



<b><u>Decision Ref:</u></b>	2022-0193
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Arrears handling - Mortgage Arrears Resolution Process Delayed or inadequate communication Complaint handling (Consumer Protection Code) Dissatisfaction with customer service Arrears handling (non- Mortgage Arrears Resolution Process ) Maladministration (mortgage) Settlement amount (mortgage) Maladministration regarding voluntary sale
<b><u>Outcome:</u></b>	Rejected

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

The Complainant submits that the interest only period for his mortgage account expired in **November 2014** and he was advised by the Provider that *“as forbearance was not available, repayment of the full amount was required”*.

The Complainant further submits that:

*“from then until the sale of the property to which the loan related and final clearance of the loan in **February 2017**, [he] was harangued, bullied and threatened by [the Provider], and coerced into selling in to a soft market at a considerable loss to [him]”*.

The Complainant asserts that he was:

*“overcharged on [his tracker mortgage account] and was offered compensation [by the Provider]” and that “while he was preparing an appeal against this, he discovered that the loan should have been subject to [the Code of Conduct on Mortgage Arrears 2013 (“CCMA”), Mortgage Arrears Resolution Process (“MARP”)] and that the protections therein were not afforded to [him]”*.

The Complainant states that the Provider advised him that it applied the principles of MARP to his case; however, the Complainant refutes this in regard to the communications and the record keeping of communications, between the parties.

The Complainant asserts that the Provider *“harangued, bullied and threatened [him] on a continual basis until the loan was repaid”*. The Complainant contends that *“all the pressure on me was via phone calls. However, despite two requests to [the Provider], bar an incomplete file note of one call, no records have been made [of the telephone calls] available to [him]”*.

The Complainant asserts that MARP *“calls for a flexible approach and the exploration, discussion of all options”* and that *“the only option I was given was to sell the property under the threat to appoint a receiver and having my credit history destroyed”*. The Complainant further asserts that *“I would also add that I was fully cooperative with [the Provider] throughout. [The Provider] on the other hand mismanaged my account”*.

### **The Provider’s Case**

In its Final Response Letters dated **7<sup>th</sup> June 2019** and **27<sup>th</sup> June 2019**, the Provider acknowledged that the Complainant was not accepting its *‘gesture of goodwill in the amount of €5,000.00’* and it recognised that *“MARP should have been applied in [the Complainant’s] case and [the Provider] apologised for [its] oversight”*.

The Provider contends that *“MARP is designed to protect the borrower’s family home rather than protect against financial loss on investments”*. The Provider further contends that it is satisfied that its *“credit decisions”* throughout this case were made *“with a clear effort to ensure [the Complainant’s] family home was not at risk”* and that it has *“not found that there was a financial loss to [the Complainant] based on the non-application of MARP”*.

The Provider acknowledges that it did not communicate with the Complainant through MARP and that in error, the Complainant’s loan was categorised as a *“buy to let”* which resulted in the Consumer Protection Code 2012 (as amended) (*“CPC”*) being applied. The Provider asserts that the outcome of the Complainant’s case *“would not have differed, should MARP have been applied”*. The Provider further asserts that, based on its review, that it *“has not found there to be any indication that our communications were inappropriate”*.

The Provider submits that the Complainant agreed to the terms of an Alternative Repayment Arrangement and that it agreed to work with the Complainant in order to complete the arrangement. The Provider further submits that *“in line with the Complainant’s plans for the disposal of [his] property; the Provider worked with the Complainant and provided [him] with an extended interest only period, to facilitate the sale”*.

The Provider has advised the Complainant of the postal address to submit an appeal form to, should he wish to *“appeal the outcome of the tracker review”*.

The Provider submits that the Subject Access Request it received from the Complainant on **13<sup>th</sup> December 2017**, was missing information from one of its business areas and that, as a consequence, this information was not included in the original file, made available for the Complainant to collect at his branch, on **18<sup>th</sup> January 2018**. The Provider advises that this was *“another customer service failing on its part and for that, it is sorry”*.

The Provider states that, in recognition of the mortgage account not being treated under MARP, the incomplete subject access report and the Complainant waiting too long for the Provider to issue a response to his complaint, it would like to offer the Complainant a *“gesture of goodwill of €5,000.00 in a full and final settlement of [the] complaint”*.

### **The Complaint for Adjudication**

The complaint is that the Provider:

1. Failed to apply MARP to his mortgage account, when the interest only period expired in **November 2014**;
2. *“Behaved aggressively and unreasonably toward a proactive, low risk client” and “failed to keep proper or accurate records”*;
3. *“Forced an earlier sale of the property” “at a considerable cost to [the Complainant]”*;
4. Failed to apply its *“vulnerable client policy”* to the Complainant;
5. Proffered below par communication and customer service throughout.

In his Complaint Form, when asked how he would like the Provider to put things right, the Complainant stated the following:

*“The capital loss to my **2017** Tax Return was €187,700. Due to the sale process the property was vacant from **February 2015** leading to a loss of rental income for 3-4 years of circa €50,000. Considering the above and the level of stress caused, I believe €250,000 would be fair settlement”*.

### **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. A Preliminary Decision was issued to the parties on **28 February 2022**, outlining the preliminary determination of this office 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

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issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

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 conscious that the Complainant has advocated for an oral hearing to be arranged, to address certain conflicts in the parties' submissions. For that reason, I have examined the authorities concerning oral hearings by this Office. I note that the Supreme Court judgment of Finnegan J in **J&E Davy v. Financial Services Ombudsman [2010] IESC 30** quoted from the judgment of Costello P, in Galvin v Chief Appeals Officer [1997] 3 IR 240, as follows:

*"There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. This case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."*

I have also considered a number of other relevant authorities. In **Ryan v Financial Services Ombudsman**, unreported, High Court, 23 September 2011 MacMenamin J stated that

*"[t]he Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing"*

...

*"[i]t is important to recognise that, if the Ombudsman's office is to be permitted to carry out its statutory function effectively, it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law". (Page 35).*

In **Star Homes (Middleton) Ltd v The Pensions Ombudsman [2010] IEHC 463** Hedigan J held that:

*"The Ombudsman has a discretion whether or not to hold an oral hearing and in these circumstances the Ombudsman was entitled to take the view that the conflict surrounding the P45 was not such as to require him to hold an oral hearing. The applicant has also failed to satisfy this court that it had an explanation which required an oral hearing to adjudicate upon. If an oral hearing were granted in this case its effect would simply be to allow the applicant to re-iterate what the applicant had already submitted to the respondent in writing, therefore fair procedures did not require the holding of an oral hearing in this case. In any event*

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*there are further reasons that support the Ombudsman's decision herein.” (Para 7.1).*

In ***Dola Twomey v. Financial Services Ombudsman*** unreported, High Court, 26 July 2013 Feeney J stated as follows:

*“An oral hearing may be required as a matter of fair procedures, but such a requirement arises when there is a clear identified dispute as to particular events central to the case, and where there is not sufficient documentary evidence available to enable the FSO come to a conclusion on the evidence and where the resolution of the dispute requires oral evidence.” (Page 14).*

I am satisfied that I have been afforded a broad jurisdiction under case law, as to whether or not to hold an Oral Hearing. Notwithstanding a number of conflicts in the submissions offered by the parties, having regard to all of the evidence and the submissions made by the parties and the specific nature of the complaint I take the view that the evidence furnished is adequate to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

In the context of this complaint, I note the following chronology of events from the evidence made available. For completeness' sake, this chronology references both the Complainant's loans, but he has made it clear that his complaint only relates to **Loan A**.

The Complainant has confirmed that he has no issues with Loan B and made every effort to clear this quickly, which he says, he did.

#### **2005**

- **3<sup>rd</sup> November 2005:** Letter of Sanction issued by the Provider to the Complainant
- **5<sup>th</sup> December 2005:** Letter of Sanction accepted by the Complainant with funds of **€500,000** drawn to Account \*\*\*\*\*406 (“Loan Account A”)

#### **2008**

- **29<sup>th</sup> April 2008:** Letter of Offer issued by the Provider to the Complainant and the other party to the loan
- **14<sup>th</sup> May 2008:** Letter of Offer accepted by the Complainant and the other party to the loan
- **3<sup>rd</sup> October 2008:** Funds of **€230,000** drawn down to Account \*\*\*\*\*166 (“Loan Account B”)

#### **2012**

- **28<sup>th</sup> August 2012:**
  - The Complainant attended a meeting with the Provider to discuss a financial plan subsequent to the Complainant's early retirement in **August 2012**.
  - The Complainant requested the continuation of interest only payments on both Loan Accounts (A and B) for a further 12 months.

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- The Complainant advised that he planned to review his financial situation over the next 12 month period when he would have a greater idea of his income and expenditure.
  - The Complainant's long term plan was to dispose of both properties securing the Loan Accounts and to reduce his debt. The Complainant had hoped at this stage that the property values may increase with time.
  - The Complainant stated that Capital and Interest repayments on the Loan Accounts were not affordable. The Provider confirmed that Reduced Payment Application forms would be forwarded by email for completion and return by the Complainant.
  - The Provider emailed the Reduced Repayment form to the Complainant with a Statement of Means attached to be completed and returned.
- **29th August 2012:** The Complainant returned the signed and completed Reduced Repayment form along with a completed Statement of Means and reason for request. The reason for the request given by the Complainant was due to a reduction in income due to retirement and the collapse of the property market. The Complainant stated the intention to sell the properties when market conditions improved.
  - **24th September 2012:** The Provider sends a letter to the Complainant acknowledging receipt of the Reduced Repayment application
  - **31st October 2012:**
    - Provider issues a letter to the Complaint advising of 12-month Interest Only arrangement on Loan Account A.
    - Provider issues a letter to the Complainant and the other party to the loan advising of 12 Month Interest Only arrangement on Loan Account B.

### **2013**

- **2nd October 2013:** Provider letter to the Complainant advising annual review of facilities in respect of Loan Account A is now due
- **10th October 2013:** The Complainant submits a completed SFS to the Provider
- **1st November 2013:** Provider issues a letter to the Complainant advising of approval of reduced payments to interest only for 12 months on both Loan Accounts.
- **8th November 2013:** Provider issues letter to the Complainant and the other party to the loan advising that Loan Account B is in arrears since **25th October 2013**
- **11th December 2013:** Provider issues letter to the Complainant advising of extension to Interest Only Payments on Loan Account A and B until October 2014.

### **2014**

- **13th June 2014:** Provider issues letter to the Complainant advising of interest rate change to Loan Account A
- **16th June 2014:** Provider issues letter to the Complainant advising him to disregard the repayments set out in the letter issued on **13th June 2014**. The letter of **16th June 2014** set out the updated repayment details
- **11th September 2014:** Provider issues letter to the Complainant advising of interest rate change to Loan Account B

- **15<sup>th</sup> September 2014:** Provider issues letter to the Complainant advising him to disregard the repayments set out in the letter issued on **11<sup>th</sup> September 2014**. The letter of **15<sup>th</sup> September 2014** set out the updated repayment details.
- **25<sup>th</sup> October 2014:** Expiry of Loan Account A and B facilities
- **4<sup>th</sup> November 2014:** Provider issues letter to Complainant and the other party to the loan advising that Loan Account B has been in arrears since **28<sup>th</sup> October 2014**
- **5<sup>th</sup> November 2014:** Provider issues letter to Complainant advising of expiry of agreement on Loan Account B and that the account was due for review. This letter set out the necessary financial information to be provided to the Provider.
- **11<sup>th</sup> November 2014:**
  - o Provider issues letter to Complainant outlining that Loan Account A has been in arrears since **28<sup>th</sup> October 2014**.
  - o The Complainant furnishes the Provider with a proposal via letter based on an extension of interest only for a further 12 months on both Loan Accounts together with a completed Standard Financial Statement
- **18<sup>th</sup> November 2014:**
  - o The Provider calls the Complainant to discuss a more sustainable long-term solution for both Loan Accounts, as early indications were that the Provider's Credit Unit would not be in favour of further short term forbearance measures.
  - o Subsequent to this call, the Provider emails the Complainant to re-iterate that no formal credit decision had been made and that the points raised by the Complainant would be addressed with the Provider's Credit Unit. The Provider also requested a link to the website where the property relating to Loan Account B was advertised.
- **19<sup>th</sup> November 2014:** The Complainant responds to the Provider's email of **18<sup>th</sup> November 2014** enquiring as to whether the call of **18<sup>th</sup> November 2014** was recorded and requesting a copy of same. The Complainant also supplies the website address requested by the Provider.
- **24<sup>th</sup> November 2014:** The Complainant emails the Provider to request copies of call recordings and advises that rental figures will be supplied in the next day or two.
- **25<sup>th</sup> November 2014:**
  - o The Bank replies to the Complainant's email of **24<sup>th</sup> November 2014** to advise that calls within that business area are not recorded.
  - o The Complainant replies to the Provider's email of **25<sup>th</sup> November 2014** with rental figures for the property securing Loan Account B and also offers capital payments of €800 per month as an addendum to the proposal outlined in the letter furnished to the Provider by the Complainant on **11<sup>th</sup> November 2014**
- **28<sup>th</sup> November 2014:**
  - o Provider's letter to Complainant advising that Loan Account A has been in arrears since **28<sup>th</sup> October 2014**
  - o Provider issues a letter to the Complainant and the other party to the loan advising that Loan Account B has been in arrears since **28<sup>th</sup> October 2014** and enclosing MARP booklet
- **29<sup>th</sup> December 2014:** Provider issued a letter to the Complainant and the other party to the loan advising that Loan Account B is in arrears since **28<sup>th</sup> October 2014**.

## **2015**

- **9<sup>th</sup> January 2015:** The Provider conducts a conference call with the Complainant to discuss a sustainable solution to debt reduction. The Provider's Credit Unit had agreed to interest only repayments on Loan Account B in addition to €800 capital repayments per month.  
The €800 capital repayment is to be paid against the Complainant's Private Dwelling House (PDH) Loan Account A in order to prioritise that debt. Two tranches of interest only forbearance at six-month intervals are granted. Subsequent to the expiry of the first 6-month period the Complainant must provide written evidence on the progress in the sale of the properties relating to Loan Accounts A and B. In the event that there is any residual debt subsequent to the sale of the properties this is to be repaid over 5 years with the existing interest rates applies.
- **26<sup>th</sup> January 2015:** The Provider issues a letter to the Complainant advising that Loan Account A is in arrears since **28<sup>th</sup> October 2014**
- **2<sup>nd</sup> February 2015:** The Provider issues a letter to the Complainant and the other party to the loan advising that Loan Account B is in arrears since **28<sup>th</sup> October 2014**.
- **20<sup>th</sup> February 2015:**
  - o Provider issued Fundamental Restructure Non-Binding Term Sheet in relation to Loan Account A to the Complainant. This document set out an indicative sustainable long term solution to the debt owing under the account, which included an agreement to sell the Buy to Let property securing the loan and to reduce the debt owing on that account from sale proceeds. The proposed solution further sought a commitment that any surplus sale proceeds from the sale of a property abroad ("the investment property"), after repayment of Loan Account B, would be applied in permanent reduction of the outstanding balance on Loan Account A.
  - o Provider issued Fundamental Restructure Non-Binding Term Sheet in relation to Loan Account B to the Complainant and the other party to the loan. This document set out an indicative sustainable long term solution, which included agreement to sell the investment property and clear the account from the sale proceeds.
- **25<sup>th</sup> February 2015:** Letter from Complainant and other party to Loan Account B outlining agreement to indicative terms detailed in correspondence of **20<sup>th</sup> February 2015**.
- **4<sup>th</sup> March 2015:**
  - o Provider issued letters to the Complainant advising of Interest Only Payment Arrangement on Loan Account A for six months.
  - o Provider issued letter to the Complainant and the other party to the loan advising of Fixed Repayment Arrangement of €925.00 on Loan Account B for six months.
- **12<sup>th</sup> June 2015:**
  - o The Provider telephoned the Complainant to acknowledge full payment of Loan Account B from the sales proceeds of the investment property. The Complainant enquired as to whether the €800 capital repayment which he had been lodging each month to Loan Account B could now be re-directed to Loan Account A.

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The Provider advised that in line with the Heads of Terms signed on **25<sup>th</sup> February 2015**, there was a potential to avail of a further 9 months interest only repayments on Loan Account A. The original sanction of interest only stipulated that interest only would be applied to this facility for a period of 12 months, applicable in two 6 month tranches, with the second 6 month term sanctioned subject to evidence of sale progress on the investment property, which the Complainant had evidenced.

However, the Provider advised that if the Complainant wished to proceed with making capital repayments to Loan Account A, the Provider would submit this to its Credit Unit for a decision. The Provider also discussed the sale progress of the Complainant's Dublin property ("the Dublin property")

- Lodgment of €228,919.05 made to Loan Account B clearing this loan in full.
- Loan Account B closes
- **15<sup>th</sup> June 2015:**
  - The Provider issues a letter to the Complainant advising that the interest only repayment on Loan Account A had been amended due to an out of course lodgement. The Provider advised the next payment to this loan account is due on **25<sup>th</sup> June 2015** in the amount of €185.36
  - Lodgement of €60,000 made in permanent debt reduction of Loan Account A.
- **17<sup>th</sup> August 2015:** Provider issues letter to the Complainant advising of Fixed Repayment Arrangement of €985 per month on Loan Account A for six months.

## **2016**

- **8<sup>th</sup> February 2016:** Provider issues letter to Complainant advising that Loan Account A has been in arrears since **26<sup>th</sup> January 2016**.
- **25<sup>th</sup> February 2016:** Provider issues letter to the Guarantor for the loan on Loan Account A advising that the account has been in arrears since **25<sup>th</sup> January 2016**
- **21<sup>st</sup> March 2016:** Sales Agent is engaged by the Complainant in relation to sale of the Dublin property.
- **25<sup>th</sup> April 2016:** Provider issues letter to Complainant advising that Loan Account A has been in arrears since **25<sup>th</sup> January 2016**.
- **10<sup>th</sup> May 2016:** The Provider issues a letter to the Complainant detailing a term extension of fixed repayments on Loan Account A for a period of 5 months in the amount of €958.00 per month with an expiry date of **25<sup>th</sup> September 2016**. This letter is not signed by the Complainant.
- **25<sup>th</sup> July 2016:** The Provider issues a letter to the Complainant advising that Loan Account A has been in arrears since **25<sup>th</sup> January 2016**
- **8<sup>th</sup> August 2016:** Complainant writes to the Provider enclosing a Property Services Agreement with Sales Agent
- **21<sup>st</sup> October 2016:** Provider issues letter to the Complainant advising that Loan Account A is in arrears since **25<sup>th</sup> January 2016**
- **23<sup>rd</sup> November 2016:** Request from Complainant's solicitor for Redemption Figure for Loan Account A
- **25<sup>th</sup> November 2016:** Provider issues Redemption Figures.

## 2017

- **19<sup>th</sup> January 2017:** Provider issues letter to Complainant advising that Loan Account A is in arrears since **25<sup>th</sup> January 2016**.
- **26<sup>th</sup> January 2017:** Complainant sends email to the Provider in respect of the arrears letter and account status
- **6<sup>th</sup> February 2017:** Request from the Complainant's solicitor from Redemption Figures for Loan Account A
- **9<sup>th</sup> February 2017:** Provider issues Redemption Figures
- **20<sup>th</sup> February 2017:** The Complainant's Solicitor wrote to the Provider enclosing a cheque in the sum of €327,149.08 to redeem Loan Account A
- **21<sup>st</sup> February 2017:** Lodgement of €327,149.08 to Loan Account A
- **2<sup>nd</sup> March 2017:** Loan Account A is closed.

## 2018

- **11<sup>th</sup> October 2018:** The Provider returns a call to the Complainant and during the course of this call, the Complainant expressed dissatisfaction with the Provider's treatment strategy of his loans. (Provider complaint reference \*\*\*\*311)
- **18<sup>th</sup> October 2018:** The Provider sends a letter to the Complainant in acknowledgement of complaint reference \*\*\*\*311
- **31<sup>st</sup> October 2018:** The Provider issues a follow on letter to the Complainant in respect of complaint reference \*\*\*\*311, advising the Complainant that the Provider was still investigating the complaint
- **23<sup>rd</sup> November 2018:** The Provider issues a follow on letter to the Complainant in respect of complaint reference \*\*\*\*311, advising the Complainant that the Provider was still investigating the complaint
- **26<sup>th</sup> November 2018:** The Complainant sends a letter of complaint to the Provider's CEO. This is received by the Provider on **27<sup>th</sup> November 2018** and is logged by the Provider as a further detail in complaint reference \*\*\*\*311
- **7<sup>th</sup> December 2018:** The Provider issues a letter to the Complainant acknowledging receipt of the complaint. The Provider advises in this letter, that as the complaint issues "are similar" to the one already being investigated by the Provider that these complaints will be amalgamated and investigated as complaint reference \*\*\*\*311
- **21<sup>st</sup> December 2018:** Follow on letter regarding complaint reference \*\*\*\*311 sent from the Provider to the Complainant, advising the Complainant that the Provider was still investigating the complaint
- **21<sup>st</sup> January 2019:** Follow on letter regarding complaint reference \*\*\*\*311 sent from the Provider to the Complainant, advising the Complainant that the Provider was still investigating the complaint
- **23<sup>rd</sup> January 2019:** Letter from the Complainant to the Provider's CEO received by the Provider on **24<sup>th</sup> January 2019**. The Complainant expressed dissatisfaction with the lack of progress/response to his complaint reference \*\*\*\*311 to date
- **5<sup>th</sup> February 2019:** The Provider sent a letter to the Complainant acknowledging receipt of the letter of complaint received with the Provider on **24<sup>th</sup> January 2019**. The Provider advises that a Senior Manager has been appointed to investigate the issues raised in complaint reference \*\*\*\*311.

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- **18<sup>th</sup> February 2019:** Follow on letter regarding complaint reference \*\*\*\*311 sent from the Provider to the Complainant, advising the Complainant that the Provider was still investigating the complaint
- **15<sup>th</sup> March 2019:** Follow on letter regarding complaint reference \*\*\*\*311 sent from the Provider to the Complainant, advising the Complainant that the Provider was still investigating the complaint
- **15<sup>th</sup> April 2019:** Follow on letter regarding complaint reference \*\*\*\*311 sent from the Provider to the Complainant, advising the Complainant that the Provider was still investigating the complaint
- **13<sup>th</sup> May 2019:** Follow on letter regarding complaint reference \*\*\*\*311 sent from the Provider to the Complainant, advising the Complainant that the Provider was still investigating the complaint
- **7<sup>th</sup> June 2019:** The Provider issues its Final Response Letter to the Complainant in respect of complaint reference \*\*\*\*311.
- **12<sup>th</sup> June 2019:** The Complainant responds to the Provider's Final Response Letter. The Complainant enquires as to whether the gesture of goodwill of €5,000 which the Provider referred to in its FRL is the final offer the Provider will make. The Complainant advises that if this is the final offer the Complainant will have to refer his complaint to this office.
- **17<sup>th</sup> June 2019:** The Provider responds by letter to the Complainant's correspondence of **12<sup>th</sup> June 2019** and re-iterates the Provider's apology and the primary function of the Mortgage Arrears Resolution Process within the Code of Conduct of Mortgage Arrears. The Provider also confirms that its offer of €5,000 remains open to the Complainant for acceptance.

### Evidence

(i) Final Response Letter of 7<sup>th</sup> June 2019

The Provider issued two Final Response Letters to the Complainant, the first of which was sent on **7<sup>th</sup> June 2019**. I note the below excerpts. In respect of the loan facilities sanctioned in respect of the Complainant, the Provider states as follows:

*"The repayment of these loans [i.e. Loan Account A and B]. You were provided forbearance by way of continuance of interest only payments during 2012, 2013 and 2014 on both of these loan facilities...After 3 years of interest only forbearance on [Loan Accounts A and B] it was necessary to agree a sustainable solution to your indebtedness. We were not in a position to continue to offer interest only forbearance indefinitely.*

The Provider thereafter details the sales of each of the properties related to Loan Accounts A and B, which resulted in the balances of each loan account being cleared.

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The Provider then states:

*“You have now alleged that you have suffered significant financial losses as you were not afforded the protection available under MARP throughout the handling of [Loan Account A]*

*“The Code of Conduct for Mortgage Arrears (CCMA) sets out how mortgage lenders must treat borrowers in or facing mortgage arrears. Due regard is given to the fact that each case of mortgage arrears is unique and needs to be considered on its own merits.*

*“[MARP] within the code requires that a lender must incorporate the following steps:*

*Step 1: Communication with borrowers*

*Step 2: Financial information*

*Step 3: Assessment; and*

*Step 4: Resolution*

*“In your case I acknowledge that we did not communicate with you to tell you that you should have been treated under MARP. Your loan was categorised as buy to let lending which resulted in the Consumer Protection Code being applied.*

*“However, on review, I am satisfied that we did carry out the steps that would be involved under the MARP process:*

- We communicated with you to let you know your accounts were in arrears as they had not been repaid within the agreed time-frames*
- We requested up to date financial information*
- We made an assessment of the information you provided*
- We provided you with an alternative repayment arrangement, which you agreed to”*

*“The primary objective of CCMA and indeed MARP is to provide the borrower with protections in relation to mortgage debt outstanding on their PDH [Private Dwelling House].*

*“I have found that we afforded you with extended forbearance and agreed an alternative repayment strategy which resulted in your debts being repaid and your home being retained by you. I am satisfied that based on your set of circumstances, the outcome would have not have differed should MARP have been applied.*

*“However, we acknowledge that MARP should have been applied in the treatment of your loans. We apologise that this was not the case, and I recognise our failing in this regard.*

In respect of the Complainant’s assertion that he was subjected to enormous pressure from the Provider which caused stress to him and his wife, the Provider states as follows:

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*“Based on my review I have not found there to be any indication that our communications were inappropriate. In line with your plans for disposal of the property, as agreed at the time of the original lending, we worked with you and provided you with an extended interest only period to facilitate the sale of the properties.*

*“You were provided with a Heads of Term agreement on **20<sup>th</sup> February 2015** to agree an alternative repayment arrangement, where you had the opportunity and were advised to obtain independent financial advice. You agreed to the terms of the alternative repayment arrangement, and we worked with you to complete the arrangement as agreed.*

In respect of the Complainant’s assertion that the Provider breached the contract, through overcharging on Loan Account A, the Provider states as follows:

*“We wrote to you on **27<sup>th</sup> November 2021** to apologise for the overcharging which occurred on your account and to outline the steps we would take to redress that issue and also to compensate you for our mistakes.*

*“You were advised that you could appeal this outcome within 12 months of the date of that letter. I can see that you have requested an appeals pack, but you have not yet submitted a formal appeal.*

(ii) **Final Response Letter of 27<sup>th</sup> June 2019**

The Provider’s second Final Response Letter to the Complainant was sent on **27<sup>th</sup> June 2019**. I note the following relevant excerpts:

*“I recognise that MARP should have been applied in your case and we have apologised for our oversight. However, I think I should mention here that the Code of Conduct for Mortgage Arrears, inclusive of MARP, is designed to protect the borrower’s family home rather than protect against financial loss on investments.*

*“In that regard we are satisfied that the [Provider’s] credit decisions throughout your case were made with a clear effort to ensure your family home was not at risk.”*

**Analysis**

In order to examine the history giving rise to this complaint, it has been necessary to consider the detailed chronologies submitted in respect of the two Loan Accounts held by the Complainant. It is apparent from a reading of the account histories that the Complainant consistently failed to make the monthly repayments falling due on both accounts, resulting in the Provider’s application of various forbearance measures.

In his more recent submissions, the Complainant points out that one loan was reduced by **€173,000**, in the period from November 2013 to February 2017 by a combination of lump sum and monthly repayments. He points out that, *“if averaged out that would equate to a monthly payment of €4,325”*. This approach however overlooks the fact that the Complainant was contractually obliged to make the monthly payments which had been agreed, rather than supplementing missed payments, or less than full payments, with periodic lumpsums.

The property secured by Loan Account B was sold in **June 2015** and the proceeds thereof were lodged to the Complainant’s loan accounts. Loan Account B was cleared in full, and the surplus €60,000 was lodged to Loan Account A. The Complainant had requested that the fixed capital repayments he was making to reduce Loan Account B, be applied to Loan Account A’s outstanding facility, which was sanctioned by the Provider.

It is evident that following this, communication occurred between the parties in respect of the sale of the Complainant’s Dublin property. Redemption figures were requested by the Complainant’s solicitor and provided by the Provider in **November 2016** and again in **February 2017**.

On **20<sup>th</sup> February 2017**, the Dublin property was sold and as the Complainant was in positive equity at the time, the Provider’s consent was not required to proceed with the sale. I note that the sale of the Dublin property resulted in the clearing of the remaining balance of Loan Account A.

In respect of the Complainant’s contention that the Provider failed to apply the provisions of MARP to the Complainant’s mortgage account, the Provider acknowledges that MARP was not applied to the account in question, that is Loan Account A. The Provider had sanctioned the Complainant’s drawdown of borrowings in respect of both loan accounts, in 2005 and 2008 respectively, for the purpose of assisting the borrowers with the purchase of investment properties.

**Loan Account A in 2005**, was categorised by the Provider as Buy to Let lending and it was sanctioned as a **Commercial Staff Business Loan**. As a result of this categorisation, the Consumer Protection Code 2012 (as amended) (CPC) was applied to the borrowings.

**Loan Account B in 2008**, was categorised by the Provider as an **equity release product**, and it was sanctioned and secured by the Complainant’s Private Dwelling House. This categorisation resulted in the application of the Code of Conduct on Mortgage Arrears (CCMA), and as a result Mortgage Arrears Resolution Process (MARP) applied to these borrowings.

Regardless of the purpose of the Complainant’s borrowings, the Provider acknowledges that because both of the borrowings were secured by the Complainant’s private dwelling house, both these Loan Accounts should also have been treated under the MARP, and the Provider should have engaged in communication with the Complainant advising him of this.

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I note that as part of its submissions to this office, the Provider has addressed each relevant provision of the CCMA in respect of its treatment of the Complainant and its adherence with the MARP process. Upon a consideration of these submissions, I am satisfied on the evidence that the Provider discharged what would have been its obligations under the MARP, had this process been explicitly applied to the Complainant's Loan Account A. In those circumstances, I do not accept that the Provider's handling of the account, would have significantly differed, if MARP had been applied, though I note the Complainant's dissatisfaction with this opinion.

The Provider's position in respect of its failure to specifically apply the MARP provisions to its management of Loan Account A is that in adopting "*a holistic approach to managing the Complainant's debt that it carried out the steps required under the MARP Process in that:*

1. *On the occasions that the accounts entered into arrears the [Provider] communicated with the Complainant to advise of same as required under Step 1 of the MARP Process.*
2. *The [Provider] requested up to date financial information from the Complainant and the other party to the borrowings (where appropriate) to allow them to make an assessment and extend forbearance as requested, as required under Step 2 of the MARP Process.*
3. *The [Provider] assessed the information provided as required under Step 3 of the MARP Process.*
4. *The [Provider] provided alternative repayment arrangements which were agreed to by the Complainant and the other party to the borrowing as it is required under Step 4 of the MARP Process".*

In respect of the Complainant's assertion that the Provider "*harangued, bullied and threatened [him] on a continual basis until the loan was repaid*", the Provider denies these claims. It is the Provider's position that in working with the Complainant to reach a mutually agreeable sustainable long-term solution to the Complainant's debt, that the Provider's communication was at all times appropriate. However, it is noted that disappointingly, no audio evidence was submitted in respect of this dispute, and the Complainant contends that

*"all the pressure on me was via phone calls. However, despite two requests to [the Provider], bar an incomplete file note of one call, no records have been made [of the telephone calls] available to [him].*

The Provider's explanation for this is that the Complainant's loan accounts were moved to the Provider's department responsible for managing customers who are outside the terms of their agreement. Within this department, telephone calls are not recorded, but file notes of calls are created similar to file notes of any customer meetings.

The Complainant is particularly frustrated by the absence of a recording of the telephone conversation on **18 November 2014**, which he refers to and he considers the Provider's file note to be entirely "sanitised" and to not fully reflect the content and tone of the call.

The file note contents set out as follows:

*I called [Complainant] in relation to his application on his expired loans: 12 months interest only payments on B I I. and PDH loans pending sale of [location 1] & [location 2] BTLs.*

*I told [Complainant] that I held indicative discussions with credit and that early indications were that the Bank would not extend the loans on an interest only basis as there was evident affordability for some form of monthly capital repayments.*

*[Complainant] was very disappointed with this view and stated that he had no affordability for increased repayments. He also stated that he was doing everything he could to resolve this situation as quickly as possible. He has changed estate agents in order to try push through a sale. He said he would forward me I stated that he had listed an expenditure of €6,700 vs income of €6,800. This would be significantly higher than [Provider] guidelines. I stated that for an income of that size, interest only repayments of c€430 would not be extended and a fixed repayment would likely be sought.*

*[Complainant] stated that he felt that he was being penalised for giving up front lump sums reductions to his debts. He highlighted that he has repaid c€300k (33% of his debts) in the last 2 years since retirement and that had he known the Bank would be seeking monthly capital reductions while I sold assets he would never have agreed to the lump sum reductions. He would have spread the lump sums out over 2/3 years. He also highlighted that he had the potential to reduce his debts by a further 300k in the coming months on completion of the sale of the [location 1] property, however if the Bank sought monthly capital reductions from him then he would spread that €300k out over a period pending completion of the sale of the [location 2] BTL. He repeatedly stated that the Bank was being unreasonable.*

*I tried to calm the conversation as [Complainant] was clearly upset. I told [Complainant] that nothing had been decided on the application and that this was a courtesy call to keep him up to date on developments. I also stated that there was a requirement to be consistent in our assessments and in this case, although there were no long-term concerns over full repayment, there was evident capacity for a higher repayment than interest only at this point. I reference (sic) the significant "lifestyle expenses" listed in the SFS at €1,500 per month as well as club memberships of €250. [Complainant] stated that he would not allow the Bank to force him to "live like a pauper". I told [Complainant] that this was not the case and was hardly an appropriate statement to make given that personal (non-property related) expenditure listed was more than double the amount allowable per [Provider] guidelines.*

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*I stated that the Bank does not look to extend short term forbearance anymore but rather to put in long term solutions based on repayment capacity. [Complainant] said he did not see this as forbearance as it was simply an annual extension of the original agreement. I stated that the loans had expired and that if a formal term of C&I repayments was not in place, then any temporary repayment arrangement would be considered forbearance.*

*[Complainant] stated that the only reason the loans are expired is due to a "technical glitch" from the original drawdown/contract process with Staff Business at that time.*

*He stated the original agreement with the Head of Staff Banking at that time was always that interest only would be met for a period of time after which it (sic) the loans would be reviewed and a new agreement would be reached. [Complainant] felt the strategy for disposal, as outlined in the 2013 review, was taken as the new agreement and that he felt we were now pressuring him for additional money. He felt that the Bank were completely ignoring the fact that he made significant upfront reductions in good faith that the Bank would continue to support him and give him time to carry out the agreed plan of action. He again stated that had he known the bank would continually seek more money from him where there is evidently such low risk, he would have spread his lump sum reductions out over a number of years.*

*I agreed to revert to Credit following this conversation and raise the points that [Complainant] raised and highlight his disappointment. I confirmed I would then be in touch with him later in the week.*

The Complainant in his submission following the preliminary Decision of this office, points out that the Provider's file notes:

*"were never discussed with or signed off by me. They do not represent true reflection of what occurred. This is a major point of difference in the evidence in this case, yet it appears to me that you have given the Bank a free pass and the benefit of the doubt for their failures in this regard."*

I am satisfied however that the notes, although not agreed by the Complainant, reflect the Provider's understanding of the communications in question, at that time, and there was no obligation on the Provider to seek the Complainant's agreement to the content of those notes.

As a result, there is no audio evidence to indicate that the Complainant was "*harangued, bullied and threatened*" and I note that all documentary evidence submitted, including the notes detailing the calls, indicates that the Provider acted appropriately in its communications with the Complainant. I understand the Complainant's frustration however, that the full tenor and tone of the discussion is not available, owing to the absence of an audio file of the call. Ultimately however, I am conscious that the borrowing fell due for review, and notwithstanding the Complainant's periodic and very substantial lumpsum

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payments, the Provider was nevertheless entitled to articulate its unwillingness to accept “*interest only*” monthly repayments, and its requirement to instead secure payment of higher monthly repayments, based on its assessment of the Complainant’s financial position as set out in the SFS.

It is of course possible that the Complainant felt under pressure because of the ongoing financial situation and because he was unable to make capital and interest repayments, but there is no adequate evidence available that any such pressure, was as a result of threats made, or actions taken by the Provider. Although the Complainant says that “*the repayment of the loan was never in question and the only pressure I felt was as a result of the Bank’s threats*”, I do not accept that the Provider’s actions in seeking a solution to the Complainant’s financial difficulties, constituted bullying or threats, simply because it was unwilling to accept the Complainant’s request for an ongoing interest only arrangement.

In its submissions, the Provider acknowledges an additional customer service failing in respect of not providing the Complainant with a full and complete file in response to his Subject Access Request (SAR). The Complainant submitted this request on **13<sup>th</sup> December 2017**. Each business area of the Provider was requested to provide the information held on file in respect of the Complainant, so that it could be furnished to him within 30 days in adherence with the Provider’s obligation under GDPR.

Upon receipt of this information, it was sent to the Complainant’s branch on **18<sup>th</sup> January 2018** for collection. However, one business area did not return their files until **19<sup>th</sup> January 2018**, and it was therefore not included in the original file sent for collection by the complainant. The Provider failed to advise the Complainant at that time that information had been omitted and the Provider offers an apology in respect of this omission.

Mindful of the fact that complaints about Subject Access Requests are a matter for the Data Protection Commission, and not for this Office, I am satisfied nevertheless that the Provider discharged the purport of its obligations under the Code of Conduct on Mortgage Arrears. Although the Complainant disagrees with this opinion, I accept that the Provider adopted a flexible approach in trying to reach a viable, sustainable solution to the Complainant’s debt and that it acted in accordance with the principles of the Code in respect of its approach to management of the Complainant’s account.

In respect of the Complainant’s assertion that the Provider “*forced an earlier sale of the property than was necessary and at considerable cost to [the Complainant]*”, the Provider maintains its contention that the Complainant did not suffer any financial loss, based on the non-application of the MARP process in respect of Loan Account A. Upon a consideration of the relevant documentation, including the Letter of Sanction and Letter of Offer in respect of the facilities, I note that both properties in respect of Loan Accounts A and B were sold for figures exceeding the debt owing. The Complainant says however that he suffered a financial loss as a result of the sale, insofar as he had purchased the property for €478,000 plus costs, with the loan in question and he sold it for €335,000 less costs, resulting in an overall loss of €187,000. He also points out that “*Currently similar properties are selling for €425,000-€475,000*”.

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In circumstances however where the Complainant was unable to meet his monthly liability to the Provider, I accept that the Provider was entitled to call for agreement on a sustainable long-term solution to the Complainant's debt, and ultimately this involved the property sale. Whilst the Complainant may have had a different and more beneficial financial outcome to his investment, if he had been able to service the full monthly repayments, such a possibility was not however open to him. I also take the view that a mortgage lender holds no obligation or requirement to protect a borrower from financial loss on that customer's investments.

The Provider has acknowledged that because the borrowings were secured on the Complainant's Private Dwelling House, MARP should have been applied to the management of both accounts and this should have been advised to the Complainant. Notwithstanding this error, however, I am not satisfied that this gave rise to the Complainant suffering a financial loss, that can be traced to this Provider error.

In respect of the Complainant's assertion that he should have been classified as a 'vulnerable customer', I am not satisfied that there is sufficient evidence of the Complainant, in **2012**, notifying the Provider, of his status in that respect.

In his recent submission, since the Preliminary Decision of this Office was issued, the Complainant says that:

*I outlined explicitly the medical issues at play at my first and only face to face meeting with the Bank in August 2012 and I passed the age of 60 in March 2014. The Bank therefor was fully aware of the medical issues. However, if you need medical records from my cardiologist and my wife's neurosurgeon they can be provided*

The Provider submits that at the time it received the Complainant's letter on **30<sup>th</sup> August 2012**, it adhered to the relevant provisions of the Consumer Protection Code. I am conscious that on **29 August 2012** when the Complainant submitted a Statement of Means, the reason for the request of a Reduced Repayment, given by the Complainant, was due to a reduction in income due to retirement and the collapse of the property market. This "*Application for Reduced Repayments*" did not however reference his vulnerability, as a person in his late 50s suffering, he says, from cardiac and neurological issues.

It is not apparent to me that the Complainant sought additional assistance, nor do I accept on the evidence available, that the Provider ought to have been aware of the Complainant's asserted status as a 'vulnerable customer' given the contents of the "*Reason For Request*" in the "*Application for Reduced Repayments*".

I am mindful that the content of the verbal discussions between the Complainant and the Provider in August 2012, are not documented, and his letter of 30 August 2012, referred only to "*a number of personal issues not least of which is my wife's health problems*". In my opinion, the Provider's "Vulnerable Client Policy" referred to by the Complainant, is of limited relevance, given the absence of evidence to suggest that the Complainant made the Provider aware that he was vulnerable at that time.

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The Consumer Protection Code provides that:

*“vulnerable consumer” means a natural person who:*

*a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); and/or*

*b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties)*

The regulatory obligation on a financial service provider, regarding a vulnerable consumer, is set out at Chapter 3, under **GENERAL REQUIREMENTS**, and provides that:

*Where a regulated entity has identified that a personal consumer is a vulnerable consumer, the regulated entity must ensure that the vulnerable consumer is provided with such reasonable arrangements and/or assistance that may be necessary to facilitate him or her in his or her dealings with the regulated entity.*

In those circumstances, even if the Complainant had been treated by the Provider as a vulnerable consumer, the Provider’s obligation would have been only to provide reasonable arrangements and/or assistance. I am not satisfied that there was any obligation on the Provider to assess the financial information made available by the Complainant, in a different manner, if he was deemed vulnerable.

I am satisfied that the Provider adhered to its obligations under the Consumer Protection Code in its management of the Complainant’s account in that it assigned a Relationship Manager to offer support to the Complainant in respect of the accounts’ management, while also extending periods of short-term forbearance, in the form of interest only repayments, rather than seeking a long-term solution from the Complainant to discharge his debt.

I appreciate that the identity of this Relationship Manager will have changed on a number of occasions, but I do not accept the Complainant’s contention that he received no support, given the Provider’s willingness to extend periods of short-term forbearance, in the form of interest only repayments.

The Provider has set out in detail in its submissions, details of its adherence to the provisions of the Consumer Protection Code 2012 (as amended) and I am satisfied that its obligations in that regard have been discharged.

I note the Provider’s acceptance of its failure on occasion to provide a satisfactory level of customer service to the Complainant, including a failure to apply MARP in its handling of the Complainant’s account and the issues experienced by the Complainant in respect of its handling of his Subject Access Request.

I acknowledge that in light of the Provider’s identification of additional customer service failings in respect of the length of time taken to investigate and respond to the Complainant’s issues (and the omission of documentation in the file supplied to the

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Complainant as part of the SAR, which is not a matter for the jurisdiction of this Office) the Provider in August 2020, at the time when it sent its formal response to the investigation, to this Office, increased its offer of a gesture of goodwill from €5,000 to **€7,500**.

In the Complainant's submission since the Preliminary Decision of this Office was issued, he expresses dissatisfaction with this position, and says:

*I am very surprised that you are comfortable with the Bank classifying their failing to comply fully with my Subject Access Request (SAR) as a customer service issue. The Bank's obligations under SAR are legal under Data Protection Legislation as is the requirement to record phone calls.*

This Office however has no jurisdiction to investigate issues arising from Subject Access Requests, which is rather a matter for the Data Protection Commission, to which the Complainant may of course refer his grievance, as this Office makes no finding in relation to this particular aspect of the matter. Rather the views of this Office have been expressed only with regard to the Provider's obligations under the relevant regulatory codes

Based on the evidence before me, I take the view that the Provider's compensatory gesture in **August 2020** represented, and continues to represent, a fair disposal of the matter, insofar as it addresses the elements of the complaint that come within the jurisdiction of this Office.

On the basis that this very reasonable offer remains open to the Complainant for acceptance, I do not consider it necessary or appropriate to make any direction in this complaint and rather, it will now be a matter for the Complainant to communicate directly with the Provider, if he wishes to accept the compensatory payment which has been long since offered to him.

### **Conclusion**

My Decision, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**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.**



**MARYROSE MCGOVERN**  
**Financial Services and Pensions Ombudsman (Acting)**

13 June 2022

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## **PUBLICATION**

### **Complaints about the conduct of financial service providers**

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.

### **Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.