



<u>Decision Ref:</u>	2018-0011
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Overdrafts
<u>Conduct(s) complained of:</u>	Delayed or inadequate communication Maladministration
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainant's business current account opened on 3 October 2013 with the Provider. An overdraft facility of €10,000 was implemented on the account on 5 February 2014, and this was increased from €10,000 to €20,000 on 19 February 2016.

The Complaint is that the Provider wrongfully gave misleading information regarding the Complainant's financial position to a third party.

The Complainant's Case

The Complainant submits that the Provider gave false/misleading details regarding his financial position to a third party. The Complainant states that the Provider "issued my father ([with the same name as the Complainant], but of a different address) with a letter... stating that as a guarantor to a loan that I received in 2010, that they wished to inform him that I had 1. Extended the term of the borrowing 2. Deferred payment on the borrowing 3. Switched to interest only on the borrowing 4. Increased the amount of the borrowing 5. One of the other guarantors had been released from the borrowing".

The Complainant submits that none of the criteria in the letter the third party received from the Provider took place. The Complainant submits that the loan has been performing exactly to the repayment schedule and timeframe as determined by the Provider.

The Complainant submits that when he enquired by telephone what the purpose of the Provider's letter was, he was unable to get a response. The Complainant submits that he

subsequently called into his local branch of the Provider and met with a representative of the Provider who was also unable to tell him exactly why the letter had been sent to his father, although she suggested that it may be due to the fact that he had extended his overdraft facility on an account that he had opened up in 2013.

The Complainant submits that in February 2016 he applied to the Provider to extend his overdraft facility from €10,000 to €20,000, which it promptly approved. The Complainant states that *“This account has nothing to do with anyone else and is solely in my own name. Is it not my right to expect privacy from this information entering the hands of 3rd parties? If indeed this is the reason for my father getting sent this letter, how come there is no mention of it being an increase in the borrowers overdraft facility in the principal reasons outlined. By [its] actions in sending this letter, [the Provider has] caused my elderly father a great deal of unnecessary worry and torment, as well as myself”*.

The Complainant submits that he was never made aware that his father acted as guarantor other than for the loan he received in 2010. The Complainant states that he is *“horrified to think that [the Provider] can justify (under [its] code of conduct) sending such a completely misleading letter on the basis that I increased an overdraft facility”*.

The Complainant states that he is seeking for the provider *“to redact the letter [it] sent in error and to issue an apology to both my father and I”*.

The Provider’s Case

The Provider submits that the overdraft facility on the Complainant’s business current account is covered by an all sums guarantee for the Complainant’s father to the Complainant. The Provider states that *“As such the Complainant’s father received correspondence relating to his son from the Bank”*.

The Provider submits that its Business & Agriculture Lending processed an application on the Complainant’s behalf to increase the Overdraft facility on his account in February 2016. The Provider submits that as the Complainant’s father previously signed as a guarantor on a loan the Complainant applied for with it, it is its practice to notify the Guarantor in writing if any change is made to a Guarantee. The Provider states that *“In this instance when you applied to increase the Overdraft facility on your... Current account a letter was issued to your father as per procedure”*.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider’s response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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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 27 February 2018, 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 submissions from the parties, the final determination of this office is set out below.

The Complainant submits that the Provider gave false/misleading details regarding his financial position to a third party. The Complainant states that the Provider *"issued my father ([with the same name as the Complainant], but of a different address) with a letter... stating that as a guarantor to a loan that I received in 2010, that they wished to inform him that I had 1. Extended the term of the borrowing 2. Deferred payment on the borrowing 3. Switched to interest only on the borrowing 4. Increased the amount of the borrowing 5. One of the other guarantors had been released from the borrowing"*. The Complainant submits that none of the criteria in the letter the third party received from the Provider took place.

The Complainant submits that the Provider's letter dated 19 February 2016 has caused a great deal of stress and worry for both him and his father. The Complainant states that *"My father is a vulnerable customer in his 70's and in poor health, it does not help [his] situation when the bank sent him a misleading letter stating that his son is in financial difficulty. No matter how many times I've tried to reassure him that nothing in the letter is true, I know there remains doubt in his mind, as the bank never sent him correspondence to say otherwise"*.

The Complainant also states that *"As for myself I am seriously concerned that as a direct result of this letter and [the Provider's] failure to correct it, that my father may consider disinheriting me and leaving the rest of [the property] to another one of my siblings, out of concern that I may be financially inept"*.

The Complainant states that *"This whole ordeal has caused me many sleepless nights, due to the worry and the anger and the complete lack of empathy that the bank has to me as a customer"*.

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I note that the Provider's letter to the Complainant's father dated 19 February 2016 states the following:

"We currently hold a Guarantee from you in relation to the borrowings as outlined above. We are required by the Code of Conduct for Business Lending to Small and Medium Enterprises to inform you of a material change in the circumstances of this borrowing.

The list below outlines some of the more common material changes, but should you have any queries as to which change has occurred in this instance please contact the borrower directly.

- *The principal borrower has extended the term of the borrowing.*
- *The principal borrower has been allowed to defer a payment on the borrowing, which will extend its term.*
- *The principal borrower has switched to interest-only payments for a time on the above borrowing. This means capital repayments will be deferred during this period.*
- *The principal borrower has increased the amount of the borrowing.*
- *One of the other guarantor's for the borrowing has been released from the obligation to guarantee the borrowing.*

We will continue to rely on your guarantee regardless of which material change has occurred.

Finally, you should note that [the Provider] continues to rely on any security currently held as counter cover for your guarantee."

The Provider submits that on 2 January 2014 an overdraft facility was approved for €10,000 on the Complainant's business current account. The Provider submits that the offer letter issued on 2 January 2014 clearly outlined that there was a letter of guarantee held from the Complainant's father guaranteeing the Complainant's liabilities.

The Provider has submitted a copy of the offer letter dated 2 January 2014, which I note sets out on page 2, among other things, the following:

"Security

Any security held now, or at any future time, shall be security for all the liabilities present and future howsoever arising, of the Borrower to the Bank.

Security currently held, and/or that required for the above facility is as listed below:

SECURITY HELD

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Following full and final discharge by the Customer of the loan facility and any other Bank facilities secured by this security, any security documentation conferring ownership rights will be held in safekeeping by the Bank, until we receive a written request for release of the same by the customer, or at the option of the Bank, may be returned to the Customer or the Customer's solicitor or in the event that the security was obtained from a loan Guarantor, the Guarantor or the Guarantor's solicitor.

- *First Legal Mortgage/Charge over the property [in the South East]... registered in the name of [the Complainant].*
- *Assignment to the Bank of... life policy... on the life of [the Complainant]...*
- *Letter of Guarantee from [the Complainant's father] guaranteeing the Borrower's liabilities in the amount of €235,000 in respect of principal together with interest and costs accrued thereon."*

I note that underneath the "FORM OF ACCEPTANCE" on page 5 of the loan offer, above where the Complainant signed the agreement it states:

"On acceptance of this Offer Letter we are required under the Consumer Protection Code to notify all existing guarantors that there is a material change in the circumstances of the borrowing."

The Provider submits that in February 2016 the Complainant contacted one of its branches to apply for an increase of the overdraft facility on his business current account from €10,000 to €20,000. The Provider submits that its branch referred the Complainant's request to its Business & Agriculture Lending who processed an application on the Complainant's behalf to increase the Overdraft facility. The Provider submits that its Business and Agriculture Lending Direct Unit telephoned the Complainant on 1 February 2016 to complete the application over the telephone. The Provider submits that it telephoned the Complainant again on 2 February 2016 to confirm that his application had been approved.

The Provider submits that an offer letter was issued to the Complainant on 5 February 2016, and the Complainant accepted this offer by signing it on 11 February 2016. The Provider has submitted a copy of the offer letter dated 5 February 2016, which I note also sets out the following on page 2:

"Security

*Any security held now, or at any future time, shall be security for all the liabilities present and future howsoever arising, of the Borrower to the Bank.
Security currently held, and/or that required for the above facility is as listed below:*

SECURITY HELD

/Cont'd...

Following full and final discharge by the Customer of the loan facility and any other Bank facilities secured by this security, any security documentation conferring ownership rights will be held in safekeeping by the Bank, until we receive a written request for release of the same by the customer, or at the option of the Bank, may be returned to the Customer or the Customer's solicitor or in the event that the security was obtained from a loan Guarantor, the Guarantor or the Guarantor's solicitor.

- *First Legal Mortgage/Charge over the property [in the South East]... registered in the name of [the Complainant].*
- *Assignment to the Bank of... life policy... on the life of [the Complainant]...*
- *Letter of Guarantee from [the Complainant's father] guaranteeing the Borrower's liabilities in the amount of €235,000 in respect of principal together with interest and costs accrued thereon."*

I note that underneath the "FORM OF ACCEPTANCE" on page 5 of the loan offer, above where the Complainant signed the agreement, it states:

"On acceptance of this Offer Letter we are required under the Consumer Protection Code to notify all existing guarantors that there is a material change in the circumstances of the borrowing."

The Provider submits that as the Complainant's father previously signed as a guarantor on a loan the Complainant applied for with it, it is its practice to notify the Guarantor in writing if any change is made to a Guarantee. The Provider states that *"In this instance when you applied to increase the Overdraft facility on your... Current account a letter was issued to your father as per procedure"*.

The Provider submits that the Complainant's father signed a Guarantee and Indemnity on 8 November 2010. The Provider submits that the guarantee clearly outlined that the Complainant's father was liable to it for the Complainant's present and future debts.

The Provider has submitted a copy of the Guarantee and Indemnity dated 8 November 2010 signed by the Complainant's father. I note that this sets out, among other things, the following:

"Now therefore IT IS HEREBY AGREED AND DECLARED as follows:

- A. *In consideration of the Bank making or continuing advances or otherwise giving credit or affording banking facilities to the Customer, for as long as the Bank may think fit, the Guarantors unconditionally and irrevocably guarantee and agree as a continuing obligation to pay to the Bank on demand all sums of money... which are now or shall at any time be owing or remain unpaid to the Bank anywhere from or by the Customer whether as principal or surety and whether solely or jointly with any other party or from any firm in which the*

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Customer may be a partner, upon current overdraft accounts, promissory notes or bills discounted or paid and other loans, credits, leases, indemnities or advances made to or for the accommodation or at the request of the Customer solely or jointly or of any such firm as aforesaid whether for actual or contingent liability or any liability in connection with foreign exchange transactions or any liability in connection with interest and currency hedging and swap agreements, forward rate agreements, interest and currency futures or options, Interest Rate Caps, Interest Rate Floors, Interest Rate Collars, Gilt and Cash Options and any other forms of financial instruments or pursuant to any guarantees, indemnities or on any other account or in respect of money which the Customer is or shall become liable to pay to the Bank in any manner whatsoever together with in all the cases aforesaid, all interest, as well after as before any demand or judgment, discount and other bankers' charges including legal charges occasioned by the preparation, negotiation and execution of this guarantee or as otherwise may be incident to this or any other security held by or offered to the Bank for the ultimate balance or by or to the enforcement of any such security and any liability to stamp duty or any other duties (all such monies being hereinafter referred to as "the Customer's liabilities") on a full and unqualified indemnity basis PROVIDED ALWAYS that the total amount ultimately enforceable against the Guarantors under this guarantee shall not exceed the principal amount set out below and to the extent they relate to such principal the following additional amounts:

...

PERSONAL GUARANTORS
ON EXECUTING THIS YOU ARE LIABLE TO THE [PROVIDER] FOR THE PRESENT AND FUTURE DEBTS AND OBLIGATIONS OF ONE OR MORE OTHER PERSONS OR COMPANIES UP TO A MAXIMUM PRINCIPAL AMOUNT OF €235,000 AND SUCH ADDITIONAL AMOUNTS THAT ARE PROVIDED FOR IN THIS GUARANTEE.

The Provider submits that on 8 November 2010 the Complainant's father signed a certificate on the guarantee confirming that he understood the nature of the liability and that he had not wished to be independently advised by a solicitor. I note that this certificate states the following:

"CERTIFICATE CONCERNING INDEPENDENT LEGAL ADVICE

I understand the nature of the liability incurred and have no wish to be independently advised by solicitors. [signature of Complainant's father]"

The Provider submits that under the Code of Conduct for Business Lending to Small and Medium Enterprises, it is required to notify the guarantor in writing if the terms of the lending changes. The Provider submits that Clause 47 of the code sets out the requirements to guarantors when the debt is being increased. Clause 47 of the Code of Conduct for Business Lending to Small and Medium Enterprises 2012 provides the following:

"Smaller Enterprises

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This Section of the Code applies to regulated entities when providing credit facilities other than leasing, hire-purchase and invoice discounting to smaller enterprises.

...

47. If the terms of a loan agreement change, the regulated entity must notify the guarantor in writing."

The Provider submits that when the Complainant's overdraft facility increased on 19 February 2016, it correctly notified the guarantor by letter dated 19 February 2016. The Provider states that *"The Bank is satisfied that there was no maladministration in issuing the letter"*.

The Provider submits that it is also obliged under the Consumer Protection Code 2012 (the CPC 2012) to notify the guarantor in writing if the terms of the lending changes. Provision 6.8 of the CPC 2012 provides the following:

"6.8 Where a regulated entity has advanced credit to a personal consumer subject to a guarantee, the regulated entity must notify the guarantor, on paper or on another durable medium, if the terms of the credit agreement change."

The Complainant states that *"Subject to the terms and conditions outlined by [the Provider] in relation to my overdraft facility which was extended to me in February 2016, under the security of a guarantor..., I accept that [it is] within the rules of [its] code of conduct and the terms of the loan, allowed to inform my guarantor of the fact that I increased my overdraft facility from €10,000 to €20,000"*. The Complainant goes on to state that *"However, [the Provider] failed to do this, instead sent a letter to my father... containing completely spurious and misleading allegations relating to my financial affairs"*.

The Complainant submits that the Provider's letter dated 19 February 2016 states that there has been *"a material change in the circumstances of this borrowing"*. The Complainant states that *"By definition a "material change" can under legal definition that I can obtain, refer to an increase in my overdraft facility, while my overall borrowings are still well under the amount guaranteed"*.

The Complainant submits that around the time of his overdraft extension being granted by the Provider, he also enquired by telephone about the criteria involved in borrowing to build an outbuilding, interest rates and the term for same. The Complainant states that *"Maybe it's possible that they took my enquiry as an actual application to borrow, and hence sent the letter?"*.

The Provider submits that when the Complainant's overdraft was increased from €10,000 to €20,000 on 19 February 2016, this was a material change to the overdraft facility. The Provider states the following:

"Therefore the Bank is satisfied that the following material change outlined in the letter applies in the Complainant's case:

(D) Increased the amount of the borrowing"

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In response, the Complainant submits that he does not believe it reasonable for the Provider to say that he had increased the amount of borrowing. The Complainant states that *“this is a completely false and misleading statement”*. The Complainant also states that *“I am confident that the increase in my overdraft facility from €10,000 - €20,000 did not come anywhere near the amount that I was guaranteed. The culmination of all and any borrowings and credit facilities with [the Provider] fell well below the amount of the guarantee”*.

The Complainant states that *“It is irrelevant whether the increase in my overdraft is a material change (to my overdraft facility) the fact is there was no material change to my borrowings as the letter by the bank stated. The fact being that the letter sent had no mention of my overdraft whatsoever”*.

Having carefully considered all of the evidence before me, I am of the view that the Provider could have tailored its letter dated 19 February 2016 to the Complainant’s father to suit the Complainant’s circumstances, and highlighted that there were no issues with the loan that the Complainant entered into in 2010. That said, I must accept that the Provider was entitled to notify the guarantor in circumstances where the Guarantee and Indemnity signed by the Complainant’s father on 8 November 2010 was for the present and future debts and obligations of the Complainant up to a maximum principal amount of €235,000.

While I accept the Complainant’s submission that his total credit facilities after the increase in the overdraft was well below the amount of the guarantee, I am of the view that the overdraft was covered by the guarantee, and therefore when this increased, the Provider was required to notify the guarantor. I note that the Provider highlighted in its offer letter dated 5 February 2016 that it is required to notify all existing guarantors that there is a material change in the circumstances of the borrowing.

While the Provider was required to notify the guarantor, it is clear in the circumstances of this complaint, that the Provider’s letter to the Complainant’s father dated 19 February 2016 has caused confusion and distress to the Complainant. Therefore, I direct the Provider to issue a letter of clarification to the Complainant clearly outlining the material change in his circumstances that caused the letter dated 19 February 2016 to be issued to his father in the first place, within 35 days.

Consequently, it is my Legally Binding Decision that this complaint is partially upheld.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider issue a letter of clarification to the Complainant clearly outlining the material change in his circumstances that caused the letter dated 19 February 2016 to be issued to his father in the first place, within 35 days.
- Pursuant to **Section 60(8)** of the **Financial Services and Pensions Ombudsman Act 2017**, the Respondent Provider is now required, not later than 14 days after the expiry of the 35 days as set out above to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction outlined above.

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**

23 March 2018

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) in accordance with the Data Protection Acts 1988 and 2003.**