



<b><u>Decision Ref:</u></b>	2019-0328
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Variable Mortgage
<b><u>Conduct(s) complained of:</u></b>	Arrears handling - Mortgage Arrears Resolution Process Failure to provide correct information Maladministration Selling mortgage to t/p provider
<b><u>Outcome:</u></b>	Partially upheld

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

### **Background**

In 2004 the Complainant entered into a mortgage loan with the Provider for €230,000 to be paid over 30 years. In 2009, the Complainant intended to sell the mortgaged property and to relocate to a different jurisdiction. The Complainant bought a new property in the different jurisdiction. The mortgaged property subsequently dropped in value and the Complainant was left in negative equity and servicing two mortgages. The Complainant was required to lease out the mortgage property.

### **The Complainant's Case**

Throughout the course of the mortgage loan, the Complainant has asserted various breaches of the Central Bank Code of Conduct on Mortgage Arrears [CCMA], Mortgage Arrears Resolution Process [MARP] and customer service failings by the Provider. In May 2016, the Complainant was informed that the CCMA no longer applied to the mortgaged property, as it was deemed to not be to the Complainant's principal private residence. In December 2016, the Complainant's loan was sold to a third party and the Provider deemed that the protections of the CCMA no longer applied.

On **8 June 2016**, a letter of complaint was sent by the Complainant to the Provider setting out the Complainant's complaint. On **5 August 2016**, the Provider replied upholding various aspects of the complaints and rejecting certain others. The Complainant asserts a specific failure on behalf of the Provider to properly categorise his property as being covered by the CCMA.

The Complainant notes that the mortgaged property was his sole residential property within the jurisdiction. The Complainant states that he received a letter on **26 April 2016** indicating this Provider's intention to not apply the CCMA to his property and that the Complainant would be treated as an Small to Medium Enterprises [SME] instead. The Complainant notes the definition section of the CCMA which defines a primary residence as meaning '*a residential property which is the only residential property in the State owned by the borrower.*' The Complainant asserts that this applies to him, as the mortgaged property is the only residential property which he owns in the State. The Complainant further queries why this was done unilaterally without his input.

The Complainant asserts that the Provider mis-stated the arrears as being €23,082 in the letter dated **26 April 2016**. The Complainant asserts that his arrears were in the region of €8,500 at that time and that there was no explanation for why the wrong figure was stated. The Complainant asserts that this was incorrect and that he was given inaccurate and misleading information.

The Complainant asserts that his loan and mortgage should not have been sold to the third party. The Complainant asserts that he had no input into this decision and queries whether or not the Provider was entitled to do so without reference to him. The Complainant asserts that his loan was sustainable and that the Provider ought not to have sold it.

The Complainant also asserts breaches of further provisions of the CCMA and MARP. The Complainant asserts breaches of the following provisions: first, a failure to handle cases sympathetically and positively (Chapter 1 CCMA) by the Provider making the process stressful and almost impossible; second, a failure to acquire relevant information before making contact with the Complainant (Chapter 3 CCMA) by repeatedly asking the Complainant to provide duplicate information that had already been furnished; third, a failure to provide documentation required for applying for state support in relation to mortgages (Chapter 3 CCMA) by not providing the Complainant with mortgage interest certificates as and when requested in November 2009, January 2010, February 2010, May 2011 and June 2011; fourth, a failure to assess whether there had been a change of circumstance in order to justify a request for a new standard financial statement (MARP step 3).

In addition, the Complainant asserts general service failings by the Provider. First, the Complainant asserts that he was debited incorrect sums by the Provider from time to time. Second, in March 2014, the Complainant asserts that an incorrect payment of €402.84 was deducted. Third, in October 2009 the Complainant asserts that he was verbally given approval for interest only payments and that he was not aware that it was only a 12 month arrangement. The Complainant asserts that he was not properly told that his account would

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revert to capital and interest payments at the expiry of this arrangement. Fourth, the Complainant asserts that statements and information were being sent to incorrect addresses rather than to his actual place of residence in a different jurisdiction and that he repeatedly sought confirmation that the Provider had his correct address.

Fifth, the Complainant asserts that there was a failure by staff members of the Provider to either respond to emails sent by the Complainant or to attempt to contact the Complainant by his agreed methods.

In terms of a resolution, the Complainant seeks to have the mortgage moved to interest only payments with repayment of the capital coming from the ultimate sale of the property whenever appropriate. In addition, the Complainant seeks damages for the distress and abuse caused by the foregoing asserted conduct of the Provider.

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

As noted at the outset, the Provider has accepted that various portions of the Complainant's complaint should be upheld, while it has maintained that other portions should be rejected.

The Provider accepts a failure on its part to properly classify the Complainant's property as being covered the CCMA. The Provider accepts that the mortgaged property is the sole residential property owned by the Complainant in this jurisdiction and that, therefore, the definition of a primary residence covers it. The Provider notes that it was wrong to send the letter dated **26 April 2016** and that this should not have happened. The Provider states that it has remedied the error by ensuring that the CCMA does apply and that the mortgaged property would be designated as a private residence.

The Provider states that the arrears figure of €23,082 is the figure of 'technical arrears' which does not take account of any alternative repayment arrangements. The figure represents the difference between the normal monthly repayments and the actual payments made. The Provider accepts that it sent an arrears figure of €23,082 on **9 May 2016** and an arrears figure of €8,415.77 on **13 May 2016**. The Provider apologises for any confusion caused by these inconsistent figures and accepts that the complaint should be upheld in this regard.

The Provider states that it was permitted to sell the mortgage loan to a third party at its discretion and without reference to the Complainant. The Provider relies on the contractual terms of the loan facility, in particular clause 8, in order to justify its contractual right to sell the loan. The Provider notes that on **14 October 2016** it wrote to the Complainant informing him that it had agreed to sell the loan on **8 October 2016**. On **19 October 2016**, the Complainant wrote confirming that he had received this notification. The Provider asserts that it is entitled in its commercial discretion to sell a loan if it wishes to.

With respect to the breaches of the CCMA and the MARP, the Provider notes as follows. First, the Provider partially accepts the accusation that it did not act sympathetically and positively (Chapter 1 CCMA) at all material times. The Provider accepts that there were service lapses and errors throughout the process insofar as the Complainant was not

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contacted promptly and was asked to resubmit documentation or requests on numerous occasions. Second, the Provider accepts the account of events put forward by the Complainant insofar as it relates to failing to acquire relevant information before contacting the Complainant (Chapter 3 CCMA).

The Provider rejects the complaint insofar as it relates to asking for the Complainant's consent before carrying out a credit reference check. The Provider accepts the complaint insofar as it relates to a failure to provide mortgage interest certificates when requested (Chapter 3 CCMA). The Provider rejects that it was responsible for the Complainant not receiving any state support as a result of the failure to provide this information. Fourth, with respect to requesting an updated SFS, the Provider says that it requests an updated SFS each time that an alternative repayment arrangement ends so that it can assess what to do going forwards. The Provider did not uphold the complaint insofar as it relates to requesting an updated SFS and it submits that it did not act inappropriately in doing so.

With respect to customer service failings the Provider notes as follows. First, the Provider accepts that certain charges were improperly added to the mortgage account: €13.32 in respect of irregular account charges in January-February 2011, €50.80 in respect of refund of unpaid charges in January 2011-February 2011 and €4.48 in respect of refund of debit interest from January 2011-May 2011). Second, the Provider accepts that it deduced the sum of €402.84 in March 2014, but that the proper amount should have been €220.00. The Provider notes that there were insufficient funds, however, and that direct debit was returned unpaid. The Provider accepts that this was an error that should not have happened. The Provider proposes a further refund of €12.70 to reflect the unpaid fee charge in respect of this transaction. Third and fourth, the Provider maintains that it was not at fault for the Complainant not receiving correspondence in 2011 indicating that the loan would move to capital and interest after the conclusion of a 12 month interest only period. The Provider asserts that it only received a letter requesting a change of address in **25 May 2011** and that it cannot be responsible for the Complainant not receiving information at the correct address before that date. The Provider accepts, however, that it has no correspondence on file that confirms that it informed the Complainant at the time that the interest only period was ending and that, therefore, it upheld the Complainant's complaint in that regard. Fifth, the Provider accepts that its employees did not properly respond to the Complainant's emails and correspondence as set out and it upheld his complaint in that regard.

Notwithstanding the acceptance by the Provider that the Complainant's complaints were justified in many respects, the Provider asserts that it did not breach the terms of its agreement with the Complainant and that it has acted reasonably in its dealings with him. The Provider notes that it has entered into various forbearance agreements with the Complainant to try and manage the loan properly. In its commercial discretion, however, the Provider decided to sell the loan to a third party. The Provider notes, however, that its customer service standard was not to the standard and it has apologised to the Complainant in that regard.

I note the Provider, in its response dated **28 March 2018** to the Summary of Complaint put to it by this Office on **15 February 2018**, stated that in an effort to settle this dispute, it had

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made an offer of redress to the Complainant of €1,500 plus a refund of charges totalling €81.30 in **August 2016**. That offer was then increased to €2,500. Finally, the Provider, by way of apology for the service issues the Complainant had encountered in respect of his mortgage account, increased that offer from €2,500 to €3,500.

### **The Complaints for Adjudication**

Due to the extent to which the Complainant's complaints have been accepted and upheld by the Provider, the complaints for adjudication have been significantly narrowed.

Based on that understanding, the complaints for adjudication are whether.

1. The Provider acted in accordance with the mortgage agreement and acted reasonably in selling the loan to a third party.
2. The Provider acted properly in requiring the Complainant to submit SFS statements in all of the circumstances and the manner in which it requested the Complainant to do so.
3. The Provider impinged on the Complainant's ability to receive state support due to the failure to provide mortgage interest certificates in a timely fashion.
4. The Provider was at fault for the failure to ensure that information and documentation was sent to the correct address and location.

### **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 9 September 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, I set out below my final determination.

### **1. The Sale of the Loan**

The loan documentation and in particular clause 8 gives a contractual right to the Provider to sell the Complainant's loan in its discretion. The Provider wrote to the Complainant on **14 October 2016** informing him that it had done so.

The Complainant in correspondence dated **19 October 2016** noted that he had received this letter and was therefore informed promptly. The decision whether or not to sell a loan is a commercial decision that is one to be made by the Provider in its discretion. There is no evidence put forward that there was any discriminatory basis for the selection of the Complainant's loan. Rather the Provider has asserted that the Complainant's loan formed a part of a portfolio of loans that were sold to a third party.

I have not been provided with any evidence that would indicate the process was unreasonable or unfair. Furthermore, the Provider had a contractual right to do so.

Therefore, I do not uphold this aspect of the complaint.

### **2. Submission of Standard Financial Statement (SFS)**

The Complainant asserts that the Provider was obliged to determine that there was a change in the Complainant's circumstances before it requested a new SFS. The Complainant relies on the MARP which states that a lender must seek an updated SFS whenever there has been a change in circumstances of the borrower. In this regard, I do not find that the MARP precludes a lender from seeking up to date financial information about a borrower at the end of an alternative repayment arrangement. I find that it is reasonable for a Provider to seek an updated SFS at the end of an alternative repayment arrangement, as at that point both the borrower and a lender need to assess what is a reasonable sum for the borrower to pay going forwards. I do not find that there is anything unreasonable or oppressive about doing so, as it is in both parties interests for the payment plan entered into to be based on the objective financial data that is available. While undoubtedly the process was frustrating and tedious for the Complainant, it does not amount to unfair conduct.

Therefore, I do not uphold this aspect of the complaint.

### **3. Provision of Mortgage Interest Certificates**

The Complainant asserts that the Provider breached the MARP by not assisting the borrower by furnishing information required for the purposes of applying for state supports in relation to his mortgage within 10 days.

The Provider acknowledges that it did not provide the mortgage interest certificates as and when requested, but denies that it breached this provision of the MARP. I find that the Provider was obliged to furnish this information to the Complainant far sooner than it did, but failed to do so. It seems clear from the sequence of events furnished by the Complainant that he repeatedly requested these certificates. The Provider submits that the Complainant has not put forward any basis to suggest that he was denied any form of state support and that the Complainant would not have been eligible for any state support due to his non-residency.

It does seem from the account statements provided that the Complainant was entitled to tax relief on his mortgage interest repayments, which the Complainant has been able to claim. That said, I believe the Provider ought to have furnished the information sooner.

Therefore, I uphold this aspect of the complaint.

### **4. Address to which correspondence was sent**

In the Complainant's sequence of events, it is noted that emails were sent on 21 January 2010 and 29 January 2010 where the Complainant specifically queried whether his correct address outside the jurisdiction was being used. On 14 April 2011 the Complainant again queried whether the address was correct. It seems, however, that the Complainant's correspondence address was only properly amended on **25 May 2011**. I find that the most likely explanation for statements, mortgage interest certificates and notification of the end of alternative repayment arrangements not being delivered to the Complainant, was due to the Provider not noting the requests of the Complainant to have correspondence sent to his address outside the jurisdiction.

Therefore, I uphold this aspect of the complaint.

While I welcome the Provider's efforts of redress to the Complainant, I do not consider them to be sufficient. Furthermore, they were based on the Provider accepting responsibility for limited aspects of the complaint.

Based on the complaints that were accepted by the Provider and also the aspects of the complaints I have upheld, I find that the Complainant has been treated unreasonably and unfairly in certain respects. I note that the Complainant requests that the mortgage be made interest only for the duration of the mortgage loan. However, this is a matter within the commercial discretion of the Provider, which I will not interfere with.

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The majority of the Complainant's upheld complaints have been either customer service issues or breaches of the CCMA or MARP that have not resulted in immediate financial loss, but rather inconvenience and annoyance to the Complainant. The Provider was at all times contractually entitled to sell the loan to a third party and the improper classification of the Complainant's property as being outside the CCMA did not result in any financial loss.

For the reasons outlined above, I partially uphold this complaint and direct the Provider to pay a compensatory sum of €5,000 to the Complainant.

### **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) (c)**.

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 €5,000, 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**

4 October 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.

