatever action it may deem necessary in relation to this matter.

I am concerned about the manner in which the Provider has 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 arrears balance. Without an ability to compare the two methodologies to understand how such a significant reduction could occur, it is 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 in the past.

The Provider was given a further opportunity by the Complainants in this case to properly explain the change in methodology when a complaint was raised on the Complainants' behalf in November 2017. In its final response letter in January 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 January 2018, but it was not furnished by the Provider.

It was not until the Provider replied to queries raised by this Office that it made any attempt to explain the previous methodology for the calculation of arrears as well as the new methodology, such that a comparison could be made between the two in order to attempt to bring clarity to the radical change in the arrears balance position. As already indicated above, the Provider's explanation even at this late stage was insufficient in my view. By simply setting out a range of figures rather than a coherent explanation of the pre-November 2017 methodology, a level of deduction and presumption was required to reach a point where the pre-November 2017 could be understood. This position is completely unsatisfactory.

/Cont'd...

Through its failures, the Provider has forced the Complainants 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. Even then, the explanation provided was not sufficient.

Irish Credit Bureau (ICB)

I turn now to the third aspect of the present complaint – that overstated arrears have seriously affected the Complainants' credit rating and their ability to properly fund their business as farmers and/or to raise funds to clear the arrears. As set out above, I have no evidence that the arrears on the Complainants' account were overstated or miscalculated prior to November 2017.

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 appears to be correct.

Even if the arrears balance had been overstated between February 2015 and November 2017 (on the assumption that the post-November 2017 methodology was correct and the pre-November 2017 methodology was incorrect, which does not appear to be the case), I am not of the view that such an overstatement of the precise level of arrears would have impacted the credit rating of the Complainants during the relevant period. This is due to the manner in which credit reports are made to the ICB.

A lender does not report an exact arrears balance to the ICB; rather it reports the 'profile indicator' that reflects the status of the account. In the Complainants' case, the Provider submitted the profile indicator '9' every month between February 2015 and November 2017 (and thereafter). '9' in this context means there have been 9 missed repayments on the loan. I accept that the number and amount of missed payments on the Complainants' mortgage loan has been in excess of 9 months of repayments at all times since the loan was assigned to the Provider.

As a consequence, I do not accept that the Provider has submitted inaccurate credit reports to the ICB. The financial difficulties that the Complainants have set out in respect of problems encountered in obtaining farm finance cannot, therefore, be considered the responsibility of the Provider or arising from an overstated arrears balance. The loan contract provides for the submission of information to the ICB and the Provider has regularly reminded the Complainants of its obligations to make monthly reports on the status of the account to the ICB.

Exclusion from MARP and Threat of Legal Proceedings

The exclusion of the Complainants for the Mortgage Arrears Resolution Process (**MARP**) and the ongoing threat of legal proceedings were raised in the submissions of the parties so I propose to deal with them briefly.

/Cont'd...

The Complainants submitted a SFS in October 2015 which indicated a monthly mortgage repayment of €1,126.02 and a monthly deficit of €1,038.33. The SFS stated that full monthly repayments of €2,360 were being made to another financial institution in respect of a buy-to-let property which, I understand, is secured on the family's farm. By letter dated 29 October 2015, the Provider wrote to the Complainants and indicated its assessment of their SFS demonstrated an ability to make their monthly contractual repayment so an ARA could not be offered.

They were informed that they were now outside of the MARP and that MARP protections no longer applied. This letter was sent in conformity with the Provider's obligation under Provision 45 CCMA and noted, (among other things), that the Provider was therefore entitled to commence legal proceedings to repossess the property from 3 months from the date of the letter or 8 months from the date the arrears arose, whichever was later. An appeal was submitted on 1 December 2015, but the appeal was rejected.

I accept that the Provider acted in accordance with its obligations under the CCMA in respect of the exclusion of the Complainants from MARP in October 2015. I also accept that it has continued to engage with the Complainants in respect of further assessments of their financial position in light of newly submitted SFSs and has considered a number of settlement proposals in relation to the account. On each of these occasions, I accept that the Provider communicated its decision and explained the reason for it appropriately and in accordance with its regulatory obligations.

In respect of the threat of legal proceedings, I accept that, for the most part, the Provider's communications were in accordance with the CCMA and not excessive. On a call on 22 July 2016, for example, and in relation to a concern he raised about litigation, the first Complainant was assured that his account was still with the Provider's Arrears Support Unit (ASU) and had not been sent to litigation. By letter dated 7 December 2016, however, the Provider wrote to the Complainants noting an arrears amount of €31,379.42 and indicating that their account was not within the MARP and that "*legal proceedings for the repossession of [the] property were about to commence*". The Complainants were encouraged to consider an Assisted or Supported Voluntary Sale of the property. On a call on 12 December 2016, the Provider indicated that the account would likely be moved to litigation soon but that all litigation would be paused if any settlement proposals were received and that the litigation process was a lengthy one. The Complainants continued to engage with the Provider, increasing their monthly payments and making renewed repayment offers centred around an extension of term. Ultimately by letter dated 16 June 2017, the Provider informed the Complainants it was unable to offer them an ARA as their SFS showed that they continue to pay €4,789 towards secondary debt repayments while there was a shortfall in the amount being paid to the monthly mortgage repayments with the Provider. The letter informed the Complainants that they were outside of the MARP and that it could commence legal proceedings against the Complainants from 18 September 2017 onwards. By letter dated 4 July 2017, arrears of €36,856.95 indicated and the Provider noted that "*legal proceedings for the repossession of your property are about to commence*".

/Cont'd...

Further similar applications for term renewal were rejected on a similar basis to the June 2017 decision in July and December 2017.

While the Provider is obliged to inform borrowers outside of MARP of the risk of legal proceedings being issued against them, there is no regulatory obligation to inform them that proceedings *“are about to commence”* unless that is the case. Provision 58 CCMA states that a lender or its legal advisors must notify the borrower *“immediately before it applies to the Courts to commence legal proceedings for the repossession of the primary residence”* but there is no suggestion that the Complainants’ account has come close to this stage, likely as a result of reasonably regular payments being made on the account which are above interest-only but below the contractual monthly amount.

The Provider has stated that the Complainants’ loan has not been referred to its legal representatives and that no instructions regarding the issuance of proceedings against the Complainants for the recovery of the debt have been made.

In that light, the letters of 7 December 2016 and 4 July 2017 which warned the Complainants that *“legal proceedings for the repossession of your property are about to commence”* appear to be overstated and somewhat misleading.

The Consumer Protection Code 2012 (CPC) requires that a regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

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.

In my Preliminary Decision I expressed the 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.

In its post Preliminary Decision submission dated **27 October 2020**, the Provider submits in response to the above that it *“respectfully submits that the Preliminary Decision makes an error of law in reaching this conclusion”*. The Provider details that the *“6 November 2017 Letter was issued after a period of engagement with the Central Bank of Ireland and the Provider was fully conscious of the need to be transparent and comply with the Consumer Protection Code 2012”*. The Provider reiterates that the letter was *“shared with the Central Bank prior to issuance and the Provider actively engaged with the Central Bank of Ireland on this matter”*.

I would first highlight that I am unaware of the circumstances surrounding or the detail of the Provider's interaction with the Central Bank in this regard. The Provider has opted not to submit evidence of these interactions in the present adjudication. The Provider is entitled to do so but it cannot, however, seek to rely on such interactions having chosen not to submit them into evidence during the investigation of this complaint.

Further to the above, I remain 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. As the Provider has opted not to submit evidence of these interactions in the present adjudication, I can only take into account evidence made available to me as part of this investigation.

It should also be noted that 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 notified to the Central Bank 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 all of the circumstances of this complaint, I am of the view that the Provider has not properly or adequately explained how its change of calculation methodology in November 2017 resulted in a decrease in the Complainants' arrears balance of more than €25,000. This is due to its failure to explain the pre-November 2017 methodology. 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 November 2017. I am of the view that even in its response to queries raised by this Office, the Provider failed to clearly and adequately explain the change to the arrears.

The Provider has, in its post Preliminary Decision submission dated **27 October 2020**, submitted that I have made an error in fact and law in coming to the above conclusions. The Provider submits that the *"6 November 2017 letter made it clear that the Complainants' arrears figure had been recalculated. The Provider states that it is satisfied that it clearly and unambiguously clarified the new calculation methodology in the 6 November 2017 letter"* and it is satisfied that *"the approach was taken in subsequent communications with the Complainants, where in explaining what happened to the Complainants, the Provider sought to provide a clear and consistent message in using language that had been shared with the Central Bank of Ireland and that sought to explain matters in as simple and as clear a way as possible"*.

The Provider further submits that I have *"made an error of fact"* in coming to the conclusion that the Provider had not given *"a sufficient or clear explanation of how the change in methodology described by the Provider has resulted in such a significant change to the stated arrears balance on the Complainants' account"*. The Provider maintains that the letter and explanation contained therein *"was issued with the knowledge of the Central Bank of Ireland"* and explained the reason for the change.

/Cont'd...

However, while I accept that an explanation regarding the new methodology was offered in the Provider's correspondence with the Complainants, I remain of the view that the correspondence failed to explain the old methodology for the calculation of arrears.

While the Provider has detailed in its submission dated **27 October 2020** that the letter of 6 November 2017 "*explains how the previous methodology worked*", although the letter offers an explanation of the previous method by which a customer's CMS was calculated 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 dramatic 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.

Having fully considered the Provider's post Preliminary Decision submissions, and all the submissions and evidence, I do not accept its position and it remains my view that the Provider's communications in respect of the significant decrease of almost €25,000 in the Complainants' arrears balance was insufficient and there was a fuller and clearer explanation called for in **November 2017**, but it was not provided.

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 also 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.

/Cont'd...

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

27 September 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.