An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0410
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Level of contact or communications re. Arrears
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the administration of the Complainants' mortgage loan account on their buy-to-let investment property with the Respondent. The Provider appointed a third party entity to manage the Complainants' mortgage account, and also appointed the same third party entity as receiver to the property that the mortgage loan is secured on.

The Complainants' Case

The Complainants submit that they have made numerous attempts to liaise with the Provider in order to resolve their arrears, to no avail. The state that they have:

> *"... tried on numerous occasions to get to a point where we get back to making payments on the property. We have offered to pay all arrears, pay the receiver fees and pay the full monthly mortgage payment going forward but there is no response from [the Provider]*".

The Complainants contend that there is *"a pyrite issue and it needs to undergo repair works at considerable costs*". The Complainants state that they would like the Provider to accept reduced mortgage repayments while the works are being carried out. They further state that they would like the Provider to accept a *"reduced and final payment"* in the event that the works are carried out and the property sold thereafter.

The Complainants assert that the Provider wrongfully appointed a receiver to their property, and that they were trying, without success, to communicate with the Provider in or around that time. The Complainants submit that they *"are open to selling the property (once repaired) to settle the outstanding debt if that is the preferred option by [the Provider]*".

The Complainants state that they want to *"get back to making repayments and take back the property which was unjustly repossessed".*

The Complaint is that the Provider:

1. Wrongfully appointed a receiver to the Complainants' property;

2. Did not clarify, in a timely manner, whether it would accept reduced repayments while remedial works were being carried out;

3. Did not clarify, in a timely manner, whether it would accept a full and final payment if the Complainants sold the property after the repair works were carried out;

4. Profferred poor customer service throughout.

The Complainants would like the Provider to:

1. Return the property to them;

2. Furnish them with answers to their questions, in writing;

3. Waive all receiver and related fees;

4. Offset *"all monies received by the receiver from tenants"* against their arrears;

5. Allow them to *"get back to making payments".*

The Respondent's Case

In its Final Response Letter dated **25 April 2018**, the Provider states:

> *"The decision to appoint a receiver was made as the account remained in arrears and there had been no communication regarding the account between September 2017 and February 2018"*.

The Provider also states that while the Complainants believed their approved third party was in *"continual contact"* with it since 2017 regarding their account, its records show that the contact was not regular. The Provider outlines this in detail in its Final Response Letter.

/Cont'd…

In its Final Response Letter dated **21 June 2019** the Provider acknowledges that the Complainants' submitted proposal was not progressed, and apologises for its lapse in service in this regard. The Provider also states that the Complainants' mortgage account is *"currently in the process of being transferred to [a third party provider]"* and that the receiver appointed in March 2018 was appointed correctly due to *"unaddressed arrears balance and non engagement*" regarding the mortgage account.

The Provider offered redress *"in recognition of any distress or inconvenience caused* in the amount of €1,000.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's 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 19 October 2020, 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The limitations of the jurisdiction of the Financial Services and Pensions Ombudsman should be borne in mind in complaints of this type. Where requests in respect of mortgage loan arrears are in dispute, this office is only in a position to investigate whether a provider correctly adhered to any obligations pursuant to the Central Bank's Consumer Protection Code (CPC) and Code of Conduct on Mortgage Arrears (CCMA) and/or any other regulatory or legislative provisions in relation to the mortgage loan and the application.

/Cont'd…

This office will not interfere with the commercial discretion of a provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant. Furthermore, the conduct of a receiver falls outside the scope of the jurisdiction of this Office.

Relevant Account History

The three Complainants jointly drew down a mortgage in **April 2008** for €405,000 to purchase an investment property. The loan was to be repayable over 25 years. Repayments were on an interest only basis for the first two years (that is, until May 2010).

As a loan secured over an investment property, the Mortgage Arrears Resolution Process (MARP) provisions of the CCMA do not apply.

Whilst it does not appear to form a substantive part of the complaint, for the avoidance of doubt, section 9 of the Mortgage Deed permits the lender to appoint a receiver over the security *"at any time after the Total Debt or any other sum of money whatever has become immediately payable..."*

It appears that it was agreed for interest only repayments to continue up to August 2012.

The loan went into arrears in **September 2012**. In **June 2013** an alternative repayment arrangement (ARA) was agreed for a period of 36 months. In **August 2013** on of the Complainants requested that the agreement be backdated to begin from September 2012, and the Provider agreed to do so. This had the effect of clearing arrears that had arisen from September 2012. However, in doing so, the Provider failed to amend the ARA term, so the ARA had effect for 47 months (up to **May 2016**) rather than the agreed 36. I can see no disadvantage to the Complainants as a result of this error. Apart from an occasional direct debit being returned unpaid, the account repayments proceeded as agreed for the next three years.

On expiry of the ARA, from **June 2016**, the account went into arrears. It is notable that at this stage, little or no capital had been paid off of the loan, it had been allowed to operate on more or less an interest only basis for the first 8 years of its original 25 year term.

Sporadic payments were made by the Complainants from this point up to the beginning of 2020, but the full contractual repayment was not made on any occasion. **From August 2017 to January 2020**, just over €3,000 was paid towards the loan account by the Complainants. The arrears that accrued during that period (August 2017 to January 2020) was over €50,000.

August 2017 to January 2020 is the period with which this Complaint is concerned, being the period in which significant arrears accrued and no agreement was reached to address the arrears, culminating in a receiver being appointed over the property.

/Cont'd…

Log notes furnished by the Provider show that on **12 March 2016** a "pre-expiry letter" was sent to the Complainants, warning that their ARA was nearing its expiry date. It does not appear that the Complainants took any action at this point. On **12 May 2016** the Provider issued a letter to the Complainants advising that as it had not been notified of any ongoing financial difficulties or sought assistance to discuss a further ARA, full repayments (of €1,958.30 subject to possible tax relief at source) would recommence in June 2016.

The following is a timeline of relevant developments but is not exhaustive:

On **19 May 2016** a third party acting on behalf of the Complainants called the Provider to enquire as to where a form should be sent.

He was advised that a letter of authority from the Complainants would be required in order for the Provider to discuss the account with him. An authority was received on **26 May 2016** but it was not in a form acceptable to the Provider. It appears from the documentation furnished that one of the authorisations provided related to a different account. A message was left for the third party. A letter was sent on **31 May 2016** following up on this issue.

On **6 June 2016** one Complainant telephoned the Provider to discuss the issue, and was told what needed to be provided in order for the Provider to discuss the account with a third party. During June a repayment was made lower than the contractual repayment, and the account began accruing arrears. The Provider attempted to telephone one Complainant but he was unable to talk with the Provider on this first attempted call. A message was left for him that he did not return on the second call. On **30 June 2016** a letter was received by the Provider from the Complainants requesting that the third party provider be authorised on their behalf. The Provider wrote to all Complainants on the same day advising that the signatures on the letter did not match the signatures on file.

During July the Provider rang Complainants on a number of occasions but did not succeed in discussing the matter with them. Similarly, during August into September, the Provider's attempts to contact the Complainants by telephone were unsuccessful, other than on **30 August 2016** when one of the Complainants advised that they were in the process of appointing a third party advisor to act on their behalf, and on **8 September 2016** when one of the Complainants advised that they would be sending a letter of authority for their third party advisor.

On **18 August 2016** the Complainants were sent a letter by a third party entity advising that it had been appointed by the Provider to manage their arrears. At this stage a contractual or agreed reduced payment had not been made to the account for 2 months, however the Complainants had made ad hoc payments.

On **21 September 2016** one Complainant contacted the Provider by telephone explaining that she had not been given an email address to forward the letter of authority for her third party advisor. An email address was given to her.

/Cont'd…

On **26 September 2016** the Provider received an authority by email, however it still required a signed letter of authority. It advised the Complainants of this by telephone on the same day.

On **29 September 2016** the Provider telephoned the third party advisor but did not get through. The Provider called a Complainant instead. On **19 October 2016** the third party advisor contacted the Provider to discuss the account. He said he would furnish a standard financial statement (as required, in order for the Provider to consider an ARA) in due course.

On **14 November 2016** the Provider contacted a Complainant to advise that an SFS was urgently required as the previous ARA had expired 4 months ago and the arrears were mounting.

An SFS was received by the Provider from the Complainants (through their third party advisor) on **22 December 2016**. The Complainants' proposal, included with the SFS, sought monthly repayments of €1,057 and a term extension to 34 years.

The Provider called the Complainants' third party advisor noting that the monthly surplus on the SFS was €1,768.82 (higher than the level of proposed repayments).

During **January 2017** the Provider telephoned the third party advisor on 3 occasions without getting to speak to him. On **27 January 2017** a discussion took place between the Provider and the third party advisor, who said he would discuss the matter with the Complainants.

During **February, March and April of 2017** the Provider attempted to contact the third party advisor on 6 occasions, but only got to speak with him once (on 15 March 2017) when the third party advisor stated he would call back as he had queries outstanding with the Complainants.

On **22 June 2016** the loan was called in – a demand for all sums due and owing under the mortgage issued to the Complainants by solicitors acting on the behalf of the Provider.

It is worth noting that from 7 days after this demand was sent (and full repayment not received), the Provider was entitled to avail of any/all of the avenues of recovery set out in the mortgage deed and letter of loan offer, including appointing a receiver.

On **29 June 2016** the Complainants' third party advisor wrote to the Provider stating that he had sent a proposal and was awaiting a response.

On **1 August 2017** an SFS was requested from the Complainants, through their third party advisor. A provider is entitled to seek an up to date SFS, and the previous SFS had been sent over 6 months previously.

/Cont'd…

There was frequent back and forth between Provider, Complainants, and their third party advisor over the next number of months, but an SFS appears only to have been received from one of the Complainants. The Provider required an SFS from all 3 accountholders. This is not an unreasonable requirement.

On **26 March 2018** a receiver was appointed over the property.

On **2 May 2018** the Complainants made a complaint to this Office.

The appointment of the receiver led to an increased intensity in the level of communications from the Complainants to the Provider. I do not propose to set out each interaction as the conduct of the receiver is not a matter upon which I can adjudicate.

Once the receiver was appointed, the Complainants' complaint essentially relates to the failure of the Provider to accept their proposals. As I have pointed out above, this matter relates to the Provider's commercial discretion.

I note that on **29 May 2018** one Complainant put forward a proposal for consideration by the Provider (or its agent). This proposal was not acknowledged or responded to until the Complainant followed up by telephone on **18 June 2018**. I also note that during November 2019 and December 2019 a new third party advisor sought to discuss the account with the Provider, but it took just over one month for the requisite authority to be received by the Provider.

Analysis

I have been presented with no evidence that the Provider has acted in any way other than in accordance with its entitlements and its commercial discretion in appointing a receiver, and not offering either a term extension or capitalisation of arrears.

The Provider's log of contact and the third party's log furnished to this Office in evidence are not contradictory. Correspondence and telephone calls were exchanged at reasonable frequent intervals by all parties. This is not a case where any party was being ignored. The Provider sent regular correspondence and followed up frequently by phone to keep the Complainants updated on the status of the account and what was required to progress matters.

From May 2016 to September 2016 the Complainants (and their third party advisor) undoubtedly had difficulty furnishing a valid third party authorisation to the Provider. This was not due to any wrongful conduct on the part of the Provider. I would also note that a provider must be satisfied that it holds a valid third party authorisation before discussing an account with a third party.

/Cont'd…

The contention that the Provider has fallen short in its level of communication with the Complainants is not sustainable on an objective examination of the interaction between all parties from May 2016 when the ARA expired and the account began to go into arrears and March 2018 when a receiver was appointed.

The Provider has accepted in its Final Response Letter that there was some delay in responding to a proposal of **29 May 2018**, and offered redress of €1,000 in respect of this. In its response to this Office, it has also acknowledged a delay in adding an authorised third party to the account in **December 2019**, and has offered redress of a further €1,000 in respect of this shortcoming.

I believe these offers to be a reasonable attempt to resolve the matter.

For this reason, and the reasons outlined in this Decision, I do not uphold this complaint.

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

16 November 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,

/Cont'd…

(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.