



<u>Decision Ref:</u>	2018-0158
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Arrears handling - Mortgage Arrears Resolution Process Delayed or inadequate communication
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the administration of the Complainants' mortgage loan account with the Provider.

The Complainants' Case

The Complainants hold two mortgage loan accounts with the Provider.

The Complainants believe that the Provider has acted unfairly and unreasonably in failing to engage meaningfully with them to come to an arrangement for the settlement of their debt.

The Complainants would like the Provider to

- cease sending demand letters while they are engaging with it in an effort to resolve the accounts;
- acknowledge the efforts the First Complainant has made to resolve these accounts;
- cease writing to both Complainants;
- assign a representative with whom the First Complainant can communicate in person in Cork;
- acknowledge that the debt will never be fully repaid, and agree a reasonable arrangement for the debt whether by way of personal insolvency agreement or otherwise.

The Provider's Case

The Provider has explained that as the two Complainants are joint account holders, various steps must be taken by both of them. It is unable to agree a resolution with just one of the joint account holders. It has further stated that it is required to issue arrears/demand in accordance with its regulatory obligations, and since both Complainants are account holders, such correspondence must issue to both of them.

It states that it has at all times acted in accordance with its regulatory obligations, and any debt reduction or any other forbearance is a matter entirely within its own commercial discretion.

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 Complainants were 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 14 November 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 additional submissions from the parties, the final determination of this office is set out below.

The limitations of the jurisdiction of the Financial Services and Pensions Ombudsman must be borne in mind in complaints of this type. Where issues of sustainability / repayment capacity are in dispute, this office is only in a position to investigate a complaint as to whether the Provider, in handling the Complainants' arrears related issues, correctly adhered to any applicable obligations pursuant to the Central Bank's Consumer Protection

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Code (CPC), the Code of Conduct on Mortgage Arrears (CCMA), and/or any other regulatory or legislative provisions relevant to such issues.

This office will not interfere with the commercial discretion of a Provider unless the conduct complained of is unreasonable, unjust, or improperly discriminatory in its application to the Complainant, within the meaning of **Section 60(2)(c)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The Complainants jointly hold two mortgage accounts with the Provider. They were drawn down in 2004 and 2006.

Unfortunately, it appears the relationship between the Complainants broke down a number of years ago – they separated in or around 2007. This Complaint is being pursued by the First Complainant, with the knowledge and consent of the Second Complainant who has signed the Complaint Form, to facilitate the investigation.

The documentation before me suggests that the First Complainant has been the person dealing with the Provider at all material times herein.

On the **8th of January 2014** a reduced repayment arrangement expired and a letter confirming this was sent to the Complainants. The First Complainant submitted a standard financial statement (SFS). The First Complainant did not wish to discuss his SFS over the telephone with an agent of the Provider, and ultimately asked that a meeting be arranged with an agent of the Provider. Over the telephone the Provider's agent confirmed that if there was to be any residual debt, after an agreed sale of the property, there would not be a write down of same, and an agreed arrangement would have to be in place for the payment of any such residual debt.

There followed a number of phone calls – missed calls, unreturned calls and occasional conversations – for a number of months.

Eventually, in **October 2014**, the First Complainant was informed that a face to face meeting would be arranged in his locality once a valuation for the property had been received. At this stage it was hoped that the tenants in the property would be in a position to buy it, if the Provider would consent to the sale.

In **November 2014**, a valuation having been received and after a number of attempts at telephone contact, an agent of the Provider met with the First Complainant. An application with regard to the possible residual debt after sale was not progressed by the Provider because the Second Complainant (and joint account holder) was not participating.

In **early 2015** the First Complainant attempted to avail of a personal insolvency arrangement. However, the Provider did not agree to the proposed arrangement, and the First Complainant lost the benefit of a protective certificate in **June 2015**. It appears that a significant stumbling block to this application was, again, the refusal of the Second Complainant to engage in the process.

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The First Complainant submitted a formal complaint in relation to his treatment by the Provider, in **July 2015**.

The Provider has furnished a detailed explanation of the steps it has taken to comply with its regulatory obligations. I set out certain extracts from that explanation hereunder:

“When [the Provider] is proposing an alternative arrangement, we need to ensure that all parties named on the mortgage are fully engaged in the process. We also need to confirm whether the SFS shows an affordability to make repayments under any proposed arrangement and how a proposed arrangement would help our customer, in their particular situation.”

“In compliance with the Code of Conduct on Mortgage Arrears (CCMA), including the Mortgage Arrears Resolution Process (MARP), we explore all options for a suitable alternative repayment arrangement, in order to determine which option is most viable for our customers”

“... the Complainants have availed of a number of different Forbearance arrangements with the Bank. The correspondence issued to the Complainants clearly outlined the agreed Forbearance arrangements, the revised payments and the impact of the arrangements on the mortgage account.”

“Our records indicate that Watch Portfolio Management received the First Complainants case details on the 25 February 2015.

Our records were subsequently updated on the 02 March 2015 to confirm that the Complainant had requested Personal Insolvency and that had been placed under a Protection Certificate and that no contact was to be made with the First Complainant during the period of same.”

“In reviewing the matter on behalf of the Complainant, I have been unable to locate any record of telephone calls being made to the Complainant during the period that the Bank was on notice that there was a Protective Certificate in place.”

“Our records illustrate that the Complainants were issued arrears correspondence detailing the outstanding arrears balance, in compliance with the [CCMA]. To confirm:

As part of the [CCMA] regulatory framework, when a balance of arrears arises on any mortgage loan a standard letter (referred to as a “Missed Repayment Letter”) is automatically generated by our system. The purpose of a ‘Missed Repayment Letter’ is to highlight the occurrence of a balance of arrears and this is a regulatory requirement, regardless of how the balance of arrears accrued.”

“As illustrated [by the evidence provided in response to this complaint], the first named complainant has been advised on a number of occasions by difference [sic] representatives of the Bank’s Arrears Support Unit (ASU) of the correct Bank policy

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and procedures in relation to the nature of the matter complained of, particularly in relation to the Bank's consent to the sale of the property (at a shortfall)."

"While the Second Complainant has confirmed she will consent to the sale of the property, the Bank has not received satisfactory proposals from both named parties in relation to how they propose to address the remaining shortfall, in order to allow the Bank to sufficiently review the Complainants request."

"[The Provider] is not obliged to offer forbearance on a mortgage account and while we understand that it is in the interests of both parties to come to a mutually acceptable arrangement, a request for forbearance of even a request for a specific type of arrangement is just that, a request."

Analysis

There is no evidence before me to suggest that the Provider failed to assess an SFS in a timely manner (in accordance with section 35 of the CCMA).

Likewise there is no evidence before me to suggest that the Bank did not assess the Complainants' case on its individual merits, or that it failed to base its assessment on the full circumstances of the Complainants.

The Provider has consistently pointed out that, as a joint account, engagement must be made by both account holders. It is not willing to enter into an arrangement with just one account holder.

This is a difficult situation for the First Complainant, with which I sympathise. However, as the debt arises from a joint borrowing, I accept that the Provider is entitled to maintain its position under the fundamental terms of the account.

This difficulty has led to the First Complainant taking issue with (a) correspondence being issued to both Complainants and (b) his proposals for forbearance (of various forms) being refused or not being assessed at all, in the absence of information being furnished by the Second Complainant. I note that the Provider has acknowledged the difficulty of the situation for the First Complainant.

This difficulty arises, unfortunately, because of the nature of a joint account. The Provider cannot be considered to be acting wrongfully in continuing to treat the account as a joint account, as this is the basis upon which the monies were borrowed.

Having said that, it is quite clear that the First Complainant has made significant efforts to engage with the Provider. The difficulty in the context of this complaint is that this Office will not impose a forbearance arrangement upon a Provider – the agreement or otherwise to such an arrangement is a matter entirely within its commercial discretion and is not a matter for the FSPO. It is notable however, that although there has been significant engagement by the First Complainant, according to the statements furnished to this office, a monthly repayment has not been made on the loan accounts since **August 2013**.

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This office does not act as an avenue of appeal for a commercial decision made by a Provider in respect of repayment capacity or sustainability. In instances of mortgage arrears, this office is limited to an assessment of whether a Provider complied with its obligations under the CPC, the CCMA, or any other relevant regulatory or legislative obligations. This does not involve an assessment of the merit of the Provider's commercial decision.

I am satisfied on the documentation before me that the Provider has complied with its obligations under the CCMA.

The First Complainant has sought to engage with the Provider, but believes he is suffering by virtue of the Second Complainant's failure to make an equal effort to engage. This is the essence of his complaint, but the Second Complainant's actions, are not a matter in respect of which the Provider can be required to take responsibility.

Regardless of the level of engagement entered into by the First Complainant, it cannot be considered unreasonable or unfair for the Provider to insist that the Second Complainant fully participate in the process too. The Complainants hold a joint account, and therefore they are jointly and severally liable for the entire debt. It would be wholly inappropriate for this office to direct the Provider to enter into any particular forbearance arrangement with the Complainants in the circumstances. The Provider cannot reasonably be expected to consider the merit of an application for forbearance, in the absence of evidence as to the financial affairs of one of the accountholders.

The First Complainant took exception to being classified as a "not co-operating" borrower in late 2015. The term "not co-operating" is a defined term under the CCMA. It is not a slight on the Complainants' character. I am satisfied on the evidence that the Provider was entitled to categorise the Complainants as "not co-operating" within the meaning of the CCMA in late 2015.

During the period in which the First Complainant had the benefit of a protective certificate, the Provider sent him one letter (March 25 2015). However, I am not satisfied that the contents of this letter breached the provisions of **Section 96** of the **Personal Insolvency Act, 2012**, in circumstances where the Provider was required to furnish the information contained in that letter, pursuant to Provision 25 of the CCMA. In light of those regulatory obligations, I am not willing to make a finding that the issue of such arrears correspondence constituted wrongful conduct on the part of the Provider.

While I am cognisant of the Complainants' difficult circumstances, there is no evidence before me that the conduct of the Provider has been wrongful, and therefore I take the view that there are insufficient grounds to uphold the complaint made against it.

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**

5 December 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.