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| <b><u>Decision Ref:</u></b>             | 2018-0086  |
| <b><u>Sector:</u></b>                   | Banking  |
| <b><u>Product / Service:</u></b>        | Repayment Mortgage   |
| <b><u>Conduct(s) complained of:</u></b> | Classification of borrower as non-cooperating<br>Arrears handling - Mortgage Arrears Resolution<br>Process<br>Complaint handling (Consumer Protection Code)<br>Arrears handling (non- Mortgage Arrears Resolution<br>Process ) |
| <b><u>Outcome:</u></b>                  | Upheld   |

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

#### **Background**

The Complainants had two mortgages with the Bank which were fully redeemed in May 2017. The accounts fell into arrears in 2011 and alternative repayment arrangements were put in place from March 2012 to April 2014. It was at the end of this period during the discussion on a new restructure, that issues arose between the Bank and the Complainants. During a meeting in April 2014, C (the relationship manager managing the case) requested a copy of the second Complainant's deceased mother's Will. This request was followed by a written request for the Will which was required "*before the end of the week*". The Bank again demanded the Will by letter dated 22 May. The Complainants' agent replied by phone call and email dated 22 July 2014 stating that they could not provide the Will as the grant of probate had not yet been taken out by the executors but that they could provide "*formal legal confirmation of what they are likely to receive beneficially under the Will*".

On the 2 September 2014 the Bank's agent, C, wrote to the Complainants stating that the Complainants have failed to provide the Bank with all the information it had requested, and if they did not provide this information within 22 business days they would be classified as "*not cooperating*". The Complainants were written to on 10 October 2014 and informed that they were classified as "*not cooperating*". The Complainants did not appeal this decision but they issued a complaint letter dated 9 October 2014 and a second

complaint letter dated 23 October 2014. Subsequently a complaint was made to this Office.

### **The Complainants' Case**

The Complainants state that the Bank requested a copy of the second Complainant's mother's Will but they could not legally provide it and they explained this to the Bank. The Complainants state that after this, in their opinion, bullying began.

The Complainants state that they came up with a solution where they would set out what they would inherit under the Will but the Bank failed to engage with them or their advisors in relation to this.

The Complainants' case is that the Bank's agent, C, was totally unprofessional, aggressive and biased in her dealings with the Complainants. It is the Complainants' case that C denied them due process and wrongfully categorised them as uncooperative. The Complainants state that they were told that C had left the Bank and that they were to be transferred to a new relationship manager but they subsequently learned that she had not left and was still dealing with their case. The Complainants say that the Bank failed to reply to phone calls and emails and failed to engage with them in a reasonable manner.

### **The Provider's Case**

The Bank refutes the various "unfounded allegations" made by the Complainants. The Bank states that there is no evidence to prove the alleged conduct of Bank staff or the alleged lack of professionalism other than one-sided communications between the customer, their advisor and his employees. The Bank states that the Complainants weren't able to provide the necessary supporting documentation to demonstrate full disclosure and transparency. The Bank states that it is the absence of disclosure of relevant information which has given rise to the Complainants being deemed "*non co-operative*".

The Bank states that while the Complainants refute being classified as "*non co-operative*" nevertheless they failed to provide the information requested, the Bank state that the Complainants were afforded the opportunity to appeal the decision to the Bank's mortgage appeals board, which was not taken up.

The Bank states that it acted in line with its policies and procedures and did not treat the Complainants in an unjust or unfair manner. The Bank states that as the information requested was not provided, the decision to deem the Complainants not co-operating was the correct decision and was made in line with the Code of Conduct on Mortgage Arrears.

## **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 16 August 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.

Both parties to the complaint have set out in detail their respective versions of the events between April 2014 and January 2015.

### **The issues in this matter are:**

1. Whether the Bank was correct to consider the Complainants to be "*non-co-operating*," when they did not submit a copy of the second Complainant's mother's Will, and whether the Bank treated the Complainants in accordance with its obligations under the Code of Conduct on Mortgage Arrears?
2. Whether the Bank treated the Complainants in accordance with the Consumer Protection Code?

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**Was the Bank correct to consider the Complainants to be non-co-operating when they did not submit a copy of the second Complainant's mother's Will and did the Bank treat the Complainants fairly within the Code of Conduct on Mortgage Arrears?**

The Code of Conduct on Mortgage Arrears explains "not co-operating" as follows:

*"A borrower can only be considered as not co-operating with the lender when:*

*1. any of the following apply to his/her particular case:*

- a) the borrower fails to make a full and honest disclosure of information to the lender, that would have a significant impact on his/her financial situation;*
- b) the borrower fails to provide information, relevant to the borrower's financial situation, within the timeline specified by the lender in accordance with Provision 34;"*

Provision 34 of the Code of Conduct on Mortgage Arrears sets out that:

*"Where the lender imposes a timeline for return of information, including a standard financial statement, the timeline must be fair and reasonable and it must reflect the type of information requested and whether the borrower may need to obtain the information from a third party."*

A Will of a relative may impact on a borrower's financial situation only if it is proved to be a valid Will and if there are sufficient net assets in the estate to discharge payment of a legacy to that borrower. A Will does not become a document of public record until such time as it is proved in the Probate Office of the High Court and a Grant issues. Before a Grant issues the only person entitled to authorise the release of a copy of the Will is the legal personal representative.

There is no duty on the personal representative to give a copy of the Will to a beneficiary and there is no legal way to obtain a copy of the Will without issuing High Court proceedings. In this instance, the Complainants' legal representatives state that they could not obtain a copy of the Will. At the relevant time the Will had not been proved in the Probate Office and therefore the Complainants had no entitlement to obtain a copy of the Will.

The Bank in this instance was seeking a document from the second Complainant that was not in her possession and which she was not legally entitled to possession of. I consider it entirely inappropriate for a Bank to deem an accountholder to be "non-co-operative" based on a failure to produce a document which the person cannot legally produce.

By email dated 22 July 2014 the Complainants' legal representative set out that the Complainants, *"cannot provide information that they do not yet have"* and *"they will provide formal legal confirmation of what they are likely to receive beneficially under the Will"*. I accept this as evidence of the Bank being informed of the impediment to obtaining the Will. The Bank states that it rang the Complainants' agent in reply to this email, however I do not consider one unanswered call to be adequate evidence of engagement with the Complainants in relation to that offer.

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On the 2 September 2014 the Bank issued the Complainants with letters stating that they would be considered as not co-operating if they failed to provide the required information. The letter of 2 September 2014 is a standard letter, it lacks any detail as to what information exactly the Complainants failed to provide the Bank, and it certainly does not contain a statement as suggested in the Bank's letter to this Office dated 10 July 2017 that the Bank would accept "*a copy of the will or alternative evidence*".

I note that the Complainants' agent states that he made numerous calls to the Bank looking for C to discuss this offer of providing legal confirmation of what the Complainants were likely to receive under the Will. It is clear from the unanswered emails from the Complainants' agent to C dated 4 September 2014 and 10 September 2014 that the Complainants were ringing and emailing the Bank in an attempt to come to a resolution. I accept the Complainants' agent's statement that the Complainants were told that C had left the Bank, as is evidenced by email.

On 12 September 2014 the Complainants' agent emailed C saying;

*"The particular issue that appeared to impair progress with the Borrowers related to provision of information pursuant to a Will currently in probate.....the borrowers have at all times been quite prepared, to the best of their ability, to resolve this matter"*

The Bank's agent, C replied stating;

*"There has been a lack of disclosure despite ample opportunity to rectify the situation"*

This curt email failed to set out what was required to be disclosed and in my opinion displayed a significant unwillingness to engage with the Complainants and to deal with the issues raised in the Complainants' email such as the offer to provide confirmation of what they believed they would receive under the Will.

Despite the Bank in its reply to this Office stating that it was seeking a "*copy of the will or the alternative evidence as proposed by the Complainants' representative*", nowhere in the correspondence from the relevant period, have I seen the Bank accept the offer of providing "*legal confirmation of what they are likely to receive*" and certainly no request was made by the Bank for "*legal confirmation of what they are likely to receive*".

It seems that the Bank failed to appreciate that once a Will goes to Probate it is a matter of public record and the Bank and/or the Complainants would then be able to make enquiries at that stage to find out the terms of the Will.

I consider that a request by the Bank to the Complainants to produce a Will, which the Complainants were not legally entitled to, within a period of 7 days, was not in compliance with the above provision 34 of CCMA.

The Code of Conduct on Mortgage Arrears Provision 28 states:

*“Prior to classifying a borrower as not co-operating, a lender must write to the borrower and:*

*b) outline the specific actions that a borrower must take within the period allowed in accordance with Provision 28 a), to avoid being classified as not co-operating”.*

I consider that the letter of 2 September 2014 was not clear in what specific action the Bank required the Complainants to take to avoid being considered not co-operating. It was not clear whether the Will was required (as this is what was required by C) or whether an explanation of what the Will contained was sufficient (as the Bank now contends). In the circumstances I consider that there was a breach of Provision 28.

The Code of Conduct on Mortgage Arrears Provision 56 states:

*“Where a borrower is in mortgage arrears a lender may only commence legal proceedings for repossession of a borrower’s primary residence, where:*

*a) the lender has made every reasonable effort under this Code to agree an alternative arrangement with the borrower or his/her nominated representative; and*

*b) (i) the period referred to in Provision 45 d) or Provision 47 d), as applicable, has expired; or (ii) the borrower has been classified as not co-operating and the lender has issued the notification required in Provision 29.”*

If an explanation of what the Will contained was sufficient, it is unexplained why the Bank did not write to the Complainants and state that it would accept this. I consider that the failure by the Bank to reply to the Complainants’ email of 22 July 2014 and to engage with the possibility of explaining what the Will contained, was a breach of the Bank’s regulatory obligation to make every reasonable effort to agree an alternative arrangement and in those circumstances, I take the view that the Complainants were incorrectly classified as not co-operating.

On the basis of the evidence before me, I consider it appropriate to uphold this element of the Complainants’ complaint.

### **Did the Bank treat the Complainants in line with the Consumer Protection Code?**

The first complaint was made by letter dated 9 October 2014. This complaint appears to have gone unanswered and is not referred to in any of the Bank’s correspondence to this Office which is not helpful. In those circumstances, there is no evidence available to me to suggest that this complaint was handled in compliance with the CPC.

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The second complaint was made by the Complainants by letter dated 23 October 2014. The person who replied to this complaint was C, the very person who the Complainants were complaining about. The Bank in its reply to this Office is silent on this aspect of the complaint. Having the person being complained about, or for that matter, the person who is looking after the Complainants' account, replying to a complaint does not comply with what one would expect in the way of fair procedures and as anticipated by Provision 2.8 of the Consumer Protection Code; *"corrects errors and handles complaints speedily, efficiently and fairly;"*

The Complainants say they were left not knowing who their relationship manager was, as they were informed on the 21 November 2014, over the phone, that a new relationship manager would be appointed to the case. I accept that this conversation took place and that the Complainants' agent was so advised, as it is supported by emails of 26 November 2014 and 1 December 2014 where the Complainants' agent requests the name of the new relationship manager. I consider it unfair and unreasonable, that for this period November to December 2014, the Complainants were not aware who their relationship manager was, and consequently there was no person to negotiate or communicate with. Further, it appears that no efforts were made to resolve this matter through negotiation before the matter moved to legal personnel. I believe this bears out the Complainants' contention that they attempted to progress the matter but their attempts were hampered by the Bank and the Bank's mismanagement of the case. In all of the circumstances, I consider that the Bank failed to engage fairly with the Complainants after April 2014.

The Bank stated in reply to this Office in July 2017 that C is no longer working for the Bank and is not in a position to defend herself. This fails to take account of the fact that this complaint was first made in 2014 and the Bank appears to have failed to take action to investigate the complaint fully at that time.

### **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)**.
- Pursuant to **Section 60(4)** and **Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, in recognition of the stress and pressure placed by the Bank on the Complainants which they have described as having been unfair and intolerable during the relevant period, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €3,500, 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.

MARYROSE MCGOVERN  
DIRECTOR OF INVESTIGATION, ADJUDICATION  
AND LEGAL SERVICES

7 September 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) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.