An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0295
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Arrears handling (non- Mortgage Arears Resolution Process) Delayed or inadequate communication Complaint handling (Consumer Protection Code) Dissatisfaction with customer service Maladministration
Outcome:	Partially upheld

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 a mortgage loan account 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 restructure of the debt. They contend that the Provider wrongfully / unlawfully appointed a Receiver in circumstances where the Provider's decision not to enter into an alternative repayment arrangement (ARA) or other restructure arrangement was based on what the Complainants contend to have been an incorrect assessment of their standard financial statement (SFS) submitted in **October 2014**.

They state that had the Provider correctly assessed their SFS, it would not have appointed the Receiver. They state that the mismanagement of the property by the Receiver has cost them in the region of €15,000 due to the deterioration of the condition of the property while being controlled by the Receiver.

When asked how they would like this complaint to be resolved, in their Complaint Form the Complainants sought the following:

i. A term extension on their mortgage;
ii. Compensation;
iii. Removal of the Receiver;
iv. Rent received by the Receiver to be credited in full to the mortgage account;
v. Reimbursement of all insurance premiums [and local property tax] for the time during which the Receiver was appointed.

The Provider's Case

The Provider acknowledges that it failed to provide a written response to correspondence dated 5 April 2014, 19 June 2014, and 30 June 2014 (It is now clear that this refers to letters dated 19 June 2014, 5 April 2015, and 30 June 2015).

The Provider agrees that it failed to send and acknowledgement letter to the Complainants' complaint of 1 March 2016 contrary to provision 10.9(a) of the Consumer Protection Code 2012 (CPC).

The Provider also explains that due to an administration error, the Complainants continued to receive "holding letters" (pursuant to provision 10.9(c) of the CPC) even after the complaint response had been furnished on 9 May 2016.

The Provider has acknowledged that there was a delay in issuing a "test period" letter between August and September 2016.

The Provider has apologised for the foregoing matters, and for any inconvenience it caused. It has offered the sum of €2,000 by way of compensation as a goodwill gesture.

The Provider also withdrew the Receiver from the property by instruction of **February 2017**. The Provider has also confirmed that it discharged the Receiver's fees (c. €7,000) rather than applying same to the mortgage balance.

The Provider has not accepted the substantive merit of the balance of the Complainants' contentions. It states that decisions regarding forbearance are a matter within its own commercial discretion, and it says that it considered the Complainants' situation appropriately. It states that it deemed the mortgage affordable in **October 2014** and again in **August 2016** based on the information supplied to it by the Complainants. However, it deemed the mortgage unsustainable in **November 2016**, based on the then updated information provided to it by the Complainants.

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The Complaint for Adjudication

The Provider wrongfully assessed the Complainants' application for an alternative Repayment Arrangement, and wrongfully appointed a Receiver over the mortgaged property.

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 13 August 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 any substantive submissions from the parties, within the period permitted, 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 its obligations pursuant to the Central Bank's Consumer Protection 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.***

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Some of the issues which the Complainants have aired in this complaint concern the conduct of the Receiver. This office cannot adjudicate on the conduct of the Receiver as a Receiver is not a regulated Financial Service Provider within the meaning of the ***Financial Services and Pensions Ombudsman Act 2017***, and, in addition, the Receiver is considered in law to be an agent of the mortgagor (ie the borrower) rather than an agent of the Provider.

Whilst the Provider has made submissions to the effect that the tenants did not co-operate with the Receiver, in various ways, this is a matter between the Receiver, the Complainants and the former tenants and is not a matter upon which this Office can adjudicate, for the reasons explained. This Office will adjudicate only on the conduct of the Provider, which is the subject of the complaint.

The Complainants' loan in this instance concerns a buy to let property, and the applicable framework is the Consumer Protection Code, rather than the Mortgage Arrears Resolution Process (MARP) as laid out in the Code of Conduct on Mortgage Arrears 2013 **unless** the property is the only property owned by **all** of the borrowers within the State. I have no evidence before me that none of the borrowers own any other properties within the State, and accordingly it seems that the provisions of MARP are not directly applicable (although the Provider cited in correspondence and followed many of the MARP provisions all the same).

The Complainants (and a fifth borrower) drew down a mortgage with the Provider in **2008** for the amount of €180,000 to be repaid over a term of 17 years. Interest only repayments were to apply to the loan for the first five years, after which capital plus interest repayments were to be made.

The loan account fell into arrears from **2013**, when the loan reverted to capital plus interest repayments as per the parties' agreement.

The Complainants' nominated third party advisor was in talks with the Provider to reach an agreed forbearance course of action. It became apparent that one of the five borrowers was not going to engage with the process. The remaining four borrowers participated and engaged with the Provider in an attempt to agree a solution.

In **October 2014**, a completed SFS with the required documentation was received by the Provider and it proceeded to assess forbearance options. The Complainants state that this assessment was conducted on the basis of incorrect information / criteria.

In particular, they state that the Provider should not have taken the income of one borrower's spouse into account as reckonable income, as he was not and is not a party to the mortgage. The Provider acknowledges that it could not compel a party's spouse (who is not party to the mortgage) to furnish their income details, but it states that once those details were furnished on the completed SFS, that it was entitled to consider such details. In other words, it made the decision based on the information furnished to it.

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The Complainants contend that the SFS assessment by the Provider was based on incomes that were in fact higher than they actually had. I note however, that it was they themselves who furnished these figures to the Provider.

If however, their incomes had been assessed at a lower level (either by not furnishing the spouse's details or by the Provider simply not taking account of such details) and if the mortgage had been deemed unsustainable at that stage, the question arises as to how this would have benefited the Complainants. It is possible in those circumstances that the Provider would have offered them a term extension or a temporary alternative repayment arrangement, but perhaps it would not have done so. Such a decision is one for the Provider alone, in such circumstances, and this Office will not interfere with the commercial discretion of the Provider in that regard.

The Complainants have taken issue with being described as "not co-operating". It is worth clarifying that "not co-operating" is simply a categorisation defined under MARP which can be based on, amongst other things, the fact that a three month period has elapsed without borrowers meeting the agreed repayments. The effect of the categorisation is that certain protections under MARP no longer apply (if indeed they did in the first place).

Demand letters issued to all borrowers on **26 June 2015**. Given the level of repayments being made compared to the monthly capital and interest repayments that were falling due, I am not satisfied that these demand letters were issued wrongfully or contrary to any provisions of the loan agreement or CPC.

I accept however, that the Complainants had been engaging with the Provider, particularly by letter dated **5 April 2015**, and that the Provider did not reply to address the contents of this letter, prior to issuing demand letters.

There followed a number of months of communication between the Provider and the Complainants (or the Complainants' nominated third party advisor). Notwithstanding this open line of communication, the Provider proceeded to appoint a Receiver by deed of appointment dated **2 February 2016**. Accordingly, the Receiver became entitled to deal with the property from that point.

I accept that the Complainants were engaging with the Provider in the months between the demand letter being issued and the appointment of the Receiver. However, engagement alone is not sufficient to prevent a lender from appointing a Receiver. There was no ARA or other forbearance measure in place, or any measures agreed, and arrears were mounting. Although the Complainants later demanded copy court orders for possession, I note that the Receiver was appointed by deed of appointment, pursuant to the mortgage agreement, and not by court order. I have no evidence to suggest that the Provider was not entitled, as a matter of law, to take the decision to appoint a Receiver over the property, when it did.
It was explained by telephone on **18 February 2016** that in order for the Provider to consider withdrawing the Receiver, the arrears would have to be cleared in full.

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An SFS from the Complainants (ie all but one of the borrowers) was assessed by the Provider in August 2016. It was noted that the Provider indicated a willingness to recapitalise the arrears on the account, should the Complainants make six consecutive months of full capital and interest repayments (€1,695.05 p/m). At that stage, no payments had been made to the account for the previous eight months. The Provider deemed the mortgage to be affordable. This decision was not however, communicated by letter to the Complainants until one month later (13 September 2016).

In a conversation with the Complainants' advisor on **3 November 2016**, the Provider states that it was informed of a change in circumstances and it then carried out another assessment of the application for forbearance. The mortgage was deemed unsustainable. In **February 2017**, the Provider had reassessed the account and decided to withdraw the Receiver, and it agreed to a 65 month extension, and a reduced repayment arrangement for monthly repayments of €1,110, on the basis that a six month test period of €1,110 was adhered to. It is unclear what information came to light that apparently triggered this decision, however this was a decision that inured to the Complainants' benefit. I note that prior to the elapse of the 6 month period in question, the Complainants' loan was sold to a third party.

The Complainants' advisor, quite reasonably, expressed his frustration that the Provider, in early 2017, essentially granted them what they had sought for the previous "three years", but in the meantime they had lost a tenant and (as pointed out in his submissions) the property had deteriorated. The root of the difficulty was however, the continuing and mounting arrears from 2013 by reason of the borrowers failing to meet their contractual repayments. Furthermore, if one of the co-borrowers had not effectively washed his hands of this mortgage account, the outcome may well have been different, and the saga could possibly have been resolved earlier.

Whilst the Complainants have at all material times believed that the "*obvious solution*" from June 2013 onwards was a term extension to the loan, in order to provide them with an alternative repayment arrangement, until "*the value of the property equalled the balance outstanding on the mortgage*" and they could then sell the property, nevertheless, it is important to bear in mind that such a new arrangement, would have represented a variation of the underlying repayment agreement entered into by the parties in 2008. Such a variation was a matter entirely within the Provider's commercial discretion. The borrowers' belief that this was the "*obvious solution*" did not give rise to any entitlement on their part to have such an arrangement put into place.

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 the context of this complaint, 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 discretion in coming to a decision.

I am satisfied on the documentation before me that the Provider has complied with its obligations under the CPC, other than those matters for which it has already accepted

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failures which it describes as "*customer service failings*" that "*did not impact on the overall strategy/resolution of the case*".

It has offered the Complainants €2,000 by way of gesture of goodwill in relation to these failings. This is in addition to the c.€7,000 it has discharged to the Receiver to cover its costs.

The Complainants have noted that they have lost out on about a year of rental income (€6,000 when one deducts the €50 p/m that was put towards insurance and LPT) and they claim a loss of about €15,000 by reason of the deterioration in the condition of the property.

The jurisdiction of this office to uphold a complaint must be grounded on some form of wrongful conduct on the part of a provider within the meaning of ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017***. The wrongful conduct for which I have evidence to ground a finding is:

- Failure by the Provider to reply to letters dated 19 June 2014, 5 April 2015, and 30 June 2015.
- Reference by the Provider to the above letters by the incorrect dates throughout its responses to this Office to address the Complainants' complaint.
- The Provider's failure to issue a letter of acknowledgement to the complaint dated 1 May 2016.
- The Provider's failure to issue the written offer of an interim full or "test" repayment arrangement starting from 1 August 2016, until 13 September 2016.
- The Provider's continued issuing of "holding letters" after a final response letter had been issued.

However, it is not possible to attribute the entirety of the Complainants' claimed loss to these failures – in circumstances where the acts of the tenants living in the property, and the fifth, absent, mortgagor seem likely to have contributed to the severity of the situation, and indeed the Complainants themselves did not make any full capital and interest repayments from 2013, as per their obligations pursuant to the original loan agreement.

I have taken into account the fact that Receiver's costs of c.€7,000 have been paid by the Provider (as opposed to being apportioned to the borrowers as per condition 11 of the loan agreement) but I am satisfied that the further €2,000 offered by way of goodwill gesture does not sufficiently reflect the inconvenience caused that can be attributed to the Provider's failures.

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Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld on the grounds prescribed in ***Section 60(2)(c) & (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 Complainants in the sum of €5,000 (five thousand Euros) to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

9 September 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.