



<u>Decision Ref:</u>	2019-0245
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Fixed Rate
<u>Conduct(s) complained of:</u>	Failure to provide accurate account/balance information Incorrect information sent to credit reference agency
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the information furnished to the ICB by the Provider in relation to repayments made on the Complainants' mortgage loan account.

The Complainants' Case

The Complainants, who are sisters, hold a mortgage with the Provider, which was drawn down in 2006.

The Complainants have taken issue with their record with the Irish Credit Bureau (ICB) as reported by the Provider in relation to their mortgage account. The ICB record for the account displayed the value of "1" (meaning a missed repayment for that month) for the repayment month of February 2015. The Complainants contrast this February 2015 ICB entry which does not record a missed payment with the February 2017 ICB entry. The Complainants contend that if no missed payment is reported for February 2017, one should not have been reported for February 2015.

In her letter to the Provider dated 26 June 2017, the First Complainant states:

“An issue regarding an ICB is a huge issue and has negative impact on both myself and my sister [the Second Complainant]. My sister went for a mortgage in early 2017 and she was shown a negative ICB for this mortgage account. Following this, I had to explain the situation to her that I was in discussions and communications with your institution regarding the matter.

She was not happy and feels that she was negatively impacted during her mortgage application process as a result of the ICB issue”.

The First Complainant also pointed out to the Provider in this letter that because of her employment with another financial service provider she was:

“obliged to discuss matters of my ICB with my managers. This was very embarrassing to say the least. This undermined my position, my credibility and my position with the bank. I cannot communicate enough to you how upset, embarrassed and annoyed I am regarding this matter”.

The Provider's Case

The Provider states that it is satisfied the reporting made to the ICB was correct on both occasions.

The Provider acknowledges that the Complainants were incorrectly informed that as the payment for February 2017 was received on 1 March 2017, this would be applied for the March 2017 payment and that arrears for 2017 remained outstanding.

The Provider accepts that this was not correct, has apologised and paid a sum of €250 as a goodwill gesture in recognition of this.

The Complaint for Adjudication

While I note the Complainants have raised the issue of the Second Complainant being refused a mortgage as part of their complaint, this aspect of the complaint relates to only one of the Complainants, whereas the mortgage and this complaint is in the names of both Complainants. Therefore, the alleged refusal of a mortgage loan, by a third party financial service provider to one of the Complainants, does not form part of this investigation and adjudication as this involves one of the Complainants only. It is open to that Complainant to make a separate complaint to the Provider and, if necessary, to this Office in this regard.

Therefore, the complaint for investigation and adjudication is that the Provider has failed to furnish fair and accurate information to the ICB in relation to the Complainants' mortgage account.

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 **2 May 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.

The following submissions were received following the issue of my Preliminary Decision:

- 5 June. The Provider made a further submission
- 6 June. The Complainants made a further submission
- 19 June. The Provider made a further submission
- 27 June. The Complainants stated they did not wish to make any further submission.

These submissions were exchanged between the parties.

Following the consideration of all the evidence and submissions made to this Office including the post Preliminary Decision submissions from the parties, my final determination is set out below.

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Background

In October 2006 the Complainants were sanctioned for a mortgage loan in the amount of €317,500 to be repaid over 35 years.

The Mortgage Loan Offer Letter contains the following relevant provisions:

“Number and frequency of payments: 420 instalments

The number of payments may vary. See conditions 4 & 5 of the general conditions.

Frequency: monthly”

The following General Conditions applicable to the loan are relevant to this complaint:

“4. Interest Charges: *Interest will be charged from the date the loan cheque is cashed. Interest from that date to the end of the calendar month is due and payable on that day. If this interest is not paid, it will be added to the loan balance which will extend the term of the loan.*

5. Monthly payments: *The first monthly payment of interest and capital is due on the 7th day of the month following the date the loan is advanced.*

The amount of the monthly repayments will be calculated by [the Provider] when the loan is advanced and will include the amount which would repay the loan, together with all the interest due, over the repayment period specified in the offer letter, using the following assumptions:

- a. *That the interest rate continues at the rate initially applied to the loan.*
- b. *That all payments on the loan are made when due.*
- c. *That interest due and payable on the day the loan is advanced (under the provisions of condition 4 above) is paid on that day.”*

“Direct Debit Mandate: *[the Provider] requires a mandate allowing [the Provider] to obtain all payments due on this loan by way of direct debit from a building society or bank account...”*

“Month – A calendar month”

The Provider has stated in its submissions that the due date for repayments on the mortgage (other than for the first repayment as set out above) is the 1st of every month. It has submitted that the 7th of the month refers only to accounts for which a direct debit is in place. There was no direct debit in place for the Complainants’ account in 2015 or 2017.

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The Provider initially furnished General Conditions from February 2015 which contain a provision in respect of accounts which do not have a direct debit in place for repayments. However, it later transpired that those Terms & Conditions were supplied in error and the correct Terms & Conditions were furnished.

The Relevant Repayments

On the 28th and 29th of January 2015, two payments were made to the account, on the 2nd and 3rd of March 2015, three payments were made to the account. The calendar month of February 2015 therefore passed without a payment being applied to the account. The Provider considered this a default of one full month's repayment, and thus made an adverse report to the ICB.

On the 30th of January 2017, two payments were made to the account, on the 28th of February 2017 a payment was made. Because part payment had been received during February, the Provider did not consider that the Complainants were one full month's repayment in arrears, and thus did not make an adverse report to the ICB.

Analysis

I accept that the Provider is entitled to furnish information to the ICB in relation to the payment history on the Complainants' mortgage account. However, this information must be accurate and fair.

This dispute revolves around the meaning of the term "Due Date".

The Complainant contends that the "due date" for each monthly repayment is the 7th, and therefore the Complainant cannot be considered as being in default of their full month's payment until (usually) the 7th of the following month has passed without any payment being made.

The Provider states that the "due date" is the 1st of each month, and therefore if a calendar month passes without any payment being made (as occurred in February 2015, but not February 2017) it considers a monthly repayment to have been missed.

The Provider's interpretation of "Due Date" may be a convenient one for it, and is consistent with the interest charges being calculated on the last day of each month as well as the definition of "Month" in the General Conditions.

However, the "Due Date" is not specifically set out as being the 1st of the month anywhere in the documentation which has been furnished in evidence. With that being the case, I must ask how could the Complainant possibly know that the Due Date is the 1st of the month? More importantly, how can the Complainant be held to have agreed to it being the 1st of the month?

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In the absence of clarity on the meaning of the term “Due Date”, I am obliged to resolve the dispute in favour of the Complainants on the basis of the *contra proferentem* rule.

I am therefore satisfied that the monthly “Due Date” for the Complainants’ account is the 7th of each month. It follows that a repayment cannot be considered as having been missed unless no payment for that month is made by the 7th day of the following month.

The Provider, in its Post Preliminary Decision submission of **5 June**, asserts that:

“The totality of the terms and conditions applicable to the contract clearly outline when the monthly payment is due and do not indicate an ambiguity so as to imply that the 7th day of the month is the ‘due date’.

General Condition 5 details that the first monthly payment is due on the 7th day of the month. It relates in this context only to the explicitly stated ‘first monthly payment.’

[The Provider] mortgage conditions define ‘month’ as a calendar month. The ordinary meaning of calendar month is the first meaning that should be taken. A calendar month in this context is from the 1st day of the month to the last day of the month in question. Note that the earlier reference to the 7th was specific to the first payment only and not a calendar month.

Mortgage conditions define a ‘year’ as ‘from 1st January to 31 December’. Accordingly a calendar month commences on the first day of the defined year. Namely the first day of January in the relevant year.

The letter of Loan Offer dated 28 September 2006, indicates that there is a ‘Monthly Repayment’. The terms ‘month’ and ‘year’ are clearly defined and indicate that the calendar month is the normal meaning of a month in these circumstances, namely the 1st to the 31st of the relevant month in 12 portions in the relevant year.

The European Standardised Information Sheet (ESIS) which was sent to the Complainants at the same time as the Letter of Loan Offer notes ‘420’ instalments and notes the frequency of payments as ‘monthly’.

To this end the sample, ‘Amortisation Table’ within the ESIS clearly indicates a 12 month sequence in a year. A year runs from the 1st day of the first month, and not the 7th day of the first month.”

The Provider goes on to argue:

“The ‘Contra Proferentem’ rule provides that where a contractual clause is ambiguous, it should be construed strictly against the party who provided the wording.

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The Supreme Court has held that there must be an element of ambiguity in respect of the relevant clause for this rule to be applied. (McMullen brothers Ltd vs McDonagh [2015] IESC 19).

It is the Bank's submission that case law indicates the following:

- (a) *There must be an ambiguity for the principle to be applicable – precondition for the adoption of this principle. (McMullen brothers Ltd vs McDonagh [2015] IESC 19). It follows that there must be a genuine ambiguity for this principle to be applied.*

The High Court has found that the rule only applies in cases of genuine ambiguity and where the Court has difficulty in deciding on the construction of a particular provision (Danske Bank A/S trading as National Irish Bank v McFadden [2010] IEHC 2016). In particular the Court noted that this principle should be used to eliminate doubt (rather than create one) and noted that the rule should only be used as a last resort.

It is the Bank's submission that there is no ambiguity and that the totality of the terms and conditions outline clearly that the monthly payment is due each month in each year commencing on the 1st day of the month and apportioned in 420 instalments over a 35 year period.

- (b) *The Principle should only be used as a last resort if there is an ambiguity. The High Court has found that this principle should be used to eliminate doubt (rather than create one) and noted that the rule should only be used as a last resort, (Danske Bank A/S trading as National Irish Bank v McFadden [2010] IEHC 2016).*

If there is an ambiguity as to when each monthly payment is due and payable, then the remaining contractual term and conditions, together with the actions of the Complainant over the many years of the loan are the most appropriate facts which should be used to interpret any perceived ambiguity in the terms of the loan.

The totality of the contractual terms and conditions, and the actions of the Complainant indicate that there was a clear understanding between the parties of when the payment was due.

The Supreme Court has held (McCann v. Halpin and Anor [2016] IESC 11) that a particular phrase, ('close of business') should be given its ordinary meaning which was to be interpreted in the particular context in which it was used.

It is the bank's submission that payments were due in each calendar month as indicated in the letter of Lon Offer and all applicable terms and conditions, and a calendar month should be given the ordinary meaning in this context as the 1st day of the relevant month in the year, which is explicitly defined as 'from the 1st day of January to the 31st December.'"

I agree that the Terms and Conditions are clear in that a month is defined and understood to be a calendar month, one twelfth portion of a year. Nonetheless, it is commonplace for an amount falling due to be one twelfth of an annual amount, with the payment falling due (to be paid) on a date during the month.

However, In my view the statement that the first monthly payment is due on the 7th day of the month following drawdown reasonably implies that subsequent monthly payments will be due on the 7th day of the month thereafter, unless something to the contrary is stated. Nowhere in any of the documentation is it state that the mortgage payments are due on the 1st Day of any month.

The very fact that the Provider relies to the extent that it does on inferences from the definitions suggests that there is a degree of ambiguity around the payment date.

The Provider, in its references to case law, has made a statement regarding the *Contra Proferentem* rule, but it has not cited that actual passages from the judgments. As the decision of Charleton J. in *McMullan Bros. Ltd. v. McDonagh* [2015] IESC 19, being a decision of the Supreme Court and being the more recent of the two cases cited has greater weight attaching to it, the following passage is of particular importance, where at para. 20, Charleton J. cites with approval sections from the judgment of Geoghegan J. in *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274 and in turn the unanimous judgment of the Supreme Court in that case:

"20. ... A fundamental principle which appears to be particularly relevant to this case is the principle of contra proferentem. Clark in Contract Law in Ireland (4th ed.) at p. 149 sets out the general principle as follows:-

"If the exempting provision is ambiguous and capable of more than one interpretation then the courts will read the clause against the party seeking to rely on it."

...

*The author points out that two Irish cases provide clear guidance on the position to be adopted in the interpretation and construction of insurance contracts. The first passage is from *Rohan Construction v. I.C.I.* [1986] I.L.R.M. 419 from a High Court judgment of Keane J. The passage reads as follows:-*

"It is clear that policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments. In the present case, the primary task of the court is to ascertain their meaning by adopting the ordinary rules of construction. It is also clear that, if there is any ambiguity in the language used, it is to be construed more strongly against the party who prepared it, i.e. in most cases against the insurer."

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It is also clear that the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance."

...

In Cheshire Fifoot and Furmston's Law of Contract (13th ed.) the rule is defined as meaning that if there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it.

21. These are the rules of construction which will be applied to the interpretation of this lease."

The requirement is not that the clause or exclusion be wholly ambiguous, as suggested by the Provider, but that there be any ambiguity. The Provider could just as easily have stated clearly that the first payment was due on the 7th day of the month following drawdown and that all subsequent payments were due on the first day of each month thereafter which is what it ought to have done if that was what it intended. However, it did not and thereby created a degree of ambiguity. If it was the Provider's intention that all payments were to be due on the first day of the month I cannot understand why it did not simply say so.

Having read the terms and conditions, the only reference to payment being 'due' is that referenced by the Provider in General Condition for [The Provider] at no. 5, which deals with the first payment, but makes no mention of subsequent payments, nor does it define 'due date' in no. 9 where certain other terms are defined.

While the [Provider's] Mortgage Conditions contains definitions of 'month' and 'year', there is nothing explicitly stating the day of the month on which each 'monthly' payment falls due, other than the statement about the 7th day of the month following drawdown.

In its Post Preliminary Submission of 5 June, the Provider states that:

"In conducting a further review of this account, two telephone calls from 2014 and 2015 further indicate that the complainants had a full awareness that the payments were to be made before the last day of the calendar month. Notwithstanding the above, while they in part pre-date the current complaint, they demonstrate that the Complainants and the Bank both had a shared common understanding and interpretation that payments were due on the first day of the calendar month, with the bank allowing payments to be made until the last day of the calendar month in which they fell due."

Recordings of these calls were supplied after my Preliminary Decision was issued. I find it most disappointing that the Provider did not furnish recordings of these calls until after I issued my Preliminary Decision.

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The explanation for the late provision is that a 'further review' of the account had been done. I accept that the Provider has apologised for this lapse.

These calls, in the opinion of the Provider go to show, although they pre-date the complaint, that the Complainants' had a full awareness that payments were to be made 'before the end of the calendar month.'

I have considered the content of these calls. The first is from **4 December 2014**, when the First Named Complainant calls the Provider about getting a letter stating her account is in arrears. The Provider's agent informs her that the funds 'went out' on the 1st December. The complainant accepts she may be a 'day over' and is warned of the tax relief implications of being in arrears. She then asks how it is possible for the payment not to have gone through since she transferred it on the 27 November and SEPA should make it go through immediately or in 24 hours. The agent apologises and says it ought to have done so. She then checks everything is up to date and the agent asks if December's payment will be made on time.

The second telephone call is from **3 March 2015**. The call is from the Provider to the Second Named Complainant and the agent states that there are arrears outstanding on the account. The Complainant says that since there are only 28 days in February and the standing order was due to go out on the 29th, she had paid it manually. The agent warns that if it is a short month or there is a weekend at the end of the month it may cause arrears to carry over and affect her credit rating and accrue interest. He then asks if the March payment will be on time and the Second Named Complainant answers 'yes'.

Neither of these calls deal with the issue being investigated as part of this complaint. The first call concerned the delay with the SEPA transfer and the TRS implications. The second call was from the arrears support unit and the main concern of the Provider's representative was that there would be no difficulty with future payments. The nature of these calls were such that the Provider had every opportunity to explain to the customer that the monthly payments were due on the 1st of every month as well as the consequences of late payments. This was not done.

Rather than support the Provider's case, I believe the calls demonstrate yet another lack of clarity by the Provider. Indeed I believe the Provider's reliance on the calls is worrying. It demonstrates a lack of understanding of the need to provide clear information to customers and consumers. Similar to its written communications on this matter, the Provider seems to expect the Complainants to infer or assume certain information.

The Provider has a responsibility to provide clear information to consumers. Section 4.1 of the Consumer protection Code 2012 states,

*"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."*

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Rather than providing clear information to the Complainants about the date on which their mortgage payments were due, the Provider is relying on the Complainants to make a series of assumptions, none of which is stated clearly in the documents or telephone communications. It has defined 'month' and 'year' and argues that this must mean that monthly amounts are due on the first day of every month. Yet it says in its submission to this Office of **5th June 2019** that if payment is made by direct debit, the seventh day of every month would be the collection date, but this is not stated either in the documentation.

The Provider cannot expect the Complainants to have made the same assumptions as it has done, without providing them with clear information.

Therefore, in relation to the substantive element of the complaint, I believe the Provider has failed to establish that the due date for each monthly mortgage repayment is the 1st day of the month. Accordingly, I believe the Provider has incorrectly reported the Complainants' repayment history to the ICB.

Having a negative credit report with the ICB is a very serious matter and can have very serious consequences.

It is particularly noteworthy in this complaint that the negative and incorrect reporting had a negative impact and additional consequences for the First Complainant who works in a bank herself.

Given the seriousness of the matter for the Complainant it is most disappointing that the Provider did not engage in a more serious effort with the Complainant to resolve the matter. I believe that if the Provider had considered the Complainant's correspondence more carefully, this matter could have been resolved much quicker and in a much less detrimental and less embarrassing way for the Complainants. I also believe that the Provider could have shown some flexibility and better understanding of the situation. It is most disappointing that the Provider continues to refuse to accept that its lack of clear communications has caused serious inconvenience for the Complainants.

I note the Second Complainant has stated that this matter impacted negatively on her ability to secure a mortgage. As I have stated earlier, it would not be appropriate for me to investigate or adjudicate on that matter as part of this complaint.

It is open to the Second Complainant to make a separate complaint to the Provider and/or this Office, if necessary, in respect of that matter. I note the Provider has taken issue with me informing the Second Named Complainant of her right to make a complaint should she wish to do so to the Provider and / or to this Office. In that regard, the Provider stated in its Post Preliminary Decision submission of 5 June 2019:

"The [preliminary] decision has suggested that the other party may bring a claim in respect of a detriment she may have suffered in a separate complaint. It is our submission that this is an inappropriate statement for the decision at hand."

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I find this to be a very unreasonable and worrying stance by the Provider. Firstly, I did not “suggest” the other party may bring a claim. What I actually stated was “*it is open to that Complainant to make a separate complaint to the Provider and/or this Office in this regard*”. Furthermore I fail to understand why the Provider would object to a consumer being informed of their right to bring a complaint to a financial service provider or to this Office. In fact, the Provider has a duty to inform its customers of their right to bring a complaint to this Office where it is unable to resolve a complaint itself. I believe it was wholly appropriate in circumstances where I was not dealing with that element of that Complainant’s complaint in this Decision, to inform her of her right to bring a separate complaint.

I am concerned that the Provider seems unable to comprehend the extent to which its unclear communications in relation to the Due Date for the payments of the Complainants’ mortgage has caused serious difficulty for the Complainants. Further, I do not believe it is acceptable that the Complainants were expected to assume or infer when their mortgage was due without any clear information in that regard from the Provider.

I am concerned that this approach may have implications for other customers and for that reason, I propose to refer this Decision to the Central Bank of Ireland for its consideration and any action it deems necessary.

I note the Provider has paid the Complainants a sum of €250 in respect of incorrect information provided in relation to the February 2017 payment. I consider this to be adequate for that error.

For the reasons outlined above, I substantially uphold this complaint and believe that a significant sum of compensation is required. Accordingly, I direct that the Provider pay a sum of compensation in the amount of €5,000 to the Complainants.

I further direct the Provider to direct the ICB to correct the Complainants’ ICB record and furnish a letter to the Complainants outlining that the February 2015 “*missed payment*” was incorrectly recorded by the Provider and also to ensure that the Complainant’s credit record is not in any way negatively impacted by the Provider’s position that the payment due date is the 1st of the month, either in the past or the future.

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 (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to instruct the ICB to correct the record by removing any reference to a missed payment in February 2015 and furnish the Complainants with a letter outlining that the February 2015 “missed payment” was reported in error by the Provider and also to ensure that the Complainant’s credit record is not in any way negatively impacted by the Provider’s position that the payment due date is the 1st of the month.

I also direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €5,000, to an account of the Complainants’ choosing, within a period of 35 days of the nomination of account details by the Complainants 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**

14 August 2019

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Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

