



<b><u>Decision Ref:</u></b>	2019-0209
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Mortgage
<b><u>Conduct(s) complained of:</u></b>	Dissatisfaction with customer service Fees & charges applied Maladministration
<b><u>Outcome:</u></b>	Rejected

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

**Background**

On **26<sup>th</sup> March 2015**, the Complainant engaged the Provider, a debt management service, to review his financial affairs, oversee the restructuring of his debts and organise a monthly payment plan on his behalf with his creditors.

The Complainant complains that he was told by a staff member of the Provider, two months after becoming a client of the Provider, that the Provider had said from the beginning that he would never be a candidate for mortgage reduction. The Complainant now requires a refund of fees charged for the services provided by the Provider on the basis that he would not have availed of their services if he had known that they knew from the outset that he was never going to be a candidate for mortgage reduction.

**The Complainant's Case**

In his complaint form to this Office, the Complainant named two Respondents: Ms X and the Provider. He complains that he first met Ms X on **9 May 2014** regarding the negative equity of his mortgage. Ms X ran a company in the business of providing debt advice. Later in 2014 Ms X's business was closed down and thereafter she became an agent of the Provider and advised the Complainant to become a client of the Provider.

The Complainant received a copy of the Provider's terms of business, which set out its services and fees. The Complainant confirmed in writing that he had received, read and understood these. On **26 March 2015**, the Provider forwarded the Complainant an overview on becoming their client, the debt advice they offered, the creditor payment services they offered, a statement of affairs to review and the proposed payment to his mortgage provider. The Complainant paid an opening fee to the Provider and two months' worth of monthly fees.

The Complainant had the opportunity to cancel the Provider's services within a five business day cooling off period and get a full refund of all fees paid, but he did not take up that opportunity.

The Complainant maintains that a staff member of the Provider was then assigned to his file. He insists that this staff member informed him over the phone approximately 2 months after he became a client of the Provider that she had spoken to Ms X and said that *"nothing could be done with my file"* and that he was never going to be a candidate to have his mortgage reduced based on his affordability. He also maintains that the staff member informed him on **10 June 2015** that a *"family of four should be able to survive on €1,400 a month."*

The Complainant insists that all paperwork preparation and documentation, including the Standard Financial Statement (the *"SFS"*), was completed in Ms X's office. The Complainant complains that the Provider should never have entered into a business relationship with Ms X when, he says, they knew she had been closed down by the Central Bank of Ireland as she was not authorised by it.

The Complainant complains that money was taken from him, and no duty of care was ever given to him by either Ms X or the Provider. The Complainant insists that Ms X should never have given him hope as to what he believed would be a positive outcome. He complains that nothing could ever have come of his situation and that the Provider knew that at all times.

The Complainant now seeks return of all monies that he paid out to Ms X and the Provider, and maintains that he should never have been allowed to become a client, or been advised to be made a client of the Provider.

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

The Provider maintains that the debt negotiating services that the Complainant obtained from Ms. X. from **9 May 2014** are a matter between the Complainant and Ms X. The Provider maintains that it is not responsible for the actions of Ms. X. and that while she was its agent, she was never employed by the Provider.

The Provider maintains that on **26 March 2015** the Complainant first became its client. Prior to that, the Provider states that the Complainant received a copy of its terms of business, which sets out in detail its services and fees. The Provider maintains that the Complainant confirmed in writing that he had received, read and understood them. On **26 March 2015**,

/Cont'd...

the Provider maintains that it again forwarded the Complainant a detailed overview on becoming its client, the debt advice it offered, the creditor payment services it offered, a detailed statement of affairs to review and the proposed payment to the bank.

The Provider notes that the Complainant had the opportunity to cancel its services within a five business day cooling off period and get a full refund of all fees paid, but he did not take up that opportunity.

The Provider maintains that it then embarked on much work on behalf of the Complainant, reviewing his finances in detail, completing the Provider's application form and reviewing all supporting documentation regarding his personal finances, completing and submitting a standard financial assessment for the Complainant's mortgage provider and forwarding a detailed statement of affairs. The Provider maintains that it also set out an independently assessed debt restructuring proposal to the Complainant's mortgage provider.

The Provider denies that any of its staff members outlined that *"nothing could be done with this file."* The Provider insists that it did everything possible to restructure the Complainant's debts based on his affordability. The Provider states that the Complainant was in financial difficulty before he engaged its services. Once he did, the Provider outlined its services to him and undertook to attempt to negotiate a restructuring of his debts to better suit his current financial situation, which the Complainant instructed it to do.

The Provider maintains that it never knows at the outset what the outcome of the creditor's negotiations undertaken for the Complainant or indeed any client will be. This varies, it says, with every client and with every Provider. As the Complainant did have some surplus income to service his debts each month, but not enough to continue to meet the full contractual monthly debt payments, he could therefore make reduced payments towards his debts and there was clear scope to seek a restructuring of his debts with his creditors. Therefore the Provider maintains that it did not know from the outset that he would not be entitled to debt restructuring as it would be impossible to know this.

The Provider maintains that it honoured its duty of care at all times to the Complainant. The Provider states that it was at all times understanding of the Complainant's situation and attempted to re-negotiate his debts based on what was affordable and sustainable having regard to his financial situation.

The Provider notes that, as explained to the Complainant in writing and orally, it charges fees for its debt advice and negotiation and creditor payment services.

In response to the Complainant's view that the Provider should have been able to get a substantial portion of his mortgage written off in a matter of weeks, the Provider states that it explained from the outset that it would request as part of his mortgage restructuring that a portion of the mortgage be written off, but maintains that it could never guarantee that a mortgage provider would write off any debt.

The Complainant complains that the Provider should never have entered into a business relationship with Ms X when he says they knew she had been closed down by the Central

/Cont'd...

Bank of Ireland. The Provider maintains that Ms X never opened up offices under the Provider's name, and was clearly an agent of the Provider, but never an employee. The Provider maintains that when it informed the Complainant that it was no longer doing business with Ms X, this did not impact his account, and the Provider continued to act on his part and gave the Complainant the opportunity to meet to discuss his case.

The Provider maintains that it did everything possible for the Complainant and that, as set out in its terms of business, all fees were notified to the Complainant in advance of becoming a client and then again immediately on becoming a client, wherein he had an opportunity to cancel its services and receive a full refund if he did not wish to proceed.

The Provider maintains that it was handling negotiations with the Complainant's creditors completely independently of Ms X. The Complainant was in arrears with his mortgage before he became a client of the Provider, and once he engaged the Provider, it commenced negotiating and liaising with his creditors.

The Provider states that it carried out its professional duty of care to the Complainant fully and completely, and all works and services were provided in full, therefore any fees incurred by the Complainant are not refundable.

### **The Complaint for Adjudication**

The Complainant is that the Provider knew from the outset that the Complainant was not a candidate for a mortgage restructuring, but, regardless of this, it entered into negotiations on the Complainant's behalf with his mortgage provider and charged the Complainant for these services, giving him false hope and causing him expense.

### **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.

/Cont'd...

A Preliminary Decision was issued to the parties on **24 May 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.

The Complainant made a further submission to this Office on 11 June.

Following the consideration of all the available evidence, including the additional submission from the Complainant, my final determination is set out below.

At the outset, I must point out that as Ms X is not a regulated entity, this Office cannot investigate any complaint against her. Indeed, this is accepted by the Complainant in his submission of **13 October 2015** in which he states *“For the record the Financial Ombudsman have stated clearly that they cannot pursue [Ms X] as she is not a recognised body. This is something that I will pursue through a different means in getting monies I paid in full to [Ms X] returned to me.”*

For the avoidance of doubt, this decision will therefore not examine or adjudicate on any complaint against Ms X. The complaint that this decision will examine relates to the actions of the Provider. I note the Complainant in his post Preliminary submission of 11 June states that it was Ms X who completed his Standard Financial Statement and not the Provider. In that submission, the Complainant also draws attention to a copy of a business card submitted by him in evidence, “clearly stating the [Ms X] under the name [the Provider].” Having examined the business card, I note the text under Ms X’s name states, “[Ms X] [the Provider] Referral Agent.”

The Complainant agreed to avail of the services provided by the Provider from **26 March 2015** after its terms of business were issued to the Complainant. Therefore, the decision relates only to conduct complained of from **26 March 2015** onwards.

The Complainant maintains that he was never a candidate for mortgage reduction based on his affordability and should never have been made a client of the Provider. He insists that the Provider’s staff member who was assigned to his file informed him over the phone, approximately 2 months after becoming a client of the Provider, that she had spoken to Ms X and had told Ms X that *“nothing could be done with my file”* and that he was never going to be a candidate to have his mortgage reduced based on his affordability. He also maintains that this staff member informed him on **10 June 2015** that a *“family of four should be able to survive on €1,400 a month.”* The Complainant has provided no objective evidence of this exchange, and maintains that it was said over the phone.

The Provider denies these statements. The Provider maintains that it engaged with the Complainant’s creditors in order to get the arrears dealt with on his account. The Provider insists that the Complainant came to the Provider as a client outlining that he could only afford €600 per month. His mortgage account went into arrears on **1 October 2014** and he therefore approached Ms X, and subsequently the Provider in respect of the arrears in order

/Cont’d...

to renegotiate his mortgage repayments. The Provider maintains that it adhered to its terms of business and engaged with the bank.

The Provider maintains that the Complainant decided to avail of the Provider's services of his own free will, completely independently, having been provided with a copy of the Provider's terms of business, its fees and how it cannot guarantee any resolution with the Complainant's creditors. It further sets out how the Provider operated and how it operated independently of Ms X.

The Complainant submits, by letter to this office dated **25 June 2018**, that at most, there was one phone call between the mortgage provider and the Provider.

The Provider disputes this, and notes, by letter to this office dated **4 July 2018** the following work done in respect of the Complainant's file: the Provider engaged with the mortgage provider via letter and phone calls. On **26 March 2015**, the initial proposal was sent to the mortgage provider together with the SFS. On **30 March**, the mortgage provider confirmed receipt of the proposal and the SFS and outlined that it would be in touch to discuss. On **22 April 2015**, a follow up letter was sent to the mortgage provider from the Provider. On **6 May 2015**, the mortgage provider phoned the Provider outlining that the expenditure submitted in the SFS was very high for a single individual, and noted that if he could reduce his expenditure to €1,300 the mortgage provider could look at restructuring his mortgage to a monthly payment of approximately €806.20. The Provider left a message with the Complainant to discuss this. On **18 May 2015**, the mortgage provider phoned again looking for an update on the account and the Provider phoned the Complainant again, advising him of the mortgage provider's concerns regarding expenditure. The Provider then sent a breakdown of the expenses in the SFS to the Complainant.

The Provider maintains that it provided the Complainant with a mortgage restructuring proposal. While the Complainant argues that the proposal furnished was a mere template that the Provider used for many clients, the Provider maintains that was specific to the Complainant's financial circumstance based on what he had agreed he could afford to pay on his mortgage, his age, the mortgage and term of the mortgage outstanding and the value of his property. These restructuring proposals, according to the Provider, follow set guidelines but the figures and restructuring proposal as presented to the Complainant's mortgage provider were completely specific to the Complainant's individual circumstances.

I find that it is clear from the documentation available to me that the Provider engaged with the Complainant's mortgage provider through up to three letters and possibly two phone calls, as a representative of the Complainant, as outlined below:

On **26 March 2015**, the initial mortgage restructure proposal was sent to the Complainant's mortgage provider by the Provider together with the Complainant's SFS. On that day, the Complainant was sent an initial letter welcoming him to the Provider and noting their initial fee of €750 and monthly fee of €90. He was also sent a statement of affairs, a financial recommendation letter and a copy of the initial mortgage restructure proposal.

/Cont'd...

On **22 April 2015**, a follow up letter was sent to the mortgage provider from the Provider. On **6 May 2015**, the mortgage provider phoned the Provider outlining that the expenditure submitted in the SFS was very high for a single individual, and noted that if he could reduce same to €1,300 the mortgage provider could look at restructuring his mortgage to a monthly payment of approximately €806.20. The Provider left a message with the Complainant to discuss this.

On **18 May 2015**, the Complainant's mortgage provider phoned again looking for an update on the account and the Provider phoned the Complainant again, advising him of the mortgage provider's concerns regarding expenditure. The Provider then sent a breakdown of the expenses in the SFS to the Complainant.

On **9 June 2015**, the Provider contacted the Complainant again to discuss his expenses. There was no answer and so the Provider maintains it left a voicemail. The Complainant rang back outlining that he wanted to come to the Provider's office to discuss his account.

On **24 June 2015**, the Complainant spoke with a member of the Provider and was frustrated with how Ms X handled his account. The Provider states that he said he was going to call the mortgage provider and consider taking the restructure being offered and possibly cease his services with the Provider.

On **2 July 2015**, the Complainant outlined to the Provider that he was cancelling his services with them and he was going to deal with the mortgage provider alone.

Regrettably, no objective verification of these telephone exchanges, referred to by the Provider of 6 May 2015 and 24 June 2015 in the form of phone recordings of have been submitted by the Provider.

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

*"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...."*

In my view, even in the absence of verification of the telephone exchanges by way of telephone recordings, it is clear from the above timeline that the Provider attempted to negotiate with the mortgage provider and agree repayment terms with them. It seems the Provider was in the midst of attempting to make arrangements with the Complainant on the basis of what the mortgage provider had reverted to it with, when the Complainant decided to cancel his services with the Provider.

There is no evidence to support the contention that the Provider knew from the outset that the Complainant was not a candidate for a mortgage restructuring.

/Cont'd...

As the Complainant did have some surplus income to service his debts each month, but not enough to continue to meet the full contractual monthly debt payments, it seemed a reasonably realistic possibility that an arrangement could be reached whereby he could make reduced payments towards his debts and there was clear scope to seek a restructuring of his debts with his creditors. Indeed, if the Complainant had not cancelled the Provider's services, there was some prospect of a reduced proposal being agreed, as his mortgage provider was engaging and providing counterproposals.

As stated, the Complainant agreed to avail of the services of the Provider on **26 March 2015** after terms of business were issued to the Complainant. I find that the conduct of the Provider at all relevant times was not unreasonable. The Provider attempted to engage with the mortgage provider, it provided a restructuring proposal based on the Complainant's circumstances, and attempted to engage with the Complainant as soon as the mortgage provider reverted on this. The Complainant was made aware of the fees charged by the Provider. The Complainant has provided no objective evidence that the Provider's agent informed him that:

*"...nothing could be done with my file"* and that he was never going to be a candidate to have his mortgage reduced based on his affordability. Nonetheless, I find that this is irrelevant to my decision, as there is sufficient evidence to demonstrate that the Provider was in the midst of negotiating a reduced payment plan for the Complainant when he decided to cancel its services.

Therefore, 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**

16 July 2019

/Cont'd...



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.

