



<u>Decision Ref:</u>	2022-0010
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Level of contact or communications re. Arrears Delayed or inadequate communication Complaint handling (Consumer Protection Code)
<u>Outcome:</u>	Upheld

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

This complaint concerns the Complainants' mortgage loan account with a third party entity, which the Provider, against which this complaint is made, is acting on behalf of.

The Complainants' Case

The Provider is acting on behalf of a third party entity which purchased the mortgage loan account from a bank in **2016**.

The First Complainant submits that the Second Complainant drew down a mortgage loan with a bank to purchase what was, at that time, her primary place of residence and the First Complainant acted as guarantor of the loan account.

The First Complainant submits that the Second Complainant was made redundant from her job and had no income in **2006** and as a result she emigrated and the property was let to tenants.

In a letter from the third party entity which purchased the loan facility, to the Complainants dated **16 January 2018**, it is stated that the loan facility agreement was

made available by the bank to both Complainants on **11 June 2004**. This letter also states that the third party entity, which the Provider was acting for, purchased the loan facility from the bank on **19 December 2016**.

The First Complainant submits that the Provider wrote to the Complainants in **August 2017** to inform them that their repayments would increase to €820 per month and that she acted upon this increase in repayments without delay. The First Complainant submits that she arranged for an accountant to assist her with the matter and that the accountant supplied the Provider with the information it required, including the Second Complainant's financial statements.

The First Complainant states that the Provider appointed a receiver over the property pertaining to the loan account in question and that this was despite her continually engaging with both the Provider and the third party entity that purchased the mortgage loan account in **December 2016**.

A letter dated **March 2018** was posted to the occupiers of the property, who in this instance were the tenants of the property, to inform them that a receiver had been appointed over the property. This letter stated:

*"As advised under the Terms of a Deed of Appointment dated **13/02/2018**, [name redacted] was appointed Receiver over the above property...If we do not have contact made by you before Thursday 15th March 2018 at 5pm, we will have deemed the property to be vacant and locks will be changed on the property".*

The First Complainant submits that as a result of the above letter, the tenants refused to engage with the Complainants and this caused her much distress and she submits that she then engaged a solicitor to act on her behalf to assist her to resolve the matter with the Provider.

The First Complainant states that on **13 April 2018**, she had a meeting with both the Provider and the third party entity that purchased the mortgage loan account, and that during this meeting she put forward a proposal which included that she would pay €1,500 per month towards repayments, which she submits was almost double the amount of the then current monthly repayments, and also make a lump sum payment towards the loan account in **October 2018**. The First Complainant submits that from **April 2018** she proceeded to make monthly repayments of €1,500 and she cleared the arrears on the mortgage loan account in question.

The First Complainant states that the Provider failed to make it clear to her, after this proposal, that the property could still be repossessed even if she continued to clear the arrears and pay the increased mortgage loan repayments.

The First Complainant submits that her solicitor wrote a letter to the Provider on **7 June 2018** outlining the steps that the First Complainant had taken to resolve the arrears on the account and to inform it that despite her actions, she had not received a response to her proposal. The letter ended with the solicitor requesting that the Provider *“let us have a full and frank explanation of why [the First Complainant’s] proposal was not dealt with in the manner in which it should under the Code of Conduct of Mortgage Arrears.”*

The First Complainant submits that she received an email from the Provider’s representative on **12 June 2018**. This email was sent to acknowledge the First Complainant’s payment of €27,835.38 in **April 2018** and subsequent repayments of €1,526.25 on the account. The email also states that the entity which purchased the loan account had reverted to the Provider, in respect of the First Complainant’s proposal, and as the arrears on the account had been paid in full and the monthly repayments had been maintained, the representative had instructed the receiver to take no further action and to stand down. The Provider’s representative stated that the Provider would issue the First Complainant with a formal letter to this effect with a few days. The First Complainant submits that neither she nor her solicitor received this formal letter as advised by the Provider.

The First Complainant submits that her solicitor wrote a letter to the Provider’s representative on **26 July 2018** regarding the mortgage loan account and followed up on this letter on numerous occasions with the Provider but that the Provider has failed to respond to this correspondence.

The First Complainant submits that the Provider wrote to her solicitor on **18 January 2019**, and she states that this letter did not outline a resolution to the dispute.

The First Complainant states that she requested a statement from the Provider which would show the address of the property rather than an account number as she needed such a statement so that she could rent the property under the HAP scheme, and the Provider did not supply her with the requested document.

The First Complainant submits that she received correspondence from the Provider dated **15 August 2019** which outlined the third party entity’s intention to sell the mortgage loan account to another third party entity.

The First Complainant wrote to this Office on **22 May 2019** rejecting an offer from the Provider of €400 and stating that the Provider has *“tried to minimize [her] complaint to an issue with customer service which is not the case”*.

The First Complainant again stresses the lack of communication from the Provider, the stress caused to her tenants as a result of the conduct of the Provider and queries how the property was allowed to be placed into receivership.

The First Complainant made further submissions to this Office dated **8 April 2020**. She stated therein that, the Provider only engaged with her and accepted a payment plan on **12 June 2018** after she had a solicitor write to it on her behalf and states that this was a full two months after she met with it on **13 April 2018**. The First Complainant states that the receiver was never made aware of this meeting or payment plan and this caused her untold stress.

By way of email to this Office dated **16 April 2020**, the First Complainant confirmed that she was not accepting an increased offer of €2,000 from the Provider.

By way of email to this Office dated **5 June 2020**, the First Complainant confirmed that she was not accepting yet another offer of €8,000 from the Provider. She also re-iterated that the Provider did not respond to her for two months after her meeting with it on **13 April 2018** and that the receiver was never informed that she had settled her arrears, met with the Provider and was paying €1,500 a month since the **April 2018** meeting and this meant that letters continued to be sent to the tenant with the result that the First Complainant was reported to Limerick Co. Council and Threshold.

By way of email to this Office dated **23 June 2020**, the First Complainant states that she finds it *“very hard to accept”* that the Provider did not have authority to withdraw the receiver.

By way of email to this Office dated **30 July 2020**, the First Complainant rejected a further offer of €15,000 from the Provider.

The Provider's Case

The Provider's Final Response Letter dated **18 January 2019**, stated that it noted that the First Complainant and her representative's letters dated **19 June 2018, 29 June 2018, 9 July 2018, 26 July 2018** and **31 August 2018** had not been answered.

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The Provider went on to state in this letter, that the Complainant's solicitor's letter dated **21 November 2018** had been forwarded to the Customer Relations team to investigate as a complaint and that it apologised for the delay in its response. The Provider stated that the formal letter which was due to follow on from its representative's email dated **12 June 2018** was not issued despite an assurance that it would be issued to the First Complainant.

The Provider's letter dated **18 January 2019**, stated that *"as the loan is now performing, these repayments are greater than the Borrower's current contractual monthly repayment of €780.09. In view of this, the Borrower's capital balance is reducing at a greater than expected rate"*. The letter further stated that a total payment amount of €42,970.38 was received by it in relation to the loan account for the calendar year **2018** and that the capitalisation of the arrears, in this instance, was not considered as an alternative repayment arrangement.

The Provider wrote to the First Complainant on **20 May 2019** to clarify a number of issues raised by the First Complainant in its complaint to this Office. The Provider states in this letter that the third party entity that purchased the loan does not offer capitalisation of arrears as an alternative repayment arrangement to borrowers where loan accounts are governed by the principles set out in the Consumer Protection Code. It stated that it had advised the First Complainant on a number of occasions that the appointment of a receiver was a possibility in the absence of a proposal and the provision of all relevant supporting information for both the Second Complainant and the First Complainant. It stated that it received the requisite supporting information in respect of the First Complainant but not the Second Complainant. It also submitted that the terms and conditions of the mortgage permit the third party entity to appoint a receiver. The Provider states that the receiver was appointed by the third party entity on **6 February 2018** but the actions of the third party are not the responsibility of the Provider. The third party entity acknowledged that it confirmed by email dated **12 June 2018** that the Second Complainant's proposal to increase the monthly repayments to €1,500 per month was acceptable to the third party entity, however. The Provider accepts that due to an administrative oversight it forgot to issue a formal response under separate cover until **21 January 2019**. Finally, in its letter of **20 May 2019**, the Provider stated that it had *"upheld your complaint in relation to the customer service deficiencies experienced by you in your dealings with [the Provider]"* and has offered a settlement proposal of €400 in full and final settlement of the complaint.

In the Provider's response to this Office it acknowledged the Complainants' continuing dissatisfaction in the matter and in recognition of this and of customer service failings that is, the Provider's delay in issuing the follow up letter to its email of **12 June 2018** and its failure to engage with the Complainants' solicitor on several occasions from **June 2018** to **November 2018**, the Provider increased its offer of compensation to €2,000 and reiterated its apology.

The Provider's submissions dated **3 April 2020** asserts that the property did not come under the protections of the Code of Conduct on Mortgage Arrears 2013 because:

- On the transfer date, the loan facility was a buy to let and governed by the principles set out under the Consumer Protection Code 2012 (as amended);
- The secured property was tenanted and neither of the Complainants were residing therein; and
- The Second Complainant is living in the USA and therefore the property is not her primary residence in this jurisdiction.

The Provider acknowledges that it did not comply with provision 10.7 of the CPC 2012 (as amended) by failing to follow up with the Complainants after its email of **12 June 2018**, together with its delay in dealing with the correspondence received from the Complainant's solicitor.

The Provider also states in these submissions that the property has not been, nor was it ever, repossessed by either the Provider or the third party entity.

The Provider also states that as the third party entity is no longer the owner of the loan, it is not able to facilitate the First Complainant's request for a statement showing the address of the property rather than the account number.

By way of submissions to this Office dated **14 April 2020**, the Provider noted the upset and distress of the First Complainant and notes that its offer of €2,000 in compensation remained available.

By way of further submissions to this Office dated **29 May 2020**, the Provider stated that it had reassessed the complaint and does not believe that its previous redress offers have been adequate.

It accepts that its actions following receipt of the Complainants' **April 2018** proposal were not acceptable in that:

- The Complainants waited two months to receive a reply to their **April 2018** proposal regarding arrears and future repayments;
- The Provider did not follow up on its **12 June 2018** letter as promised; and
- Six letters sent to us by the Complainant's solicitor in the period **June to November 2018** were not acknowledged or replied to.

In recognition of the above, the Provider made an updated offer of €8,000 to the Complainants.

The Provider made further submissions to this Office by way of email dated **18 June 2020** wherein it attempted to explain the receiver's actions and role as it concerned the Complainants' property and further re-iterating that there were customer service deficiencies in its dealings with the Complainants. This email again offered the Complainants €8,000 by way of compensation.

The Provider made further submissions to this Office by way of email dated **20 July 2020** on foot of its review of correspondence from the receiver to the First Complainant. The Provider notes that it "*cannot opine on matters relating to the Receiver and its agents' actions*", however, it states that it appreciates the upset caused to the Complainants by the receiver's actions. The Provider does note that when the arrears were paid by the Complainants on **25 April 2018**, this was done without agreement that the third party entity would discharge the receiver from its duties and as per the Provider's email dated **28 March 2018**, it advised the Complainants that it could not guarantee that the receiver would be discharged from its appointment if the arrears were paid. The Provider also states that prior to the third party entity's decision to appoint a receiver over the property, the Provider proactively engaged with the Complainants to see if a resolution could be reached regarding the arrears and when an arrangement was not reached, a receiver was validly appointed by the third party entity.

By way of email dated **28 July 2020**, the Provider wrote to this Office, increasing its offer of compensation to €15,000. Subsequent to the First Complainant's rejection of that offer, the Provider wrote to this Office on **31 July 2020**, confirming that the offer of €15,000 remained open.

The Complaint for Adjudication

The complaint is that the Provider dealt with the Complainants' mortgage loan account in an unacceptable manner and failed to adequately communicate with the Complainants in relation to the mortgage loan account and the complaint in a timely manner.

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 29 November 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.

Following the issue of my Preliminary Decision, the Provider made a submission under cover of its letter to this office dated 16 December 2021, a copy of which was transmitted to the Complainants for their consideration.

The Complainants have not made any further submission.

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

I note that while the complaint was progressing through this Office the Complainants were informed of the loan owner's intention to sell their mortgage loan. They sought for this office to intervene and prevent that sale. The Complainants were informed by way of email from this Office on **28 August 2019** that it was not possible for this Office to prevent the sale of the mortgage loan.

I note the Complainants have asserted that the actions of the receiver and the contact made by the receiver with the Complainants' tenants was upsetting and stressful for the First Complainant and the tenants. However, any issues relating to the appointment or actions of the receiver are not matters that can be examined as part of this complaint.

The Complainants sought the protections of the Code of Conduct on Mortgage Arrears in relation to their dealings with the Provider. I note the Provider in response has asserted, and indeed acted on the basis that that the property the subject of this complaint did not come under the protections of the Code of Conduct on Mortgage Arrears.

It states that it came to this important conclusion on the following basis:

- On the transfer date, the loan facility was a buy to let and governed by the principles set out under the Consumer Protection Code 2012 (as amended);
- The secured property was tenanted and neither of the Complainants were residing therein; and
- The Second Complainant is living in the USA and therefore the property is not her primary residence in this jurisdiction.

In my Preliminary Decision I set out my view that this approach by the Provider does not accord with the definition of a Primary Residence as set out in the Code of Conduct on Mortgage arrears which provides important protection for borrowers in arrears. It defines Primary Residence as follows:

Primary Residence means a property which is:

a) the residential property which the borrower occupies as his/her primary residence in this State, or

b) a residential property which is the only residential property in this State owned by the borrower.

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I stated in my Preliminary Decision:

It is most disappointing and completely unacceptable that the Provider would substitute its own definition of Primary Residence for the clear definition set out in the Code. As it has not properly applied the definition in the Code, I do not accept that the Provider has established that the Complainant was not entitled to the protections of the Code. I believe this had serious adverse consequences for the Complainants.

Provision 10.7 of the CPC 2012 (as amended) states that a regulated entity “*must seek to resolve any complaints with consumers*”.

The Provider, in its post Preliminary Decision submission of 16 December 2021, states:

“Please note that [Provider] does not accept this point. Instead, [Provider] considered all relevant matters which are pertinent to the definition of Primary Residence as set out in the code, namely those considerations set out in paragraph 8 of our Final Submission dated 3rd April 2020 as follows:

The Provider then repeats the criteria it used, as set out above, in arriving at its decision. It goes on to state:

“As set out above, [Provider] did review the Complainant’s reply- “Please note that although this property appears to you to be an investment, this property will be my daughter’s home when she returns from the USA”- and it is satisfied that its response -“This would not have been grounds to consider this as the Complainant’s principal primary residence as described in the CCMA. There is also nothing on record to support that the secured property is either of the Complainant’s only residence in the state”- is in line with the definition of primary residence in the CCMA Code, and not in line with a definition substituted by [Provider].

Although there was no evidence on file that the property was either Complainants only residential property owned in this State, we fully accept that we should have formally requested the necessary evidence to complete a full regulatory code review. Given this we have requested the current loan owner review the regulatory code status with the Complainants. In addition, the entire Decision is under consideration for lessons learned with all relevant stakeholders and being regarded with the utmost seriousness.”

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I remain of the view that the Provider has not properly established whether the Complainant was entitled to the protections of the Code. I believe this was a very serious deficiency on the part of the Provider. However, I welcome the Provider's commitment to consider the outcome of this Decision in the context of lessons that can be learned.

The Provider's conduct was clearly in breach of provision 10.7 of the Code. Therefore, I also welcome that the Provider acknowledges that it did not comply with provision 10.7 of the CPC 2012 (as amended) by failing to follow up with the Complainants after its email of **12 June 2018**, together with its delay in dealing with the correspondence received from the Complainant/her solicitor dated **19 June 2018, 29 June 2018, 9 July 2018, 26 July 2018** and **31 August 2018**.

Provision 2.8 of the CPC requires that the Provider "*corrects errors and handles complaints speedily, efficiently and fairly.*" From the conduct outlined above it is clear that the Provider is also in breach of provision 2.8 of the CPC.

I note that the Provider has made various offers starting with an offer of €400 and culminating in an offer of €15,000 in recognition of its failures. The Provider's attempts to resolve this complaint can be described as too little too late.

When a person falls into arrears with their mortgage it can be a very difficult and stressing time. It was clear that the complainant fell on difficult times but despite this the second Complainant and the first Complainant (her Mother) made significant efforts to engage with the Provider and indeed made very considerable progress in dealing with the mortgage arrears.

In contrast, the Provider's conduct and lack of engagement was appalling and most unreasonable. I fully accept that the Provider dealt with the Complainants' mortgage loan account in an unacceptable manner and failed to adequately communicate with the Complainants in relation to the mortgage loan account and the complaint in a timely manner. This was at a time when the Provider should have been engaging with the Complainants to the fullest possible extent in order to resolve the situation. I am also not impressed with the Provider's approach to and attempts to resolve the complaint. While I acknowledge that the Provider eventually offered a sum of €15,000 this was only offered at an advanced stage of the investigation by this office of the complaint.

I find the Provider's original offers derisory and an indication of its complete lack of understanding of the consequences of its conduct.

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For the reasons outlined in this Decision, I uphold this complaint and direct the Provider to pay a sum of €25,000 to the Complainants for the inconvenience caused by its unreasonable conduct.

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) (b)** because of the Provider's unreasonable conduct.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €25,000 to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

7 January 2022

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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.