



<u>Decision Ref:</u>	2019-0333
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Personal Loan
<u>Conduct(s) complained of:</u>	Appointment of debt collection agency Delayed or inadequate communication Dissatisfaction with customer service Failure to process instructions in a timely manner
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the administration of the Complainants' mortgage loan account with the Provider.

The Complainants' Case

The Provider advanced a mortgage loan to the Complainants to fund an investment.

The Complainants feel that they have been harassed and persecuted by the Provider's steps taken to recover the debt. They maintain that they have engaged in a meaningful manner with the Provider at all times throughout the period of this loan, and that by reason of the Provider's own failures they are now facing enforcement proceedings through the courts. They believe the issuance of these proceedings to be defamatory of them, and deny that they have been uncooperative.

The Complainants note that on a number of occasions the Provider failed to follow up or review proposals for restructures, and that on at least one occasion the Provider sought to increase their monthly repayments even though they state that there was no change in their

financial circumstances to justify such a proposed increase. They state that in May 2012 there were no arrears on the account.

The Complainants feel that they are faced with legal proceedings by reason of the Provider's own failings, and that they are being treated unfairly by reason of them having other legal proceedings in being against the Provider (a "pathfinder" claim against the Provider in relation to the management of the investment to which this loan relates).

The Complainants believe the service they have received from the Provider was unacceptable. They would like their complaint to be resolved by way of redress/compensation, and feel that the loan contract should be deemed "*void from the outset*".

The Provider's Case

The Provider has accepted certain failures in the level of customer service provided to the Complainants, but denies that the Complainants have been victimised by reason of their existing proceedings in being against the Provider.

It notes that a revised repayment plan was offered to the Complainants in July 2017 but this has not yet been accepted or rejected by the Complainants, although it notes that the Complainants were (as of March 2019) making repayments in line with this proposal (albeit apparently excluding the lump sum payment element of the proposal).

The Provider submits that issues in relation to the enforceability of the debt are the subject of ongoing legal proceedings and thus do not fall to be considered by this office.

For its failures in customer service it has offered €2,500 by way of goodwill gesture (since a complaint was made to this office), and to bear its own legal costs incurred during the period from December 2016 to March 2017.

The Complaints for Adjudication

that the Complainants are faced with legal proceedings by reason of the Provider's own failings;

that the Complainants are being treated unfairly by reason of them having other legal proceedings in being against the Provider (a "pathfinder" claim against the Provider in relation to the management of the investment to which this loan relates);

that the service the Complainants have received from the Provider was unacceptable.

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.

A Preliminary Decision was issued to the parties 7 October 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

The limitations of the jurisdiction of the Financial Services and Pensions Ombudsman should be borne in mind in complaints of this type.

Where requests in respect of mortgage loan arrears or repayment arrangements are in dispute, this office is only in a position to investigate whether a provider correctly adhered to any obligations pursuant to the Central Bank's Consumer Protection Code (CPC) and Code of Conduct on Mortgage Arrears (CCMA) and/or any other regulatory or legislative provisions in relation to the mortgage loan and the application. This office will not interfere with the commercial discretion of a provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant.

In relation to the legal procedures in being, Section 50 of the Financial Services and Pensions Ombudsman Act, 2017 provides as follows:

"50.(1) Notwithstanding sections 44(2)(a)(i) and 54(1), the Ombudsman may accept a complaint against financial service provider or

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pension provider that has initiated legal proceedings in relation to a matter to which the complaint relates, where the Ombudsman believes, based on reasonable grounds, that the financial service provider or the pension provider, as the case may be, has begun those proceedings in order to prevent the making of the complaint, or to frustrate or delay its investigation.

(2) *Where a question arises as to whether the Ombudsman has jurisdiction, under this Act, to investigate a complaint, the question shall be determined by the Ombudsman, whose decision shall be final.*

(3) *The Ombudsman shall not investigate or make a decision on a complaint where—*

[...]

(b) *there are or have been proceedings (other than where proceedings have been stayed under section 49) before any court in respect of the matter that is the subject of the investigation...”*

There are at least two sets of proceedings in respect of the loan account the subject of this investigation. One brought by the Provider which issued on the 21st of March 2017 seeking judgment in respect of the debt, and another brought by the Complainants (as part of a larger investor group) against the Provider which it appears issued in 2014 .

There are no grounds, reasonable or otherwise, to believe that the Provider brought the 2017 proceedings to prevent the making of this complaint, or frustrate or delay its investigation. In fact, it appears the Provider has deferred its progress of these proceedings.

The Complainants' 2014 proceedings appear to encompass a wide range of allegations against the Provider (amongst others), and was most recently the subject of a written judgment from the High Court on an interlocutory issue. From this judgment, however, it is clear that the claim is a complex one.

By virtue of the operation of section 50 of the Financial Services and Pensions Ombudsman Act, 2017, this office will not consider or make any finding in relation to any matter which could overlap with a substantive issue in either of those sets of proceedings. In those circumstances (and primarily focussing on the 2017 proceedings) this office will not consider or adjudicate upon any issues raised in relation to representations allegedly made and/or relied upon, the validity of demand letters, or the validity of loan contract itself.

The issues that fall to be decided upon by this office in this complaint are therefore solely in relation to the level of customer service provided to the Complainants by the Provider (insofar as such service could not be considered as material to the legal proceedings in being).

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The Complainants drew down a mortgage loan in 2004 for €153,000. The loan repayment was stated as being "Review by 24/09/2005". Security was to be a first legal charge over a property in the South West.

It appears the investment did not mature in the manner that had been hoped, and arrangements for the repayment of the loan were thus reviewed periodically.

From the statements provided to this office, it appears that from September 2004 (when the loan was drawn down) to June 2014 (when agreed repayments began) the Complainants made one lodgement of €1,349.64 to the credit of the account. Between 2010 and 2012 letters issued roughly once per year from the Provider to the Complainants advising that the expiry date of the loan was approaching and thus the account was due for review. The Provider issued a letter of demand for the full balance of the loan in July 2012. A second letter of demand issued in December 2012.

Following this demand, an interim repayment arrangement was agreed, in principle at least, between the parties for €1,000 per month.

The Provider has acknowledged that in February 2013 the Complainants queried the level of interest that would be charged as part of this proposed repayment arrangement, and that the Provider failed to provide formal correspondence in response to this query.

The Complainants began making the agreed payments of €1,000 per month.

The Provider accepts that a review of the facilities ought to have taken place in January 2014 but did not occur.

The repayments of €1,000 per month continued to be made.

In September 2016 the Provider erroneously sent forms seeking a revised repayment proposal and a standard financial statement to the Complainants' solicitor. It accepts that the forms it ought to have sent were a net worth statement and statement of means.

The Complainants confirmed their willingness to continue to make monthly payments of €1,000. The Provider has confirmed it was not willing to accept repayments continuing at that level, but the branch manager failed to communicate this position to the Complainants. A letter of claim issued from the Provider's solicitor to the Complainants in November 2016. The Provider has accepted that this letter was premature in circumstances where it had not formally communicated its unwillingness to accept continued payments at a level of €1,000 per month. It states:

"[The Provider] regrets and apologises for the failure to adequately and proactively communicate with the Complainants to advise them that the proposal to continue with the historic repayment of €1k per month for more than 10 years was not considered acceptable in light of the Complainants' net worth and existence of unencumbered assets. [The Provider] ought to

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have formally advised the Complainants that it had declined the proposal and advised that legal action would ensue”.

A third demand letter issued to the Complainants in March 2017.

The Provider has accepted that there was “a miscommunication” regarding the start time of a meeting which was scheduled for early May 2017.

In June 2017 the Provider offered to accept a schedule which it states was put to it by the Complainants – namely monthly payments of €2,000 in addition to a lump sum payment of €49,000. A written agreement for this arrangement issued to the Complainants from the Provider’s solicitors, but it appears it was not executed by them. The Complainants have nonetheless been making monthly repayments of €2,000 to the account from August 2017 up to the date of the Provider’s submissions being received by this office.

In its final response dated 25 July 2017 the Provider admitted failings in customer service and offered to bear its own legal costs for the period from November 2016 to March 2017 (i.e. the period pertaining to the “premature” letter of demand).

In its response to this complaint the Provider has offered an additional €2,500 by way of goodwill gesture in recognition of its customer service failures.

Analysis

The Complainants are, in essence, seeking a write off of the debt.

As set out above, this office does not act as an appeal process for a commercial decision made by a provider in respect of repayment capacity or sustainability. The decision as to whether or not to grant forbearance to a borrower in respect of a debt is one that could only be interfered with in the most exceptional circumstances.

Furthermore, the relevant transactions and interactions between Provider and Complainants are the subject of two ongoing sets of High Court proceedings.

In the circumstances, I am limited to making findings in relation to the customer service aspect of the dispute. I can therefore only consider evidence to make a decision in relation to the following matters:

- a) failing to furnish correspondence in response to the Complainants’ interest rate query in February 2013;
- b) failing to carry out a review of the facilities promptly in January 2014;
- c) sending incorrect forms to the Complainants’ solicitor in September 2016;

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- d) causing a demand letter to issue prior to formally notifying the Complainants that their proposal had been declined in November 2016;
- e) failing to communicate clearly in relation to an appointment time in May 2017.

Every other issue raised by the Complainants necessarily falls outside the remit of this office due to their possible relevance to ongoing proceedings.

The matters (a) – (e) above vary in their gravity. Taken as a whole, and in isolation from any other matter raised in this complaint, but not adjudicated upon due to ongoing legal proceedings, I accept that the Provider's offer to waive its legal costs from November 2016 to March 2017, together with the additional €2,500 for customer service failures, represents an appropriate level of redress.

For the reasons outlined 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**

30 October 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.