



<u>Decision Ref:</u>	2021-0116
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Commercial Mortgage
<u>Conduct(s) complained of:</u>	Appointment of a receiver Delayed or inadequate communication Dissatisfaction with customer service
<u>Outcome:</u>	Rejected

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

The Complainants entered a mortgage loan agreement with the Provider in **May 2008**. Two properties were held as security for this loan, Property 1 and Property 2 (the **Properties**). The Complainants were deemed *not co-operating* by the Provider in **June 2013** and letters of demand issued in **October** and **November 2013**. A Receiver was appointed over the Properties in **December 2013**.

The Complainants' Case

The Complainants explain that they received a phone call from the tenant at Property 1 on **5 December 2013** informing them that they had received a letter from a representative of a Receiver stating that Property 1 was in receivership and that the tenant was to no longer pay rent to the Complainants. The Complainants state they were absolutely shocked that they had not received notification or correspondence from the Provider or its solicitors (who the Complainants were in regular contact with) in respect of the appointment of the Receiver.

The Complainants say the First Complainant phoned the Receiver who advised the First Complainant that he had no idea she been in discussions with the Provider's solicitors. The Complainants state that the First Complainant has spent a number of years requesting that the Provider "... *tell us what happened*"

The Complainants explain they separated in **2014** and the Provider's conduct has *hugely* affected their marriage. The Complainants say the Provider has treated them unfairly. The First Complainant advises that she applied for personal insolvency which was granted in **2018**.

The Provider's Case

The Provider states the loan the subject of this complaint is jointly held by the Complainants and is secured on two investment properties, Property 1 and Property 2.

On **18 February 2013**, the Provider says it received an email from the First Complainant indicating that a submission would be made to the Provider within the next week, but this did not materialise. The Provider says it issued correspondence to the Complainants on **19 June 2013** addressed to Property 2 due to the level of arrears on the Complainants' loan and their failure to provide an SFS with supporting documentation. Its letter also advised that the Complainants had been classified as *not co-operating*. The Provider advises that the Complainants state they did not receive this letter until **14 September 2013**.

The Provider cites the following passage from an email sent by the First Complainant dated **14 September 2013**: *'It had been agreed previously that all rental income be paid against the mortgage which is currently being lodged weekly/monthly to the account unless maintenance monies/taxes or insurance have to be paid.'*

The Provider advises that the only formal agreement in place with the Complainants prior to **September 2013** was a 6 month interest only arrangement in **May 2010**. The Provider states that in **2010** and **2011**, the Complainants made six payments to the loan account totalling €3,670.69 as against the amount due for that period of over €40,000. The Provider states that for investment properties, it would expect that, at a minimum, any rental income would be paid into the loan account, even if the amount of rent received was less than the full repayment due. The Provider submits that this may have been what was said to the Complainants at some stage in discussions with them, but a formal agreement was not in place for this. The Provider says it is unable to identify any telephone call or meeting with the Complainants where they were advised of this.

The Provider states that on **18 September 2013**, the Second Complainant called to his local branch to discuss the loan and advised the Provider's agent that the Complainants wanted to sell the Properties but was aware there would be a shortfall. The Provider says the Second Complainant was advised to get the Properties valued and submit a proposal to the Provider along with a Standard Financial Statement (**SFS**) and supporting documentation.

The Provider says, at that time, it was not possible to assign a single point of contact to the Complainants as different sections within the Provider's Arrears Support Unit (**ASU**) were dealing with the Complainants' case depending on the stage it was at.

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On **9 October 2013**, the Provider says its solicitors wrote to the Complainants, separately, at their address at Property 3 demanding payment of the amount outstanding on the loan or possession of the Properties. The Provider says the Complainants visited their local branch on **17 October 2013** in respect of this letter. The Provider says the Complainants advised that they had been unable to submit the SFS as they were waiting for their accountant to prepare the necessary documentation. The Provider states its branch staff member called the ASU to discuss the Complainants' case. The ASU agent advised that the Complainants' case had gone legal and they would need to contact the Provider's solicitors. The Provider states its agent also advised that the Complainants submit an SFS with supporting documentation and a proposal in relation to their debt.

The Provider states its solicitors received an email from the First Complainant on **17 October 2013** attaching an SFS. In this email, the Provider says the First Complainant referred to her email of **14 September 2013** to which she did not receive a reply and that the Complainants had previously advised the Provider they had requested all correspondence be sent to their new address but this request was ignored. The First Complainant also stated that the Complainants wanted to sell the Properties and come to an arrangement in relation to the residual debt.

The Provider says its solicitors responded to the First Complainant on **18 October 2013** explaining the email would be forwarded to the Provider and requested that the First Complainant send in the required supporting documentation in respect of the SFS. The Provider explains the First Complainant responded the same day advising that she would contact the Complainants' accountant to obtain the required information.

By email dated **21 October 2013**, the Provider says its solicitor received supporting documentation from the First Complainant and this was forwarded to the Provider on **22 October 2013**. The Provider says not all of the necessary documentation was provided and it was unable to assess the Complainants' financial circumstances.

The Provider explains that further letters issued to the Complainants on **30 October 2013** advising that as the Provider had been unable to contact the Complainants, a field representative was going to call to them at Property 2. The Provider states that this visit did not take place and "*... acknowledges that this letter was not appropriate and should not have been sent*"

The Provider advises that given the length of time the Complainants' account was in arrears, their failure to provide an SFS with full supporting documentation and the fact the Complainants' case had already entered the legal process, the Provider progressed the case along the legal route.

The Provider states that it acknowledges the Complainants advised their local branch on **18 September 2013** to forward all correspondence to a different address (Property 3) and this was not amended on the Provider's system. The Provider also acknowledges that due to this error, the demand letters issued on **20 November 2013** would not have been received by the Complainants prior to the appointment of the Receiver.

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The Provider states that it *"... would like to apologise for this error and acknowledges that it would have come as something of a shock to the Complainants to be advised by their tenants of the appointment of the receiver."*

The Provider acknowledges that the First Complainant had been involved in discussions with its solicitors. The Provider states it should be noted that correspondence issued by its solicitors on **9 October 2013** demanding repayment of the outstanding debt or possession of the Properties failing which, it would commence legal proceedings.

The Provider advises that the Complainants submitted a change of address request dated **21 July 2014** and their address was amended on **28 July 2014**.

The Provider says that it received a number of complaints from the First Complainant and issued response letters on **16 July 2014**, **19 January 2016**, **2 June 2016** and **27 February 2019** explaining what happened in the Complainants' case. The Provider states that in its responses, it explained the Receiver was appointed to the Properties due to the high level of arrears on the loan account and the Complainants' failure to submit an SFS and supporting documentation.

The Provider says it rejects the Complainants' contention that it never treated them fairly. The Provider states it was willing to consider proposals from the Complainants, however, the Provider was not provided with the full documentation required for a proposal to be considered. The Provider has also set out its engagement with the Complainants between **2010** and **2013**.

The Provider explains that due to an error on its part, a letter from the Complainants' solicitor dated **13 April 2015**, was scanned to the Complainants' file without being responded to or logged as a complaint. The Provider advises that this was not responded to until the First Complainant brought it to its attention in an email dated **1 September 2015**. The Provider states that it *"... would like to apologise for this oversight and for any inconvenience caused by the delay in responding ..."*

In respect of a letter received from the Complainants' solicitors dated **22 March 2016**, the Provider advises this was responded to on **2 June 2016**. At this time, the Provider advises that it was dealing with a large volume of complaint related correspondence and was not in a position to respond until **2 June 2016**.

In respect of the complaints received from the Complainants on **28 May 2014** and **4 May 2016**, the Provider states that response letters issued within 40 business days. The Provider acknowledges that due to a large volume of complaints being dealt with at the time, the complaint letter received on **1 September 2015** was not responded to until **19 January 2016**. The Provider advises that it issued regulatory holding letters when this complaint was under investigation.

The Complaint for Adjudication

The complaint is that the Provider mal-administered the Complainants' loan account by:

1. Failing to update the Complainants' correspondence address;
2. Issuing correspondence to an incorrect address;
3. Appointing a Receiver over the Property 1 and Property 2 without proper notice or explanation;
4. Failing to respond and/or delayed in responding to the Complainants' correspondence; and
5. Providing poor customer service.

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 21 January 2021, 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.

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Following the issue of my Preliminary Decision, the Complainants made a submission under cover of their two e-mails to this Office dated 21 January 2021, copies of which were transmitted to the Provider for its consideration.

The Provider advised this Office under cover of its e-mail dated 26 January 2021 that it had no further submission to make.

Having considered the Complainants' additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

Background

The Complainants emailed the ASU on **18 February 2013** explaining:

"I refer to your letter dated 22nd January 2013. We will be making [a] submission in the next week. We apologise for the delay. The documentation was posted to an address that we no longer reside at and have only just received the correspondence from you."

This was followed by arrears letters addressed to Property 2 in **February** and **May 2013**. The Provider wrote to the Complainants on **19 June 2013** advising them that due to not receiving full contractual repayments for the previous 3 months and the absence of contact, the Complainants were deemed *not co-operating*. The letter also advised that the Provider was commencing legal proceedings to repossess Property 2.

The First Complainant emailed the ASU on **14 September 2013**, referring to its letter of **19 June 2013**, stating:

"Firstly we have requested on numerous occasions that all correspondence be sent to [Property 3]. I have only today received this letter from our tenants"

The Provider has also provided the following entry from the Complainants' branch file notes in respect of a conversation with the Second Complainant on **18 September 2013**:

"[The Second Complainant] called in to discuss his arrears as he is having trouble getting an answer from ASU. He wants to sell the 2 investment properties but is aware that there will be a shortfall. I advised that he get the properties valued and submit his proposal to us along with an updated SFS. He took away the form to be completed and will come back to me once he had it completed.

Please send all future correspondence to [Property 3]."

The Provider's solicitors wrote to the Complainants at Property 3 on **9 October 2013** calling on them to discharge the amounts owed or deliver up possession of the Properties within 14 days, failing which, the Provider's solicitors were instructed to issue legal proceedings to repossess each of the Properties.

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The Provider's branch notes record a meeting with the Complainants on **17 October 2013**. During this meeting the letter of **9 October 2013** was discussed and the Complainants advised the branch staff member that they were unable to submit an SFS as they were waiting for information from their accountant. The notes also record that the Complainants were advised to submit an SFS with supporting documentation, and to contact the Provider's solicitors.

The First Complainant emailed the Provider's solicitors on **17 October 2013** enclosing an SFS and supporting documentation. The First Complainant also remarked, in particular, that a response had not been received to her email to the Provider dated **14 September 2013**.

The Provider submitted in evidence the email exchange that took place between the First Complainant and its solicitors. I note that names and email addresses have been redacted.

However, it can be seen that the Provider's solicitors responded to the First Complainant's email on **18 October 2013** as follows:

"... I will forward same to my client today for instructions. It is important that you furnish all of the documentation to accompany the Standard Financial Statement to this office as soon as possible ie bank statements, payslips, social welfare receipts etc."

The First Complainant responded the same day, explaining that she would contact the Complainants' accountant and gather the required information. The First Complainant appears to have provided further supporting documentation to the Provider's solicitors on **21 October 2013**. This appears to have been forwarded by the Provider's solicitor to the Provider on **22 October 2013**.

A letter regarding a visit from a field representative was issued to the Complainants at Property 2 on **30 October 2013**.

The Provider wrote to the Complainants at Property 2 on **20 November 2013**. This was a letter of demand and also sought to notify the Complainants that one of the means it would consider in recovering the debt was the appointment of a Receiver.

It appears that a Receiver was appointed over the Property 1 and Property 2 on **3 December 2013**. The Receiver wrote to the *Tenants* at Property 1 and Property 2 advising them of his appointment on **3 December 2013**. Separately, the Receiver wrote to the Complainants at Property 3 on **5 December 2013**. The letter advised the Complainants, amongst other matters, of his appointment and that all income generated from Property 1 and Property 2 was payable to the Receiver.

The First Complainant emailed the Provider on **26 May 2014** expressing her dissatisfaction with the manner in which the Provider had been treating the Complainants. This appears to have been acknowledged as a complaint by the Provider on **28 May 2014**.

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The Provider wrote to the First Complainant on **20 June 2014** explaining that the complaint was still being investigated and a response would issue on the completion of the investigation. A Final Response letter issued on **16 July 2014**.

It appears the First Complainant requested a change of address form by email on **24 June 2014**. The relevant form was provided to the First Complainant the same day. The First Complainant completed and signed the form dated **21 July 2014**.

By letter dated **13 April 2015** the First Complainant's solicitors wrote to the Provider to inform the Provider that it had not responded to the First Complainant's email dated **17 October 2013** and also sought an explanation as to why the Complainants were not given advance notice of the appointment of the Receiver and requested confirmation as to the status of the Properties.

The First Complainant emailed the Provider on **1 September 2015**, attaching the solicitors' letter of **13 April 2015**, explaining that a response had not been received to this letter. The Provider responded the same day advising the First Complainant that the letter was received on **15 April 2015** but due to an administrative error, the letter had not been sent for the relevant agent's attention. The Provider's agent apologised for this error and advised the First Complainant that the matter would be investigated and a response would issue in the coming days. The Provider wrote to the First Complainant on **30 September 2015** advising that due to large volumes of complaints, it was unable to respond to her complaint. However, the Provider hoped to issue a response within 20 working days. A Final Response letter issued on **19 January 2016**.

The First Complainant's solicitors wrote to the Provider again on **22 March 2016** stating that a reply had not been received to the First Complainant's email of **17 October 2013** and also sought an explanation as to why the Complainants were not given advance notice of the appointment of the Receiver, confirmation as to the status of the Properties, and confirmation regarding any residual debt. Although it is not entirely clear from the evidence provided by the parties, it appears the absence of a response to this letter was also raised as a complaint. By letter dated **10 May 2016**, the Provider wrote to the First Complainant acknowledging that a complaint had been received by the ASU on **4 May 2016**. The Provider wrote to the First Complainant on **27 May 2016** advising that the investigation of her complaint was pending and a response would issue as soon as the investigation was complete. A Final Response letter issued on **2 June 2016**, referring, in particular, to the March letter.

Analysis

It appears from the evidence that the Complainants made the Provider aware they were no longer residing at Property 2 in or around **18 February 2013**. The First Complainant emailed the ASU again on **14 September 2013** notifying the Provider that the Complainants no longer resided at Property 2. In this email, the First Complainant mentions that several previous requests had been made for correspondence to be sent to Property 3.

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The Provider's branch notes dated **18 September 2013** also expressly record that all future correspondence was to be sent to Property 3.

It is quite clear that the Provider was aware or ought to have been aware that the Complainants no longer wished for correspondence to issue to Property 2 from **February 2013** and, at the very latest, **September 2013**. No action appears to have been taken by the Provider to ensure the Complainants' correspondence address was updated or to inform the Complainants of any particular steps or forms that were required in order to effect a change of address.

The Provider's failings in this regard resulted in correspondence being sent to Property 2 until the change of address form was completed in **July 2014**. However, from the evidence, it appears that only correspondence issued by the Provider was sent to the incorrect address, and correspondence issued by the Provider's solicitors and the Receiver was sent to Property 3.

The fact correspondence issued by the Provider's solicitors and the Receiver was correctly addressed would also suggest that the Provider was aware of the Complainants' correct correspondence address but failed to update its system.

Having reviewed the documentation submitted by the parties, it appears that arrears correspondence, the *not co-operating* letter, and the Provider's formal demand were incorrectly sent to Property 2.

Accordingly, I am satisfied that the Provider failed to update the Complainants' correspondence address and issued correspondence to an incorrect address.

The first express reference to the appointment of a Receiver appears to have been the Provider's letter of **20 November 2013** which was sent to an incorrect address. The Receiver wrote to the tenants at Property 1 and Property 2 on **3 December 2013** notifying them of his appointment. The Receiver wrote to the Complainants at Property 3 on **5 December 2013** notifying them of this appointment.

It is reasonable to expect that the Complainants be given some form of advance notification of the Provider's entitlement to appoint a Receiver and the possibility of the Provider exercising its rights in this regard. I believe this advance notification was contained in the incorrectly addressed November letter. Therefore, I accept that the Provider attempted to notify the Complainants of the possibility of a Receiver being appointed; however, due to its failure to maintain an up to date correspondence address, this was not received by the Complainants prior to the appointment of the Receiver. Despite this, I am satisfied that the Complainants were properly notified of the Receiver's appointment by the correctly addressed letter of **5 December 2013**.

In terms of the Provider's engagement with the Complainants, having reviewed the correspondence exchanged between the parties, the Provider has not demonstrated that it responded to the Complainants' emails in a timely manner or at all.

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In particular, there is no evidence to show that the Complainants' emails dated **18 February 2013** or **14 September 2013** were responded to.

Further to this, while the Provider's solicitors responded to the First Complainant's emails in **October 2013**, when the various documents were forwarded to the Provider by its solicitors, there does not appear to have been any engagement by the Provider with the Complainants following receipt of this documentation; whether in terms of attempting to put a proposal in place or informing the Complainants that the documentation provided was incomplete and advising them as to documentation required. I note in a submission dated **9 November 2020**, the Provider "... acknowledges that it did not advise the Complainants that the supporting documentation provided was inadequate for the purpose of the Bank completing [an] assessment"

It is clear that the Provider also failed to respond to the letter issued by the First Complainant's solicitors in **April 2015**.

This was brought to the Provider's attention by the First Complainant on **1 September 2015** and appears to have been treated as a formal complaint by the Provider. While an update letter was issued by the Complaints Team on **30 September 2015**, a letter acknowledging the complaint within 5 business days as required by section 10.9(a) of the **Consumer Protection Code 2012** (the **Code**) does not appear to have been issued. Although the Provider explains that it was experiencing a high volume of complaints, I do not accept this would prevent such a letter from being issued. Disappointingly, no further updates were received as required by section 10.9(c) of the Code. A Final Response letter issued over 4 months after the complaint was made, on **19 January 2016**. In light of the absence of any sufficient updates and the length of time it took for a Final Response letter to issue, I am not satisfied the Provider responded to this complaint in a timely manner.

It also appears that the letter issued by the First Complainant's solicitors in **March 2016** was not responded to by the Provider.

From the evidence submitted, I accept that the Provider failed to respond and/or delayed in responding to correspondence issued by or on behalf of the Complainants. Furthermore, having considered the circumstances of this complaint, I believe the level of customer service provided by the Provider fell well below the standards that would reasonably be expected of the Provider.

Goodwill Gesture

In its Formal Response, the Provider states:

"The Bank does acknowledge that there have been some customer service failures on its part in its management of the Complainants' case. These failings include poor communication and failing to keep our records up to date. In particular the Bank would like to acknowledge letters sent to a previous address when the Bank had been provided with more up to date contact details.

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In light of the service failings identified the Bank would like to apologise to the Complainants and their solicitor for [any] inconvenience caused. The Bank would like to offer the Complainants a goodwill gesture of €5,000 in full and final settlement of this dispute.”

In my Preliminary Decision I indicated that I considered this goodwill gesture to be a reasonable sum of compensation for the failings on the part of the Provider. I note the Complainants have expressed their disappointment with this amount in their post Preliminary Decision submissions. They state that it does not adequately compensate them. However, I remain of the view that, in the circumstances of this complaint, the sum of €5,000 is reasonable in all the circumstances. On the basis that this offer remains available to the Complainants, 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**

26 April 2021

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**

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(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

