



<u>Decision Ref:</u>	2019-0128
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Personal Loan
<u>Conduct(s) complained of:</u>	Increase in interest rate Application of interest rate
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainant's term loan account with the Provider.

The Complainant's Variable Rate Term Loan account was issued on 2 April 2008, in the amount of €28,000.00 at a variable rate of 8.60% for a term of 120 months. The monthly repayments of the term loan were €348.65.

The Complainant's Case

The Complainant submits that the Provider issued a 10 year loan in the amount of €28,000.00 to him on 2 April 2008. The Complainant submits that he made the monthly repayment of €348.65 on time every month. The Complainant submits that he received an Annual Statement yearly and no other correspondence was received from the Provider for 8 years until a letter arrived in March 2016 stating that there would be a shortfall of €7,588.27 on his term loan.

The Complainant submits that when he had a variable mortgage loan with the Provider he received a letter every time that there was a rate change, and he questions why his term loan would be any different.

The Complainant states that he is seeking *"to repay this loan at the current €348.65 per month until the end of the loan in March 2018"*.

The Complainant submits that the term loan has already cost him €41,838, and that he cannot afford to pay an extra €7,588.27. The Complainant states that the Provider's *"treatment of me is shameful, arrogant and underhand and recent legal rulings regarding [its] treatment of [its] customers is in the public domain. I would consider it illegal behaviour. I have had mortgages, re-mortgages, numerous car loans and personal loans with [the Provider] since the 1980's, always paid promptly, in other words I've been a loyal and very lucrative customer"*.

The Provider's Case

The Provider submits that its records show that the Complainant's term loan issued on 2 April 2008 in the amount of €28,000 at a variable rate of 8.60%. The Provider submits that the Credit Agreement signed by the Complainant on 2 April 2008 included details of the amount of credit advanced, period of agreement and the number of repayments. The Provider submits that Condition 5(d) of the Terms and Conditions of the Credit Agreement states the following:

"In the event of any variation in the interest rate applicable to the loan, we shall give notice of such variation to you by: (i) advertisement published in at least one national newspaper or (ii) a statement addressed to you. As a result of any change in the interest rate we may vary the amount of the instalments or the Period of Agreement or both".

The Provider submits that condition 5(a) of the Terms and \Conditions of the agreement provides that:

"The rate of interest applicable to the loan will be the interest rate specified in the schedule, as varied from time to time at our absolute discretion".

The Provider submits that the interest rate applicable to the Complainant's term loan from the date of inception are as follows:

- 2 April 2008 8.60%
- 28 April 2008 from 8.60% to 9.60%
- 14 July 2008 from 9.60% to 10.10%
- 1 April 2010 from 10.10% - 11.40%

The Provider submits that in addition to advertisements in the national press, prior to each interest rate change, the annual statement issued on the Complainant's term loan account also included details of the increased interest rates. The Provider states that *"Repayment instalments on your loan account are for a fixed amount. [The Provider] did not increase the monthly repayments in line with its interest rate changes. The Bank does reserve the right, as per the terms and conditions of the agreement to either increase the number of repayments to clear the loan or alternatively vary the repayment amount or change both."*

The reason such a payment is required is that during the lifetime of the loan the interest rate charged to the account increased while the monthly repayments remained the same. Consequently by the monthly repayment not increasing in line with the rate change, this resulted in a shortfall accumulating on your term loan”.

The Provider submits that in early February 2016 it wrote to all customers with an active term loan account regardless of the natural expiry date of the loan. The Provider submits that this letter was to advise the account holder that for a range of reasons, the repayments they were making on the loan would not be sufficient to clear the loan balance by the original expiry date of the loan. The Provider submits that this correspondence outlined a number of options available in relation to repaying the shortfall, that is, increasing the amount of current repayments, paying a lump sum into the account on the expiry of the term loan period or alternatively, continue making the monthly repayment instalments until the loan was cleared.

The Provider submits that it subsequently became aware that the letter issued in February 2016 contained an error in relation to the number of repayments that would be required between February 2016 and the date of expiry, and it issued a letter to the Complainant outlining this. The Provider states that *“While the number of payments to be made to the loan to the date of expiry was incorrect, I can confirm that the shortfall amount to clear the loan, having made 120 payments, was correct”.*

The Provider wrote to the Complainant on 19 June 2017 stating that:

“I wish to confirm that the Bank has carried out a further review of your complaint. In an effort to reach an amicable resolution, the Bank would like to reduce the balance outstanding on your above referenced Term Loan account number by €2,000.00 as a gesture of goodwill”

In an email to this Office dated 23 August 2018, the Provider stated, among other things, the following:

“While the Bank is satisfied that the interest charged to the Loan has been applied in accordance with the terms and conditions of the loan, the Bank has reviewed its position and would like to make a formal settlement offer to resolve the complaint.

We wish to extend a sincere apology to the Complainant and would like to offer the Complainant, as a gesture of goodwill, the sum of €6,411 in full and final settlement of the complaint.

This sum will be lodged in reduction of the outstanding balance on the loan.”

The Complaints for Adjudication

The first complaint is that the Provider mis-sold the loan to the Complainant. The second complaint is that the Provider administered the Complainant’s loan in an unreasonable manner.

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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 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 25 March 2019, 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.

An email dated 10 April 2019 was received from the Complainant seeking clarification, and a letter of response dated 23 April 2019 was received from the Provider after the issue of a Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional correspondence. In the absence of additional submissions from the parties, the final determination of this office is set out below.

The first issue to be determined is whether the Provider mis-sold the loan to the Complainant.

The Complainant submits that all negotiations regarding the loan were conducted over the telephone. The Complainant submits that prior to agreeing the loan, in a conversation with one of the Provider's representatives, he was quoted a monthly repayment of €348.65 over 10 years with a total repayment of €41,838.00 for a credit advance of €28,000.00. The Complainant states that *"I once again asked [the Provider's representative] was that the total amount to be repaid and he confirmed that "that will be the total amount for this loan"*. The Complainant submits that he proceeded with the loan on the basis of these quoted figures.

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The Complainant submits that he was asked to telephone a branch of the Provider to arrange to sign for the loan. This was arranged for 2 April 2008. The Complainant states that *"I presumed that I would be meeting with [named representative] which would be the normal procedure and that we would have a brief meeting regarding the loan and the drawdown of funds, instead I was met by a cashier, [another named representative] who came from behind the counter with a document which was the Credit Agreement and I was asked to sign in two locations marked X. "Sorry we are very busy at the moment, could you just sign here and here and we will arrange to have the funds transferred as soon as possible"... I asked if [named representative] was available and I was told that he was not available"*.

The Complainant submits that it has always been his understanding that he was dealing with a fixed term loan, as that is what he had requested. The Complainant states that *"In the application form I stated that I would take the advice/or be advised by the Bank with regard to the repayments and the period of time for repayment [TBA is clearly marked on the application]"*. The Complainant submits that the first time he became aware that his Term Loan Account was being charged at a variable interest rate was when he received a letter from the Provider in March 2016.

The Provider submits that when the Complainant applied for the Variable Rate Term Loan on 26 October 2007, the interest rate applicable was 8.1% which was the rate quoted on the Commercial Division /Retail Lending Notice of Approval. The Provider submits that on 26 November 2007, there was a change of interest rate from 8.1% to 8.6%. The Provider states that *"the monthly repayment amount applicable to an interest rate of 8.1% available on 26th October 2007 (when the Complainant completed the application form) would have been €341.19 whereas the repayment of €348.65 applies to an interest rate of 8.6% (available on the 2nd April 2008). [The Provider's representative] could not have advised the Complainant that the repayment would be €348.65 in October 2007"*.

In response, the Complainant submits that there was no mention by the Provider's representative about any difference in interest rate between the initial telephone conversation in October 2007 when he applied for the loan, and further conversations in April 2008 regarding drawing down of the loan. The Complainant states that *"After a full 5 months gap between loan approval and loan issue, a difference of €7.46 per month wasn't noticed. It was under €350 per month which was my figure to budget with, as my monthly expenditure at that time was high due to school fees for 3 of my 4 children and I was keenly aware of the figures I had to work with"*.

The Provider submits that telephone calls in Branches are not recorded and therefore it is unable to supply them. The Provider submits that while both representatives referred to by the Complainant are no longer employed by it, all of its staff are fully trained and familiar with the options and products available to customers.

The Provider submits that it did not and does not offer Fixed Rate Term Loans. The Provider submits that the Statement of Suitability, issued to the Complainant prior to drawdown of the facility, clearly outlined that it was a Variable Interest Rate Loan and advised that the repayment capacity was derived from several elements including *"Current interest rates,*

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which may rise in the future". The Provider submits that the Statement of Suitability further states that "Please review the information in this letter and ensure the loan features and details meet your requirements and wishes, given your discussions with [the Provider] staff and the information you provided. You should take the necessary time to consider and query any information provided to you in relation to your loan application". The Provider submits that the Statement of Suitability also states, "A copy of [the Provider's] Terms of Business and your loan terms and conditions will have been provided to you. If you require another copy please contact your branch... If you disagree with, or wish to change any of the above requirements/statements, please contact us".

The Provider submits that the Statement of Suitability also detailed the features of the Loan, and advised the Complainant to take necessary time to consider and query any information provided to him in relation to his Loan application. The Provider submits that the Term Loan also outlined that the Period of Agreement, Number of repayment instalments, amount of each instalment, Cost of Credit, Interest Rate and Annual Percentage Rate may increase or decrease at the Provider's discretion in accordance with the Terms and Conditions.

The Provider submits that the Complainant accepted the Terms and Conditions of the Variable Rate Term Loan Account and indicated his willingness to be bound by same by duly signing the Term Loan Credit Agreement on 2 April 2008. The Provider submits that the Complainant signed the Credit Agreement under a declaration which states:

"I/We confirm that before signing this Agreement I/We had the opportunity to read and become acquainted with it, and I/we agree to be bound by its terms and conditions"

The Complainant submits that when the loan request was made by telephone in late October/early November 2007, he was not advised by the Provider's representative that the Provider did not and does not offer fixed rate loans. The Complainant states that *"I was clear I wanted a set monthly repayment. Over the years, I had at least 4 car loans with [the Provider] and my recollections are, they were all fixed amounts"*.

In response, the Provider submits that Car Loans are a different product to Personal Term Loans and therefore the terms and conditions would differ.

I note that the Loan Application Form dated 26 October 2007 sets out, the following under the heading "YOUR LOAN DETAILS":

"Amount of loan required *Purpose of loan*
...
Total amount of loan *Repayment* *period*
..."

I note that underneath the "Repayment period" is handwritten "10 or 15 yrs TBA".

I note that the Provider's letter dated 31 March 2008 to the Complainant headed "Statement of Suitability" states, among other things, the following:

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IMPORTANT INFORMATION	
<i>(as at 02 April 2008)</i>	
<i>(This notice is required to be set out on the front page of all credit agreements by the Consumer Credit Act 1995)</i>	
1. Amount of credit advanced:	€28000.00
2. Period of Agreement*: 120	Months from drawdown
3. Number of Repayment Instalments*: 00120	
4. Amount of Each Instalment*:	€348.65
5. Total Amount Repayable*:	€41838.00
6. Cost of this credit (5 minus 1)*:	€13838.00
7. Annual percentage rate of charge (APR)*:	8.9% p.a.
NB: You may withdraw from this Agreement at any time within 10 days of receiving this Agreement or a copy of it. **	

*Note: These may increase or decrease at our discretion see General Condition 5 and 7 overleaf.

**Note: You may withdraw from this Agreement without penalty if you give written notice to this effect within a period of 10 days of receiving a copy of this Agreement. You may waive this right by signing the waiver of cooling off period below."

Underneath the heading, "SCHEDULE" in the Credit Agreement it sets out, among other things, the following:

SCHEDULE
Borrower(s) Name: ...
Address: ...
Term Loan Variable Rate*: (Currently 8.600% p.a.) Personal Rate
Date of Expiry: 120 months from drawdown (This may change – see General Condition 5(d) overleaf)
Special Conditions:

Condition 5 of the Credit Agreement sets out the following:

"5 Interest and Repayment:

- (a) The rate of interest applicable to the Loan will be the interest rate specified in the Schedule, as varied from time to time at our absolute discretion. You will repay the Loan with interest thereon at such rate by monthly periodic instalments in amounts which, over the Period of Agreement, will be sufficient to discharge in full the Loan together with such interest. You will commence payment of such instalments one month after first drawdown of the Loan.

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- (d) *In the event of any variation in the interest rate applicable to the Loan, we shall give notice of such variation to you by:*
- (i) *advertisement published in at least one national newspaper;*
 - or*
 - (ii) *a statement addressed to you. As a result of any change in the interest rate we may vary the amount of the instalments or the Period of Agreement or both.*
- (e) *Where the Bank has agreed to accept a deferral of the monthly repayments of the Loan for the period represented by the difference between the period of this agreement and the number of repayment instalments referred to in the "Important Information" provided in the Credit Agreement, the repayments on the Loan will be deferred from the date of drawdown until expiry of the deferral period as so represented and thereafter the repayments will be calculated over the remaining term of the Loan. The monthly accrued interest will be added to the principal on the last working day of the month in which the first monthly repayment, due after expiry of the deferral, becomes payable and interest will accrue on the increased principal accordingly. The "Amount of Each Instalment" as set out in the "Important Information" has been recalculated so as to take account of the deferral."*

Condition 7 of the terms and conditions of the term loan provides:

"7 Change in the APR:

The annual percentage rate of change, or APR, as defined in the Consumer Credit Act 1995, is designed to indicate the total cost of credit to the consumer on a percentage basis. It is measured on the basis of circumstances prevailing at the date of issue of a credit agreement. The APR in this Agreement may change if the interest rate changes during the currency of the Agreement or between the date of issue of this Agreement and the drawdown of the Loan or if the interval at which interest is debited to your account changes".

While I cannot say with certainty what was discussed between the Provider's representative and the Complainant during the loan application stage, I must accept that the Statement of Suitability issued to the Complainant prior to signing the Term Loan Agreement set out that the interest rate type was a variable interest rate. Furthermore, the loan Agreement signed by the Complainant confirmed that the loan was a Term Loan Variable Rate. Having carefully considered the evidence before me, I do not consider that the loan was mis-sold to the Complainant.

The second issue to be determined is whether the Provider's conduct in administering the loan was reasonable.

The Complainant submits that he received a letter from the Provider in March 2016 stating that there would be a shortfall of €7,588.27 on his term loan. The Complainant submits that during the 8 years prior to this letter there was never a request from the Provider to increase

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monthly repayments *“as is the norm with a variable mortgage account, and which would obviously have alerted me to the problem immediately and I wouldn’t find myself in this position now”*.

The Complainant states, *“The stress this matter has caused me has been awful, not only on a personal level but on a business level. I have just had a business cashflow loan application turned down by [another financial service provider], one of the reasons being the uncertainty of the amount outstanding on this loan in dispute. As a sole trader, my options [for] financial lending are limited”*.

The Complainant submits that he signed a standing order at the start of the loan agreement in 2008 and not a direct debit, which would give the Provider the power to take varying amounts from his account *“which would obviously have been another opportunity to alert me to the variable rate being charged”*.

The Provider submits that the Complainant drew down a Variable Rate Term Loan on 2 April 2008 in the amount of €28,000.00 for a term of 120 months with repayments of €348.64 per month. The Provider submits that in accordance with the Terms and Conditions of the Term Loan Account, the interest rate varied during the Period of Agreement, however the Complainant’s monthly repayment amount remained unchanged, and as a result, a shortfall amount of €7,588.27 became payable on the expiry of the Term Loan on 2 April 2018.

The Provider submits that it was entitled under the terms and conditions of the loan account to vary the interest rate at its discretion, and in the event of an increase in interest rate, one of the options available to it was to maintain the amount of the monthly repayment while extending the Period of Agreement.

The Provider submits that while condition 5(d) of the General Terms and Conditions (set out above) of the term loan indicate that it is obliged to either provide notice of the rate changes by way of a newspaper advertisement or by issuing a statement, it gave notice by way of both. The Provider submits that the changes in the interest rate applicable to the Complainant’s term loan from inception date were as follows:

- 28 April 2008 from 8.60% to 9.60%
- 14 July 2008 from 9.60% to 10.10%
- 1 April 2010 from 10.10% to 11.40%

The Provider submits that all interest rate changes were advertised in at least one national newspaper in accordance with the terms and conditions of the Term Loan account. The Provider has submitted a copy of the interest rate change advertisements it states were dated 28 April 2008, 14 July 2008 and 31 March 2010. The Provider also submits that it updated the information on its information services including telephone helplines and websites as soon as the change came into effect.

While there could be no obligation on a Provider to go to extreme lengths to give notice to a customer, or even to take steps to ensure that notice is received, I believe that it is not oppressive to require the Provider to notify individual customers of a rate increase, in clear terms, where the purpose of the notice would be obvious, either before it happens or as

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soon as practicable thereafter. In the age of modern technology and communications, where newspaper readership is on the decline, it is questionable (even in 2008) if it is reasonable to effectively impose upon a customer a duty to inspect newspapers daily, for 10 years, for news of a rate increase.

Furthermore, the newspaper advertisements (themselves small and containing some exceptionally small and difficult to read font) did not make clear which loans were affected and, in particular, did not clearly state the loan which it had styled "Consumer Term Loan Variable Rate" in its own documentation, was affected by the rate increase. There is also a lack of consistency in terminology within, and between, the relevant advertisements. I cannot see why the Provider, knowing that it was communicating with consumers, could not simply have used the terminology in its loan documentation in the newspaper advertisements or, if using an umbrella term in a heading, why it could not have also listed each of the loans affected by the rate increase.

For example, in the advertisement of 28 April 2008, the loans affected by an increase of 1% are described in the heading as "Variable Rate Personal Loans" and in the body of the notice as "Personal Variable Loans".

The advertisement of 14 July 2008 is even more opaque. The loans affected by a .50% increase are described as "Variable Rate Term Loans"; while this may be closer to the terminology in the Loan, the advertisement goes on to explain that "variable rate, AA and AAA term loans" are affected. Not only are the terms "AA" and "AAA" not defined, there is nothing in the loan documentation to suggest that it was such a loan.

The advertisement of 31 March 2010 is probably the most opaque. On the one hand, the Provider states that interest rates applicable to "Variable Rate Personal Loans" of over €9,000 will increase by 1.3% but it goes on to state under "Variable Personal Loan Customer Notice" that "the interest rate applicable to all existing variable rate personal loans will increase by 2%". Even if the Complainant had understood that he had a variable loan and even if he had understood that his "Consumer Loan Variable Rate" loan was affected by the rate increase, he would not have been clear on the applicable rate increase.

An increase in the interest rate of a variable loan is arguably the most significant event on the loan, from a borrower's perspective. In the case of the Complainant it resulted in a demand for over €7,500 in additional payments on a €28,000 loan. It was incumbent upon the Provider to ensure that its newspaper advertisements were crystal clear so that customers who did read them would understand that they were affected and how they were affected.

The Provider submits that it issued the Complainant with regular Term Loan Account Statements to his address noted on its system. The Provider submits that its records indicate the correspondence address was subsequently amended on 30 March 2016. Provider submits that it issued the Complainant with account statements on the following dates:

- 31 March 2009
- 31 March 2010

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- 31 March 2011
- 30 March 2012
- 28 March 2013
- 28 March 2014

The Provider submits that the Annual Statements gave a twelve month summary of the reducing balance of the Variable Term Loan Account, the repayment amounts applied, the interest amounts deducted and any interest rate changes as they occurred.

The Provider submits that all interest amendments to the Term Loan occurred between April 2008 and April 2010 and were contained in the Statements issued to the Complainant between 2009 and 2012. The Provider submits that it has no record to suggest that these Statements were returned undelivered. The Provider submits that all Term Loan Statements issued from 2011 contained the following message:

"A variation in the no. of payments left may arise because of a change in interest rate, your repayment or any late repayments or arrears. At the current payment levels we estimate your payments to... reduce by or increase by X (X denoted the number of payments)"

The Complainant states that *"The statements received on the Loan A/c prior to 2013, I had no reason to scrutinise, just to confirm in my own mind that all my payments were up to date and paid on time"*.

The Complainant states that *"all addresses on our accounts with [the Provider] were changed in 2013 when we sold our previous property, it was the manager that noticed this loan account hadn't been changed"*. The Complainant submits that in 2013 he notified the Provider of a change of address on all account held with it. The Complainant states that the Provider *"failed to change the address on this Loan A/C. [Its] error, not mine. This was only noticed in 2016 by the Acting Manager in [a branch of the Provider] when I was with her at a meeting, and it was only then that the details were updated"*.

The Provider states that *"While it is noted that the correspondence address of the other party to the Complainant's joint account was amended in 2013, the Bank has no record of the Complainant requesting the Bank amend his correspondence address"*.

The Provider submits that the Statement issued to the Complainant on 28 March 2014, addressed to the correspondence address noted on its system was returned undelivered. The Provider states that *"As is procedure, to prevent further Statements issuing to this address a hold was placed on the account. As a result subsequent Statements in 2015 and 2016 did not issue"*.

The Provider submits that the Complainant's correspondence address was subsequently amended in March 2016. The Provider states that *"Unfortunately, due to human error the hold placed on the account was not removed when the address was amended in March 2016 resulting in the Statement issued in March 2016 and March 2017 not being issued to the"*

Complainant. This hold was removed on 20th April 2017 when the Complainant again amended his correspondence address and the Statements were re ordered and issued on 27th July 2017".

While I note that the Provider submits that the yearly statements issued to the Complainant from 2011 included a statement advising that *"A variation in the no. of payments left may arise because of a change in interest rate, your repayment or any late repayments or arrears. At the current payment levels we estimate your payments to... increase by X (X denoted the number of payments)"*, it is disappointing that it did not submit a copy of these statements. The Provider has only submitted a copy of the account statement issued to the Complainant in August 2017 showing all payments to and from the loan account from 2 April 2008. Therefore, I have no evidence that the message above was in fact conveyed to the Complainant.

General Condition 5(d) states that *"in the event of any variation in the interest rate"*, the Provider *"shall give notice of such variation to you by...a statement addressed to you"*. This provision implies that the Provider would give notice of a rate increase just before, upon, or shortly after the occurrence of the event. While the annual statements did refer to the rate increases in the list of transactions, on the Provider's own evidence, some increases were notified a number of months after they occurred. In the circumstances, the references in the annual statements relevant to those increases amount more to confirmation of a rate increase which had been in effect for several months.

General Condition 5(d) implies that a notice would follow a rate increase and, therefore, it is reasonable to assume that each individual rate increase would be specifically notified to a customer. The Provider relies upon annual statements as valid notification of rate increases. I do not accept that a generic annual statement, the purpose of which is undoubtedly to provide an annual summary on the account, comprises notification of a rate increase in the manner envisaged by General Condition 5(d). In addition, I do not accept that the use of one statement, whatever its nature, to give "bulk" notice of rate increases meets the requirements of General Condition 5(d).

In light of the above, I am satisfied that General Condition 5 expressly and/or impliedly required the Provider to do what the provision was clearly designed to achieve that is, where there was a rate increase, notify the Complainant quickly and clearly by one of the prescribed means. It is not at all clear that the Provider's newspapers advertisements or annual statements were sufficient to discharge those obligations.

The Provider submits that the Complainant agreed to make monthly repayments of €348.65 to the loan and this repayment amount remained fixed, as per its discretion in accordance with the terms and conditions of the loan account. The Provider submits that as the interest rate increased, the amount of interest applied to the account increased accordingly. The Provider submits that while the interest rate increased the Complainant continued to pay €348.65 monthly at a variable rate of interest in line with the Credit Agreement.

The Provider submits that due to the three increases in the variable interest rate, the Complainant's total amount repayable increased which resulted in a shortfall of €7,588.27

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which became payable on the expiry date of the term loan, that is, 2 April 2018. The Provider submits that approximately two years prior to the anticipated final payment due date of 2 April 2018, it issued correspondence to the Complainant dated 3 February 2016 advising him that a further €7,587.44 will remain outstanding as of 2 April 2018. The Provider submits that this letter also outlined the options available to the Complainant in relation to repayment of the shortfall, which occurred due to the interest rate increases.

The Provider has submitted a copy of its letter to the Complainant dated 3 February 2016, which states the following:

“We are writing to you in connection with your variable Term Loan... taken out on 02/04/2008. The loan was taken out for 120 months, and therefore under the terms of the loan agreement is due to be repaid in full on 02/04/2018 (the “Date of Expiry”).

We would like to give you some advance notification that the current repayment schedule, which provides for 32 Repayment Instalments of €348.65 between now and the Date of Expiry, will not be sufficient to clear the loan in full. A further payment of €7587.44 will be required as at this time. This shortfall is as a result of the following:

- *Increases to interest rates increased the amount repayable on your loan, however as per your terms and conditions your repayment did not increase to meet that rate change and*
- *Late/Missed payments occurred on your account*

While the terms and conditions of your loan provide for the repayment of your loan to be made in full by the Date of Expiry, the conditions also provide for the term of your loan to be extended so that any shortfall arising in the circumstances mentioned above can be repaid. Therefore, you have three options in relation to repayment of the shortfall.

Option 1: *We will continue to accept Monthly Repayment Instalments after the Date of Expiry, until such time as the loan is fully repaid unless we hear otherwise from you.*

Option 2: *Contact us and we can arrange to increase your repayments to ensure your loan is repaid by the original date of expiry.*

Option 3: *You can choose to repay all outstanding amounts, including interest, on your account at the date of expiry.*

If you choose Option 1, we expect, based on current interest rates and the repayment of amounts due, that an additional 22 repayments(s) will be required. The final payment will be for the then outstanding balance and may not be a full Repayment Instalment.

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Should you decide on Option 1 we will continue to collect these payments, unless you have repaid the loan in full by the date of expiry. If you want to discuss Option 2 and/or Option 3 and have any queries in relation to your account please do not hesitate to contact our Customer Service Team directly on... You can also call into your local Branch where one of our personal lending team will be happy to assist you."

The Complainant submits that he never missed any of the monthly loan repayments. I have not been provided with any evidence that the Complainant missed any loan repayments. It is therefore unacceptable that the Provider set out, in its letter to the Complainant dated 3 February 2016, that the shortfall was a result of increases to interest rates and *"Late/Missed payments occurred on your account"*. The Provider should be careful when issuing such correspondence to ensure that it is factually correct.

The Complainant also submits that he never received this correspondence.

The Provider submits that its letter dated 3 February 2016 was returned to it marked "Gone Away". I note that the Provider submits that the Complainant's correspondence address was subsequently amended in March 2016, and it is disappointing that the Provider did not re-issue this letter to the Complainant at that time.

The Provider submits that further correspondence was issued to the Complainant on 6 May 2016 advising that due to an administration error the account specific details provided in the correspondence dated 3 February 2016 was inaccurate. The Provider submits that while the number of repayment instalments required between February 2016 and the date of expiry were incorrect the amount of the shortfall and the terms and conditions remained. The Provider submits that this letter reiterated the options available to the Complainant and provided contact details should he wish to discuss same. The Provider has submitted a copy of its letter dated 6 May 2016.

I consider that the terms and conditions make clear that the interest rate on the Complainant's loan is a variable interest rate. The interest rate in this agreement is set at the discretion of the Provider and is not linked to the ECB interest rate. I accept that, on the basis of paragraph 5(a) of the terms and conditions of the credit agreement, the Provider was entitled to vary the interest rates either upwards or downwards at its discretion. I note the only changes were increases in the interest rates.

I note that condition 5(d) of the terms and conditions of the credit agreement states that *"As a result of any change in the interest rate we may vary the amount of the instalments or the Period of Agreement or both"* (emphasis added). Condition 5(e) goes on to state that *"Where the Provider has agreed to accept a deferral of the monthly repayments of the Loan for the period represented by the difference between the period of this agreement and the number of repayment instalments referred to in the "Important Information" provided in the Credit Agreement..."* (emphasis added). The terms and conditions of the credit agreement provided the Provider with an option to vary the amount of the instalments or the period of agreement or both. It is most disappointing that the Provider did not contact the Complainant each time the interest rate increased to advise him that it was opting to vary

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the period of agreement and the implications of this. The Complainant could have then planned for the surplus remaining at the end date of expiry of the term loan.

Alternatively, given that the terms and conditions of the credit agreement provided for the option of varying the amount of the instalments, I am of the view that, where there was an increase in the variable interest rate, the Provider should have given the Complainant the option to decide whether he wished to vary the amount of instalments or the period of agreement or both. Particularly, in circumstances where condition 5(a) of the loan terms and conditions set out that *"The rate of interest applicable to the Loan will be the interest rate specified in the Schedule, as varied from time to time at our absolute discretion. You will repay the Loan with interest thereon at such rate by monthly periodic instalments in amounts which, over the Period of Agreement, will be sufficient to discharge in full the Loan together with such interest"* (emphasis added).

Provision 4.1 of the Consumer Protection Code 2012 states that:

"4.1 A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."

Whilst the Provider argues that it operated within the terms and conditions of the credit agreement, I am of the view that the Provider should have provided the Complainant with clearer information in relation to the interest rate increases and his options, including an option to increase his monthly payments to avoid a shortfall occurring on the date of expiry of the loan.

I believe it was unreasonable and oppressive for the Provider not to increase repayments, or at least provide the Complainant with the option of increasing the payments on the Loan around the time that interest rates rose, particularly when two of those increases occurred within four months of the commencement of the Loan. Had that happened, the Complainant would likely have come to understand at an early stage that the interest rate had increased and the serious implications of such increases.

It should be noted in this context that, in the correspondence to the Complainant dated 3 February 2016 and 6 May 2016, the Provider is asserting that it was not entitled to increase instalments on the Loan (repayments did not increase *"as per your terms and conditions"*) but this is obviously not the case.

It should also be noted that General Condition 5(a) is not entirely consistent with the Loan since it states that *"[y]ou will repay the Loan with interest thereon at such rate by monthly periodic instalments in amounts which over the Period of Agreement [not defined], will be sufficient to discharge in full the Loan together with such interest"* and, therefore at least in that portion of the condition, implies that the borrower would be required to repay the Loan by the expiry date.

In the circumstances, I believe that the conduct of the Provider was unreasonable. While I note that the Provider argues that the advertisements and statements could constitute notice of interest rate increases sufficient to satisfy the requirements of General Condition 5(d) and could entitle the Provider to receive from the Complainant the monies it is demanding in interest from that point onward, in all of the circumstances, I am not satisfied that this would be a just resolution.

I accept that the Complainant was on notice for the last 2 years or so of the loan that the interest rate had increased and that additional repayments would be required. Therefore, in order to do justice between the parties I direct the Provider to significantly reduce its demand.

To conclude, given the unreasonable actions of the Provider as set out above, it is my Legally Binding Decision that this complaint is substantially upheld. While I note that the Provider initially offered the Complainant the sum of €2,000 as a gesture of goodwill and subsequently increased its goodwill offer to €6,411.00 in full and final settlement of the complaint, I do not find this to be sufficient in all the circumstances. I direct the Provider to write down its demand for €7,588.27 to €750.00 and that no further interest is to apply to any amount above the original sum of €41,838.00, being the amount of credit advanced (€28,000.00) together with the cost of the credit (€13,838.00), in full and final settlement of this loan. For the avoidance of doubt if the Complainant has made any payments over the sum of €41,838.00 plus the €750.00 in respect of this loan, the Provider should refund this amount to the Complainant. Furthermore, I direct the Provider to ensure that this arrangement does not adversely affect the Complainant's credit rating and amend any adverse credit rating in the Irish Credit Bureau and Central Credit Register in relation to this loan and provide confirmation of this to the Complainant.

I also direct the Provider to make a compensatory payment in the sum of €1,000.00 to the Complainant for its lapses in service, in particular, regarding its errors surrounding the Complainant's address resulting in the Complainant not receiving some statements and correspondence from the Provider.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld on the grounds prescribed in **Section 60(2)(b) and (c)**.
- Pursuant to **Section 60(4) and Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to:
 - (1) Write down its demand for €7,588.27 to €750.00 and that no further interest is to apply to any amount above the original sum of €41,838.00, being the amount of credit advanced (€28,000.00) together with the cost of the credit (€13,838.00), in full and final settlement of the loan. I also direct the Provider to ensure that this arrangement does not adversely affect the Complainant's

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credit rating and amend any adverse credit rating in the Irish Credit Bureau and Central Credit Register in relation to this loan and provide confirmation of this to the Complainant.

- (2) Make a compensatory payment in the sum of €1,000.00 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

17 May 2019

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.**