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| <u>Decision Ref:</u> | 2019-0233 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Mortgage |
| <u>Conduct(s) complained of:</u> | Disputed transactions Failure to process instructions |
| <u>Outcome:</u> | Rejected |

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

Background

The complaint relates to the administration of the Complainants' two interest only mortgage accounts with the Provider.

The Complainants' Case

The Complainants claim that they began to make a series of overpayments to their two mortgage accounts with the Provider in **2014**. The Complainants assert that they were advised that one option that would be available to them, would be to seek a refund of these overpayments in due course. The Complainants sought such a refund in **August 2016** but same was declined by the Provider.

The complaint is that the Provider has unreasonably refused to issue a refund to the Complainants of the overpayments made on the two accounts over an extended period. The Complainants seek a refund of these overpayments in the amount of €7,755.

The Provider's Case

The Provider disputes that the Complainants were advised of the possibility of a refund of the overpayments. The Provider furthermore contends that it is entitled to deem the

overpayments as early payments and, by reference to the terms and conditions of the loan accounts, it disputes any entitlement on the part of the Complainants to a refund of the payments.

The Complaint for Adjudication

The complaint is that the Provider has unreasonably refused to issue a refund to the Complainants of the overpayments made on the two accounts over an extended period. The Complainants seek a refund of these overpayments in the amount of €7,755.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 9 July 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.

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

Prior to embarking on an analysis of the complaint it is useful to reproduce certain relevant terms and conditions and to note certain details in relation to particular 'phone calls between the Provider and the first Complainant.

Terms and Conditions

The Provider relies upon the following terms and conditions from the mortgage loan accounts:

2.5 *Any sums repaid early may not be redrawn.*

Phone Recordings

I have been furnished with 26 audio files containing recordings of phone calls had between the Provider and the first Complainant on 18 different days between **January 2014** and **January 2017**. Certain of the calls are between the first Complainant and the Provider's agent however, as the Provider is responsible for the conduct of its agent, I have simply referred to the 'Provider' at all times.

I have listened to these recordings and it will be useful to set out hereunder certain details from a limited number of the calls.

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| 02/01/2014 | Phone call in which the first Complainant queried " <i>what is happening to that overpayment</i> ". The Complainant asked " <i>is it coming off the capital balance? Is it putting the account into credit? Is it sitting in a separate account or what exactly is happening?</i> ". The Provider indicated that " <i>it just goes into credit basically. If it accumulates up to €1000 in credit, then you can request for it to go off the balance.</i> " The Provider also indicated that the overpayments do not affect the interest amount and do not come off the capital balance and that a request in writing would be required to implement this. The Provider also noted that the credit amounts on the respective accounts was €106.53 and €239.11 which prompted the first Complainant to challenge those figures. The Provider undertook to look into it and revert to the first Complainant either later that day or the following day. The first Complainant requested a statement for both accounts. |
| 09/01/2014 | Phone call in which the first Complainant, not having received a call back in respect of the 02/01/2014 call, summarised the previous call and sought clarity regarding the credit balances. The Provider simply confirmed that the statements had been posted and advised the first Complainant to revert when he had reviewed same. |
| 10/01/2014 | Phone call in which the first Complainant was transferred to the 'Arrears Support Unit'. The first Complainant once again explained his reason for calling and summarised his previous calls. The first Complainant indicated that he had received the statements and noted, in respect of one of the accounts, that the 'closing balance' appeared to reflect a reduction of €1,812.45 in the amount due. In these circumstances the Complainant queried why the account was only showing an overpayment of €106. The Provider sought to explain the anomaly by reference to " <i>a colleague's interpretation of the information in front of her</i> " and went on to confirm that the credit balance on the main account was €713.18. The credit |

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| | <p>balance on the second account was stated to be €446.94. The first Complainant went on to query the differential of €1,812.45 which he had identified in the statement of the main account which the Complainant sought to explain by reference to historic arrears. The Provider then went on to volunteer certain options open to the first Complainant including letting the next scheduled repayment come out of the credit surplus. The first Complainant was advised that the credit balance would <u>not</u> impact on his capital balance and would thus <u>not</u> result in any reduction of his interest repayment amounts. The first Complainant indicated that what he would do would be to <i>“let it accumulate for a while and then toss it in off the credit [he presumably meant to say ‘capital’ here] balance”</i>. The Complainant was advised that a written instruction would be required for this.</p> |
| 08/07/2016 | <p>Phone call in which the first Complainant was advised that any extra or overpayments on the accounts would not be recognised as a capital repayment. The Complainant noted that he hadn’t intended the ‘floating’ amounts to be taken off the capital <i>“as yet”</i>. The Provider confirmed that the amount of credit on the accounts stood at €3,711.14 and €2,606.93 respectively. The Provider further confirmed, contrary to advice previously given, that any missed monthly instalments would not be taken from the credit. The Complainant also queried whether he could have the credit refunded and was advised <i>“no, I would doubt that”</i>. The Provider reverted having spoken with a supervisor to state that it would be <i>“close to impossible probably to request that refund from the bank”</i>.</p> |
| 08/09/2016 | <p>Phone call in which the first Complainant was advised that the credit amounts stood at €4,566 and €2,942 respectively. The Provider advised, contrary to previous advice, that the capital balances were reduced by these amounts:</p> <p><i>“Any time you pay an extra amount, if you pay an extra amount less than 1000 over and above the scheduled amount, it will automatically come off the balance, the total, the outstanding balance, the capital and interest balance. If you pay more than 1000 extra, we require you to confirm in writing what you want to do with it, to come off the balance or come off the term, whichever.”</i></p> <p>The Provider was told of the previous advice and advised simply that that may have been the old system.</p> |
| 07/11/2016 | <p>Phone call in which the first Complainant summarised the advice given to him in the phone calls in 2014. The Complainant stated that the credit funds would just sit in his account generating no benefit <i>“until and unless I instructed [the Provider] to either reduce the capital balance or if I sought a refund”</i>. The Provider again advised that any overpayments would automatically come off the capital balance (without any necessity for a written instruction). The Complainant went on to state as follows:</p> |

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| | <p><i>“From our perspective here, we understood that the funds were going to be there and available for our use either to reduce capital balance or take a refund.</i></p> <p>...</p> <p><i>We decided just to keep putting the funds in there so that at any stage we could decide to reduce the capital balance or seek a refund which is what we were advised by [the Provider’s agent].</i></p> <p>...</p> <p><i>The situation on that at the moment obviously is that [the Provider] are advising that it’s not company policy to do that. Now that’s obviously at variance with what we were originally informed so, you know, at this stage I’ve had no option but to contact the Financial Services Ombudsman.</i></p> <p>...</p> <p><i>I am entitled to have them refunded back to me. You know, I mean, it was on that basis that we continued to make the additional payments because we were advised that at any stage in the future we could request to have the overpaid amount reused in reduction of the capital balance or alternatively have the funds refunded.”</i></p> <p>The first Complainant was advised that the overpayments would not be refunded.</p> |
| 24/11/2016 | Phone call in which the first Complainant advised of his intention to cease making overpayments |

Analysis

The Complainants state that in or around 2014, due to a drop in interest rates, the regular repayments they were making on their two interest-only mortgage accounts came to represent more than the figure actually required to satisfy the interest repayments. The Complainants nonetheless opted to continue making repayments in the larger amounts with the result that the overpayments put the accounts into credit.

The Complainants state in their complaint form to this office, that they contacted the Provider in 2014 and were provided with the following advice:

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“... that unless we instructed them to set up a monthly “fixedoverpayment” that the accounts would simply be pushed into an overpaid situation. It would not reduce our monthly instalment or reduce the monthly interest charged. We would receive no benefit whatsoever from the overpayments until and unless we submitted written instructions to them requesting that the additional funds be applied in reduction of the capital balance or that it be refunded.”

There are essentially two issues that require to be address in this decision. In the first instance, I must determine whether the Provider gave the Complainants any advice or assurances from which it should not now be allowed to resilie. In the event that it did not, I must then consider whether the Provider is entitled, by reference to the terms of the loan agreement, to retain the funds overpaid.

The Complainants contend that the advice originally given to them as to their entitlement to a refund of overpaid amounts, was given in the course of phone calls in 2014. Having listened to recordings of the relevant phone calls, I am satisfied that the summary quoted immediately above from the Complainants’ complaint form is perfectly accurate, save in one critical aspect. At no point in the phone calls in 2014 was there any discussion of a refund of the overpayments.

Similarly, in a letter to this office dated 23 January 2017, the first Complainant sought to clarify the Provider’s earlier synopsis of his complaint. He stated as follows:

“I was advised by their Agent at the time [name redacted] that a refund of overpayments could be made precisely because the amounts being overpaid were less than €1,000.

...

I was advised by [name redacted] that individual overpaid amounts of less than €1,000, or accumulated balances in excess of this, could and would be refunded on request...”

The phone recordings do not however bear this out, insofar as the question of a refund was not canvassed at all by the first Complainant in the phone calls in 2014 and the Provider made no commitments or indeed comments regarding such.

The content of the phone call of 07/11/2016 illustrates the Complainants’ argument neatly. It is very clearly claimed by the Complainants that they were “advised” that they could “have the funds refunded” and any suggestion to the contrary is “at variance with what we were originally informed”. I am satisfied however, by reference to the audio evidence available in the form of the phone recordings that I have listened to, that this is simply not so. Accordingly, insofar as the Complainants’ complaint relies on any advice or assurances provided to them, I am not in a position to uphold this aspect of their complaint.

I will turn now to the question of whether the Provider is entitled to retain the funds overpaid independent of any assurances and/or advice given, and by reference to the terms

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of the loan agreement executed between the parties. The Provider seeks to rely on Clause 2.5 of the terms and conditions of the account as reproduced above. In doing so, the Provider clearly characterises the overpayments made by the Complainants as payments "*repaid early*".

The Complainants here were clearly aware that they were making repayments over and above the amount required to satisfy the interest only repayments. The Complainants argue that they let this state of affairs continue as they were satisfied that they could, at some point in the future, either apply the funds to the capital balance or seek a refund. (I have already determined that this second belief, insofar as it existed, was not the result of any advice or assurances given by the Provider.)

It is clear therefore that the overpayments were consciously and deliberately made and were not simply the result of an oversight. Indeed, it is also clear that the only stated future intention of the first Complainant in the various phone calls prior to July 2016 (ie for the majority of the period during which the overpayments were being made) was to apply the overpayment towards the capital balance.

The Provider has confirmed that the overpayments were applied to the outstanding balances of the mortgages and that the interest that accrued on the mortgages was calculated by reference to reduced outstanding balances such that the interest "*would have been higher if [the Complainants] had not made additional payments*". (I will return below to the contradictory advice initially provided.)

In the circumstances, I am satisfied that the Provider did in fact treat the overpayments as early payments insofar as the funds were applied to the outstanding balances (thereby reducing the interest repayments). More importantly, I am satisfied that the Provider was entitled to treat the overpayments in that manner and of course this was in fact to the financial benefit of the Complainants. Consequently, I am satisfied that the Provider was entitled, by reference to clause 2.5 of the terms and conditions of the account, to decline to issue a refund of the overpayments to the Complainants.

One further issue requires to be addressed. The Provider in this instance was clearly responsible for the provision of incorrect and misleading advice, insofar as it initially informed the first Complainant, in a series of phone calls in January 2014, that the overpayments would not have any effect on the outstanding balances and would not result in any reduction of the interest repayment amounts. The Provider also provided conflicting advice to the first Complainant regarding the possibility of missed repayments being met by the credit surplus.

The Provider has acknowledged in its response to this office that the Complainants "*received incorrect and conflicting information regarding the allocation of credit payments*" and it has offered an apology for this and acknowledged that the service provided to the Complainants fell below the requisite standard. The Provider has also offered the Complainants the sum of €500 by way of apology, which the Complainants can accept from the Provider if they wish to do so. In that event, they should notify the Provider expeditiously, as the Provider cannot be expected to hold this offer open indefinitely.

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In the circumstances, and in particular by reference to the fact that the Complainants have at all times had the benefit of the overpayments in the form of reduced outstanding balances and reduced interest repayments, I am satisfied that this offer represents fair compensation for the miscommunications committed by the Provider.

In light of the foregoing, in recognition of the fact that the main thrust of the Complainants' complaint has been rejected, and in the absence of evidence of wrongdoing by the Provider or conduct within the terms of **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017** that could ground a finding in favour of the Complainants, I am not in a position to uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

31 July 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.