An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0313
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) Selling mortgage to t/p provider
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

In **November 2006**, the Complainants entered into two buy to let mortgages with the Provider in respect of two adjacent properties, both in the sum of €208,250.00, with a 20 year term and interest only repayments for the first 5 years.

The complaint is in respect of the manner in which the Provider dealt with the Complainants in negotiations in respect of these mortgages and that ultimately the Provider sold the mortgages to a third party (the "**TP**").

The Complainants' Case

The primary complaints made by the Complainants are that the Provider did not properly engage with the offers made by the Complainants and that the Provider should have accepted offers made by the Complainants to restructure their arrangements.

The interest only 5 year period expired in November 2011. The Complainants were afforded three further interest only periods, each lasting for 12 months, in respect of repayments of the loan. These interest only periods were due to expire in early 2015. On **17 December 2014**, the Complainants formally requested a further fourth year of interest only payments.

On **28 April 2015**, the Provider formally rejected the Complainants request for further interest only periods.

On **3 March 2016**, the Complainants' personal insolvency practitioner obtained a protective certificate. The personal insolvency practitioner submitted a report and proposal in respect of the Complainants' debt and how it should be restructured.

The Proposed Personal Insolvency Arrangement ("**PPIA**") notes that the Complainants were a married couple with an unencumbered principal private residence ('**PPR**') and the two encumbered buy-to-let properties ('**BTL**') the subject of this complaint. At the date of the PPIA, the PPR was valued at €280,000.00 while the BTLs were valued at €90,000.00 each. The total debt owed to the Provider was €417,207.00. The PPIA proposed that the BTLs would be surrendered to the Provider, that the Complainants would make a cash payment of €50,000.00 and that a charge in the sum of €50,000.00 would be placed on the PPR to be paid if the Complainants died or left the PPR. The Complainants assert that this deal respected the spirit of the personal insolvency regime in that it would allow them to keep their PPR and the bank would receive €280,000.00 in total representing a 67% return.

In the alternative, the Complainants were prepared to continue renting out the BTLs until their asset value increased such that their sale would cover the entirety of the debt.

On **27 April 2016**, the Provider voted at the convened creditors' meeting to reject the proposal put forward by the insolvency practitioner. The Complainants did not appeal the refusal of the PIA to the Circuit Court, such an appeal being provided for in personal insolvency legislation. The Complainants state that the Provider insisted on the BTLs being sold.

On **8 June 2016**, the Provider demanded the sums of €208,406.59 and €208,347.19 remaining outstanding on the mortgage accounts from the Complainants. On **3 August 2016**, the Provider's solicitor wrote to the Complainants demanding the sums of €208,384.77 and €208,444.17, which were then outstanding. The Provider's solicitors wrote a further letter on **10 August 2016** stating that it would consider any proposal which the Complainants wished to submit.

On **7 October 2016**, the Complainants made two proposals to the Provider.

First, the Complainants offered to sell both BTLs (then valued at €120,000.00 each), to make a cash payment of €50,000.00 and to place a €50,000.00 charge on the PPR to be discharged when the PPR was sold. Second, the Complainants offered to make a cash payment of €50,000.00 and to retain the BTLs for another seven years to allow the asset value to increase. The Complainants envisioned that the properties could each be rented for €850.00 per month. The Complainants also set out the health problems that both had been subjected to over recent years and that these problems meant that it was extremely important for the Complainants to retain their PPR.

The Complainants submit that they put forward these proposals so that they could resolve the situation and pay back all debt due on the BTLs while retaining their family home, free

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from any residual debt. The Complainants submitted a Property Activity Report from an estate agent along with these proposals, to show the potential percentage increase that the properties could achieve in the two years proposed.

While negotiations were ongoing between the Complainants' solicitor and the Provider's solicitor, on **3 November 2016**, the Complainants received correspondence from the Provider advising that a receiver had been appointed over the BTLs.

The Complainants' solicitor made contact with the Provider's solicitor in respect of this proposal. On the **10 November 2016** the Provider's solicitor advised that it expected to be in receipt of instructions shortly, regarding the Complainants' proposal. On **11 November 2016** the Provider's solicitor wrote again to the Complainants' solicitor advising that it had instructed the receiver to refrain from proceeding with the receivership.

The Complainants submit that neither the Provider's solicitors nor their solicitors had been made aware of this. They submit that this caused them undue stress and only on the intervention of both solicitors was the receivership stepped back and the negotiations allowed to proceed. They state that the Provider never gave them an explanation for why this happened.

On **24 November 2016**, the Provider's solicitor wrote rejecting the proposals made by the Complainants and putting forward another proposal whereby the Complainants would sell both BTLs and consent to a charge being place over their PPR. The complainants submit that their PPR was never given as a financial guarantee in respect of the BTLs and the stress and worry that they experienced at this time was beyond explanation.

Negotiations continued and on **15 December 2016**, the Complainants made a further proposal to the Provider. The Complainants proposed that the two BTLs would be placed on the market and the proceeds remitted to the Provider. The Complainants indicated that they would consent to judgment for the residual debt over the PPR on condition that the Provider would take no steps to enforce as long as either of the Complainants remained at the PPR. The Complainants requested that the Provider write off €45,000.00 of the residual debt. The Complainants state that in 2014 the Provider had offered to write off residual debt in the sum of €45,000.

On **14 March 2017**, the Complainants wrote stating that an offer had been received for one of the BTLs in excess of €130,000.00 and that notices of termination had been served on the tenants. The Complainants requested a response to the letter dated 15 December 2016. On **11 April 2017**, the Complainants again requested a response to the letter dated **15 December 2016**.

On **12 April 2017**, the Complainants made a further proposal to the Provider, stating that they had received advice that it would be better to leave the BTLs on the market and to sell in two years' time, as their asset value was due to increase further. The Complainants proposed to pay €25,000.00 off each property in two weeks, with assistance from family, and to immediately re-let the BTL's at €850.00 each per month, as the Complainants stated that there had been a substantial increase in the rental income in that area at that time. The

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Complainants offered to enter a binding agreement to sell the property in two years' time. In the Complainants' opinion, this would result in the entire indebtedness being paid back within two years, even though, as the Complainants state, there was still 10 years left on the mortgage. The Complainants submit that had the Provider accepted this offer they would have been in a position to pay €200 towards the interest on each BTL, per month, and €600 towards the principal debt outstanding on each BTL, per month.

The Complainants state that all of the above details, were furnished to the Provider's solicitors on **2 April 2017** but on, **20 April 2017,** they received a letter from the Provider advising that the loans had been sold to TP. The Complainants state that this came as a terrible shock to them as they had done everything possible to try and clear the full debt due to the Provider. They submit that had their proposal submitted on **12 April 2017** been accepted by the Provider, they would have incurred no losses at all.

The Complainants submit that they never missed a single payment on the monthly interest only payments since the loans were granted and have always had a good credit history with the Provider, so much so, that they had previously been offered a further €1,000,000 for buy-to-let properties after the purchase of the two BTLs subject of this complaint. The Complainants state that they felt that it did not make financial sense due to the position of the property market at the time they received this mortgage approval and they therefore withdrew the deposits they had placed on properties. The Provider, at the time, advised the Complainants that it would leave the option open to them to draw down the funds for another 3 months. The Complainants submit that this was reckless by the Provider.

The Complainants say that the foregoing offers were reasonable and made commercial sense. In that context, the Complainants state that in selling their loans to the TP, the Provider would have had to write off tens of thousands of euro which would have resulted in considerable losses to the Irish tax payer. The Complainants cannot comprehend why the Provider sold their loans to the TP. They submit that due to the Providers actions they suffered extreme stress and financial losses in their having to engage a financial advisor and solicitor, as advised to do so by the Provider, to act on their behalf in respect of the negotiations with the Provider.

The Provider's Case

The Provider contends that it engaged with the Complainants and decided to reject their proposals for good reason. In respect of the above complaints, the Provider asserts as follows.

Firstly, in respect of the interest only request made by the Complainants in December 2014, the Provider states that the Complainants had previously had three additional requests for interest only payments granted which amounted to a total of eight years of interest only payments, instead of the five as agreed in the loan offer. The Provider notes that it responded to the Complainants' request on **22 December 2014** noting the request, and on **28 April 2015** it again wrote to the Complainants rejecting the request. In the letter dated **28 April 2015**, the Provider made the following three proposals to the Complainants.

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1. The Provider proposed that both BTLs could be sold with rolled up interest during the sale leaving approximately €220,000.00 residual debt. The Provider agreed to write off €45,000.00 leaving residual debt of €175,000.00.

2. Alternatively, the Provider proposed sale of one BTL and the PPR and to write off the residual debt, allowing the Complainants to reside in the remaining BTL.

3. The final proposal was that the Provider offered to allow the Complainants to sell both BTLs and the PPR and that this would clear the entirety of the debt and potentially leave the Complainants with €60,000.00 equity release.

The Provider notes in its submissions to this office that the Complainants continued to make interest only repayments notwithstanding that the capital and interest payments were required.

In respect of the PPIA, the Provider reiterated that the fundamental issue with the PPIA was the retention by the Complainants of the unencumbered PPR which was significantly more valuable than the BTLs. If the Provider accepted the PPIA, then this would result in a significant write down of the debt in circumstances where the Complainants retained a valuable unencumbered asset. The Provider states that this reason was communicated to the Complainants and that alternatives were suggested that would allow the Complainants to stay in one of the BTLs, but that this never materialised as a formal alternative PPIA from the Complainants.

The Provider acknowledges that it received correspondence from the Complainants' financial advisor dated **3 March 2016,** which advised the Provider that a protective certificate was issued and submitted a proposal in respect of the debt. The Provider accepts that further correspondence was received from the Complainants' financial advisor dated **5 April 2016** requesting a response to the proposal and seeking details of the case manager. The Provider submits that it responded to this email on **6 April 2016** providing the details of the case manager. The Provider admits that there was a service failure in this regard as the case manager assigned to the case should have contacted the Complainants' financial advisor and notified him who was managing the case going forward. However, the Provider submits that this did not happen as the staff member had left employment with the Provider and no new case manager was assigned.

In respect of the offer made by the Complainants on **7 October 2016**, the Provider asserts that it responded on **24 November 2016** with a counteroffer. The Provider reiterated that it could not accept the offer made by the Complainants as it would result in a write down of the debt and the retention by the Complainants of the valuable unencumbered PPR. The Provider's counteroffer was that the Complainants dispose of one BTL and the PPR. The Provider indicated that the valuations that it received in respect of the properties would be enough to, most likely, discharge the entire indebtedness of the Complainants.

Alternatively, the Provider proposed to the Complainants that it would accept the sale of the two BTLs with a cash payment of €50,000.00. The Provider would then secure the

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residual debt of approximately €126,000.00 by a consent judgment registered as a judgment mortgage on the Complainants' PPR. The Provider offered to undertake to not enforce the judgment mortgage provided the Complainants remained living at the property.

In relation to the offer made by the Complainants on **15 December 2016**, the Provider submits that it cannot locate any response that it made to this offer. The Provider acknowledges that this amounted to a customer service failing.

The Provider notes, in respect of the **14 April 2017** offer, that it had sold the loans on **20 April 2017** and was therefore, not in a position to accept or refuse the offer made. The Provider asserts that it was not in a position to negotiate further with the Complainants as it no longer owned the loans.

In respect of the Complainants' complaint about the appointment of the receiver, the Provider asserts that the loans were non-performing and that the appointment of a receiver is a viable option open to it when payments are not being met and security has to be realised. Similarly, the Provider asserts that it is contractually entitled to sell mortgage loans to a third party in its commercial discretion. The Provider points to its letter to the Complainants; dated **28 April 2015**, wherein it advised that should a mutually consensual arrangement in respect of the mortgage debt not be reached between the Complainants and the Provider, then the Provider may have no option but to take whatever action is deemed necessary to recover the facilities which include, but are not limited to, realising any security it holds.

In light of the customer service failings by the Provider in respect of the delay in responding to the Complainant's proposals in March 2016 and the failure to respond **in December 2016,** the Provide offers the sum of €1,000 as a goodwill gesture.

The Complaints for Adjudication

The complaints for adjudication are:

- That the Provider acted improperly and unreasonably in the manner in which it considered and engaged with the proposals made by the Complainants and their agents in respect of their debt; and

- That the Provider unreasonably appointed a receiver in **November 2016** and ultimately sold the Complainants' loans to a third party.

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

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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 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 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 issue of my Preliminary Decision, the following submissions were received:

- Letter from the Complainants to this Office dated 22 July 2019, a copy of which was transmitted to the Provider for its consideration.
- Letter from the Provider to this Office dated 6 August 2019, a copy of which was transmitted to the Complainants for their consideration.
- The Complainants advised this Office under cover of a letter dated 12 August 2019 that they have no further submissions to make.

Having considered these additional submissions, together with all of the evidence and submissions furnished, I set out below my final determination.

That the Provider acted improperly and unreasonably in the manner in which it considered and engaged with the proposals made by the Complainants and their agents in respect of their debt.

Firstly, it is necessary to set out the financial position that existed when the parties commenced discussions. It is not disputed that the Complainants' PPR was significantly more valuable than the two BTLs and that it was unencumbered. It is also apparent that the loans were non-performing: the Complainants had been given three additional years of interest only repayments in forbearance and, once the capital and interest payments began in **January 2015**, it was apparent that the Complainants could not meet the payments and began to fall into arrears.

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The primary matter that caused disagreement between the parties was how to deal with the Complainants' unencumbered PPR. In my view, both of the parties acted reasonably and engaged with one another in respect of the offers made. I find that both parties adopted reasonable positions and made reasonable proposals. It is unfortunate that the parties did not reach agreement, as it seemed that there was some consensus between them.

It is apparent from the various proposals, that both parties seemed to strive for a position where the Complainants would retain possession of the PPR, but the dispute remained in the context of how much of the residual debt was to be secured on the PPR and how much cash payment was required up front. In all of the circumstances, subject to what is set out below, I find that the Provider acted reasonably in how it engaged in the negotiations in respect of the PPIA. I note that the Complainants did not appeal the refusal of the PPIA to the Circuit Court.

I do find, however, that the Provider acted unreasonably in not responding to the counter proposal made by the Complainants in **December 2016**. The Provider accepts that this failure fell below an acceptable standard. It is impossible to say with certainty whether or not the parties would have reached a settlement if the Provider had responded to the counter-proposal. The delay in responding to the Complainants' financial advisor's correspondence in **March 2016**, between **3 March 2016** and **10 May 2016** was a service failure by the Provider and fell below the standard one would expect of a financial service provider.

It is not possible for me to adjudicate as to whether an agreement would have been reached between the parties had the Provider responded to the counter proposal made by the Complainants in **December 2016**, or had it not delayed in responding to the correspondence issued on behalf of the Complainant in **March 2016**. However, these failures fall below the standard that I would expect of a Provider in communication, in particular the fact that the Provider did not respond at all to the Complainants' proposal in **December 2016** having regard to Chapter 8.12 of the Consumer Protection Code 2012 which states that;

> *"Where arrears arise on an account and where a personal consumer makes an offer of a revised repayment arrangement that is rejected by the regulated entity, the regulated entity must formally document its reasons for rejecting the offer and communicate these to the personal consumer, on paper or on another durable medium."*

Despite these service failings, I find that the Provider was not obliged to accept any proposal made by the Complainants or to reach an agreement about the debt if it was not satisfactory to the Provider.

That said, I believe that the Provider should take account of the fact that the Complainants found themselves in a very stressful situation and were endeavouring to engage with the Provider. I believe that the Provider's failure to respond at such a critical time added greatly to the stress and inconvenience suffered by the Complainants.

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That the Provider unreasonably appointed a receiver in November 2016 and ultimately sold the Complainants' loans to a third party.

In respect of the decision to appoint a receiver and to sell the Complainants' loans, I find that these were commercial decisions that the Provider was entitled to make. I note the receiver was appointed pursuant to a Deed of Charge which, it is indicated, provides a power to the Provider to appoint a receiver. The Complainants' loan was in arrears and the outstanding debt had become due and owing. The Complainants had been unable to discharge the principal and interest payments that had fallen due. It was apparent that the Complainants did not wish to enter into an agreement that involved the sale of their PPR, having regard to the content of their proposals made on **17 December 2014, 3 March 2016, 7 October 2016, 15 December 2016, and 12 April 2017**, and that there was insufficient equity in the BTLs to discharge the indebtedness. The Complainants did not have enough cash reserves to discharge whatever residual debt would have existed. The Complainants were on notice that the Provider reserved its entitlement to appoint a receiver over the BTLs, and in this regard I specifically note the letter to the Complainants dated **April 2015** wherein it advised that "*should a mutually consensual arrangement in respect of the mortgage debt not be reached between the Complainants and the Provider, then the Provider may have no option but to take whatever action is deemed necessary to recover the facilities which include, but are not limited to, realising any security it holds".* Furthermore, the Provider in its demand letter dated **8 June 2016** specifically reserved the right to appoint a receiver if the monies remained unpaid. In those circumstances, I find that the Provider was entitled to appoint a receiver.

In respect of the Provider's decision to sell the Complainant's loans to the TP, I accept that the loans were non-performing and this is accepted by the Complainants. I find that the Provider is contractually entitled to sell mortgage loans to a third party in its commercial discretion, which it exercised in respect of this matter. Due to the non-performance of the loans, as the Complainants continued to make interest only payments after the expiration of the extended interest only periods afforded to them by the Provider, I find that the Provider was entitled to exercise its commercial discretion to decide to sell the loans.

In a post Preliminary Decision submission, the Complainants raise the issue of their credit rating and the effect the actions of the Provider have had upon it. They suggest that this will affect them for a period of seven years which they state is an excessive amount of time to have such a default on their record.

In response to the observations about the credit rating effects the Provider states that it has checked the Complainants' credit profile with the ICB and that it is an accurate reflection of the arrears accrued on the loan accounts before transferring the loans to the third party.

The issue of the ICB credit rating was not part of the original complaint. In any event, the Complainant has not suggested that the record is not accurate and the Provider claims it is an accurate record of the payments made and missed.

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I understand the Complainant's concern with an adverse credit rating. However, in the absence of wrongdoing by the Provider, I am not in a position to make any direction I relation to the ICB record. I note the Complainants have suggested this will affect them for seven years. While this is a matter for the ICB, my understanding, and this is also stated by the Provider, is that this adverse record will be in place for 5 years.

I am partially upholding the complaint insofar as the Provider failed to respond to the counter proposal made by the Complainants in **March 2016** and again in **December 2016**, which fell below the standard of service expected and could reasonably be expected to have led to inconvenience on the part of the Complainants. I do not believe that the goodwill gesture made by the Provider in this regard in the sum of €1,000 is adequate for these failings. I believe a sum of €3,000 to be more appropriate.

For the reasons set out above, I partially uphold this complaint and direct the Provider to make a compensatory payment to the Complainants in the sum of €3,000.

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).***

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 €3,000, 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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

2 September 2019

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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.