



<b><u>Decision Ref:</u></b>	2019-0271
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Premature ceasing of arrears negotiations Appointment of debt collection agency Delayed or inadequate communication Dissatisfaction with customer service Disputed transactions Misrepresentation (at point of sale or after) Selling mortgage to t/p provider Arrears handling (non- Mortgage Arrears Resolution Process ) Errors in calculations Settlement amount (mortgage)
<b><u>Outcome:</u></b>	Rejected

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

**Background**

In **April 2006**, the Complainants entered into a buy to let mortgage with the Provider in the sum of €315,000.00 for a 25 year term. The mortgage was to be interest only for the first three years. In May 2009, the Provider extended the interest only period for a further two years. In April 2012, the Complainants' loan went into arrears.

On **20 November 2013**, the Provider demanded the sum of €310,235.01 outstanding on the loan. On **11 December 2013**, the Complainants provided standard financial statements, and sought further forbearance. The Respondent declined the request, and on **10 January 2014** appointed a receiver over the property. On **3 October 2015**, the property went sale agreed.

On **27 November 2015**, the Complainants sent in updated income and expenditure information. On the basis of this information, the Provider assessed the Complainants could

pay €752.00 per month for 84 months to clear the residual debt. The Complainants challenged the assessment.

On **14 April 2016**, the sale of the property closed with a gross price of €258,000.00. The mortgage account was credited with €209,827.00 after the costs of the receivership were deducted.

The Complainant sent a letter of complaint in relation to the conduct of the receivership and the Provider's assessment on what they could afford to pay in February 2016 and received a final response letter in April 2016.

### **The Complainants' Case**

There are various issues raised by the Complainants, which are as follows.

Firstly, the Complainants raise issue with the decision to appoint a receiver. The Complainants say that they had been in consultation with a mortgage advisor at one of the Provider's branches. The Complainants say that in the course of a meeting on **27 November 2013** the advisor stated that she would recommend that the term of the mortgage be increased to 35 years with a new repayment plan. The Complainants note that a receiver was appointed less than two months subsequent to this meeting, and say that it is unfair.

Secondly, the Complainants argue that the receiver and the Provider delayed in selling the property and this resulted in an almost two year gap between the appointment of the receiver and the property being sold. The Complainants submit an e-mail dated **30 June 2014** from a property agent indicating that the tenants of the property were moving out the following day. The Complainants state that the property was being leased for €1,200 per month before the receiver was appointed and that it was vacant from June 2014 until it was finally sold. The Complainants say that this was unfair as the property could have been generating an income to reduce the debt, but that the receiver precluded this from happening by leaving the property vacant. The Complainants submit a further e-mail dated **14 April 2015** which confirms that the property was not on the market at that point. The Complainants assert that the receiver and the Provider could have generated approximately €31,000.00 in rental income had the property been leased out instead of being left vacant. The Complainants say that they were not informed of the sale of the property until **April 2016**.

Thirdly, the Complainants raise issue with the residual debt that remained on the account subsequent to the sale closing, The Complainants indicate that they were told that the residual debt was €60,660.00, but that the actual residual debt once the property was sold was in fact €103,116.98. The Complainants say that this is inconsistent and does not make sense.

Fourthly, the Complainants assert that the Provider acted unfairly in how it assessed both of the Complainants' financial positions in determining what could reasonably be paid to deal with the residual debt. The Complainants submitted income and expenditure

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information to the Provider. One of the Complainants set out a net salary of €3,065.09 per month and that he was entitled to €810.02 in expenses from his employer, and that his total income was €3,875.11. His expenditure per month amounted to €4,110.61. The other Complainant set out a net salary of €2,989.45 and that he was entitled to €1,730.00 in expenses from his employer, and that his total income was €4,989.45. The Complainants assert that the Provider treated these expenses as part of the Complainants' income and, therefore, unfairly determined what would be a reasonable sum to pay each month to reduce the residual debt. The Complainants submitted evidence from their employers setting out that the Complainants were not entitled to this sum each month and expenses were vouched and therefore not a guaranteed amount. The Complainants state that the Provider accepted these expenses were categorised as income in a phone call.

All things considered, the Complainants say that they co-operated and tried to resolve the residual debt with the Provider, but that they suffered a loss due to the receiver's actions and that their income was unfairly assessed.

### **The Provider's Case**

Firstly, the Provider states that the decision to appoint a receiver is a decision for the Provider alone. In respect of the Complainants' meeting with the mortgage advisor, the Provider notes that the Complainants submitted income and expenditure information after this meeting, but that the Provider rejected the forbearance request and decided to proceed to appoint the receiver. The Provider notes that the Complainants fell into arrears once the loan moved to capital and interest payments in **January 2013**. While there were subsequent periods of forbearance, the Provider asserts that the Complainants failed for the most part to abide by the terms of the forbearance agreements. As such, the Provider says that it was entitled to serve the letter of demand in **November 2013** and to proceed to appoint a receiver in **January 2014**.

Secondly, with respect to the conduct of the receivership, the Provider makes the following points. The Provider states initially that the receiver had no power to lease the property and that this was why the property was not leased for the currency of the receivership, and that the estate agent advised that the property was to be sold with vacant possession. The Provider also states that many costs arose during the course of the receivership, which were set out in a schedule of costs and expenses that arose during the receivership. The Provider states that an explanation in the delay in the sale of the property was due to a property portfolio sale collapsing. The Provider notes that the property was ultimately sold for €38,000.00 over the valuation price. The Provider acknowledges that there were delays in the receivership.

Thirdly, the Provider explains the difference between the two residual debt figures by stating that figure of €60,660.00 was based on the estimated residual debt, while the figure of €103,116.98 was the actual residual debt following the sale of the property and taking account of the costs of receivership and the rent received by the receiver before the tenants left.

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Fourthly, the Provider says that it fairly assessed the Complainants' financial position in making an alternative payment proposal. The Provider states that the Complainants had capacity to pay €584.00 per month and €425.00 per month respectively even if expenses were not treated as income. In light of that, the Provider maintains that the proposal of €752.00 per month for 84 months was reasonable in all of the circumstances. The Provider states also that in June 2016 – after the Complainants complained about the assessment of their incomes, it offered to accept reduced repayments to €372.90 per month over 179 months, but that this was not accepted by the Complainants. The Providers asserts that it has made reasonable proposals to the Complainants to deal with the residual debt.

### **The Complaint/s for Adjudication**

The complaints for adjudication are as follows:

- that a Receiver was wrongfully appointed in January 2014;
- that the Receiver did not conduct the receivership appropriately;
- that the Provider did not properly ascertain the residual debt figure after the sale of the property; and
- that the Provider did not fairly assess the Complainants' financial position and make reasonable offers in light of the information provided.

### **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 on 11 July 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

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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, within the period permitted, I set out below my final determination.

#### *Appointment of the Receiver*

It is not disputed that there were arrears on the account and that the Complainants ran into difficulty once the capital and interest payments became due and owing. This is why the parties began discussions to try and deal with the arrears.

On **20 November 2013**, the Provider demanded payment of the total sum due and owing being €310,235.01. The demand letter reserved the right to appoint a receiver. It is clear that the Complainants had previously requested forbearance and had been given forbearance. In the Provider's submission, it is asserted that forbearance agreements were entered into in May 2009, February 2012 and May 2013, and that these agreements were not complied with. The Complainants argue that their capacity to pay should have been assessed differently. As such, as a matter of law, the Provider was entitled under the terms of the mortgage deed to appoint the receiver in order to realise the security without further notice to the Complainants. I note that the Complainants say that the Provider's representative in a particular branch said that she would recommend that the payments be restructured. I note that the Provider's decision was predicated upon the updated financial information supplied, and that the Provider was entitled not to extend the term of the loan on that basis. This is a commercial decision that the Provider is entitled to make. It is important to note too that the Complainants do not assert that a final agreement had been entered into, but accept that the representative would recommend the proposal to extend the loan. I have not been supplied with any evidence that the Receiver was wrongfully appointed. There were arrears of €10,617 on the account when the Receiver was appointed.

#### *Conduct of the Receiver / Provider during the Receivership*

In respect of the conduct of the Receiver, this office cannot address the aspects of the complaint that relate to the actions of the Receiver, as the Receiver is deemed to be an agent of the Complainants and not the Provider. This Office has, however, investigated the circumstances surrounding the appointment of the Receiver in **January 2014**. 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, falls 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 as dealt with above.

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### *Residual Debt*

I note that the Provider gave an estimate of the likely residual debt, there are certain variables that cannot be known with precision at the time of the estimate which comprise the residual debt. For example, the Provider cannot know the final figure for the costs associated with maintaining the building until the receivership has ended. Similarly, the Provider cannot know the final figure that the property will be sold for. It is desirable for the Provider to provide some sort of estimate of the residual debt to the Complainant to enable a borrower to plan to deal with any potential residual debt. It would be wrong, however, for the foregoing reasons, to find that there is anything unfair or unreasonable in the residual debt being different to the estimate.

I have been provided with no evidence that the residual debt was calculated incorrectly. I believe that the Provider did not act wrongfully in giving an estimate of the residual debt figure.

### *Assessment of Financial Position*

I note that the Provider included expenses in its evaluation of the Complainants financial position. It is clear from the letters from the Provider dated **4 December 2015** that the Provider intended to treat the expenses as income, as it amended the net income sum in the Complainants' financial statements to include the expenses figure. Simply because the Complainants are, on occasion, entitled to be reimbursed for their expenses does not mean that any benefit has accrued to them. The purpose of reimbursement of expenses is to ensure that the Complainants can suffer no loss for the associated costs of performing their jobs for their employers. I believe that the inclusion of expenses as income was incorrect and to treat expenses as income was an unfair in the context of the assessment of the Complainant's financial position. However, I find that the Provider acted fairly and reasonably in offering to reduce the repayments to €372.90 per month over 179 months, which offer I accept was made in light of the Complainants assertion that the offer of €752.00 for 84 months was not affordable and was predicated on an incorrect assessment of their incomes. I note that the Complainants did not accept this.

I note that in the phone call dated **12 February 2016** the Provider acknowledged the counter offer previously made by the Complainants to pay €240.00 per month, but did not say that it would necessarily be accepted. The offer made by the Provider to the Complainants was to be affordable to the Complainants as per the SFS submitted and the Provider was entitled to reject an offer below this where it was of the view that it was within the Complainants' capacity to make higher repayments. This is a matter which is within the commercial discretion of the Provider.

For the reasons outlined above, I do not uphold this complaint.



**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.**

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

6 August 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.