An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0156
Sector:	Banking
Product / Service:	Personal Loan
Conduct(s) complained of:	Failure to process instructions Dissatisfaction with customer service
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant entered into a term loan with the Provider on **22 March, 2011** ("loan") for the sum of €14,900. On **7 January, 2013**, the Complainant's loan account fell into arrears.

The Complainant's Case

The Complainant submitted his complaint form to this Office dated **7 July 2017**. The Complainant was a self-employed individual who ran a business. He states that due to the economic recession experienced throughout the State, he experienced financial pressure. His business experienced a 33% downturn in turnover, which led to his loan account falling into arrears. The Complainant's wife was diagnosed with cancer in 2007 and the Complainant was diagnosed with cancer in April 2015. The Complainant's business did not receive his full attention during the period of 2007-2015 because of the treatment he received and because he was providing care for his wife. By **17 December 2012**, the Complainant had paid the loan down to €10,828.91.

On **7 January 2013**, the Complainant's loan account fell into arrears. He entered a "promise to pay" arrangement with the Provider on **6 February 2013**, whereby he agreed to pay €65.39 for 5 months. Notwithstanding this agreement, the Complainant made payments in the sum of €110.00 for those months. The Complainant also held a mortgage with the Provider, which fell into difficulty during the currency of the loan.

As a result of his diagnosis on 2015, the Complainant received a lump sum benefit, for his illness. The Complainant says that he was advised at that time (by an unidentified party) that his mortgage repayments with the Provider should be prioritised over the term loan repayments. Accordingly, the Complainant paid €55,382.85 of the illness benefit towards his mortgage arrears by agreement with the Provider, in **2016**. In addition to the mortgage repayments due to the Provider by the Complainant, the Complainant had to use his illness benefit to pay for other loans, responsibilities and medical expenses.

The Complainant was in frequent communication with the Provider after his account fell into arrears in January 2013 in an attempt to resolve the loan arrears. The only option that the Provider ever offered the Complainant was to default on his loan, which he was not prepared to do. He says that he had never defaulted on a loan in his life and did not want to take this option as it would have implications for his ICB rating, which in turn would have further implications for his business.

The Complainant and his wife considered their financial position and in August 2016 decided to make an offer to the Provider in full and final settlement of the loan. On **29 August 2016**, the Complainant telephoned the Provider and offered the sum of €11,897.46. He informed the Provider that he would transfer that sum to it within the week. This sum comprised the outstanding capital sum together with the non-punitive interest under the loan. The Complainant was not prepared to pay the sum of €2,196.00, which had accrued in respect of penalty interest. During the call which the Complainant says lasted 32 minutes, the Provider rejected that offer. The Complainant says that he asked how he would go about defaulting on the loan, and was told that he would have to visit his branch.

On Friday **2 September 2016**, the Complainant and his wife lodged the sum of €11,897.46 into his loan account. He sent a letter to the Provider on that day outlining his situation, and what had transpired during the telephone call earlier that week, on Monday 29 August 2016, and making it clear that this was lodged in full and final settlement of his account.

On **5 September 2016**, the Complainant and his wife attended at the Provider's local branch for the purposes of conducting a review of the Standard Financial Statement ("SFS") he had furnished to the Provider. He handed the Provider the letter dated **2 September 2016**. The letter provided:

> "*My wife and I have lodged €11,897.46 into my* [Provider] *Term Loan account today, in full and final settlement of my* [Provider] *Term Loan account…*"

The Complainants' additional letter dated **5 September 2016** advised, amongst other things, as follows:-

> *"After a long battle…€100K was paid out by* [insurer] *on the policy … 3 weeks ago. … through all this time we have found it difficult to come to agreements with [the Provider] and now we have paid €44K off our mortgage and €12K off a personal loan. We find it hard to take that* [the Provider] *will not write off the penalty interest in*

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this instance and accept repayments of €550 per month going forward without affecting our agreement with the [third party financial service provider]."

The Provider did not indicate that it did not accept that sum of €11,897.46, in full and final settlement of the term loan until the First Complainant received a letter dated **30 March 2017**, which he received on **19 April 2017**. Neither did the Provider communicate any reason for rejecting his proposed revised payment arrangement in accordance with its obligation to do so under provision 8.12 of the Consumer Protection Code 2012 ("CPC") until it wrote to him by Final Response Letter dated **5 July 2017**.
The Provider refused to accept the Complainant's offer because he needed, according to the Provider, to furnish additional financial statements. The Complainant had completed 3 financial statements on **19 August 2013, 15 May 2014**, and **5 September 2016**, so he believed it would be pointless to provide any further information. The Provider did not engage with the Complainant in any meaningful way to resolve the arrears on his loan account. The total projected cost of repayment of the loan was €19,616.40 but as at **2 September 2016**, he had paid the Provider €22,664.26.

The Complainant seeks repayment of the over-payment of €3,047.86 together with such compensation as to this Office might deem appropriate.

The Provider's Case

The Provider says that it was entitled to apply penalty interest to the Complainant's loan account. By Final Response dated **4 July 2017**, the Provider indicated that it did not receive any correspondence from the Complainant until it received his letter of **16 March 2017**. By letter dated **30 March 2017**, the Provider indicated that his account would need to be assessed for full and final settlement.

The Provider repeatedly informed the Complainant that he would have to default on his loan in order for a full and final settlement to be offered to him. As the account was not in arrears since the lodgement on **2 September 2016**, the Provider was not obliged to issue correspondence to the Complainant under the Consumer Protection Codes. As he refused to compile a Statement of Means ("SOM"), the Provider could not offer the Complainant a full and final settlement.

The Provider indicated, on the telephone on **29 August 2016**, that the Complainant would not be able to make a payment in full and final settlement of his account unless and until the Complainant submitted a Statement of Means. On that telephone call, the Provider indicated that the only other option would be to default on the loan.

In respect of the Complainant's lodgement on **2 September 2016**, the Provider stated that it could not be considered as full and final settlement as the sum lodged was not agreed by the Provider. The Complainant was told that he would have to complete an SOM, in accordance with the Provider's procedure.

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As the Provider had not agreed that the lodgement could be made in full and final settlement of the Complainant's loan account, the Provider continued to hold the Complainant liable in accordance with the loan agreement. The lodgement was applied to the Complainant's arrears as of the date of lodgement, which were cleared in full. At that juncture, the arrears stood at €9,930.42.

The Provider was not obliged to write down or discharge the Complainant's outstanding debt or interest on his loan. If the Complainant wanted the Provider to do so, he was obliged to submit an SOM. As the Complainant repeatedly refused to do so, the Provider could not offer a full and final settlement.
The Provider asserts that it is entitled to charge the Complainant penalty interest and it did not overcharge the Complainant. The Provider states that the Complainant is not, therefore, entitled to a refund.

The Provider is willing to discharge the accrued interest on the loan account from **2 September 2017**, in the sum of €438.95, however it maintains that the sum of €2,118.75 remains due and owing on the term loan account.

During the course of its investigation, the Provider identified service issues on the loan and, accordingly, is willing to make an *ex gratia* payment to the Complainant of €1,000.

The Complaint for Adjudication

This complaint is that the Provider wrongfully and unreasonably refused in late August/early September 2016, to accept the Complainant's offer of €11,897.46 in full and final settlement of his loan account.

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.

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A Preliminary Decision was issued to the parties on 5 April 2019, 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, within the period permitted, the final determination of this office is set out below.

It is common case between the parties that the Complainant fell into arrears on his loan account on **7 January 2013**. The Complainant does not dispute that the Provider was entitled to apply penalty interest to his account under the agreement. Rather, he views it as unfair that this occurred notwithstanding that this was due to factors outside of his control.
It is clear to me from the correspondence and audio evidence received by this Office that the Complainant was always keen to repay the loan. The following is some evidence of that willingness:-

1. He repaid the sum of €110 rather than the agreed sum of €65.39 for 5 months during the promise to pay arrangement agreed in February 2013.

2. By letter of **11 November 2013**, he informed the Provider "*I would like to state that I do not intend, or want, to default on this loan.*".

3. He wrote to the Provider on **6 February 2014**, indicating that he had made numerous attempts to arrange an alternative payment agreement. That letter expressly stated "*This Letter is not a Letter of Complaint, as I want to pay back all my loans.*".

4. By letter dated **6 February 2016**, he indicated "*Default on this Loan is not an option for me.*"

5. By letter dated **2 September 2016**, the Complainant stated "*I have never defaulted on a loan in my life, and did not want to default on this loan.*".

6. The Complainant paid the Provider the sum of €11,897.46 in respect of his loan in an attempt to finalise the account from the proceeds of the illness benefit he received.

7. The Complainant completed financial statements on **19 August 2013, 15 May 2014**, and **5 September 2016**.

8. In his telephone conversation with the Provider on **29 August, 2016**, the Complainant stated:-

    a) "*At least if I die in the next year, that loan will be paid back*";

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b) "*If someone comes back to me knowing everything I've said and they say no, well I'll go to my grave happy enough that I made a decent offer.*"

The Provider did not deny the Complainant's willingness. Rather, it stated that it was unable to consider entering into a full and final settlement with the Complainant due to his refusal to complete an SOM. Whilst the Provider must of course have processes in place, to deal with such a situation, I take the view that the Respondent's submissions on this point are unconvincing, for the following reasons:

Firstly, I cannot see what would have been added to the Respondent's knowledge of the Complainant's financial situation by his submission of a further SOM. The SFS submitted by the Complainant on **5 September 2016**, is a substantial document that contains a large amount of information in relation to his financial position. This document would have allowed the Respondent to accurately assess the Complainant's ability to repay the loan. This approach by the Provider seems, to me, to be an unnecessarily formulaic and stringent adherence to internal policy, rather than any attempt to undertake a merit based assessment of the financial facts as presented to the Provider.

Secondly, the Respondent repeatedly informed the Complainant that it was impossible to consider a full and final settlement of his account unless he was willing to default on the loan. The Complainant, although already in arrears, did not want to totally default on his loan. Accordingly, even if he had submitted the new SOM as requested, it seems that this would not have progressed the matter as he was unwilling to default. I note indeed, that the Complainant completed a Statement of Means (SOM) in May 2014, which was unacceptable to the Provider as it did not contain a settlement proposal. When the Provider reiterated its request for a settlement proposal, and the Complainant then put a proposal in June 2014, to settle the liability, this was then rejected on 17 June 2014 by the Provider as the Complainant had not defaulted on the loan; this remained a requirement to meet the Provider's processes.

The Complainant and his wife found themselves in exceptionally difficulty circumstances during the period complained of, both physically and financially. Notwithstanding both of them being diagnosed with cancer, they continued to seek to resolve their financial difficulties. In fact, they offered, and ultimately lodged, the majority of the illness benefit that the Complainant received, to the Provider in order to do so. The Complainant lodged the sum of €11,897.46, which represented the sum due and owing by him to the Provider less the penalty interest, on **2 September 2016**. He sent a letter to the Provider that date stating that this was in "*full and final settlement*" and handed a copy of that letter to an agent of the Provider on **5 September 2016**. It is disappointing that there is no evidence available of the Provider having acknowledged or replied to that letter or having written to explain its refusal to accept the lodgement as a full and final settlement, or indeed, to explain how those monies would be applied by the Provider to the account.

The only correspondence that issued from the date of lodgement to 19 April 2017, were two arrears notifications dated **21 February 2017**, and **10 March 2017**, and a letter from the Complainant dated **16 March 2017**, which noted again the contents of the letter of **2 September 2016**. In my view, the Provider should have expressly indicated within a short

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period of receiving the lodgement and accompanying letter, that the sum was not being accepted as full and final settlement, if that were the case. I consider it unsatisfactory that the Provider took the benefit of the lodgement, cleared the arrears and applied the balance to the principal sum, only to inform the Complainant 6 months later that this was the course of action it had adopted.

Provision 2.1 of the CPC 2012 provides that the Provider:

> "*Acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market*."

Provision 8.3 provides:

> "*Where an account is in arrears, a regulated entity must seek to agree an approach (whether with a personal consumer or through a third party nominated by the personal consumer in accordance with Provision 8.5) that will assist the personal consumer in resolving the arrears.*"

In light of the foregoing, I find that the Provider did not act within the spirit of its obligations under provision 2.1 or 8.3 of the CPC 2012. It is also clear that it breached its obligations under Provision 8.12, to document its reasons for refusing the Complainant's lump sum offer in September 2016.

One can well understand why, given the Complainants' very difficult circumstances over the last number of years that they felt disappointed and let down that the Provider was unwilling to write off the additional interest which had been incurred as a result of the arrears on the loan over a period of time. It is important however, for the Complainants to understand that any proposal in relation to a settlement of the debt was a matter falling entirely within the Provider's commercial discretion. There was no obligation on the Provider to recognise the difficult circumstances of the Complainants, or to accept the Complainants' lump-sum payment of €11,897.46 in full and final settlement of the balance outstanding on the loan, in circumstances where it only represented 85% of the balance due and owing, including arrears and penalty interest.

I have noted that within a very short period after receiving the specified illness lump-sum benefit payment of €100,000, the Complainants discharged some €44,000 to their mortgage account and an additional almost €12,000 to the loan account which is at issue. I believe that they were entitled, at a minimum, to the courtesy of an acknowledgment and an explanation from the Provider as to how the monies paid to the loan account, would be applied. It is a mystery as to how the Provider permitted a period of 6 months to elapse before acknowledging the lump-sum payment from the Complainants. By way of response to this complaint, the Provider has offered to discharge the accrued interest on the First Complainant's term loan account since 2 September 2017, in the amount of €438.95. In addition, in circumstances where the Provider's Asset Management Unit was noted to have no record of receiving the Complainants' letter of 2 September 2016, but the Provider was aware that this correspondence was referred to in the Complainants' Standard Financial Statement of 5 September 2016, it has acknowledged that this letter was received on 5

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September 2017 and that it was not responded to in writing and in those circumstances, the Provider has offered an *ex gratia* payment of €1,000 to the Complainants for that oversight.

In all of the circumstances, I take the view that it appropriate to partially uphold this complaint. Whilst the Provider was under no obligation to accept the Complainants' settlement proposal, nevertheless, the Provider failed to even acknowledge that communication and in my opinion, bearing in mind the efforts the Complainants had gone to, to achieve the lump-sum payment at that time, the Provider wholly failed to respond as appropriate to the Complainants' approach and I believe that a compensatory payment is warranted.

To mark this decision, my directions to the Provider are outlined below under "Conclusion", but it is important for the Complainants to understand that notwithstanding the said directions, their profile with the ICB and the Central Bank's Credit Register, will reflect the factual position regarding any arrears which existed at the earlier dates.

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) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** in order to do justice as between the parties, I direct the Provider to write-down the term loan balance to a sum of €500 and I direct the Provider to apply no further interest to that account balance for a period of 45 days from today's date, so as to enable the Complainants to discharge that balance within that period. If the balance is not then discharged within that period of 45 days, the interest shall continue to accrue in accordance with the terms and conditions of the loan agreement entered between the parties on 7 April 2011.

- 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

1 May 2019

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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.