An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0342
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Errors in calculations
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a mortgage loan held by the Complainant with the Provider and, specifically, the calculation of arrears thereon.

The Complainant's Case

The Complainant states that he had received letters from the Provider informing him of an arrears balance on his mortgage that, over a period of approximately three years until the end of 2017, had increased from zero to over €50,000. The Complainant states that he had been informed by the Provider that the mortgage was unsustainable on many occasions and that he had agreed to a voluntary sale on the property on two occasions but did not reach an offer acceptable to the Provider. The Complainant states that he reached an agreement with the Provider in **May 2017** where his mortgage was restructured, capitalising the arrears and extending the term for four years.

The Complainant states that he received a letter in **November 2017**, a few weeks after reaching agreement, where the Provider stated that it had recalculated the arrears using a different formula and that the overall arrears were now €9,000. The Complainant submits that he contacted the Provider to make formal enquiries about the change, and asked, among other things, why the change had happened, why it had been done when it was done, and if he could have avoided arrears. The Complainant states that he received the same answer each time he asked a question, one which explains that the methodology was changed but not why, why then, or any of the other questions he posed.

The Complainant asserts that despite thoroughly reading the Provider's response to queries raised by this Office, he still cannot reconcile how the arrears figure was revised downwards from €52,000 by approximately €43,000 on 2 November 2017 as appears in his mortgage statement. He questions whether the recalculation is related to a newspaper article dated **18 November 2017** which reports that the Provider had stopped all repossession proceedings as a result of miscalculating arrears on customer accounts.

The Complainant further argues that one of the reasons why he signed the AVS agreement in **September 2016** was because of the arrears of over €35,000 that were set out on the AVS offer. He argues that his decision to sign the agreement was driven largely by the fact that the arrears were so large that he would have been unable to repay them while the Provider was already seeking to have monthly repayments reinstated to full capital and interest payments. The Complainant argues that, to him, the level of arrears was sufficiently high to warrant considering foregoing his family home. He argues that the original arrears figures provided to him were either erroneous or at least misleading. He argues that the fact that there are multiple possible ways to calculate arrears is confusing.

The Complainant argues that he has always paid as much as he could in respect of the mortgage account, that he accepts that the balance of the mortgage was always correct and he accepts that the interest payable and charged was always correct. He argues that when he agreed to sell his home in a voluntary basis in 2016, he assumed that the arrears figures furnished by the Provider were correct. He argues that he has subsequently discovered that this was not correct and that two years earlier, the High Court in Belfast had described the same methodology used in calculating arrears as "*double counting*". He argues that since the mortgage was restructured in 2017/2018, he has met full capital and interest repayments, which he argues shows that the mortgage was sustainable and that there was no reason for the Provider to insist on a voluntary sale, especially one based on wrongly calculated arrears. He argues that his signing of the AVS agreement was based on arrears which were overstated and that he was provided with misleading information in the letter of **6 November 2017**.

The Complainant argues that having failed to get a satisfactory answer from the Provider in respect of the change to the arrears' methodology, he has taken advice from a mortgage expert. He argues that the letter received from the Provider on **6 November 2017** describing the change in methodology in arrears calculations originated from an instruction from the Central Bank of Ireland to all loan providers to cease the practice of "*double counting*" based on a High Court of Northern Ireland judgement which deemed the method employed of capitalising arrears and demanding arrears payments as "*double-billing*". He argues that while the terms and conditions of his loan may have included a clause to allow the Provider to do so, the clause was held to be invalid. The Complainant argues that the use of double-billing of arrears meant that the arrears figures provided in the AVS agreement were overstated.

The Complainant argues that he was previously unaware that the Provider had recapitalised his arrears without his consent. He further argues that the Provider has tried to mislead him in its correspondence. The Provider, he argues, still refuses to acknowledge that its methodology was wrong.

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He argues that it is disingenuous to insist that an adjustment of over €40,000 was not due to an error but "*to provide greater transparency and clarity*". He argues that he still does not know what the correct arrears figure was when he signed the AVS agreement. The Complainant argues that the Provider has not acknowledged or addressed the fact that its terms and conditions used a method which resulted in 'double counting'. He argues that while he understands that this office is not obliged by a precedent set in the High Court in Belfast, 'double counting' is 'double counting' regardless of jurisdiction and is unlawful under the Unfair Terms in Consumer Protection legislation. He argues that the conclusions of the High Court in Belfast are damning of the practice, which is referred to as being unconscionable. He argues that the Provider gave him no alternative to a voluntary sale because of the high level of arrears and the fact that it deemed the mortgage unsustainable. He argues that he has subsequently proved the mortgage to be sustainable.

The Complainant further submits that, under the voluntary sale agreement that the Complainant made with the Provider, he had responsibility to sell the property but subject to the Provider's agreement on price. The Complainant submits that he had been informed by the estate agent that the Provider had instructed the estate agent to hold off on marketing the property until they received instruction from the Provider. The Complainant contends that this is against the terms of the voluntary sale agreement. The Complainant argues that on **10 January 2017**, the estate agent called him to confirm that they had to await instruction from the Provider to market the property for sale and sent an email to confirm this. The Complainant argues that he had an obligation under the agreement to put the property on the market within two weeks of accepting the offer and cannot see how the Provider could intervene in the sales process – when he was led to believe that this was within his responsibility – simply because it was unhappy with the fee structure.

The Complainant wants the Provider to offer "*plain speaking answers*" to the questions he asked and to pay him an unspecified amount of compensation. He has subsequently requested an apology and an acknowledgement from the Provider that the arrears figure on which he based his decision to agree to an AVS was wrong.

The Provider's Case

The Provider argues that the loan CMS is calculated where there is a trigger event, for example, whether the rate changes. It submits that the methodology previously used to recalculate the Complainant's CMS included the accumulated arrears on the mortgage account up to the date of recalculation to ensure that he would clear the mortgage within the remaining term of the loan. It argues that this methodology was in line with the terms and conditions of the loan, and specifically clause 6(2)(a). The Provider argues that the methodology had no impact on the Complainant's overall indebtedness, or the interest charged. It argues that by including missed payments in the CMS at recalculation events, the methodology had the benefit of a lower cost of capital when payments were resumed.

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Notwithstanding that, the Provider submits that it changed its methodology for calculating CMS in **November 2017**. It argues that the change in methodology was brought about to provide greater transparency and clarity for customers in relation to CMS and arrears. The Provider argues that it advised the Central Bank of Ireland prior to making the change and sharing proposed customer communications with it. It argues that a detailed letter outlining the change was sent to the Complainant on **6 November 2017**. The Provider argues that the revised calculation methodology ensures that the Complainant's 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 the arrears figure at **30 November 2017** was €8,918.93 and this comprised the total monthly repayments due since the CMS was last calculated of €19,671.78, less the payments actually made to the account since the CMS was last calculated of €10,752.85.

The Provider argues that the Complainant first fell into arrears in January 2014 and continued to accumulate arrears since that date. It argues that his account was dealt with under the Mortgage Arrears Resolution Process (**MARP**).

The Provider states that the Complainant submitted a Standard Financial Statement (**SFS**) for consideration on **26 June 2015**. On review of his SFS, it was concluded that the mortgage was unsustainable on a long-term basis and in accordance with MARP, a 'no options' letter under Provision 45 of the Code of Conduct on Mortgage Arrears (**CCMA**) issued to the Complainant. The Provider argues that the Complainant's authorised third party contacted it on **8 August 2016** informing the Provider that the Complainant wished to progress with an Assisted Voluntary Sale (**AVS**) of the property. The Provider argues that an AVS process offer pack was sent to the Complainant on **15 August 2016** and was signed and accepted by the Complainant and returned to the Provider on **6 September 2016**. The Provider argues that as the Complainant agreed to enter the AVS process, the interest rate on the loan account was set to 0%. The Provider submits that the Complainant requested the estate agent to remove the property from the market on **7 February 2017** and confirmed to the Provider over the phone on **16 February 2017** that he no longer wanted to progress with an AVS.

The Provider rejects the assertion that it did not comply with the terms of the voluntary sale agreement. It argues that the Complainant consented to the Provider liaising with the estate agent. The Provider argues that it contacted the estate agent to review the current asking price and fee structure in place as the property was placed on the market for sale prior to entering into the AVS agreement. The Provider argues that it was unhappy with the fee structure agreed between the estate agent and the Complainant and requested that it be amended and drafted a new property sale agreement. The Provider argues that this revised agreement with the estate agent was returned to the Provider by the estate agent on **3 February 2017** but that the Complainant subsequently requested that the property be taken off the market on **7 February 2017**.

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The Provider highlights several conditions of the AVS offer letter which, it argues, allowed it to liaise with the appointed estate agent and referred to the reduction of "*agreed*" auctioneer's fees from the sale proceeds. The Provider argues that under the terms of the AVS agreement, it was necessary for the Provider to agree to the auctioneer's fee structure. The Provider argues that it was not initially satisfied with what was proposed and liaised with the auctioneer to agree a new fee proposal. The Provider argues that it has no record on file that the estate agent was directed not to market the property. It argues that the Provider had the ultimate say on the property sale price and auctioneer's fees had to be first agreed. It argues that any delay to the marketing of the property was caused by the time it took to agree auctioneer's fees, which was a key element of the AVS agreement. The Provider further argues that in circumstances where Complainant informed the Provider that he did not wish to continue with the sale of the property during the initial period, the Provider submits that the argument is moot.

The Provider argues that it notified the Complainant of the change in arrears methodology by letter dated **6 November 2017** and is satisfied that the letter fully disclosed the relevant material information in a way that seeks to inform the Complainant, as required under general principle 2.6 of the Consumer Protection Code 2012 (**CPC**).

The Provider argues that prior to the recalculation of **November 2017**, the methodology used by the Provider to calculate the Complainant's arrears figures comprised the shortfall between:

(i) the Complainant's total monthly repayments due since his loan was drawn down and

(ii) payments actually made by him since the loan was drawn down.

Accordingly, it argues, the arrears figures provided to him prior to **November 2017** comprised the shortfall between the total monthly payments due from drawdown and the payments actually made by him since his loan was drawn down.

The Provider argues that the Complainant's CMS was last calculated effective from **1 April 2017** when the interest rate changed from 0.00% to 1.25%. It submits that the interest rate had been reduced to 0% in **October 2016** by the Provider as a concession following the Complainant's acceptance of the AVS offer. It argues that following the withdrawal by the Complainant from the AVS, the Provider reinstated the Complainant's interest rate to 1.25% effective from **1 April 2017**.

The Provider argues that from **1 April 2017**, the Complainant's CMS increased from €2,147.86 to €2,458.71, which was the amount required to clear the Complainant's mortgage account balance within the remaining loan term. From **November 2017**, the arrears figure comprise shortfall between:

(i) the total monthly repayments due to the CMS was last calculated and

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(ii) payments actually made to the account since the CMS was last calculated.

The Provider argues that the newspaper article referred to by the Complainant was not pertinent to the Complainant's account and that it has no comment to make in respect of it. The Provider submits that the methodology used by it had no impact on the Complainant's overall indebtedness or the interest charged.

In respect of the Complainant's submission that his decision to sign the AVS was driven largely by the fact that the arrears were so large that he would have been unable to repay them, the Provider submits that the key consideration in entering the AVS was the fact that the Complainant was in default, had missed a significant number of repayments, and the mortgage was unsustainable on a long-term basis. It argues that he failed to make full CMS repayments for 41 out of 113 payments due from drawdown to **June 2015**. It further argues that since the Complainant withdrew from the AVS, the arguments raised by him are moot.

The Provider disagrees that the arrears figures provided prior to **November 2017** were erroneous. It argues that the methodology used for **November 2017** was in line with the applicable loan terms and conditions and did not impact on the Complainant's overall indebtedness. The Provider further argues that the arrears figure stated on the AVS offer letter dated **11 August 2016** was the correct arrears figure at that time. It argues that by paying lower than the total monthly repayment due on the mortgage, the Complainant was in default under the terms and conditions of the mortgage, thereby entitling the Provider to demand repayment in full of the loan balance. The Provider refers to an affordability assessment in 2015 which determined that the Complainant had insufficient monthly mortgage repayment capacity to make sustainable payments and therefore, in line with the CCMA, he was informed of the availability of alternative options involving the voluntary sale of the property which included a commitment to write off any residual mortgage debt remaining after the sale. The Provider argues the Complainant voluntarily entered and subsequently chose to withdraw from the AVS agreement with no loss suffered. The Provider argues that the arrears adjustment in **November 2017** did not invalidate any previous arrears figures and was without prejudice to the methodology used previously.

The Provider notes that the Complainant makes reference to a legal case that occurred in another jurisdiction, that is, Northern Ireland. The Provider argues that different jurisdictions operate under different authorities and regulators and that the different requirements apply, with different loan agreements containing different terms and conditions. It argues that the fact that a court in another jurisdiction makes certain decisions does not mean that that position has any implications in another jurisdiction, particularly where different terms and conditions apply.

The Provider rejects the contention that its pre-**November 2017** methodology was wrong. It argues that the methodology used was in line with the applicable terms and conditions of the mortgage. Further, it argues that the Provider voluntarily elected to change its methodology to provide greater transparency and clarity for customers in relation to their monthly mortgage repayments and their arrears.

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It argues that the Central Bank of Ireland was aware of the methodology used by the Provider up to **November 2017** and that it advised the Central Bank prior to making the change to the methodology.

The Provider argues that the Complainant was assessed under the MARP on four separate occasions. In respect of a **June 2015** SFS, the assessment identified a repayment capacity of just €1,007.67 per month which was insufficient to meet the best possible restructuring arrangement then available to him of €1,998.40 per month. Accordingly, it argues, the assessment concluded that the mortgage was unsustainable on a long-term basis. The Provider rejects the assertion that if the arrears had been adjusted prior to the AVS, the Complainant would not have considered the AVS option. It argues that, instead, it was the evaluation of the Complainant's mortgage as being unsustainable which led to the consideration of AVS by the Complainant as an alternative to litigation arising from payment default under the terms and conditions of the mortgage.

The Provider argues that following the Complainant's withdrawal from the AVS agreement, a further SFS was submitted in **March 2017**. It submits that the **March 2017** assessment identified a monthly mortgage repayment capacity of €1,588.33 but this was insufficient to meet the then-CMS or the best possible restructuring option of €2,073.09 per month. Consequently, it argues, the assessment concluded that the mortgage remained unsustainable on a long-term basis.

The Provider argues that in **October 2017**, the Complainant submitted a third SFS as his income had increased. The Provider argues that the assessment of this SFS revealed that the Complainant could by then afford mortgage repayments of €2,090 per month. Following this assessment, the Provider submits that it offered the Complainant a short-term six-month reduced repayment arrangement of €2,090 per month to allow the Complainant to demonstrate his increased repayment capacity with a view to entering a long-term restructure. The Provider argues that the Complainant met the terms of the short-term arrangement and a fourth SFS assessment was completed and a permanent mortgage restructure incorporating term extension was offered to and accepted by the Complainant. The Provider argues that this restructure reduced the CMS to €2,082 which was in line with the increased monthly repayment capacity evident in the Complainant's SFS. The Provider argues that the Complainant's eligibility for the restructure was due to his increased mortgage repayment capacity and did not arise as a result of the reduction in the arrears figures arising from the change in methodology.

The Complaints for Adjudication

The complaint is that the Provider:

> Has not explained the change in arrears calculation methodology to the Complainant's satisfaction and did not afford him the opportunity to address his arrears sooner using the revised methodology in a way that might have allowed him to avoid the hardship resulting from the accumulation of arrears; and that the Provider did not adhere to the terms of the voluntary sale agreement made with the Complainant.

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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 Complainant was 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 19 July 2021, outlining 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 and letter from the Complainant to this Office dated 23 July 2021.

2. E-mail and letter from the Provider to this Office dated 19 August 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.

The Recalculation of the Arrears Balance

The kernel of this complaint is a recalculation of the arrears balance on the Complainant's mortgage loan account with the Provider which occurred in **November 2017**. The Complainant is aggrieved that the Provider (in his view) has failed to properly explain the change in the arrears and overstated the level of his arrears prior to this adjustment.

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He further argues that the overstatement of his arrears balance led to his agreeing to an Assisted Voluntary Sale (**AVS**) of his family home in **September 2016**, albeit that he subsequently resiled from the agreement. The Provider argues that it has properly explained the change, denies that the arrears were overstated and argues that the Complainant's 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 correctly assessed the Complainant's mortgage as unsustainable prior to the offer of an AVS based on his then income and not on the basis of the arrears balance.

The Complainant was offered a mortgage by a third party financial service provider, the previous owner of the loan, dated **7 February 2006**. The period of the agreement was 30 years and the terms of the loan indicated that it was "*interest only*" with an interest rate of 1.25% over the main ECB rate (that is, a tracker rate). The loan was accepted by the Complainant on **13 February 2006**.

A top up of the loan was offered to the Complainant by letter dated **10 May 2006** with the special conditions noting that upon drawdown of funds, the existing mortgage loan would be switched to a capital and interest product with a 1.25% two-year discount tracker rate.

This was accepted by the Complainant in **May 2006**. While the initial loan was therefore an interest only loan, it would appear that from **May 2006**, the mortgage loan was to be repaid on an annuity repayment basis, with the regular monthly payment of capital and interest.

In respect of the calculation of monthly repayments, the terms and conditions of the loan agreement provide as follows:

> "6*.2 Annuity Loans*
>
> (a) *If the Loan is scheduled to be repaid on an Annuity/Repayment basis, we will calculate suitable monthly repayments designed to repay the Loan by the end of the Term of the Loan*."

I accept that this provision of the loan agreement allows the Provider to recalculate monthly repayments taking into account the entire balance of the mortgage (to include any arrears). This is commonly referred to as the capitalisation of arrears – an arrangement where some or all the outstanding arrears are effectively added to the remaining mortgage balance. This means that it will then be repaid over the life of the mortgage and will not remain outstanding at the end of the mortgage term. While there is no regulatory rule prohibiting a mortgage lender from automatically capitalising arrears, I understand that the Central Bank of Ireland discourages the practice and has liaised in the past with certain lenders to discourage or stop them from doing so. The details of these interactions are not available to me.

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The Provider has submitted a mortgage statement in respect of the mortgage, spanning from **21 February 2006** to **30 April 2020**. I note that the Complainant accepts that all payments made by him in respect of the account were properly credited and that interest was appropriately charged.

The Provider has also submitted an Arrears Statement in respect of the mortgage account. I note that an arrears balance first appeared on the statement on **31 January 2014** and increased quickly thereafter. I note that as of **31 October 2017**, the arrears balance is stated as €52,910.39, while on **30 November 2017**, the arrears balance is stated as €8,913.93. The following is the relevant extract from the statement:

Date	Transaction Type	Debit	Credit	Balance
27/10/2017	BANK PAYMENT		1,500.00	
31/10/2017	EXPECTED PAYMENT	2,459.06		
31/10/2017	ARREARS BALANCE			52,910.39
02/11/2017	ARREARS ADJUSTMENT		37,252.04	
02/11/2017	ARREARS ADJUSTMENT		7,575.58	
03/11/2017	BANK PAYMENT		1,500.00	
20/11/2017	TAX RELIEF		122.90	
22/11/2017	REVERSE BANK PAYMENT	1,500.00		
28/11/2017	BANK PAYMENT		1,500.00	
30/11/2017	EXPECTED PAYMENT	2,459.06		
30/11/2017	ARREARS BALANCE			8,913.93

It is apparent therefore that the arrears balance on the mortgage was decreased by the Provider by almost €44,000 in the month of **November 2017** on the basis of an "*arrears adjustment*" that occurred on **2 November 2017** and not due to any additional repayments from the Complainant.

By letter dated **6 November 2017**, the Complainant was informed by the Provider of "*a change in the arrears figure on your account"* which as of the date of the letter *"had reduced to €9,041.83*". 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 €483,998.78 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.*

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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 reiterate 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).”

The Complainant called the Provider on **10 November 2017** questioning the recalculation of the arrears. He questioned why the change had been made and why he had not been informed sooner so that he could have increased his payments a little to keep the arrears down. The representative in question indicated that he could not answer the queries and that he could merely request that he speak to a case manager who could explain the situation properly.

The representative indicated that the previously calculated monthly repayment included the arrears but it would now be calculated independent of the arrears. The Complainant indicated that the intent of the letter may have been to clarify things, but it had caused huge confusion and the Provider’s representative confirmed that the situation was not entirely clear to him either. The Provider’s representative indicated that the Complainant’s case manager would contact him.

The Complainant called the Provider again on **16 November 2017** as there had been no response to the queries he had raised on his initial call. The representative in question indicated that frontline staff of the Provider have been given an explanation as far as possible but that where customers had additional queries, they should be informed it was better to put the queries to the Provider in writing. The Complainant was informed that, from now on, if there were arrears on the account, they would not be factored into the calculation of the monthly mortgage repayments and so the arrears balance would still be outstanding at the end of the term if all monthly repayments were made. The representative in question acknowledged that the particular change to the Complainant’s arrears was very significant but that he could not answer his queries and encouraged the Complainant to put them in writing to seek appropriate information.

By letter dated **16 November 2017**, the Complainant wrote to the Provider referring to the letter of **6 November 2017** and to his phone calls. He stated that he had not received answers that he was able to understand clearly. He stated that he would like to understand in simple terms:

1. “*The methodology for calculation the arrears before the new methodology was adopted.*
2. *The new methodology.*

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3. *How and why would there be more than one methodology available to choose from? I would have thought that there was a single method, which would be provided by, or stipulated by, the Central Bank.*
4. *Given my arrears is now over 80% less than it appeared to be two weeks ago, and that the total amount outstanding is the same, how can the interest payable on the arrears from both positions result be the same?*
5. *Your letter is designed to provide greater clarity to your customers, but I find it very confusing and unclear.*
6. *If I am only in €9,000 arrears since starting to go into arrears several years ago, the monthly amount by which I was going into arrears was relatively small (compared to what was expected of me), and something I could have taken action to pay (e.g. borrowing from family temporarily) in order to avoid going into arrears, and thereby developing a very poor credit rating. Why wasn't I given the opportunity to avoid this at the start of going into arrears?"*

By letter dated **20 December 2017**, the Provider responded to the Complainant's letter in the following terms:

> *"1. The methodology we previously used to calculate your 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. Prior to the recalculation your arrears balance comprised the shortfall, between; (i) your total monthly repayments due since the loan was drawn down and (ii) the payments actually made by you since your loan was drawn down.*
>
> *2. We have adopted a revised CMS calculation methodology with effect from 01 November 2017 which will ensure your arrears figure remained independent of your CMS should it be recalculated in the future, for example, if your interest rate changes. The recalculated arrears figure now comprises the shortfall, 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.*
>
> *Your CMS was last calculated on 31 March 2017 when the interest rate changed from 0.00% to 1.25%. The arrears figure at 30 November 2017 was €8,918.93 and this comprises the total monthly repayments due since the CMS was last calculated of €19,671.78, less the payments actually made to the account since the CMS was last calculated of €10,752.85.*
>
> *3. CMS calculation methodologies may vary depending on the treatment of payment shortfall amounts.*
>
> *4. Interest is applied to your mortgage balance at the applicable rate, currently at 1.25% on your account. We again confirm that your overall mortgage balance has not been affected by the change in CMS calculation methodology or the recalculation of the arrears figure.*

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5. We note your comments and trust that this response addresses your further queries.

6. We refer to our response to 2 above. The arrears figure as at 30 November 2017 was €8,918.93 and this comprises the total monthly repayments due since 31 March 2017 of €19,671.78, less the payments actually made to the account since 31 March 2017 of €10,752.85. We note [the Provider] have completed three Standard Financial Statements assessments with you in relation to your account since it was acquired by [the Provider] in February 2015."

By way of final response letter dated **11 April 2019**, the Provider referred to a complaint received from the Complainant by phone on **13 February 2019** and replied as follows:

"*As advised in our letter of 6th November 2017, we have adopted a revised monthly mortgage payment ("Contractual Mortgage Subscription"/"CMS") calculation methodology with effect from 1st November 2017.*

The methodology previously used to calculate your 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 remained independent of your CMS should it be recalculated in the future, for example if your interest rate changes.

The revised arrears figure now comprises the shortfall between:

(i) the total monthly repayments due since the CMS was last calculated and

(ii) the payments actually made to the account since the CMS was last calculated.

Prior to the recalculation your arrears figure compiled the shortfall, between:

(i) your total monthly repayment due since your loan was drawn down and

(ii) the payments actually made by you since your loan was drawn down.

You advised during a phone call on 13 February 2019 that had [the Provider] calculated your arrears in the same way as they are calculated now, you would not have fallen into arrears and you would not have had to attempt voluntary sale of your property. 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 reduced by the amount of payments made by you.

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We enclose an arrears statement for your convenience. You will note the level of arrears increasing from January 2014 at a result of underpayments on the account.

We regret that our letter of 06 November 2017 has caused you any confusion or distress, however we believe the methodology will provide greater clarity to our customers.

We trust this clarifies matters for you."

In his submissions, the Complainant has referred to a decision of the Belfast High Court in which the court had to determine whether the lender in that case could both consolidate mortgage arrears by increasing monthly instalments through capitalisation, and also rely on the arrears for possession proceedings. The case in question is *Bank of Scotland v Rea, McGeady* [2014] NI Master 11. Master Ellison held that the mortgages should no longer be regarded as in arrears once capitalisation has taken place and described the lender's reliance on extinguished arrears as double-billing. The practice was said to unfairly and confusingly distort perceptions of affordability. The decision in question was made in a different jurisdiction under consideration of different mortgage account terms and conditions, different regulatory and legislative rules, and pertinent affidavit evidence.

Further, the Northern Ireland Master had the benefit of full legal argument in respect of the procedure adopted by the lender in that case. Finally, it was the combined fact that the lender had automatically capitalised the arrears (a characterisation that the lender continued to deny) and sought to rely on the same arrears to establish its entitlement to repossession that led the Master to his conclusions. For those reasons, I am unable to rely on any conclusions drawn in the case in adjudicating the present complaint.

That said, the case is of assistance in helping to understand what may have transpired in this complaint.

In respect of the **November 2017** change in methodology in the calculation of arrears, my understanding 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 Complainant *since the loan was drawn down*;

B. Following the recalculation, the arrears figure comprised the shortfall between total monthly repayment due *since the CMS was last calculated* in **April 2017** and the payments actually made by the Complainant *since the CMS was last calculated* in **April 2017**;

/Cont'd…

C. When the CMS was recalculated prior to November 2017 (for example, on **1 April 2017**), it was recalculated to ensure that the total outstanding balance of the Complainant's mortgage loan would be repaid over the remaining term or, to put it another way, that his arrears balance was included in calculating the monthly repayments (a method that could be described as the unilateral capitalisation of arrears);

D. If the CMS was recalculated after **November 2017**, any arrears balance would not be included in calculating future monthly repayments and so, any arrears balance would remain at the end of the mortgage term if not repaid before then; and

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

On the basis of total monthly mortgage repayments of €19,671.78 due and payments actually made to the account by the Complainant of €10,752.85 since the date of the CMS recalculation on **1 April 2017**, the arrears were calculated as €9,041.83 (that is, €19,671.78 minus €10,752.85) in **November 2017**. The previously advised arrears balance of more than €52,000 reflected the total missed payments on the account since drawdown in **2006**. There has been no evidence submitted that suggests this calculation of missed repayments on the loan between drawdown and **October 2017** was incorrect. There is evidence of significant under-payment from **2014** onwards, during which time the arrears balance on the account seems to have 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. 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 Complainant prior to **November 2017** of over approximately €52,000 were overstated or miscalculated. The new methodology portrays the Complainant's account in a better light.

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The issue here (and the one repeatedly raised by the Complainant) 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 Complainant in terms of the new methodology applied, or whether there were costs implications for him under the old methodology. It is not clear to me why arrears can simply disappear as they have, unless the Provider was relying on arrears that it had previously capitalised in a manner similar to the lender in the Northern Irish case described above. 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 are issues which the Central Bank of Ireland may wish to examine.

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 Complainant. 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 Complainant 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 Complainant would be wholly confused by the change in methodology and would jump to the conclusion that there had been a miscalculation in the arrears.

I note that the Complainant contacted the Provider on several occasions by phone and by letter seeking answers to his queries on the new methodology. On those phone calls, the Provider's own representatives agreed that the situation was confusing and they were unable to answer the Complainant's questions. If the Provider's letter of **6 November 2017** was as clear as it now claims it to have been, one has to wonder why its own staff were unable to communicate the changes or answer the Complainant's questions. I note that a fuller explanation was provided to the Complainant by letter dated **20 December 2017** in response to his letter of **16 November** but I accept that the explanation did not go far enough.

In my Preliminary Decision, I expressed the view that the Provider's communications in respect of the significant decrease of almost €44,000 in the Complainant's arrears balance was insufficient and there was a fuller and clearer explanation called for in **November 2017,** but it was not provided.

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The Provider, has in its post Preliminary Decision submission dated **19 August 2021**, submitted that I have fallen into error in drawing the above conclusions. The Provider submits that the "*The 6 November 2017 Letter explains how the previous methodology worked (it included the accumulated arrears on the Complainants' mortgage account up to the date of recalculation i.e. all arrears) and how the methodology from November 2017 onwards works"* and it is satisfied that "*the approach was taken in subsequent communications with the Complainant, where in explaining what happened to the Complainant, 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 its fuller explanation which was provided to the Complainant by letter dated 20 December 2017 did not go far enough. The Provider submits that the *"letter of 20 December 2017 further sets out the change in methodology, the date of the last monthly repayment calculation and how the revised arrears figure was calculated.* The Provider "*believes this further explanation sets out in a clear, concise and timely manner the Provider's change in methodology*".

As set out above, in my view the "*explanation was comparatively clear*" on how customer arrears were to be calculated from **November 2017** in the Provider's letter of 6 November 2017. However, it is my continued view that the letter failed to adequality explain the old methodology for the calculation of arrears.

While the Provider has detailed in its submission dated **19 August 2021** that the letter of 6 November 2017 "*explains how the previous methodology worked*", while the letter provides 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.

I have fully considered the Provider's post Preliminary Decision submissions and all of the submissions and evidence, in this regard, I do not accept its position and it remains my view that the Provider's communications in respect of the significant decrease of almost €44,000 in the Complainant's arrears balance was insufficient and there was a fuller and clearer explanation called for in **November 2017,** but it was not provided.

I do not, however, accept the Complainant's argument that if the new methodology had been applied earlier, or if he had been made aware that a new methodology could have been applied in respect of his arrears, he could have paid more money each month to avoid going into arrears in the first place.

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It is apparent based on the above that the reason why the Complainant's arrears were just over €9,000 after the **November 2017** recalculation, was that the arrears that had built up prior to **April 2017** were capitalised (or consolidated or otherwise included) in the revised monthly repayments from **1 April 2017**. It is not the case, therefore, that an arrears balance of €9,000 built up between **2015** and **2017**; rather, the same arrears balance built up between **April** and **November 2017**.

I note that the Provider has made reference to the awareness of the Central Bank of Ireland of its change in methodology and its proposed customer communications. I am unaware of the circumstances surrounding, or the detail of the Provider's interaction with, the Central Bank in respect of the letter of **6 November 2017**.

I am unaware whether the Provider's 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 not to submit evidence of these interactions in the present adjudication. The Provider is entitled to so decide. It cannot, however, seek to rely on such interactions having chosen not to submit them into evidence.

I further note that 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 that this, I note first that the details of that complaint were different in that 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. While this Office strives for consistency in its approach to complaints, each individual complaint requires and deserves individual consideration. In the present case and based on the submissions of both parties, I am of the view that the Provider failed to properly or adequately explain to the Complainant how his arrears balances reduced so dramatically in **November 2017**.

It is apparent that despite the Provider's letter of **6 November 2017**, the Complainant did not understand what had occurred and repeatedly asked the Provider for answers to his questions. I have identified above the shortcomings of that letter, as I perceive them to be. 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 Complainant's account.

As noted above, in addition to my finding that the Provider failed to provide an adequate explanation to the Complainant 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 Complainant 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 I can resolve, I am referring 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.

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Arrears and the Offer of the Voluntary Sale Agreement

Although it did not form part of his initial complaint to this office, in subsequent submissions, the Complainant has argued that the arrears balance which the Provider communicated to him prior to **November 2017** led him to accept the Provider's offer of an Assisted Voluntary Sale (**AVS**) agreement in **September 2016**. He argues that based on the extent of the 'misleading' arrears then notified to him of approximately €35,000, he formed the view that he would be unable to meet the normal monthly repayments on the account in addition to repaying the arrears balance.

The Provider has argued that the AVS option was offered to the Complainant and accepted by him not due to the extent of the arrears but because there was no long-term restructure available in respect of his mortgage loan as it had deemed the mortgage to be unsustainable. It further argues that the Complainant withdrew from the AVS agreement and so no loss occurred to him.

Based on the evidence before me, an assessment of the Complainant's Standard Financial Statement (**SFS**) was carried out around **June 2016**. The assessment carried out deemed the mortgage to be unsustainable based on the Complainant's then income levels. The Provider offered the Complainant the option of a supported voluntary surrender or an assisted voluntary sale by letter dated **5 July 2016**. Each option was explained to the Complainant. By letter dated **11 August 2016**, an offer letter in respect of an Assisted Voluntary Sale (**AVS**) was issued to the Complainant and this was accepted by him on **1 September 2016**. I note that the letter stated that the outstanding arrears on the letter were €35,048.88.

The Complainant decided in **February 2017** to withdraw from the voluntary sale agreement. Thereafter he submitted a new SFS and, on assessment, the Provider informed him by letter dated **5 April 2017** that it was unable to offer him an alternative repayment arrangement (**ARA**). It explained that the SFS indicated affordability of €1,588.33 per month.

The Provider indicated that the amount was not sufficient to sustain any of the ARAs which the Provider had on offer. In those circumstances, he was informed that he was outside of the MARP and that legal proceedings could be commenced from **July 2017**. The letter indicated other options available to him, including the voluntary sale or voluntary surrender of the property.

I have considered the content of the telephone calls that took place between the Complainant's third party adviser and the Provider from **April 2017** onwards. The Provider explained on a number of occasions the minimum monthly repayment amount that the Complainant would have to be in position to show affordability for to allow the Provider to offer him an ARA. The Provider informed the third party adviser that with his current income, there were no sustainable options.

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On a call on **5 July 2017**, the third party adviser indicated that the Complainant's circumstances might be changing and his income might increase but it was not yet clear. In a further call on **9 October 2017** after the submission of a new SFS, the Provider's representative sought detailed information from the third party adviser in respect of certain entries on the SFS. She explained that the Provider had already issued two no options letter to the Complainant and she did not want to issue a third one though, currently, affordability for a long-term restructure was not yet present on his SFS. On a subsequent call on **27 October 2017**, the Provider's representative discussed the differences in the minimum monthly payment if the Complainant made lodgements of €10,000, €20,000 or €30,000. She explained that if there was no lodgement, repayment capacity for a minimum of €2,090 per month would have to be shown on the Complainant's SFS.

By letter dated **20 November 2017**, the Provider wrote to the Complainant's third party adviser indicating that if the Complainant decreased his expenses to show affordability of €2,090 and the term of the loan was extended by four years, a restructure would be possible. By letter dated **15 December 2017**, and following a further assessment of a revised SFS, a six-month ARA was offered to the Complainant by payment of €2,090 per month. As the Complainant met his obligations under the short term restructure, a long-term restructure was offered to him by letter dated **18 July 2018**, by way of the capitalisation of arrears of €11,017.70 and a term extension of four years.

On the basis of the above, I accept that prior to **December 2017**, the Provider deemed the Complainant's mortgage to be unsustainable on the basis of his income as advised to it in various SFSs submitted from 2015 onwards. I accept that it was only in **December 2017** when the Complainant's revised SFS indicated a repayment capacity of €2,090 per month that the Provider was in a position to offer him a long-term restructure. Accordingly, I accept the Provider's submission that it was the increase in the Complainant's income in **2017**, (in addition, it appears, with a reduction in his expenditure on his SFS), that allowed the Provider to assess the Complainant as having affordability to meet monthly repayments of €2,090. I do not accept that the argument that the Complainant's mortgage should always have been viewed by the Provider as being sustainable simply because the Complainant has now put himself in a position where he has managed to restructure the mortgage and meet the revised monthly payments.

It is apparent that his income has increased in the interim and his mortgage payment affordability increased by approximately €1,000 per month between **2015** and **2018**. This is a significant increase.

A more difficult question is the impact, if any, of the level of arrears as communicated to the Complainant in his initial decision in **September 2016** to the voluntary sale of his family home. I accept the Provider's arguments that its offer of an AVS in full and final settlement of the mortgage loan account was made due to its assessment of the mortgage as being unsustainable rather than on the basis of the arrears balance. I also accept that the categorisation of the Complainant's mortgage account as unsustainable, coupled with the Provider's indication that it could not offer a long-term restructure, must have been factored in by the Complainants in making his decision.

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That does not mean, however, that the level of arrears that were communicated to him would not also have had a bearing on the decision. Despite the suggestion of the Provider, I do not accept that an arrears balance is immaterial to perceptions of affordability. In another context, for example, the level of arrears on an account is commonly used by courts in determining the appropriateness or reasonableness in granting a possession order. It stands to reason that the Complainant would have averted to the arrears balance communicated to him in weighing up his options on whether to agree to an AVS in full and final settlement of his mortgage loans.

Having said that, I accept the Provider's submission that the Complainant withdrew from the AVS process in **February 2017** and suffered no loss as a result of his initial decision to accept the AVS. Further, and as set out above, there is no evidence before me that the arrears balance communicated to the Complainant prior to **November 2017** was erroneous or misleading, albeit that I am referring the issue to the Central Bank of Ireland for its consideration.

The Assisted Voluntary Sale Agreement

The Complainant has argued that he agreed to the assisted voluntary sale of his property in **September 2016** but that the Provider prevented the appointed auctioneer from putting the property on sale for a period of time, contrary to the agreement of the parties. He has submitted evidence of an email from the auctioneer in question dated **10 January 2017** in which the auctioneer confirmed that the Provider had told the auctioneer to wait on instructions from the Provider to market the property for sale. The email did not make any reference to the question of fees.

The Provider accepts that there was a delay in respect of the marketing of the property but explained that this was due to its disagreement with the price structure agreed between the Complainant and the auctioneer. The Provider argues that it was entitled under the agreement to agree the auctioneer's fees and that the delay resulted from attempting to agree an appropriate fee with the auctioneer, which it ultimately did.

By letter dated **11 August 2016**, the Provider offered the Complainant an assisted voluntary sale (**AVS**) in full and final settlement of his mortgage. The offer was addressed to the Complainant (i.e. the "you" referred to in the letter) and was subject to the following conditions:

> a) "*You accepting this offer.*
> b) *[The Provider] receiving the offer document duly signed by you.*
> c) *[The Provider] consenting to the sale of the property for an agreed amount.*
> d) *You selling the property and the application of the sale proceeds, after deduction of the agreed Auctioneer and Solicitors fees, to the loan facility within six months of the date of acceptance of this offer by you.*
>
> …

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GENERAL CONDITIONS

1. Offer

The Provider will:

- *Support you with the Assisted Voluntary sale of the property.*
- *Accept and apply the sale proceeds of the property to the loan facility.*
- *Agree to a full and final settlement of the loan facility providing the sale proceeds of the property, after deduction of agreed Auctioneer and Solicitors fees, are applied to the loan facility, hence you would owe nothing further on your loan facility with [the Provider]. …*

2. Borrowers Obligations

To enable [the Provider] to support you in the Assisted Voluntary Sale of the property you agreed to:
…

- *Appoint an Auctioneer/Estate Agent, from [the Provider's] panel of Auctioneers/Estate Agents, to sell the property.*

…

3. Sale of the Property

To facilitate the sale of the property you agree to:
…

- *Appoint an Auctioneer/Estate Agent, from [the Provider's] panel of Auctioneers/Estate Agents, to put the property up for sale within two weeks of accepting this offer.*
  …

- *Instruct your solicitor to complete the sale documents and sale proceeds, less deduction of agreed Auctioneer and Solicitors fees, to the Provider for the credit of your loan facility within six months of the date of acceptance of this offer. …*
  …

4. …

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5. ***Settlement***

Taking into account your affordability, as outlined in your SFS, [the Provider] would be prepared, upon receipt of the sales proceeds after deduction of agreed Auctioneer and Solicitors fees, to agree that any remaining loan facility balance will no longer be due and you would owe nothing further on a loan facility with the Provider.

…

6. ***Sale - Negative Equity***

Following the sale of the property and if the sale proceeds are less than the mortgage balance, the Provider will:
…

- *Authorise the deduction from the proceeds of sale of agreed Auctioneer fees.*

- *Apply the Auctioneer's fees and costs to the mortgage account. …"*

While there is no express condition in the offer letter requiring or allowing the Provider to agree the relevant auctioneer's fees with the appointed auctioneer prior to their marketing the property in question, I accept that it is clear from several clauses cited above that the auctioneer's fees had to be agreed. Further, the declaration signed by the Complainant on **1 September 2016** in respect of the offer consented and acknowledged that he was agreeing to "*the application of sale proceeds less deduction of agreed Auctioneer and Solicitors fees*" to his facility.

Further, and most significantly, the Complainant was required to sign an "*Authorisation to Disclose Information – Auctioneer*" form which he was advised to pass to the appointed auctioneer for their completion and return to the Provider. That authorisation form provided the Complainant's consent and agreement to the auctioneer contacting the Provider in respect of any matters relating to the sale and to providing any information requested by the Provider relating to the sale. It further provided as follows:

> "*I understand that the Provider will agree the payment of fees directly with the appointed Auctioneer/Estate Agent.*"

While I can understand the Complainant's confusion as to the delay in the marketing of his property considering that he accepted the AVS offer and appointed an auctioneer from the Provider's own list of auctioneers as requested, I am of the view that the relevant offer documentation allowed the Provider to agree the auctioneer's fees in advance of any sale.

I am therefore unable to uphold this aspect of the complaint.

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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 Complainant's 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 **19 August 2021**, the Provider submits in response to the above that it "*respectfully submits that an error of fact was made in reaching this conclusion".* The Provider details that it "*advised the Central Bank of Ireland prior to making the change and shared proposed customer communications with the Central Bank of Ireland. The 6 November 2017 Letter was issued after a period of engagement between the Central Bank of Ireland and the Provider".* The Provider reiterates that the "*6 November 2017 letter was issued with the knowledge of the Central Bank of Ireland. In issuing the letter, the Provider was fully conscious of the need to be transparent and comply with the Consumer Protection Code 2012*".

As I pointed out in my Preliminary Decision, 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 so. However, it cannot seek to rely on such interactions having chosen not to submit them into evidence.

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 initiated by the Provider. As the Provider has opted not to submit evidence of these interactions as part of this investigation. I can only take into account evidence made available to me as part of this investigation.

I would further note 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.

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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 Complainant's arrears balance of almost €44,000.

It is clear that the Provider did not furnish a satisfactory explanation for its conduct when it should have. Such an explanation was required from the outset due to the significant change in the arrears balance and was further required once the Complainant raised queries in respect of it. 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 Complainant to reflect this failure.

As indicated above, 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 Complainant in the sum of €3,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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 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.