



<u>Decision Ref:</u>	2019-0251
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Endowment mortgage
<u>Conduct(s) complained of:</u>	Failure to provide product/service information Delayed or inadequate communication
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Complainants' endowment mortgage loan taken out with the Provider in 1992. An endowment policy was taken out with another financial service provider at this time. The policy matured in 2012, at which point, the Complainants state that they were left with a shortfall of €11,597.68 in respect of the balance owed.

The Complainants' Case

The first Complainant states that it is his understanding that *"if requested by the customer, it is possible for the bank and insurance [company] to negotiate a more favourable outcome to the underperforming endowment mortgage"*. The first Complainant states that despite making several requests in this regard, *"to date, [the Provider has] not responded to my requests and... [has] ignored them"*.

In the course of their submissions, the Complainants have included a copy of a letter which the first Complainant sent to the Provider dated 25 March 2015. In this letter, the first Complainant makes reference to a letter which he received from the Provider dated 18 March 2015 which *"informed me of recent amendments to my loan and that the repayments had changed, [however] this letter fails to outline as to what these changes are, just that the repayments have increased"*. The first Complainant submits that following receipt of this letter, he telephoned the Provider.

The first Complainant states that he was informed during this telephone conversation that despite making repayments to cover the shortfall of the endowment policy, these payments have been sitting *“dormant in my mortgage account and has not reduced [the] original shortfall amount by 1 cent....I’m still required to pay the interest on the full amount of €11,597.68”*.

The first Complainant has emphasised that this information is at *“variance”* to a previous conversation which he had with another representative of the Provider during which the he explained that *“my income comes from [an] invalidity pension...my financial situation was extremely challenging. [The Provider’s representative] explained to me that because of my financial situation it was acceptable to [the Provider] for me to make regular monthly payments over a nine year period to clear the shortfall”* The first Complainant questions why *“this arrangement has not been honoured by [the Provider]”*.

The first Complainant states that *“It was by accident that I discovered I needed to acquire a capital transfer form in order to reduce the balance and the interest amount. I completed this form and the interest amount has come down since. It has taken me 3 years to be given the correct information, this is very frustrating”*. The first Complainant also states that *“throughout the latter stages of the term of this mortgage, [the Provider] sent numerous letters advising me I need to make a lump sum payment to the mortgage account to cover the shortfall... in recent months I have received phone calls from [the Provider], all requesting the payment in full of the outstanding amount in order to close the account.....[the Provider is] fully aware my income comes from [an] invalidity pension and I don’t have the money they are demanding.”*

The first Complainant states that *“[the Provider] recently made an interest rate cut, with this in mind I rang [the Provider] to ask if I would be getting this reduction.....I was informed my type of loan will not get the benefit of this rate cut”*.

The Provider’s Case

The Provider submits that Endowment Mortgages offered were based on the expected annual growth of between 8 and 10 percent, which were an Insurance Industry average endorsed by the Irish Federation. The Provider submits that these growth rates were not guaranteed, but were dependent on the performance of the financial markets. The Provider submits that it is the poor performance of the investment markets that has reduced the value of the Endowment Policy.

In its Final Response Letter to the Complainants, the Provider responds to the first Complainant’s contention that it ignored his requests *“to negotiate a more favourable outcome to the underperforming endowment mortgage.”* Specifically, the Provider states that it did contact the third party insurance company but was informed by the insurance company that it did *“not negotiate on the values of policies”*.

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In response to the first Complainant's contention that the Provider has sent him "numerous letters" coupled with telephone calls "all requesting the payment in full of the outstanding amount in order to close the account", the Provider states that "it is not [its] policy to accept a sum less than the full redemption balance as full and final settlement of the debt. [The Provider] understands that this is a difficult time for many of our customers and will at all times try to engage with our customers to find a resolution appropriate to all parties concerned. Since your Mortgage Account expired and the balance owing has become due, the Bank has attempted to engage with you regarding the outstanding balance on your Mortgage Account. The Collections Department has issued correspondence every three months to inform you that your Mortgage has expired. The Bank has offered to treat your Mortgage under the Mortgage Arrears Resolution Process (MARP) and requested you contact the Bank to arrange an appointment... I would like to confirm that under the Code of Conduct on Mortgage Arrears and the Consumer Protection Code 2012... [the Provider] is entitled to make contact with the customer between the hours of 9am and 9pm Monday to Saturday". The Provider concludes that it "will try to work with each customer to reach an amicable resolution to the situation."

The Complaints for Adjudication

The complaint is that:

1. The Provider failed to notify the Complainants of the level of shortfall that would occur on their mortgage loan account when their endowment policy matured.
2. The Provider ignored the first Complainant's request "to negotiate a more favourable outcome to the underperforming endowment mortgage" with a named third party insurance company.
3. The Provider failed to inform the Complainants that they should complete a capital transfer form in order to "reduce the balance and the interest amount" of the shortfall figure and that the first Complainant was left to discover the necessity for this "by accident".
4. Despite the Provider having informed the first Complainant that "because of my financial situation it was acceptable to [the Provider] for me to make regular monthly payments over a nine year period to clear the shortfall", this "arrangement has not been honoured".
5. The Provider has requested that the Complainants repay the shortfall balance in full despite being aware that the first Complainant's "income comes from [an] invalidity pension and I don't have the money [it is] demanding".

The Provider refused the first Complainant's request for an interest rate reduction on the amount owing on the Complainants' mortgage loan account.

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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 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 12 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, I set out below my final determination.

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

Firstly, the Complainants have expressed their dissatisfaction with the performance of their endowment policy. It has been communicated to the Complainants that the performance of the policy is a matter for a separate Financial Services Provider.

Secondly, the Complainants submit that the endowment policy was mis-sold to them in 1992. It has been communicated to the Complainants previously and acknowledged by the Complainants that the sale of the policy will not be adjudicated upon by this Office due to the passing of time between the date upon which the policy was sold and the date upon which the complaint was received by this Office.

I will now address the heads of complaint in turn:

(1) The Provider failed to notify the Complainants of the level of shortfall that would occur on their mortgage loan account when their endowment policy matured.

The Complainants state that “while a shortfall was outlined in recent years by both [the Provider] and [the insurance company] at no time was it indicated that anything like 29% would be the outcome, the amounts outlined by the companies were best case 6% shortfall paying an amount of €38,748 and worst case 14% paying €35,150. The outcome has no resemblance to their projections”.

The Provider submits that it contacted the complainants as early as 2004 to advise that the endowment mortgage loan account would not be redeemed in full by the proceeds of the endowment policy plan, on expiry of the account in June 2012. The Provider has submitted a copy of its letter dated 11 February 2004 to the Complainants, which I note states the following:

“... I am writing to inform you of the current position regarding your endowment mortgage loan and endowment policy.

The current value of your [named policy] as at 19 January 2004 is €15152.00 while the projected values on maturity at growth rates of 4.80% and 6.40% are €35150.00 and €38748.00 respectively.

As the balance on your endowment mortgage account is €41278.55, we believe that your endowment policy plan will not have sufficient funds to pay off your endowment mortgage at maturity date.

There are a number of options available to you to reduce your potential shortfall:

- (a) Convert your endowment mortgage to a repayment mortgage (with a reducing balance)*
- (b) Lodge a lump sum into your endowment mortgage account*
- (c) Convert to a repayment mortgage and extend the mortgage term*
- (d) Commence a separate savings plan to cover the shortfall.*

If you are relying on this policy to repay your endowment mortgage, we strongly advise that you take action now rather than later and that you arrange an appointment to discuss the matter.

...

Warning: All future fund values shown above are estimates only. There is no guarantee that the proceeds of the Insurance policy will be sufficient to repay the loan in full when it becomes due for repayment.

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The assumed growth rates of 4.80% and 6.40% are shown before management charges. These assumed growth rates are for illustration purposes only and are not guaranteed. Actual growth could be more or less than illustrated and will depend on the performance of the underlying assets. The current value is at the date shown and is not guaranteed. This value can rise and fall.”

I note that the Provider’s letter to the Complainants dated 25 February 2004 states:

“I refer to my recent letter regarding your endowment mortgage loan and endowment policy values.

We have not received any response from you but would strongly advise that you contact us to review your position as you will not have sufficient proceeds on maturity of the policy to pay off your mortgage loan.

...”

The Provider’s letter to the Complainants dated 12 March 2004 states:

“I refer to my recent letters regarding your endowment mortgage loan and endowment policy values.

We have not received any response from you but would strongly advise that you contact us to review your position as you will not have sufficient proceeds on maturity of the policy to pay off your mortgage loan.

Once again, we strongly recommend that you review your options and take action to ensure that your endowment mortgage loan will be cleared on expiry.

To make sure you are kept fully informed about your loan repayment plan, we intend to review your endowment loan every three years and will send you an update...”

The Provider submits that as the endowment mortgage loan account was not converted to a repayment loan, it continued to be billed on an interest only basis, in accordance with the terms and conditions of the policy. The Provider submits that it issued further correspondence to the Complainants on 6 February 2012.

The Provider has submitted a copy of its letter to the Complainants dated 6 February 2012, which states:

“An important message concerning your endowment mortgage loan.

As part of the Bank’s ongoing commitment to customer service, I am writing to inform you of the current position regarding your endowment mortgage loan which is due to mature [on] 30th June 2012.

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The current value of your [named policy] as at 06th February 2012 is €28,181.00 while the projected value on maturity is €19,396.00 plus a bonus of €7,590.75.

As the balance on your endowment mortgage account is €41,266.49 we believe that your endowment policy plan will not have sufficient funds to pay off your endowment mortgage at the maturity date.

If you are relying on this policy to repay your endowment mortgage, we strongly advise that you take action now rather than later and that you arrange to contact... to discuss the options available to you.

If we do not [hear] from you the shortfall will become due in full [on] 30th June 2012.

..."

The Provider's letter to the Complainants dated 6 March 2012 states:

"An important message concerning your endowment mortgage loan.

I refer to my recent letter regarding your endowment mortgage loan and endowment policy values.

We have not received any response from you but would strongly advise that you contact us to review your position as you will not have sufficient proceeds on maturity of the policy to pay off your mortgage loan.

..."

The Provider submits that the Complainants' insurance company would have also provided the Complainants with regular updates on the value of the policy.

The Provider submits that the term of the Complainants' mortgage loan account was due to expire on 30 June 2012. The Provider submits that on 6 February 2012 it issued correspondence to the Complainants to advise that the remaining balance on their mortgage loan account at that time was €41,266.49 therefore it would be unlikely that their endowment policy plan would be sufficient to redeem the mortgage loan account in full at the date of maturity.

I note that Condition 1.22 of the Provider's "GENERAL MORTGAGE LOAN APPROVAL CONDITIONS" sets out, among other things, the following:

"1.22 Endowment Loans

WARNING

THERE IS NO GUARANTEE THAT THE PROCEEDS OF THE INSURANCE POLICY WILL BE SUFFICIENT TO REPAY THE LOAN IN FULL WHEN IT BECOMES DUE FOR REPAYMENT."

I note that the mortgage loan conditions set out the following, under the heading "ENDOWMENT LOANS":

"3.1 If the Letter of Approval provides for taking out of an endowment assurance policy to assist in the repayment of an amount advanced then this condition will apply to that amount for so long as:

- (a) the policy has been assigned to [the Provider] and is comprised in [the Provider's] security,*
- (b) the policy is subsisting, and*
- (c) the Mortgagor's obligations under the Mortgage and these conditions are being fully observed and performed.*

3.2 If and so long as this Condition applies to any such amount:

- (a) 2.2 and 2.3 shall be modified in relation to that amount as follows,*
- (b) the repayment of the amount or part thereof at the discretion of the [Provider] will be suspended until the end of the term and the Mortgagor will in the meantime pay interest there on at the Appropriate Rate (together with partial repayment of principal as required by the [Provider] in writing) by monthly instalments on the specified day in every month PROVIDED ALWAYS that the [Provider] shall incur no liability or responsibility whatever to the Mortgagor or other person by reason of the fact that any suspension of the repayment of the Loan or any part thereof results in the Loan not being repaid at the end of the term due to the inadequacy of or fluctuation in the value of the Policy or otherwise.*

3.3 If this condition ceases to apply to any such amount the same will become repayable by combined payments in accordance with 2.2 and 2.3 and such combined payments may be calculated by [the Provider] to ensure that the amount is repaid with interest by the end of the term.

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- 3.4 *[The Provider] shall be under no obligation to see to the adequacy of the Life Assurance Policy to repay the amount advanced or any part of it.*
- 3.5 *The Mortgagor shall on his own account (or at the request of [the Provider]) increase the premiums paid by him to ensure that the projected maturity benefit is sufficient to protect and repay the amount advanced and in particular where such benefit is subject to fluctuation.*
- 3.6 *[The Provider] may on behalf of the Mortgagor pay any such increase referred to at 3.5 which shall be immediately repayable to [the Provider] by the Mortgagor and until repaid shall be a charge on the Property.”*

Having carefully considered all of the evidence before me, I note that the mortgage loan terms and conditions set out the obligations on the part of the Complainants regarding any shortfall on the mortgage loan, and that the Provider was “*under no obligation to see to the adequacy of the Life Assurance Policy to repay the amount advanced or any part of it*”. I note that the Complainants were on notice from 2004 that their endowment policy plan would not have sufficient funds to pay off their endowment mortgage at the maturity date. While I note that the Complainants state that “*the amounts outlined by the companies were best case 6% shortfall paying an amount of €38,748 and worst case 14% paying €35,150*”, the Provider’s letter to the Complainants dated 11 February 2004 contained a warning that “*All future fund values shown above are estimates only... these assumed growth rates are for illustration purposes only and are not guaranteed. Actual growth rates could be more or less than illustrated and will depend on the performance of the underlying assets. The current value is at the date shown and is not guaranteed. This value can rise and fall*”.

I note, however that the Provider’s letter dated 12 March 2004 to the Complainants sets out that “*To make sure you are kept fully informed about your loan repayment plan, we intend to review your endowment loan every three years and will send you an update...*”. It is disappointing that I have not been provided with any evidence that the Provider did review the endowment mortgage loan every three years thereafter, nor that it updated the Complainants in this regard. I note that the next correspondence to the Complainants relating to the shortfall on their endowment mortgage loan was 6 February 2012, four months prior to the maturity date of the mortgage loan.

Consequently, I partially uphold this aspect of the complaint.

(2) The Provider ignored the first Complainant’s request “to negotiate a more favourable outcome to the underperforming endowment mortgage” with a named third party insurance company

The first Complainant submits that he made requests by telephone and in writing for the Provider to approach the insurance company in this regard, however he received no response.

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The Provider states that *"It is unclear as to why the first Complainant was of the understanding that policy values could be negotiated, however it would seem from the first named Complainant's correspondence of 15th May 2012 that this was suggested to him by an agent of the Insurance Federation of Ireland. The Bank is not in a position to negotiate the value of policies and our attempt at doing so at the first named Complainant's request was unsuccessful"*.

The Provider states that it *"refutes the assertion that the first named Complainant's request for negotiation was ignored"*. The Provider submits that it received correspondence from the Complainants on 16 May 2012 requesting that it engage with the insurance company to seek a more favourable final payment for them.

I note that the first Complainant wrote to the Provider on 15 May 2012 stating:

"Since we last spoke I have had a meeting with an official from the insurance federation of Ireland and I have been advised that because the current amount of endowment mortgages are very few and more importantly, the disastrous performance of these policies in recent years. According to the official I spoke to, it has transpired that banks have developed a special relationship with the insurance companies, with regard to negotiating on a case by case basis a more favourable final payment.

I trust [the Provider] can engage with [the insurance company] to see what can be achieved..."

The Provider submits that following this request, its Mortgage Department contacted the insurance company on the Complainants' behalf, and a letter dated 25 May 2012 issued to the Complainants confirming the outcome of its enquiries. The Provider submits that the insurance company informed it that it does not negotiate on the values of policies. The Provider has submitted a copy of its call note for 25 May 2012, which I note, states:

"Reviewed a/c today 25/05/2012, I rang [the first Complainant] today on mobile as per uniscreens and got no answer. Went to voice mail. Have had no response from my message as above so will write to clients today in response to letter as above. I rang [insurance company] today and spoke to [name redacted] and got up to date values. C.V. as of 02/05/2012 is €29,040.00. They confirmed this is the only price and they do not negotiate on this value."

I note that the Provider's letter dated 25 May 2012 to the Complainants states:

"I refer to your letter of 15th May 2012 and would like to outline our position.

Further to your comments stating the banks and insurance companies have a special relationship, I would like to confirm that [the Provider] get the fund values from [the insurance company] on a case by case basis and each time the figures are quoted on the fund value on that day.

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I rang [the insurance company] today and got a current value of your policy, they confirmed the price value was as of 02nd May 2012 and was for €29,040.00. I asked was this the best price and they confirmed that they do not enter negotiations on values. The value received is for the fund value of that day.”

The first Complainant states that “the only copy of this letter I have is the unsigned one sent in the response from the bank on foot of the complaint to the Ombudsman’s office, the address appears to be added at a different time in a different print. Is it possible this letter was not sent to me from the bank. To the best of my knowledge I have no recollection of receiving this letter nor do I have it in my files. Why would I continue to request that [the Provider] approach [the insurance company] if I was aware [it] had already done so... As far as I am aware the last contact I had with [the Provider] about approaching [the insurance company] on this matter was a phone call to [a branch of the Provider]... he told me that he would ring [the insurance company] but he was not optimistic, I have had no contact since. I’m of the opinion a phone call for something this serious is somewhat inadequate”.

The Provider submits that it received a further request from the Complainants on 13 July 2012 requesting a summary of their payments to date, and on 23 July 2012 its representative issued a letter to them along with statements for their mortgage loan account. The Provider submits that the Complainants sent a further letter to its representative dated 14 August 2012, which was referred to its Customer Relations Department, who responded on 24 September 2012. I note that the first Complainant’s letter to the Provider dated 14 August 2012 states, among other things, the following:

“In a previous letter I stated that in a meeting with an official from the Irish Insurance Federation I was advised it was possible for mortgage providers to negotiate a more favourable outcome to a shortfall in these situations, on foot of your reply I have spoken to them again and again I have been assured that in the past and in circumstances just like mine a more favourable final payment was negotiated. If [the Provider] could do anything in this regard I would be grateful.”

I note that the Provider issued a final response letter to the Complainants dated 24 September 2012. It is disappointing that the Provider, in its final response letter dated 24 September 2012, did not address this query by highlighting that it had previously issued the Complainants with a letter in this regard, that is, on 25 May 2012.

The evidence before me indicates that the Provider did investigate the Complainants’ request to “negotiate a more favourable outcome to the underperforming endowment mortgage” with the insurance company. While I note the Complainants submit that they did not receive the Provider’s letter dated 25 May 2012 confirming the outcome of its investigation, the Provider’s call notes indicate that it was the Provider’s intention to issue the letter. That said, the Provider should have informed the Complainants of this again when they raised it in their letter of 14 August 2012.

Consequently, I partially uphold this aspect of the complaint.

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- (3) The Provider failed to inform the Complainants that they should complete a capital transfer form in order to “reduce the balance and the interest amount” of the shortfall figure and that the first Complainant was left to discover the necessity for this “by accident.”**

The Complainants submit that they discovered by accident that their regular repayments were not reducing the principal mortgage loan account balance, and the first Complainant states that *“it has taken me 3 years to be given the correct information”*. The first Complainant submits that he completed the Capital Transfer Form and the interest amount has come down since.

The first Complainant submits that he has received conflicting information from the Provider. The first Complainant submits that he received a letter dated 18 March 2015 from a Manager in the Provider’s Mortgage Department informing him of recent amendments to his mortgage loan, and that the repayments had changed. The first Complainant submits that this letter failed to outline what these changes were. The first Complainant states that he subsequently contacted the Provider and *“In this conversation there was some uncertainty as to these amendments and changes. What I did learn from this phonecall I find quite disturbing, and that is that the money I have been paying towards the shortfall of the endowment policy payout is sitting dormant in my mortgage account and has not reduced original shortfall amount by 1c”*.

The first Complainant submits that on foot of a letter he received from the Provider he made contact with its helpline to question, *“why although I have made regular payments against the shortfall, the interest amount payable monthly, has not reduced by one cent”*. The first Complainant states that *“I was informed because this loan is an interest only account I’m required to pay interest on the full amount of [€]11,597.68 until every cent is cleared. They said if even as little as five euro is outstanding I am still required to pay interest on [€]11,597.68. I consider this stance by the bank to be completely unfair and differs greatly from the expressions of understanding and the sympathetic statements relayed to me in several phone conversations with members of staff of [the Provider], when I informed them that my income comes from an invalidity pension due to long standing and ongoing illness”*.

The Provider submits that it issued correspondence to the Complainants on 11 February 2004 to advise of the shortfall and offering several options to ensure the outstanding principle balance would be addressed before, or on expiry of the loan. The Provider submits that these options included an offer to switch the account to a repayment loan with a reducing balance, and/or a repayment loan with a term extension. The Provider submits that the Complainants did not contact it with a view to availing of these options.

The Provider submits that the Complainants’ mortgage loan account expired on 30 June 2012. The Provider submits that the proceeds of the Complainants’ endowment policy plan were lodged to the endowment mortgage account on 8 August 2012, which resulted in a shortfall amount becoming payable of €11,764.98.

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The Provider submits that following the expiry of the endowment mortgage loan it made efforts to engage with the Complainants with a view to arranging an Alternative Repayment Arrangement (ARA) to address the shortfall balance that had arisen on expiry. The Provider submits that it encouraged the Complainants to complete a Standard Financial Statement (SFS) in order to ascertain if an ARA could be put in place to address the shortfall balance. The Provider states that *"Our records show that the Complainants attended an appointment at their local [name redacted] branch... in order to complete a SFS, but did not complete the relevant documentation at that time. As a result, an ARA could not be put in place on the Complainants' account to address the outstanding shortfall balance"*. The Provider submits that the Complainants did not engage in this process and continued to make interest only payments to the endowment mortgage account after the loan expired.

The Provider submits that on 27 March 2014 the first Complainant contacted it by telephone to discuss the shortfall balance on the mortgage loan account. The Provider submits that its agent offered to arrange for the account to be switched to full capital and interest repayments going forward, however the first Complainant advised its agent that he felt he would not be in a position to clear the shortfall amount outstanding as his income consisted of an invalidity pension.

The Provider submits that its agent advised that another option would be to complete a SFS to ascertain if a formal ARA could be put in place to address the outstanding balance, and provided the first Complainant with some calculations based on its restructure offerings at that time. The Provider states that the first Complainant *"advised that the SFS process had been offered to him previously by the Bank but he did not wish to complete the documentation at that time, and was again reluctant to do so"*. The Provider goes on to state that *"In order to address the shortfall balance outstanding, the Complainant advised the agent that he would commence making increased repayments going forward in the amount of approximately €145 per month. The agent advised that this would not be a formal arrangement, as a SFS would be required for same, but confirmed that the Bank would accept these overpayments to be lodged towards the shortfall balance. The agent advised the first named Complainant that he would be required to complete a Flexible Mortgage Options Form in order to ensure that his overpayment funds would be credited to his principle balance"*.

The first Complainant states that during the telephone conversation with the Provider's representative he was informed that *"because of my financial situation it was acceptable to [the Provider] for me to make regular monthly payments over a nine year period to clear the shortfall. At no time was I informed that the payments being made would be sitting dormant in my account until the full amount of this shortfall was completed. I was of the understanding that payments made would reduce the outstanding balance by the amount paid each month. I am asking you why is this arrangement not been honoured by [the Provider]"*.

Recordings of the telephone calls between the Complainants and the Provider have been provided in evidence.

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I note during the telephone conversation on 27 March 2014, the Provider's representative informed the first Complainant that *"we calculate interest on your capital balance including any surplus of funds any balance of credit, however to get it formally taken from your capital balance for accounting purposes you would need to fill out a flexi options form"*.

The Provider submits that the Complainants commenced making lodgements of €105.00 per month to the account from 31 March 2014 in addition to the interest only billed amount of €41.83 per month. The Provider states that *"However, as the Complainant did not complete the necessary Flexible Mortgage Options Form, these additional funds remained on the account as a credit balance, and were not reducing the principle amount outstanding of €11,764.98"*.

The Provider submits that on 18 March 2015, it issued correspondence to the Complainants outlining the details of their endowment mortgage account. The Provider states that *"I regret to advise that the Bank does not have a copy of this letter on file, however I can confirm that it was automated correspondence to advise of an increase in the monthly interest only repayment amount to €44.31"*. The Provider submits that on receipt of this letter the first Complainant contacted it to query same, and subsequently it received correspondence from him dated 25 March 2015 *"to advise of his dissatisfaction that the additional lodgements to date had not been used to reduce the shortfall balance on the Endowment Mortgage Account"*. The Provider submits that it logged a formal complaint on receipt of this letter.

I note that the Provider's Final Response Letter dated 21 April 2015 to the Complainants set out, among other things, the following:

"I have been advised that the letters you are receiving are automatically generated by our system as there are funds sitting in credit on your Mortgage account. The credit is taken into consideration each month via the interest and this is shown by way of a payment change each month. In order to stop these letters being issued and to apply the credit amount to your Mortgage, you need to request a Capital Reduction by contacting..."

The Provider submits that the Complainants submitted a completed Flexible Mortgage Options Form to it on 11 June 2015, and the accrued credit balance of €1,838.09 was deducted from the principle balance outstanding, reducing it to €9,726.21.

The Provider submits that the additional credits lodged to the Complainants' mortgage loan account are taken into consideration via the interest. The Provider submits that the interest calculated on the mortgage loan account is calculated on the net remaining balance outstanding. The Provider submits that the net balance owing is the balance owing on the loan account minus any additional credit amounts lodged to the mortgage loan account in excess of the monthly repayments due.

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The Provider submits that its records show that since the Complainants began lodging additional funds to the mortgage loan account in March 2014 their monthly repayments have adjusted at least every two months.

The Provider states that *“Notwithstanding the above, the Bank reviewed this matter in December 2016 and found that more of an effort could have been made to advise the first named Complainant of the Flexible Mortgage Options Form/capital reduction procedure. On reviewing the Complainants’ overpayments, the Bank calculated that an amount of €50.07 in interest would not have accrued on lodgements to the account, had the lodgements been applied in reduction of the principle balance outstanding. In light of this, the Bank lodged an amount of €150.07 to the Complainants’ Endowment Mortgage Account on 2nd December 2016, to represent a refund of interest accrued of €50.07 and a gesture of goodwill in the amount of €100.00. The Complainants were advised of this in writing on 6th December 2016”*.

I note that the Complainants were making interest only payments on the mortgage loan account until 31 March 2014 when they commenced making interest and part capital payments. While I note that the Provider’s representative advised the first Complainant that he would need to complete a Flexible Mortgage Options Form during the telephone conversation on 27 March 2014, in circumstances where the Provider did not receive the completed form it is disappointing that the Provider did not contact the Complainants until 21 April 2015 in this regard.

Consequently, I propose to partially uphold this aspect of the complaint.

- (4) Despite the Provider having informed the First Complainant that *“because of my financial situation it was acceptable to [the Provider] for me to make regular monthly payments over a nine year period to clear the shortfall”*, this *“arrangement has not been honoured.”***

The first Complainant states that during a telephone conversation with the Provider’s representative he was informed that *“because of my financial situation it was acceptable to [the Provider] for me to make regular monthly payments over a nine year period to clear the shortfall”*.

The Provider submits that the first Complainant contacted it on 27 March 2014 to discuss the shortfall balance owing on the account in the amount of €11,764.98. The Provider submits that the Complainants had been successfully repaying the interest only repayments to the account every month in the amount of €41.83, but had not made any payments towards the shortfall balance.

The Provider submits that during the course of the call, its agent discussed the options available to the Complainants including the option to switch the account to a repayment loan, where the repayments would be full capital and interest going forward.

The Provider submits that the first Complainant advised that this may prove difficult in his financial circumstances as he was in receipt of an invalidity pension. The Provider submits that its agent advised that the Complainants could complete a SFS with a view to ascertaining if an ARA could be applied to the account to address the shortfall balance. The Provider states that its agent *“provided some calculations to the first named Complainant based on the Bank’s current restructure offerings at that time. These calculations included a restructured repayment amount of €145 per month for a period of 8 years (96 months). The first named Complainant advised the agent that he found the SFS process to be quite daunting and was reluctant to engage in same”*.

The Provider goes on to state that *“As an alternative, the first named Complainant advised that he would commence making overpayments to the mortgage account in an effort to address the shortfall balance. The agent informed the Complainant that without completing a SFS, these payments would not be considered a formal arrangement, but would be accepted towards the shortfall balance outstanding”*.

The Provider submits that it did not offer a formal ARA to the Complainant, as to offer same would have required the completion of a SFS for assessment. The Provider submits that it advised the Complainants of this process but they did not engage with it in this regard. The Provider states that *“While the Complainants commenced making overpayments to the account in the additional amount of €105 per month, this does not constitute a formal arrangement and these payments were accepted on a without prejudice basis”*.

I note during the telephone conversation the Provider’s representative went through some options with the first Complainant to include making monthly repayments of €145 over 96 months. I must accept that this was not a formal arrangement. The Provider’s representative advised the Complainant that he could commence making these repayments and it would start reducing the balance outstanding, however if the Complainants wished to enter into any kind of formal arrangement with the Provider then they would need to complete an SFS.

Consequently, I do not uphold this aspect of the complaint.

(5) The Provider has requested that the Complainants repay the shortfall balance in full despite being aware that the First Complainant’s *“income comes from [an] invalidity pension and I don’t have the money [it is] demanding.”*

The first Complainant submits that throughout the latter stages of the term of the mortgage loan, the Provider sent him numerous letters advising that he needed to make a lump sum payment to the account to cover the shortfall. The first Complainant states that *“at this stage nobody was aware of what the shortfall might be, in recent months I have received phone calls from [the Provider], all requesting the payment in full of the outstanding amount in order to clear the account, they are fully aware my income comes from invalidity pension and I don’t have the money they are demanding”*.

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The first Complainant submits that one of the Provider's representatives requested that he take out a personal loan to cover the shortfall, and another of the Provider's representatives *"suggested that I would be given a writedown if things were better in the bank"*.

The Provider submits that it is not its policy to accept a sum less than the full redemption balance as full and final settlement of the debt. The Provider states that it *"understands that this is a difficult time for many of our customers and will at all times try to engage with our customers to find a resolution appropriate to all parties concerned"*.

The Provider submits that since the mortgage loan account expired and the balance owing has become due it has attempted to engage with the Complainants in an effort to put a plan in place to address the shortfall balance. The Provider states that *"As the outstanding shortfall balance was now noted as arrears on the account in accordance with the terms and conditions, the Bank treated the Complainants' Endowment Mortgage Account under the Mortgage Arrears Resolution Process (MARP), as outlined by the Central Bank's Code of Conduct on Mortgage Arrears (CCMA)"*. The Provider submits that it issued correspondence to the Complainants every 3 months to inform them of the status of the account, which also stated:

"If you are not in a position to pay this amount in a lump sum, we are prepared to accept repayment by instalments over a period of time. At [the Provider], we appreciate that you may require some specific and expert help at this time and we will treat your loan under our Mortgage Arrears Resolution Process (MARP) which we have put in place to help our customers who are in difficulty with their mortgage repayments".

The Provider submits that it also contacted the Complainants by telephone in order to discuss the arrears. The Provider submits that it requested that the Complainants complete a SFS for assessment, in order to ascertain if an ARA could be put in place to suit their particular financial circumstances. The Provider states that *"The Complainants were reluctant to engage in this process and it is noted that they attended a branch appointment on 13th September 2013 but did not submit the necessary documentation [or] complete the SFS at that time"*.

The Provider states that *"The first named Complainant made the Bank aware that his income was from an invalidity pension and same was noted by the Bank. However, as discussed with the Complainants on several occasions, the Bank required a completed SFS and supporting documentation from the Complainants before an Alternative Repayment Arrangement could be offered"*. The Provider goes on to state that *"It is important to note that the Complainants did not complete a SFS until 31st July 2017. Without receipt of a SFS, the Bank was unable to assess the Complainants' circumstances in order to apply an Alternative Repayment Arrangement to the account. As a result, the arrears balance of €11,764.98 remained due in full and payable immediately on the account"*.

The Provider submits that the first Complainant submitted a SFS on 31 July 2017 and the second Complainant submitted a SFS to it on 18 August 2017. The Provider states that *“However, as the Complainants did not submit the necessary documentation required with a SFS, the Bank could not proceed with the assessment process. This was communicated to the Complainants in writing on 23rd August 2017... and the specific missing documentation was requested. However, to date same has not been received by the Bank. As a result, the Bank has to date been unable to formally apply an Alternative Repayment Arrangement to the Complainants’ Endowment Mortgage Account. The Bank continues to issue regular correspondence to the Complainants... to inform them of the account status, in accordance with CCMA”*.

I must point out that the Provider is not obliged to provide the Complainants with an alternative repayment arrangement. The Complainants have a contractual obligation to repay the mortgage in full and in the terms originally agreed. This Office can investigate the procedures undertaken by the Provider regarding the Mortgage Arrears Resolution Process, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints.

I note that the first Complainant did not complete and submit an SFS to the Provider until 31 July 2017 and the second Complainant on 18 August 2017. As the Complainants did not furnish the Provider with the necessary documentation required with the SFS, the Provider did not have an opportunity to assess the Complainants’ application for an alternative repayment arrangement. I note that the Provider submits that it is still willing to engage with the Complainants in order ascertain if an ARA can be put in place to address the outstanding shortfall balance.

Consequently, I do not uphold this aspect of the complaint.

(6) The Provider refused the first Complainant’s request for an interest rate reduction on the amount owing on the Complainants’ mortgage loan account.

The first Complainant submits that he is still paying the full interest rate of 4.50%, about 2% above the E.U. average. The Complainant submits that new customers of the Provider get a much better interest rate.

The first Complainant, in his submission to this Office dated 29 September 2015, states that *“The bank recently made an interest rate cut, with this in mind I rang the mortgage section of [the Provider] to ask if I would be getting this reduction, I was told I would be getting a letter in this regard that I needed to sign and return, to date I have not received any letter. In one of my most recent phone calls from [the Provider’s] Collection Dept. I asked about the rate cut, I was informed “my type of loan will not get the benefit of this rate cut”*.

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The Provider submits that it sets its interest rate at its discretion and such decisions are commercial in nature. I note that the General Mortgage Loan Conditions state the following:

***“IF THE LOAN IS A VARIABLE RATE LOAN
THE FOLLOWING APPLIES:***

***“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE
LENDER FROM TIME TO TIME.”***

Condition 1.10 of the General Mortgage Loan conditions states:

“1.10 Whenever the Directors of [the Provider] in their absolute discretion consider it desirable the interest rate payable under this advance may be varied”

The Provider submits that in September 2015 it launched its Managed Variable Rate (MVR) Switch Offer to its existing Variable Rate customers. The Provider submits that this Offer invited over 70,000 of its customers to apply to switch from their Variable Rate Mortgage Accounts to the new Managed Variable Rate Mortgage Account. The Provider submits that the new MVR Mortgage Account would have an interest rate applied based on the current Loan to Value ratio of the mortgaged property. The Provider submits that it issued all eligible customers correspondence on 3 September 2015 inviting them to apply to switch to the new MVR Mortgage Account. The Provider states that *“To be eligible to switch to the MVR Mortgage Account, a customer had to be on an existing Standard Variable Rate Mortgage Account, within the original term of the loan. I wish to confirm that the Complainants’ Endowment Mortgage Account was not eligible for this offer, as the term had expired on the account on 30th June 2012”*.

The Provider goes on to state that *“I regret to advise that I cannot locate the telephone call referred to by the first named Complainant however I can confirm that if the Complainants’ Endowment Mortgage Account would have been eligible for the Bank’s MVR Switch Offer, the Bank would have issued correspondence to the Complainants inviting them to switch and enclosing the relevant MVR Switch Application Forms. As they were not eligible to apply, no correspondence was issued to the Complainants in this regard”*.

I must accept that the setting of the variable interest rate, is a matter which falls within the Provider’s commercial discretion. I take the view that it is also at the Provider’s discretion to determine what rates it offers to new and existing customers. While it may be perceived that this is somewhat unfair to existing customers, that they cannot avail of these lower rates, ultimately, it is the case that a Provider has a discretion as to the nature and content of the products which it offers and that it is entitled to take certain criteria into consideration when setting rates for new business customers and, in doing so, is entitled to have regard to a variety of factors including its competitive position in the market.

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This Office will not, however, interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant. I can find no wrongdoing on the part of the Provider with regard to the interest rate applied to the Complainants' mortgage loan, and accordingly, I do not uphold this aspect of the complaint.

To conclude, having carefully considered all of the evidence before me, I am satisfied that the Provider's actions have been, for the most part, satisfactory, and the substantive complaint cannot, therefore, be upheld.

For all of the reasons outlined above, I partially uphold this complaint and direct the Provider to make a compensatory payment to the Complainants in the sum of €1,500.00.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2) (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €1,500.00, 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**

6 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.

