



<b><u>Decision Ref:</u></b>	2019-0365
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Dissatisfaction with customer service Level of contact or communications re. Arrears
<b><u>Outcome:</u></b>	Partially upheld

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

**Background**

This complaint concerns two of the Complainant's mortgage loan accounts held with the Provider.

**The Complainant's Case**

The Complainant and her late husband held two mortgage accounts in relation to a buy to let property in the West of Ireland. The Complainant explains that these accounts fell into arrears and the Provider appointed a receiver in December 2014. Sadly, the Complainant's husband died suddenly on **13 January 2015**. The Complainant states that her solicitors advised the Provider of her husband's death on **28 January 2015** and that there was a mortgage protection policy in place which should clear the sums due and that the receiver should be stood down.

The Complainant states that despite the fact the Provider was advised of her husband's death at the end of January 2015, they did not succeed in obtaining payment from the life assurance provider under the mortgage protection policies until September 2015. The Complainant states that she has never received an explanation for the delay in this regard.

In addition, the Complainant states that despite being asked on several occasions, the Provider failed to stand down the receiver until October 2015. In addition, the Complainant

states that the Provider and/or the receiver failed to re-let the premises when the existing tenant vacated in July 2015 which resulted in unnecessary receivership costs and the loss of rental income.

In addition, the Complainant states that she should be entitled to a sum of €1,757 arising out of the cost of having to replace contents which she alleges were removed from the rental property when it was being managed by the receiver.

In addition, the Complainant complains about poor communication, customer service and complaints handling from 2015. The complainant states that the first formal complaint was lodged on her behalf with the Provider on **10 November 2015** and that the Provider did not furnish a response until **6 January 2016** which failed to deal with all of the issues raised and failed to provide details of rent arrears, receivership costs and rent received in relation to the rental property. The Complainant states that the Provider reopened the complaint in February 2016 and issued a further response on **26 July 2016** which the Complainant is unhappy with.

The Complainant states that the Provider has failed to deal properly and professionally with her mortgage accounts and the receivership. The Complainant states that the Provider has breached a duty of care to her due to delays and failures on the Provider's part. These failures are identified as the delay in arranging payment of sums due under the mortgage protection policies, failures and delays by the Provider in furnishing details requested on her behalf by her solicitors, failure to stand down the receiver at an earlier date, failure to advise the Complainant that the existing tenant had vacated the premises in July 2015.

The Complainant wants the Provider to pay the sum of €11,000 arising out of 10 months of loss of rent, €1,757 arising out of lost contents in the rental property, credit her for receiver costs and legal costs and to explain to her how mortgage arrears were calculated and from what source receiver costs were paid.

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

The Provider denies any wrongdoing in relation to the delay in receiving the due payments under the life assurance policy. The Provider states that there was no wrongdoing nor was the Provider liable to the Complainant arising out of the management of the rental property insofar as the Complainant is claiming loss of rental income or loss of certain listed items in the house. The Provider does accept that it was guilty of poor customer service in relation to the Complainant and the Complainant's solicitor.

### **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 Complainant was 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 9 September 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, within the period permitted, I set out below my final determination.

At the outset, although the Complainant has not raised the appointment of a receiver as a ground of complaint, having examined the loan offer and the mortgage title deed, I note clause 4.04 and clause 8 provide an entitlement to appoint a receiver over the mortgaged property at any time after the monies secured have become payable and enforceable.

The documentation provided shows that from at least 2013, the Provider had been writing to the account holders in respect of ongoing and significant arrears. The Provider also wrote stating that the mortgage was not being treated in accordance with the MARP procedures and thereafter, letters were issued in 2014 that set out that if full payment in cleared funds was not made, the Provider would take the steps as are deemed necessary to recover the debt and enforce its right under the security held to include the appointment of receiver and any other legal action. I accept therefore, that the Complainant was provided with the appropriate level of information regarding the arrears on the account and the consequences for failing to make the payments under the mortgage agreement which included, amongst other things, the appointment of a receiver and the loss of the property.

Dealing firstly with the processing of the payments under the life assurance policy. Sadly, the Complainant's husband died suddenly in **January 2015**. The Complainant states that her solicitors advised the Provider of his death on **28 January 2015**. I have been supplied with a copy of that letter of **28 January 2015** which confirms that the solicitors acted on behalf of the Complainant and it notes that the Complainant's husband died on **13 January 2015** and that they were liaising directly with the Complainant in relation to the appointment of the receiver and would appreciate the Provider's cooperation at this difficult time. A further letter was issued on **3 February 2015** enclosing a client authorisation whereby the

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Complainant authorised the solicitors to act on her behalf and to deal with the Provider in respect of the mortgage account.

On **4 February 2015**, the Provider wrote to the Complainant's solicitors expressing sympathy on the passing of the Complainant's husband and confirmed that there was a life assurance policy in place in respect of one of the mortgage accounts. The letter requested a certified copy of the full death certificate and a certified copy of the birth certificate as these would be required by the life assurance company in order to proceed with the claim.

On **25 February 2015**, the Provider wrote to the Complainant's solicitor stating that it had been advised by the life assurance company that it would not be in a position to fully assess the claim without a cause of death which is only stated in the full death certificate and therefore they have requested a certified copy of the death certificate.

It appears from the documentation, that the Complainant then changed solicitors. The new solicitors then forwarded to the Provider on **9 July 2015**, a copy of the *interim* death certificate and asked the Provider to furnish details of all sums due regarding the loan accounts in the joint names of the Complainant and her late husband, details of life policies which had been assigned to the Provider regarding the said accounts and a request that the current loan accounts would be frozen pending receipt of the funds under the policy and that the receivership would be cancelled. The Provider was also asked to accept the policy proceeds in full and final settlement of all sums due by the Complainant and her late husband to the Provider. A copy of the interim death certificate was also enclosed on the file and this was certified to be a true copy on **9 July 2015**.

On **13 July 2015**, the Provider wrote to the Complainant's solicitor reiterating the fact that the life assurance company had requested a certified copy of the full death certificate to assess the claim under the policy. The letter goes on to state that the Provider had requested redemption figures and balances, as of the date of death, on the account which would be forwarded to the Complainant's solicitor and that the request in relation to the receivership and moratorium had been forwarded to the Provider's Arrears Support Team.

On **15 July 2015**, the Provider's Arrears Support Team wrote to the Complainant's solicitor stating that it would not agree to any debt write-down without having a full understanding of the finances of the estate of the Complainant's late husband and asked that a copy of the death certificate, will, grant of representation and Inland Revenue affidavit be furnished to the Provider along with a completed standard financial statement from the Complainant.

By letter dated **17 July 2015**, the Complainant's solicitors furnished the Provider with an original birth certificate and death certificate of the Complainant's late husband and asked that the Provider furnish these to the life assurance company and arrange payment under the life policy as a matter of urgency. It also requested an update showing all sums due on the mortgage accounts. On **21 July 2015**, the Provider wrote to the Complainant's solicitor providing the outstanding balances as at the date of death of the Complainant's late husband in respect of each account. On **22 July 2015**, the Provider acknowledged that it had forwarded the certified copies of the birth certificate and death certificate to the life assurance company in order for it to assess the claim.

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The Provider then submits that from the date it furnished the documentation to the life assurance company on **22 July 2015**, up to the date it received the policy proceeds, on **3 September 2015**, the matter was with the underwriters of the life assurance company and was outside the control or the remit of the Provider. There is no evidence before me that suggests otherwise and I accept that the correspondence since the notification of the Complainant's husband's death demonstrates that the Provider had communicated at a very early stage and that the life assurance company required a copy of the full death certificate. This was not furnished to the Provider until **21 July 2015** when it was immediately then forwarded by the Provider to the life assurance company. From that time up to the receipt of the proceeds on **3 September 2015** I cannot see any culpable delay or omission on the part of the Provider.

The receiver was then withdrawn on **23 October 2015** following the arrears on the account being cleared.

It is important to note 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) rather than an agent of the Financial Service Provider.

In relation to the management of the rental property by the receiver, when a receiver is appointed, he/she/they become the agent of the Complainant. The receiver becomes the landlord of the rental property if there is a tenancy in place and it is the receiver who receives the rents.

The Complainant complains that she was not notified when the tenant vacated the rental property at some time in 2015 and that the property was left vacant without a paying tenant for the remainder of the receivership. The Complainant states that she is therefore entitled to the loss of rental income for that period. As I have stated above, it is not the function of this office to investigate the merits or otherwise of income derived under a tenancy or, in the alternative, income not derived in the absence of a tenancy.

During this period in dispute, the validly appointed receiver was the landlord and manager of the rental property and as a matter of law, was an agent of the Complainant. This is equally applicable to any claim arising out of the alleged loss of items in the rental property. There are other forums and other statutory provisions that fall outside the remit of this office that deal with disputes in relation to these matters.

In relation to the removal of the receiver, I note the receiver was appointed on **2 December 2014**. The husband of the Complainant passed away on **13 January 2015**.

On **4 February**, the receiver wrote to the Complainant's solicitor and on **25 February** the solicitor was advised of the need for a certified copy of the death certificate.

It would appear the Provider's policy is that once a receiver is appointed, until such time as the arrears have been cleared in full, the receiver is not removed from a property. The delays in paying the sums due under the life assurance policy unfortunately added to the difficulty encountered by the Complainant. However, I cannot hold the Provider responsible for these delays. They are a matter between the Complainant and the insurance company that provided the life cover and do not form part of this investigation. It is open to the Complainant to make a separate complaint in this regard, should she wish.

Once the Provider received the necessary death certificate on **21 July 2015**, it sent it to the life assurance company on **22 July**. Once it received the policy proceeds on **3 September**, the amount was paid that day to the account. The Provider states it cannot be held responsible for the time taken by the life assurance company to process the claim. I do not disagree with this.

On **7 October 2015**, a letter from the Complainant's solicitor was received by the Provider which stated the policy proceeds had been paid and the arrears cleared from the accounts. It also requested confirmation the receivership would be cancelled.

The receiver was withdrawn on **23 October** from the property.

I note the Provider states that the receiver did not re-let the property as the arrears on the Complainant's mortgage accounts were possibly going to be cleared from the proceeds of the various life policies and control of the property would then be returned back to the Complainant.

In relation to the complaint of poor customer service, poor communication and poor complaint handling, the Provider has admitted wrongdoing in this regard and therefore it is not necessary for this office to make a determination in those circumstances. It is clear, as the Provider has now acknowledged, that there was a significant and culpable delay in providing the Complainant's solicitor with the breakdown of the arrears on the mortgage accounts. In addition, the Provider did not respond to letters from the Complainant's solicitor in January and February 2016. I note that the Provider is waiving any entitlement to charge the costs of the receivership (€3,415.99) to the Complainant.

On **12 November 2015** the Complainant's solicitor wrote to Provider asking why the property had been left unoccupied. This was answered on **6 January 2016**, explaining that the tenant had left the previous year. The Provider received further letters from the solicitor on **15 January, 20 January** and **3 February 2016**. None of these were answered. A further letter was sent on **4 February** and the Provider recorded this as a complaint. The solicitor wrote again on **19 February** seeking compensation for receiver costs, missing contents and lost rent.

The Provider replied on **26 July**, five months later, with details of the rents received and costs incurred.

The Complainant's solicitor replied to the Provider on **2 August** seeking further details in relation to property repair costs, security costs and expressing dissatisfaction with the Provider's response dated **26 July**. The solicitor wrote again on **11 August** which was logged as a complaint.

The Provider replied to the solicitor on **3 November 2016** stating that the Provider's position was unchanged. The solicitor wrote to the Provider again on **21 December 2016** following direct contact with the receiver and the Provider answered on **11 January 2017** including details of rents collected and costs incurred in a Final Outcome Statement.

Since the tenant had left in 2015 and there had been no further rent collected, it does not appear at all reasonable that such a straightforward enquiry should have taken more than a year to be answered satisfactorily.

Insofar as complaint handling is concerned, the Provider is of the view that it complied with its obligations under the Consumer Protection Code.

The Provider's relevant obligations in complaint resolution is provided in Section 10.9 of the Consumer Protection Code 2012 which provides as follows:

*"A regulated entity must have in place a written procedure for the proper handling of complaints. This procedure need not apply where the complaint has been resolved to the Complainant's satisfaction within five business days, provided however that a record of this fact is maintained. At a minimum this procedure must provide that:*

*a) the regulated entity must acknowledge each complaint on paper or on another durable medium within five business days of the complaint being received;*

*b) the regulated entity must provide the Complainant with the name of one or more individuals appointed by the regulated entity to be the Complainant's point of contact in relation to the complaint until the complaint is resolved or cannot be progressed any further;*

*c) the regulated entity must provide the Complainant with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals of not greater than 20 business days, starting from the date on which the complaint was made;*

*d) the regulated entity must attempt to investigate and resolve a complaint within 40 business days of having received the complaint; where the 40 business days have elapsed and the complaint is not resolved, the regulated entity must inform the Complainant of the anticipated timeframe within which the regulated entity hopes to resolve the complaint and must inform the consumer that they can refer the matter to the relevant Ombudsman, and must provide the consumer with the contact details of such Ombudsman; and*

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*e) within five business days of the completion of the investigation, the regulated entity must advise the consumer on paper or on another durable medium of:*

- i) the outcome of the investigation;*
- ii) where applicable, the terms of any offer or settlement being made;*
- iii) that the consumer can refer the matter to the relevant Ombudsman, and*
- iv) the contact details of such Ombudsman.”*

I have reviewed the correspondence issued to the Complainant's solicitor in relation to the complaints lodged on her behalf.

While it is clear that the Provider acknowledged the complaints and issued correspondence to the Complainant's solicitor at intervals that are in compliance with the Consumer Protection Code 2012, there has been no satisfactory explanation as to why the investigation took the length of time that it did.

I consider that the time period from which it took to investigate complaints and issue the Complainant with the outcome of the investigation was unreasonable in light of the circumstances of this case. Accordingly, I uphold this aspect of the complaint.

Furthermore, while I accept the Provider's right to appoint a receiver to the property, I believe the complete lack of sensitivity and very poor communication on the part of the Provider throughout the whole process, particularly after the death of her husband, was unreasonable.

The Complainant was in a very bad situation being in arrears on her loan. Her difficult circumstances were compounded by the loss of her husband. In the circumstances I would have expected much great sensitivity and far better communication by the Provider.

Aside from the waiver of the receiver costs, which it values at €3,415.99, the Provider has offered a goodwill gesture of €2,500 in recognition of the acknowledged poor customer service. I do not consider this to be sufficient in all the circumstances of this complaint and, in particular, the poor communication and inconvenience suffered by the Complainant at such a difficult time. The Provider did not accept that it had fallen down in respect of complaint handling and in acknowledgement of its poor complaint handling I partially uphold this complaint and direct that the Provider pay an additional €2,500 to the Complainant. In total therefore, I direct that the Provider pay a sum of €5,000 to the Complainant.



## **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) (f)**.

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 Complainant in the total sum of €5,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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**

4 October 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.