An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0130
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Dissatisfaction with customer service Failure to process instructions in a timely manner Maladministration
Outcome:	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the Complainants' grievances associated with the provision of customer service.

The Complainants' Case

The First Complainant is unhappy with the level of customer service she received following the engagement of the Provider to manage the Complainants' debt.

In **November 2016**, the Complainants were in arrears on a mortgage loan account held jointly by the First Complainant and the Second Complainant (the First Complainant's ex-husband). The First Complainant states that the Second Complainant ceased payments on the mortgage loan some time in **2008** and she has maintained the payments since then. Despite her efforts to continue the payments, the mortgage loan fell into arrears and after a phone call in **November 2016** with a representative of the Provider, the First Complainant states that she engaged the Provider, a debt management firm.

The First Complainant asserts that during her initial telephone call with the Provider, she was informed that she would pay two monthly instalments of €400 which would go directly to the Provider and, thereafter, any €400 monthly instalments would be divided between the Provider and the third party credit servicing firm administering her mortgage loan; the First Complainant understood the breakdown to consist of €78 for the Provider and the remainder for the credit servicing firm.

The First Complainant further submits that she was told by the Provider at this time that if a debt management agreement between her and the credit servicing firm could not be reached by **March** or **April 2017**, that it would forward her case for personal insolvency. She says that that she was told that she would eventually be *"discharged from insolvency"* if she continued to pay €400 per month, on top of her existing mortgage loan repayments, for *"about five or six years"*.

The First Complainant contends that she paid her first instalment to the Provider on the last day of **December 2016** and submitted her documents readily at this time. In **March 2017**, the First Complainant states that she was asked to complete a Standard Financial Statement. She submits that she queried this request, as she had been led to believe that her case would have reached personal insolvency at this point; however, she asserts that she was assured that *"everything was proceeding as normal"*. The First Complainant contends that in **July 2017**, further documentation was requested from her, specifically a Borrower Application Form. Again, the First Complainant contends, she was reassured *"that matters were progressing"*. The First Complainant says that in September 2017 she was told her case was *"going upstairs"* to be reviewed for personal insolvency and that she was *"virtually guaranteed to be approved"* and that this would happen within weeks.

Having not received any confirmation nor update from the Provider regarding her application for personal insolvency, the First Complainant telephoned the Provider twice in **November 2017** and left one voicemail message. When the Provider returned her telephone call, it was apparent to her that the representative working on the application had little familiarity with her case. The First Complainant submits that the representative assured her that he would send her the relevant personal insolvency documentation to be completed, but having not received anything two weeks later, she decided to cancel her monthly direct debit payments as she *"had had enough"*.

The First Complainant contends that including her **November 2017** monthly payment, she sent a total 12 payments of €400 to the Provider who *"did nothing except take* [her] *money"*. She further submits that the Provider *"exploited* [her] *vulnerability in this situation, accepting* [her] *direct debits, month after month, fobbing* [her] *off in the knowledge that* [she] *would defer to* [the Provider's] *purported superior knowledge and expertise in this area"*. She contends that after the whole experience with the Provider she was *"left no closer to a resolution, but €4800 poorer"*.

The First Complainant made further submissions to this Office dated **18 May 2019**. The First Complainant stresses here that she was told in her initial **November 2016** phone call with the Provider that she would only have to make payments to the Provider for a few months as a sign of good faith, after which she would be put forward for personal insolvency. She notes that the Provider has not retained a recording of that phone call. The First Complainant highlights that it was only after 12 months of payments that she actually received the personal insolvency application form. Furthermore, in these submissions, she says that there were lengthy delays by the Provider in attempting to contact the credit servicing firm, in relation to her case and she outlines 7 periods of delay ranging from 14 – 71 days which occurred between **15 December 2016** and **19 October 2017**.

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The First Complainant states that she was not aware that her application for personal insolvency was dealt with by a separate entity, and she says that the Provider indicated/implied that it was dealt with in-house.

The First Complainant made further submissions to this Office on **23 May 2019**. She explicitly states that it was not explained to her during that initial phone call that she could try to reach an agreement privately via the Provider or she could go with the personal insolvency process. She was led to believe that these were all part of the same service and that a few months of payments would be required as a sign of good faith to the credit servicing firm, before proceeding to an application for insolvency. Furthermore, the First Complainant states that there is no satisfactory explanation offered by the Provider as to why they left her *"in the dark"* about her case's progress (or lack thereof) for so much of the year during which they accepted her payments.

The First Complainant made a further submission to this Office on **30 May 2019** re-iterating that she had been assured in **November 2016** that she would be put forward for personal insolvency after a few months of payments. She also states that the Provider took advantage of her *"very vulnerable position"*.

Ultimately, the Complainants want the Provider to reimburse them €1,580, which represents the sum paid to the Provider throughout the 12 month period, during which it was engaged.

The Provider's Case

In its Final Response Letter dated **15 January 2019**, the Provider asserts that on **22 December 2016** it sent an initial debt restructuring proposal of €321 per month on behalf of the Complainants, to the credit servicing firm.

The Provider says that its initial fee charged to the First Complainant was €850 and was collected over three monthly instalments beginning in **January 2017**. The initial letter sent to the First Complainant by the Provider dated **15 December 2016**, stated that in addition to the initial fee of €850, a monthly fee of €79 would also apply.

It explains that the Complainants' mortgage loan debt would been reviewed by the credit servicing firm firstly to assess it for a debt management plan and that if this was unsuccessful, personal insolvency would be explored. This, it asserts, was explained to the First Complainant during her initial phone call with the Provider in **December 2016**.

The Provider states that *"as no positive outcome was arising from the private approach,* [the Complainants'] *case was then put in the pipeline for Personal Insolvency review"* following some interactions in **May**, **June** and **July 2017** with the credit servicing firm. The Provider submits that a Personal Insolvency Adviser was assigned to the Complainants' mortgage loan sometime after this.

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The Provider states that it *"successfully set up a payment plan/debt management plan on* [the First Complainant's] *behalf and submitted a detailed and independent restructuring proposal to* [her] *creditors with all the necessary supporting documentation.* [It] *engaged with* [her] *creditor on a regular basis and unfortunately* [the credit servicing firm] *deemed* [the Complainants'] *account unsustainable. This is why* [the Provider] *explored Personal Insolvency with* [the First Complainant].

The Provider states that it never told the First Complainant that she would be discharged from insolvency if she paid €400 per month for 5/6 years. It states that it:

> *"never would or never did tell this client she would be discharged from insolvency, based on a set payment as she never even entered personal insolvency in the first place"*.

The Provider states that it was in compliance with the Consumer Protection Code 2012, as amended, and it has addressed its obligations under provisions 2.1, 2.2, 2.3, 2.8, 13.13, 13.17, 13.18 and 13.19.

In further submissions to this Office dated **21 May 2019**, the Provider states it did not have a policy of recording phone calls in **November 2016** and that is the reason the initial phone call with the First Complainant was not recorded. It states that the service it was going to provide to the First Complainant was explained in significant detail, both orally and in writing, at the very start of the process. It states that it was explained to the First Complainant that she could try and reach an agreement with the credit servicing firm privately through the Provider or she could try reach an agreement via the more formal and court based personal insolvency process.

The Provider states that it explained to the First Complainant when she first engaged with the Provider that if she was to avail of personal insolvency, this would involve signing up to separate documents and terms and conditions, due to the regulatory status associated with personal insolvency. The Provider also stated that it explained that this personal insolvency service was provided in association with the Provider, but separate from it. Essentially, the Provider states that two separate services were explained and offered to the Complainant and the Complainant chose to avail of the option to try and reach an agreement with the credit service provider, via the Provider. Furthermore, in respect of the complaint of delay against it, the Provider states that it submitted the debt restructuring proposal, supporting financial information and detailed statement of affairs to the Complainant's creditor and it then had no option but to wait until the creditor reviewed the information and reverted. It also submits that it contacted the Complainant's creditor on a number of occasions urging the creditor to revert regarding the proposal.

In further submissions to this Office dated **30 May 2019**, the Provider states that all the evidence and documents signed by the First Complainant completely contradict what the First Complainant states. The Provider states that the First Complainant received a copy of the Provider's terms of business which clearly set out the services and fees. The Provider asserts that the First Complainant confirmed in writing that she had received, read and understood this and the service that was being provided and all associated fees.

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In addition, the Provider states that it provided an overview letter to her separately and once again outlined the services that the firm would be providing, the debt advice that would be offered, the creditor payment service the Provider would provide, upon the First Complainant becoming a client, as well as a statement of affairs to review and the proposed creditor payment & restructuring proposal to also review. The Provider states that the overview letter also mentioned the personal insolvency services but made it clear that it was a different service. The Provider states in its further submissions that all fees charged, were charged exactly as set out and explained and signed off on by the First Complainant. The Provider states that that it was in **July 2017**, not after 12 months, that it again offered the personal insolvency option to the First Complainant.

In further submissions to this Office dated **6 June 2019**, the Provider reiterates many of the points made in previous submissions and states that it *"has never tried to take advantage"* of the First Complainant.

The Complaint for Adjudication

The complaint is that the Provider failed to demonstrate an acceptable level of customer service towards the Complainants when the First Complainant was attempting to manage her mortgage loan debt.

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 on **27 March 2020**, 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.

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In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the evidence before this Office includes documentation signed by the First Complainant on **30 November 2016** which authorised the Provider to help the First Complainant negotiate on its behalf with the credit servicing firm and set out the terms and conditions for doing so, including the initial fee of €850 plus €79 per month:

> *"Terms of Business/Schedule of Fees and Charges*
>
> *Our fees and charges will be applied as follows:*
>
> *Initial fee:…Our minimum Initial fee is €850 (exclusive of VAT)*
>
> *Monthly fee: we charge 15% (exclusive of VAT) of the monthly repayment figure paid by each client, subject to a minimum charge of €79 per month or such other monthly figure as may be agreed in advance with the client"*

I note from the evidence submitted to this Office that both an initial letter and an overview letter were sent to the First Complainant by the Provider dated **15 December 2016**. The initial letter stated that in addition to the initial fee of €850, a monthly fee of €79 would be charged to the First Complainant for engaging the services of the Provider. I also note that the overview letter detailed the key information about the debt management services that the Provider would make available. I accept that the overview letter set out the debt advice on offer, the creditor payment service the Provider would provide upon the First Complainant becoming a client, as well as a statement of affairs to review and the proposed creditor payment & restructuring proposal to also review. I further note that the overview letter also mentioned the personal insolvency services but made it clear that it was a different service:

> *"Your options are private-inform debt management plan and negotiations, or the more formal and public personal insolvency arrangements. At this stage we consider the informal debt management route to be the most flexible, advantageous ad suitable for your circumstances now. If required, we can avail of more formal, rigid and public Personal Insolvency or Bankruptcy options at a later date. The actual or potential consequences associated with debt management plans are outlined in detail below."*

Having carefully considered all of the evidence before me, I accept that the Provider explained to the First Complainant that she could try to reach an agreement with the credit servicing firm privately through the Provider or she could try to reach an agreement via the more formal and court based personal insolvency process. I further accept that it was explained to the First Complainant when she first engaged with the Provider that the personal insolvency service was a separate service and that the First Complainant chose to avail of the option to try to reach an agreement with the credit service provider via the Provider.

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The documentary evidence does not however, address the proposed timeline, which the Complainant has referred to and in the absence of a recording or other adequate contemporaneous note of the parties' discussions on the phone at that time in November 2016, it remains unclear as to why the Complainant understood that a certain timeline would apply, if such timeline was not in fact to be.

In respect of the 7 alleged periods of delay ranging from 14 – 71 days which occurred between **15 December 2016** and **19 October 2017**, I note the following:

- A 71 day period of delay from 15 December 2016 – 24 February 2017: the Provider delayed in contacting the creditor. No reasonable explanation for the delay has been made available by the Provider
- A 14 day period of delay from 24 February 2017 – 10 March 2017: the Provider was awaiting contact from the credit servicer and whilst the 2 week period is less than ideal, I accept that there is a reasonable explanation for the delay.
- A 19 day period of delay from 20 April 2017 – 8 May 2017: the Provider delayed in contacting the First Complainant. No reasonable explanation for the delay has been made available by the Provider.
- A 30 day period of delay from 9 May 2017 – 8 June 2017: the Provider was awaiting a response from the credit servicer but in my opinion, greater efforts could have been made to follow this up.
- A 35 day period of delay from 8 June 2017 – 13 July 2017: the Provider was again awaiting a response from the credit servicer.
- A 52 day period of delay from 18 July 2017 – 4 September 2017: An issue arose regarding the financial circumstances of the Second Complainant and therefore, on balance, I accept that this period may have been reasonable.
- A 44 day period of delay from 5 September 2017 – 19 October 2017: No reasonable explanation for the delay has been made available by the Provider.

Noting the position in respect of these delays and even putting aside the absence of adequate follow up by the Provider in its interactions with the credit servicer, the Provider has not put forward a reasonable explanation for at least 134 days of delay incurred in its dealings with the First Complainant (approximately 4.5 months). I am satisfied therefore, that the Provider has not acted with due skill, care and diligence in the best interests of the First Complainant in adherence with provision 2.2 of the ***Consumer Protection Code 2012 (as amended)*** ('the CPC').

The Provider has accepted that it did not record the initial phone call that took place with the First Complainant in **November 2016**. I also note that the Provider has not supplied this Office with any notes/log details of this initial phone call that would assist in ascertaining the contents of said phone call.

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It is notable that much of the First Complainant's complaint rests on the content of that initial phone call and the advice she says she was given by the Provider during the phone call which led her to engage it services.

Provision 11.5(e) of the CPC states that a Provider must maintain up-to-date records containing

> *"all correspondence with the consumer and details of <u>any other information provided to the consumer in relation to the product or service</u>"*
>
> [My emphasis]

Provision 11.6 of the CPC states that a Provider must retain records for

> *"at least six years from the date on which the regulated entity ceased to provide any product or service to the consumer concerned."*

Based on the failure of the Provider to supply any notes/log details or documentary or alternative audio evidence concerning the initial phone call with the First Complainant in **November 2016**, I note that the Provider has breached provisions 11.5 and 11.6 of the CPC.

Whilst the Terms & Conditions supplied by the Provider to the First Complainant demonstrate adherence to provision 13.1 of the CPC and the initial letter and accompanying overview letter demonstrate adherence to provision 13.2 of the CPC, nevertheless in my opinion, the evidence made available in this matter demonstrates a very poor level of service made available to the Complainant and indeed the absence of any objective contemporaneous evidence of the parties' initial discussions, on foot of which the First Complainant elected to engage the services of the Provider.

Having regard to the particular circumstances of this case, in particular the failing on the part of the Provider to keep any records of the initial phone call between the parties in **November 2016** and the delays by the Provider in advancing the Complainants' case, I propose to substantially uphold the complaint. Although the Complainant had agreed to pay a sum of €79 to the Provider each month for its services, it is clear from the evidence that during certain periods of time, the Provider's level of service to her was very lacking.

Consequently, to conclude this matter, I consider it appropriate to direct the Provider to make a compensatory payment of €500 (five hundred Euro) to the First Complainant in respect of the failure to keep an adequate record of the initial phone call discussions. In addition, I consider it appropriate to direct the Provider to make a compensatory payment of €400 (four hundred Euro) to the First Complainant in respect of the delays she encountered in her dealings with the Provider. These compensatory figures together total a sum of €900 (nine hundred Euro) which is referred to below.

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Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld on the grounds prescribed in ***Section 60(2)(b)*** and ***(g)***.

- 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 First Complainant in the sum of €900, to an account of the First Complainant's choosing, within a period of 35 days of the nomination of account details by the First 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.

MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

24 April 2020

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.