An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0465
Sector:	Banking
Product / Service:	Tracker Mortgage
Conduct(s) complained of:	Maladministration
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to asserted maladministration of the Complainants' mortgage account.

The Complainants' Case

The Complainants are unhappy that they had been repeatedly exited from, and re-entered to the Mortgage Arrears Resolution Process (**MARP**). The Complainants nominated a third party representative (the Complainants' Representative) to liaise with the Provider on their behalf and, on 12 August 2016, the Complainants' Representative received a Mortgage Account Information Form from the Provider advising them that the Complainants had been exited from MARP on 1 October 2008. This, the Complainants' Representative states, is nearly two years before the Code of Conduct on Mortgage Arrears (**CCMA**) which created MARP was introduced and three weeks before the mortgage was even entered into.

When the Complainants' Representative queried this with the Provider, they argue that confusing and contradictory responses were received from the Provider in December 2016, with one letter indicating the Complainants had been exited from MARP on 7 December 2012 and another letter dated 7 December 2012 indicating that the Complainants would be exited from MARP if they failed to communicate.

The Complainants argue that in a further letter from the Provider in December 2016, the Complainants were told that they had exited MARP since December 2012.

The Complainants' Representative also queries whether the Provider re-entered the Complainants in MARP in August 2016 and then exited them again on the same day. Following this, the Complainants' Representative contends that the Provider readmitted the Complainants to MARP on 7 April 2017 and exited them again on 26 June 2017. It also asserted that the Complainants were readmitted to MARP sometime before August 2017 but again exited on 19 September 2017.

In relation to the decision of the Provider to remove the protection of MARP from the Complainants in 2017, the Complainants' Representative argues that it had written to the Provider on 20 April 2017 indicating that it was working with the Complainants to prepare and submit an SFS but that this was delayed as the First Complainant was self-employed and needed to consult with his accountant and to verify and certify his income, as required by the Provider. The letter also requested additional information required to assist the First Complainant in completing the SFS. The Complainants' Representative notes that the information was not supplied by the Provider until 18 May 2017. It is accepted that a warning letter was sent to the Complainants on 26 June 2017 but it is asserted that no follow-up letter was sent to the Complainants on 16 May 2017 as suggested in respect of the risk of being deemed uncooperative. Further, the Complainants' Representative states that the Provider failed to send copies of this correspondence to it, despite the fact that it was liaising with the Provider at the time. The Complainants' Representative argues that the 20 day time limit imposed for receipt of the completed SFS was unreasonable considering that information was required from a third party and the Provider had been informed of this. The Complainants' Representative argues that the April 2017 letter did not comply with the requirements of Provision 28 of the CCMA and the Complainants were not advised in writing of the danger of being exited from MARP. The representative therefore argues that the Complainants were exited from MARP at this time without adequate notice.

The Complainants are aggrieved that the Provider wrongly relied upon incorrect provisions of the Consumer Protection Code 2012 (**CPC**) and the CCMA when exiting and entering the Complainants to MARP. They argue that in its letter dated 14 December 2012, the Provider advised the Complainants that they had been exited from MARP under Provision 29 CCMA but Provision 29 was not enacted until 1 July 2013 so they could not have been exited under this provision in 2012. Furthermore, the Complainants' Representative asserts that these letters were never sent to the Complainants at the time as it was impossible for the Provider to refer to Provisions 28 and 29 considering that it was not enacted until seven months later.

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In addition, the Complainants' Representative asserts that the Provider's demands for the return of requested documentation from the Complainants with a 20 day deadline was in breach of the CCMA as there was no provision associated with timelines in it.

Furthermore, the Complainants are dissatisfied with the general administration of the joint mortgage loan account. They assert that the Provider has breached provisions of the CPC and the CCMA, including Provisions 10.5 and 10.6 CPC in respect of record-keeping and 10.7 to 10.12 in respect of the handling of the Complainants' complaint. The Complainants' Representative further argues that the Provider has breached section 50(a) and (b) of the CCMA.

The Complainants take issue with any attempt by the Provider to blame its third-party provider for the provision of misinformation in respect of exiting from MARP as all documentation was issued on the headed notepaper of the Provider. In respect of the letter of 14 September 2016, the Complainants argue that the Provider accepted, at least one month prior to the issue of this letter, that the Complainants should not have been exited from MARP yet this letter stated that they had been exited from MARP. The Complainants argue that they did not have any record of having been advised that they were placed back within the protections of MARP from 7 September 2018. The Complainants argue that a lender is precluded from applying penalties or charges to an account which is within MARP and requests a review of any charges that have been applied incorrectly and requests that these be refunded in full. The Complainants also take issue with the fact that the Provider did not inform them or their party representatives of the fact that the Provider itself had been informed by solicitors on 18 August 2016 that the claim that the Complainants were exited from MARP in 2012 was incorrect.

In a later submission, the Complainants argue that based on a review undertaken by an accountant, the fees and charges applied to the account had not been refunded in full and that a total of €20,040.78 in fees, interest and other charges has been applied to the accounts, while only €6,155.08 has been refunded. In response to the Provider's clarification that all fees and charges were reversed from 2012 onwards and that any fees and charges applied by the previous lender prior to 2012 were not reversed, the Complainants' third party adviser argues that the Provider appears to accept that some €13,885 remains outstanding. It argues that the Provider committed that "*all litigation fees and any associated interest had been reversed*". It further argues that the Provider has impliedly accepted that the Complainants were never correctly exited from the CCMA so that they were never entitled to apply any fees or charges to the account.

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The Complainants argue that financial compensation is appropriate as a result of the repeated incidents of misinformation and wrongful exits from MARP. They point to the fact that the Provider only corrected these errors after the making of a formal complaint, and the fact that it did not inform the Complainants that they had been readmitted to MARP. Their representative argues that had the Complainants not been so persistent, the Complainants would, in all likelihood, now be outside the protections of MARP and open to legal possession proceedings and the application of charges to the account. The Complainants' Representative argues that the Provider's behaviour should be seen as part of an overall pattern, whereby it sought excuse after excuse to claim that the Complainants were outside MARP. The Representative argues that the Provider failed to address the errors in the process when it became aware of them, and only addressed those errors when they became the subject of a formal complaint.

The Complainants request that they are immediately readmitted to the protections of MARP and given the opportunity to submit a further Standard Financial Statements (SFS) as an initial request for forbearance. In addition, they would like any legal proceedings to be withdrawn as well as any penalty interest, charges or fees that would have been applied to their account outside of MARP. They also want to be financially compensated.

The Provider's Case

The Provider states that the mortgage loan was transferred from the lender on 8 May 2015 and was outside MARP. The Provider argues that it relied on information provided by the original lender as an accurate reflection of the account and that the lender had adhered to applicable regulatory codes in servicing the loan. The Provider indicates that a third party agent was appointed to manage the day-to-day credit servicing administration of the mortgage loan at the time of the transfer. From January 2016, the Provider managed the servicing of the account.

The Provider details contacts and attempted contacts with the Complainants and its agent and the Provider itself from the date of transfer of the loan. The Provider indicates that one of its representatives met with the Complainants on 16 May 2016 and provided them with an SFS to complete and advised them that supporting documentation was required. It states that the same representative called back to the Complainants on 26 May 2016 and collected the SFS. On 11 July 2016, the Provider states that it received a completed SFS and supporting financial documentation including bank statements and Department of Social Protection claim receipts. The Provider states that it spoke to the Complainants on the same day to obtain a payment proposal which was €600 per month.

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The Provider states that the monthly interest accrual at the time was €1,340 per month so the payment proposal was less than the full interest on the account. In the meantime, legal proceedings were being prepared in respect of then proceedings by the Provider's solicitors. The Provider states that the Complainants' Representative was appointed on 9 August 2016 and a request for account details was completed by this agent on request and returned on 12 August 2016. On 10 August 2016, the Provider states that it completed the initial assessment of the SFS and this was passed to management for approval of an unsustainable outcome.

The Provider states that it received legal advice from its solicitors on 18 August 2016 that the Complainants' mortgage account had to be in MARP in line with CCMA 2013 before proceeding with litigation. It states that a request was sent by it to its agent on 24 August instructing it to place the mortgage under the protection of MARP for this purpose. The Provider states that on 25 August 2016, the account was determined to be unsustainable as there was no affordability to meet interest-only payments based on the SFS, bank statements and social welfare claim receipts provided. The Provider states that the Complainants' affordability was less than €500 per month at the time with interest-only payments greater than €1,300 per month. The Provider states that its agent did not return the Complainants' account to MARP status until 1 September 2016. On the same date, the Provider's decision that the mortgage account was unsustainable was communicated by letter to the Complainants and they were informed that the protections of MARP no longer applied in line with provision 45 CCMA 2013. The Provider states that the letter afforded the Complainants the right to appeal the decision within 25 business days but that no appeal was received.

The Provider states that it received a letter from the Complainants' Representative dated 31 August 2016 in response to a letter of 12 August 2016 which referred to the Complainants exiting MARP on 1 October 2008 despite the fact that the CCMA was not introduced until 2010.

The Provider states that on 14 September 2016, its agent issued a letter to the Complainants' Representative which provided incorrect information stating that the mortgage account had exited MARP on 7 December 2012 under Provision 29 CCMA. The complaint was then raised by the third-party representative on 28 September 2016. The Provider states that it issued an acknowledgement letter on 4 October 2016 and that a final response letter was issued on 23 November 2016 in which the complaint was upheld based on the incorrect information provided to the Complainants' Representative and offering further 10 business days to lodge an appeal of the unsustainable outcome but no appeal was received.

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The Provider states that on 13 January 2017, a final demand for the arrears balance was issued to the Complainants. Then on 5 April 2017, the Provider consented to place the mortgage account back under the protection of MARP and it agreed to reverse any legal fees and associated interest applied since it acquired the loan.

The Provider states that on 6 April 2017, an SFS was sent to the Complainants' Representative requesting the completion of an SFS and supporting financial documentation. The Provider states that the communication outlined that the information was to be returned within 20 business days from the date of the letter. The Provider states that a reply was received from the Complainants' Representative dated 21 April 2017 in which third-party representative advised he was continuing to work with the Complainants and requesting forbearance. The Provider states that on 16 May 2017, a not cooperating warning letter in line with Provision 28 CCMA was issued to the Complainants advising that the documents requested on 6 April 2017 had not been returned within the timeframe specified. It allowed a further period 25 business days within which to return the documentation. On 18 May 2017, the Provider states that it issued a letter to the Complainants' Representative with a copy of the letter of offer and signed acceptance along with confirmation that the solicitors' fees and charges had been reversed. On 15 June 2017, the Provider received a letter from the Complainants' Representative advising that the SFS had been completed and would be forwarded in the coming days. On 26 June 2017, the Provider states that a not cooperating confirmation letter in line with Provision 29 CCMA 2013 was issued to the Complainants stating they had been exited from MARP due to non-return of the requested documentation. The Provider states that the Complainants were afforded the right to appeal the decision but no appeal was made.

The Provider states that on 7 July 2017, the documentation required to carry out an assessment of the Complainants' financial circumstances was received but based on their financial situation, there was no appropriate sustainable solution available. The Provider states that the affordability was noted at less than €815 per month interest-only payments were greater than €1,400 per month. On 16 August 2017, the Provider states that its decision was communicated to the Complainants by letter and email sent to the third party representative.

The Provider states that it received a letter of complaint from the Complainants' Representative on 22 August 2017 and states that it issued an acknowledgement letter on 28 August 2017.

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It issued its final response letter on 19 September 2017 rejecting the complaint on the basis that no errors had occurred since the re-entry of the Complainants to MARP on 6 April 2017. The Provider states that on 7 September 2018, it consented to place the account back under the protections of MARP and agreed to reverse any legal fees and associated interest applied during 2017 and 2018. The Provider states that the account has remained in this position since that time, despite what it states to be no engagement from either the Complainants or their third-party representative. It also states that no payments were being made towards the debt.

The Provider accepts that a complaint holding letter was not issued to the Complainants' Representative in accordance with CPC 10.9 C on 27 October 2016 as it was issued on business day 21. Further the Provider accepts that a final response letter was not issued in accordance with CPC 10.9(d) and (e) on 23 November 2016 because it was sent on business day 39.

The Provider states that once it was identified by its solicitors in August 2016 that regulatory letters that were issued by the original lender in 2013 and 2014 did not comply with the CCMA, litigation proceedings were discontinued and it instructed its agent to place the mortgage loan under the protection of MARP. The Provider acknowledges that there was no written correspondence issued to the Complainants to explicitly confirm the reinstatement of the account into MARP. The Provider states that it is unfortunate that at the time the mortgage account was placed back under the protections of MARP, an assessment was being carried out which determined that the mortgage was unsustainable, thus placing the mortgage account outside MARP. The Provider apologises for the confusion caused in providing an incorrect MARP exit date in the letter of 14 September 2016. The Provider argues that since 2016, the mortgage account is back under the protections of MARP and all associated fees and interest accrued have been reversed on two occasions.

In response to an accountant's letter submitted by the Complainants indicating that the sum of €6,155.08 has been refunded but a total of €20,040.78 in charges and fees and interest applied to the account, the Provider states that it reversed all fees and charges from 2012 onwards. It states that any fees and charges prior to 2012 will not be reversed as these were applied under the administration of the previous lender. The Provider argues that litigation commenced by the previous lender in 2009 which was some years prior to the existence of the MARP. It argues that the Complainants had made no case that this litigation was entered into unfairly or incorrectly. The Provider states that it agreed to waive legal fees from 2012 onwards as an exceptional gesture to reach a mutually satisfactory conclusion to the complaint but argues that this does not indicate that it accepts that the legal proceedings during the 2016 period were entered into in error.

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The Provider accepts that no correspondence was sent to the Complainants or the Complainants' Representative when the account was placed back under the protection MARP on 7 September 2018 but suggests that this was due to the ongoing mediation process. It asserts that all legal fees and charges stated in 2016 mortgage statements had been reversed and at no additional fees or penalties have been applied in this regard.

The Provider reiterates its argument that the errors did not meet any significant detriment to the Complainants and it does not deem it appropriate to offer any form of compensation.

The Complaints for Adjudication

The complaint is that:

- The Provider repeatedly wrongly exited the Complainants and re-entered them into the Mortgage Arrears Resolution Process;
- The Provider relied upon incorrect provisions of the CPC and CCMA when exiting and re-entering the Complainants to and from MARP; and
- The Provider breached several provisions of the CPC and CCMA in its general administration of the Complainants' mortgage loan account.

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.

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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 18 November 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 further submissions to this office, copies of which 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 Complainant's representative has, in a post Preliminary Decision submission dated 26 November 2020, put forward that while my office has "*mention*[ed] *three grounds for a complaint, there is in fact a fourth ground: that the provider knowingly or recklessly provided* […] *false and misleading information, in that they claimed in writing that* [the Complainants] *had been exited from the MARP in 2012"* and that the Provider "*knowingly or recklessly tried to falsely claim that they had not issued these letters, despite having already confirmed in writing that they had done so".*

It should be noted that in my Preliminary Decision I had detailed that, "*In respect of any suggestion from the Provider that its third party service provider may have been responsible for certain of the misinformation provided to the Complainants, I accept that all communications were issued on behalf of the Provider and the Provider must accept responsibility for the actions of its third party service provider including any errors*" which includes any incorrect information. I had detailed that "*I will therefore proceed to adjudicate the complaint without reference to the fact that there may have been some miscommunication or time-lag issues between the Provider and its agent on the basis that, either way, the Provider is responsible for the information that was sent to the Complainants".*

The Complainants' representative has maintained in the post Preliminary Decision submission that he disagrees with making the Provider responsible for all the communication of the servicing firm.

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The representative submits:

> *"We would argue strongly that this element of our complaint must be adjudicated upon by your office. For your office to state that no distinction will be made between correspondence issued by [the Provider]and that issued by [name of servicing firm] is to side-step this issue and fail to address the possibility that false information was either deliberately or recklessly provided to your office by the lender".*

I do not accept the Complainants' representative view. Accordingly, it remains my position that any communications issued by the servicing firm will be taken as being the responsibility of the Provider, and as detailed below I will examine if any such communications contained errors or incorrect information.

Prior to continuing, for the sake of completeness I will set out the Provider's response to the Complainants' post Preliminary Decision submission. The Provider, through its post Preliminary Decision submission dated **3 December 2020,** has detailed that:

> *"With regards to the complainant's allegation that [the Provider] "knowingly or recklessly" provided false and misleading information, we refute this claim in its entirety. There would have been no possible benefit to [the Provider] in issuing incorrect information in this instance – it would purposelessly risk prejudicing future litigation and risk regulatory censure, to no gain of any kind. The issuance of incorrect information, as stated in our formal response to this investigation, as well as in our formal complaint response of 23rd November 2016 , was an unfortunate error on the part of [the Provider's] former servicing partner, [name redacted]."*

As detailed earlier, I have held the Provider responsible for all the communications to the Complainants, both for correspondence issued by it directly or by its former servicing partner.

The Provider continues its post Preliminary Decision submissions and submits that:

> *"with regard to the complainants' allegation that [the Provider] "knowingly or recklessly tried to falsely claim that they had not issued these letters", at no point has [the Provider] denied the issuance of these letters. We have, factually, stated that these letters were issued on [the Provider's] behalf by our former servicing partner, [named redacted], who at the time were contracted on behalf of the loan owners to carry out certain administrative tasks.*

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Should the FSPO choose to include the above allegations in the substance of the complaint, we request that it also includes [the Provider's] refutation in the strongest possible terms."

The mortgage account in question was transferred to the Provider from a third party lender in 2015. It appears that before the account was transferred, the account did not enjoy the protections of the Mortgage Arrears Resolution Process (MARP). Between May and September 2016, the Provider engaged with the Complainants in seeking an SFS which was submitted and assessed. Unfortunately, the Complainants' monthly affordability was assessed as being far lower than interest-only payments due on the account and was deemed to be unsustainable. In a letter dated 1 September 2016, the Provider communicated its decision to the Complainants and indicated that the account was outside the protections of MARP in line with Provision 45 CCMA.

While this process was taking place, the Complainants appointed a Representative to liaise with the Provider on their behalf. In response to a request for mortgage account details from the third party representative, the Provider indicated the following details (among other things) as of 12 August 2016:

"*Date mortgage drawdown: 14/7/08*
Current balance (excluding arrears): €267,665.21
Current arrears: €6,031.68
Contractual payments due: €1376.26
Is an arrangement in place? N
Date and amount of last payment: 6/8/16, €400
Is the customer outside MARP? Yes
If yes, date they were exited: 1/10/08
Section of CCMA under which they were exited:
Has legal action commenced?: No"

It is common case that the date of purported exit from MARP could not possibly have been accurate since the Complainants had not even entered into the mortgage by that date. Further, the MARP did not exist at that time as it was only introduced in January 2011 by the Code of Conduct on Mortgage Arrears 2011 (CCMA 2011). From 1 January 2011, MARP provisions were to be applied to a mortgage account where arrears had arisen on the account and the arrears remain outstanding 31 days from the date the arrears arose; where the account was in pre-arrears; or where an alternative repayment arrangement (ARA) breaks down or expires (Provision 17). I accept that this information was incorrect.

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By letter dated 14 September 2016, the Provider wrote to the Complainants' Representative as follows:

> "*We can confirm that your client exited the Mortgage Arrears Resolution Process (MARP) on 7 December 2012. They exited MARP under provision 29 of the Code of Conduct on Mortgage Arrears (CCMA) and we enclose the correspondence issued to them on that date under the relevant section of the CCMA*."

There appear to have been two enclosures to this letter of 14 September 2016. In the first letter dated 14 November 2012, the then lender wrote to the Complainants in the following terms;

> "*If you have agreed arrangement in place with regard to your monthly repayments, we can confirm that we are treating your case as a MARP case under our Mortgage Arrears Resolution Process (MARP). We would like to stress the importance of your cooperation with us during MARP process.*
>
> *If you do not currently have an arrangement on your account with regard to your monthly repayments, please take the first step in our MARP by contacting us today.*
>
> *Please be aware that where co-operation with our Mortgage Arrears Resolution Process (MARP) ceases and your account remains in arrears without an adequate and realistic arrangement, the protection of MARP will no longer apply and [the lender] may take further action which may result in repossession of your property in due course. . .*
>
> *Where your cooperation with our MARP ceases, fees and charges in relation to arrears will apply and your account may be charged:*
> *[details of charges]*
>
> *Please contact us today, if you do not have an arrangement on your account*."

In the second enclosed letter dated 7 December 2012, the then lender wrote to the Complainants in the following terms:

> "*On review of your account, we are disappointed that you have not supplied us with requested documentation or you have not responded to attempts to contact us to discuss your financial circumstances in accordance with our Mortgage Arrears Resolution Process.*

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Without gaining a full understanding of your financial circumstances, we are now unable to move to the next step which is to explore all options for alternative arrangements and identify a viable resolution for your mortgage repayment difficulties.

Therefore, we regret to advise that you are assumed to be no longer participating in our Mortgage Arrears Resolution Process (MARP). Your account will no longer be offered the protection available to customers engaging in MARP under the Code of Conduct for Mortgage Arrears.

In your own interest, please contact the undersigned within five days to discuss your account."

Once again, there was yet another error in this letter of 14 September 2016. The letter enclosed two letters from 2012 which purported to form the basis of the decision on 7 December 2017 to exit the Complainants from the MARP at that time. The Provider in its letter of 14 September wrongfully identified provisions of the version of the CCMA that were not yet in place in December 2012. When the December 2012 letter was sent, CCMA 2011 was in place. CCMA 2011 provided that a lender could not seek possession unless every reasonable effort was made to reach agreement of alternative arrangement (Provision 46). If the borrower cooperated with the lender, the lender was obliged to wait at least 12 months from the date the borrower was classified as a MARP case before issuing possession proceedings (Provision 47) with certain time periods excluded from the reckoning. Legal action for repossession within the 12 month period was only possible, among other things, "*where the borrower does not co-operate with the lender*".

A borrower could be considered as not co-operating if they failed to provide information sought by the lender relevant to their financial situation or a three-month period elapsed during which the borrower failed to make their mortgage repayments and made no contact with or did not respond to communications from the lender.

In error, in its letter of 14 September 2016, the Provider referred to relevant provisions from CCMA 2013 which apply where a lender purports to deem a borrower as non-cooperating. While there have been many subsequent submissions in relation to the Complainants having been wrongfully exited from MARP in 2012, the only clear error that I can see is in the Provider having identified a more recent provision in respect of non-cooperation which was in existence at the time that the previous lender exited the Complainants from MARP. There is no mention in the letter of 7 December 2012 of these CCMA 2013 provisions.

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By letter dated 27 September 2016, a complaint was raised on behalf of the Complainants by their Representative on the basis that the Complainants had not been properly exited from MARP and that inaccurate information had been provided to them. The complaint was acknowledged by letter dated 3 October 2016. A holding letter dated 27 October 2016 was sent indicating that the final response would issue by 24 November 2016. In a final response letter issued on 23 November 2016, the complaint was upheld in full. It was deemed that the Complainants had subsequently exited MARP correctly under CCMA. However, due to the fact that the provision 45 letter was sent to the Complainants on 1 September 2016, after the account was deemed to be unsustainable, an extension of the appeal period from the letter dated 1 September 2016 was offered.

I note that the Complainants have a further complaint in that the Provider did not inform them at this time that it had received legal advice to the effect that letters issued by the previous lender in 2013 and 2014 were not compliant with CCMA 2013 and thus the account had to be placed back under the protections of MARP in August 2016.

I note the Complainants believe they are entitled to legal advice the Provider received from its solicitors. I do not accept that this is the case. It may be the case that this is privileged legal advice between the Provider and its solicitors. However, I do believe the Provider ought to have made the Complainants aware of the true and accurate situation in relation to MARP as it applied to them as soon as it was aware of the situation.

The CPC (2012) requires that a regulated entity must, among other things, ensure that in all its dealings with customers and within the context of its authorisation it:

> *"2.1 acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;*
>
> *2.2 acts with due skill, care and diligence in the best interests of its customers;*
>
> *…*
>
> *2.6 makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;*
>
> *…"*

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There can be no doubt but that the Provider did not act in the best interest of the Complainants by making full disclosure of all relevant material information in a way that sought to inform the Complainants.

I note the Provider argues that it relied on information provided by the original lender as an accurate reflection of the account and that the lender had adhered to applicable regulatory codes in servicing the loan. It is not clear to me what level of assurance or evidence the Provider sought or secured to satisfy itself that the Complainants had been properly exited from MARP. I do acknowledge the fact that an assessment of the Complainants' financial situation was conducted at the same time and that the Complainants appear to have been correctly exited from MARP on 1 September 2016 following an assessment that their mortgage account was unsustainable. However, this does not absolve the Provider of its requirement for full disclosure.

It was also unacceptable that the Provider did not formally inform the Complainants that it was readmitting them to MARP in August 2016 before it decided to exclude them from MARP in September 2016 due to unsustainability. While I am also conscious that these processes overlapped this does not, in my view, justify the lack of communication.

By letter dated 6 April 2017, the Provider wrote to the Complainants' Representative notifying that the Provider had returned the Complainants' mortgage accounts within the protection of MARP. The letter advised that before the Provider could review the mortgage account for forbearance, it required a number of documents, including a signed SFS, bank statements, verification of income, and a proposal on how the Complainants intended to resume contractual monthly instalments and address the outstanding arrears. The letter stated "*please return the above information within 20 business days from the date of this letter in the enclosed prepaid envelope*".

In a phone call between the Complainants' Representative and the Provider dated 25 November 2016, the Complainants' Representative made it clear that all that was required to remedy the complaint at the time was remittance of the Complainants into MARP.

While it may be that this decision to readmit the Complainants to MARP took longer than the Complainants may have wished, the Provider agreed to readmit them in April 2017 and gave them a further opportunity to engage in relation to agreeing an ARA, in addition to the other protections offered by MARP.

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By letter dated 20 April 2017, the Complainants' Representative responded to the Provider's letter of 6 April indicating that "*we are continuing to work with our clients to complete and submit an SFS and forbearance request*", that the First Complainant was unable to attend a scheduled meeting that day and that a new appointment was scheduled for 3 May when they expected to move towards completion of the SFS.

By letter dated 27 April 2017, the Complainants' Representative wrote to the Provider as follows:

> "*I refer to your email of 24th April. As previously advised we are meeting with our client next week and hope to be able to move towards completion of an SFS at that point.*
>
> *We refer to your threat to classify our client is not cooperating. We respectfully draw your attention to the definition of not cooperating contained within the CCMA, which states that "A borrower can only be considered as not cooperating when … the borrower failed to make contact with, or respond to any communication from the lender". As we have responded to all communications from the lender on our clients' behalf they do not meet the definition of not cooperating contained in the CCMA, and in those circumstances any such declaration would be referred to the FSO by way of formal complaint.*
>
> *We refer further to the 20 day limit imposed by you for receipt of the completed SFS. The CCMA makes no provision for the imposition of any specific time limit, and we draw your attention to the provisions of Section 34 of the CCMA, which states "Where the lender imposes a timeline for return of information, including a standard financial statement, the timeline must be fair and reasonable and it must reflect the type of information requested and whether the borrower may need to obtain the information from a third party.*
>
> *In this context we would advise that [the First Complainant] must seek some of the information requested by you from his accountant, some from his bank, and some from the Department of Family Protection, and is seeking the assistance of this office in completing the SFS.*
>
> *In order to assist us complete our work with our clients we hereby request a copy of the original housing loan, as per the requirements of Section 129 of the Consumer Credit Act 1995 (the Act) and a copy of the mortgage deeds, and any contract relating thereto, as per the requirements of Section 130 of the Act."*

/Cont'd…

By letter dated 16 May 2017, the Provider wrote to the Complainants at their home address in the following terms;

> "*We refer to our letter dated 5th April 2017 in which we enclosed a Standard Financial Statement (SFS) for you to complete. Unfortunately our records show that you have failed to take the required action within 25 business days specified in our letter.*
>
> *In the circumstances you will be classified as not cooperating under the Code of Conduct on Mortgage Arrears 2013 (the Code) without further warning if the Specific Actions or the Ongoing Actions listed below are not undertaken by you within 25 business days from the date of this letter.*
>
> ***Specific Actions***
>
> *We enclose another SFS, with a further stamped addressed envelope. Please return this completed signed by all parties to the mortgage and dated.*
>
> *If you do not undertake the above Specific Actions we will not be able to complete an assessment of your circumstances*."

The balance of the letter set out the implications of being classified as not cooperating, including that the Complainants would fall outside of the legal protections of MARP and that the Provider could immediately commence legal proceedings for possession of the property. The ongoing actions specified reflect the definition of non-cooperation under the CCMA.

By letter dated 15 June 2017, the Complainants' Representative wrote to the Provider indicating that they had now completed an SFS with the Complainants and the document had been sent to the Complainants for final review and signature. The letter noted that we "*anticipate being able to forward the completed and signed SFS to you in the coming days*."

By letter dated 26 June 2017, the Provider wrote to the Complainants at their home address in the following terms:

> "*We wrote to you on 16 May 2017 to inform you that you were at risk of being classified as not cooperating as defined in the Code of Conduct on Mortgage Arrears 2013 (the Code) and also to inform you of what actions were required to avoid being classified as such.*
>
> *Since you have failed to carry out these actions within the timeframe specified, we are writing to advise you that you have now been classified as not cooperating under the Code. As such, you now fall outside the protections of [the Provider's MARP]*."

/Cont'd…

The balance of the letter set out the consequences of exclusion from MARP, including the Provider's entitlement and intention to commence legal proceedings for the possession of the property and indication of the costs of such proceedings.

The Provider further outlined the liability of the Complainants for any outstanding balance after the sale of the property, and other options available to the Complainants including trading down and voluntary sale. The letter indicated that the Complainants should seek appropriate legal and financial advice, that they were entitled to consult a Personal Insolvency Practitioner, and that they had a right of appeal within 25 business days from the date of the letter regarding the decision to classify them as not cooperating.

By letter dated 3 July 2017, the Complainants' Representative wrote to the Provider enclosing a completed SFS for consideration and indicating a total monthly disposable income of €813.48. A long-term forbearance arrangement was requested based around that sum.

By letter dated 21 August 2017, the Complainants' Representative wrote to the Provider referring to the letter of 26 June 2017 and lodging a formal complaint in similar terms to the complaint being investigated by this Office. The letter noted that it had written to the Provider on 15 June 2017 indicating that an SFS had been completed and was with the Complainants for review and signature. The letter stated that the completed SFS was submitted to the Provider on 3 July 2017. The Complainants' Representative argued that a letter dated 18 May 2017 was the most recent correspondence on its file and that no other correspondence was received from the Provider since that date. The letter further indicated that on 8 August 2017, it received a phone call from the Provider to advise that the time limit for the appeal provided in the letter of 26 June 2017 had expired and the Complainants were now outside MARP. The Complainants' Representative highlights that neither of two non-cooperation letters were sent to his office and further that the Complainants were adamant that they did not receive the letter dated 16 May 2017.

In its response to the complaint, the Provider wrote to the Complainants' Representative by letter dated 19 September 2017, indicating that the Provider had agreed to re-enter the Complainants to MARP on 6 April 2017. In relation to the complaint regarding the contents of the letter of 12 August 2016 and the enclosed 2012 letters, the Provider stated that this issue had already been dealt with in full by the re-inclusion of the Complainants in MARP. The letter indicated that the 20 day period provided for completion of an SFS "*is the minimum timeline set out in the [CCMA and] is considered fair and reasonable with regards to collating and submitting the required documentation*."

/Cont'd…

The letter stated that although it was aware that the Complainants' Representative had been engaged by the Complainants, it was not instructed to request the amendment of the correspondence address such that all regulatory **letters** such as the Provision 28 and Provision 29 letters were issued directly to the Complainants' home address.

While the Provider accepted that the Complainants' Representative had engaged in active communications with the Provider, it stated that the specific actions set out in the Provision 20 letter were not acted upon within the timetables set out and, therefore, the Complainants were deemed not cooperating for failure to provide information within the timeframe specified and that the appropriate warning letter had been sent.

In respect of the arguments that the Complainants claim not to have received the Provision 28 letter issued on 16 May 2017, the Provider referenced its letter of 6 April 2017 which advised that the required information had to be submitted within 20 business days and that the letter of 15 June 2017 which indicated that the SFS that they had been completed was received 48 business days after the information had initially been sought. The letter concluded that there were no grounds upon which it would be appropriate to re-enter the Complainants into MARP and that the Provider had been fair and accommodating in all dealings, having allowed sufficient time for the Complainants to submit the necessary paperwork for assessment.

While I acknowledge that in its letter of 6 April 2017, the Provider requested that the information sought be submitted to it within a 20 day period and has subsequently referred to this timeframe as being mandated by the CCMA, I accept the argument of the Complainants' Representative that there is no time limit set down in the CCMA in this regard. Instead, the CCMA requires that a reasonable period of time be provided to borrowers to allow them to compile the information requested.

Provision 34 CCMA 2013 provides that:

> "*Where the lender imposes a timeline for return of information, including a standard financial statement, the timeline must be fair and reasonable and it must reflect the type of information requested and whether the borrower may need to obtain the information from a third party*."

In the case of a self-employed person who requires the assistance of a third party accountant or other person, flexibility ought to be afforded in regard to the fixing of timetables for the return of requested information and documentation. In this context, I note that the Complainants' Representative kept the Provider updated in respect of the process.

/Cont'd…

It therefore ought to have been clear to the Provider that it was not the case that the Complainants were simply not cooperating. The situation was that it was taking some time for them to liaise with the Complainants' Representative and other third parties to allow them to submit the information that had been requested. As a result of this, I am of the view that it was premature for the Provider to have sent the Provision 28 warning letter to the Complainants on 16 May 2017.

I also note that the Complainants' Representative has indicated that the Complainants did not receive the letter in question, notwithstanding that a copy of this letter which is addressed to the Complainants at their address has been submitted by the Provider.

Further, and while I accept that the correspondence address on the Complainants' account was not changed, I also accept the arguments of the Complainants' Representative that he should have been copied with the relevant correspondence due to the fact that he was liaising directly with the Provider in respect of the information that had been requested by letter dated 6 April 2017. The same is true of the subsequent Provision 29 letter sent on 26 June 2017. I do not believe that it was appropriate for the Provider to send the Provision 28 letter on 16 May 2017 and I am further of the view that both letters ought to have been sent, or at least copied, to Complainants' Representative.

I accept that the Complainants were again wrongly exited from MARP on 26 June 2017.

As with the 2016 incident, the process of deeming the Complainants as non-cooperative was unfolding at the same time that a further assessment of the Complainants' financial affairs took place. It appears that in early July 2017, the documentation required to carry out an assessment of the Complainants' financial circumstances was received and assessed but based on their financial situation, the Provider deemed that there was no appropriate sustainable solution available. The Provider states that the affordability was noted at less than €815 per month while interest-only payments were greater than €1,400 per month.

On 16 August 2017, the Provider states that its decision was communicated to the Complainants by letter and an email sent to the third party representative.

Fees and Charges

The issue of the application of fees and charges (or rather whether all fees and charges were properly refunded) arose very late in the adjudication of the complaint.

/Cont'd…

Nevertheless, the Provider responded to the issues raised by the Complainants so I am of the view that it is not appropriate for me to consider the issue.

The Provider has submitted an internal memorandum dated 5 October 2018 into evidence. This memo acknowledges that the accounts never properly exited MARP on the basis that the borrowers claim not to have received the non-cooperating warning letter issued on 16 May 2017 under Provision 28 CCMA and that the Complainants' authorised third party was not copied on relevant correspondence as required under Provision 8 CCMA.

As the Provider determined that the Complainants did not satisfy the criteria to be deemed non-cooperating in 2017, the memo records that all fees related to the non-cooperating status on the account in 2017 are to be reversed and the account classified as a MARP case. Further, the memo indicated that references to previous decisions to exclude the account from MARP based on the original lender's determinations were incorrect so all fees posted on the account from 2012 to date were removed in addition. The letter stated that the account was reinstated into MARP as if was never exited and was fully under the protection of MARP.

The Complainants have submitted a letter from an accountant dated 28 November 2018 reviewing the Complainants' bank account for the years August 2008 to September 2019. The report sets out the total amount of penalty charges, penalty interest, legal fees and other charges applied to the account from August 2008 as calculated by the accountant as follows:

> "*Interest on arrears €10,199.61*
> *Interest prior arrears €289.34*
> *Interest and fees €14.91*
> *Arrears fee €180.00*
> *Call out €607.50*
> *Solicitors fees €8,749.42*"

The letter identifies that fees and charges in the sum of €6,155.08 were refunded to the account to include €5,334.37 in charges and €820.71 in interest fees. There is no further computation provided in respect of the fees and charges applied or in respect of the dates of the application of the fees and charges in question.

A mortgage loan account statement for 2018 has been provided, in evidence, which demonstrates that the sum of €6,155.08 was refunded to the Complainants' mortgage account on 31 October 2018, comprising of €5,334.37 in principle and €820.71 in interest.

/Cont'd…

The Provider has argued that this represents all fees and charges and associated interest applied on the account from 2012 onwards and this has not been disputed by the Complainants. I therefore accept that all the relevant fees and charges were refunded by the Provider from 2012 onwards.

I note that the Complainants' Representative has argued that the Provider seems to suggest that all fees had been refunded but I think the Provider's communications are open to an interpretation that it was willing to refund, and did refund the fees in dispute between parties that were applied after 2012 when the initial impugned decision to remove the Complainants from the protections of the CCMA arose.

The remaining dispute appears to be in relation to legal charges that appear to have been applied between 2008 and 2012 by the previous lender. I note that the Complainants' Representative has argued that a borrower in the position of the Complainants have all the defences that they would have against the original lender on the assignment of a loan.

While that is undoubtedly the case, this Office is engaged in adjudicating a complaint in respect of the conduct of the Provider against which this complaint is made and not the previous lender. Therefore, I cannot comment on the conduct of the previous loan owner as part of this investigation and adjudication.

The original Code of Conduct on Mortgage Arrears (CCMA 2009) issued to all mortgage lenders in February 2009 and introduced a six month moratorium on applications for repossession of a borrower's primary residence. The CCMA 2009 did not mention MARP and did not prohibit the addition of arrears or surcharge interest or legal fees on the mortgage account of any borrower. In February 2010, a revised code was issued extending the moratorium period to 12 months (CCMA 2010). The CCMA 2010 did not mention MARP and did not prohibit the addition of arrears or surcharge interest or legal fees on the mortgage account of any borrower.

A further revised code became effective in January 2011, having been published in December 2010. CCMA provisions in respect of the Mortgage Arrears Resolution Process and a prohibition on arrears charges were introduced by CCMA 2011, effective from 1 January 2011.

MARP provisions were to be applied to a mortgage account where arrears had arisen on the account and remain outstanding 31 days from the date the arrears arose; where the account was in pre-arrears; or where an alternative repayment arrangement (ARA) breaks down or expires (Provision 17).

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Provision 9 CCMA 2011 provided as follows:

> "*Lenders are restricted from imposing charges and/or surcharge interest on arrears arising on a mortgage account in arrears to which this Code applies and in respect of which a borrower is co-operating reasonably and honestly with the lender in the Mortgage Arrears Resolution Process*."

The CCMA 2011 provided that a lender could not seek possession unless every reasonable effort was made to agree an alternative arrangement (Provision 46). If the borrower cooperated with the lender, the lender was obliged to wait at least 12 months from the date the borrower is classified as a MARP case before issuing possession proceedings (Provision 47) with certain time periods exclusive from the reckoning. Legal action for repossession within the 12 month period was only possible, among other things, "*where the borrower does not co-operate with the lender*". A borrower could be considered as not co-operating if they failed to provide information sought by the lender relevant to their financial situation or a three-month period elapsed during which the borrower failed to make their mortgage repayments and made no contact with the respondent to communications from the lender.

From 2011, therefore there were restrictions on the lender's ability to impose charges or surcharge interest on arrears. I note that the Provider has refunded the fees and charges that it applied to the Complainants' account.

The Provider's Response and Redress

When mortgage holders fall into arrears due to difficult circumstances, they need understanding, maximum assistance and the clearest possible communications from their lender. This is even more important where loans are sold from one entity to another and the borrower is required to deal with different entities, in this case, three different financial service providers. Indeed the codes under which financial service providers are required to operate are designed to support an approach that would protect and assist the borrowers. There can be no doubt that the Complainants fell into difficulty such that they were unable to meet their contractual repayments on their mortgage.

The evidence furnished to this Office does not demonstrate that the Provider dealt with the Complainants in the manner I have outlined above, or that it met its obligations under the MARP and the CPC.

/Cont'd…

The Provider wrongfully exited the Complainants from MARP on a number of occasions, provided misinformation in relation to the exit, and failed to remedy errors once it became aware of them.

I note the Provider again readmitted the Complainants to MARP in September 2018 in light of the complaint centering on the decision to exit the Complainants in 2017 for deeming to be non-cooperating.

However, there was no formal communication to the Complainants to inform them that they had been re-entered into MARP in September 2018. However, there is no suggestion that the Complainants were not re-entered into MARP at that time and it appears that they are currently receiving the protections of MARP.

In my Preliminary Decision I stated:

> *"Despite the Complainants having the protections of MARP for almost two years since re-admittance, sadly there does not appear to have been any further progress in relation to agreeing a sustainable solution on the mortgage and I note payments on the mortgage appear to be few and sporadic."*

The Complainants' representative seems to have some issue with the inclusion of this factual information in my Preliminary Decision. He has stated in the post Preliminary Decision submission dated 26 November 2021:

> "We note that in your decision you made reference to progress on this account. We are somewhat surprised at this, as this formed no part of the complaint, and we had not been asked to provide any information on this issue.
>
> But we are happy to advise that our client has been referred to a PIP under that Abhaile scheme and has been working with them for some time to formulate a proposal. We understand that the PIP is about to apply for a Protective Certificate and put their proposal to the provider.
>
> Given the fact that progress on the mortgage account was never part of the complaint, and that the borrower was never asked to make any submission on this issue, we would argue that it should form no part of the FSPO's decision."

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The Complainants' representative made an additional post Preliminary Decision submission on **14 December 2020** stating:

> "*We note that [the Provider] have no objection to the issue of account progression being included in the complaint. However, as previously pointed out this formed no part of our original complaint, it has never been raised or addressed as part of the investigation, [the Provider] have never made any submissions on this issue, nor have we been asked to do so.*
>
> *We are therefore uneasy with the right of one party to a complaint; whether that be the FSPO or the provider, (neither or whom were the original complainant), being allowed to unilaterally add an issue on to a complaint in the final stages of the complaint process, after the investigation phase has been completed, especially in the circumstances described above.*
>
> *If this issue is to be included then we ask that the file return to the investigation process, that the grounds for the complaint be set out, and that this office be given an opportunity to consult with our client and prepare submissions on the issue.*
>
> *We would also ask the FSPO's office to confirm by what authority they may take it upon themselves to add an issue to a complaint during the final adjudication phase, where such an issue was never raised by either party to the complaint, has not been addressed during the investigation phase, and where neither party has made, or been given an opportunity to make, any Submissions on it."*

It is difficult to understand why the Complainants' representative takes issue with the inclusion of this information. I believe it is always sad when parties are unable progress in relation to these very serious and distressing situations. The outcome for borrowers in such situations can be very difficult. I am happy to include the update furnished by the Complainants' representative as set out above.

The Complainants' representative seems to be labouring under the misapprehension that I am a party to this complaint. I would point out that I am not a party to this complaint. The parties to the complaint are the Complainants and the respondent Provider. I am the independent adjudicator of the complaint and I derive my powers under the ***Financial Services and Pensions Ombudsman Act 2017.***

I note the Provider's position is that its errors did not result in any significant detriment to the Complainants, and it does not deem it appropriate to offer any form of compensation.

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I do not agree, and I believe this statement indicates a complete lack of understanding by the Provider of the impact of its conduct and the inconvenience it caused to the Complainants. There can be no doubt that the conduct of the Provider, as outlined in this Decision fell far short of what is expected of a regulated financial service provider in such circumstances.

In my Preliminary Decision I indicated that "*I propose to substantially uphold this complaint and direct the Provider to pay a sum of €3,000 in compensation".*

The Complainants' representative has, in the post Preliminary Decision submissions, disagreed with the amount of compensation directed believing it "*is a grossly inadequate"* figure and, in the Representative's view, the *"lightest possible tap on the wrist"* for a financial service provider.

The Complainants' representative goes on to state that in this complaint, if a Provider can "*walk away with a fine of a paltry €3,000, then we are left wondering what a provider must do to incur a meaningful sanction"* and that the Complainants and the representative "*would have hoped that in reaching its decision one consideration for the FSPO would have been to dis-incentivise this type of behaviour in the future. A penalty of €3,000 is a pittance for an organisation like [the Provider] and represents no form of sanction or disincentive whatsoever".*

It is clear from the Complainants'/Complainants' Representative's submissions that they misunderstand the role and legislative basis of this Office. For the avoidance of any doubt, I derive my powers from the ***Financial Services and Pensions Ombudsman Act 2017***. It does not confer any powers of sanction on me and I therefore, have no jurisdiction to issue any sanctions or penalties on financial service providers. It is not within my remit as an independent and impartial body for the resolution of complaints, to act as a regulatory body that would impose a "*penalty*" or "*sanction*". This is the role of the regulator, the Central Bank of Ireland.

For the reasons outlined in this Decision, I substantially uphold this complaint and direct the Provider to pay a sum of €3,000 in compensation to the Complainants.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld, on the basis that the Provider's conduct was unreasonable and improper on the grounds prescribed in ***Section 60(2) (b) and (g).***

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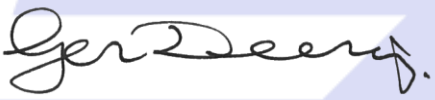
Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €3,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

1 December 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.