



<b><u>Decision Ref:</u></b>	2019-0136
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Arrears handling (non- Mortgage Arrears Resolution Process )
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

The Complainants drew down a mortgage with the Provider on the **22 April 2008**. the mortgage subsequently fell into arrears on **the 16 March 2011** and continued to be in arrears from this point until the sale proceeds of the property were realised on the **11 April 2017**.

The Provider appointed a Receiver over the property on the **29 June 2015**.

**The Complainants' Case**

The Complainants are dissatisfied with the appointment of a Receiver over the property at the time the decision was made, along with the procedure in which the Provider made this appointment.

The Complainants are further dissatisfied with the actions of the appointed Receiver and the timeframe it took to sell the property.

In summary, the Complainant says that there was:

1. Mismanagement of the account by the Provider in its decision to appoint a Receiver and delay in the sale of the subject property by the appointed Receiver.

2. Lack of communication throughout the process. In an e-mail dated 1 August 2018 to this office the Complainants say that “the process” refers to all dealings with [The Provider] after the appointment of the Receiver.
3. Delay caused by both the Provider and the Receiver whereby the Complainants have incurred additional interest on the mortgage loan.

### **The Provider’s Case**

1. The Provider contends that it at all times demonstrated a flexible approach in the handling of the Complainants’ case and made every effort to deal with the Complainants’ difficult circumstances. The Provider refutes the allegations with regard to the mismanagement of the mortgage account.
2. The Provider contends that there were numerous attempts to engage both Complainants on the account.
3. The Provider refutes the suggestion that the Provider caused any delay and contends that following the appointment of a Receiver there are legal, procedural and policy requirements which must be complied with and implemented prior to the Receiver being in a position to sell the property.

The Provider contends that it maintained a reasonable and flexible approach in attempting to resolve the Complainants’ arrears. The Provider denies any allegations that it mismanaged the Complainants’ account and further contends that numerous attempts were made to engage with the Complainants. The Provider contends that the appointment of the Receiver was an appropriate decision which was made at an appropriate time when the Complainants were not adequately engaging with the Provider and it was so entitled to make this decision as per the terms of the deed of mortgage and charge, which was executed by the Complainants.

### **The Complaint for Adjudication**

The complaint is that the Provider mismanaged the Complainants’ account and acted wrongfully in appointing a Receiver.

### **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.

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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 1 May 2019, 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.

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 has, however, investigated the circumstances surrounding the appointment of the Receiver on **29 June 2015**. Insofar as the present complaint concerns the actions of the Provider prior to the appointment of the Receiver, this has been 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, fall outside the remit of the Office, except insofar as those aspects represent the consequences of the Provider's decision to appoint a Receiver at the relevant time.

### **CCMA 2013**

The code of Conduct on Mortgage Arrears (2013) published by the Central Bank of Ireland sets out how mortgage lenders must treat borrowers in arrears or facing mortgage arrears, with due regard to the fact that each case of mortgage arrears is unique and needs to be considered on its own merits. The Code sets out the framework that lenders must use when dealing with borrowing in arrears or in pre-arrears. All such cases must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower in meeting his or her mortgage obligations.

The sequence of events giving rise to this complaint is set out below:-

Owing to the Complainants' failure to make payments due on foot of their mortgage loan account when they fell due, on the **11 December 2014** the Provider issued a letter to each of the Complainants advising, amongst other things, as follows:-

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**\*\*\*MORTGAGE ARREARS RESOLUTION PROCESS –  
URGENT ACTION REQUIRED IN YOUR INTEREST\*\*...**

*Your mortgage loan is being dealt with under the Mortgage Arrears Resolution Process (MARP) which is part of the Central Bank's Code of Conduct on Mortgage Arrears ("CCMA"). We have recently sought to obtain information from you that would enable us to complete an assessment of your current financial circumstances under the MARP process. So far, you have not provided the necessary information.*

*If you do not complete either of the actions below within 25 business days of the date of this letter we will classify you as "Not co-operating" under CCMA which will have serious consequences for you."*

The Provider contends that the Complainants were not engaging with the Provider and arrears, at this stage, were €54,662.80.

On the **21 January 2015** as the Complainants had not returned the standard financial statements as requested in the letter dated the **11 December 2014**, the Provider issued a further letter to each of the Complainants, advising, amongst other things, as follows:-

**\*\*\*\*\*MORTGAGE ARREARS PLEASE READ THIS LETTER CAREFULLY\*\*\*\*\***

...

*We wrote to you recently to warn you that we would classify you as "not co-operating" under the Code of Conduct on Mortgage Arrears ("CCMA") if you did not take the actions specified by us within a period of 25 business days. That period is now expired and we note that you have failed to take the actions we asked you to take despite our warning.*

*We have now classified you as "Not co-operating" under CCMA.*

...

*The protections of the MARP no longer apply. This means, for example, that under CCMA we can commence legal proceedings for possession of the property. We may also apply fees, charges and surcharge interest to your account.*

...".

The Provider issued a letter of demand to each of the Complainants on the **25 February 2015** requesting the Complainants to discharge the full amount due and owing within 10 business days, being a figure of €503,207.35. The Provider informed the Complainants that if this sum was not discharged, the Provider would proceed to enforce its security, including but not limited to the option of appointing a Receiver over the property. The letter in question to each of them included the following:-

***"Warning: If you do not pay us what you owe us under the above mortgage loan account(s) within 10 business days, including any interest that arises after the date of this letter, we can start legal proceedings against you to enforce our rights including, but not limited to, proceedings for re-possession of the mortgaged***

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*property, appointment of a Receiver over the property, and any other right to remedy we might have in respect of the debt outstanding.”*

On the **4 March 2015** the first named Complainant's appointed third party, informed the Provider that the Complainants' family law proceedings were listed for hearing on the **9 and 10 June 2015** and requested that the Provider not appoint a Receiver as the Complainants intended to sell the property at the determination of these family law proceedings.

By separate letters to each of the Complainants, dated the **13 March 2015**, the Complainants were informed by the Provider that the Provider would be proceeding to appoint a Receiver. The letter in question advised as follows:-

*“...As you have failed to discharge the amount due, we will proceed to appoint a Receiver. Please note that this will be done immediately upon the expiry of 10 business days from the date of this letter and without further notice to you...you will be liable for all costs incurred in appointing a Receiver which may be in excess of €3,500 per property. This figure is only an estimate and in certain circumstances the costs can substantially exceed this amount if difficulties are encountered.”*

The Provider reiterated this by letter dated the **2 April 2015**. During a phone call of that day the Agent of the Provider noted that mediation talks were to take place on **the 21 April 2015** (this was later clarified to be the **22 April 2015**). The Agent of the Provider informed the Representative of the first named Complainant that he would allow a voluntary sales package to be returned by the **29 April 2015**. The Agent also required an update to the Provider on the day of the mediation talks, and if these instructions were followed, a Receiver would not be appointed.

It was made clear in that respect that in order to avoid the appointment of a Receiver the Complainants were required to return the voluntary sales package (which issued on the **16 March**) by the **29 April 2015** signed by both Complainants. The voluntary sales package was not however returned within the timeframe set by the Agent of the Provider. I note that the Agent attempted unsuccessfully to call the representative on 24 and 27 April 2015, and left messages with the representative's receptionist, on both occasions, but no voluntary sales package was returned by the **29 April 2015** nor was any contact made with the Provider by this date. Subsequently the Provider appointed a Receiver which was confirmed by signed deed of appointment dated the **29 June 2015**.

By way of phone call dated the **2 July 2015** the first named Complainant spoke to the Agent and the Agent informed the Complainant that the Receiver had been appointed due to the failure on the part of the Complainants to meet the criteria set down by the Provider, as outlined above. The Agent reiterated to the Complainant the criteria which had been required and informed the Complainants' Representative that he had attempted to make contact with the Complainants' Representative on the **24 April** and on **27 April 2015** but he did not hear back. The Agent was informed during this phone call that the family law proceedings had concluded and that the Complainants wished for the Receiver to be discharged, so the Complainants could sell the property in question.

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The Complainant asked the Provider to revoke the appointment of the Receiver to allow the parties to sell the property on the open market. During this call the Agent informed the Complainant that he would do his best to ask the credit department of the Provider to remove the Receiver upon the request of the Complainant. This request was however refused by the Provider's retail credit department, and this was highlighted to the Complainant by phone call from the Agent to the Complainant on the **27 July 2015**. The reasons offered by the Provider were the poor repayment history on the account, the previous lack of engagement and accruing arrears.

As the Receiver is not a regulated Financial Service Provider, the conduct of the Receiver is not a matter which can be the subject of an investigation by the FSPO. In this instance, it is only the conduct of the Respondent Provider including its decision to proceed with the appointment of a Receiver which can be the subject of this formal investigation.

It is clear from the evidence that the Complainants did not inform the Provider, until **July of 2015**, that the matrimonial proceedings had concluded. At that point, the Receiver had already been appointed. I am satisfied that the Provider's Agent who was handling the Complainants' case gave the Complainants several opportunities to avoid the appointment of the Receiver; the Agent handling the case outlined clear timelines and instructions for the Complainants to follow, in order to avoid the appointment of the Receiver.

The Complainants were informed several times, through different forms of communication, that the account was in arrears and that the consequences of this could lead to the appointment of a Receiver. The Complainants did not take the necessary steps to address the arrears or complete the voluntary sales package in the timeframe set by the Provider. In my opinion, the Provider exercised reasonable discretion in allowing the Complainants opportunities to avoid the appointment of a Receiver, and ultimately the Complainants did not avail of the opportunities within the periods permitted. The terms of the deed of mortgage and charge as executed by the Complainants provides that in the event of default in the repayments, the Provider has the right to demand payment of the loan in full, and failing repayment of same, it has the right to enter into possession of and to sell or dispose of the property.

I take the view therefore, on the evidence available, that the Provider did not act unfairly or in an unreasonable manner in proceeding to appoint the Receiver to the property in June 2015. Thereafter, it was a matter for the Complainants to liaise directly with the Receiver in relation to the sale of the property in question. In those circumstances, I am of the opinion that the evidence before me does not disclose any basis upon which it would be reasonable to uphold this complaint against the Provider.

For the reasons outlined above, this complaint is rejected.



**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**

24 May 2019

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.