



<u>Decision Ref:</u>	2018-0112
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Maladministration regarding voluntary sale Delayed or inadequate communication Failure to provide correct information Failure to process instructions in a timely manner
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the implementation of an Assisted Voluntary Sale (AVS) procedure by the Provider.

The Complainant's Case

The Complainant holds a mortgage loan with the Provider. During 2016 and 2017 he attempted to effect a voluntary surrender and then sale of the property. In November 2015 an offer of €95,000 was apparently received but this sale did not proceed.

In February 2017 the Complainant received a bid of €82,000 for the property and sought the Provider's consent to sale. The Provider did not furnish its consent, and by March/April 2017 the sale had apparently fallen through.

The complaint is that the Provider wrongfully failed to furnish consent to sale within a reasonable time or at all, and based its decision on irrelevant or wrongful grounds. The Complainant would like compensation for inconvenience, distress and nuisance, and to offset the professional fees he has incurred.

The Provider's Case

The Provider states that the Complainant placed the property for auction despite there being no consent from it for this to proceed. It states that the Complainant was fully aware of the requirement for consent to sale from the Provider, in order to proceed with any sale, and every effort was made to facilitate a sale of the property, prior to appointment of a receiver (in January 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 23 August 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

The Provider deemed the Complainant's loan unsustainable in **February 2014** and the Complainant was given the option of a voluntary sale or surrender of the property. The Complainant submitted a revised proposal in **late 2014** but this was declined by the Provider in **January 2015** as the Provider states it could not identify a suitable solution. The Provider again sought a voluntary sale or surrender of the Property.

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A Final Demand for Mortgage Arrears issued in **April 2015**. A Final Demand for Mortgage Balance issued in **August 2015**.

The Complainant agreed to a voluntary surrender of the property. It was agreed that this would not be progressed until December 2015 in order to allow the Complainant's parents to vacate the property. At that point the Provider expected to receive a Deed of Surrender and other associated documentation.

In **October 2015** the Complainant instead submitted an updated Standard Financial Statement and proposal which sought permission from the Provider for the Complainant to attempt to sell the property himself. A nominated third party contacted the Provider indicating that he would act on the Complainant's behalf to assist with the sale.

On the **17th of November 2015** the Complainant's representative contacted the Provider informing it that an offer of €95,000 had been received for the property. However, the Provider did not then receive confirmation of all proposed deductions from the sale price until the **25th of February 2016**, and a valuation was not obtained by it until the **29th of March 2016**.

The following day, on **30 March 2016** the Provider furnished its consent to the sale of the property for €95,000, to the Complainant and his solicitors, by letter containing the following information:

"I hereby confirm that [the Provider] consent to the sale of the mortgaged property for €95,000 and will execute a discharge of our mortgage over the Property subject to receipt of the following:

- 1. Receipt by [the Provider] of gross sale proceeds from the property of no less than €95,000.00*
- 2. The Borrower's solicitor providing a completion statement and a copy of the Contracts for Sale confirming the sale price.*

[...]

Please note that this letter will expire on 30th June 2016 unless extended by [the Provider] in writing."

As is clear from the foregoing, the consent was valid for a period of 3 months until the 30th of June 2016 unless extended by the Provider in writing. If there could be any doubt about this, the Complainant's solicitors had also been sent this letter and no issue has ever been raised in the extensive submissions accompanying this complaint, to the effect that the three month period was unclear. No extension was sought.

Over the next number of months the Provider continued to send monthly notices of arrears as required. By **November 2016**, the Provider had heard nothing further from the Complainant or his representatives. The Provider contacted the Complainant's nominated

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third party by email to seek the return of title deeds to the property and advising that it was its intention to appoint a Receiver.

The Complainant's nominated third party explained that he had not heard from the Complainant in "nearly ten months", but forwarded this correspondence to the Complainant's solicitor who advised the Provider that the €95,000 sale had not proceeded but the property had been placed with an auctioneer and there was a fresh bid on same.

A warning letter was sent to the Complainant on the **16th of November** which advised of the Provider's entitlement/intention to appoint a receiver. The Provider states that an attempt was made to contact the Complainant's solicitor by telephone on the **30th of November 2016** and a message was left but there is no record of that call ever being returned. Another warning letter was sent on the **12th of December 2016**. A Receiver was ultimately appointed by deed dated the **31st of January 2017**.

On the **13th of February 2017** the Complainant's solicitors wrote to the Provider advising, *inter alia*, as follows:-

"Reference above matter and previous correspondence herein resting with our letter of the 15th November last.

We confirm this property was in fact placed with Leinster Property Auctions and sale was agreed in the amount of €82,000 subject to the consent of [the Provider].

We enclose herewith copy of the signed Contract from December.

*We have been waiting on details of the property charges in respect of the property but we think that the household charges have been paid including the NPPR and we have now received Cert of Exemption from **** County Council.*

We enclose herewith an account, draft Closing Statement and a copy of the Invoice from the Auctioneers as well.

Can you please confirm that [the Provider] are agreeable to the sale."

The Provider replied to this by letter dated the **15th of February 2017** advising the Complainant's solicitor that a receiver had been appointed and that any offer should be referred to the receiver for consideration.

On the **22nd of February** another letter issued from the Provider to the Complainant's solicitor expressing concern that the property appeared to have been "*entered into an auction without [the Provider's] consent*", given that the Provider had been advised in a letter in November 2016 that the Complainant's solicitors were awaiting formal confirmation of a fresh bid, and that approval of such a bid would be sought from the Provider. However, the Provider did leave open the possibility of consenting to the €82,000 sale if it could obtain access to the property in order to carry out a valuation, and also subject to receiving details of all of the proposed fees/deductions relating to the sale.

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It noted, in particular, that the auctioneer's fee appeared to be far above industry norms and that items of the solicitor's fee would not be agreed.

The Complainant's solicitor responded on the **13th of March 2017** referencing a recent phone call and "*figures furnished*". The solicitor also stated that the parties appreciated that any sale that was entered into at the auction would be subject to the consent of the Provider, but indicated that it appeared to be a good sale and worth pursuing.

On the **23rd of March 2017** the Complainant's solicitor wrote to the Provider to advise of its understanding that the previous proposed sale in 2015 had fallen away, because of the Provider's delay in furnishing consent to sale. An attempt was made to seek agreement on fees from the Provider, in relation to the sale which had been detailed to the Provider in February 2017. It appears this letter was received by the Provider on the 28th of March 2017.

Also on the **28th of March 2017**, the Provider emailed the Complainant's solicitor seeking invoices for any deductions. It also included the maximum amounts that the Provider would agree to in respect of certain professional fees.

On the **5th of April 2017** the Complainant's solicitor wrote to the Provider setting out what he felt was the up to date position – namely that the auctioneer's fees were the "stumbling block" to "salvaging the sale".

On the **13th of April 2017** the Provider wrote to the Complainant's solicitor confirming, *inter alia*, the following position:

- Consent to sale for consideration of €95,000 expired in June 2016;
- Consent to sell at Auction for a consideration of €82,000 was not approved by the Provider and this route was no longer an option as judgments were in place against the property;
- The Provider did not conduct mortgagee in possession sales;
- The Provider requested the return of the title deeds as per its February 2017 letter.
- If a prospective purchaser was still interested they should contact the receiver who would consider all offers on the property.

On the 19th of April 2017 the Complainant's solicitors returned the title deeds to the Provider, and took issue with a number of the matters put forward in the Provider's letter of the 13th of April 2017 and the general conduct of the Provider. In particular, it stated that the Complainant's solicitor was not familiar with the sale of €95,000 which had been agreed in June 2016 and was concerned that this may have been taken into account when considering whether to provide consent to the more recent sale; that all parties were fully aware that the Provider's consent had not been provided for the sale at auction; that the existence of judgment mortgages did not rule out a sale; that the Provider wrongly stated that it does not conduct mortgagee in possession sales; and that the auctioneer's fees appeared to have been the real stumbling block.

This is the crux of the dispute.

Much is made in this complaint of the Provider's attitude towards auctioneer's fees, whether or not the Provider conducts mortgagee in possession sales (the Provider has since stated that it ceased to do so during 2017) and in particular whether or not consideration was given by the Provider to the consent to sale at €95,000 which had expired in June 2016, when arriving at a decision to consent to the proposed €82,000 sale the following year. The Complainant's solicitor states he was a "stranger" to the €95,000 sale, and his letter of 23rd of March 2017 indicated that the Complainant put the property up for auction in spite of his advices or without consulting him in advance. For its part, the Provider notes that the Complainant's solicitor sought title deeds on accountable trust receipt, in January 2016 for the sale and redemption of the property.

In my opinion, these issues are of somewhat limited relevance. Assuming that the contracts for sale were signed on the 1st of December 2016, as dated, they were not furnished to the Provider until mid February, 10 weeks later and after a Receiver had been appointed. Then, 5 weeks later, the Complainant's solicitor advised that the prospective buyer had walked away "*as consent of sale had not been furnished*", thereby seeking in some manner to ascribe responsibility for this outcome to a delay on the part of the Provider. The evidence available to this office however, in that regard indicates that every stage of the sale transaction from late 2016 onwards was conducted, without the Provider's consent and, over a number of months without the Provider's knowledge.

If consent had been sought in advance, it is quite possible that most of the issues that arose after the consent was sought (or even after a sale had been agreed in principle) could have been dealt with in good time. In the event, the Provider was presented with the sale as a *fait accompli* and was required to work backwards to try to arrange a consent after the event. In my opinion, the fault for the buyer walking away in those circumstances cannot reasonably be laid at the door of the Provider.

In my opinion, the Complainant was unwise to place a property for sale at auction without the consent of the Provider. Having sought and received a consent to sale in late 2015/early 2016, the Complainant was obviously well aware of the requirement that the Provider consent to any proposed sale of the property. He nevertheless proceeded to put it up for auction regardless of the fact that it could not be sold without the Provider's consent. This could have led to much greater complications than it ultimately did, in that it appears the prospective buyer was content to accept contracts for sale subject to the lender's consent, and then walk away when the consent did not materialise within a few weeks.

Given that the Provider received no contact whatsoever from the Complainant in the period from March to November 2016, and then received no contact from the Complainant in response to warning letters dated the 16th of November 2016 and the 12th of December 2016, I have no evidence before me to conclude that the appointment of the receiver was anything other than reasonable, and in accordance with the Provider's entitlements.

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The AVS is a process with which the Provider must have significant familiarity. However, individuals who need to avail of the process will most likely have little or no knowledge or experience of how it operates. In addition, as with the Complainant, individuals needing to avail of the process can often be already in a financially distressed situation. For these reasons I believe there is an obligation on financial service providers such as the Provider to furnish sufficient information and provide the necessary support to assist the vendor to navigate the process.

With regard to the provision of information to a consumer, the Consumer Protection Code states that a regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish, or obscure important information. I am satisfied that the Provider discharged its duties in that regard, in this instance.

To quote the words of the Complainant's solicitor in correspondence dated 23 March 2017:-

"The parties entered the property into auction and they were advised by ourselves that the matter was back to front, the cart before the horse or whatever you want to call it, but they proceeded nevertheless."

Indeed the evidence confirms that the property was put up for auction without even notifying the Provider of an intention to do so. It appears from the correspondence that the Complainant's solicitor did his best to find a solution to difficult circumstances, which were caused by the Complainant putting a property up for auction without having sought or received the Provider's consent for same.

In my opinion, there is no evidence before me of wrongful conduct on the part of the Provider, such that it would be appropriate to make a finding against it, on the basis set out in **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017**.

Conclusion

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

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

**MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION
AND LEGAL SERVICES**

16 November 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.