An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

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| **Decision Ref:** | 2020-0210 |
| **Sector:** | Banking |
| **Product / Service:** | Fixed Rate |
| **Conduct(s) complained of:** | Selling mortgage to t/p provider |
| **Outcome:** | Rejected |

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

The Complainants owned commercial investment properties which were leased out to third parties and which were mortgaged to a financial service provider. The mortgages were sold to a third party who appointed the Provider, against which this complaint is made, to act as its administrator of the two mortgage accounts in 2015.

In 2017, a dispute arose between the parties as to the circumstances which led to the Complainants being deemed to be non-cooperating in respect of their loans. The Complainants contested this and appealed the decision internally with the Provider. This appeal was unsuccessful.

### The Complainants' Case

The primary thrust of the Complainants' complaint relates to the circumstances which led to the Provider deeming the Complainants to be '*non-cooperating*' in respect of their mortgage accounts. It is necessary to set out the lengthy timeline of the written correspondence. On **17 December 2015**, the Complainants wrote to the Provider in relation to the sale of their loan and confirming that they were available to discuss matters. On **8 June 2016**, the Complainants wrote again referring to their previous letter and noting that there had been no further communication, but again reiterating that they were available for discussion.

On **9 September 2016**, the Provider wrote to the Complainants noting that their loan was in arrears for 3 months and that the Complainants could be classified as non-cooperating if they did not engage meaningfully in order to facilitate an assessment of their situation. On **28 September 2016**, the Complainants replied expressing surprise as they had been communicating with the Provider. The Complainants also provided the identification documents that the Provider requested in its letter. On **7 October 2016**, the Provider wrote again requesting a list of documentation within 15 business days '*in order to complete an assessment of your situation*'. The documentation related to the financial situation of the Complainants and their investments.

On **25 October 2016**, the Complainants responded indicating that they were endeavouring to put together the information requested, but that the First Complainant was currently on sick leave and had been off work from June 2013. They said that they would furnish the documentation at the earliest possible date. The Complainants also requested authorisation for their representative to act on their behalf. On **25 November 2016**, the Complainants wrote to indicate that they hoped to have the relevant information forwarded within 10 days. On **20 January 2017**, the Provider sent a letter warning the Complainants that the arrears stood at €61,556.31 and that they were at risk of being classified as non-cooperating. The Provider again requested that within 20 business days specific documentation be furnished in order to enable to Provider to '*complete a full assessment of your financial difficulties*'. On **2 February 2017**, the Complainants' representative emailed the Provider noting that he had a phone call with the Provider on **19 January 2017** where the parties agreed that the Complainants would put in place standing orders of €2,333.33 per month and €120.00 per month in respect of the two mortgage accounts. The Complainants' representative noted that the Complainants had almost all of the documentation ready that had been requested and that the Complainants were ready to engage with the Provider to seek a resolution.

On **15 February 2017**, the Complainants sent the requested documentation to the Provider. On **21 April 2017**, the Provider wrote to the Complainants stating that they had been classified as non-cooperating as they had not taken the specific actions required by the Provider. On **17 May 2017**, the Complainants wrote directly to the Provider asserting that they had co-operated fully at all times and setting out the narrative of their cooperation. The Complainants indicated that they did not accept their classification as non-cooperating and that they wished to appeal.

In the Complainants' submissions they have identified various legislative and regulatory provisions that they rely upon in order to challenge the Provider's actions. I will address these in my Decision.

For the sake of completeness, the foregoing narrative sets out the written correspondence between the parties that is relevant to the issue of whether or not the Complainants were non-cooperating. The Complainants, and in particular the Complainants' representative, make reference to various phone calls that took place between the Complainants' representative and the Provider's representatives.

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While there are a great number of phone calls and attempted phone calls that took place in relation to the specific non-cooperating issue, the Complainants draw attention to the following in particular.

On **22 March 2017**, before the non-cooperating letter, the Complainants' representative spoke to the Provider's representative about the various options available to the parties and that the Complainants' representative would discuss those further with the Complainants. The Complainants' representative says that no time scales were discussed. The Complainants assert that this evidenced cooperation on their part. Additionally on **27 April 2017**, after the non-cooperating letter, the Complainants' representative had another discussion with the Provider's representative where the Complainants' representative states that the Provider's representative played down the significance of the letter and indicated that it was simply part of a process that had to be followed to protect the lender's position.

The Complainants say that they were co-operating and that the Provider should not have classified them as non-cooperating.

In respect of the appeal process, on **17 May 2017**, the Complainants lodged the appeal against their classification which was received by the Provider and acknowledged by letter on **19 May 2017**. On **7 June 2017**, the Provider wrote upholding the initial decision as it deemed the Complainants to have not been cooperating as there was no proposal made to resolve the outstanding debt. The Provider said that this was a requirement that had to be complied with in order to not be classified as non-cooperating. On **8 June 2017**, the Complainants' representative called the Provider and was told that he was not authorised to act for the Complainants on the Provider's system. On **20 June 2017**, the Complainants set out their grievances with the appeal finding, as it did not set out any basis or evidence to support the findings. In particular, the Complainants assert that the appeal board did not have sufficient information before it in order to come to a proper decision. The Complainants assert that the appeal process was not in compliance with the relevant statutory and regulatory provisions and was unfair to the Complainants.

The Complainants make various customer service complaints in how the Provider dealt with their grievances, recorded information and managed their account generally. The Complainants note how a large amount of phone calls between the Complainants' representative and the Provider failed to be recorded. The Complainants note that a data subject access request was made but not properly replied to. The Complainants make reference to various letters and phone calls that were not responded to. The Complainants assert that the Provider did not keep any proper records of their grievances.

In respect of loss, the Complainants have set out in a lengthy submission the alleged consequences of the Provider's actions and conduct. The Complainants assert a loss of employment in that the First Complainant was obliged to leave his work due to being classified as non-cooperating. The First Complainant asserts that he worked in a financial services context which was subject to the fitness and probity regime of the Central Bank.

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When he was classified as non-cooperating the First Complainant asserted that this caused him to suffer a loss of employment and income, as he was required to leave his job.

The First Complainant also noted that he suffered loss of a company car, pension entitlements, health insurance and his mobile phone. The Complainants also assert severe mental health and distress culminating in personal injuries which they seek compensation in respect of. The Complainants assert that punitive damages should be awarded against the Provider in light of its conduct. In respect of the Complainants' representative's costs, these were initially set as being €149,998.50 but were subsequently reduced to €129,242.25.

**The Provider's Case**

In relation to deeming the Complainants as non-cooperating, the Provider states that it classified the Complainants as non-cooperating because there was no proposal made on their behalf to resolve the outstanding debt. The Provider states that if a borrower does not make a proposal, then this does not amount to full co-operation and therefore the Provider was entitled, pursuant to the relevant legislative and regulatory provisions, to deem the Complainants non-cooperating. The Provider points to the following items of correspondence. On **7 October 2016**, the Provider states that it requested documentation from the Complainants in order to complete an assessment of their situation. The Provider notes that the documentation required included '*repayment proposals to cover the total amount outstanding*'. On **19 January 2017**, the Provider wrote an e-mail to the Complainants seeking again a list of documentation and '*a proposal to address the current outstanding debt*'. On **20 January 2017**, a formal non-cooperating warning letter was sent setting out the documentation required and also stating that in addition to the documentation being provided that the Complainants were obliged to '*contact us and work with us to find a resolution to your financial difficulties*'. On **22 March 2017**, the Provider notes that it spoke with the Complainants' representative and that different repayment options were discussed, but that the Complainants' representative was to liaise with the Complainants and take further instructions and to revert. The Provider states that it requested that the Complainants make a proposal, but that this was not forthcoming within the relevant time limit and that the Provider was therefore, pursuant to the regulations, entitled to deem the Complainants to be non-cooperating. The Provider accepts that the formal letter of **20 January 2017** did not include a specific requirement for a proposal to be made, but the Provider notes that it had previously and frequently requested that the Complainants make a proposal. The Provider states that it is not enough for the Complainants' representative to be discussing the resolution of the debt, but rather it is incumbent that a proposal is advanced.

In relation to the appeal process, the Provider notes the following. The Provider states that the appeal was conducted within the relevant time limits as it was received on **18 May 2017** heard on **2 June 2017** and the decision was communicated to the Complainants on **7 June 2017**.

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The appeal body was comprised of the Provider's Chief Operations Officer [COO] and a regulatory compliance solicitor and the relevant information and case file was before the appeal body.

The Provider states that this complies with the relevant legislative provisions as contained within the regulations. The Provider asserts that the appeal body correctly upheld the decision at first instance and that the Complainants were correctly classified as non-cooperating.

In relation to the handling of the complaints, the Provider accepts certain failings. The Provider accepts that it fell down in its customer service handling in the following respects. First, in failing to properly authorise the Complainants' representative as a third party and in preventing him from acting on the Complainants' behalf in June 2018. Second, in failing to properly record and retain all of the relevant phone calls between the Complainants and the Provider. Third, in failing to respond to items of correspondence and requests sent by the Complainants, particularly in reference to the Complainants' letters dated **7 December 2015**, **8 June 2016** and **7 February 2018.** Aside from that, however, the Provider submits that it has complied with the relevant regulations insofar as they apply to complaint handling and record keeping. The Provider submits that it has procedures in place to ensure that complaints are dealt with, acknowledged and processed properly. It states that it has a Complainant management system which logs any complaints received and the responses given with related documents. The Provider says that it made reasonable efforts to resolve the complaints that have arisen. The Provider acknowledges that there were issues with the handling of the Complainants' account. The Provider has offered the Complainants a sum of €10,000 in compensation for these failings.

**The Complaints for Adjudication**

The complaint for adjudication is that the Provider incorrectly classified the Complainants as non-cooperating and did not correctly manage the Complainants' appeal and complaints.

I must point out at this stage that any compliance or otherwise with a data subject access request is more properly a matter for the Data Protection Commissioner and is outside the jurisdiction of this Office. Similarly, any issues that do not pertain to the specific conduct of the Provider in relation to the Complainants and instead pertain to the general regulatory compliance by the Provider are not appropriate matters for me to determine. As such, any issues relating to the compliance or otherwise by the Provider with general regulatory provisions unrelated to the Provider's specific conduct in relation to the Complainants' complaint will not be dealt with in this Decision.

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**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 22 April 2020, 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.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. Two e-mails, together with enclosures, on behalf of the Complainants to this Office dated 13 May 2020.

2. E-mail from the Provider to this Office dated 14 May 2020.

3. E-mail, together with attachments, on behalf of the Complainants to this Office dated 18 May 2020.

Copies of these submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished by both parties to this Office, I set out below my final determination.

In my Preliminary Decision, and in this Decision, I refer to the fact that the Provider has offered the Complainants a sum of €10,000 in compensation for its failings.

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The Complainants' representative highlighted, in a post Preliminary Decision submission dated **13 May 2020**, that the Provider originally in its final response letter only offered:

> *"…by way of apology a cheque in the sum of 200 Euros..."*

It was not until **8 January 2019** that the offer of compensation was increased to €10,000.

It is necessary to first set out some of the legislative and regulatory provisions that are relevant to this complaint.

The main legislative provisions that govern this particular dispute are contained within the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 [S.I. No. 585 of 2015] ('**the Regulations**').

Regulation 20(8) of the Regulations is the key provision in relation to this complaint and it provides that:

> "*Prior to classifying a borrower as not co-operating, a regulated entity shall issue a warning letter informing the borrower and any guarantor, in a durable medium, of the following:*
>
> *(a) that the borrower will be classified as not co-operating if it does not perform specific actions to enable the regulated entity to complete an assessment of the borrower's circumstances;*
>
> *(b) that the specific actions set out in the letter referred to in subparagraph (a) are to be carried out within a specified time period which shall not be shorter than 20 working days from the date of the warning letter;*
>
> *(c) an outline of the implications for the borrower of not co-operating, including –*
>
> *(i) the impact on the regulated entity's consideration of an alternative arrangement,*
>
> *(ii) the impact of such a classification on the regulated entity's consideration of it exercising any existing legal or contractual rights to enforce security, and*
>
> *(iii) where security is realised, that the borrower will remain liable for any outstanding debt."*

Regulation 9 provides that the requirements of Regulation 8(1)(a) shall be proportionate and reasonable.

Regulations 18 and 19 provide that a lender shall create policies for distressed borrowers and make available to borrowers an information booklet that contains various pieces of information relating to distressed borrowers.

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Regulation 24 deals with appeals. Regulations 24(4) provides that any appeal panel shall be comprised of two individuals who were not involved with the borrower's case previously and have sufficient knowledge and experience to conduct the appeal. Regulation 24 also sets out certain time limits which are not of relevance to this complaint.

Regulation 25 deals with how complaints must be handled. Regulation 25(1) provides that reasonable efforts must be made to resolve a complaint. It further provides that updates shall be given to the customer every 20 working days and an explanation after 40 days. 5 days after the complaint has been investigated and determined, the borrower must be informed of the decision.

In the Provider's information booklet issued pursuant to Regulation 19, the Provider sets out four steps that it will follow. First, it will communicate with the borrower. Second, it will obtain financial information from a borrower. Third, the Provider will then assess the financial information in order to work out the most appropriate solution for that borrower. Fourth, the Provider then undertakes to look for a solution. In this section it states that '*we try to make a decision within 15 working days of receiving all of the information we need from you.*' In respect of non-cooperating, the section also states that it is important for a borrower to engage in a timely manner and to provide full and truthful information, otherwise there is a risk that the borrower may be classified as non-cooperating.

The provisions of the Consumer Protection Code have also been referenced in the complaint lodged, in particular, the general principles set out at Article 2. These place broad obligations on the Provider to act fairly, honestly and professionally in how it deals with consumers.

It is important to note the scope of this decision. Pursuant to the ***Financial Services and Pensions Ombudsman Act 2017***, it is the specific *conduct* of the Provider as it relates to the Complainants that I am investigating and not any regulatory issues or hypothetical issues that may or may not be an issue for a regulatory authority responsible for enforcement of regulatory provisions. In the Complainants' submissions there are various issues that have been raised that do not relate to the specific conduct of the Provider in relation to the Complainants. I will be making no finding in relation to those matters where the assertions do not pertain to the specific conduct of the Provider in relation to the Complainants.

Despite the volume of the correspondence that the parties have engaged in and the lengthy submissions made to this Office, the core of this dispute relates to the conduct of the Provider on **21 April 2017** when it classified the Complainants as non-cooperating.

The Complainants' representative and the Complainants were voluntarily engaging with the Provider by communicating with it and inviting discussion. In particular, the Complainants' representative was frequently attempting to make contact with the Provider's representative but his phone calls and emails were not being replied to.

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Of critical importance is the warning letter of **20 January 2017** and the provision of documentation by the Complainants on **15 February 2017**. The letter of **20 January 2017** asks the Complainants to furnish the financial documentation set out in order to allow the Provider to assess their financial difficulties. It does not ask the Complainants to furnish the documentation *and* to make a proposal of how to settle the debt. The reference to maintaining contact and working with the Provider cannot be interpreted as an obligation to furnish a proposal to settle the debt. The documentation had to be furnished within 20 working days which it was.

On **22 March 2017**, the parties had a telephone call in order to discuss the possible options available to the parties. It is hard to see how this is anything other than active cooperation from all sides to try and resolve the issues between the parties. While it may have been impossible to resolve the issues in light of the underlying commercial position, that does not mean that the parties were not co-operating.

The Regulations and, in particular Regulation 20(8), is very clear. It provides that in order to classify a borrower as non-cooperating, a Provider must first send a letter to the borrower setting out certain actions that must be done and that a borrower will be classified as such if they do not perform those actions within a specified time. This is clearly a reference to the letter sent by the Provider on **20 January 2017**. It is not a reference to previous e-mails and telephone calls had between the Provider and the Complainants. It is not reasonable therefore for the Provider to state that it had asked the Complainants to make proposals in relation to the debt and that a failure to do so amounted to non-cooperation. If that were to be the case, then the letter dated **20 January 2017** should have said so. The Complainants provided the relevant information within the relevant time frame and should not have been classified as non-cooperating.

For the sake of completeness, in the Provider's information booklet, there does not seem to be any positive obligation on a borrower to make a proposal before being classified as non-cooperating. Rather, the sections quoted above indicate that the obligation to co-operate extends primarily to providing relevant financial information when requested to allow the Provider to make an assessment. I find that the Complainants should not have been deemed to be non-cooperating. The Provider's conduct in this regard was contrary to the Regulations.

In relation to the appeal that was conducted, the primary thrust of the Complainants' complaint as set out in the submissions is focussed upon Regulation 24(4) which provides that any appeal panel shall be comprised of two people with sufficient knowledge and experience to conduct the appeal. It does not seem to be in dispute that the Provider did appoint two separate individuals who had the relevant experience. Similarly the time frames provided for in the Regulations were complied with. The sole issue in relation to this aspect of the complaint relates to whether the appeal panel had enough knowledge.

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The Complainants assert that the appeal panel could not have because the Provider did not keep proper records or details of the nature of the Complainants' grievance. It seems that this is more a criticism of the Provider's ability to retain relevant data and records about the complaint rather than a specific criticism of the appeal panel. The appeal panel were able to perform their function, as they had the final first instance decision and the basis for the decision before them.

While the Complainants have a legitimate grievance about the merits of the decision to classify them as non-cooperating, it does not appear that this creates any basis to criticise the appeal panel as having insufficient knowledge. It was constituted in accordance with the Regulations by the COO of the Provider and a regulatory solicitor and made its decision in accordance with the time limits imposed by the Regulations. While the Complainants do not agree with the appeal body's decision, this does not mean that it did not have sufficient knowledge to arrive at the decision that it did. Undoubtedly it is the case that the Provider could have kept more complete data and records and could have provided more of that information to the appeal panel.

In a post Preliminary Decision submission referring to my Preliminary Decision, the Complainants' representative puts forward the argument that there has been *"misrepresentation of important facts of the Complainants' appeal case and letter of appeal"* and:

> *"… ask the Ombudsman to review the conduct of our Appeal by the Provider, arising from the following new facts for consideration".*

The 'new facts' that the Complainants' representative states should alter my Decision are:

> *"In the Appeal Board decision letter to the complainants of the 7th June 2017, [name redacted], Head of Regulatory Compliance, [Provider], stated in the conclusion [sic] paragraph of his letter as follows: "the Appeal Board noted that since receipt of your Appeal, you have submitted a proposal for repayment of the Facilities. We can confirm that your proposal will be presented to [redacted] on the 8th June 2017"*
>
> *However, the correct facts are that the 'proposal for repayment of facilities letter' was sent to [Provider] by email on the 3rd May, 2017 which was 5 working days after receipt of notice of non-cooperating on the 25th April 2017and two weeks BEFORE the letter of Appeal of the 17th May"*
>
> *…*
>
> *It is conclusive evidence that the Appeal Board decided on the complainant's appeal case, based on a false premise and misrepresentation of important facts. This is reinforced by further evidence in the Minutes of the Appeal Board Meeting, included in Evidence 8 [Appendices] submitted by [Provider] in response to Adjudication Officer requests.*

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*The Appeal Board Minutes note under the Discussion Points in the Minute as follows:*

> *"Subsequent to the borrower's letter of appeal, a proposal was submitted and will be presented to credit on the 8/06/2017".*

*We ask the Ombudsman to review the Provider's decision and handling of the complainant's Appeal in the light of this new evidence."*

This is not new evidence, and this point had previously been raised by the Complainants' representative in submissions to this Office. In the Complainants' submission dated **5 November 2019**, the Complainants' representative states:

*"We note from the Discussion Points set out in the Appeals Board meeting minutes [Evidence 8] which states as follows that:*

> *"Subsequent to the borrower's letter of appeal a proposal was submitted and will be presented to credit on the 8th June 2017. ****

*This is a false and seriously misleading statement of the facts in the meeting discussion points minutes. The proposal email was sent to [Provider] by CM on the 3rd May 2017. The Appeal letter was sent to [Provider] on the 17th May 2017. [It is worth noting in this respect that the email proposal of the 3rd May 2017 was not recorded /logged as submitted on the loan management system!]"*

As this point was previously raised, it was considered by me prior to issuing my Preliminary Decision.

The requirement under the Regulations is for the appeal panel to have '*sufficient knowledge*' and not complete or perfect knowledge. I believe that the appeal body did have sufficient knowledge and that there was no breach of Regulation 24(4).

In relation to the general handling of the Complainants' grievances and the customer service issues, it is quite clear from the evidence and submissions that there were various instances of the Complainants and their representative attempting to contact the Provider and making reasonable requests of the Provider. Quite often the Provider responded with computer generated letters or ignored various queries. This clearly did not assist the resolution of the Complainants' grievance. The Provider has expressly admitted to not responding to certain items of correspondence particularly in reference to the Complainants' letters dated **7 December 2015**, **8 June 2016** and **7 February 2018.**

The Provider has also admitted to not recording or failing to keep recordings of the phone calls between the parties. The Provider has also admitted to incorrectly precluding the Complainants' representative from acting on behalf of the Complainants due to failing to note his status as the Complainants' representative on its system.

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The Provider delayed significantly in actioning requests for transcripts and phone calls that were made by the Complainants. While the Provider did provide three formal responses dated **19 July 2017**, **18 June 2018** and **20 August 2018** to complaints made by the Complainants, Regulation 25(1) provides that a Provider shall make all reasonable efforts to resolve a complaint made by a borrower. Phone calls and letters were ignored or disregarded throughout. This cannot be considered to be a reasonable effort on the part of the Provider. In its formal response to this Office, the Provider has not set out how it made reasonable efforts. Rather, the Provider states that its complaint handling process is designed '*to ensure that all reasonable efforts to resolve complaints are made in accordance with Regulation 25*'. This does not establish whether reasonable efforts were made or not. In the same way that I cannot consider general points not related to this complaint from the Complainants, I cannot be swayed by what the process the Provider has in place. I can only consider its conduct in relation to the Complainants. I find that the Provider did not make reasonable efforts to resolve complaints arising in the course of the relationship between the Complainants and the Provider.

Furthermore, it is quite apparent that the Provider did not keep proper records or accounts of the phone calls that were exchanged between the parties, which has been implicitly accepted by the Provider.

The Complainants have set out a lengthy submission that, as noted above, seeks to obtain significant compensation for loss of employment and damages for personal injuries. The Complainants have asserted that the First Complainant's employment ceased due to the First Complainant being classified as non-cooperating. The First Complainant previously worked in the financial services sector and claimed to be subject to the Central Bank's fitness and probity regime.

The First Complainant states that the consequence of his classification as non-cooperating was that he was obliged to leave his employment. In my Preliminary Decision I stated as follows:

> *"This is notwithstanding the fact that the First Complainant seems to have been on sick leave for quite a few years beforehand. I have been provided with no evidence of whether or not the First Complainant disclosed this matter to the Central Bank and was told that he could not work. There is also no evidence provided that being classified as non-cooperating by a lender precludes an employee subject to the fitness and probity regime from continuing to work. In short, the Complainants have provided no evidence to substantiate the vast majority of the financial loss they claim to have suffered as a result of the Provider's conduct."*

The Complainants' representative, in a post Preliminary Decision submission dated **13 May 2020**, challenged my comments relating to the Central Bank of Ireland's fitness and probity standards.

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They submit that:

> *"In the Preliminary Decision, the Ombudsman raised a number of questions about the facts in relation to the application of the Fitness & Probity Standards to [the First Complainant] and the consequence of Borrower's classification as 'not cooperating' and the Sick Leave record of the First Complainant".*

The Complainants' representative submits that the Complainant in [role and named financial provider redacted] is a controlled function, which is subject to the Central Bank Fitness & Probity Standards. An email was submitted which shows this.

The Complainants' representative states that:

> *"The Central Bank has published a statutory code, the Fitness and Probity Standards, together with guidance documents on compliance with the Fitness and Probity obligations. Among the many things set down, a Regulated Firm must:*
>
> *-Satisfy itself that each CF individual complies with the Standards.*
> *-Conduct ongoing due diligence on compliance of individuals.*
> *-Get written confirmation from each CF individual on compliance.*
> *-Require each CF individual to notify of changes in circumstances.*
> *-Require each CF individual to certify compliance at least each year.*
>
> *Under these statutory obligations, a company cannot permit a person to perform a controlled function unless satisfied on reasonable grounds that a person is compliant with the Standards.*

The Complainants' representative further details that:

> *"a person to whom these standards apply, must comply with these standards at all times. In order to comply, a person is required to be [a] competent and capable [b] honest, ethical and to act with integrity [c] be financially sound. In relation to Financial Soundness, the relevant section of the Standards states, among others:*
>
> ** A person shall manage his or her affairs in a sound and prudent manner.*
> ** A person must be able to demonstrate that his or her role in a relevant function is not adversely affected to a material degree in the fact that any of the following may be applicable:*
>
> *- a person has defaulted upon any payment due arising from a compromise or scheme of arrangement with his or her creditors …..*
> *- the person is subject to a judgement debt which is unsatisfied…*
> *-subject to a bankruptcy….*
> *-subject to insolvency… to include 'receivership'…."*

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The Complainants' representative states in a post Preliminary Decision dated **13 May 2020** that:

> *"... The notice of classification of the Borrowers… as 'not co-operating' by [the Provider], by letter dated the 21st April 2017, received on the 25th April, was a serious compliance development, professionally for [the first Complainant], given his controlled function role in [named financial provider]. The ATP felt responsible, as the ATP was acting on his behalf on all these matters. The Enforcement Action notice from [the Provider] on the pending appointment of a Receiver and the threat of legal proceedings in relation to the balance of debt were 'Forward' compliance issues that required reporting to [named financial provider] in relation to his personal financial circumstances and all that would entail in a compliance audit.*
>
> *Once reported, under the Fitness & Probity Standards, [the named financial provider] could not allow him to continue in his controlled function role as [role redacted] in accordance with the Standards and Guidance documents.*

The Complainants' representative submits that the Complainant:

> *"knew, professionally, he could not continue in a [role redacted] capacity to customers on their [redacted]affairs in these circumstances. It would be untenable and unethical, in professional terms, to continue to do [description redacted] work, given the Standards and the Guidance requirements. The ATP concurred with him on this position and advised him accordingly*
>
> *…. [the first named Complainant], accompanied by [the second named Complainant], the [Third Party Representative], met with Director, HR Business Partners and Business Line Director with [named financial provider] on a number of occasions, off site... Arising from these discussions and subsequent negotiations, [the first named Complainant] withdrew from service and employment with [the named financial provider] after [in excess of 20] years of service, on redundancy terms, with effect from [date redacted] 2017.*
>
> *…His exit from his controlled function job with [named financial provider] at that time was the consequence of [the Provider's] decisions and notified enforcement action of receivership. Had [the Provider] withdrawn the classification, as it was contrary to the regulations, or upheld our Appeal, or investigated our Complaint letter properly [the Complainant], would not have had to exit his [role redacted] with [named financial provider], at the time, and would have continued to work up to his retirement age, on [date redacted] 2020. He would pursue the option of [role redacted] with [named financial provider] following retirement".*

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The Provider responded to these comments in its post Preliminary Decision submission dated **14 May 2020** as follows:

> *"There appears to be a perception that [Provider's] classification of the Complainants as not co-operating led to far reaching consequences for the first named Complainant regarding the loss of his job. It should be noted that arrears on these accounts first arose in 2010 and regular repayment recommenced in January 2017".*
>
> *The 2014 Central Bank of Ireland Fitness and Probity Standards, a code issued under Section 50 of the Central Bank Reform Act 2010, outlines that a person who holds a CF/PCF role and falls under the Fitness and Probity regime is required to be 'financially sound', and any information provided to the regulated financial services provider, the employer, should be 'truthful and full, fair and accurate in all respects and not misleading to the best of their knowledge'. In addition to this initial declaration, the individual is now required on an annual basis to declare whether they are aware of any material developments in relation to their compliance with the F & P Standards of which the regulated financial service provider ought to be aware.*
>
> *In this regard we would like the Ombudsman to consider the following:*
>
> - *The Loan accounts first entered in the arrears in 2010 (…903) and 2011 (…580).*
> - *Between 2010 and 2015, when [the Provider] commenced the day to day management of the accounts, €202,497.81 of arrears had accumulated.*
> - *5.1 & 5.2 of the Fitness and Probity Standards Clearly sets out what is expected of a person subject to the Central Bank of Ireland Fitness and Probity Standards.*
>
> *Viewed from this perspective and considering the nature of the loan agreements, the attaching terms and conditions, and the powers contained within the mortgage deed, the first named complainant at all times should have considered the consequences of his defaulted position on the loans accounts and the appointment of a receiver, which was a very real possibility at least three months from the date the Complainants defaulted on repayments. This declaration should have been made in his F&P questionnaire as and when required by his employer – not after the classification of not co-operating. The first named Complainant had an ethical, moral and legal obligation to his employer to present information to his employer which is "truthful and full, fair and accurate in all respects and not misleading to the best of their knowledge".*

The Complainants' representative has stated that he takes offence at the comments made by the Provider and in a post Preliminary Decision submission dated **18 May 2020** states:

> *"It is more than disappointing to read the Provider's baseless effort to impugn the professional character and integrity of the First Complainant.*

/Cont'd…

> *The Provider has no evidence to support these statements and assertions in the final paragraph of the letter. [The Provider] did not take control of servicing the Complainant's loan account until the 19th October 2015, and making such statements is completely out of order. For the record, the First Complainant has completed the Fitness and Probity questionnaires properly in full accordance with the information and declaration requirements and guidance standards. It should be noted that the First Complainant's Loan Agreements were with [named financial provider], the employer group of the First Complainant.*
>
> *There was no risk of a receiver appointment to this loan account at any stage".*

While the Complainants' representative has made a number of arguments that I should have found that the Provider's decision to categorise the Complainants as 'not cooperating' was the reason for his loss of employment and future employment, I do not accept this.

It is not my role to interpret and make a decision regarding the Fitness and Probity Standards. Both parties have made arguments regarding the interpretation of the relevant sections. It is not for me, to make a decision, on whether the Complainant was or was not fit to continue his employment due to the arrears or being categorised as '*not cooperating'.* Nor is it my role to determine employment related matters.

As I have already pointed out, it is the specific conduct of the Provider as it relates to the Complainants, that I am investigating and not any regulatory issues or hypothetical issues that may or may not be an issue for a regulatory authority responsible for enforcement of regulatory provisions. Despite the Complainants' representative's lengthy submissions on these matters, I will be making no finding in relation to those matters where the assertions do not pertain to the specific conduct of the Provider in relation to the Complainants I am investigating.

In my Preliminary Decision I had stated that *"… the Complainants' representative has advanced a significant claim for €129,242.25 in respect of his participation in the processing of this complaint*". I further detailed in my Preliminary Decision that, whilst it is of course open to any complainant to engage the services of a professional advisor for the purpose of maintaining a complaint to this Office, it is not necessary to do so, and any costs thereby incurred are entirely a matter for any such complainant, and are not recoverable through this Office.

The Complainants' representative has, in a Post Preliminary Decision submission dated **13 May 2020**, stated that:

> *This is not, altogether, a correct representation of the facts.*

/Cont'd…

The Complainants' representative has submitted that:

> *"The nature of the expenses sought are in respect of the representative work in dealing directly with [the Provider] over a period of 3 years, in 2016, 2017 and 2018, on behalf of the Borrowers, because of the extensive workload generated by the unacceptable case management and unreasonable conduct and lack of responsiveness of [the Provider], as is evidenced on file. The referral of the complaint to the FSPO did not take place until the 17th September 2018.*

It has been stated by the Complainants' representative in a previous email submitted to this Office dated **22 October 2019** that:

> *"I wish to confirm that the complainants will not now seek compensation in respect of expenses costs or fees incurred by the complainants in utilizing their approved third-party representative to assist with the formal submission to and handling of the complaint process with the FSPO".*

The Complainants' representative has requested of me "for *reasons of accuracy and correctness in representation"* to note the fee expense figure in the final decision as:

> "*105,075 Euros plus Vat*"

The Complainants representative, in a Post Preliminary Decision submission, states:

> *"We request the Ombudsman to take a fair and balanced approach to a consideration of what the Ombudsman would consider a reasonable representative expense in handling this case with [the Provider] given the evidence on the file in relation to the workload, in a determination of the appropriate amount of compensation".*

It is not the role of this Office to comment on or determine what "*a reasonable representative expenses in handling this case"* would be. My role is that of an independent and impartial adjudicator of complaints against financial service providers. The fees charged by a third party representative for representing complainants in their dealings with a provider, is not a matter which I will comment on nor does it form part of my determination of this complaint.

There is insufficient evidence that the conduct of the Provider, whether in classifying the Complainants as non-cooperating or in their complaint handling and customer service approach, has caused the financial loss claimed by the Complainants.

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The Complainants' representative appears to question the processes used by this Office in its investigation of this complaint in a post Preliminary Decision submission dated **13 May 2020** stating:

> *"We made a detailed submission on the 16th May, 2019. If further evidence or documentation was required, we would have expected that to be requested or that we would be advised accordingly, during the last twelve months. In our communications with the FSPO, we had stated that if the Office of the Ombudsman, required anything further on any aspect of our case or submission, to please let us know.*
>
> *We would have open [sic] to being questioned on any aspect of our case to the Ombudsman, in the same manner put to the Provider by the Adjudication Officer in her Summary of Complaint letter of the 10th September 2019. In that letter, the Adjudication Officer raised certain questions with the Provider and sought a 'Schedule of Evidence Required' relating to the complaint. It was an excellent and robust process".*

The Complainants' representative then states:

> *"The complainants should have been afforded the same opportunity and due process, as the Provider, particularly, given the number of questions and the significant issues of evidence that have been raised in our case by the Ombudsman in his Preliminary Decision. The complainants are having to, belatedly, respond to the Preliminary Decision, within the restrictions set down in Ombudsman's letter of the 22 April 2020. These evidence gaps could have been raised with us prior to the Preliminary Decision, particularly, the Fitness and Probity issues, the Sick leave, the Financial Loss to enable us to effectively respond to these questions, before, the Ombudsman reached his Preliminary Decision.*
>
> *Reading the Preliminary Decision, we have the strong impression that these gaps in information and evidence had an important bearing on the determination reached by the Ombudsman in the Preliminary Decision and that inferences may have been drawn, in the absence of information, particularly, on Fitness and Probity, Sick Leave, Expenses and Financial Loss, that were detrimental to our complainant's case. We consider our bone fides are been [sic] unfairly questioned in the Preliminary Decision because of these gaps in information, evidence and facts".*

I do not accept that in my Preliminary Decision, or at any time, I unfairly or otherwise, questioned the bone fides of the Complainants. This Office has adhered to fair procedures throughout the investigation and adjudication of this complaint. The onus is on the Complainants or their representative to submit any information or material they believe is relevant or may, in their opinion, assist in the adjudication of their complaint.

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Every opportunity has been afforded to the Complainants to do so and the Complainants' representative has made numerous and detailed submissions. All of the responses from the Provider were shared with the Complainants and they were afforded an opportunity to respond.

I am an independent and impartial adjudicator of complaints. My role is to investigate complaints against financial service providers. I do not investigate complainants nor is it my role to dictate or influence what submissions should be made by the Complainants.

The purpose of the Summary of Complaint and Schedule of Questions is to require the Provider to respond to the complaints raised by the Complainants; the Office will ask a number of questions in it to ensure the complaints raised by a complainant are addressed. It would not be appropriate to question the Complainants in the same manner as I am not investigating the conduct of the Complainants.

There is insufficient evidence that the conduct of the Provider, whether in classifying the Complainants as non-cooperating or in their complaint handling and customer service approach, has caused the financial loss claimed by the Complainants. While the conduct of the Provider has, at times, been both unreasonable and unacceptable, I note the Provider has offered a sum of €10,000 in compensation to the Complainants. In all the circumstances, I find this sum to be reasonable compensation and 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 June 2020

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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.**