An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0244
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Wrongful consideration of forbearance request Delayed or inadequate communication Level of contact or communications re. Arrears Complaint handling (Consumer Protection Code) Dissatisfaction with customer service Documents mislaid or lost Failure to process instructions in a timely manner Maladministration Failure to consider vulnerability of customer Selling mortgage to t/p provider Arrears handling (non- Mortgage Arears Resolution Process) Maladministration (mortgage)
Outcome:	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns an interest only mortgage account which the Complainants held with the Provider.

The Complainants' Case

Complainants took out an interest only mortgage on their home in **March 2007** with the Provider. In **2010**, the First Complainant became *"seriously ill"* and the Complainants state that this meant that they needed assistance with their mortgage repayments.

The Complainants submit that they sent a proposal to the Provider on **9 June 2014** requesting that their mortgage be considered under the Mortgage Arrears Resolution Process ("MARP").

The Complainants state that between **2014** and **2018** they had discussions with and sent letters to the Provider; the Complainants state that they wrote to Person A, a representative of the Provider, in **January 2017** with a standard financial statement ("SFS") with *"up to date information"* but that this was never responded to. The Complainants raised this issue with Person A and obtained a meeting on **9 February 2018** and that this culminated in a *"detailed proposal"* from the Complainants on **5 March 2018** which the First Complainant *"delivered by hand"* and the Provider gave them *"10 options available to us under MARP"* and that they opted for a split mortgage whereby there would be a write off of **€400,000** (four hundred thousand Euro) and they would repay €400,000 (four hundred thousand Euro).

The Complainants state that, during the meeting of **9 February 2018**, the Provider *"felt that a warehouse and write off of €400,000 was agreeable"* in the circumstances, due to the illness of the First Complainant.

The Complainants state that they never received a response to the above proposal and that the Provider merely paid *"lip service"* and that the paperwork in relation to their proposal and meetings was *"shredded"*.

The Complainants were made aware in **July 2018**, that their mortgage was being sold by the Provider to a new owner and they assert that the Provider merely delayed in making a decision, so that the loan could be sold. They made a complaint to the Provider on **14 August 2018** prior to the sale of the loan, and they received a final response letter on **2 November 2018**.

The Provider's Case

The Provider states that the Complainants re-mortgaged their property with the Provider on **10th March 2007** on an interest only basis, for a twenty-five-year term and that this mortgage transferred to a new owner in **November 2018,** as part of the Provider's Republic of Ireland portfolio of mortgages.

The Provider accepts that it was first contacted by the Complainants in **2014**, in relation to concerns over repaying their mortgage and that it received a proposal from the Complainants in relation to a request that it accept €350,000 (three hundred and fifty thousand Euro) in full and final settlement of the mortgage balance (at the time of **€805,420.04**). The Provider states that it wrote to the Complainants to decline this proposal on **31 July 2014**.

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The Provider accepts that the proposal made in **2018** was not passed to its Head Office due to an *"administrative error and not an attempt to mislead the Complainants"*.

The Provider acknowledges that it fell *"short of the principles"* of the ***Consumer Protection Code 2012*** in this error and the Provider has offered the sum of **€150** (one hundred and fifty Euro) as compensation for this error.

The Provider states that although its Head Office never received the proposal and by the time it dealt with the matter in its Final Response Letter, the loan had been sold, it *"would never have agreed to 'write-off' a mortgage balance of €400,000"*.

The Provider states that it *"did not destroy or shred the Complainants' mortgage file"*; it states that it still *"has a copy of the Complainants' file up to the date that the transfer and assignment took place"*. The Provider states that it has no record of any meetings with the Complainants during **2017** and **2018** as the "*system it would have been recorded on, is now no longer in use".*

The Provider acknowledges that it received correspondence from the Complainants confirming that the First Complainant suffered from diabetes. Based on that information, the Provider confirms that the First Complainant was not classed as a vulnerable customer.

The Complaint for Adjudication

The complaint is that the Provider:

1. Proffered below par communication, customer service and complaints handling throughout and paid *"lip service"* to their situation for a prolonged period
2. Misled the Complainants between **2014** and **2018**, regarding their proposal for Alternative Repayment Arrangement while in the background, the Provider appears to have significantly delayed reviewing the Complainants' file, until it exited the Irish market and sold their loan to a new owner
3. Failed to implement an agreement for a *"warehouse and write off"* of €400,000 (four hundred thousand Euro) under MARP. When the Provider exited the Irish market, the Complainants submit they *"lost an agreement for a €400,000 reduction in their mortgage"*
4. *"Deliberately shredded"* the Complainants' paperwork and *"destroyed"* their file
5. Failed to complete an agreement to liaise with the new owner of the loan regarding the Complainants' Alternative Repayment Arrangement proposal.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **1 July 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 issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

The documentary evidence available for this investigation is severely lacking in many respects as the Provider states that it no longer has access to much of the documentation relating to this complaint. It is certainly disappointing that there is no documentation relating to any meetings or phone calls had between the parties, during the relevant time, nor is there any email correspondence, other than that shared by the Complainants. I am conscious in that regard that the Central Bank of Ireland's Consumer Protection Code 2012 has long since prescribed that: -

> *"11.5 A regulated entity must maintain up-to-date records containing at least the following:*
> *a) a copy of all documents required for consumer identification and profile;*
> *b) the consumer's contact details;*
> *c) all information and documents prepared in compliance with this Code;*
> *d) details of products and services provided to the consumer;*
> *e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
> *f) all documents or applications completed or signed by the consumer;*

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g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and
h) all other relevant information and documentation concerning the consumer.

11.6 A regulated entity must retain details of individual transactions for six years after the date on which the particular transaction is discontinued or completed. A regulated entity must retain all other records for six years from 83 the date on which the regulated entity ceased to provide any product or service to the consumer concerned.

11.7 A regulated entity must maintain complete and readily accessible records; however, a regulated entity is not required to keep records in a single location."

Although the Provider may have sold the Complainants' loan to a new owner in **2018**, I am not satisfied that this relieved the Provider of its obligations under the CPC in respect of the financial service which it had previously made available to the Complainants. It is very disappointing that the Provider did not consider it appropriate to retain the necessary records to meet those regulatory obligations.

It is accepted by the Provider that they were initially informed of the Complainants' financial difficulties in **2014** and it is accepted by both parties that the proposal sent in **2014** was received and rejected by the Provider who notified the Complainants of that decision.

The Provider states that the next proposal received was that of **5 March 2018** which it accepts it failed to act on. However, the Complainants state that this proposal was the result of ongoing communication between them and the Provider's representatives. There is no record of that communication as the Provider states that it no longer uses the systems on which that information was stored. Therefore, where the Complainants have stated that a meeting or phone call took place the Provider has no evidence to offer to refute that assertion.

As part of this process to seek a restructure, the Complainants say they submitted an SFS to the Provider on **24 January 2017**; the Complainants state that this was never responded to, and the Provider cannot offer any evidence to rebut this. From the documentation supplied, it is not clear to me the extent to which there were discussions around seeking a mortgage proposal in **2017** but I am satisfied that if, as I accept, the Complainants provided an updated SFS, this was for the purpose of seeking to get a repayment proposal approved.

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The Complainants state that a meeting was held on **9 February 2018**; again, there are no minutes or records of this meeting, and the Provider has no evidence to counter that contention. I am satisfied to accept, that at this meeting, there was a discussion surrounding a proposal which would include a write off, of some amount of debt, and that the Provider's representative was aware of the First Complainant's illness. The Complainants states that there was an offer of 10 options available to them under the MARP and that they then chose the option of a warehousing of debt, at this **9 February 2018** meeting. In relation to these 10 options the Complainants have provided no detail as to what these options were, but under the Provider's MARP it states:

> *"The [Provider] will explore a number of alternative repayment arrangements in order to determine which, if any may be appropriate to your circumstances. The alternative repayment arrangements may include:*
>
> 1. ***Temporary Transfer To Interest Only****…*
> 2. ***Part Capital Part Interest Only …***
> 3. ***Temporary Transfer to Interest Only With Reduced Payments*** *…*
> 4. ***Full Capital and Interest Moratorium*** *…*
> 5. ***Extending your Mortgage Term*** *…*
> 6. ***Arrears Balance Capitalisation*** *…*
> 7. ***Changing your Mortgage Product*** *…*
> 8. ***Split Mortgage –*** *this option may be considered if you are unable to afford your full monthly mortgage payment amount. If the [Provider] agrees to split your mortgage loan, we will create two balances; the first being an affordable balance (an amount you can afford to pay) and the second being a warehoused balance (no payments will be made of this amount for an agreed period of time) … It is important to understand that no interest will be applied to your warehoused balance, but this warehoused balance remains payable in full on or before the end date of your mortgage loan."*

From the evidence provided, and the Complainants stating that they chose an option available to them *"under the MARP",* I am satisfied that these were the options to which the Complainants have referred. It should be noted however that the MARP simply sets out what potential options the Provider may consider, and it does not dictate what must be offered to the Complainant, nor is it a requirement under the **Code of Conduct on Mortgage Arrears 2013** (CCMA) that any such option/s must be offered to a customer in arrears. The Provider states that it would not have accepted a proposal to write off of a significant amount of the loan. However, the Provider has no records of precisely what ensued at the meeting in question.

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It is likewise important to note that the Mortgage Arrears Resolution Process does not make "*options available*" to a borrower. Rather, the Mortgage Arrears Resolution Process sets out several options to be considered by a Provider, when a borrower encounters a repayment issue in respect of their mortgage loan. It is not a matter for the borrower to select a preferred option. Rather, if the borrower has a preference, this can of course be proposed to the lender, but the lender is under no obligation whatsoever to accept the borrower's preferred option. Rather, it is a matter for the Provider to consider the relevant options, including perhaps the borrower's preferred option, but there is no obligation on a Provider to accept any such option in question.

In respect of the Complainants' proposal to secure the warehousing of a very significant portion of their loan, it is accepted by the Provider that it took no steps to progress the proposal. It states that this was due to an administrative error, and this absence of progress continued for almost six months until the loan was sold to a new owner. As set out above, I am not satisfied that this failure to respond to the Complainants was an isolated error as there had previously been a failure to respond to the Complainants in **2017**.

Accordingly, on the basis of the evidence available, I am satisfied that the Provider failed in a significant way, to communicate with the Complainants in a timely manner. Because there was a hard deadline for any agreement to be reached between the parties, due to the impending sale by the Provider of a portfolio of loans, I am satisfied that this was an urgent matter which the Provider failed to adequately address. Provision 3.3 of the ***CPC*** requires providers to process instructions *"properly and promptly"* and, under Provision 4.2, the relevant information should be communicated to the customer in a timely manner with regard to the *"urgency of the situation"*. I am satisfied that this did not occur in this instance.

The Complainants contend that the delay on the part of the Provider was intentional and that it was seeking to delay until it had exited the Irish market; the Provider denies this. Whatever the explanation for absence of any adequate response, I am satisfied that there was an unacceptable and unreasonable delay by the Provider and that this happened from at least **2017**. I am satisfied that this delay continued until the Provider exited the Irish market as the issue was not acknowledged at all, until after the sale had completed. In my opinion, the conduct of the Provider in that regard, was unreasonable and unjust contrary to **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

It should be noted however, that I do not accept that any agreement had been secured by the Complainants from the Provider, to accept the warehousing option which the Complainants preferred. The Provider's failure in this instance, was not in my opinion, a failure to implement an arrangement agreed, but rather, it was a failure to respond to the Complainants' interactions when they were seeking to make arrangements to restructure a very significant mortgage debt.

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The Complainants further complain that the Provider *"deliberately shredded"* their documentation. The Complainant has submitted no evidence to support this contention and I am not satisfied that there was any deliberate destruction of documentation. However, I accept that the Complainants were led to believe, as a result of the **9 February 2018** meeting, that both parties were working towards a proposal when in fact the Provider was not, and I am satisfied that this failure by the Provider to progress matters caused the Complainants significant inconvenience and frustration.

In relation to the final element of the complaint, that the Provider failed to liaise with the new owner of the loan in relation to the Complainants' proposal, I am satisfied from the documentation provided that there was email correspondence from the Provider to the new owner in relation to this, and the Complainants received a response from that new owner, rejecting their proposal. There was no obligation upon the Provider to ensure that the new owner accepted the proposal; the Provider's failure was in not itself embarking on a consideration of the proposal.

Finally, I note that reference has been made to the health difficulties of the First Complainant. The Provider states that upon being informed of this, it did not classify him as a "vulnerable customer". Within the definitions provided in Chapter 12 of the ***Consumer Protection Code 2012*** (CPC) a vulnerable customer is defined as:

> ***"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)*

It is clear that the First Complainant had significant health difficulties which bore directly upon the Complainants' ability to repay their mortgage and was a driving factor in their need for assistance to restructure their arrears. However, I have been provided with no evidence to suggest that the effect of these physical health issues, impacted upon the First Complainants decision making capacity and therefore, I don't accept that the Provider was incorrect in not classifying him as a vulnerable consumer.

I note indeed that in a letter to the Provider dated **24 January 2017**, the Second Complainant provides authority for the First Complainant to act on her behalf, in relation to their mortgage account. The ill-health of the First Complainant was clearly a highly relevant factor to the discussions surrounding an alternative repayment arrangement, but it seems that the

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First Complainant was capable of engaging directly with the Provider, I am not satisfied that he should have been classed as a vulnerable consumer.

In summary, I am satisfied that the Provider unreasonably and unjustly failed to engage with the Complainants. On at least two occasions, it failed to progress the Complainants' proposals to address their restructure of arrears and the result was that no arrangement was in place at the time of the sale of the loan. I am satisfied that this was unreasonable of the Provider, within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

This caused the Complainants a significant amount of inconvenience and was detrimental to their position because, if the Provider had fulfilled its obligations and responded to the Complainants, they may have been able to put an arrangement in place, which would have transferred with the sale of the loan.

In marking my decision that this complaint is substantially upheld, I am mindful that there was no obligation on the Provider to agree to any specific proposal from the Complainants. It is very disappointing to note the failure of the Provider to respond to the Complainants during the period when they were clearly very worried by the impact of the First Complainant's illness on their ability to repay their borrowings, and they were seeking to engage in a meaningful way in order to restructure the loan.

Nevertheless, at this point, it is unclear as to what restructure arrangement, if any, the Provider might have considered to be appropriate, if it had engaged in a meaningful way with the Complainants, during that period. One can well understand however, the level of frustration and inconvenience encountered by the Complainants during this difficult period when they were faced with an ongoing situation preventing them from progressing their proposals in any meaningful way.

In all of those circumstances and, for the reasons outlined above, I propose to substantially uphold the complaint and to direct that the Provider pay compensation to the Complainants, as specified below.

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 grounds prescribed in ***Section 60(2)(b).***

- Pursuant to ***Section 60(4)(d) and Section 60(6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider make a compensatory payment to the Complainants in the sum of **€8,000** (eight thousand

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Euro) 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.

MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

25 July 2022

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—

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(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.