



<b><u>Decision Ref:</u></b>	2018-0024
<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 the Complainant's loans taken out 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 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 the repayment of earlier loan accounts.

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

The Complainant submits that she has been a customer of the Provider since 1998. The Complainant submits that in November 2008 she took out a loan with the Provider and before the loan was fully discharged she was sold a new loan facility. The Complainant submits that this occurred subsequently on a number of loans.

The Complainant also submits that the old loans were discharged out of the proceeds of the new loans. The Complainant states that *"All of these loans were refinancing and I now understand - illegal"*. The Complainant also states that *"According to press reports [the Provider] broke the law and have to compensate [its] customers"*.

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

The Provider submits that within the Consumer Credit Act 1995 (CCA 1995) there is no requirement to only allow a customer one consumer credit loan at a time. The Provider states that *"It is entirely acceptable to provide multiple loans to a customer, providing they are each affordable, which looking at the income and expenditure information in your application forms they were"*. The Provider goes on to state that *"However, under the law, when advancing a further loan, the customer must receive the full amount of the loan in their hand. If the agent withholds any amount then it would be in breach of section 99 of the CCA"*.

The Provider submits that while it is unclear whether or not the Complainant's agent withheld funds, there were three loans issued to her in August 2009, June 2012 and January 2013 where a previous loan was repaid in close proximity to the issue of these new loans. The Provider states that *"This might suggest agents withholding funds, however, this is not evidence of refinancing and given that customers are entitled, by law, to make such overpayments, these are not probative of any breach of the Consumer Credit Act but rather of the exercise of a right under it, to repay any amount due earlier than the Agreement envisages and thereby achieve an early settlement rebate"*.

The Provider submits that in the event that money from a new loan was withheld by the Agent, it was with the Complainant's agreement and was used to repay an earlier loan. The Provider states that *"Notwithstanding this would have been in breach of s99 CCA, it means that the earlier loan was repaid sooner than it would have been. It would have had the effect of thereby keeping your weekly rate to a manageable level by avoiding the need to service two loans concurrently"*.

In its final response letter dated 14 January 2016 the Provider states that following:

*"as a gesture of goodwill and without any admission of liability but solely for the purposes of this letter I have accepted that these three loans might have been issued in breach of s99 and arranged to clear your outstanding balance of €585.00 and issue you a payment for €70.46.*

*This amount is based on the assumption that you would only have borrowed the amount you received in cash assuming that the large repayment proximate to the issue of the loan represents money retained by the agent and thus represents the additional cost incurred by refinancing, rather [than] borrowing that lower amount and running the loans concurrently. Finally, I have awarded you 8% simple interest on that amount since the date the lending took place. This money given is ex gratia and without admission and without prejudice"*.

### **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

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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.*

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

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be continuing conduct for the purposes of subsection (5) of **Section 51(5)** of the **Financial Services and Pensions Ombudsman Act 2017**, and consequently this aspect of the matter falls within my jurisdiction.

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 been discharged in full.

The Provider submits that within the Consumer Credit Act 1995 (CCA 1995) there is no requirement to only allow a customer one consumer credit loan at a time. The Provider states that *“It is entirely acceptable to provide multiple loans to a customer, providing they are each affordable, which looking at the income and expenditure information in your application forms they were”*.

The Provider submits that the Complainant entered into nine loan agreements with it since 2010. The Provider has submitted a summary of these loan facilities, and the salient details are summarised as follows:

	Agreement No.	Issue date	Amount advanced (€)	Total amount payable	Charges	Settlement date
1	*****8988	25/02/2010	1,500.00	1,950.00	450.00	24/08/2010
2	*****1495	27/08/2010	1,500.00	1,950.00	450.00	28/02/2011
3	*****0200	17/02/2011	2,000.00	2,600.00	600.00	09/08/2011
4	*****2690	05/08/2011	2,500.00	3,250.00	750.00	16/01/2012
5	*****5106	09/01/2012	3,000.00	3,900.00	900.00	18/06/2012
6	*****1549	22/06/2012	3,000.00	3,900.00	900.00	22/01/2013
7	*****1508	16/08/2012	2,000.00	3,120.00	1,120.00	24/09/2013
8	*****8598	26/01/2013	3,000.00	4,680.00	1,680.00	
9	*****9434	24/04/2013	2,000.00	3,120.00	1,120.00	

While the Complainant has not raised any issues relating to the affordability of the loans to this Office, I note that the Provider, in its submission dated 22 March 2017 states that:

*“In the complaint the customer stated that the loans were unaffordable and the income and expenditure information was supplied by the agent to facilitate the granting of loans. The customer appears to be saying that the agent made up the figures and she 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”*.

It is disappointing that the Provider has not submitted a copy of the Complainants complaint correspondence issued to it.

The Provider submits that all its agents are trained as to how to complete the customer details form regarding an income and expenditure assessment. The Provider states that *“For*

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*all nine loans you can consider in this complaint as they fall within the six year period you can investigate, '988', '495', '200', '690', '106', '549', '508', '598', '434' there is a customer details form 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 states that its *"agents are not incentivised on loans issued but on collections made. 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 she colluded with an agent to obtain monies she 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 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."*

I note that the Provider gathered the Complainant's financial information and recorded the information on the loan agreements ending in 200, 690, 106, 549, 508, 598, 434 which the Complainant signed confirming that *"the information on this form which I have provided is true"*. While it is disappointing that the Provider did not record the financial details on the loan agreements ending in 495 and 988, I note that these agreements contained the total weekly rate of €75 and the Complainant signed her name confirming that the total weekly rate *"is affordable to me"*.

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 consider that the Complainant did confirm to the Provider that the weekly repayments were affordable to her.

Consequently, this aspect of the complaint is not upheld.

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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 she did not always receive the full proceeds of the loan when credit was being extended as the money to discharge previous loans came from new loans.

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

*“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 states that *“Despite several attempts... [the Complainant] has been unwilling to discuss her complaint with us and whilst we are confident that the self-employed agent would have provided her with the full funds of the loan, we have been unable to confirm this point with the customer directly. Therefore, on the balance of the information available to us in relation to [the Complainant], we have proceeded on the basis that there may have been a possibility that there was a breach of Section 99 and made a goodwill offer of remediation in relation to her account on a commercial basis”*.

The Provider submits that it agreed to refund interest on three loans on the basis that those previous loans were paid in close proximity to new lending. The Provider submits that loan agreement ‘548’ was issued around the time loan ‘653’ was repaid. The Provider submits that its system shows that €1,500.00 was issued and a payment of €544.87 was applied to the previous account on or about 18 August 2009 bringing the earlier loan to an end. The Provider submits that an early settlement balance of €5.13 was provided on this loan.

The Provider submits that loan agreement ‘549’ was issued around the time loan ‘106’ was paid in full. The Provider submits that €3,000 was issued and €425.00 was allocated to the previous account on or about 18 June 2012 and in settlement of same. The Provider submits that there was no early settlement balance applied on this account.

The Provider submits that loan agreement ‘598’ was issued around the time loan ‘549’ was paid in full. The Provider submits that €3,000 was issued and a payment of €350.00 was allocated to the previous account on or about 22 January 2013 bringing the earlier loan to an end. The Provider submits that there was no early settlement balance applied on this account. The Provider states that *“Having weighed up the benefit to the customer, together with her version of events and the evidence we hold, we proposed to refund the adjusted*

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*interest on the three loans... This was a total refund of €655.46 and we agreed to close two outstanding account balances with this”.*

The Provider submits that the agent is no longer available for interview and as such it can only come to a conclusion based on the evidence at hand.

I note that the Provider submits that three loans, that is, loans ending in ‘653’, ‘106’ and ‘549’ were paid in close proximity to new lending. Having reviewed the loan documentation submitted by the Provider I also note that loan ending in ‘690’ was drawn down on 9 August 2011, and on that same day a payment of €200.00 was made to loan account ending in ‘200’ to discharge this loan. It would therefore appear that monies may also have been withheld from loan account number ‘690’ to redeem loan account ending in ‘200’. Furthermore, I note that loan account ending in ‘548’ was redeemed in close proximity to loan account ending in ‘988’ issuing, and loan account ending in ‘398’ was redeemed in close proximity to loan account ending in ‘653’ issuing.

The evidence before me is highly indicative of a breach of Section 99(b) of the Consumer Credit Act 1995. 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 have no reason to doubt the Complainant’s submission.

I note in its final response letter dated 14 January 2016 the Provider states that:

*“as a gesture of goodwill and without any admission of liability but solely for the purposes of this letter I have accepted that these three loans might have been issued in breach of s99 and arranged to clear our outstanding balance of €585.00 and issue you a payment for €70.46.*

*This amount is based on the assumption that you would only have borrowed the amount you received in cash assuming that the large repayment proximate to the issue of the loan represents money retained by the agent and thus represents the additional cost incurred by refinancing, rather [than] borrowing that lower amount and running the loans concurrently. Finally, I have awarded you 8% simple interest on that amount since the date the lending took place. This money given is ex gratia and without admission and without prejudice”.*

While I note that the Provider cleared the outstanding loan balance of €585.00 and issued the Complainant with a cheque in the sum of €70.46, which the Complainant did not accept, 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 comply with Section 99 (b) of the CCA 1995, 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 €585.00 already cleared by the Provider.

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For all the reasons outlined above, 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**

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.