An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0217
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Settlement amount (mortgage) Classification of borrower as non-cooperating
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a number of mortgage loans.

The Complainant's Case

The Complainants state that they "*entered into a disposal agreement*" with the Provider in **2014**, which covered the disposal of a number of properties. The Complainants state that this allowed for the full repayment of loans held with the Provider with "*no compromise or write-off*".

The Complainants say that the agreement was due to expire in **November 2019**, and by the end of this month, "*sales had been agreed on two of the three remaining properties with the third on the market and with active interest*". The Complainants state that the Provider refused consent for the sale of the two properties, where sales had been agreed, and the Provider moved to demand "*full capital and interest payments on loans that would have been cleared, had the sales been allowed to proceed*".

The Complainants state that "*a subsequent review of security held*" by the Provider has led them to believe that the Provider "*did not have proper security on the properties*" and that the Provider "*did not comply with Central Bank regulations regarding release of security*". The Complainants also state that their loans were transferred to new ownership, and that the agreed sales on the remaining properties were lost, due to the Provider's delays.

The Complainants state that "*significant losses and costs have been incurred to include drops in sale prices, loan interest, property insurance, maintenance and local property tax, professional fees*".

The Provider's Case

The Provider says that on **24 March 2015**, it issued non-binding heads of terms (HOTs) to restructure the Complainants' existing facilities, across 5 accounts.

The Provider says that on **6 December 2019**, it contacted the Complainants to state that the sale of the properties had been declined.

The Provider states that on **24 February 2020**, the Complainants had not sold the properties by the dates agreed in the Asset Disposal Agreement, and

> "*as a result your clients are in breach of the terms of these LOAs, and the agreed period for the full repayment of the loans has expired*".

In relation to its communications with the Complainants, the Provider listed the letters it furnished to the Complainants over the period between **16 December 2019** and **21 February 2020** "*in line with our obligations under CPC regulations*".

In its response to this Office, the Provider stated as follows:

> *In its review and preparation of this submission the Bank has identified a number of service failings in relation to poor communication. These include omitting information from a* [subject access request] *response, not responding to emails in a timely manner and not adequately communicating with the Complainants with regard to the asset disposal target dates. The Bank apologises for any upset or inconvenience these may have caused the Complainants.*
>
> *In an effort to resolve this dispute for the Complainants and in recognising the passage of time that this matter has been outstanding for them, the Bank would like to offer a goodwill payment in the amount of €5,000 in full and final settlement of this matter.*

The Complaint for Adjudication

The complaint is that the Provider delayed in supplying information requested by the Complainants, resulting in their financial loss.

The Complainants want the Provider to cover the costs they say they have incurred from the Provider's conduct, as calculated by the Complainants at **€46,453**.

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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 **9 May 2022**, 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. In the absence of additional substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

The background to this complaint includes a series of six mortgage restructures agreed between the Provider and the Complainants in **2015**. As part of the restructures agreed, the Complainants undertook to sell six specific properties within certain target periods (ranging from one year to four years from the date of the restructures) with a view to reducing their overall indebtedness to the Provider. The Complainants take issue with the refusal by the Provider, in **December 2019** (on foot of a request made on 27 November 2019) to sanction the sale of two of the three properties which at that point remained unsold, but in respect of which sales had been agreed with prospective buyers. The third remaining unsold property was, at that point, being actively marketed and consent to its envisaged sale, on the basis that it was anticipated that a buyer would be found in short course, was also refused.

With regard to the two properties in respect of which sales had been agreed but in relation to which the Provider declined to consent to the sales (hereinafter 'Property A' and 'Property B') I note that the Provider had stipulated in its 'Fundamental Restructure Non-Binding Term Sheet' dated **24 March 2015** (referred to below as the 'Heads of Terms' or 'HOTs') that the properties were "*to be sold within 4 years*" and that specified minimum proceeds of the sale, were to be paid to the Provider by "*31/03/2019*".

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The HOTs had also stipulated that any surplus funds after redemption were "*to be lodged in debt reduction of all other … facilities held by*" the Complainants with the Provider.

In the relevant Letters of Offer that issued subsequent to the HOTS, and which were accepted by the Complainants, I note that it was agreed that the sales of Properties A and B would be completed, in each case, by **31 July 2019**. In their letter of **27 November 2019** requesting the Provider's consent to sale, the Complainants indicated their view that, once consent was provided, the sales would complete "*in early January*" and "*in early course*" respectively, and certainly *"by a longstop date of 31st March 2020"*.

With regard to the remaining property being actively marketed in **November 2019** (hereinafter 'Property C') I note that the Provider had stipulated in the 'HOTs' that the property was "*to be sold within 4 years*" and that specified minimum proceeds of the sale, were to be paid to the Provider by "***31/03/2018***" (which was actually three years only). This document also provided for surplus funds after sale "*to be lodged in debt reduction of all other … facilities held by*" the Complainants with the Provider.

I note that pursuant to the relevant "Amendment Letter to Mortgage Letter of Loan Offer" dated **9 July 2015**, that subsequently issued to, and was accepted by the Complainants on **7 August 2015**, it was agreed that the sale would be completed by **31 July 2018**. In their letter of **27 November 2019** requesting the Provider's consent to sale, the Complainants indicated their view that, once consent was provided, a sale would be completed in respect of Property C *"by a longstop date of 31st March 2020*" on the basis that it was anticipated that a buyer would be found in short course. I note that the relevant terms of the respective restructure agreements (in this instance, two signed Letters of Offer) are identical and provided as follows:

> *For the avoidance of doubt … except as expressly amended by this Letter of Agreement, the Loan Offer shall remain in full force and effect and should be read together with this Letter of Agreement as one agreement*
>
> ***Conditions***
>
> *The Conditions of this Letter of Agreement are as follows*
>
> 1. *You agree that the property/properties listed in the table below is/are to be sold by the relevant Sale Date set out in the table below.*
>
>   *You agreed to select and formally engage a Selling Agent from* [the Provider's] *Approved Selling Agents List in this Letter of Agreement within 10 business days of signing this Letter of Agreement. The Selling Agent will be required to market and sell the property/properties on your behalf. Your failure to comply with this Condition will result in the Bank withdrawing this Letter of Agreement. You are required to notify the name of the Selling Agent to the Bank and by signing this Letter of Agreement you hereby agree that you permit the Bank and/or its agent to make regular contact with the Selling Agent to monitor the sales process.*

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Property Address	***Sale Date***
[Relevant address]	[Relevant Sale Date]

2. *You agree that the property/properties listed in the table above is/are to be sold for combined minimum target price (together with any additional payment as required under Condition 6 of this Letter of Agreement if applicable) which is sufficient to redeem and clear the Mortgage Loan Account(s) in full (including the entire amount of any arrears and accrued interest if applicable) on the later to expire of the Sales Dates set out in the table above. <u>It is a condition of this Letter of Agreement at each of the properties/properties must be sold by the relevant Sale Date set out in the table above.</u>*

[My underlining for emphasis]

3. *Immediately following completion of the sale of each of the property/properties set out in the table above, the entire sale proceeds of each property/properties shall be applied in redemption of the monies due and owing under the Mortgage Loan Account(s). When the final property set out in the table above has been sold prior to or on the expiry of the relevant Sale Date set out in the table above, those sales proceeds (together with any additional payment as required under Condition 6 of this Letter of Agreement if applicable) must be sufficient to redeem and clear the remaining balance of the Mortgage Loan Account(s) in full (including the entire amount of any arrears and accrued interest if applicable) which is due and owing on by the expiry of the latest of the Sales Dates set out in the table above.*

   For the avoidance of doubt if there is only one property set out in the table above then the sale proceeds of that property (together with any additional payment as required under Condition 6 of this Letter of Agreement if applicable) must be sufficient to redeem and clear all monies due and owing under the Mortgage Loan Account(s) in its entirety (including the entire amount of any areas and accrued interest if applicable) on or prior to the Sale Date set out in the table above.

4. *If there are any surplus monies arising from the sale proceeds of the property/properties listed in the table above following full redemption of all monies due and owing under the Mortgage Loan Account(s) ("**Surplus Sale Proceeds**") then such Surplus Sale Proceeds (or such portion of the Surplus Sale Proceeds as agreed and approved by the Bank in writing prior to the sale of the property/properties) shall be applied against the following facilities in the following manner and order of priority…*

Thereafter, the relevant agreements each identified a different one of the Complainants' other mortgage loans (such that two were identified in total) and indicated that "*100% of Surplus Sale Proceeds*" were to be applied towards the identified accounts.

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The Provider submits that it "*extended the asset disposal target dates on three occasions*". This would appear to relate solely to Property C. In terms of this property, the Provider states that "*the original asset disposal date was 31 March 2018*" which was then extended to 31 July 2018 in the Letter of Offer, and then extended again to 31 December 2018. The Provider states that the period was further extended to 31 July 2019 and then to 30 November 2019. Given that the HOTs were non-binding, I consider this to represent three extensions.

In terms of Properties A and B, the Provider states that the asset disposal date was, in each case, initially 31 July 2019. The Provider goes on to state as follows in respect of these properties:

> *The bank sought to include these properties in the credit approval process in June 2019 to implement an uncontracted extension to facilitate the sales process and extended the asset disposal date to 30 November 2019. This uncontracted arrangement was advanced on the basis that the Complainants were engaging with the Bank and the properties were with the Selling Agent.*
>
> *The Bank note that this was an uncontracted arrangement which was agreed with the Banks credit department this new asset disposal date was not advised to the Complainants. The Bank recognises this as a customer service failing on their behalf and apologise for the poor communication on this occasion.*
>
> [Some confusion appears to have arisen from what I believe to be a typographical error in a single email, which referenced an extension to 31/12/2019 rather than 30/11/2019.]

The Provider points out that the Complainants' letter of **27 November 2019** requesting consent for the sales, proposed that the envisaged surplus sale proceeds would be used to redeem a mortgage account other than the two accounts expressly identified in the relevant Letters of Offer, following which the Complainants would pay €40,000 to another account, other than the two accounts expressly identified in the relevant Letters of Offer "*in full and final settlement of all of* [the Complainants'] *liabilities to* [the Provider]".

The Provider declined this proposal including the request for consent to sale (which would have entailed agreement to an extension to the asset disposal dates). The Complainants believe this response to have been unreasonable. They state that the Provider suggested that the sales prices agreed were unsatisfactory but that "*a full comprehensive report by a* [Provider] *panel auctioneer was provided, confirming that full market prices were obtained*". The Complainants also say that "*a subsequent review of security held* by [the Provider] *has led us to believe that* [the Provider] *did not have proper security on the properties*".

I am conscious that the restructure agreements clearly provided for the sale of the relevant properties, prior to certain dates. The Complainants were afforded a four-year period to complete the sales of Properties A and B, and a three-year period to complete the sale of Property C. On the evidence available, I am satisfied that the Complainants failed to comply with these conditions.

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The restructure agreements did not provide for any right in favour of the Complainants, to extend these periods. Notwithstanding this, the Provider extended the deadline for Property C on three occasion allowing an additional 16 months. A single extension of four months was allowed in respect of both Property A and Property B. In my opinion, this was a reasonable approach for the Provider to take.

When the Provider declined in **December 2019**, to countenance any further extensions, it seems to me, based on what the parties had already agreed, that it was entirely entitled to do so and to revert to the pre-existing agreements, in circumstances where the Complainants had clearly failed to comply with their obligations. Neither do I accept that the Provider's unwillingness to agree a further extension was unreasonable conduct on its part, in the circumstances.

The Provider, though it was not required to do so, had already granted an extension of 16 months and two of four months. I am not satisfied that a failure to sanction any further extensions can be properly characterised as unreasonable. In addition, it warrants mention that the Complainants' letter of 27 November 2019 seeking consent for the sales, proposed a mechanism for dealing with the surplus sale proceeds, other than that already provided for in the restructure agreements. This alone would, in my view, have constituted adequate grounds for the Provider to withhold consent.

The Complainants also say that the Provider "*did not have proper security on the properties".* This proposition has been set out in detail by the Complainants. A specific issue is raised with regard to the security held over Property B. With regard to this particular matter, the Complainants state that the charge is registered in favour of "[the Provider] *Bank*" and not in favour of the "[the Provider] *Mortgage Bank*" to which the debt is actually owed.

In my opinion this technical point is one which is more appropriately addressed before a Court of Law. I note that the 'Mortgage Bank' is in fact a wholly owned subsidiary of the Provider. The Complainants' argument on this matter appears to me to be somewhat tenuous in the face of the Provider's position that an equitable mortgage would be deemed to exist if any deficiency were to be found to affect the legal mortgage. The Complainants clearly borrowed the money and expressly consented to a charge in respect of the said borrowings to be registered over Property B, but I make no finding as to whether or not the security is validly held so that if the Complainants wish to pursue this aspect of their grievance, they can raise this technical issue before a Court of Law, entirely separate from this complaint investigation.

In that regard, I have determined that it is appropriate to discontinue the investigation of this element of the complaint pursuant to ***Section 52(1)(d)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, on the basis that the Complainants can more appropriately pursue an alternative and satisfactory means of redress, by raising such a complaint before the Courts.

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For the reasons outlined above, I do not propose to uphold any aspect of the central thrust of the Complainants' complaint. However, I consider it appropriate to comment on the failings that the Provider has acknowledged. These relate to admitted *"poor communication", "omitting information from a* [subject access request] *response, not responding to emails in a timely manner and not adequately communicating with the Complainants with regard to the asset disposal target dates".*

The Subject Access Request falls outside of the jurisdiction of this Office and is rather a matter for the Data Protection Commission.

The failure to properly communicate with the Complainants with regard to the asset disposal target dates, appears to relate to the Provider's decision to allow an extension of four months to the period in which Properties A and B were to be sold. This decision was not communicated in writing, but the Complainants' 'Submissions' make clear that this was at least communicated orally to them.

The other admissions relate to more general failings. In respect of these matters, I am satisfied that the Provider has made appropriate acknowledgements and apologies and significantly, I am satisfied that the compensation the Provider offered the Complainants, at the time of sending its formal response to the investigation of this Office, in **November 2020**, in the amount of **€5,000**, adequately addresses these failings. As a result, noting that this offer "*remains available*" to the Complainants, I do not consider it necessary or appropriate to make any direction to the Provider or to uphold the complaint made against it. Instead, it will be a matter for the Complainants to make direct contact with the Provider, if they wish to accept that reasonable compensatory offer available to them and, in that event, they should do so expeditiously, as the Provider cannot be expected to hold that offer open indefinitely.

In light of the entirety of the foregoing, and in the absence of evidence of wrongdoing by the Provider or conduct within the terms of ***Section 60(2)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** that could ground a finding in favour of the Complainants, I do not consider it appropriate to uphold the 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.

MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

29 June 2022

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.