



<u>Decision Ref:</u>	2019-0287
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Personal Loan
<u>Conduct(s) complained of:</u>	Application of interest rate Dissatisfaction with customer service
<u>Outcome:</u>	Rejected

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

Background

The complaint relates to a term loan which the Complainant held with the Provider and to notification given to the Complainant towards the end of that term that further payments over and above those envisaged at drawdown would be required. The complaint is that the Provider administered the Complainant's loan in an unreasonable manner. The complaint also relates to alleged mis-selling of the loan product.

The Complainant's Case

The Complainant opened a loan account with the Provider in June 2007 and drew down a loan of €30,000 for the purposes of home renovation, which was to be repaid over 10 years subject to a variable interest rate of 8.1%. Monthly repayments, at the point at which the loan was drawn down, were calculated in the amount of €365.56. The Complainant duly made monthly repayments in that amount by way of direct debit.

In February 2016, almost nine years into the repayment schedule, the Complainant received correspondence from the Provider indicating that the repayments to date would not be sufficient to clear the loan by the anticipated date of expiry of the loan in June 2017 and that a further payment of €8,063.65 would be required. This was said to have arisen due to the fact that interest rates had increased over the term of the loan whereas the repayment amounts had not changed. The Complainant contends that the Provider ought to have

increased his monthly repayments upon any interest rate increases so that the loan would have been paid off in full at the end of the original term of the loan.

The Complainant also contends that the term loan was not a suitable product and should not have been offered to him. The Complainant submits that the Provider should have, in light of the positive equity the Complainant had in his home, advanced the Complainant the requested €30,000 via a top-up of his mortgage loan (or a re-mortgage) which would have meant that the lending would have been subject to a rate of 4.5% only. This aspect of the complaint was articulated only after the original complaint was made to this office and was set out in correspondence of June 2017.

In correspondence of 15 October 2018, the Complainant quantified, for the first time, the saving that he states he would have made in interest repayments which he calculated in the amount of €16,820. The total figure 'overcharged', when penalties and interest applied subsequent to the term expiry date are taken into consideration, was calculated in the amount of €18,633.

The conduct complained of is maladministration in that the Provider sought further payments from the Complainant towards the end of the term of the loan.

The Complainant also relates to alleged mis-selling of the loan product.

The Complainant originally sought that the Provider "*write off the outstanding balance (overcharged interest) that occurred because they didn't increased [sic] monthly repayment when the interest rate was changed*". This originally amounted to a request for a write-down in the amount of €8,063.65 however in more recent correspondence, the Complainant seeks compensation in the amount of €18,633.

The Provider's Case

The Provider in this case was not afforded the opportunity to respond to the 'overcharging' aspect until the original complaint had been made to this office. The Provider then emailed this Office on 3 September 2018 in the following terms:

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

We wish to extend a sincere apology to the Complainant and would like to offer the Complainant, as a gesture of goodwill, the sum of €7,652.00 in full and final settlement of the complaint.

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The Complainant declined this offer. However, the Provider has confirmed that the offer remains open for acceptance, should the Complainant wish *“to accept at a later date”*.

With regard to the Complainant’s argument that he should have been offered the funds within his mortgage account and subject to the same terms applicable thereto, the Provider states that *“the Bank’s Credit Policy at that time required a minimum loan amount of €40,000.00 to qualify for an Equity Release Mortgage product, therefore this product would not have been available to the Complainant”*.

Decision

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

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

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

A Preliminary Decision was issued to the parties on 15 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.

Following the issue of my Preliminary Decision the Complainant under cover of his e-mail to this Office dated 17 July 2019 sought clarification on the Preliminary Decision. Following receipt of the clarification sought, the Complainant then advised this Office under cover of his letter dated 24 July 2019 that he would accept the Provider’s settlement offer.

Having considered the Complainant’s correspondence and all of the submissions and evidence furnished to this Office, I set out below my final determination.

Mis-sale of the Product

The first aspect of this complaint contends that the Provider mis-sold the Complainant the term loan product and that it should have advanced him the €30,000 within his existing mortgage loan via a top-up or restructure. The mechanism within the Provider's business through which such an outcome is achieved is an 'Equity Release Mortgage'.

The Provider has stated that the Complainant did not qualify for such a product at the time that the application was made:

Please note that the Bank's Credit Policy at that time required a minimum loan amount of €40,000.00 to qualify for an Equity Release Mortgage product, therefore this product would not have been available to the Complainant.

The criteria by which a financial services provider accedes to a request for credit is a commercial decision. A lending institution has a broad discretion (subject to the provisions of the Code of Conduct) over a commercial decision such as whether, and under what terms, to offer an Equity Release Mortgage. The Complainant was not compelled to accept the terms offered to him. Rather, the Complainant entered into a written agreement with the Bank following the Bank's issue of a loan offer in the form of the credit agreement. The Complainant was free to decline the Bank's offer however he chose to accept the terms presented to him and in doing so agreed to be bound by these. On that basis, I have not been provided with evidence of mis-sale of the loan.

Maladministration

The second aspect of this complaint regards the notification provided in February 2016 to the effect that a further payment of €8,063.65 would be required following the termination of the original envisaged term of the loan. The Provider has indicated that these payments could be made by way of a lump sum, by continuing the existing repayments for a further period, or by increasing the payments to be made in the remaining period of the original term. It was explained that the necessity for this arose from various interest rate increases since the drawdown of the loan which rendered the cost of the credit more expensive than envisaged at drawdown.

The Complainant states that this was unfair and that he was not given access to all three of the possible options for payment as they occurred. By acting as it did, the Provider has made it possible only for him to make the additional payments rather than be able to extend the loan or make larger monthly payments over a longer period of time. This, he states, is unreasonable and oppressive.

Policy Terms and Conditions

Prior to considering the complaint of maladministration, I will set out certain terms and conditions of the loan account in question:

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The 'Consumer Term Loan Variable Rate' Credit Agreement signed by the Complainant contains the following provision:

Term Loan Variable rate * (Currently 8.100% PA) Personal Rate

...

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

The General Terms and Conditions Term Loan annexed to the Consumer Term Loan Variable Rate Credit Agreement contains the following provision:

5 Interest and Repayment

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

...

(d) *In the event of any variation in the interest rate applicable to the Loan, we shall give notice of such variation to you by:*

- i. Advertisement published in at least one national newspaper or*
- ii. A statement addressed to you. As a result of any change in the interest rate we may vary the amount of the instalments or the Period of the Agreement or both.*

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

7 Change in APR

The annual percentage rate of charge, or APR, as defined in the Consumer Credit Act 1995, is designed to indicate the total cost of credit to the consumer on a percentage basis.

It is measured on the basis of circumstances prevailing at the date of issue of a credit agreement. The APR in this Agreement may change if the interest rate changes during the currency of this Agreement or between the dates of issue of this Agreement and the drawdown of the Loan or if the interval at which interest is to be debited to your account changes.

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The Provider's Right to change Interest Rates

With regard to any variation in interest rate made by the Provider, I accept that, on the basis of paragraph 5(a) of the General Terms and Conditions, the Provider is entitled to raise the interest rates on a variable rate loan at its discretion. In the event of such an increase occurring, I also accept that one of the options open to the Provider, pursuant to 5(d)(ii), is to maintain the constant level of repayments while extending the period of the agreement. The payments were not increased over the term of the loan, nor did the Provider seek to increase them.

Option 5(d)(ii) is subject to an obligation on the Provider to inform a customer of the variation in the interest rate. In accordance with 5(d) above, it is open to the Provider to effect this notification by way of statements addressed to the customer or by way of advertisement published in at least one national newspaper.

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

Providing Information about the changes

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

- 28 November 2007 from 8.1% to 8.6%
- 28 April 2008 from 8.6% to 9.6%
- 14 July 2008 from 9.6% to 10.1%
- 1 April 2010 from 10.1% to 11.4%

The Provider submits that all interest rate changes were advertised in at least one national newspaper in accordance with the terms and conditions of the Term Loan account. The Provider has submitted copies of the interest rate change advertisements dated; 27 November 2007, 28 April 2008, 14 July 2008 and 31 March 2010.

An increase in the interest rate of a variable loan is arguably the most significant event in the history loan, from a borrower's perspective. In the case of the Complainant, it resulted in a demand for almost €8,063.65, in additional payments on a €30,000 loan. It was incumbent upon the Provider to ensure that its newspaper advertisements were clear so that customers who did read them would understand that they were affected and how.

The newspaper advertisements did not make clear which loans were affected and, in particular, did not clearly state the particular loan which it had styled "Consumer Term Loan Variable Rate" in its own documentation, was affected by the rate increase. There is also a lack of consistency in terminology within, and between, the relevant advertisements. I think it is reasonable to expect the Provider, knowing that it was communicating with consumers, to use the same terminology in its loan documentation and in the newspaper advertisements or, if using an umbrella term in a heading, that it could also list each of the loans affected by the rate increase.

For example, in the advertisement of November 2007, the loans affected by the increase of 0.5% are described as "Variable Rate Personal Loans". In the advertisement of 28 April, 2008, the loans affected by an increase of 1% are described in the heading as "Variable Rate Personal Loans" and in the body of the notice as "Personal Variable Loans".

The advertisement of 14 July 2008 is not clear. The loans affected by a .5% increase are described as "Variable Rate Term Loans"; while this may be closer to the terminology in the Loan, the advertisement goes on to explain that "variable rate AA and AAA term loans" are affected. Not only are the terms "AA" and "AAA" not defined, there is nothing in the loan documentation to suggest that it was such a loan.

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

I do note that the Provider also submits that it updated the information on its information services including telephone helplines and websites as soon as the change came into effect.

Annual Statements

The Provider has also stated that it furnished the Complainant with annual statements which "*included details of the increased Interest Rates*" on the following dates:

05/06/2008, 05/06/2009, 04/06/2010, 03/06/2011, 01/06/2012, 31/05/2013, 30/05/2014 and 29/05/2015.

The Provider submits that these statements gave a twelve-month summary of the reducing balance on the variable rate term loan account, the repayment amounts applied, the interest amounts deducted and a reference to any interest rate changes that had occurred. The Provider states that the following message was included on all statements from 2011:

"A variation in the no. of payments left may arise because of a change in interest rate, your repayment or any late repayments or arrears. At the current payment

levels we estimate your payments to... increase by X' (X denoted the number of payments)"

However, I also note from the submissions that the Provider has not supplied a copy of these statements. The Provider has only submitted a copy of the overall account statement issued to the Complainant showing all payments to and from the loan account from June 2007. Therefore I have no evidence that the message above was conveyed to the Complainant.

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

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

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

Letter Informing Complainant of the outstanding amount or additional repayment period

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

"We are writing to you in connection with your variable Term Loan... taken out on 12/6/2007.

The loan was taken out for 120 months, and therefore under the terms of the loan agreement is due to be repaid in full on 12/06/2017 (the "Date of Expiry").

We would like to give you some advance notification that the current repayment schedule, which provides for 21 Repayment Instalments of €365.56 between now and the Date of Expiry, will not be sufficient to clear the loan in full. A further

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payment of €8,063.65 will be required as at this time. This shortfall is as a result of the following:

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

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

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

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

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

If you choose Option 1, we expect, based on current interest rates and the repayment of amounts due, that an additional 23 repayments(s) will be required. The final payment will be for the then outstanding balance and may not be a full Repayment Instalment.

Should you decide on Option 1 we will continue to collect these payments, unless you have repaid the loan in full by the date of expiry. If you want to discuss Option 2 and/or Option 3 and have any queries in relation to your account please do not hesitate to contact our Customer Service Team directly on...

You can also call into your local Branch where one of our personal lending team will be happy to assist you."

Whilst the Provider argues that it operated within the terms and conditions of the credit agreement, I am of the view that the Provider could have furnished the Complainant with clearer information in relation to the interest rate increases and his options, including an option to increase his monthly payments to avoid a shortfall occurring on the date of expiry of the loan. I consider that this would have been most helpful to the Complainant on each of the occasions when there was an increase in the interest rate: had the Provider made clearer information available, at the time, about the options, the Complainant would have had more time to prepare or may have taken a different course of action.

I believe it was unreasonable for the Provider neither to increase repayments, nor at least provide the Complainant with the option of increasing the payments on the Loan around

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the time that interest rates rose, particularly when two of those increases occurred before the first-year anniversary of the Loan and where instalments were being paid by way of direct debit which the Provider had the power to increase, as a result of the “*Payment Instructions*” portion of the loan application. In addition, the Provider could have made it clearer in the early stages of the interest rate increases that the option to extend the overall period of the agreement was open.

Provision 4.1 of the Consumer Protection Code 2012 states that:

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

For the reasons set out above, I do not accept that the Provider has communicated as clearly as it should with the Complainant, as required by the Consumer Protection Code.

I do not consider that the Provider has acted reasonably in relation to this complaint. Its procedure for advising the Complainant of the changes to rates of interest and the implications of those changes was inadequate. By not advising the Complainant of his full range of choices in a timely manner, the Provider denied him the opportunity to make provision for the changes.

I note that the Provider has made an offer of the sum of €7,652.00 in compensation as a gesture of goodwill in full and final settlement of the complaint, as well as an apology. Although this offer was originally declined by the Complainant, I note that the Complainant, after I issued my Preliminary Decision, agreed to accept that offer of settlement.

On **10 May 2019**, I sought clarification from the Provider on the implications of its offer of compensation on the ICB and CCR record of the Complainant.

The Provider responded **21 May 2019** stating that it would amend the ICB and CCR record, should the Complainant accept its offer of compensation in the amount of €7,652, removing any reference to an arrears balance.

The Complainant replied on **27 May 2019** questioning if the Provider would lodge this to term loan account ending in 3414 which would, ‘bring the account up to date’. The Complainant noted that he does not have access to that account and was unsure whether this would clear the balance on the term loan. He sought clarity if the remaining balance would be zero.

The Provider responded on **30 May 2019**, that the outstanding balance on the loan was then €9,375.71 including an arrears balance of €7,676.76. Should the offer of €7,652 be accepted the outstanding balance would be €1,723.71 which would remain payable by the Complainant in four instalments of €365.56 and a final repayment of €261.47.

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On **11 June 2019**, the Complainant stated the outstanding amount of €1,723.71 is the debit interest and penalties which the Provider applied to the loan account and that he feels it is an unfair demand. The only offer he would be prepared to accept is €9,375.71.

On **28 June 2019**, the Provider answered that the Complainant is obligated to pay the debt in full, together with interest, penalties and charges that may have accrued. The Provider believes the offer of €7,652 is reasonable and is not in a position to write off the balance.

The Complainant had originally rejected the Provider's offer but has since agreed to accept it. In this regard I believe it is important to note that the Complainant had seventeen months' notice, in very clear terms, before the end of the loan that the interest rate had increased and the additional money was due. For this reason, I believe the offer made by the Provider was reasonable in all the circumstances and I note that the Complainant accepted the offer after I issued my Preliminary Decision.

For the reasons set out above, I do not 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.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

23 September 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.