



| | |
|---|------------------------|
| <u>Decision Ref:</u> | 2018-0115 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Debt Management |
| <u>Conduct(s) complained of:</u> | Fees & charges applied |
| <u>Outcome:</u> | Upheld |

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

On 6 October 2015 the Complainant engaged the Provider's "debt management services" to deal with her mortgage debt on her behalf. The Complainant was unhappy with the services provided and the manner in which they were provided. Following a meeting between the Complainant and the Provider on 15 September 2016 the Complainant cancelled her contract with the Provider.

The Complainant's Case

The Complainant states that the Provider failed to negotiate with the creditor on her behalf and that apart from the initial proposal letter there was no negotiation to seek better repayment terms on her behalf.

The Complainant is not happy that the Provider accepted her ex-husband as a customer as she believes this was a conflict of interest.

The Complainant says that the Provider submitted incorrect repayment figures to the creditor, in particular the Provider said that the proposed monthly repayments were €425 even though she was paying €450 per month to her mortgage account. Further the Provider failed to communicate to the creditor that her husband was now paying €140 monthly towards the mortgage repayments.

The Complainant is seeking a refund of the €1,450 paid to the Provider in fees.

The Provider's Case

The Provider states that it provided its service fully to the Complainant as set out in its terms of business and which the Complainant accepted by signing the application form. It states that for 11 months it handled all monthly payments to her creditor and handled all creditor communications and negotiations during this time. The Provider states that in addition to the initial proposal letter to the creditor it completed the standard financial statement with the creditor, followed up with the creditor and had numerous phone calls and discussions with the creditor. The Provider states that unfortunately the creditor would not agree to restructure or write down the Complainant's mortgage and therefore she was advised of alternative options, including personal insolvency or bankruptcy.

The Provider states that it assisted the Complainant by ensuring that her ex-husband started paying €140 monthly towards the mortgage.

The Provider states that it reduced its monthly fee to below its minimum fees as set out in its terms and conditions to try to help the Complainant's situation and to try to assist her to reach an agreement with her creditor. The Provider states that the initial proposal letter, set out that the Complainant could afford €425 per month as this was the amount available after deducting the Providers standard monthly fee, however as the Provider subsequently reduced the monthly fee to try to assist the Complainant, the Complainant was then able to pay €450 per month to the creditor.

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.

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 27 June 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

/Cont'd...

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 Provider's "terms of business/schedule of fees charged" set out that there is an initial fee of €750 together with a minimum €75 monthly charge or other monthly fee as may be agreed in advance with the client. In this case the monthly charge was reduced from €75 to €50 by agreement.

The "terms of business/schedule of fees charged" under the heading "services" state at paragraph 2.3 that;

"We will negotiate with your Creditors and attempt to agree repayment terms with them of the amounts outstanding. In doing so we shall use the Payment Plan and we shall ensure that the periodic payments that we agree with your Creditors on your behalf do not exceed your disposable income (less our fees) as calculated by us for the same period..."

Paragraph 2.4 "We shall attempt to agree with your Creditors, where appropriate that they freeze interest or reduce their interest charges and that they suspend or withdraw enforcement proceedings issued in connection with your agreements with them. It should be noted however, that some Creditors may not agree to these requests."

The documentation supplied by the Provider to this Office include a letter from the Provider to the creditor on the 22 October 2015 stating that the Provider has been engaged by the Complainant to represent her and to handle all loan payments. A short letter dated 17 November 2015 states that the Provider will be in contact with the Complainant with a mortgage restructure proposal in the new year. By letter dated 23 February 2016 the Provider wrote to the Complainant's creditor's representative with a "proposed new monthly payment" of €425.00 and the "proposed re-structure options" consisting of a split mortgage, a follow up letter also issued. An identical letter was sent to the "new" creditors representative providers on 26 April 2016 and a follow up letter again issued.

The Provider did not submit a call log of calls made to the creditor's representative on behalf of the Complainant. No emails were submitted as between the Provider and the Complainant's creditor's representative. I note that the Provider claims that it completed the standard financial statement with the creditor, followed up with the creditor and made numerous phone calls and had discussions with the creditor, however there is no proof of phone calls made in which the Provider discussed the possibility of a restructure of the mortgage or different repayment terms.

The Oxford English dictionary defines "negotiate" as

/Cont'd...

- “1.try to reach an agreement by discussion.
2. bring about by discussion.
- 3.find a way over or through an obstacle or difficult route.”

I do not consider that sending one proposal letter and a follow up letter is negotiation, I consider that negotiation must be a two-way discussion. I consider the Provider failed to comply with its own terms of business by failing to “*negotiate with your Creditors and attempt to agree repayment terms*”. I find that the Provider has breached its terms of business in the manner in which it failed to negotiate to agree repayment terms on the Complainant’s behalf.

I note that the Provider failed to write to the creditor to confirm that repayments were €450 or that the Complainant’s husband was now contributing to the mortgage repayments to the sum of €140 per month. The creditor was receiving €165 per month more than the Provider had represented.

I have not seen any letter in the evidence furnished by the Provider in which the creditor set out that they would not agree to a long-term restructuring of the Complainant’s mortgage nor that the creditor deemed the mortgage unsustainable. The Provider states that this information was given during a telephone conversation however he has failed to provide a recording of this telephone conversation to support this claim.

The Complainant has submitted the creditors call log to support her claim, the log shows repeated calls from the creditor to the Provider requesting a completed Standard Financial Statement and supporting documentation, it is noted that three Standard Financial Statements were submitted to the creditor, however, none of these were complete because they were not signed by the borrowers. I note that the call log does not state that the creditor would not agree to a long-term restructuring agreement, rather the call log notes that the mortgage provider is awaiting a completed Standard Financial Statement and supporting documentation to make a decision. A note of a call to the Provider on 20 September 2016 records that assessment will be done once the creditor has received the requested documents. In the circumstances I consider the Provider incorrectly informed the Complainant that restructuring was denied.

I note that the Provider’s own records state that the Complainant paid €50 monthly fee to the Provider rather than €75 from 22 February 2016, therefore, when the Provider sent the creditor the letter of 23 February 2016 the Provider was aware that the Complainant now had €25 extra to put towards monthly mortgage repayments. The amount the Complainant can afford to repay a creditor is of upmost importance and €25 per month is a significant sum which may have had an impact on the creditors opinion of whether this mortgage was sustainable. The Provider breached its duty of care to the Complainant by submitting incorrect figures to the creditor or not updating those figures when it became clear that the repayments had increased.

I do not find a conflict of interest in the Provider representing the Complainant’s ex-husband in the circumstances.

I accept the Provider's explanation as to why eight payments of €140 were credited to the Complainant's mortgage account on the 5 April 2017, in particular, I note that the bank provided a "interest rebate" of €11.28 on the 5 April 2017 which supports the Providers explanation that this was a bank mistake.

I note the Provider states by letter dated 29 January 2018, that the Complainant refused to submit documentation to support the Standard Financial Statement, I consider that if this was the case the Provider had a duty to inform the Complainant that it could no longer act on her behalf.

For the reasons set out a above, I uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld on the grounds prescribed in **Section 60(2) (b) and (g)**.

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 Complainant in the sum of €1,450.00, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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**

19 July 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*.