



<u>Decision Ref:</u>	2020-0185
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Property Investment
<u>Conduct(s) complained of:</u>	Maladministration
<u>Outcome:</u>	Upheld

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

This complaint relates to two mortgage accounts held by the Complainant.

In **March 2008**, mortgage facilities were made available to the Complainant to purchase two investment properties under mortgage accounts ending **907** and **809** by regulated financial service provider (*the “Original Mortgagee”*). These loans were sold in **2014** to another entity (*the “Second Mortgagee”*).

Since 2014 the second Mortgagee has had two credit servicing firms dealing with the Complainant’s mortgage loan accounts. The first credit servicing firm which was dealing with the mortgage loan accounts between 2014 and January 2016 will be called the ***Second Mortgagee’s previous Credit Servicing Firm*** throughout this decision. The credit serving firm which was then appointed in February 2016 and against which his complaint is made will be called the ***Respondent Provider***.

In **March 2016** a receiver was appointed over the properties and a deed of appointment was executed. Both properties have since been sold by the receiver.

The Complainant’s Case

The Complainant submits that due to his mental health difficulties his mortgage loans (accounts ending **907** and **809**) fell into arrears of about €30,000.

The Complainant outlines that his wife who had power of attorney negotiated a payment plan in **February 2015** with the Respondent Provider to pay double the monthly repayments to reduce the arrears on mortgage account ending **907** and that the property which was the subject of mortgage loan account ending **809** would be voluntarily surrendered.

The Complainant outlines that from **12 March 2015** up to **29 February 2016**, €16,387.00 was paid on mortgage account ending **907**; €8,322.00 in mortgage repayments and €8,065.00 in arrears payments.

The Complainant submits that the Respondent Provider states that *“only four phone calls in total”* were made between the Respondent Provider and the Complainant’s wife and that *“this is not correct”*. The Complainant states that his wife dealt with *“several”* of the agents of the Second Mortgagee and the Respondent Provider and *“fully engaged”* with them. The Complainant details that during these calls his wife was informed that receivers may be appointed to take over the management of the property which was subject to mortgage account ending **809** and not in relation to mortgage account ending **907**. The Complainant outlines that his wife informed the Respondent Provider that the property the subject of mortgage account ending **809** *“needed work and was not let-able”*.

The Complainant submits that a completed **Standard Financial Statement (“SFS”)** was received by the Respondent Provider, and that his wife informed the Respondent Provider, during a phone call, the recording of which was not included in evidence, that the supporting documents they sought *“did not exist”* and that they had received *“everything that she had control over”*.

The Complainant submits that the following supporting documentation was required of him:

1. **Personal Bank statements for the months November and December 2014 and January 2015:** the Complainant’s banking was done with another Irish bank who closed his accounts in 2013 as they were exiting the Irish market. As he was ill, he did not open another account and as such he had no personal or business bank statements for the time requested.
2. **Social Welfare Payments:** the Complainant was not in receipt of social welfare payments.
3. **Proof of Income:** during the previous years, the Complainant was *“unable to instruct his accountant so no assessment was made. No accounts were available at that time.”*
4. **Tenancy agreement to show rental income:** The tenants had continuous month to month Part 4 tenancies and as such, no leases existed.

The Complainant details that the Respondent Provider treated the accounts as one, when the mortgage loans were stand alone accounts with no *“cross-borrowings or securities.”*

The Complainant outlines that a receiver was appointed in **March 2016** and he lost access to the properties. The Complainant details that the Respondent Provider acted in *“haste”* when the receiver was appointed *“because it was a tracker mortgage they were determined to close the mortgage account as quick as possible.”* The Complainant maintains that he carried out his obligations according to the alleged agreement made in February 2015 and that the appointment of the receiver was therefore unjustified and *“unfair”*.

The Complainant submits that once the receiver was appointed over the properties, he and his wife exhausted the Respondent Provider’s complaints procedure and that the only reason they were given for the appointment of the receiver was that a letter the Respondent Provider issued to the Complainant dated **03 November 2015** was not answered.

The Complainant details that he has discharged his Non-Principal Private Residence (NPPR) duties and has paid all stamp duty in full on the properties and that at no time did anyone request information from him in relation to the properties. The Complainant submits that it made no commercial sense for the receiver to take the actions he did.

The Complainant has sought the return of the property the subject of mortgage account ending **907**. The sale of that property had not completed at that time his complaint was initially made. The Complainant also sought that any rent being collected by the receiver be credited to him and that all costs incurred by the Respondent Provider or any companies related to them from the time the receiver was appointed be carried by them.

The Respondent Provider’s Case

The Respondent Provider submits that on **28 March 2008** the Original Mortgagee agreed to make mortgage facilities available to the Complainant which were offered to purchase two residential investment properties. It states that an all sums legal mortgage was given over the properties and the offer letters were signed by the Complainant in **April 2008**, accepting the mortgage loan offer and agreeing to the terms set out in the terms and conditions leaflet.

The Respondent Provider submits that in the terms and conditions, the definition of debt has been highlighted, which states that debt means all sums of money owed and all liabilities of obligations to be carried out to the lender.

The Respondent Provider outlines the details with respect to each mortgage loan account were as follows;

- Mortgage account ending **809** – An interest only facility for the sum of €1,100,000 over a term of 20 years.
- Mortgage account ending **907** – An interest only facility for the sum of €900,000 over a term of 20 years.

The Respondent Provider maintains that the Complainant's wife was made aware of the arrears balances on the mortgages by numerous phone calls and through the quarterly arrears letters, and that she was also made aware of the fact that, given the high level of arrears, a receiver may be appointed to manage the properties.

The Respondent Provider rejects the Complainant's contention that an agreement was reached in or around **February 2015** to voluntarily surrender the property which was subject to mortgage account ending **809** and to pay down the arrears of ending **907**. It maintains that there is no evidence to support this alleged agreement.

The Respondent Provider submits that in order to complete an assessment of a proposal made, a completed SFS and supporting documentation was required. It states that despite "*all reasonable efforts*" undertaken to obtain the supporting documentation during the period **February 2015** and **November 2015**, no supporting documentation was provided and an assessment to determine if an alternative repayment arrangement could be put in place could not be made. The Respondent Provider maintains that at all stages, the Complainant's wife was made aware that in order to consider any proposals, a SFS and supporting documentation would be required.

The Respondent Provider rejects the contention by the Complainant that the Complainant's wife informed the Respondent Provider, during a phone call the Complainant submits was not included in the evidence, that the documents they were looking for did not exist and they had received everything in the Complainant's wife's control. The Respondent Provider submits that there is no evidence to support this assertion, and the Respondent Provider maintains that the first time it heard of this was during the investigation by this Office. The Respondent Provider maintains that an **Alternative Repayment Arrangement** (an "**ARA**") was never agreed or put in place. In order to consider an ARA, a completed SFS and supporting documentation is required. The Respondent Provider submits that it met its obligations under the **Consumer Protection Code 2012** (the "**CPC 2012**").

The Respondent Provider details that the proposal put forward by the Complainant's wife included payments in excess of the contractual monthly repayments on mortgage loan ending **907** while "*ignoring*" the Complainant's obligations under mortgage loan account ending **809**. The Provider submits that this would not have been agreed as it was not a sustainable arrangement.

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The Respondent Provider states that the Power of Enforcement of the Mortgage and the right to appoint a receiver is contained in **section 8** of the **Mortgage Terms and Conditions** and an event of default is defined in **section 5** of the **Mortgage Terms and Conditions**.

The Respondent Provider maintains that the process for appointment of a receiver is initiated following an event of default and when all efforts to find a resolution with the borrower, in accordance with their obligations under the **CPC 2012**, have failed. The Respondent Provider, in response to the Complainant's complaint regarding the maladministration of the appointment of the receiver, maintains that, following attempts to seek meaningful engagement from the Complainant, a 'call in debt letter' was issued to the Complainant in respect of the properties, advising that despite previous correspondence, the Complainant had failed to clear the arrears due on the mortgage loans. The call in debt letter with respect to mortgage loan account ending **809** issued on **20 August 2015** and with respect to mortgage loan account ending **907** issued on **02 February 2016**.

The Respondent Provider argues that an event of default occurred on both loans and the Complainant was required to pay, within five days of the letter, the full sums. The Respondent Provider details that, as the full amount owing, was not paid the receiver was appointed and a deed of appointment was executed on **08 March 2016**. The Respondent Provider maintains that the receiver has in each case been validly appointed.

The Respondent Provider submits that both properties have since been sold and the sale price, associated costs and outstanding balance are as follows:

- The property the subject of mortgage loan account ending **809**

Total Sale Price	€855,000
Associated Costs	€73,569
Outstanding Balance	€387,787

- The property the subject of mortgage loan account ending **907**

Total Sale Price	€641,000
Associated Costs	€69,060
Outstanding Balance	€340,962

The Complaint for Adjudication

The complaint for adjudication is the Respondent Provider acted in an unjustified and unreasonable manner by appointing a receiver over the property which is the subject of mortgage loan account ending **907** in **March 2016**.

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 on 8 January 2020, 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 my Preliminary Decision the parties made the following submissions:

1. Letter from the Provider to this Office dated 24 January 2020.
2. Letter from the Complainant to this Office dated 27 January 2020.

Copies of these additional submissions were exchanged 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.

At the outset it is important to clarify that this office will not be considering any complaint made by the Complainant about the conduct of the receiver, once appointed. The reason for this is that this office has jurisdiction to consider complaints against regulated financial service providers in the provision of a financial service to a consumer, as per the **Financial Services and Pensions Ombudsman Act 2017** (the "**FSPO Act**"). A receiver is not a regulated financial service provider and does not provide financial services within the meaning of the FSPO Act.

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As such I will not be making any decision on the submissions made by the Complainant about the conduct of the receiver once he was appointed.

The issue to be determined is whether the Respondent Provider acted in an unjustified and unreasonable manner by appointing a receiver over the property which is the subject of mortgage loan account ending **907** in **March 2016**. In order to determine this, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation with respect to both mortgage loan accounts ending **809** and **907**. It is also necessary to consider the details of certain interactions between the Complainant's wife and the Provider from **May 2014** to **March 2016** when the receiver was appointed.

The **Offer of Mortgage Loan** with respect to mortgage loan accounts ending **809** and **907** are detail, as follows;

Mortgage Loan Account ending 907	Mortgage Loan Account ending 809
The Important Information section details, as follows: Amount of Credit Advanced: €900,000 Period of Agreement: 20 years Repayment Method: Interest Only	The Important Information section details, as follows: Amount of Credit Advanced: €1,100,000 Period of Agreement: 20 years Repayment Method: Interest Only
The Particulars of the Offer section details as follows; Applicable Interest Rate: 4.85% (at offer date) Basis of Interest Rate: 0.85% plus the ECB Main Refinancing Operation Rate Interest Type: Tracker Purchase Price/Valuation: €1,200,000	The Particulars of the Offer section details as follows; Applicable Interest Rate: 4.85% (at offer date) Basis of Interest Rate: 0.85% plus the ECB Main Refinancing Operation Rate Interest Type: Tracker Purchase Price/Valuation: €1,600,000

Both Offer of Mortgage Loans (mortgage loan accounts ending **809** and **907**) detail that the loan is subject to "conditions contained in the enclosed Terms and Conditions leaflet dated October 2005". The Provider has furnished two sets of terms and conditions with respect to each mortgage loan in evidence, titled as follows;

- Home Loan Mortgage Conditions
- Buy to Let Terms & Conditions

Both sets of conditions are marked "10/05" on the back cover page of the document.

The **Home Loan Mortgage Conditions** define “Debt” at **Clause 1.1(e)** as;

“Debt” means all sums of money owed and all liabilities or obligations to be carried out to the Bank at any time and from time to time, by a Borrower whether:

- (a) they arise before or after the Bank has demanded that they are repaid or carried out;*
- (b) they are owed or to be carried out immediately or only after a stated event has occurred’*
- (c) the Borrower owes or is to carry them out on his own or jointly with any other persons;*
- (d) the Borrower owes or is to carry them out on his own account or as guarantor for other persons;*

together with Interest upon them and Expenses relating to them.”

Clause 8.1 of the **Home Loan Mortgage Conditions** details:

“At any time after the Bank has demanded the repayment of the Debt or following a request by the Borrower and insofar as the law allows, the Bank may:

- (a) appoint a Receiver over all or part of the Property.”*

Both the **Home Loan Mortgage Conditions** and the **Buy to Let Terms & Conditions** contain a clause titled “**Events of Default**”. The **Home Loan Mortgage Conditions** in **Clause 9**, detail as follows;

“Events of Default

9.1 The Bank shall not exercise any of the powers provided for in Clause 8 hereof or conferred by any enactment until any of the following events shall occur:

- (a) the Borrower fails to pay any sum on the due date for payment as outlined in the Facility Letter or any other sum due and payable to the Bank;*
- ...
- (e) the Borrower stops or delays payment of sums due or is unable to pay debts as they fall due or is believed unable to pay sums due or is deemed apparently insolvent under insolvency legislation.*

9.2 If the Bank declares that an event of default has occurred the Bank may at (or at any time after) the time of making the declaration:

...

- (b) *demand immediate payment of the sums outstanding (in which case the sums outstanding will become immediately due and payable by the Borrower) or declare that the sums outstanding shall become due and payable on demand”*

The **Buy to Let Terms & Conditions** detail as follows at **Clause 5**;

5.1 We may declare that an Event of Default has occurred upon or at any time after the happening of any of the following events;

- (a) *You fail to pay, for a period of three months, any sum on the due date for payment under this offer or any other sum due or payable to us.*

...

Provided that we have taken all reasonable steps to bring the event to you[r] attention as soon as possible after the occurrence of such event, before we declare that an event of default has occurred.

Clause 5.2(b) of the **Buy to Let Terms & Conditions** contains the same text as **Clause 9.2(b)** of the **Home Loan Mortgage Conditions**.

The **Acceptance of Loan Offer** with respect to both mortgage loans was signed by the Complainant and witnessed by a solicitor on **02 April 2008**. The Acceptance of Loan Offer states as follows:

“(A) I/we accept the Offer of Mortgage Loan on the terms herein and set out in the terms and conditions leaflet dated October 2005.

...

(F) My/our Solicitor has fully explained the said terms and conditions to me/us.”

It is unclear to me why there are two sets of terms and conditions applicable to each of the mortgage loans that both contain different clauses dealing with Events of Default. It does not appear to be in dispute between the parties that both sets of terms and conditions are applicable to each of the Complainant’s mortgage loans.

The definition of debt contained in the terms and conditions of both mortgage loan accounts (as quoted above) means that *“all sums of money owed and all liabilities or obligations”* are included in the definition of debt contained within each mortgage loan. The Complainant is correct in his contention that the mortgage loans were issued under two separate mortgage facilities and I have not been provided with any evidence of any cross securities of the properties which are the subject of the mortgage loans. However the mortgages under mortgage loan accounts ending **907** and **809** are both all sums due mortgages and in those circumstances, the occurrence of an event of default on one account, can impact the other mortgage loan account.

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I understand that mortgage loan account ending **907** first went into arrears on **22 September 2012** and mortgage loan account ending **809** first went into arrears on **26 October 2012**. The Second Mortgagee's previous Credit Servicing Firm began writing to the Complainant with respect to the arrears on those accounts from **May 2014**. At the time, the arrears balances on the mortgage loan accounts were as follows;

- mortgage loan account ending **907**: €22,346.34
- mortgage loan account ending **809**: €26,285.50

The Complainant's wife wrote to the Provider by letter dated **16 September 2014** and outlined as follows;

*"I apologise for the delay in answering your letters. I had been making contact with [the **Original Mortgagee** and its Credit Servicing Firm].*

I am [the Complainant's] wife, I have power of attorney over his affairs, [the Complainant] is under Dr [Name] of [Named Hospital]. [He] is recovering after a serious [incident].

I am trying to get our finances sorted, I am meeting with my account and solicitor. I hope to be in a position to make payments to the accounts in December. Hope this meets your approval.

If you require further information please contact me at [Telephone Number]. Thank you.

The Complainant's wife was provided with a **Third Party Authorisation Form** to enable the Provider to deal with the Complainant's wife with respect to the mortgage accounts which was signed in **October 2014**. The Authority was valid for 12 months.

The Second Mortgagee's previous Credit Servicing Firm continued to write to the Complainant with respect to the arrears arising on the mortgage loan accounts every three months. By **December 2014**, the arrears balances on the mortgage loan accounts were as follows;

- mortgage loan account ending **907**: €27,025.44
- mortgage loan account ending **809**: €32,183.29

In **December 2014**, the Complainant made lodgements of €693.53 to mortgage loan account ending **907** and €300 to mortgage loan account ending **809**. These were the first payments to the mortgage loan accounts since they had went into arrears in September/October 2012.

On **26 January 2015** an agent of the Second Mortgagee's previous Credit Servicing Firm phoned the Complainant's wife to get an update on the mortgage loan accounts. The agent informed the Complainant's wife of the arrears on the mortgage loan accounts and advised a SFS would be sent to the Complainant's wife and that the SFS should be returned with supporting documentation to enable an assessment to be completed.

The Complainant submits that his wife and the agent were at cross purposes for most of this call, as his wife thought the agent was enquiring about another property. A recording of this telephone call has been provided in evidence. It appears that there was initial confusion in relation to what property was discussed, but this was clarified clearly by the agent and the Complainant's wife expressed an understanding of the properties under discussion.

On **26 January 2015** the Second Mortgagee's previous Credit Servicing Firm issued a letter to the Complainant for the attention of the Complainant's wife enclosing the SFS to be completed and requesting the following supporting documentation;

- *"Three months recent personal bank statements (November & December 2014, January 2015*
- *If self employed; a copy of Notice of Assessment for 2014, set of business accounts and six months business bank account statements*
- *Statements for any loans holds elsewhere*
- *A copy of any social welfare entitlements"*

The letter further detailed *"on receipt of your documentation, I will assess your individual circumstances with a view to proposing a mutually acceptable arrangement"*

On **12 February 2015** an agent of the Second Mortgagee's previous Credit Servicing Firm phoned the Complainant's wife, who confirmed that she had received the SFS and was completing it with her accountant. The agent emphasised the SFS and supporting documents, including statements and proof of income must be returned as soon as possible. It was advised that due to the level of arrears on both accounts, without a formal arrangement in place receivers may be appointed to take over the management of the properties. The Complainant's wife acknowledged this and stated she was receiving financial advice. The agent of the Second Mortgagee's previous Credit Servicing Firm advised of the arrears on the accounts, which were then over €35,000 on mortgage loan account ending **809** and approx. €28,000 on mortgage loan account ending **907**.

By this time the Complainant had made a further lodgement of €400 to mortgage loan account ending **809** on **12 February 2015** and had made further payments of €695.53 in **January** and **February 2015** to mortgage loan account ending **907**.

On **5 March 2015** the Complainant's wife returned a call to the agent of the Second Mortgagee's previous Credit Servicing Firm. The Complainant's wife advised the SFS was still with her accountant. The agent made the Complainant's wife aware of the necessity of the supporting documentation to be included with the SFS. The agent advised that due to the irregularity of repayments, the underpayments and the level of arrears on both accounts, without a formal arrangement in place receivers may be appointed to take over the management of the properties. The Complainant's wife advised that the intention was to pay €1,500 a month on mortgage loan account ending **907**. The agent of the Second Mortgagee's previous Credit Servicing Firm welcomed the proposal and clearly indicated that this proposal would have to be put to the Credit Committee to consider, but that this could not take place without the SFS and the supporting documentation. With respect to mortgage loan account ending **809** the Complainant's wife indicated that she hoped to be in a position to make full repayments once the property was rented.

On **14 April 2015** an agent of the Second Mortgagee's previous Credit Servicing Firm phoned the Complainant's wife requesting an update as to the completion of the SFS. The Complainant's wife advised that she was away and had not spoken to the accountant for a while and would ask him for the documentation required. The agent noted that she would like to get the documentation in as soon as possible. The agent noted that a payment in excess of the monthly repayment had been made on mortgage loan account ending **907** and that no repayments had been made on mortgage loan account ending **809**.

The agent sought clarity on whether a repayment would be made on both accounts that month, noting that a receiver may be appointed to take over the management of the property the subject of mortgage loan account ending **809**, as no repayments had been made to the loan account. The Complainant's wife advised that the property the subject of mortgage loan account ending **907** was rented but the property the subject of mortgage loan account ending **809** was vacant. The agent enquired as to whether mortgage loan account ending **809** was listed for sale or whether there were prospective tenants. The Complainant's wife indicated that work was needed on that property. The agent inquired if the Complainant's wife was open to a voluntary surrender on that property given that it was vacant. The Complainant's wife advised that they did not want to sell at the time, but rather they were looking to rent the property. The agent again clarified that she could not move forward with any assessment without the documentation and requested that it be forwarded as soon as possible.

In **April 2015** the Complainant had made a further lodgement of €400 to mortgage loan account ending **809**. This was the last payment made to that mortgage loan account. Between **March and June 2015** the Complainant had made monthly payments of €1,500 to mortgage loan account ending **907**.

An SFS was submitted to the Provider under cover of letter from the Complainant's accountant dated **09 June 2015**. The SFS did not enclose any supporting documentation.

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The Second Mortgagee's previous Credit Servicing Firm wrote to the Complainant on **17 June 2015** and outlined as follows;

"I am writing further to your recent correspondence with our office with a completed Standard Financial Statement enclosed. In order for our restructuring team to consider your proposals please can you provide the following information to support the Standard Financial Statement that you have provided?"

>Proof of current income for all parties to the mortgage, including social welfare income;

>Proof of any applications for social welfare assistance;

>Tenancy agreements to confirm rental income

On receipt of your documentation, our restructures team will assess your individual circumstances with a view to proposing a mutually acceptable arrangement."

The Second Mortgagee's previous Credit Servicing Firm wrote to the Complainant on **20 August 2015** with respect to mortgage loan account ending **809** which outlined that despite previous correspondence, the Complainant had failed to clear the arrears due on the mortgage loan and an 'event of default' had arisen and the Complainant was required to pay within 5 days the full sum.

The letter further advised that if the Complainant failed to pay the full amount that proceedings for possession and/or the powers under the Deed of Mortgage and Charge could be executed, including the power of sale or the appointment of a receiver. The letter also contained details of the charges associated with these actions.

The Second Mortgagee's previous Credit Servicing Firm wrote to the Complainant in **July** and **September 2015**, with respect to the arrears arising on mortgage loan account ending **907**. The Complainant's wife wrote to the Second Mortgagee's previous Credit Servicing Firm by letter dated **20 October 2015** and outlined as follows;

"Re: your letter dated 02/09/2015

I am in communication with yourselves about the arrears. As agreed I am endeavouring to pay double the monthly repayment until the arrears are full payed.

If you require further information please contact me at [Number]. Thank you."

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The Second Mortgagee's previous Credit Servicing Firm responded with respect to mortgage loan account ending **907** by letter dated **03 November 2015** and outlined as follows;

"In order for me to assess the proposed increased repayment and to engage with [the Complainant's wife] I require the following information:

- *The enclosed Standard Financial Statement (SFS) fully completed*
- *A signed letter from you authorising [the Complainant's wife] to discuss your account with [the Second Mortgagee's previous Credit Servicing Firm]*
- *A copy of the Tenancy Agreement for the above mentioned property*
- *Any other relevant information to assist us in assessing your proposal*

To facilitate a speedier assessment of your account I require the above information to be completed and returned to me within 2 weeks of the date of this letter."

The Second Mortgagee's previous Credit Servicing Firm issued letters with respect to the arrears arising on mortgage loan account ending **907** by letter dated **01 December 2015**. The arrears balance at that point in time was €21,380.15.

Between **December 2014 and February 2016**, the Complainant's wife made the following payments to the mortgage loan accounts. At the time the monthly repayment amount due on mortgage loan account ending **907** was €693.53 and the monthly repayment amount due on mortgage loan account ending **809** was €847.65.

Date	Mortgage Loan Account ending 907	Mortgage Loan Account ending 809
16/12/2014	€693.53	€300
26/01/2015	€693.53	-
12/02/2015	€693.53	€400
12/03/2015	€1,500	-
20/04/2015	€1,500	€400
13/05/2015	€1,500	-
18/06/2016	€1,500	-
21/07/2015	€1,500	-
11/08/2015	€1,500	-
18/09/2015	€693.53	-
19/10/2015	€1,500	-
17/11/2015	€693.53	-
21/12/2012	€1,500	-
12/01/2016	€693.53	-
29/02/2016	€1,500	-

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The Second Mortgagee's previous Credit Servicing Firm wrote to the Complainant on **02 February 2016** with respect to mortgage loan account ending **907** which outlined that despite previous correspondence, the Complainant had failed to clear the arrears due on the mortgage loan and an 'event of default' had arisen and the Complainant was required to pay within 5 days the full sum. The letter further advised that if the Complainant failed to pay the full amount that proceedings for possession and/or the powers under the Deed of Mortgage and Charge could be executed, including the power of sale or the appointment of a receiver. The letter also contained details of the charges associated with these actions.

The Complainant's wife wrote to the Second Mortgagee's previous Credit Servicing Firm by letter dated **09 February 2016** and outlined as follows;

"Re: your letter dated 02/02/2016

I am in communication with yourselves about the arrears. As agreed I am paying double the monthly repayment until the arrears are full payed. Thank you.

If you require further information please contact me at [Number]. Thank you."

The signed **Third Party Authorisation Form** to enable to Provider to deal with the Complainant's wife with respect to the mortgage accounts was signed on **03 March 2016**.

On **8 March 2016** a receiver was appointed over both properties and Deeds of Appointment were executed.

Subsequent to the appointment of the receiver, the Complainant requested a SFS from the Respondent Provider in **April 2016**. The SFS was completed and returned to the Respondent Provider on **26 May 2016**. There were no supporting documents with the SFS.

The Complainant's wife wrote to the Second Mortgagee's previous Credit Servicing Firm by letter dated **15 April 2016** taking issue with the appointment of the receiver over the property the subject of mortgage loan account ending **907** given the efforts that were being made to clear the arrears and the "agreement" that was in place. With respect to mortgage loan account ending **809** the Complainant's wife detailed that *"I have not been able to manage [property address] and I accept you are entitled to appoint a receiver to this property."*

Between **March 2016 and June 2016**, the Complainant had made the following payments to the mortgage loan account ending **907**;

Date	Mortgage Loan Account ending 907
31/03/2016	-
28/04/2016	€693.53
31/05/2016	-
07/06/2016	€693.53
07/06/2016	€693.53

No further payments were made to mortgage loan account ending **907**.

In circumstances where the evidence shows that the Complainant accepts that the Provider was “*entitled*” to appoint a Receiver to the property which was the subject of mortgage loan account ending **809**, I will only consider the appointment of the receiver over the property the subject of mortgage account ending **907**.

It is clear from the evidence submitted that numerous attempts were made by the Second Mortgagee’s previous Credit Servicing Firm to get a completed SFS and supporting documentation from the Complainant. The requirement to submit an SFS and the required supporting documentation was made clear during the telephone calls on **26 January 2015, 12 February 2015, 05 March 2015 and 14 April 2015** and also in the written correspondence issued by the Second Mortgagee’s previous Credit Servicing Firm to the Complainant on **26 January 2015, 17 June 2015 and 03 November 2015**. It was also made clear in these communications that an assessment could not be conducted until all of the required documentation was received. I note that the Complainant has submitted that there were further telephone calls between his wife and the Second Mortgagee’s previous Credit Servicing Firm, during **2015** and it was at that time that the Second Mortgagee’s previous Credit Servicing Firm were advised that the documents requested did not exist and that it had received everything in the Complainant’s wife’s control.

I have not been provided with any evidence of any further telephone calls during 2015 and in those circumstances I have no evidence that the Second Mortgagee’s previous Credit Servicing Firm was advised by the Complainant’s wife that the documentation requested did not exist.

With respect to the Complainant’s submission that there was a formal agreement in place to pay double the monthly repayment on mortgage loan account ending **907** there is no evidence of any formal agreement of this nature. The first reference to a proposal by the Complainant’s wife was during the telephone call on **5 March 2015**.

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I note that the agent of the Second Mortgagee's previous Credit Servicing Firm welcomed the proposal, but the agent was very clear that there was a process to be undertaken with the Credit Committee before the proposal could be considered by the Credit Committee and that this could not take place without the SFS and the supporting documentation. The Complainant's wife in her letter of **20 October 2015** then indicated that the proposal had been agreed. The Provider again clearly outlined in its letter of **03 November 2015** that the proposed increased repayment could not be assessed until an updated SFS and supporting documentation was submitted.

Chapter 8 of the Consumer Protection Code 2012 (the "**CPC 2012**") (effective from 1 January 2012) applies to arrears handling in respect of loans, which includes the residential investment mortgage loan which is the subject of this complaint under account ending **907**.

Provision 8.3 of the CPC 2012 outlines:

"Where an account is in arrears, a regulated entity must seek to agree an approach (whether with a personal consumer or through a third party nominated by the personal consumer in accordance with Provision 8.5) that will assist the personal consumer in resolving the arrears."

Provision 8.12 of the CPC 2012 outlines as follows;

"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."

It appears to me that under the **Clause 5 of the Buy to Let Terms & Conditions** the Provider was entitled to declare that an event of default had occurred on mortgage loan account ending **907**, as the Complainant had failed to make payment on this mortgage loan account between **September 2012** and **November 2014** (inclusive). With regard to the CPC 2012, the evidence shows that some efforts were undertaken by the Second Mortgagee's previous Credit Servicing Firm throughout 2015, to agree an approach with respect to the arrears on the Complainant's mortgage loan account.

I also accept that the fact that no supporting documentation was provided and no reason why it could not be provided appears to have been given, meant that an assessment to determine if an alternative repayment arrangement could be put in place could not be progressed by the Second Mortgagee's previous Credit Servicing Firm throughout 2015.

The Complainant, in a post Preliminary Decision submission dated **27 January 2020** has put forward that there was an error of fact in my Preliminary Decision in relation to the Provider's justification for appointing the receiver.

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He states as follows:

“the Banks justification for appointing the receiver was the lack of supporting documentation for the Standard Financial Statement”.

The Complainant has submitted that the documents requested did not exist and that the Provider was notified of this. The Complainant has stated:

“...I am being asked to prove a negative.”

I have been provided with no evidence that the Provider was informed of the non-existence of the documents it sought. I believe in the absence of being informed that the documents, that are routinely required in such situations, were not available, it was not unreasonable for the Provider to expect to receive them.

The Complainant, in his post Preliminary Decision submission, has also stated that the Provider were assuming the requested documentation was being withheld from it and believes that this was leading to misunderstandings. He states:

“During the phone calls the Banks agents would have known that English was not my wife’s native language and that misunderstandings were happening. The Bank should have offered a translator or have letters sent to her in her own language.”

The Complainant’s post Preliminary Decision submission was the first time this was raised as an issue and did form part of the initial complaint made to this Office. Nor have I been provided with any evidence that the Complainant’s wife ever sought a translator or sought any special accommodation to be made by the Provider. Furthermore, I note the Complainant’s wife informed the Provider that she was receiving the assistance of her Accountant and Solicitor in providing the documents sought.

I believe it is most unfortunate that the Complainant and/or his wife or their Accountant or Solicitor were unable or unwilling to provide the material sought by the Provider to assess their ability to pay.

That being said however, in proceeding to appoint the receiver over the property, the subject of mortgage loan account ending **907** in **March 2016**, I am of the view that the Provider did not act in a just and reasonable manner. I am minded to note that the Complainant had been *“recovering after a serious [incident]”* and had appointed his wife to look after his affairs from **November 2014**. From that point between **December 2014** and **February 2016**, the Complainant’s wife had resumed making full monthly repayments on mortgage loan account ending **907**. Furthermore, albeit outside of an alternative repayment arrangement, the Complainant’s wife was making further repayments to the mortgage loan in an effort to clear the arrears. Between **December 2014** and **February 2016** these payments totalled €7,258.50. It does not appear to me that the Provider took these factors into account before proceeding to issue the call in debt letter in **February 2016** and appoint the receiver in **March 2016**.

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It appears to me that the Complainant and his wife had been through a period of significant personal difficulty and were making endeavours to engage with the Respondent Provider and get the monthly repayments with respect to mortgage loan account ending **907** back on track and clear the arrears. I am of the view that the Provider should have made further attempts from October 2015 to seek to agree an approach to resolve the arrears with the Complainant's wife.

For the reasons set out above, I uphold the complaint that the Respondent Provider acted in an unreasonable manner by appointing a receiver over the property which was the subject of mortgage loan account ending **907** in **March 2016**.

I direct that the Respondent Provider mitigate the conduct complained of by writing off half of the residual outstanding balance of €340,962 and to also write off any interest or other costs that have been added since the property was sold. In making this direction, I have taken into account the fact that although the Complainant's wife had resumed making the monthly repayments from December 2014 and had made payments towards the arrears, the Complainant's wife had not followed the correct process to agree a formal arrangement with the Provider.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is 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 rectify the conduct complained of by writing off half of the residual outstanding balance of €340,962 and to also write off any interest or other costs that have been added since the property was sold.

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

5 May 2020

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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.