



<b><u>Decision Ref:</u></b>	2018-0004
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Personal Loan
<b><u>Conduct(s) complained of:</u></b>	Maladministration
<b><u>Outcome:</u></b>	Partially upheld

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

#### **Background**

This complaint concerns various loans taken out by the Complainant with the Provider.

The first complaint is that, on a number of occasions, the Provider wrongfully extended credit to the Complainant when an existing loan held with the Provider had not yet been discharged in full. The second complaint is that the Provider failed to provide the Complainant with the full amount of credit available under the relevant credit agreements in order to facilitate repayment of earlier loan accounts.

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

The Complainant submits that he was sold top up loans and roll over loans by the Provider without previous loans being discharged. The Complainant submits that when the Provider issued him with a new loan there was still a balance on a previous loan, which was discharged from the new loan. The Complainant has submitted newspaper articles in this regard. The Complainant submits that the Provider often wrote to him to take out a loan without the previous loan being discharged.

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

The Provider submits that Section 99 of the Consumer Credit Act 1995 (CCA 1995) does not prohibit the issue of concurrent loans but only the withholding of funds from a new loan with the intention they be used to repay an earlier loan. The Provider submits that the Complainant confirmed during a telephone conversation that he received the full amount

of each of the loans he agreed to, and therefore there is no breach of section 99 of the CCA 1995.

The Provider states that it has *“completed a full and thorough review of [the Complainant’s] account and there is no indication that any of the loans have been issued outside of either our policy or regulatory guidelines”*. The Provider goes on to state that *“Furthermore, I can confirm that your agent was not one of those identified by the Central Bank as having informed it of any s99 breaches”*.

### **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 26 January 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

Before turning to the issue at hand, I must point out the following:

I am mindful of the provisions of **Section 51(1)** of the ***Financial Services and Pensions Ombudsman Act 2017***, which provides as follows:

*51. (1) A complaint in relation to conduct referred to in section 44 (1)(a) that does not relate to a long-term financial service shall be made to the Ombudsman not later than 6 years from the date of the conduct giving rise to the complaint.*

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However, **Section 51(5)** of the **Financial Services and Pensions Ombudsman Act 2017** provides:

*“(5) For the purposes of subsections (1) and (2)—*

*(a) conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred, and*

*(b) conduct that consists of a single act or omission is taken to have occurred on the date of that act or omission.”*

Bearing in mind the specific circumstances presented, that is, the Complainant has alleged that a series of acts has occurred whereby the Provider has provided loans in circumstances where it deducted a previous loan balance from a new balance since 2008 I consider this to be continuing conduct for the purposes of **Section 51(5)** of the **Financial Services and Pensions Ombudsman Act 2017**, and consequently this aspect of the matter falls within my jurisdiction.

**(1) The first issue to be determined is whether the Provider, on a number of occasions, wrongfully extended credit to the Complainant when an existing loan held with it had not yet been discharged in full.**

The Provider submits that the loan repayments for the loans advanced were affordable, and that there are no regulations restricting the number of loans a customer can hold at one time. The Provider submits that as part of the complaint investigation it reviewed the affordability of the Complainant’s loans and found no concerns that any of the loans were unaffordable.

The Provider submits that the Complainant entered into the following loan agreements:

	Agreement No.	Issue Date	Amount advanced	Total amount payable	Charges	Settlement date
1	*****406	21/11/2008	€1,000.00	€1,300.00	€300.00	25/05/2009
2	*****669	02/05/2009	€1,500.00	€1,950.00	€450.00	18/08/2009
3	*****804	21/08/2009	€1,500.00	€1,950.00	€450.00	23/02/2010
4	*****995	25/02/2010	€1,500.00	€1,950.00	€450.00	24/08/2010
5	*****069	27/08/2010	€1,500.00	€1,950.00	€450.00	28/02/2011
6	*****192	17/02/2011	€2,000.00	€2,600.00	€600.00	09/08/2011
7	*****683	05/08/2011	€2,500.00	€3,250.00	€750.00	16/01/2012
8	*****673	09/01/2012	€3,000.00	€3,900.00	€900.00	18/06/2012
9	*****556	22/06/2012	€3,000.00	€3,900.00	€900.00	22/01/2013
10	*****490	16/08/2012	€2,000.00	€3,120.00	€1,120.00	24/09/2013
11	*****581	26/01/2013	€3,000.00	€4,680.00	€1,680.00	
12	*****388	24/04/2013	€2,000.00	€3,120.00	€1,120.00	08/06/2015

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The Provider submits that during the course of the complaint, the Complainant stated that the loans were unaffordable for him, and stated that the income and expenditure information was supplied by the agent to facilitate the granting of loans. The Provider states that *"The customer appears to be saying the agent made up the figures and they passively accepted them. We have no evidence of such or any means to verify this statement but we must add that the customer offers no proof of such an assertion"*. The Provider submits that all its agents are trained as to how to complete the Customer Details Form regarding a customer's income and expenditure. The Provider states that *"For all nine loans you can consider in this complaint, as they fall within the six year period you can investigate, '388', '581', '490', '556', '673', '683', '192', '069' and '995' there is a customer details form for each loan showing the affordability information the agent checked at the time"*.

As set out above, I consider that the conduct complained of is continuing conduct, and therefore, I will consider all loans issued by the Provider to the Complainant since 2008.

The Provider submits that each time the customer signed the affordability assessment to verify this information was factual and accurate next to the disclaimer, *"I can confirm that the information on this form which I have provided is true"*. The Provider submits that it would always expect a customer to query anything they were unsure of or declare any financial difficulties they were experiencing prior to signing the documentation. The Provider submits that its agents are not incentivised on loans issued but on collections made. The Provider states that *"There is therefore no incentive on an agent acting as suggested as they will not receive commission on collections if the customer cannot pay"*.

The Provider also states that *"the import of what the customer appears to be suggesting is that they colluded with an agent to obtain monies they could not afford and could not repay. The payment history shows payments were made to all loans and possibly some difficulties occurred around August 2013 after the last loan was issued in April 2013. This would suggest a change in circumstances after our last loan was issued"*.

The Provider, in its submission to this Office dated 22 March 2017, submits that the Complainant alleged that its former self-employed agent personally lent him money to allow him to repay a particular loan. The Provider states that *"Given the amount of time that had passed since this alleged event and when it was first raised in the complaint, we previously noted that the agent was no longer a self-employed agent of [the Provider] and, as such, we were not able to obtain any evidence in relation to this specific allegation. Needless to say that we also had no other evidence of and no knowledge of this alleged illegal lending by a former self-employed agent and so we recommended that [the Complainant] report the alleged actions of this former self-employed agent to the Gardaí"*.

It is disappointing that the Provider has not submitted a copy of the Complainant's letter of complaint issued to it. While I note that the Complainant made allegations regarding a former self-employed agent of the Provider during a telephone conversation with the Provider's representative on 9 July 2015, the Complainant has not made any complaint to this Office regarding this matter. I must accept that any complaint regarding any alleged

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illegal activity by the Provider's former self-employed agent is more appropriate for the Gardaí.

The Provider has obligations pursuant to the European Communities (Consumer Credit Agreements) Regulations 2010 (the "2010 Regulations"). Provision 11 of the 2010 Regulations provides the following:

*"Obligation to assess creditworthiness of consumers*

*11. (1) Before concluding a credit agreement with a consumer, a creditor shall assess the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database."*

The Provider submits that the Consumer Protection Code for Licensed Moneylenders 2009 requires suitability to be considered in the context of the customer's needs and the moneylender's products. The Provider submits that it supplies one product albeit over several different terms. The Provider states that "Clause 16 of the Code requires a statement in writing setting out why the product is considered suitable. [the Provider] adopted the format suggested by the then Financial Regulator in its 2009 FAQs and incorporated that wording into its agreements. The Central Bank is familiar with the method adopted on [the Provider's] agreements and has not questioned its use for complying with the suitability requirement. The customer is advised on the face of the agreement about what this type of loan is suitable for and the relevant reason of the two on offer is ticked".

It would have been preferable if the Provider had issued the Complainant with a suitability statement once the loan had been approved. I note, however, that the Provider gathered the Complainant's financial information and recorded this on the loan agreements ending in 388, 581, 490, 556, 673, 683, 192, 069, 995, 804, 669, 406 which were signed by the Complainant.

I must accept that there is nothing to prevent the Provider issuing more than one loan to the Complainant at the same time, as long as the Complainant can demonstrate sufficient repayment affordability. I can find no evidence to demonstrate that the loans were not affordable to the Complainant at the time that they issued.

Consequently, this aspect of the complaint is not upheld.

**(2) The second issue to be determined is whether the Provider failed to provide the Complainant with the full amount of credit available under the relevant credit agreements in order to facilitate repayment of earlier loan accounts.**

The Complainant submits that when the Provider issued him with a new loan there was still a balance on a previous loan, which was discharged from the new loan.

Section 99 of the Consumer Credit Act 1995 provides that credit extended under a money lending agreement must be advanced in full, as follows-

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*“99. Where credit is made available to a borrower by means of a moneylending agreement that credit shall not be reduced by the moneylender or a person acting on his behalf by any amount in respect of:*

*(a) repayment of the credit or any charges related thereto, or*

*(b) repayment of a previous credit or any charge related thereto, and no payment in respect of the credit shall be required of the borrower by the moneylender or a person acting on his behalf before the due date of the first repayment instalment.”*

The Provider submits that it considered as part of its investigation whether there could have been a breach of section 99 of the CCA 1995. The Provider states that *“However after speaking to [the Complainant] he confirmed that the full amount of the cash loan was always provided to him and it was his decision to make any repayment against previously held loans. Therefore there cannot have been any breach of section 99”*.

The Provider, in its submission to this Office dated 22 March 2017, states that:

*“On the basis of all of this information we believe that there are no grounds for the complaint, however I can confirm that we have taken a commercial decision to close the outstanding balance of €415.00 on a goodwill basis and a letter was sent to the customer under separate cover to confirm same. This means the customer has no further payment obligation with [the Provider]”*.

The Provider has submitted a recording of the telephone conversation between the Complainant and its representative on 9 July 2015. I note that during this telephone conversation the Complainant advised that he had received *“all roll over loans, none of them were paid off as I was offered top ups each time”*. I note that the Provider’s representative advised the Complainant that he had 12 loans with it since 2008. The conversation between the parties then went as follows:

Provider: *“When the agent came out to give you the loan money, did you always receive the full amount in your hand?”*

...

Complainant: *“I’m nearly sure I did, yes”*

...

Provider: *“So each time when you got that loan did you get the full amount in your hand?”*

Complainant: *“Oh, I did yes. Yes. If it was for €1,500.00, I was handed €1,500.00. Yeah”*.

Provider: *“So you were given the full amount on each of the loans, yes?”*

Complainant: *“Yeah”*

...

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Provider: *"What did you do with the money that you got? So, the loan that you got what did you do with the actual money was it just for personal use? What was the purpose of the loan? What did you do with the money?"*

...

Provider: *"Did you ever use any of the loan money to pay off any outstanding debts whether with [the Provider] or with any other company?"*

...

Complainant: *"No, they would have just been for home improvements and getting the kids to school and that, you know."*

Provider: *"Did you ever give any money back to the agent?"*

Complainant: *"No, just on the weekly payments"*

Provider: *"OK. Did anyone from [the Provider].... Did they ever ask you to pay off any previous loans"*

Complainant: *"No. No. Nobody asked me to clear the existing loan before I got another loan"*

Provider: *"Sorry, say that again"*

Complainant: *"Nobody ever asked me.... Say I had a loan for €1,500, and they came along and gave me another say €1,500 or €1,000 they didn't ask me to clear off the previous loan first of all."*

Provider: *"Ok, so they just gave you the money and it was your decision whatever you did?"*

Complainant: *"Yeah"*

...

Provider: *"Ok, I'm just looking at your account... on the 18<sup>th</sup> of August 2009... you made a payment on your account for €867.31... how did you make that payment?"*

Complainant: *"That could have been a two week payment... I might have missed one payment..."*

Provider: *"... €867.31..."*

Complainant: *"Now, that could have been a couple of week's payment at a time..."*

Provider: *"So because it's quite a large lump sum, is that money that you came into...?"*

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Complainant: *"No, no, no. I might have paid three or four weeks payments at one time"*

Provider: *"Right... that payment there was an early settlement of the account so you basically paid off the account cause your balance was €875 but you made a lump sum payment of €867.31 so you paid off the balance back in August 2009..."*

...

Provider: *"... where did that money come from..."*

Complainant: *"I can't remember."*

Provider: *"OK. But it is something that you paid yourself, is that correct?"*

...

Provider: *"... Did you clear that yourself or did someone ask you to do that?"*

Complainant: *"The agent could have asked me to do it... The agent could have lent me the money..."*

...

Provider: *"I need to understand... I need to know exactly what the answer is cause I can't go on possibility..."*

Complainant: *"I'm nearly one hundred percent sure the agent lent me the money to sort that out."*

Provider: *"So the agent gave you €867?"*

Complainant: *"Yeah, so they could refinance me."*

Provider: *"Refinance you?"*

Complainant: *"Yeah"*

...

Provider: *"Why would the agent lend to a customer €867?..."*

Complainant: *"Because I was getting another loan."*

Provider: *"You made a payment of €867.31 on the 18<sup>th</sup> of August 2009... On the 21<sup>st</sup> of August 2009... you took out a loan for €1,500. So what happened then. Did you get the full amount of the loan?"*

Complainant: *"Yeah..."*

...

Provider: *"So the €1,500 you got on 18<sup>th</sup> August, you used that money on yourself?"*

Complainant: *"Yeah"*

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Provider: *"... the €867 that the agent gave you to pay off a previous loan, how did you pay her back...?"*

Complainant: *"When I got the new loan"*

Provider: *"... the €1,500 loan that you got on 21<sup>st</sup> August?"*

Complainant: *"Yeah"*

...

Provider: *"So what you are saying is that the agent was basically manipulating figures?"*

Complainant: *"Yeah"*

....

Provider: *"Apart from this were there any other occasions where this might have happened?"*

Complainant: *"I can't remember off hand"*

...

Complainant: *"Yeah, like in 2009 it's a long time ago and I have borrowed a lot of money off [the Provider] since, that it's hard to remember, it's hard to keep track and everything."*

...

Complainant: *"I think none of them were paid off, I think they were refinanced..."*

...

Provider: *"Did you clear any of the loans?"*

Complainant: *"No, none of them"*

...

Provider: *"So the rest of the loans you've paid basically lump sums to catch up with... arrears... so that's why you paid the lump sums?"*

Complainant: *"Yeah"*

...

Provider: *"... before I go... I'm just going to go through the details with you one last time... you took out 12 loans ok, you received the full amount in your hand from the agent."*

Complainant: *"Yeah"*

Provider: *"you didn't use the money to pay off previous loans apart from one occasion which was back in 2009"*

Complainant: *"Yeah"*

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Provider: *"Nobody forced you to do anything? You said if you didn't listen to the agents you would be blacklisted. When I asked you what you meant by that you said that if you don't play ball then you can't get new loans from the agents. Is that correct?"*

Complainant: *"Yes that is correct"*

...

The Complainant, in his submission to this Office dated 28 June 2017 states, among other things, the following:

*"For the record I am a recovering Alcoholic and only in the last few years am appreciating how little I remember of what happened during my periods of insobriety. I found the telephone conversation very challenging and sensed a growing frustration on [the Provider's] behalf with my tentative responses. At times I even felt I was being asked leading questions.*

*My dealings with [the Provider] were born out of desperation. I am pretty sure a number of new loans were used to repay existing loans or at least a portion of same and I was then handed the balance. However this is a fact I was reluctant to admit to [the Provider's] representative for fear of any unintended consequences such an admission might have on their Agents. Furthermore I am certain that [the Provider's] records will identify all areas where existing loans or part thereof were paid off out of new loans as anyone using [its] service is highly unlikely to have any other source of funds. I therefore would reason that where a substantial payment was made its source could only be [the Provider]..."*

Having carefully examined the evidence before me, while I note that a number of loans were issued to the Complainant around the time existing loans were redeemed, it would appear that the final payment on the existing loans were the usual weekly payment, and I can find no evidence therefore to suggest that there was a breach of s99 of the CCA Act 1995 in respect of these loans. However, in relation to loan agreement ending in '669', whilst it is most disappointing that the Provider has not submitted a copy of the payment records for this account, it is evident from the telephone conversation between the Provider's representative and the Complainant on 9 July 2015 that the Complainant made a lump sum payment of €867.31 on 18 August 2009, in close proximity to the Complainant entering into loan agreement ending in '804' on 21 August 2009.

While I note that the Complainant, during the telephone conversation with the Provider's representative on 9 July 2015, initially confirmed that he had received all monies issued under the loans, I note that he later in the conversation stated that *"Yeah, like in 2009 it's a long time ago and I have borrowed a lot of money off [the Provider] since, that it's hard to remember, it's hard to keep track and everything"*. The Complainant in his submission to this Office dated 28 June 2017 states that *"I am pretty sure a number of new loans were used to repay existing loans or at least a portion of same and I was then handed the balance"*. Given the absence of any statement from the agent who advanced the credit facilities to the Complainant denying that any loan portion was retained, or any evidence to the contrary, I

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have no reason to doubt the Complainant's submission. While I cannot ascertain with certainty whether the Provider breached s99 of the CCA 1995 at this time, the evidence before me is highly indicative of a breach of Section 99(b) of the CCA 1995.

While I note that the Provider in its submission dated 22 March 2017 states that it has "*taken a commercial decision to close the outstanding balance of €415.00 on a goodwill basis*", I am of the view that this compensation is not sufficient in the circumstances.

This aspect of the complaint is partly upheld.

To conclude, to mark the Provider's failure to evidence that it complied with Section 99 (b) of the CCA 1995 in relation to loan agreement ending in '804', I direct the Provider to make a compensatory payment in the sum of €500.00 to an account of the Complainant's choosing within 35 days. For the avoidance of any doubt, the sum of €500.00 is in addition to the outstanding loan balance of €415.00 already cleared by the Provider.

For all the reasons outlined above, it is my Decision that this complaint is partly upheld.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of.
- Pursuant to **Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I 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**, where the amount is not paid by 27 March 2018.
- Pursuant to **Section 60(8)** of the **Financial Services and Pensions Ombudsman Act 2017**, the Respondent Provider is now required, not later than 14 days after 27 March 2018 to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction/s outlined above.

**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**

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20 February 2018

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) in accordance with the Data Protection Acts 1988 and 2003.

