



<u>Decision Ref:</u>	2018-0085
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Commercial Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling - buy-to-let Appointment of a receiver Level of contact or communications re. Arrears Maladministration
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainant's mortgage loan held with the Provider.

The complaint is that the Provider failed to enter into negotiations with the Complainant, and unreasonably appointed a Receiver over her property.

The Complainant's Case

The Complainant purchased a buy to let property in 2009 with a mortgage loan of €120,000 from the Provider. She subsequently got into difficulty paying the mortgage loan.

The Complainant submits that three parties placed deposits to purchase the property, however the deposits had to be returned as the Provider failed to enter any negotiations with her regarding the redemption of the mortgage loan.

The Complainant submits that in December 2013 there was a fire at the property and the property was deemed hazardous. The Complainant submits that she had to pay to have the property restored and repaired, and she could not have a tenant in the property until the works were complete and the property deemed "safe" for a tenant to reside there.

The Complainant submits that she wrote to the Provider and attended at the Provider's branch on 3 and 14 September 2012. The Complainant states that "I had a meeting on both

occasions with [the Provider's representative] and supplied her with copies of my Bank Statements and any paperwork required by the Bank. I explained to [the Provider's representative] that I had been in a fire explosion... in June 2012, I now required medical treatment and subsequently suffered [a number of] miscarriages after the accident. I supplied the Bank with photos and doctors certificates. I went through my paperwork with [the Provider] in December 2012 and I explained that I would be under financial strain... I explained that I needed to enter an agreement with the bank to dispose of this property as I was under a lot of stress".

The Complainant submits that she attempted to negotiate with the Provider since December 2012. The Complainant submits that she did not receive any contact from the Provider, and after numerous attempts to liaise with the Provider it was brought to her attention that the Provider's representative she had met with in September 2012 had retired and her paperwork had all been misplaced.

The Complainant states that *"I refurnished the paperwork to the Bank in December 2012 after I had no progress I was told to refurnish all paperwork to [the Provider's representative] in Customer Credit Relationship Manager".*

The Complainant submits that despite communicating with the Provider on numerous occasions she received a letter from the Provider on 20 February 2014 stating that she was not co-operating.

In her Complaint Form dated 21 February 2014, the Complainant states she is seeking that the Provider:

"accepts payment of €63,500.00 (50% of the total amount due) being full and final settlement of the mortgage account...

I will incur the costs of bringing the property up to a safe liveable standard (for sale purposes), although technically the fire took place during a time when negotiations should have been long completed should the bank have entered any agreement with me to dispose of the property and redeem the mortgage with either of the three consecutive purchasers I secured".

The Provider's Case

The Provider submits that the Complainant refused to provide it with the up to date documentation/information required to assess her financial circumstances and consider her proposals. The Provider states that *"As a result of this and in light of the arrears on the Complainant's mortgage account, her case was progressed along the legal route which resulted in a Receiver being appointed in September 2015. The Complainant's property was subsequently sold and the sale proceeds were lodged to her mortgage account on 24th November 2015".*

The Provider also states *"Whilst the Bank acknowledges that the documentation provided by the Complainant in September 2012 may have been mislaid, the Bank did consent to the*

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sale of the Complainant's property in March 2013 and April 2013. The failure of the sale of the property to progress at that time was due to the Complainant rejecting the offers put forward by the Bank. Subsequent to this the Bank was unable to consider any proposals put forward by the Complainant due to her refusal to provide the Bank with up to date documentation/information".

The Provider submits that prior to the Receiver being appointed arrears letters had regularly issued to the Complainant which made her aware that if the arrears were not addressed then it could consider appointing a debt recovery agent or taking legal proceedings for recovery of the loan and/or repossession of the property. The Provider states that it took the decision to appoint a Receiver due to:

- “(i) the level of arrears on the account – approximately €19,000 when the Receiver was Appointed*
- (i) the repayment history on the account – last repayment to the account was made in August 2012.*
- (iii) the failure of the Complainant to provide the Bank with the information/documentation required to assess her financial circumstances.”*

The Provider submits that there have been no repayments made to the account from August 2012 until such time as the property sale proceeds and a refund was lodged to the account in May 2017.

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 22 June 2018, 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.

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Following the consideration of an additional submission dated 11 July 2018 from the Complainant, the final determination of this office is set out below.

Before turning to the issue at hand, I must point out the following:

- The Complainant submits that the Provider lost her personal data, including very sensitive medical data. The Complainant submits that the Provider lost two copies of her file “*somewhere in both [its branch] and [head office]*”. The Complainant submits that the files were never found nor did the Provider offer an apology or excuse for this matter contrary to the Data Protection Act 2003 and in particular Section 2C(b)(i) of the Act.

This Office informed the Complainant that “*any complaint in relation to breaches of data protection legislation, are not a matter for this office, and instead should be directed to the Office of the Data Protection Commissioner*”.

- The limitations of the jurisdiction of this Office have been set out to the Complainant. This Office can investigate the procedures undertaken and the conduct of the Provider, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage loan which is a matter between the Provider and the Complainant, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant.
- This Office wrote to the Complainant on 20 January 2016 setting out that:

*“this Office **cannot** examine the **conduct** or actions of a Receiver, as a Receiver is not a regulated financial service provider. Equally, we cannot examine a complaint against the Bank for the conduct of a Receiver...”*

We can, however, investigate the circumstances surrounding the appointment of the Receiver (before and after – provided it is the conduct of the Bank that is called into question, rather than the Receiver)...”

The issue to be determined is whether the Provider failed to enter into negotiations with the Complainant, and unreasonably appointed a Receiver over her property.

The Complainant submits that she made 58 written attempts to resolve the matter with the Provider. The Complainant also submits that her solicitor furnished numerous lengthy and in depth letters attempting to reach an agreement. The Complainant submits that her solicitor made his final attempt in August 2014, which was rejected by the Provider in September 2014. The Complainant states “*After rejecting my solicitors final proposal, the Bank then took the property into [its] possession after I had spent considerable monies on the decoration and refurbishment of the property after a fire. The Bank then held the property for another year before selling it and charged me a further years interest*”.

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The Complainant submits that the following were among the numerous correspondence she issued to the Provider:

- **Letter dated 9 January 2013 with enclosures to the Provider's Assistant Manager in the Customer Credit Department.**
The Complainant states that *"I was told by [the Provider] to now correspond with Assistant Manager Arrears support..."*
- **Letter dated 25 February 2013 with enclosures to the Provider's Assistant Manager in its Arrears Support Unit.**
The Complainant states *"I was told by the Bank to now liaise with Credit Operations..."*
- **Letter dated 25 March 2013 with enclosures to the Provider's representative in its Credit Operations Department.**
- **Letter dated 22 May 2013 with enclosures to the Provider's Credit Operations Department.**
- **Letter dated 6 June 2013 with enclosures to the Provider's Credit Operations Department.**
- **Letter dated 2 July 2013 with enclosures to the Provider's representative in its Credit Operations Department.**
The Complainant states that the Provider's representative *"telephoned me and requested that I refurnish all paperwork to the Bank a fourth time"*.
- **Letter dated 21 August 2013 with copy emails from the Estate Agent.**
- **Letter dated 29 August 2013 to the Provider's Manager in its Arrears Support Unit.**
The Complainant states that *"I received a letter from the Bank stating the Retail Credit Management Unit were now set up to deal with my query I was to write to them"*.
- **Letter dated 24 January 2014 to the Provider's Retail Credit Management Unit.**

The Complainant submits that during this time the Provider issued one letter offering to redeem the loan of €127,000 *"for €55,000 once off payment (to be received [from] the purchaser) and I sign up to a new loan... for the balance of €70,000 which was totally unacceptable and unfair terms"*.

The Complainant submits that she had multiple purchasers for the property in 2012 and she sought redemption figures prior to receivership as the Provider would not provide any form of an alternative arrangement. The Complainant states that the Provider *"constantly provided me with generic letters however the delay in [the Provider] producing proper redemption figures lost me a sale four times prior to the receivership"*.

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The Complainant submits that in October 2013 the Management Company informed her that there had been a fire in the property and the inside had been totally destroyed. The Complainant states *"I had to make sure the property had no tenant in it at this time as specified by the Fire Department it was now deemed unsafe for habitation, and therefore the arrears were mounting as I had still no resolution with [the Provider] despite my contact"*. The Complainant also states *"I spent four months bringing the property back to its former state redecorating it, replacing all carpets throughout, providing new furniture for the entire property. The property was completed in April 2014 and I was told I could now get a tenant to which I did after paying for the advertisement and the estate agents fee. The first month that the new tenant entered the property they were contacted by the Receiver to state all rent should be paid to their point of contact"*.

The Complainant states that *"While in hospital I pleaded with [the Provider] by phone prior to receivership to meet with me as I did not want to be placed in receivership knowing the effect this would have on me and I was intimidated, laughed at and bullied by [the Provider's] staff over the phone in the last two weeks of July 2014. I made every attempt to avoid receivership as I knew it would impact my future borrowings and mortgage application for a home of my own"*. The Complainant also states that *"I was informed by the staff that the calls were being recorded at that time therefore, it should not be a problem to access them"*.

The Complainant states that *"On numerous occasions the [Provider's] support staff cut me off on purpose to avoid taking my call after they took my name as they were aware I wanted to make an appointment, they laughed at me and cut off the call. On one occasion multiple staff members laughed together over the phone at me when I asked for an alternative to receivership and they cut me off"*.

The Provider has submitted three telephone recordings. It is clear from the content of these telephone calls that the situation and conversations were very difficult. However, I find no evidence that the Complainant was intimidated, laughed at or bullied on these calls. During one particularly difficult call the Provider's representative terminated the call, and advised the Complainant that this would happen. I am of the view that it would have been more appropriate if the Provider's representative had escalated the telephone call to his supervisor.

The Complainant states that *"While I was in hospital, the Bank sold it below the mortgage value, took possession of all my belongings, my furniture and contents which were valued at €20,000 and sent me a statement a year later for an outstanding amount which equals the value of the original with no breakdown or explanation"*.

The Complainant submits that she is still being charged interest for the shortfall for in excess of the six years that *"it is taking [the Provider] to come to an agreement, of which there has been none to date"*.

The Complainant states, in an email to the Provider dated 25 June 2013, that:

"All financial statements and bank statements were furnished to the Bank in September 2012."

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I had a two hour meeting in [the Provider's branch] to discuss the negative equity and restructure of the loan in September 2012.

The Bank subsequently lost all paper work and notes from the meeting as [the Provider's representative] retired in September 2012.

I refurnished all new paperwork in November 2012 and had another meeting in November 2012 to discuss same."

The Complainant submits that she advised the Provider that she would not take a risk that a third set of medical records and files would be lost, and that the Provider could review all of her finances as she only banked with it, and that she would therefore not supply any further information.

In her submission dated 14 August 2017, the Complainant states "*The amounts received for the property and the statement by the Bank produced [to the FSO] is the first time I have been informed of how much [it] received and lodged off the account. The shortfall from Sale Price to lodgement to the account has yet to be explained*".

The Provider submits that the Complainant contends that she provided her Relationship Manager in its branch with bank statements and supporting documentation in meetings held with her on 3 September 2012 and 14 September 2012 and that she went through her paperwork with it in December 2012.

The Provider states that "*It is difficult for the Bank to comment on this as the staff member who was dealing with the Complainant at the time left the Bank shortly after this. The Bank has previously apologised to the Complainant for any inconvenience caused to her*". The Provider submits that in order to progress matters, it did subsequently assess the Complainant's financial circumstances based on her Reduced Repayment Application Form from August 2012.

The Provider submits that its branch submitted a Reduced Repayments Form and supporting documents on 28 August 2012, and on foot of this application for forbearance and supporting documents, the Complainant was granted a six month 'interest only' arrangement from 21 August 2012 to February 2013. The Provider submits that the arrears on the account as at 27 December 2012 were €2,640.60.

The Provider submits that correspondence was received from the Complainant's solicitors on 6 December 2012, which advised that the Complainant had received an offer of €55,000 for the property. The Provider submits that the Complainant's solicitor requested that the Provider accept the net proceeds of sale of €50,000 in full and final settlement of the entire debt outstanding. The Provider submits that the Complainant was contacted by telephone on 19 December 2012 by its representative, who was managing her case at the time, and confirmed it would not be able to make a decision in relation to the full and final settlement offer on the property without a meeting and additional information and documentation being provided.

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The Provider submits that correspondence was sent to the Complainant on 19 December 2012 confirming the necessary documentation required and that the Provider's representative would contact her in early 2013 to arrange a meeting. The Provider submits that it received no response to this correspondence and its representative left a voicemail for the Complainant on 3 January 2013 and again on 9 January 2013. The Provider submits that on both occasions its representative received no return call.

The Provider submits that it received correspondence from the Complainant on 10 January 2013 with confirmation of her position including her proposal to *"sign up for a further loan for €10,000 along with the current market value offered by the purchaser in December 2012 in full and final settlement..."*. The Provider submits that in this correspondence, the Complainant also confirmed that she would provide no further documentation to it. The Provider submits that on receipt of this correspondence, the case manager contacted the Arrears Support Unit (ASU) by email on 10 January 2013.

The Provider submits that it issued a response to the Complainant on 18 February 2013, which advised that some further information was required before her application could be progressed. The Provider submits that it also advised the Complainant that she would be fully liable for the full residual balance of the mortgage, however, it would be prepared to discuss an arrangement for payment of same based on her repayment capacity.

The Provider states that it *"is under no obligation to accept a full and final settlement offer to discharge the residual debt on a mortgage loan in a sale for loss agreement"*. The Provider submits that in order for it to make an assessment of the treatment of the residual debt, other than restructure, it requires submission of up to date supplementary documentation, in order to make a full and fair assessment of the Complainant's capacity to make repayments.

The Provider submits that it received correspondence from the Complainant dated 25 February 2013 wherein she repeated her proposal for full and final settlement of the mortgage loan, and stated that the staff member who had dealt with her in 2012 *"did not process any of my paper work as she retired from [the Provider] delaying the matter even further as my application for a moratorium was never processed"*.

The Provider submits that an application was submitted to the ASU by its branch on the Complainant's behalf on 28 August 2012. The Provider submits that in this application the branch advised that the Complainant had requested a 3 month capital and interest moratorium followed by interest only repayments for 6 months. The Provider submits that following an assessment of the Complainant's financial circumstances, interest only repayments were approved for 6 months from August 2012.

The Provider submits that in order to progress the matter, it reviewed the Complainant's account together with the Standard Financial Statement (SFS) from August 2012, however the supporting paperwork was out of date for any further proposals regarding treatment of the residual debt other than a restructure arrangement. The Provider submits that on 20 March 2013 it wrote to the Complainant with approval in principle for voluntary sale for loss

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on the property on the basis that she discharge the full residual balance on the loan over a 15 year period.

The Provider submits that it received further correspondence dated 25 March 2013 from the Complainant wherein she stated that the sale of the property had fallen through due to its delay in dealing with the matter. The Provider states *"acceptance of offers on the... property are not dependent on the bank accepting your full and final settlement offer"*. The Provider submits that the Complainant's letter dated 25 March 2013 also outlined that the agreement provided by it on 20 March 2013 was unacceptable, and put forward a different proposal to the one sent in by the Complainant's solicitor in December 2012. The Provider submits that as this was a different proposal, its ASU was required to review this in full before reverting to the Complainant with a decision.

The Provider submits that on 22 April 2013, it issued a new Letter of Offer to the Complainant. The Provider submits that this Letter of Offer was issued based on the information provided by the Complainant in August 2012 as the Complainant had declined to provide it with up to date information. The Provider states *"The Letter of Agreement agreed to the sale of the property at €55,000 with net sale proceeds of €52,269... The residual balance of approximately €70,560 was to be repaid over a 25 year term with estimated repayments of €410.82 per month"*.

The Provider submits that on 7 June 2013 it received correspondence from the Complainant stating that she had been trying to resolve this matter since November 2012. The Provider states *"You also confirmed that you are rejecting the bank's offer of voluntary sale for loss and restructure of the residual balance over a 25 year term. You outlined two new proposals to the bank. Your first proposal involved the bank accepting the sale price of €55,000 excluding solicitors and management agent fees. You further proposed amalgamating all your loans with [the Provider], including credit card, and sign up to a new loan for €39,500 over a 25 year term. Your second proposal was to refinance the entire loan, including current arrears into a new loan for €122,000 for a term of 30 years. As you are aware, the outstanding balance on the above mortgage account is €123,786.14 with arrears of €7,324.39"*.

The Provider submits that on 18 and 20 June 2013 it received emails from the Complainant regarding her proposals she had put forward earlier that month, and requesting a new Letter of Offer to be furnished to her. The Provider states *"At this stage, the Bank required up to date financial information from the Complainant in order to assess her case, as the most recent Reduced Repayment Application form on file was dated 9th August 2012"*.

The Provider submits that on 25 June 2013 the Complainant spoke with its representative and *"he once again clarified the bank's requirements... This was confirmed to you in writing by [the Provider's representative] on 25 June 2013"*. The Provider submits that it is unable to provide a copy of this telephone call, as due to an oversight it was not recorded. The Provider submits that its representative's letter to the Complainant dated 25 June 2013 also offered to meet with the Complainant in the Provider's head office to discuss her application, and confirmed that he would assess the Complainant's case the same day. The Provider submits that the Complainant then wrote to it via email on 25 June 2013 to advise

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that she had previously provided this information and indicated that she would not be providing it again.

The Provider submits that on 25 June 2013, the case manager from its ASU wrote to the Complainant addressing the proposals and correspondence which it had received from her. The Provider states that:

“This correspondence confirmed the following:

- *The Bank had consented to the sale of the Complainant’s property, with the terms as outlined in the Letter of Agreement dated 22nd April 2013.*
- *In order to assess the Complainant’s proposal in relation to the residual balance, the Bank required an up-to-date completed Standard Financial Statement and relevant supporting documentation.*
- *The case manager confirmed that he was willing to meet with the Complainant in [head office] to receive these documents and would assess the Complainant’s case immediately on receipt of same.*
- *The case manager gave the Complainant 7 days to provide this information. In the event that the Bank did not receive this information within 7 days, the Complainant was advised that the Bank would have no alternative then but to classify the Complainant as “not co-operating”.*

The Provider submits that it received emails from the Complainant on 2, 4 and 10 July 2013 together with a letter on 9 July 2013 seeking an update regarding consent to sell. The Provider submits that it issued a response to the Complainant on 22 July 2013 in relation to her correspondence of 2 July 2013, which it had logged as a complaint. The Provider states that *“In this correspondence the Bank outlined the interactions with the Complainant in relation to her account since August 2012. This correspondence advised the Complainant again, that any proposals regarding residual debt could only be assessed with the provision of an up to date Standard Financial Statement and full supporting documentation”*.

The Provider submits that it received further correspondence from the Complainant on 25 July 2013, 13 August 2013, 3 September 2013 and 28 January 2014 seeking clarification in relation to its position regarding the sale of her property and also included a new proposal in relation to the repayment of her loan. The Provider states that it *“did not issue a response to the Complainant in relation to this correspondence as the Bank had explicitly outlined its position to the Complainant and what documentation it required in order to consider any proposal from the Complainant in its correspondence dated 25th June 2013. The Bank also wrote to the Complainant on 22nd July 2013 and outlined its position in setting out in detail the requirements of the bank and offered to meet in an effort to resolve matters. In summary, it was made explicitly clear to the Complainant that the Bank required an up to date SFS and supporting documentation in order to agree terms for repayment of any residual debt arising from the sale of the property... At that time the Complainant had still not provided the Bank with the documentation required to assess her financial circumstances and consider her proposal”*.

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The Provider submits that correspondence issued to the Complainant on 31 January 2014 requesting her to complete a Standard Financial Statement enclosed with the letter and to submit it to the ASU with the relevant supporting documentation in order to assess her financial circumstances. The Provider submits that as this documentation was not provided, it issued correspondence to the Complainant on 20 February 2014 advising her that she could be deemed as “not co-operating” if she did not provide the documentation which had been previously requested.

The Provider submits that it received a response from the Complainant on 26 February 2014 *“in which she expressed her surprise at receiving the Bank’s letter of 20th February 2014”*. The Provider submits that it issued correspondence to the Complainant on 13 March 2014 which advised her that it would instruct its solicitors to begin legal action, unless the entire amount due and owing to the account, or firm repayment proposals, were agreed within 10 days.

The Provider states that *“In light of the Complainant’s failure to provide the Bank with the required documentation, a demand letter issued to her on 18th June 2014”*. The Provider submits that it received correspondence from the Complainant on 30 June 2014 and 13 August 2014, and the Complainant telephoned the ASU on 19 August 2014 where she was advised that unless the arrears were cleared and full contractual repayments were being met, a Receiver would be appointed in relation to her property. The Provider submits that it received further correspondence from the Complainant’s solicitor on 26 August 2014 containing proposals from the Complainant in relation to her mortgage loan account. The Provider submits that it issued a response to the Complainant’s solicitor on 16 September 2014, advising that the Complainant’s proposals were not acceptable, and that in the absence of the arrears being cleared and the account returning to full capital and interest repayments, the Complainant’s account would remain in Legal Arrears Management.

The Provider submits that it received correspondence from the Complainant’s solicitor on 19 September 2014 expressing his dissatisfaction at the Provider’s decision to appoint a Receiver and sought clarification as to the appeal process. The Provider submits that a Receiver was appointed in relation to the Complainant’s property on 23 September 2014, and correspondence issued from the Receiver to the Complainant on this date confirming his appointment.

The Provider submits that on 10 October 2014 the Receiver received a letter from the Complainant’s solicitor, advising that the Complainant had rejected the appointment of a Receiver to her property and that she was appealing the decision through this Office. The Provider submits that on 18 December 2014 the Receiver received correspondence from the Complainant outlining her previous interactions with the Provider. The Provider states that *“The Complainant referred to the agreement letter issued on 20th March 2013 (which she had not accepted) and stated that she was willing to pay and honour the new terms of this contract. She requested this matter be brought to a satisfactory close prior to any further expense being incurred”*. The Provider submits that on 22 December 2014 the Receiver responded to the Complainant and advised that her correspondence of 22 December 2014 had been forwarded to the Provider and that he had been advised to continue with the receivership.

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The Provider submits that the Complainant telephoned its ASU on 28 September 2015, and its representative explained to her that the sale of the property was being managed by the Receiver and that once the property was sold and the sale proceeds were received, it would contact her in relation to the residual debt. The Provider submits that its staff member also advised the Complainant that if she was unhappy with how her case was dealt with prior to the appointment of the Receiver, she should submit a complaint.

The Provider submits that in October 2015 management of the Complainant's account was referred to a third party agent acting on its behalf. The Provider submits that the third party agent wrote to the Complainant on 15 October 2015, 18 November 2015 and 10 December 2015 requesting her to complete an Income & Expenditure form and submit it to them in order to assess her financial circumstances. The Provider submits that representatives from the third party agent also spoke to the Complainant on 16 October 2015 and 11 December 2015, and during the telephone call of 11 December 2015, the Complainant informed the agent that she would not be completing the Income and Expenditure Form.

The Provider submits that the Complainant's property was subsequently sold and net sale proceeds of €44,487.61 were lodged to her mortgage loan account on 24 November 2015. The Provider submits that the Complainant wrote to its Mortgage Appeals Office on 25 November 2015, and her correspondence was received on 1 December 2015. The Provider submits that the Mortgage Appeals Office wrote to the Complainant on 7 December 2015 to advise that as her property related to a Buy to Let and was not covered under the Mortgage Arrears Resolution Process (MARP), her appeal was out of scope. The Provider submits that this letter also advised the Complainant that her appeal was not submitted within the normal timeframe. The Provider submits that its third party agent wrote to the Complainant on 14 December 2015 and advised that management of her account was being returned to the Provider with immediate effect.

The Provider submits that the net proceeds of sale were lodged to the Complainant's mortgage loan account in November 2015, which is in line with the average 12 month period of time which it would take for the sale of a property to be concluded after it has been secured by it. The Provider submits that it issued the Complainant with a letter giving a breakdown of the distribution of the gross sale proceeds on 23 August 2017.

The Complainant, in her submission to this Office dated 11 July 2018, states that:

"The Financial Service Provider withdrew the proceeds of sale from the mortgage account and did not provide a breakdown for two years however, I was not authorised access to this account any longer and could not see any transactions but it is noted that after two years once an apportionment account was furnished the Financial Service Provider sold the property for a portion of its value... Despite the property being sold and paid against the loan the interest and chares placed on the amount due by the Bank are excessive and the amount outstanding is now higher than the original mortgage taken out despite the lump sum received from the sale taken off... The property was worth €115,000 the outstanding loan was €109,000 the property sold and monies paid off the loan and now the balance outstanding

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stands at €120,000 with the property sold the balance now due is higher than the original mortgage amount despite a property selling for 68k off a loan of 109k normally would leave a balance of 40k.”

The Complainant has submitted a copy email from an estate agents dated 9 February 2018 which states that *“The average sales price for a 2 bed Apartment at [similar location as the property the subject of the mortgage loan] in 2015, would have been €115,000”*.

As set out above, this Office wrote to the Complainant on 20 January 2016, setting out that:

*“this Office **cannot** examine the **conduct** or actions of a Receiver, as a Receiver is not a regulated financial service provider. Equally, we cannot examine a complaint against the Bank for the conduct of a Receiver...*

We can, however, investigate the circumstances surrounding the appointment of the Receiver (before and after – provided it is the conduct of the Bank that is called into question, rather than the Receiver)...”

The Provider has submitted a copy of the mortgage loan account statements and the realisation account for the sale of the property dated 24 November 2015. I note that the balance outstanding on the property in September 2015 was €139,441.50, the net proceeds of sale of €44,487.61 was lodged to the account in November 2015 leaving an outstanding balance on the account of €94,953.89. There does not appear to have been any payments made to the account since the lodgement of the net proceeds of sale, while interest is accruing on the account.

The Complainant submits that the Provider breached provisions 3 a), 3 b), 6a), 7, 11, 13, 12 c), 13, 14 p), 16 (step 4), 19, 22 a), 22 b), 23 vii), 24, 28, 29, 31, 37, 38, 39, 43, 45, 47, 49, 50, 56, 58, 59 and 60 of the Code of Conduct on Mortgage Arrears (CCMA). The Complainant also states that *“I wrote to the Appeals Board of [the Provider] pursuant to Provision 43 of the Central Banks Code of Conduct on Mortgage Arrears... but there was no response and the appeal was closed by the Bank for no reason”*.

The CCMA applies to *“the mortgage loan of a borrower which is secured by his/her primary residence”*. I note that the property, the subject of the mortgage loan, was a buy to let property and not secured by the Complainant’s primary residence, I must accept therefore that the Complainant’s mortgage loan was not subject to the CCMA.

However, the Provider has obligations pursuant to the Consumer Protection Code 2012 (the 2012 Code). The Complainant submits that the Provider has breached the General Principles of the 2012 Code. Chapter 2 of the 2012 Code provides:

“GENERAL PRINCIPLES

A regulated entity must 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;

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- 2.2 acts with due skill, care and diligence in the best interests of its customers;*
- 2.3 does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service;*
- 2.4 has and employs effectively the resources, policies and procedures, systems and control checks, including compliance checks, and staff training that are necessary for compliance with this Code;*
- 2.5 seeks from its customers information relevant to the product or service requested;*
- 2.6 makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;*
- 2.7 seeks to avoid conflicts of interest;*
- 2.8 corrects errors and handles complaints speedily, efficiently and fairly;*
- 2.9 does not exert undue pressure or undue influence on a customer;*
- 2.10 ensures that any outsourced activity complies with the requirements of this Code;*
- 2.11 without prejudice to the pursuit of its legitimate commercial aims, does not, through its policies, procedures, or working practices, prevent access to basic financial services; and*
- 2.12 complies with the letter and spirit of this Code.”*

Provisions 8.3 and 8.12 of the 2012 Code provides:

“8.3 Where an account is in arrears, a regulated entity must seek to agree an approach (whether with a personal consumer or through a third party nominated by the personal consumer in accordance with Provision 8.5) that will assist the personal consumer in resolving the arrears.”

“8.12 Where arrears arise on an account and where a personal consumer makes an offer of a revised repayment arrangement that is rejected by the regulated entity, the regulated entity must formally document its reasons for rejecting the offer and communicate these to the personal consumer, on paper or on another durable medium.”

While it is most disappointing that the Provider appears to have mislaid the Complainant’s documentation submitted by her in September and November 2012, I note that the Provider subsequently requested financial information on numerous occasions in order that it could assess the Complainant’s financial circumstances. While I note that the Complainant had been engaging with the Provider and put proposals to the Provider, I must accept that it required up to date information from the Complainant in order to assess her financial circumstances and as this was not forthcoming, it could not assess her proposals regarding the mortgage loan account.

While I understand that this situation was very stressful, I have to accept that a financial service provider is entitled to seek and receive the necessary up to date documentation to assess a person’s financial circumstances when they are unable to meet their commitments under a mortgage loan and are seeking an alternative repayment arrangement.

/Cont’d...

As outlined above, this Office can investigate the conduct of and procedures undertaken by the Provider, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage loan which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints.

I must point out that the Provider is not obliged to provide the Complainant with an alternative repayment arrangement. The Complainant has a contractual obligation to repay the mortgage loan in full and in the terms originally agreed.

It is also disappointing that the Provider did not reply to the Complainant's correspondence received by it on 25 July 2013, 13 August 2013 and 3 September 2013. That said, I must accept that the Provider had clearly set out to the Complainant what was required from her in order to assess her proposals. I note that there was a significant delay on the part of the Provider in issuing the Complainant with a breakdown of the distribution of the gross sale proceeds. The net proceeds of sale were lodged to the Complainant's mortgage loan account in November 2015, however a breakdown of the distribution of the gross sale proceeds was not provided to the Complainant until 23 August 2017. This is unacceptable, particularly in such distressing circumstances.

To mark the Provider's lapses in service, that is, its failure to respond to the Complainant's correspondence dated 25 July 2013, 13 August 2013 and 3 September 2013, and, its delay in furnishing the Complainant with a breakdown of the distribution of the gross sale proceeds, I direct the Provider to make a compensatory payment to the Complainant in the sum of €750.00 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider

Consequently, it is my Legally Binding Decision that this complaint is partly upheld.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €750.00 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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**

25 July 2018

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.