



<u>Decision Ref:</u>	2019-0430
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Settlement amount (mortgage) Delayed or inadequate communication Arrears handling (non- Mortgage Arrears Resolution Process)
<u>Outcome:</u>	Partially upheld

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

Background

This complaint concerns the administration of the Complainant's residential investment property mortgage loan account with the Provider.

The Complainant's Case

The Complainant held a mortgage with the Provider. By letter dated 16 September 2015 the Provider notified the Complainant that his request for an alternative repayment arrangement had been refused, and invited him to consider a voluntary sale or surrender of the property.

By letter dated 19 September 2015 the Provider notified the Complainant that it would agree to accept a revised monthly repayment of €593.00 per month. The Complainant did not accept this offer, however he continued to engage with the Provider and submitted a standard financial statement (SFS) on a number of subsequent occasions.

Subsequently, the Provider advised that in its view the Complainant was in a position to reduce his overall debt as he had capacity to meet reduced repayments and/or had equity in assets that could be used to reduce the debt. The Complainant (who was assisted by a third party) had proposed to dispose of the property, the subject of the mortgage loan and use the proceeds to reduce the debt, make a lump sum payment of €9,000 and that the residual debt would then be written off by the Provider. The Provider was not agreeable to this proposal.

The Complainant feels that the Provider has acted unfairly and unreasonably in failing to engage meaningfully with him to come to an arrangement for the settlement of his debt.

In particular, the Complainant's complaint is that:

- (i) The Provider wrongly believes that the Complainant has unencumbered assets with equity in them to support any residual debt post sale of the property the subject matter of this mortgage (and thus refused his proposal on factually incorrect grounds);
- (ii) The Provider acted unprofessionally or wrongfully in appointing a receiver over the property (in November 2016);
- (iii) The Provider used incorrect figures when assessing the reasonable monthly expenditure for a family of the Complainant's size (and thus refused his proposal on factually incorrect grounds);
- (iv) The Provider has failed to respond to the Complainant's complaints in a timely fashion;
- (v) The Provider has failed to meet with the Complainant in order to address his proposals / complaints;
- (vi) The Provider has erroneously stated that the Complainant failed to provide certain information to support his proposal(s) when required.

The Complainant would like the Provider to agree to his debt settlement proposal, or compensation for its wrongful conduct.

The Provider's Case

The Provider states that is satisfied that it conducted its review of the Complainant's proposal appropriately.

In relation to the Provider's assertion that the Complainant owns assets with equity in them to support any residual balance post property sale, the Provider refers to a telephone conversation between the Complainant and a member of the Provider's Arrears Support Unit (ASU) which took place on 27 August 2015. The Provider refers to the note added to the file by the staff member in question following that conversation. The staff member states that the Complainant advised her that he has 80 acres of land, 40 of which were charged to the Complainant's brother for monies owed. In addition, the Complainant confirmed that 38 acres were charged to a third party bank along with a charge over the BTL property in [address].

The Provider also refers to correspondence from the Complainant's representative dated 15 January 2016. In this correspondence the representative confirmed that the Complainant had 82 acres of land - 38 of which are fully charged to a third party bank and the remaining acres are fully charged to the Complainant's brother.

The Provider also refers to Folios in relation to equity held.

In relation to the appointment of a Receiver, the Provider states that arrears management continues regardless of whether or not a customer has an open complaint. In the case of the Complainant, the Provider took the decision to appoint a Receiver in May 2016. The Provider states that this decision was taken in light of the high level of arrears which had accrued on the account of around €24k, failure to meet the contractual repayments and lack of an alternative repayment arrangement being agreed. A Receiver was appointed in October 2016.

In relation to the use of Insolvency Service of Ireland figures in its assessment, the Provider rejects the allegation that incorrect Insolvency Service of Ireland (ISI) figures were used by the Provider. It states that an assessment was conducted by the Provider following receipt of the Complainant's Standard Financial Statement (SFS) dated 3 August 2015. The Provider noted that the Complainant had declared his expenditure at €1,654.50 per month (€3,309 divided by 2).

This was noted as being higher than the Insolvency Services of Ireland (ISI) guidelines. In line with the ISI guidelines, the Complainant's expenditure should be €879 pm (€1,757 divided by 2). However, as the Complainant was meeting the contractual repayments due on the PDH mortgage account, the Provider determined that the monthly expenditure could not be greater than €678. As such, the Provider states that this is the figure that was used by it for the purpose of the assessment.

In relation to the Provider's response to the Complainant's complaint, the Provider states that a complaint was received from the Complainant's representative on behalf of the Complainant on 18 February 2016. Upon receipt, this complaint was logged and an acknowledgement letter was issued on 22 February 2016. The Provider issued holding letters to the Complainant's representative on 10 March 2016, 8 April 2016 and 5 May 2016. A final response letter was issued to the Complainant's representative on 13 May 2016. In the final response letter the Provider apologises for the delay in responding to the complaint and responded to the matter raised in the complaint.

A follow on complaint was received from the Complainant's representative on behalf of the Complainant and a follow on complaint was logged on 24 May 2016. An acknowledgement letter was issued on 27 May 2016. The Provider issued holding letters on the complaint on 14 June 2016, 12 July 2016, 9 August 2016, 6 October 2016 and 1 November 2016. A final response letter was issued to the Complainant's representative on behalf of the Complainant on 3 November 2016. In this correspondence, the Provider apologised for the delay in responding to the complaint and addressed the matters which had been raised.

The Provider states that it is satisfied that the complaints received on behalf of the Complainant have been handled in a professional manner. The Provider has acknowledged and apologised for any delays in responding to the complaints. The Provider states that it is satisfied that the complaints were handled in line with the Provider's requirements under the Consumer Protection Code.

In relation to the point that the Provider had failed to meet with the Complainant and his representative, the Provider contends that a meeting was facilitated between the parties and that this meeting took place on 7 January 2016 @ 2:30 pm.

The Provider's response to the Complainant's contention that it has erroneously stated that the Complainant had failed to provide information to it, the Provider states that following on from the meeting which took place on 7 January 2016, the Complainant's representative was requested to provide a full breakdown of the rental income and the Complainant's representative agreed to provide a complete schedule as to what the rental income was being used for. The Complainant's representative was advised that the Provider expected the new rent to be paid into the mortgage. On 15 January 2016, the Provider received an email from the Complainant's representative in which the Provider was advised that the rent received in recent months had been used to pay income taxes and that Local Property Tax was presently due. The Provider did not receive a detailed breakdown of rental income versus costs/taxes.

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 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 26 September 2019, outlining my preliminary determination 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 Provider made a submission under cover of its e-mail to this Office dated 18 October 2019.

A copy of that submission was exchanged with the Complainant.

Having considered the Provider's additional submission and all of the submissions and evidence furnished to this Office, I set out below my final determination.

The extent of the jurisdiction of the Financial Services and Pensions Ombudsman should be borne in mind in complaints of this type. Whether or not to write down a loan or agreeing an alternative repayment arrangement falls within the commercial discretion of a financial service provider.

This office will not interfere with the commercial discretion of a provider unless the conduct complained of was 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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The complaint which this office is investigating is whether the Provider, in handling the Complainant's arrears related issues, correctly adhered to all applicable obligations pursuant to the Central Bank's Consumer Protection Code (CPC), the Code of Conduct on Business Lending to Small and Medium Enterprises, and/or any other regulatory or legislative provisions relevant to such issues and whether the Provider's conduct was reasonable in all the circumstances.

Relevant Account History

I have been provided in evidence with a copy Standard Financial Statement (SFS) submitted to the Provider in August 2016. This SFS contained, among other things, the following information:

<i>Net monthly salary:</i>	€500
<i>Monthly income from property assets (other than primary residence):</i>	€500
<i>Monthly income from non-property assets</i>	"some from farm (see a/cs)"

The "Total monthly expenditure" field is blank.

Under the section entitled Property Assets (other than primary residence), the Complainant lists the property the subject matter of this mortgage (valued at €170,000) and "land" valued at €500,000 with a "loan balance" listed at €210,000. He also lists "Home" and a fourth property, although no further details are given in respect of those.

I have been furnished with a file note appearing to indicate a telephone call between the Complainant and the Provider on 27 August 2015. On foot of this call a note was added to the Complainant's file to the effect that he held some 80 acres of land of which 40 was charged to the Complainant's brother and 38 was charged to a third party bank.

A Standard Financial Statement (SFS) was received by the Provider in August and the phone call referred to above took place on 27 August 2015. The precise chain of events leading to the two letters of September 2015 are not clear, but do not in any event form part of this complaint. Decisions were communicated to the Complainant by letters on 16 and 19 September 2015.

On 16 September 2015 the Provider refused an application for forbearance on the basis that the mortgage was unsustainable. On 19 September 2015 the Provider offered the Complainant a reduced monthly repayment plan of €539.00. This offer was not accepted by the Complainant, but the Complainant continued to engage with the Provider.

Correspondence issued to the Complainant in relation to a voluntary sale of the property.

I have been provided with a copy SFS signed by the Complainant on 4 December 2015. It appears that an unsigned copy of this SFS was received by the Provider on 25 November 2015, and the signed copy was received by it on 11 December 2015. This SFS contained, among other things, the following information:

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Net monthly salary: €2,117
Total monthly expenditure: €3,225 (a note states that the Complainant's "50% share is €1,613")

Under the section entitled Property Assets (other than primary residence), the Complainant lists the property the subject matter of this mortgage (valued at €134,400 and with a loan balance listed as €242,916), and a farm (valued at €228,000 with portions charged in favour of his family (€60,000) and a third party bank (€107,647)). The farm described therein appears to refer to the lands referred to in the August telephone call.

While certain information in the August SFS may not have been placed in the appropriate boxes and while some of the information in his SFS is broadly similar to the information contained in the December SFS, it differs significantly, however, in relation to the valuations of the properties.

On foot of receipt of the signed December SFS, a meeting was arranged between the Provider and the Complainant (and his authorised third party) on 7 January 2016. A number of issues have been raised in respect of this meeting and its aftermath, and the ultimate decision reached by the Provider not to accede to the Complainant's proposal.

The Provider contends that during this meeting, the December SFS was discussed but ultimately an assessment was never carried out based on the December SFS because supporting information was not received.

It states that it requested the Complainant to provide a full breakdown of rental income, in order to understand how various monthly payments were being met. On examining the information contained in both the August SFS and the December SFS, this does not appear to be an unreasonable request. The Complainant has provided the information sent to the Provider dated 15 January 2016 which sets out an annual rental income from one property of €8,400, which appears to have been earmarked to meet income tax liabilities. I would note that this does not constitute a detailed breakdown, as requested by the Provider, in circumstances where the Provider wished to understand what portion of the rental income would be paid towards the debt with the Provider (as against the portion to be put towards LPT and the Complainant's income tax liabilities). An annual deficit of some €13,436 is set out, which is described as being "*financed by spouse and extended family*".

The Complainant states that the Provider used incorrect guideline figures (primarily, the Insolvency Service of Ireland guidelines) when assessing what a reasonable monthly expenditure would be in his circumstances.

The Provider notes that it did not use expenditure guidelines when assessing the August SFS as it assumed a monthly expenditure figure of less than €678 from the information contained in the August SFS by taking a monthly income of €1,027 minus monthly repayments of €349 for his "PDH [Private Dwelling House] loan". The Complainant gave no monthly expenditure figure in his August SFS.

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By email dated 1 February 2016 the Provider informed the Complainant that his proposal was not acceptable to it. It outlined that the Provider's position remained as set out in its letter dated 2 November 2015, and that was its final decision.

In the absence of the required documentation, I must accept that the Provider was not in a position to carry out a full assessment of the Complainant's application. It would appear that the SFS submitted in December 2015, was discussed during the meeting on 7 January 2016.

I have not been provided with any evidence that there are grounds for me to find that the Provider acted in any way other than in accordance with its entitlements and its commercial discretion in refusing to agree to the Complainant's proposal to write off the Complainant's debt, appointing a receiver over the property in November 2016, and selling the loan to a third party in 2017.

The Complainant has put forward a number of grounds upon which he contends that the Provider's conduct was based wholly or partly upon a mistake of fact. Specifically, it is submitted on his behalf that he has no unencumbered assets; that the Provider relied on incorrect expenditure guidelines; and that the Provider is not correct in its assertion that he failed to provide information when required.

The Complainant has stated that the Provider failed to respond to his complaints in a timely fashion. I have examined the correspondence in relation to the complaint from February 2016 onwards.

The complaint having been received by the Provider on 18 February 2016, a holding letter was sent on 10 March 2016 – 3 weeks later – advising that the investigation was pending. Further holding letters were sent each month in April and May until a Final Response Letter issued on 13 May 2016.

A further complaint was received by the Provider on 24 May 2016. Holding letters were sent in June, July, August, October and November 2016, with a Final Response Letter issuing on 3 November 2016.

Under the provisions of the Consumer Protection Code 2012 ("the CPC") when dealing with a complaint a provider is, amongst other things, required to:

- acknowledge receipt of the complaint within 5 business days of the complaint being received (10.9(a));
- provide updates on progress at intervals of no more than 20 business days (10.9(c));
- where the complaint has not been resolved within 40 days, provide an estimated timeframe for the resolution of the complaint (10.9(d));

In respect of the first complaint, the Provider acknowledged receipt of the complaint on 22 February 2016, within the requisite 5 business days from 18 February 2016. It provided updates as to progress within 20 business days on each holding letter in March, April and May. In its handling of this complaint it complied with provisions 10.9 (a) and (c) of the CPC. It also provided a timeframe for anticipated resolution when the complaint had not been resolved within 40 business days. A final response issued on 13 May 2016, being three months after the complaint was made.

I accept in respect of the first complaint that the Provider complied with its obligations under the CPC in handling the complaint.

In respect of the second complaint, the complaint was acknowledged on 27 May 2016 – the 3rd business day after it was received. A holding letter issued on 14 June 2016, within the requisite 20 business days. On 12 July 2016 another holding letter issued, this time containing an anticipated time for resolution of the complaint: 9 August 2016.

On 9 August 2016 and 6 October 2016 holding letters issued giving anticipated resolution times of 6 September 2016 and 3 November 2016, respectively. Ultimately a final response issued on 3 November 2016.

In respect of this second complaint to the Provider, I incorrectly stated that the Provider did not write to the Complainant during October 2016. That was an error in that I intended to state that the Provider did not write to the Complainant during September as I had no evidence, when issuing my Preliminary Decision that the Provider had written to the Complainant in September. However, the Provider has, in its post Preliminary Decision submission of 18 October, provided evidence to show that it issued a holding letter to the Complainant dated 7 September 2016.

The Provider *“acknowledges that this was not provided in evidence as part of its formal submission to the FSPO and apologises for this error”*.

In light of the new evidence being submitted by the Provider, I now accept that a holding letter had been issued by the Provider for September 2016.

It is disappointing that this evidence was not submitted by the Provider when it should have been.

I note that the estimated timeframes were not met for the resolution of the complaint from July 2016 until November 2016. There is no doubt that the repeated pushing back of the estimated time for resolution would have greatly inconvenienced the Complainant.

While I appreciate the circumstances of this complaint are complicated and required extensive investigation, and involved the Provider, the Complainant and the Complainant’s representative, a period of nearly 6 months from complaint to resolution is excessive, particularly in the absence of clear reasons for the delay being provided to the Complainant.

The decision of the Provider to enforce a sale of the property and not write down the residual debt was one that it was entitled to make.

However, I believe greater and better communication was required by the Provider when handling the complaint received on 24 May 2016.

For the reasons outlined above, I partially uphold this complaint and direct the Provider to pay a sum of €1,000 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)(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 payment to the Complainant in the sum of €1,000, 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

3 December 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.