



<b><u>Decision Ref:</u></b>	2019-0157
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Maladministration Level of contact or communications re. Arrears
<b><u>Outcome:</u></b>	Rejected

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

**Background**

This complaint concerns the Provider's decision to classify the customer as "not cooperating" within the meaning of the Code of Conduct on Mortgage Arrears, 2013 (CCMA).

**The Complainant's Case**

The Complainant holds a mortgage account with the Provider. This account is held jointly with a third party but only the Complainant has advanced this complaint.

On the 28<sup>th</sup> of March 2017 the Provider issued a letter to the Complainant to the effect that he was being classified as "not cooperating". The Complainant appealed this classification.

His appeal was unsuccessful, and he was notified of this by letter dated 11<sup>th</sup> May 2017.

The Complainant takes issue with a number of matters in the letter of the 28<sup>th</sup> of March 2017, primarily:

- a) it is contended that the letter refers to a net worth statement and declaration from "the end of 2016", when in fact the relevant documentation was completed and furnished at the end of July 2016, and received in August 2016;

- b) during this period from August 2016 to March 2017, the Complainant was not informed of any issue with his documentation, but instead simply informed that it was not sufficient without prior consultation;
- c) the Complainant feels the letter suggests an attempt by him to mislead the Provider, which he vehemently denies;
- d) various forms and documentation do not recommend independent legal advice.

The Complainant would like the decision to classify him as not cooperating to be reversed, thus bringing him back within the MARP process.

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

The Provider states that the Complainant was classified as not cooperating on the basis of an inaccuracy in his net worth statement and declaration – specifically that he did not disclose his ownership of a property in the Irish city where he lives. The Provider also states that the Complainant was given an opportunity to clarify this discrepancy in the letter dated 28<sup>th</sup> of March 2017, wherein he was asked to provide a “completed” net worth statement within 10 days, however no such updated/completed statement was received.

### **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 on 10 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

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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, both parties made further submissions as follows:

1. Letter from the Complainant's solicitors to this Office dated 18 April 2019.
2. E-mail from the Provider to this Office dated 25 April 2019.
3. Letter from the Complainant's solicitors to this Office dated 8 May 2019.

Having considered the post Preliminary Decision submissions from the parties, together with all of the evidence submitted, I set out below my final determination.

The Complainant and a third party took out a mortgage with the Provider in 2003. Between 2007 and 2011 a number of interest only repayment arrangements were agreed between borrowers and the Provider. The Complainant and the third party were divorced during that period. A restructure was approved by the Provider but it was never implemented.

In relation to the mortgage the subject matter of this complaint, proceeds of a property sale were applied in reduction of the mortgage balance on the 12<sup>th</sup> of December 2014, leaving an outstanding balance of just under €30,000. No payments have been made on that account since then.

By 2016 various properties had been sold and the proceeds applied in reduction of certain debts. On the 9<sup>th</sup> of May 2016 the Provider wrote to the Complainant (the May 2016 Letter) advising that a restructure was envisaged, and in order to consider/implement a restructure the Provider would require information as set out in an appendix to the letter. Amongst other things, the letter advised that if the Complainant required independent legal advice he could avail of MABS. The Provider required the information within 20 days. The documentation sought was:

- a) standard financial statement (SFS);
- b) net worth statement (NWS) and declaration;
- c) confirmation of tax position.

The letter was addressed to the Complainant at his residential address – “number 38”. The Complainant did not respond to this letter.

On the 22<sup>nd</sup> of June 2016 a follow up letter was sent to the Complainant at number 38 by the Provider, but again no response was received.

It is, however, noted that the Complainant suffered leg injuries that required him to receive periodical treatment from June 2016 to January 2017 (and beyond). The Provider was advised of this injury by telephone on the 19<sup>th</sup> of July 2016.

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During July 2016 an agreement was progressed whereby the Complainant's business was to be sold with an agreed minimum proceeds of sale to be applied in reduction of his outstanding debt (in relation to a different mortgage to the one the subject matter of this complaint).

On the 15<sup>th</sup> of July 2016 the Provider issued a second follow up letter to the Complainant at number 38 (further to the May 2016 Letter) again seeking documentation from him. This letter elaborated on the risk of being classified as "not cooperating" should the documentation not be forthcoming within 20 days, and recommended that the Complainant seek independent legal advice.

It appears that this letter prompted the Complainant to inform the Provider of his leg injury. During that call the Complainant asked the Provider to reissue the relevant correspondence to a different address – "the co-borrower's address". The Complainant confirmed that he had discussed the previous correspondence with his co-borrower.

On the 16<sup>th</sup> of August 2017 the Provider acknowledged receipt of an SFS. On the same date the Provider contacted the Complainant's solicitor seeking an update as to the proposed sale of premises as referred to during July 2016.

I note at this point that the Complainant had failed furnish complete documentation as sought in the May 2016 Letter (or follow up / reissued letters) – neither a signed declaration nor confirmation of tax position had been provided.

During late 2016 the property sale referred to above was finalised, and the proceeds of this were applied in reduction of the Complainant's debt in January 2017.

The letter which has primarily given rise to this complaint was issued by the Provider to the Complainant at his co-borrower's address on the 28<sup>th</sup> of March 2017 (the March 2017 Letter), which issued to his address at number 38.

This letter sets out the following:

- a) that the Complainant did not correctly complete the NWS as every section in the statement has been crossed out, thereby failing to include reference to his debt to the Provider;
- b) that the declaration was not witnessed by a solicitor / commissioner for oaths;
- c) that the Complainant has not included the fact that he is the owner of number 38.

From the evidence furnished to this Office, I believe that these three assertions are factually correct.

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The March 2017 Letter goes on to state that on the foregoing basis the NWS “*would appear to be inaccurate*”, and requests that the Complainant advise why number 38 was not included in the NWS and complete an NWS containing “*all assets and liabilities*” held by the Complainant, and allows the Complainant 10 business days to so do failing which it may take legal action against him for recovery of the debt.

It continues:

*“As outlined under my previous correspondence... a borrower can be considered as not co-operating with the lender if they fail to make a full and honest disclosure of information to the lender, that would have a significant impact on their financial situation.*

*As a result we now have no alternative but to classify you as a ‘not co-operating’ borrower and you are now outside of the Mortgage Arrears Resolution Process, (MARP) the protections of which will no longer apply to you.”*

It is subsequently recommended that the Complainant seek independent legal advice.

In or around this time a different solicitor began to correspond with the Provider on behalf of the Complainant, which resulted in a new written authority being sought from the Complainant.

In response to the March 2017 Letter, it was explained on behalf of the Complainant that he was hard of hearing and has been in and out of hospital over the previous extended period of time.

It is noted that by telephone call on the 6<sup>th</sup> of April 2017 the Complainant’s solicitor instructed that correspondence to the Complainant should go to the address “on file”, meaning number 38.

By the 13<sup>th</sup> of April 2017 the Complainant had not received any documentation. A telephone call ensued wherein the Provider explained to the Complainant’s solicitor that the written authorisation was still to be received, and the correspondence had been sent to the address “on file”.

Ultimately, matters were progressed and the Complainant’s new solicitor was in a position to address the March 2017 Letter. He did so by letter dated the 21<sup>st</sup> of April 2017 in which he raised 12 points. Given the overlap between them, I do not propose to respond to each submission individually. The submissions furnished on behalf of the Complainant are variations of four principal points:

- a) The Complainant was not afforded an opportunity to furnish complete documentation;

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- b) The Complainant was not recommended independent legal advice at certain points;
- c) The Complainant's particular circumstances, specifically his leg injury, his hearing difficulties, and the fact that English was not his first language, were not taken into account;
- d) The Provider unfairly accused the Complainant of misleading it (or implied as much).

The Complainant's solicitor takes issue with the fact that the letter references information received by the Provider "*at the end of 2016*" when in fact the documentation was received by it in August 2016. In other words, August is not "*the end*" of a year. This has been accepted by the Provider, and it has apologised for this error. In my view, this error did not have any material impact on the Complainant or the process.

This complaint is then recast to take issue with the fact that no correspondence was sent to the Complainant from August 2016 until the 28<sup>th</sup> of March 2017, thus not allowing him an opportunity to address any issues that the Provider might have had with the documentation submitted. It is clear from the documentation furnished to this office in response to this complaint that matters were progressing during this period – a sale was being finalised which would have resulted in reduction of the debt and contact was maintained with the Complainant's previous solicitor. The Provider notes that the same letter would likely have issued earlier had this property sale not been progressing that is to the effect that the documentation was unsatisfactory and that satisfactory documentation would be required within 10 business days.

The complaint here is essentially that the Complainant was not given an adequate opportunity to address the issues with the documentation.

I cannot accept that contention in all the circumstances, but I take particular cognisance of the fact that the Complainant was given multiple opportunities to furnish the documentation, that when he did it was undoubtedly incomplete, that the March 2017 Letter gave him a further (albeit short) period of time in which to provide clarification. The Complainant does not appear to have furnished what the Provider might consider "*complete*" documentation at any stage.

The Complainant's solicitor then notes the Complainant's unfortunate history of injuries, together with his hearing difficulty and the fact that he is Asian but dealing with "*a complex form*" and suggests that the Provider's interpretation that he is "*denying his [bank] debt*" is, essentially, unfair.

The March 2017 Letter does not say that he is denying his debt, it simply notes that the information appears to be inaccurate. Similarly, the March 2017 Letter does not say that he is trying to mislead the Provider in relation to number 38, simply that it has not been included as an asset (and thus the information is inaccurate).

The fact that the declaration was not witnessed is, in my view, irrelevant. While a declaration would have been required at some point, there is no evidence to suggest that had the SFS/NWS been filled out in full (to include the Complainant's assets and liabilities), the declaration could have been attended to relatively quickly and easily.

The Complainant's solicitor takes issue with various forms and documents not containing a specific recommendation to take legal advice. A recommendation to take legal advice is a statutory requirement on certain documents and forms. The Complainant was advised to seek legal advice as early as July 2016, when correspondence from the Provider had gone unanswered. I have not been provided with any evidence that the Provider failed to recommend independent legal advice on any form where it was required to do so.

Neither have I been provided with any evidence that the chain of events that unfolded in this complaint would in any way have been affected by independent legal advice. I do not believe the Complainant's solicitor can stand over a submission to the effect that the reason he did not fill out the NWS in an accurate manner was because he was not advised to seek independent legal advice.

The letter of 16<sup>th</sup> August 2016 was merely an acknowledgment that the Provider had received the documentation, in which the Provider explains that a full review will take place, or additional information may be required. The Complainant's solicitor's criticism of that letter on the basis that it does not indicate any difficulty with the documentation is misconceived given that it is, as set out above, simply an acknowledgment of receipt of the documentation.

The Complainant's solicitor's submission that the entitlement to receive legal advice is a basic human right is correct. There is no evidence that the Provider prevented the Complainant from obtaining legal advice at any stage.

There is no evidence before me to suggest that the Complainant's hearing difficulties or any apparent difficulty with English affected the course of events in this complaint. His leg injury may well have caused some difficulty in attending to correspondence (and indeed required correspondence to be sent to a different address for a period of time), but I have not been provided with any evidence of wrongful conduct on the part of the Provider in that regard.

There is no evidence that the Provider's appeal process was conducted other than in accordance with the Code of Conduct on Mortgage Arrears, 2013 – the submissions provided on behalf of the Complainant in that regard are misconceived.

### **Conclusion**

I believe the complaint as presented to this Office is without merit, and revolves primarily around an unfair interpretation of the content of the March 2017 letter from the Provider.

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However, on foot of preparing its submissions for this Office, the Provider discovered that it failed to issue the Complainant with the regulatory correspondence advising him of the MARP on this account, due to a combination of a failure to update the address for the Complainant when the property was sold, and a failure to update the mortgage account balance in a timely fashion.

The Provider has agreed to re-classify the Complainant as a co-operating borrower and begin the mortgage arrears resolution process (MARP) again.

The Provider has further committed to appointing a dedicated relationship manager to expedite the process, and has offered the sum of €2,500 as a goodwill gesture.

In a post Preliminary Decision submission of 18 April 2019, the Complainant's solicitor queried the Provider's commitment to implementing this offer. The Provider, in response, reiterated its commitment to pay its goodwill gesture of €2,500 and re-classify the Complainant as cooperating for the purpose of MARP. The Complainant's solicitor accepted these commitments by letter dated 8 May 2019.

For the reasons set out above, I do not 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 rejected.

**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**

14 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.

