



<u>Decision Ref:</u>	2018-0095
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling (non- Mortgage Arrears Resolution Process) Level of contact or communications re. Arrears
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a residential business mortgage loan the Complainant took out in 2006, which loan the Provider (against which this complaint is made) commenced the management in October 2015. When the Provider took over the day-to-day administration of the facility, the Complainant was repaying an amount of €2,200 towards the loan, on foot of an alternative repayment arrangement. At this point in time the loan was in arrears in the amount of €8,048.66.

In February 2016, following consultation with the Provider, the Complainant decided to place the property forming security for the loan in question on the market for sale. In March 2016 the Provider indicated that a guide price of between €650,000 and €750,000 should be listed as an estimated price for the property in order to progress the sale.

According to the Provider, in or around March 2016 the full monthly instalment of €4,077.11 became due and owing and a direct debit request for this sum was placed on the Complainant's nominated payment account. This amount was returned unpaid. Communications ensued between the parties during the course of which the Complainant made it known that he could not afford the increased repayments. Ultimately it was agreed between the parties that the Complainant could continue to repay the lower monthly amount of €2,200 towards his mortgage loan; however, arrears would continue to accrue.

In July 2016 the Complainant contacted the Provider to outline that he had been advised to take the property off the market until 2017, which would be after the opening of a primary

care centre. The Complainant indicated that the sale price achievable in 2017 would be substantially higher once the care centre was in operation.

In October 2016 the Provider completed an overview of the Complainant's loan account and it determined that it would not be in a position to agree to the Complainant's proposal to recommence the marketing of the property in 2017. A letter dated the 12 October 2016 confirming the position issued to the Complainant, which letter also advised that the Provider may have no alternative but to exercise its legal and contractual rights to demand payment in full and to enforce any security provided. The Complainant responded to this correspondence by email dated the 13 October 2016, stating that he had been proactive with regard to the facility and reiterating his intention to sell the property with a view to discharging the entire loan. This email was forwarded to the Provider again on the 18 October 2016. The Provider did not respond to these emails.

On the 14 November 2016 the Provider's Solicitors wrote to the Complainant to advise that they had been appointed to act on the Provider's behalf. This letter included a formal demand to pay the outstanding sum of €383,019.53, due under the loan. The Complainant's Solicitors responded to this letter on the 29 November 2016, emphasising that the Complainant had maintained regular contact with the Provider concerning the loan and that the Complainant intended to sell the property to redeem the facility in full. The Provider's Solicitors responded to this letter on the 1 December 2016 and reiterated the Provider's position regarding the outstanding monies due.

On the 1 December 2016 the Provider appointed a Receiver over the property forming the security for the Complainant's mortgage loan. The Receiver wrote to the Complainant by letter dated the 5 December 2016 informing him of the recent appointment. Following the appointment of a Receiver, the Complainant continued to communicate with the Provider expressing his dissatisfaction with the "*drastic action*" taken and requesting it to come to a mutually agreeable solution. Despite the Complainant's requests to defer the receivership, the Provider was unwilling to change its position that a Receiver would remain in place.

The Complainant's Case

The complaint is that the Provider acted wrongfully and/or unfairly by appointing a Receiver over the property forming security for the Complainant's loan and the manner in which he was treated by the Provider regarding the administration of his mortgage loan.

The Complainant is extremely dissatisfied with the manner in which he has been treated, outlining that he has been "*lied to, ignored and misrepresented*" by the Provider.

The Complainant emphasises that he has been "*diligent, honest, upfront and proactive*" in all his dealings with the Provider.

On his Complaint Form dated the 16 December 2016, when asked how he would like the Financial Service Provider to put things right the Complainant stated as follows-

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“I would like the Financial Service Provider to withdraw their receivership and to agree a timeline on the disposal of the asset.”

The Provider’s Case

The Provider rejects the complaint and insists that it acted correctly and in accordance with the mortgage contract when it appointed a Receiver over the mortgage security property.

The Provider explains that when it took over the administration of the Complainant’s loan in 2015 the account was already in arrears. When the Complainant defaulted on repaying the full amount due on the account from March 2016, arrears continued to increase. The Provider states that following a review of the Complainant’s account in October 2016 it determined that it had no alternative but to exercise its contractual and legal right to demand payment in full and to enforce the security provided. Its review took into account the following-

- It was no longer in a position to offer the Complainant an alternative repayment arrangement to address the outstanding arrears.
- The Complainant had advised his Relationship Manager that he was not in a position to meet his monthly instalment of €4,077.11 and could only maintain a monthly instalment of €2,200.
- The Complainant indicated that he was unable to refinance the loan with another lender.
- The Complainant had been given the opportunity to sell the property from January to July 2016 to no avail and no guide price was listed on the property despite several requests that a guide price be listed to advance the sale.
- The Complainant withdrew the property from the market without the Provider’s consent.

While the Provider acknowledges that it did not respond to the Complainant’s email of the 13 October 2016, it states that the only action it would have considered to negate the appointment of a Receiver was payment of the full outstanding loan balance.

The Provider states that its decision to appoint a Receiver was made in accordance with the terms and conditions of the Complainant’s mortgage agreement. An event of default had arisen on the account, arrears continued to accrue and there was no confidence that the Complainant would remarket the property in accordance with the Provider’s instructions.

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

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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 27 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.

In the absence of any substantive submissions by either party to be taken into account, the final determination of this office is set out below.

It should be noted from the outset that this Office cannot examine the conduct or actions of a Receiver, as a Receiver is not a regulated Financial Service Provider. Equally, this Office cannot examine a complaint against a Financial Service Provider about the conduct of a Receiver appointed by that Provider, because, at law, a Receiver is considered to be an agent of the mortgagor (i.e. of the borrower) and not an agent of the Financial Service Provider. This Office can, however, investigate the circumstances surrounding the appointment of a Receiver. Insofar as the present complaint concerns the actions of the Provider prior to the appointment of the Receiver, this can be investigated. Issues relating to the amount realised by the sale of the investment property by the Receiver and the manner in which those proceeds were achieved, falls outside the remit of this Office, except insofar as those aspects represent the consequences of the Provider's decision to appoint a Receiver at the relevant time.

The Complainant is aggrieved at the manner in which he has been treated by the Provider regarding the administration of his mortgage loan. The crux of his complaint is that the Provider should not have resorted to the appointment of a Receiver over his mortgage property in circumstances where he was at all times proactive in the servicing of his loan and given that his ultimate intention was to sell the mortgage property in order to redeem his loan in full.

The factual background leading up to the complaint has been set out in brief above and both parties have provided detailed timelines of events in their respective submissions to this Office. I will now outline the salient historical details.

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The Complainant took out the mortgage loan in question in 2006. A copy of the Letter of Approval dated the 18 August 2006 has been supplied in evidence. The Loan Type is described thereon as “Residential Business Loan”. The loan advanced was in the amount of €502,500.00, repayable over a 20 year term at an interest rate of 4.7000%. Page 1 of the mortgage contract stipulates that the monthly repayments will comprise €3,233.56.

Special Condition K refers to the security for the loan and confirms the non-consumer nature of the loan as follows-

“K. THAT THE SECURITY FOR THIS LOAN DOES NOT COMPRISE A DWELLING HOUSE USED OR TO BE USED AS A PRINCIPAL RESIDENCE OF THE APPLICANT OR AS THE PRINCIPAL RESIDENCE OF THE DEPENDANTS OF THE APPLICANT AND AS SUCH THIS LOAN BEING FOR BUSINESS OR COMMERCIAL PURPOSE IS THEREFORE A NON CONSUMER LOAN AND THE APPLICANT HAS FURNISHED A DECLARATION TO THAT EFFECT.”

The Complainant signed the Acceptance of Loan Offer on the 23 October 2006 and in so doing he declared that-

“I the undersigned accept the within offer on the terms and conditions set out in

- (i) Letter of Approval*
- (ii) the General Mortgage Loan Approval conditions*
- (iii) the [Bank’s] Mortgage Conditions*

copies of the above which I have received, and agree to mortgage the property to [the Bank] as security for the mortgage loan.”

Following the sale of the mortgage loan inclusive of any guarantees, security and rights to the [purchaser of the loan] it subsequently appointed the Provider to deal with the day-to-day management of the loan. The Provider has stated the following to be the status of the loan when it took over the administration of the Complainant’s account as follows-

Outstanding Balance	€381,889.86
Arrears Balance	€8,048.66
Scheduled Repayment Terms	Monthly Repayment of €2,200 agreed over a six month period. This arrangement was to expire on 27 February 2016. Followed by a Monthly Repayment of €4,077.11 effective from 27 March 2016.
Maturity Date	27/10/2026

There doesn’t appear to be any conflict over the fact that the Complainant, following discussions with his then Relationship Manager, decided to place the mortgage property on the market. The Complainant indicates that he commenced trying to dispose of the property

as early as September 2015. In or around July 2016 the Complainant withdrew the property from the market upon advice from his nominated Auctioneers. Although the Complainant informed the Provider of his decision to take the property off the market, the Provider insists that it never authorised such an action. The Provider outlines further that the Complainant was notified in advance that such an action would not meet with approval.

While the property was on the market, i.e. prior to July 2016, an issue arose in respect of the monthly mortgage repayments.

The Provider states that when it took over the administration of the Complainant's account an alternative repayment arrangement was in place on the loan, with an expiry date of the 27 February 2016 fixed. The Provider explains that following expiry of this arrangement, repayments were due to revert to a monthly amount of €4,077.11. It seems that in advance of the 27 March 2016, the date the full repayment amount was due to be collected, the Complainant contacted the Provider to request an extension of the alternative repayment arrangement. The Provider acknowledges that it has no record of a follow up call being made to the Complainant about his forbearance request. In accordance with the terms of the repayment arrangement in place on the account, the full contractual amount was applied to the account on the 27 March 2016.

Following on from this, extensive communication ensued between the parties concerning the Complainant's request to continue servicing the account on an interest-only basis, culminating in the Provider refusing to offer an extended alternative repayment arrangement. This decision was communicated to the Complainant by email dated the 9 May 2016. Subsequently, the Provider agreed to allow the Complainant to repay the lower amount of €2,200 per month, conditional upon the full contractual instalment being applied to the account. Arrears would continue to accumulate on the account, given that an amount less than the requested payment was being repaid.

Although this complaint is primarily focused on the appointment of a Receiver, which I will address shortly, the Complainant has also expressed dissatisfaction with the manner in which his forbearance request was handled and over the Provider's "unilateral decision" to reinstate the full monthly instalment on his account.

The Provider has been unable to furnish a copy of the written agreement underlying the alternative repayment arrangement in question. The Provider insists that the arrangement, negotiated with the original lender, was due to expire in February 2016. In its letter to this Office dated the 14 September 2016 the Provider claims the following-

"We can confirm that [the Provider was] not provided with written documentation regarding the forbearance option that afforded the Complainant reduced repayments of €2,200 until February 2016 however we derived the billing schedule from the information provided to our offices by [the original lender]."

It is most disappointing that the Provider does not have the written agreement in relation to the Alternative Payment Arrangement.

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I am of the view that the Complainant's own request for an extension of the interest-only arrangement in the lead up to March 2016, when the full instalment was due to be applied to the account, suggests an awareness on his part that the reduced repayment arrangement was due to imminently conclude. The Complainant's request to extend the reduced repayment arrangement is alluded to in his own email to the Provider of the 29 March 2016 when the Complainant outlined that *"In late February or early March I spoke to [a representative of the Provider] and explained my situation again, she said she would look into it. I duly waited for someone to get back to me so that I could extend the existing arrangement until the premises is sold..."* On this basis, I accept that the agreement was due to expire in February 2016.

The Provider has claimed that on the 9 May 2016 it advised the Complainant that it was not amenable to extending the interest-only repayment arrangement on the loan. By email communication dated the 9 May 2016 the Complainant was advised as follows-

"The [purchaser of the loan] have declined your request to extend the forbearance agreement for a period of 6 months. As previously advised, you can continue to make repayments at the reduced level of €2,200 per month however arrears will accrue on the account."

Ultimately the Complainant reverted to the monthly repayment of €2,200. I accept that he was informed that arrears would continue to accrue during the continuance of this repayment period. That this information was conveyed is demonstrated in the email excerpt above, and is further illustrated by the following extract from an earlier email dated the 29 April 2016 from the Complainant's Relationship Manager to the Complainant-

"The [purchaser of the loan] may, however, consider accepting reduced repayments of €2,200 per month for a 6 month period with arrears accruing at an interest rate of 10% to be discharged in full upon the sale of the property. This will require approval from the [purchaser of the loan] you might advise if this is something you would consider."

Given that a lender is under no obligation to accept lower repayments (than those outlined in the original mortgage contract) from a borrower; considering the Complainant's original commitment to service the loan in accordance with the Letter of Approval dated the 18 August 2006; and, in circumstances where the Provider did assess the Complainant's forbearance request, I must accept that the Provider was entitled to apply the full contractual amount to the Complainant's account with effect from March 2016. However, I do note that the Provider took an extended period of time to consider the request, with an official response to the Complainant's late February/early March request not forthcoming until May 2016. I am of the view that given this timeframe, the Provider did not act in accordance with Section 23 of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (lending to small and medium-sized enterprises) Regulations 2015, which provides as follows-

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“When an alternative arrangement comes to an end, a regulated entity shall promptly review the borrower’s situation in order to assess whether a further alternative arrangement is necessary.” [emphasis added]

Returning now to the chronology of events and in particular the decision to place the mortgage property on the market. By January 2016 the property was on the market. The Provider states that the Complainant was advised to list the property as having a guide price of between €650,000 to €750,000 but that he refused to do this, saying he would not sell the property for less than €1,000,000. The Complainant asserts that at the time he indicated that the property was worth in the region of €750,000 to €1,000,000; however, he denies telling the Provider he would not sell for less than €1,000,000. In his submission to this Office dated the 28 September 2017 the Complainant states that his Auctioneer did work from a guide price of between €650,000 and €750,000 but that he had hoped a sale would achieve more.

It is clear that the Provider was anxious that a guide price of €650,000 be fixed, as evidenced from an email dated the 29 April 2016 from the Provider to the Complainant which states the following-

“We understand that you are agreeable to the sale of the property with a view to discharging your liabilities in full to the [purchaser of the loan]. As previously discussed, both our Real Estate team and your [Real Estate Team] are of the opinion that a guide price of c. €650,000 should be placed on the property...”

In circumstances where I do not have any submissions from the Auctioneer who attempted to sell the property, or any advertisements showing the price the property was listed at the time, I am unable to determine exactly what guide price was detailed.

On the 27 June 2016 the Provider emailed the Complainant looking for an update as to the progress of the sale. By email dated the 8 July the Complainant informed the Provider as follows-

“I had a meeting with my auctioneer last week and he has advised me to take the property off the market until the new year due to the scheduled opening of the primary care centre being delayed until late autumn. With over 100 people due to be employed there and the volume of footfall created he has advised me to wait until the centre opens to reassess our options.”

The Provider states that in the wake of this correspondence the Complainant was contacted and advised that it was unlikely that the [purchaser of the loan] would be agreeable to waiting until 2017 to complete a sale of the property. The Complainant was urged to investigate the option of refinancing so that he could settle his obligations to the [purchaser of the loan]. By email dated the 14 July 2016 the Complainant emailed the Provider and outlined the following-

“I spoke to my bank and they told me they wouldn’t give me a loan, I also got a second opinion from another auctioneer and both he and [the Complainant’s auctioneer] are

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of the same opinion. It would be madness to sell now they both advised waiting for the primary care centre to open and to then oust [sic] for a sale in the new year."

Subsequently, on the 28 September 2016 the Provider emailed the Complainant asking him when exactly he proposed to place the property back on the market for sale. The Complainant responded by email of the same date explaining the following-

"It will be in the early new year, February 2017, the primary health centre is nearing completion opposite the shop and should be open by Christmas so I have been advised to wait until February to maximise the sale price."

Following on from this, the Provider carried out an overview of the Complainant's account, which culminated in its decision to reject the Complainant's proposal to put the property on the market in 2017.

By letter dated the 12 October 2016 the Provider informed the Complainant as follows-

"Your proposal to place the property on the market for sale in February 2017 was declined by the [purchaser of the loan] for commercial reasons."

The letter also advised the Complainant of the possibility of enforcement action being taken-

"It is important to resolve the arrears on your Facility to bring your account up to date, Otherwise, the [purchaser of the loan] may have no option but to exercise their legal or contractual rights to demand payment in full and to enforce any security you have provided."

Enforcement action could include the appointment of a receiver to manage and subsequently sell any asset(s) provided as security in connection with your loan or the initiation of legal proceedings."

The Complainant responded to this letter the following day, the 13 October 2016, telling the Provider he was *"somewhat surprised"* at the tone used in the letter and the *"strong arm approach"*. The Complainant reiterated his intention to sell the property in order to discharge the loan in full and explained that he had received professional advice regarding the *"best course of action regarding the sale of the premises"*. The Complainant expressed hope that *"we can come to a mutual agreement regarding the time line for sale of the premises"* and indicated that he would appreciate a prompt response.

The Provider has acknowledged that the Complainant's email of the 13 October 2016 was not responded to. The Complainant forwarded the email to the Provider again on the 18 October 2016. A response to this forwarded email by the Provider was not forthcoming either.

On the 24 November 2016 a letter of demand issued to the Complainant, seeking payment of the sum of €383,019.53 by 5pm on the 28 November 2016. The letter stipulated further

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that if the requested payment was not made, a Receiver could be appointed over the assets securing the loan to recover the debt due and owing.

On the 29 November 2016 the Complainant's Solicitor wrote to the Provider's Solicitor requesting that no further action be taken.

The Provider's Solicitor contacted the Complainant's Solicitor by letter dated the 1 December 2016 confirming the position of the Provider. A Receiver was subsequently appointed over the property in question by an Instrument of Appointment of Receiver dated the 5 December 2016.

It is the appointment of a Receiver over the mortgage property, together with the manner of that appointment, which the Complainant is most concerned with.

In December 2016, at the time the Receiver was appointed, the Complainant's mortgage account was already in substantial arrears. Two months earlier, by letter dated the 12 October 2016 the Complainant was advised that his account was in arrears by €22,291.90. The Complainant had been made aware in April 2016 that by failing to repay the full monthly instalment towards his account, arrears would continue to accumulate and indeed they did.

Although the Complainant had the property on the market, with a view to discharging his outstanding debt in full until July 2016, he made the decision to withdraw the property from the market at that point, without the Provider's consent. While I accept that he received professional advice about the best course of action to take regarding the sale of the property from auctioneers, the withdrawal of the property from the market was a matter that should have been fully discussed with the Provider before any such decision was taken. It is clear from the correspondence that has been furnished in evidence that the Provider had reservations about postponing the sale, which reservations were notified to the Complainant. In his submission to this office of the 28 September 2017 the Complainant argues that he did not withdraw his property from the market in the strict sense because it was always for sale.

This is at odds with an earlier submission by the Complainant. In a timeline of events the Complainant submitted to this Office under cover of letter dated the 21 March 2017 the Complainant outlined the following-

"The property was duly put up for sale and we were not successful in securing a buyer. So on the advice of two auctioneers I withdrew the property from sale with the intention of putting the property up for sale in the spring of 2017."

By letter dated the 12 October 2016 the Complainant was informed in writing that the Provider was not agreeable to postponing the sale of the property. Although the Complainant did respond to the Provider immediately, with a view to reaching a "mutual agreement", it is noteworthy that the Complainant did not reinstate the property on the market.

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The original mortgage contract the Complainant entered into in 2006 empowers the lender to appoint a Receiver over the mortgage security. The power to appoint a Receiver is also based in statute, on foot of the power of sale conferred by Section 19 of the Conveyancing Act 1881, as amended¹. Section 6.2 of the 'Mortgage Conditions 2002' attached to the Complainant's loan agreement states that *"The statutory powers of sale and appointment of a receiver conferred by and incidental provisions contained in the Conveyancing Acts 1881 to 1911 shall apply to this security..."*

Section 20 (ii) of the Conveyancing Act 1881 provides that a mortgagee shall not exercise the power of sale until *"some interest under the mortgage is in arrear and unpaid for two months after becoming due"*.

The original mortgage contract also sets out when the total debt due becomes payable. Section 7 of the 'Mortgage Conditions 2002' attached to the Complainant's loan agreement stipulates the following-

*"7 TOTAL DEBT TO BECOME IMMEDIATELY PAYABLE
The Total Debt shall become immediately payable to [the Bank]:*

7.1 If the Mortgagor defaults in the making of two Monthly Repayments or for two months in the payment of any other moneys payable under the Mortgage..."

Given **(i)** the extent of arrears on the Complainant's loan by December 2016, far in excess of the sum of two monthly instalments, **(ii)** the fact that the Complainant, of his own volition and without the consent of the Provider, opted to withdraw the mortgage property from the market, **(iii)** the Complainant's stated position that he was simply unable to meet the full monthly mortgage repayments on his loan, and **(iv)** the fact that the Complainant had been warned on numerous occasions about the potential appointment of a Receiver over his property, I must accept that the Provider had a contractual and legal right to appoint a Receiver over the Complainant's mortgage property. Before the property entered into receivership, the Complainant was given an opportunity to repay the full amount due and owing, which he failed, or was unable, to do.

It is also noted that the Complainant's Solicitor's response to the letter of demand from the Provider's Solicitor post-dates the *"Specified Date"* for repayment of monies outlined in that letter.

Furthermore, given the notifications to the Complainant about the potential for enforcement action under the loan, and considering the level of default, I accept that the Provider was entitled to appoint a Receiver. It is noted that quite apart from the usual warnings in the arrears letters that issued to the Complainant², in an email dated the 29

¹ The mortgage contract was incepted prior to the Land And Conveyancing Law Reform Act 2009, which Act repeals certain parts of the 1881 Act.

² For example, the following warning contained in the letter to the Complainant dated the 27 February 2016-

April 2016 from the Provider (already referred to above) the Complainant was told that the Provider's rights under the facilities including *"the right to demand repayment in full of the Facilities and enforce security and guarantees held are hereby expressly reserved."*

Notwithstanding my findings in relation to the appointment of a Receiver, I am of the view nonetheless that there were significant shortcomings in the level of service provided to the Complainant. First and foremost, the Complainant's email of the 13 October 2016 should have been responded to. While I note that the Complainant subsequently appealed the Provider's decision and that the ultimate decision of the Appeals Board was to stand over its earlier decision regarding the rejection of the Complainant's proposal to postpone the sale of the property (the Provider's letter to the Complainant dated the 23 February 2017 refers), I am of the firm view that a response should have issued to the Complainant at the time of his email. Even noting the Provider's comments to the effect the only action it would have considered at this time (i.e. October 2016) to negate the appointment of a Receiver would have been payment of the full outstanding balance, efficient customer care and common courtesy should have mandated a response to the Complainant's email.

In this instance, I do not believe the Provider observed the requirement of Section 20(7) of the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (lending to small and medium-sized enterprises) Regulations 2015, which provides as follows-

"Without prejudice to any other timeframes prescribed by these Regulations, a regulated entity shall respond to all written communications from a borrower regarding financial difficulties or arrears within 10 working days of the receipt of those communications."

I am also cognisant of the efforts the Complainant went to in an effort to engage with the Provider as evidenced by the audio recordings in particular, that have been provided in evidence to this Office. On numerous occasions the Complainant telephoned the Provider in order to talk to his Relationship Manager only to be told that that individual was not available. It seems that promised call-backs were not made, with the Complainant instigating much of the telephone contact.

The appointment of a Receiver in circumstances such as outlined in this complaint have very serious and long-term consequences for the borrower. It is undoubtedly a very stressful process for the borrower. Therefore it is incumbent on the financial service provider to engage to the fullest extent possible and communicate effectively with the borrower prior to and during the process of appointing a receiver.

There were serious lapses in the communication by the Provider with the Complainant in this case. This was evident from the delay in considering the Complainant's request to

"It is important you engage with us early with a view to resolving the situation in relation to your loan. Otherwise, enforcement action may be taken which could include the appointment of a receiver to manage and subsequently sell any asset(s) provided as security in connection with your loan; or the initiation of legal proceedings."

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extend his reduced repayment arrangement and in the failure to respond to the Complainant's e-mails in October 2016 and his telephone calls relating to the appointment of the Receiver.

The relevant agents in the Provider dealing with the matter neither took nor returned his calls despite the Complainant telling the agents he spoke to that *"we need to talk about this"; "I need to talk to her, I need to talk to someone"; "... tell her it's very very urgent"; [named agent] is not returning any calls, any e-mails, any letters"*.

He also pointed out to the agents that the Provider's correspondence stated *"if you get into arrears it is important that you contact us"*. He pointed out *"that is the complete opposite to what is happening to me"*.

Some of the Complainant's queries related to what he was to do now. For example, at one stage he asked was he to continue payment or stop paying the mortgage.

Having listened to these calls, I find the lack of response and communication by the Provider to be totally unacceptable and most egregious. I have no doubt that the conduct of the Provider made an already stressful and difficult situation even more stressful and difficult for the Complainant. This could have been in some way mitigated in my view, with better engagement and communication by the Provider.

Therefore, I am partially upholding this complaint.

Before concluding, I note that following submission of his Complaint Form, and after the Provider's response to queries raised by this Office, the Complainant has continued to provide this Office with email communications in relation to the Receiver. These emails indicate a deep dissatisfaction with the manner in which the receivership was being conducted, particularly regarding the sale price of the property.

This complaint is directed not at the Receiver, but rather relates to the appointment of the Receiver by the Provider. As I pointed out at the outset, any matters relating to the way in which the Receiver handled the sale of the property fall outside the jurisdiction of this Office.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld pursuant to **Section 60(1)(c)** of the **Financial Services and Pensions Ombudsman Act 2017**, on the grounds prescribed in **Section 60(2) (b) and (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 €15,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the provider. I also direct that interest is to be paid by the Provider on the said compensatory

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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

19 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**.