



<b><u>Decision Ref:</u></b>	2020-0149
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Current Account
<b><u>Conduct(s) complained of:</u></b>	Delayed or inadequate communication Complaint handling (Consumer Protection Code) Dissatisfaction with customer service
<b><u>Outcome:</u></b>	Substantially Upheld

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

This complaint relates to a loan account and the alleged maladministration and poor customer service of the Provider.

#### **The Complainants' Case**

The Complainant and another borrower jointly hold a loan account which was originally arranged with the Provider in or around **October 2008**. The Complainant states that he submitted an initial proposal regarding the account, to the Provider in **May 2012** but that the Provider did not respond to him until 9 months later, in **February 2013**. The Complainant states that a trend of poor communication and lack of response from the Provider continued from this point forward. He states that he responded promptly to all communications received from the Provider and provided all financial information as requested. The Complainant states that he made a further three submissions to the Provider following the initial submission of May 2012, the last one being in **March 2017**. The Complainant states that the Provider failed to engage in relation to his submission of March 2017.

The Complainant states that he then learned that his account had been moved to the Provider's centre in [new location] and on 23 August 2017, the Complainant's financial adviser wrote to the Provider in [new location] on his behalf to which he received no response. The Complainant has expressed his concern that during this period of non-engagement by the Provider, his loans were being assessed and prepared for inclusion on a loan sale process. The Complainant states that the Provider may have chosen this strategy in relation to the loan accounts in an effort to maximise its return on the loan facilities. The Complainant states that the Provider is totally disregarding its obligations and his entitlements under the Central Bank regulations for lending to Small and Medium Enterprises, and exposing him and his business, to a vulture fund.

The Complainant believes that the Provider has breached its obligations to him personally and has also breached the Central Bank Regulations in the following manner:

- (i) Failing to adhere to its stated policies for dealing with borrowers in financial difficulties;
- (ii) Not acting to address these difficulties despite acknowledging that it was in receipt of the financial information requested and required;
- (iii) Not identifying a dedicated contact point;
- (iv) Not including the statement "*a key objective of this policy is to assist borrowers to resolve their financial difficulties*". The Complainant states that the Provider appears to have ignored this and may potentially have deliberately chosen to seek to maximise its own position while ignoring the borrowers' position by including his loans in a loan sale;
- (v) Failing to advise how long it would take to complete its consideration of the proposal and by failing to consider it at all;
- (vi) Not providing any timelines;
- (vii) Not providing a statement regarding how it is in the borrowers' interest to engage with the regulated entity;
- (viii) Failing to engage with the Complainant;
- (ix) Failing to provide a summary of the Central Bank Regulations;
- (x) Failed in its duty to make contact with the Complainant as a borrower;
- (xi) Failed to inform him of a change in his contact point;
- (xii) Failed to respond to the Complainant within the timelines provided by the Regulations;
- (xiii) Failing to offer an alternative arrangement to the Complainant; and
- (xiv) Taking steps to include the Complainant's and his co-borrower's loan in a loan sale, without any communication with the Complainant.

The Complainant stated that he found the Provider's refusal to deny that his loans were to be included in a loan sale, as adequate reason for his concern. He believes that it would have been very simple for the Provider to have advised his contact point and to have engaged with him, if his loans were not to be included in the loan sale. The Complainant originally stated that if his loans were being included in a loan sale now or in the near future, he wanted the Provider to be held accountable for failing to meet its obligations to Small and Medium Enterprises, and for causing him and his family enormous worry and stress notwithstanding the fact that he engaged and cooperated fully with the Provider at all times.

After the formal investigation of this complaint was commenced in **September 2018**, the Complainant notified this office the following month, in October 2018 that in fact, 6 months earlier in May 2018, the Complainant and his co-borrower had been notified by the Provider of the sale of the loan in question to a third party provider (TPP) as permitted by the provisions of the loan agreement entered into. This communication had confirmed in May 2018, that it was expected that the transfer would complete on or after 27 July 2018.

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### The Provider's Case

The Provider concedes shortcomings in a number of areas complained of in relation to communication, customer service and a lack of engagement with the Complainant. The Provider however denies wrongdoing in not agreeing to an alternative arrangement with the Complainant or in the sale of the Complainant's loan to a third party.

The Provider references a "report" to the Provider in **May 2012** from the Complainant whereby it was proposed that the properties charged to the Provider be retained in the medium term and that the income produced be lodged (less associated costs) in a dedicated rent account to manage outstanding liabilities to the Provider, in line with the cash flows which were detailed. The Provider points out that this proposal was rejected by the Provider in **January 2013**.

The Provider has explained that in its opinion there have been long standing issues as between the parties, and indeed questions over the security which the Provider had in place. As far back as in 2012, there were concerns in relation to the perfection of the security for the premises at [Property 2] and [Property 1]. It had been the intention that the security was to be registered in the joint names of the Complainant and the co-borrower, his father. The loan associated with the property was to be drawn down in the joint names of the Complainant and the co-borrower as set out in the Letter of Sanction. Clarity was required in that regard because the leasehold interest over the public house at [Property 2] was registered in the sole name of the Complainant and was due to expire in **July 2016**. It was confirmed at the time that the Complainant had bought out the freehold to this property in conjunction with an adjoining property at [Property 1].

The Provider has confirmed that a delay arose in addressing these issues because the Complainant's case manager was on sick leave from the Provider for a number of months and, unfortunately, the case was not re-assigned to another member of staff. In **2012**, a proposal was submitted by the Complainant to the Provider which was forwarded to the Provider's credit unit but, on the basis of the information available showing affordability to service the debt, the Provider did not see any reason to agree to reduce repayments as requested. The Complainant indicated at a meeting which included his advisor, that he was worried that the Provider would sell his livelihood and possibly his family home and, from then on, he would only lodge rent monies and wages to show the true picture.

At a subsequent meeting in **2013** it was clearly explained to the Complainant what was required from him, in order to progress a new application for a re-structure on his connection of accounts. It was confirmed that the Provider was now looking at long term sustainable solutions, instead of short term restructures as had previously been facilitated. Throughout 2013, there was active engagement between the Complainant and the Provider as there were several complications and queries outstanding with the properties, including structural queries. This ongoing communication continued into **2014**. In **2016** whilst confirmation on the structural concerns had been addressed, there were still several items of information which remained outstanding. As a result, the Provider was unable to fully complete an assessment and was unable to get a clear understanding of the full situation regarding the properties.

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### **The Complaint for Adjudication**

The complaint is that the Provider wrongfully and unreasonably refused to engage with the Complainant's proposals and refused to provide the Complainant with answers to his questions.

### **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 **21 February 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

This office has been furnished with a significant volume of documentation including all correspondence for the relevant periods along with account terms and conditions.

I note that the Complainant arranged a loan with the Provider in the amount of €425,000 in or around **October 2005**. Repayment of the loan was stipulated to occur 10 years from the date of drawdown, by a single payment equivalent to the principal amount of the facility plus any interest accrued but not yet paid, as at the date of final repayment. In the interim, quarterly interest charges were to be charged to the Complainant's working account. Security for the loan was stated to include the following items:

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- (1) Assignment over Ark life policy for €1,000,000 on the life of the Complainant;
- (2) Legal charge dated \*\*\* 2004 over [Property 1];
- (3) Legal charge dated \*\*\* 2003 over [Property 2]; and
- (4) Legal charge over [Property 3].

Subsequently, on **22 October 2008** the Complainant and his co-borrower entered into an agreement with the Provider for a facility of €1,345,574 (One Million, Three Hundred and Forty Five Thousand, Five Hundred and Seventy Four Euro) to facilitate the repayment of a previous commercial loan, and also to facilitate the purchase of a commercial property at [Property 4] with certain monies being intended for shop refurbishment and construction of an apartment.

I note that the repayment terms were specified as follows:-

*“Borrowings on the account are repayable on demand. However, without affecting the [Provider’s] right to demand repayment at any time, the loan is repayable over 236 months x 8 consecutive monthly repayments of EUR 6,306.58 towards interest commencing on 01/11/2008 followed by 228 consecutive monthly payments of EUR 10,001.18.*

*We will not automatically adjust the amount of the instalments if the interest rate rises or falls. This may mean that these instalments may become insufficient to clear the credit facility on schedule. If you want to make an adjustment to keep pace with an interest change, please ask us.”*

I note that the security for this borrowing was specified to include the following:-

1. Legal charge from the Complainant to be executed over the entire property at [Property 2].
2. Legal charge from the Complainant over [Property 5].
3. Legal charge from the Complainant over [Property 3].
4. Legal charge from the Complainant to be executed over residential public house at [Property 5].
5. Legal charge over shop premises and 5 apartments at [Property 1].
6. Assignment from the Complainant dated \*\*\*/2003 over Ark Life policy [Policy A] on the life of the Complainant for EUR 1,000,000.
7. Assignment from the Complainant dated \*\*\*/2008 over Ark Life policy [Policy B] on the life of the Complainant for EUR 1,000,000.
8. Legal charge over five Apartments [No.] to [No.] at a specified location.

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I note that both the Complainant and his co-borrower accepted the terms of this facility arrangement, by executing the agreement on **7 November 2008**.

In **May 2012**, a report was submitted to the Provider on behalf of the Complainant. The report stated that the goal of the exercise being undertaken by the Complainant was to agree a strategy for addressing the outstanding debt of the Complainant in his own name, and jointly with his wife and his father respectively. It was stated that the purpose of this was to maximise the value of the assets charged, on a medium to long-term basis. The summary of the proposal stated that it was proposed that the properties charged to the Provider be retained in the medium term, and income produced be lodged, less associated costs, in a dedicated rent account, to manage outstanding liabilities in line with the cash flows, which were attached. It was stated that the Complainant remained committed to working with the Provider to maximise the return from the assets charged to the Provider. Ultimately, the Provider rejected this proposal in **January 2013**. The Provider acknowledged and apologised for the delay in responding to the proposal and explained that it was compounded by the Provider's manager's absence from work between September and December 2012.

The second proposal was submitted in around **July 2013** and the correspondence provided to this office shows that the Provider requested further information and documentation with regard to this proposal. The correspondence between the Provider and the Complainant's representative on 6 September 2013, evidences that the Provider had a number of queries in relation to outstanding issues for [Property 1]. This correspondence also notes that the Provider was likely to be supportive of retaining the Complainant's business/livelihood at [Property 2] but it was uncertain whether the Provider had an appetite to retain the commercial unit or the apartments at [Property 1] in the long term.

On 12 September 2013, the Complainant's representative replied to the Provider and stated, amongst other things, that the structural/compliance issues in relation to the [Property 1] and [Property 2] were numerous and that the Complainant was seeking an opinion from an engineer regarding rectification. It was also stated that there were fire certificate issues in relation to [Property 1] and that the consent of the adjoining landowners would be required in order to rectify these issues. It does not appear, from the evidence furnished to this office, that these queries or issues were ultimately addressed and it also appears that the second proposal of July 2013, was not completed.

It then seems that the Complainant's loans were sold to the third party purchaser (TPP). The Provider wrote to the Complainant on **23 May 2018** informing it of its intention in that regard and the transfer of the loans was completed in or about **2 August 2018**.

There are numerous elements to the Complainant's complaint that the Provider unreasonably refused to engage with him:

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Firstly, the Complainant is unhappy about the refusal of the Provider to accede to the alternative arrangement proposals. The documentation furnished to me shows that the Provider examined and assessed the Complainant's proposals in 2012 and 2013. I accept on the evidence before me that, putting aside the issue of the delay involved, the Provider dealt with the Complainant's 2012 application based on its own policy and taking into account affordability criteria which it was entitled to do, and that it did not act unreasonably in doing so. I accept that the Provider adhered to its obligations in dealing with borrowers in financial difficulties.

A lending institution has a broad discretion over a commercial decision such as whether or not to accede to an application of this nature, and on the facts of this case I don't consider it appropriate to interfere with that discretion. I am satisfied that in assessing the Complainant's repayment proposals, the Provider considered all of the relevant information. There was no obligation upon it however, to accept the Complainant's proposal, to vary the existing contractual arrangements in place.

The Complainant also maintains that the Provider failed to engage regarding his March 2017 proposal. There were certainly communications between the Complainant and the Provider during 2017 and 2018 including, I note, significant pieces of correspondence marked "*Without Prejudice*", though there is little evidence of a fresh "*proposal*" in early 2017; the parties continued their communications and the Complainant made certain outstanding financial information available. I note from the Provider's Final Response Letter dated January 2018 that it does not deny that financial information was received from the Complainant during that time, but it notes that:-

*"A full review of same has not been completed to date, due to changes in management of [the Complainant's] Case and ongoing capacity issues."*

Whatever capacity issues the Provider was experiencing, this no doubt came as cold comfort to the Complainant and his co-borrower, who were awaiting a meaningful response to the proposals made. If the Provider was unwilling to agree to those proposals, it could have simply confirmed this to the Complainant. Instead, it seems that the proposals were simply neglected and given no attention or priority owing to "*capacity*" issues. This is unsatisfactory. Likewise, the Provider's Final Response Letter of January 2018 acknowledged receipt of the Complainant's representative's letter of 23 August 2017 and apologised for not responding to that letter, due to "*resourcing constraints*".

In relation to the **2013** proposal, the correspondence clearly shows in correspondence from both parties, that there were outstanding issues relating to a number of the properties over which the loan was charged. Those issues do not appear to have been adequately addressed and it was clear that they formed part of the Provider's considerations; it was therefore not unreasonable in my opinion for the proposal not to have been advanced, in the absence of those issues being resolved.

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The Provider informed the Complainant of its intention to sell his loans to a third party in May 2018. This development must be viewed against the background of the contractual arrangements which were in place at that time between the parties. In order to draw down the loan in 2008, the Complainant was required to accept the Provider's terms and conditions provided. In that regard, I have been furnished with, and I have reviewed, the terms and conditions relevant to the credit agreement entered into between the parties.

The relevant clause is clause 7.15 and it provides as follows:

*The [Provider] reserves the right to assign, transfer, or sub-participate all or part of any facility to any of the companies in the [Provider] Group or to any financial institution either within the State or otherwise, without the prior consent of the borrower and will be entitled to give any proposed assignee, transferee or sub-participant such information as it deems necessary relating to the Borrower and any facility.*

This particular clause confirms the Provider's right to assign the loan to another entity within the Provider's group or indeed to a third party, without notice to or without the prior consent of the Complainant and the co-borrower.

The Complainant and his co-borrower applied for the loan and having been issued with a Letter of Loan Offer in October 2008, they accepted the offer which was specified to be:-

*"set out in this letter and subject also to the Bank's General Terms and Conditions Governing Business Lending, a current copy of which is enclosed. **These are legal documents and should be read very carefully.**"*

While it appears that the sale of the loan by the Provider, did not actually complete **until 2 August 2018**, the sale had been agreed prior to that. I accept the Provider's evidence that the Complainant's proposal in 2018 was received after the Provider had agreed to sell the loans to the TPP and that, as and from the date of the loan sale agreement, the TPP had a beneficial and economic interest in the loans and had an entitlement to review any proposals such as that submitted by the Complainant.

I also accept that the Complainant still benefited from the same regulatory protections that it had with the Provider prior to the loan sale, as a result of the regulatory arrangements in place at that time.

In those circumstances, whilst the Provider has a case to answer to the Complainant in respect of certain failures to respond to the Complainant at other times, detailed below, and in relation to certain significant delays in dealing with his communications, I do not accept any culpability on the part of the Provider in relation to the 2018 proposal.

The Complainant also says that the Provider failed to:-

- (i) Adhere to its stated policies for dealing with borrowers in financial difficulties.
- (iii) Identify a dedicated contact point.

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- (viii) Engage with the Complainant and
- (x) Make contact with the Complainant as a borrower.

The Provider has accepted culpability in respect of each of these grounds. Amongst other things, the Provider acknowledges that its follow-up to some of the Complainant's requests in the absence of all of the required information not being submitted, was not always effective or adequate in the circumstances.

Furthermore, the Provider explains that for a significant period between May 2012 to January 2013, there was a lack of engagement as a result of the case manager being on sick leave. Furthermore, there was a serious lack of engagement throughout 2014 which the Provider acknowledges but fails to provide any reason for. Likewise, there were culpable failures to engage with the Complainant between January 2016 and July 2016 and again from October 2016 to April 2017. No reasons whatsoever have been made available by the Provider for these failures. I'm satisfied therefore that these grounds of complaint are well grounded, and should be upheld. These are not insignificant shortcomings on the part of the Provider and the period of time during which there was a failure to adequately engage with the Complainant or indeed engage at all, was in my opinion, inordinate and inexcusable.

Finally the Complainant maintains that the Provider:-

- (iv) Did not include the statement "*a key objective of this policy is to assist borrowers to resolve their financial difficulties*".
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- (vi) Did not provide any timelines.
- (vii) Did not provide a statement regarding how it is in the borrower's interest to engage with the regulated entity.
- (ix) Failed to provide a summary of the Central Bank Regulations.
- (xi) Failed to inform him of a change in his contact point and
- (xii) Failed to respond to the Complainant within the timelines provided by the Regulations.

While the Provider accepts some shortcomings in relation to all of the above, I note that the Complainant throughout this period was being advised by a professional adviser. The Provider acknowledges that a statement providing that "*a key objective of this policy is to assist borrowers to resolve their financial difficulties*" was not given. It points out that the Complainant was directed to the Central Bank website in its letters of September 2016 and March 2018 in order to access the relevant regulations that oblige the foregoing sentence to be included. In my opinion however, this was not adequate.

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In relation to not providing any timelines, the Provider simply responds stating that it provided clear timelines in relation to the outstanding information that was requested by the Provider. While this might be correct it does not excuse or explain the general lack of communication regarding timelines in relation to the process as a whole. While the Provider acknowledges that it didn't provide a specific statement regarding how it was in the borrower's interest to engage with the regulated entity, the Complainant was being advised by a professional adviser, who no doubt will have advised the Complainant of this and in any event it was clear that there was engagement by the Complainant with the Provider so the failure in question, appears not to have significantly prejudiced the Complainants. I am very conscious that the Complainant was seeking to engage in a meaningful way with the Provider, and over certain periods, it was the Provider which was failing to engage.

The Provider agrees that it has no record of evidence to show that it furnished the Complainant with a summary of the Central Bank regulations, but it did refer the Complainant to the Central Bank website as outlined above. The Provider acknowledges that there have been instances where it failed to respond within the timelines provided by the regulations. However, the Provider submits that its obligation to respond to a proposal within 15 business days was only operative once all relevant financial information was to hand. While I accept that the Provider did not have all the requested information to hand, and did not breach the 15 day requirement, it does not excuse the overall pattern of unsatisfactory engagement and a failure to provide clarity or adherence to reasonable timelines.

In light of all of the foregoing issues, it is clear that there was culpability on the part of the Provider to a material degree in relation to lack of engagement over significant periods of time. Bearing in mind the level of debt in question, and no doubt the very considerable stress to the Complainant and the co-borrower over this extended period of time, I do not consider the Provider's offer of €5,000 in this regard to be a reasonable offer. Such a figure indeed represents some 50% only of the Complainant and his co-borrower's monthly liability to the Provider pursuant to the October 2008 loan agreement.

Given the very extensive period during which these issues continued, I take the view that a figure of €25,000 is more reasonable. In my Preliminary Decision, I indicated my intention to direct that this compensatory be off-set against the Complainant and his co-borrower's liabilities, arising on foot of the loan in question, which the Provider has since sold to a third party purchaser (TPP), and on the assumption that this borrowing has not already been discharged. The Complainant subsequently requested that consideration be given to having that payment made to him directly, and the Provider has indicated that it has no objection in that respect, advising that because the loan has been sold since 2018, it is not in a position to confirm the outstanding balance.

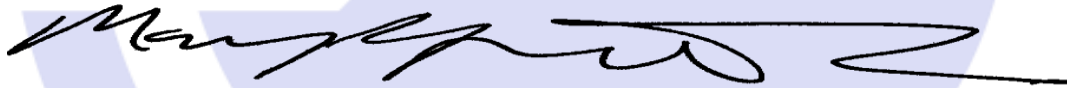
Whilst it is the Complainant who has maintained this complaint, it arises in the context of his interactions with the Provider regarding a borrowing which was drawn down in the joint names of the Complainant and his co-borrower. In those circumstances, I consider it appropriate to direct the payment of the compensation the Complainant and his co-borrower jointly, and it will be a matter for them to then together decide how those funds, when received, should be applied or utilised.

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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)(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 rectify the conduct complained of by making a compensatory payment to the Complainant and his co-borrower, in the sum of €25,000, to an account selected by both the Complainant and his co-borrower, within a period of 35 days of the nomination of account details by the Complainant and the co-borrower 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  
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

2 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.