



<u>Decision Ref:</u>	2019-0067
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Debt Management
<u>Conduct(s) complained of:</u>	Dissatisfaction with customer service Fees & charges applied
<u>Outcome:</u>	Upheld

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

Background

This complaint concerns a debt management arrangement that the Complainants had with the respondent debt management service provider (“the Provider”). The Complainants entered an agreement with the Provider in November 2014 wherein the Provider agreed to review the Complainants’ financial affairs, assist in the re-structuring of the Complainants’ debts and organise a monthly payment plan on behalf of the Complainants with their creditors.

The complaint specifically arises from payments made by the Provider to the entity servicing the Complainants’ mortgage, held by a third-party provider, which the Complainants state were reduced. The Complainants cancelled their debt management arrangement with the Provider in May 2015.

The Complainants’ Case

The Complainants state that in November 2014 the agreement entered into with the Provider required a €300 up-front fee to be paid to the Provider by the Complainants and a direct debit for €300 per month to be paid to the Provider to service the Complainants’ mortgage.

The Complainants state that in late 2014/early 2015 they received phone calls from the entity servicing the Complainants' mortgage enquiring as to why only €20/€25 was paid towards the Complainants' mortgage for the months of November and December 2014.

The Complainants provided correspondence to this Office originating from the third-party mortgage provider to the First Named Complainant dated 15 April 2015 alerting the First Named Complainant to the fact that there were outstanding arrears of €1,484.37 on the Complainants' mortgage account and that the Complainants were in danger of being classified as not co-operating by the third-party provider in relation to their mortgage account should the Complainants fail to pay the arrears.

The Complainants also state in their Complaint Form that Ms. L, the representative from the Provider allocated to their case, failed to answer calls from the Complainants and furthermore failed to respond to emails from the Complainants in relation to the aforementioned correspondence received by the First Named Complainant from the third-party mortgage provider. The Complainants have provided emails from the First Named Complainant to Ms. L dated 22 April 2015, 27 April 2015 and 28 May 2015 as well as a letter from the First Named Complainant to Ms. L dated 13 March 2017.

The Complainants seek to have any monies paid by them to the Provider refunded less any monies paid towards their mortgage arrears.

The Provider's Case

The Provider acknowledges that an agreement was entered into between it and the Complainants in November 2014. The Provider states that this agreement was signed by both of the Complainants and stipulated that an initial payment of €750 was to be made to the Provider by the Complainants and thereafter a monthly direct debit of €300 was to be made to the Provider, €55 of which would be paid to the Provider as a monthly supervisory fee with the remainder (€245) being used to pay the Complainants' mortgage. The Provider states that the Complainants' account was formally closed on its system on 29 May 2015.

The Provider has given a breakdown of the monies paid to it by the Complainants and a description of how those monies were allocated for November 2014 to April 2015.

Date	Payment made by Complainant	Retained by Provider for Set-Up Fee	Retained by Provider for Supervisory Fee	Paid to Complainant's Mortgage
12.11.14	€300	€300	Nil	Nil
1.12.14	€300	€245	€55	Nil
30.12.14	€300	€205	€75	€20
29.1.15	€300		€55	€245
5.3.15	€300		€55	€245
1.4.15	€300		€35	€265
TOTAL	€1,800	€750	€275	€775

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The Provider states that the reduction of its supervisory fee in April 2015 by €20 was in light of the overpayment of its supervisory fee by €20 in December 2014. On 28 April 2015 and 28 May 2015, the Provider states that direct debits from the Complainants to the Provider bounced. The Provider states that it received correspondence from the Complainants' bank on 29 May 2015 stating that the Complainants had cancelled their direct debit to the Provider.

The Provider makes no direct reference in its response to the Complainants' assertion that, during a phone call held between the First Named Complainant and Ms. L, an agreement was reached for the Complainants to pay an up-front fee to the Provider of €300 for the provision of the Provider's services.

Furthermore, the Provider makes no direct reference to the customer service element of the Complainants complaint except to confirm that Ms. L was the Provider's representative who was initially working on the Complainants' case and that on 22 March 2017 the Provider wrote to the Complainants informing them that Ms. L no longer worked for the Provider.

The Complaint for Adjudication

The complaint for adjudication is the quality of the service given to the Complainants by the Provider and, in particular, the fees charged, disbursement of the money paid to the Provider by the Complainants and the communication surrounding these payments.

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.

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A Preliminary Decision was issued to the parties 15 February 2019, 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 issuing of my Preliminary Decision, the Provider made a further submission by letter dated 1 March 2019, a copy of which was transmitted to the Complainants for their consideration. The Complainants confirmed by e-mail to this Office on 13 March 2019 that they did not wish to make a further submission.

Following consideration of the Provider's further submission, together with all of the evidence before me, I set out below my final determination.

When considering whether the Provider applied the correct fees and charges in the provision of its debt management services to the Complainants, one of the primary issues which has to be resolved is whether the Complainants agreed to pay an initial fee of €750 to the Provider in November 2014 and whether the information given to the Complainants by the Provider could have misled them in relation to the amount to be paid as part of this initial fee. In relation to this issue, it is clear that in correspondence sent by Ms. L to the Complainants on 4 November 2014, Ms. L stated that the Complainants are required to send a *"draft of €300 for initial fee made payable to the Provider"*. This correspondence references a *"recent phone call"*, the contents of which have not been provided to this Office. This phone call is explicitly referenced by the Complainants in their complaint wherein they state that the First Named Complainant *"had a discussion with Ms. L from the Provider regarding my mortgage repayment difficulty's (sic) over the phone. We decided that a €300 fee be paid up front and a direct debit for €300 per month paid into the Provider to be set up."* Neither this phone call nor the contents thereof were addressed by the Provider in its response to the complaint or its post Preliminary Decision submission dated 1 March 2019 and thus the only evidence before the Office in relation to the phone call is the statement by the Complainants and the correspondence referring to same. I have no reason to doubt the Complainants' recollection of this call.

The Provider, in its post Preliminary Decision submission of 1 March 2019 states the *"Ombudsman picks out one line from a letter 'draft of €300 for initial fee made payable to the Provider. The contents of this one line is their first payment of €300 was to be allocated towards the initial fee payable to the Provider'"*.

With regard to the provision of information to a consumer the Consumer Protection Codes state that a regulated entity must ensure that all information it provides to a consumer is clear and accurate, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.

Provision 4.1 of the Consumer Protection Code 2012 states that:

4.1 A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.

I believe the correspondence of 4 November was clear in requesting the Complainants to submit a draft of €300 *“for initial fee”*. If this was intended to be a partial payment or deposit then this communication should have stated this clearly.

Furthermore, I note the Provider wrote to the Complainants on 20 November 2014 and stated, among other things:

“I would like to confirm receipt of your initial fee €300 with thanks”.

The letter went on to outline *“what you should now do”*.

This letter does not mention that the €300 is any form of partial or loan payment, nor does the list of what to do mention payment of the balance.

The correspondence of 4 November 2014 from the Provider to the Complainants attaches the agreement from the Provider to be completed and signed by the Complainants. I note that the Complainants did complete and sign this agreement on 10 November 2014. I also note that within this agreement, contrary to both the correspondence of 4 November 2014 and the Complainants account of their phone call with the employee/agent of the Provider, the Complainants signed the agreement which included an initial fee of €750 to the Provider. The Provider, in its response, references the *“terms & conditions”* of this signed agreement. However, I note that this Office has not been supplied with a copy of those terms and conditions.

I am thus satisfied on the basis of the evidence available to me, that, notwithstanding the fact that the Complainants signed the agreement between the parties on 10 November 2014 wherein it was stated that they were to pay an initial fee of €750 to the Provider, the Complainants had been led to believe by the Provider, through both open correspondence and a phone call, prior to the signing of the agreement that the initial up-front fee to the Provider was to be €300 only.

In relation to the €55 supervisory fee to be paid to the Provider each month by the Complainants, I accept that this fee was notified to the Complainants and furthermore, I am satisfied, based on the evidence, that although the Provider did overcharge the Complainants by €20 in respect of this supervisory fee on 30 December 2014, this overcharge was rectified by a reduction of €20 in the supervisory fee charged by the Provider on 1 April 2015.

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In respect of the Complainants' assertion that the Provider did not respond to phone calls or emails sent in April/May 2015, no evidence to the contrary has been furnished to this Office by the Provider.

While I note that the Provider wrote to the Complainants on 22 March 2017 informing them of the change to the individual who was dealing with their complaint, this communication took place almost two years after the initial queries were raised with the Provider by the Complainants. Due to the Provider's lack of engagement with the Complainants in April/May 2015, the Complainants were left in a difficult situation having raised genuine queries about the approach of the Provider to managing their debt and receiving no response from the Provider in relation to those queries and difficulties.

The Provider, in its post Preliminary Decision submission dated 1 March 2019, states "*this client outlined in writing that all they could afford to pay towards their debts was €300, reflecting their current income and living expenses, therefore their mortgage was going to fall into arrears anyway, due to insufficient cash flow each month to pay the full mortgage payments, not because of this firm*".

I believe the Complainants' precarious and difficult financial situation was all the more reason why the limited money they had should have been prioritised for their mortgage and why they needed the maximum level of assistance and better communication from the Provider.

I note that of the €1,800 paid to the Provider by the Complainants between November 2014 and April 2015 only €775 was paid off the Complainants' mortgage with the remainder of the money paid by the Complainants being allocated towards the Provider's fees. As a result, the Complainants' mortgage had fallen into arrears of €1,484 by April 2015.

As a result of those arrears, the Complainants found themselves in danger of being deemed not co-operating in relation to their mortgage. This could have had serious consequences for them.

The Provider has obligations under the Consumer Protection Code 2012. Specifically the Code requires that a provider:

- 2.1 acts honestly, fairly and professionally in the best interests of its **customers** and the integrity of the market;
- 2.2 acts with due skill, care and diligence in the best interests of its **customers**;
- 2.3 does not recklessly, negligently or deliberately mislead a **customer** as to the real or perceived advantages or disadvantages of any product or service;
- 2.6 makes full disclosure of all relevant material information, including all **charges**, in a way that seeks to inform the **customer**;

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Overall, I do not accept that the Provider has discharged its obligations under the Consumer Protection Code. Specifically, I do not accept it has acted fairly or professionally, nor in the best interests of its customers, in relation to the Complainants. It was unclear from the Provider's documents that it would use the initial monthly instalments from the Complainants to cover the 'Initial Set-Up fee' of €750 before any money was paid towards their mortgage.

The Complainants were already in a difficult situation, with arrears on their mortgage, before they sought the service of the Provider.

I note that the result of the diversion of the monthly payments to cover the Set-Up Fees of the Provider was an increase in the arrears on the mortgage and subsequent communication from the lender to the Complainants warning them of the risk of being deemed 'non-co-operating'. Since the Provider had not told the Complainants that the funds would not be paid off their mortgage when that was clearly the Complainants' expectation and understanding, I consider the lack of clear communication to the Complainants in this respect to be a very serious matter.

In terms of correspondence from the Provider to the Complainants, the Provider's letter of the 22 March 2017, two years after the event, is the first reference to the fact that the '*Initial Set-Up Fee was €750, which is paid once only and unless you pay upfront it is deducted from your forthcoming payments*'.

In addition, I do not accept that the Provider has entered into an agreement with the mortgage holder to the extent that the Complainants thought was the case. In the Provider's submissions, I can find nothing to suggest the proposal by the Provider was acceptable to the lender nor that the lender had confirmed it would regard the Complainants' case as subject to MARP.

Since that is strongly at variance with the Complainants' understanding of how this process worked and their only source of information was the Provider, I find this to be another serious lapse in communication.

While the information given by the Provider after the complaint was made clearly sets out how the monthly payments made by the Complainants were disbursed, the existence of the Initial Fee which the Provider states is a one-off, is contained in a table titled, 'New Monthly Payment Plan' on page 7 of the application form to the provider. I do not accept that there is a reasonable or adequate description of the intention of the provider to have 'first call' on the monthly payment for the first three months of the plan with the exception of €20/€25 going to the lender in month three.

Payments by the Complainants

In total the Complainants paid €1,800 to the Provider.

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€750 was the Set-Up fee
€275 was the Provider's monthly administration fee
€775 went to the mortgage holder

Section 13.15 of the Code sets out the following requirements for Debt Management Firms:

Where relevant, the statement required under Provision 13.14 must set out:

- a) any cost savings to the **consumer**;
- b) any additional fees or **charges**, including those charged by the **debt management firm**; and
- c) any fee, commission or monetary benefit receivable by the **debt management firm** from a third party.

Section 13.20 of the CPC sets out the following requirement for a Debt Management Firm:

- a) A **debt management firm** must provide to a **consumer**, on paper or another **durable medium**, a notification of the outcome of negotiations with creditors within three **business days** of such outcome. However, such notification must take place without delay where the creditor has imposed a shorter timeframe for acceptance of a negotiated outcome.
- b) This notification must:
 - i) highlight any variations from the proposed course of action outlined in Provision 13.14 and set out the reasons why the negotiated outcome is considered to be suitable and affordable for that **consumer**;
 - ii) include details of the steps that the **consumer** must take in order to comply with the terms negotiated with creditor(s) and the timeline imposed by the creditor(s) for complying with these steps;
 - iii) include details of the circumstances in which the **consumer** can withdraw from the new arrangements and the steps required to withdraw from the new arrangements;
 - iv) include details of the circumstances under which any cancellation charges may become payable by the **consumer**;
 - v) include details of any penalties that may be applied by creditors if the **consumer** fails to meet the terms of the new arrangements; and

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vi) include details of creditor(s) that have declined to engage with the **debt management firm**.

I believe the Provider has not complied with Sections 13.15 or 13.20 of the CPC in its dealings with the Complainants.

I note the complaint was formally lodged with the Provider on 13 March 2017. It acknowledged that complaint on 22 March. This was seven working days later. Allowing for possible postal delays I do not find that unreasonable, although 5 working days is the required standard. A letter acknowledging their request for a final response letter was sent on 6 June 2017, some 60 working days later. No letter explaining the delay was sent after 20 days, nor any explanation offered for the time scale of the investigation.

The letter of 6 June does not explain the outcome of the complaint; it simply re-iterates the terms and acknowledges that the Complainants are dissatisfied. It did not refer the Complainants to the then Financial Services Ombudsman, when it should have done.

For the reasons set out above, I uphold this complaint and direct the Provider to provide compensation to the Complainants in the sum of €1,200 by reason of the unreasonable manner in which the reductions in payments were made by the Provider in respect of monies that the Complainants thought were being directed to the Complainants' mortgage account and the poor communication in the provision of its debt management services.

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), (f) 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 Complainants in the sum of €1,200, 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**

28 March 2019

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.