An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref: 2020-0041

Sector: Banking

Product / Service: Mortgage

Conduct(s) complained of:

Outcome: Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the administration of the Complainant's mortgage loan account with the Provider secured on buy-to-let properties.

The Complainant's Case

The Complainant holds a mortgage loan account with the Provider.

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. He contends that the Provider wrongfully / unlawfully appointed a receiver to the assets that form security for the mortgage loan account.

In particular, he states that the Provider appointed a receiver without notifying him, and prematurely in circumstances where he had an agreed repayment plan in place and was awaiting a response to the financial statement he had submitted to them for consideration.

When asked how he would like this complaint to be resolved, in his complaint form, the Complainant seeks the following:

i. Income and expenditure information from both the Provider and the receiver;

ii. Removal of the receiver;

iii. Suitable engagement with him on the basis that he would be in a position to pay €200,000 off the mortgage balance once another property was sold;

iv. A new mortgage loan agreement with monthly repayments of €7,500.

The Provider's Case

The Provider states that it has at all times acted in accordance with its regulatory obligations.

The Provider has, however, acknowledged that it neglected to respond to an email from the Complainant's solicitor following the appointment of a receiver. It has apologised for this omission and offered the sum of €250 by way of good will payment to the Complainant.

The Provider has stated that the sale of a property by the receiver has been put on hold pending receipt of funds from sales of other properties by the Complainant that will discharge the arrears, and on being satisfied that the Complainant can meet the full contractual repayments (capital plus interest) the receiver will be discharged.

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 24 May 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.

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Following the issue of my Preliminary Decision, both parties made the following submissions:

1. Letter from the Complainant to this Office dated 8 June 2019.
2. Letter to this Office from the Complainant's appointed representative, dated 11 June 2019.
3. Letter from the Complainant to this Office dated 1 July 2019, authorising his representative to act on his behalf in this matter.
4. Letter from the Provider to this Office dated 12 July 2019.
5. Letter from the Complainant' representative to this Office dated 26 July 2019.
6. Letter from the Provider to this Office dated 6 August 2019.
7. Letter from the Complainant's representative to this Office dated 22 August 2019.
8. E-mail from the Provider to this Office dated 19 September 2019.
9. E-mail from the Provider to this Office dated 24 September 2019.
10. E-mail from the Provider to this Office dated 7 October 2019.
11. Letter from the Complainant's representative to this Office dated 9 October 2019.
12. E-mail from the Provider to this Office dated 30 October 2019 (received 5 November 2019).
13. Letter from the Complainant's representative to this Office dated 20 November 2019.
14. E-mail from the Provider to this Office dated 4 December 2019.
15. Letter from the Complainant's representative to this Office dated 20 December 2019.
16. E-mail from the Provider to this Office dated 9 January 2020.

A full exchange of these submissions took place between the parties.

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

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The extent of the jurisdiction of the Financial Services and Pensions Ombudsman should be borne in mind in this complaint. 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 Complainant's arrears related issues, correctly adhered to any applicable 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.

The main issues which the Complainant has aired in his complaint to this Office concern the conduct of the receiver. This Office is not in a position to adjudicate on the conduct of the receiver, as a receiver is not a regulated financial service provider, so complaints regarding that conduct were not investigated as part of this adjudication. This was communicated to the Complainant on 18 December 2015 – the day after the Provider's Final Response Letter was received by this Office. Despite this, I note the Complainant continued to comment on the conduct of the receiver, including in his post Preliminary Decision submission.

Despite the considerable volume of correspondence generated in this complaint, this office is only in a position to investigate whether the Provider reneged on an agreed repayment plan, and whether it complied with its regulatory obligations when deciding whether or not to call the loan in (and appoint a receiver).

The Complainant drew down a mortgage with the Provider in 2005 for the amount of €1,350,000 to be repaid over a term of 20 years. Interest only repayments were to apply to the loan for the first three years, after which capital plus interest repayments were to be made.

In 2008, when the loan was due to revert to capital plus interest repayments, the Complainant and the Provider agreed to extend the period of interest only repayments for a further 12 months. In June 2010 an agreement for 6 months of interest only repayments was agreed. A further 2 months of interest only repayments was agreed in December 2010. 12 months of interest only repayments were agreed from March 2011, and a further 2 months of interest only repayments were agreed from March 2012.

Accordingly, at the end of May 2012 the account was due to revert to capital plus interest repayments. No alternative repayment agreement was reached at that stage.

In November 2012 the Complainant and the Provider agreed an alternative repayment arrangement of €5,000 per month for a period of 6 months. This is evidenced by letter dated 15 January 2013. The Complainant did not make the agreed €5,000 repayments, however the repayments he did make were between €4,000 and €4,500.

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By July 2014 the arrears were over €150,000 and the Complainant was asked to submit a standard financial statement and supporting documentation within 2 weeks. The Complainant submitted a standard financial statement but the Provider states that he failed to submit all of the documentation required. On 9 September 2014 the Provider called in the loan and issued a letter of demand. Two months later (on 21 November 2014) a receiver was appointed to the properties that formed the security for the loan.

There is no doubt that the Complainant's loan account was significantly in arrears by 2014. It is also a matter of fact that the Complainant failed to make the agreed alternative repayments of €5,000 per month.

It is a matter for the Provider to consider the sustainability or otherwise of a loan; this Office cannot interfere with that commercial discretion.

The loan concerned buy to let properties, so the applicable framework is the Consumer Protection Code of 2012/2015 (CPC), not the Mortgage Arrears Resolution Procedure (MARP) as laid out in the Code of Conduct on Mortgage Arrears 2013 as the MARP only applies to mortgages on private dwelling houses.

The Provider has furnished evidence that from August 2012 the Provider issued correspondence to the Complainant detailing the arrears position; advising of the potential for legal proceedings / repossession; recommending independent legal advice; and advising the Complainant would be liable for the residual debt, as required under the CPC. These letters contained the information required under provision 8 of the CPC.

The Provider has also furnished evidence of compliance with provision 8.11 of the CPC, and I accept its level of communications was proportionate and not excessive within the meaning of provision 8.13 of the CPC.

There is no evidence to suggest that the Provider has not complied with its obligations under the CPC.

The Complainant's third party representative, in its post Preliminary Decision submission dated 11 June 2019, has submitted what it considers an additional point of fact, which the representative believes is a:

> *"…material fact which should be considered in the context of [the Ombudsman's] preliminary decision".*

The additional point of fact raised is that the Provider has confirmed to the Complainant in correspondence dated 28 May 2019 that it has overcharged the Complainant:

> *"…during the period when your account was in arrears, we did not consider some of these payments when calculating the interest. As a result some interest charges were higher than they should have been"*

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The same correspondence confirms the amount overcharged and that it has been credited to the Complainant's loan account:

> *"We have credited the amount we overcharged €8,006.88 to your loan account on 18/05/2019 thereby reducing the amount left on your loan".*

It is disappointing that the overcharge does not appear to have been discovered during the earlier stages, when the complaint was being prepared by the Provider for investigation and adjudication of the complaint by this Office.

However, I note that even when taking the above figure into consideration the Complainant would still find substantial arrears present on his loan account, following this the Provider would still have the commercial discretion to appoint a receiver having considered the sustainability of the loan. This does not alter my view that the Provider has complied with its obligations under the Consumer Protection Code when undertaking the process of appointing the receiver.

In terms of conduct that this Office is in a position to investigate, the only other aspects of the complaint that remain is the Provider's failure to respond to an email from the Complainant (or the Complainant's solicitor), and the allegation that the Provider acted wrongfully in appointing a receiver when it was in receipt of a standard financial statement (albeit one that the Provider says was incomplete). Essentially, the Complainant contends that the Provider was under a duty to consider and, if necessary, seek further information from the Complainant regarding that standard financial statement prior to appointing a receiver.

With regard to the failure to respond to his solicitor's email, I note the Provider has offered a sum of €250 and I accept that this offer is reasonable in circumstances where the Provider was in contact with the Complainant and his financial advisor during this period, and the failure to respond appears to be an oversight rather than a sustained effort to ignore legitimate queries.

I will now address the Provider's conduct between seeking a standard financial statement and appointing the receiver.

On 11 July 2014 the Complainant spoke with an agent of the Provider by telephone. The Provider's agent advised that the Provider may proceed to appoint a receiver, and requested that the Complainant furnish a standard financial statement with accompanying documentation within 2 weeks. This did not occur. The Complainant supplied a standard financial statement one month later, and the Provider states that he did not include all the required documentation – it was missing current account statement, accounts for the period ending 31/12/13, and a revenue notice of assessment.

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If one was to ignore the considerable arrears and history of missed contractual repayments on this account, the failure of the Provider to allow an extended period over and above the 2 weeks it had stated to the Complainant for a standard financial statement to be received and assessed (and, as was necessary in this case, further documentation to be provided), and proceeding to appoint a receiver, could be viewed as being hasty. However, it would still have been a course of action the Provider would have been contractually entitled to take.

However, the possibility of appointment of a receiver had been specifically raised with the Complainant on a number of occasions by telephone prior to the eventual appointment, in addition to his being in receipt of CPC compliant warning letters every three months.

Furthermore, the mere fact that a standard financial statement was submitted would not preclude the Provider from appointing a receiver.

In the context of the history of dealings between the Complainant and the Provider – the level of arrears; the period of time between the account going into arrears and the appointment of a receiver; the failure of the Complainant to make agreed alternative repayments of €5,000; the failure of the Complainant on a number of occasions to respond in a timely manner to requests for documentation / information made of him by the Provider; the Provider's view of the sustainability of the loan – I am not in a position to find that the appointment of a receiver was wrongful within the context of the regulatory obligations of the Provider or within the scope of Section 60(2) of the Financial Services and Pensions Ombudsman Act, 2017.

The Complainant's primary concern in the complaint made to this Office was the appointment and conduct of the receiver. The Complainant sought, among other things, to have the receiver discharged and/or to prevent the receiver from effecting a sale of the properties. As has been pointed out to the Complainant, it is not a function of this Office to investigate the conduct of a receiver, nor will this Office interfere with the commercial discretion of a financial service provider. Although the Complainant was advised of this limitation at an early stage, the complaint in relation to the receiver's conduct was still pursued vigorously.

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. This Office will investigate whether a provider complied with its obligations under the CPC, the CCMA, or any other relevant regulatory or legislative obligations.

I accept on the documentation before me that the Provider has complied with its obligations under the CPC.

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

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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 rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

12 February 2020

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.