



<b><u>Decision Ref:</u></b>	2019-0294
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Increase in interest rate Failure to provide accurate account/balance information
<b><u>Outcome:</u></b>	Rejected

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

**Background**

The Complainants entered into a commercial loan facility with the Provider in **2005**, which they have referred to as a “Tracker Loan Account”. The Complainants submit that the Provider failed to record and acknowledge an interest-only arrangement in respect of their loan account that was in place between **March 2012** and **August 2013**. The Complainants submit that the Provider increased the interest rate on their loan account between 2005 and 2013 from 0.75% to 1.25%. Furthermore, the Complainants state that repayments made between 2005 and 2010 which were €1,000 above their contracted repayment amount, were not reflected on their loan account statements. Finally, the Complainants state that the Provider maintained an incorrect balance on their loan account, arising from its failure to correctly calculate the amount of unpaid capital that had accrued when interest-only arrangements were in place.

**The Complainants’ Case**

The Complainants refer to their Letter of Sanction dated **22 March 2005** in respect of a borrowing of €1,136,806 and state that their interest rate has increased “*from 0.75% in 2005 to 1.25% in 2013*”. The Complainants further submit that their loan account balance as of **April 2015** is stated as €1,057,640 however, the actual balance should be lower than this figure.

At the request of the Provider the Complainants paid a lump sum figure of €78,208 to bring the loan account balance up to date after a period of interest-only repayments [This figure is used by both parties throughout their submissions and in certain documents however, the correct figure appears to be €78,206]. The Complainants state that the Provider's repayments schedule shows at repayment number 120, that €880,739.18 is outstanding on their loan account. However, the Complainants' loan account statements show an outstanding balance on their loan account of €1,057,640.18. When the lump sum payment is subtracted from this figure the Complainants state that the difference between the two account balances is €176,901.

The Complainants state *"We got no credit for the increased repayments months 6 to 57 ... We paid €1,000 per months extra ..."* over a period of 49 months between **1 November 2005** and **1 February 2010**. The Complainants state that this is not reflected in their loan account statements.

### **The Provider's Case**

The Provider states that the interest rate applying to the Complainants' loan account is as stated on the Letter of Sanction dated **22 March 2005** i.e. *"Prime Rate Varying Plus 0.75%"* which on the date of the loan offer, was 3.375% (the **First Letter of Sanction**). The Provider states that the Prime lending rate was not removed from the Complainants' loan account at any stage. The Letter of Sanction dated **4 February 2013** (the **Second Letter of Sanction**) was not formally drawn down, as all of the special conditions contained in the letter were not fulfilled by the Complainants. Therefore, there was no change in the interest rate being applied to the Complainants' account.

The Provider submits that had the revised facility been formally put in place, then any change in the interest rate would have been reflected on the loan account. The Provider points to a letter dated **15 May 2014** to confirm this.

The Provider states that when the Complainants received copies of documentation on foot of their subject access request (**SAR**) one of the items they received was a memorandum dated **19 October 2012** called *Commercial Banking Price Adjustment*. In respect of this the Provider acknowledges:

*"This document clearly states that a period of interest only was agreed from March 2012 and the [Provider] apologises that this did not come to light earlier and that the [Provider's] system did not accurately reflect what was agreed with the Complainants at the time."*

The Provider acknowledges that an interest-only period was discussed between the Complainants and their case manager around **March 2012**. The interest-only period was due to commence in **March 2012** and a review of the account was to be scheduled for **December 2012**. The Provider states that it does not have a letter of sanction for this interest-only

period however, it accepts that when the Complainants began making interest-only repayments in **June 2012**, they understood this to be the case.

The Provider states that regardless of the fact that the special conditions contained in the Second Letter of Sanction were not fulfilled, on **15 August 2013** the interest-only period as set out in this letter of sanction was inputted into the Provider's internal system and an amendment was made to the Complainants' borrowing placing the account on interest-only. This interest-only period remained in place until **April 2015**. The Provider confirms that the Complainants made interest-only repayments for the period **March 2012** to **April 2015**. In light of this, in August 2018, the Provider stated:

*"In summary:-*

- *The [Provider] fully accepts the Complainants' understanding that an interest only period was verbally agreed to be in place from March 2012 and we apologise that it has taken so long for the [Provider] to correctly understand the position.*
- *On the basis that there was an agreed period of interest only from March 2012, this alters the position in respect of the account.*
- *In particular, in April 2015 a figure of €78,208 was provided to the Complainants in order for the Complainants to bring the loan account balance up to date, so the original repayments as per the Terms & Conditions of the Letter of Sanction dated 22<sup>nd</sup> March 2005 could be resumed.*
- *This information was incorrect and the [Provider] will explain this further in our response ..."*

The figure of €78,208 was calculated on the basis that the Complainants were not making the contracted repayments and were making interest-only repayments between **March 2012** and **August 2013**. The Provider states that it appears that the Complainants' case manager calculated that figure of €78,208 by subtracting authorised limit balance of €1,057,642 from the actual account balance of €1,135,848 as per an email dated **21 November 2014**. The Provider *"accepts that the amount of €78,208 should not have been classed as arrears as the account should have been on an interest only schedule."* The Provider states that the Complainants' loan account was placed on interest-only repayments on its internal system in **August 2013** until **April 2015**.

From **October 2014** until **April 2015** the Complainants' advisor was in contact with the Provider in an effort to arrange for the Complainants to return to their contracted repayments. Their advisor was informed that the Complainants were required to repay outstanding arrears of €78,208 before they could revert to the terms contained in the First Letter of Sanction. This figure represented the amount of arrears on the Provider's system for the period **March 2012** to **August 2013**. The Provider acknowledges that the Complainants were not given the correct figure of €278,190.14 which was the total amount of capital that was not repaid during the entire period of **March 2012** to **April 2015**.

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The Provider states that as the Complainants were only advised to pay €78,208, the overall outstanding balance which included the missed capital payments was €199,982.14 higher than what was advised. It is for this reason the Provider submits, that the Complainants' monthly repayments were calculated to be €10,359.30 to ensure clearance of the loan within the contracted expiry of **30 March 2024**. The Provider states that in order to achieve this, the loan repayments did not revert to the previously agreed repayments of €8,900. The Provider states that the Complainants' *"... account was in order as of 30 August 2013 and all interest repayments had been paid by the Complainants. Although some interest payments were not received exactly on time, they were repaid at a later date."*

The Provider states that the Complainants' loan account statements show all repayments made by the Complainants to their loan account from the date of loan drawdown, to that date of its written submission to this Office. It submits that it is evident from reviewing these statements that the Complainants were making the contracted repayments of €9,511 from **31 March 2005 to 2 October 2006**. The interest rate during that period increased: the Prime Rate Varying Plus 0.75% as of 31 March 2005 was 3.375% and the rate as of October 2006 was 4.625%. The Provider states that the monthly repayments increased from €9,511 to €10,500 commencing on **31 October 2006** which continued until **28 February 2011**. This represented an increase of €989 above the contracted monthly repayments.

The Provider states that the variable interest rate continued to increase during the following 12 to 24 months however, the Complainants' repayments remained at €10,500 per month. The total interest rate including the agreed margin was at its highest point at 6.5% (Prime rate plus 0.75%) in **October 2008**. After this, the interest rate dropped consistently over the next 2 to 3 years to as low as 1.625% (Prime rate plus 0.75%) during 2009 and 2010. The Provider refers to the fluctuations in the interest rate on the Complainants' loan account from the date of drawdown, in the Schedule of Evidence which it has furnished, in response to the complaint. The Provider submits that the Complainants' repayments remained consistent at €10,500 per month for this period and consequently, a monthly repayment at this level would have resulted in the loan being repaid earlier or later than the agreed term, depending on fluctuations in the prevailing interest rate. In addition, the Complainants' repayment amount, at a time when interest rates were decreasing, had the potential to place the loan ahead of schedule. The Provider states that in practice a consistent repayment amount on a loan with a variable interest rate will ultimately result in repayments being higher or lower than the amount actually required to repay the loan within the agreed term.

The Provider states that it appears that it was the Complainants' decision to increase the repayments on the loan. On **23 February 2011**, the Complainants wrote to the Provider requesting lower monthly repayments in line with a reduction in interest rates which was 2.125%. As per the advice of their accountant, the accelerated repayments up to that point were leaving the Complainants open to a tax liability. The Provider states that the new repayment amount was communicated to the Complainants by letter dated **24 February 2011**. This letter advised the Complainants that any adjustment in the interest rates would not automatically adjust the amount of the instalment and they would need to contact the Provider if they wished to amend the repayments. All other terms and conditions contained in the Complainants' Letter of Offer would continue to apply. The Provider points out that

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its letter does not acknowledge that the Complainants' loan repayments were €42,549.25, ahead of schedule.

In respect of its compliance with the Code of Conduct for Business Lending to Small and Medium Enterprises 2009 and 2012 (the **Code**) the Provider acknowledges that it did not fully comply with the Code but endeavoured to adhere to its general principles. Further to this, the Provider points out that it is not satisfied that its Final Response letter dated **23 March 2017** read in conjunction with its letter dated **15 March 2017** "... *adequately represents our response to all the elements of this complaint.*" Further to this, the Provider states:

*"In summary, the [Provider] has incorrectly held the position that it had not agreed a period of interest only with the Complainants in March 2012. In addition, the [Provider] also provided the incorrect figure to the Complainants in April 2015 as to what they were required to pay towards the loan account so as to bring the balance of the account 'up to date' as if the 'interest only' period had never existed and for the Complainants to resume monthly payments of €8,900.00."*

The Complainants have furnished further submissions to which the Provider has responded in an effort to provide further clarity to the matters raised in this complaint.

### **The Complaint for Adjudication**

The complaint is that the Provider:

1. Wrongfully increased the Complainants' interest rate from Prime Rate Varying Plus 0.75% in **2005** to Base Rate Plus 1.25% in **2013**;
2. Failed to correctly record the Complainants' loan account balance:
  - i. firstly, following the payment of €78,208; and
  - ii. secondly, on foot of the increased payments made between **November 2005** and **February 2010**.

### **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.

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

A Preliminary Decision was issued to the parties on 9 July 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

**Complaint 1**

The First Letter of Sanction states that the interest rate applicable to the Complainants' loan account is *"Prime rate varying, plus 0.75% per annum, currently 3.375% per annum."*

The Second Letter of Sanction provided for a *"Base Lending rate varying, plus 1.25% per annum, currently 1.445% per annum."*

The Provider asserts that the Second Letter of Sanction never came into effect, due to the non-fulfilment of certain of the special conditions contained in this letter. The Complainants do not dispute this.

The Complainants have not identified when they believe that the increase in the interest rate from 0.75% to 1.25% occurred. It is the Provider's position that the Complainants' interest rate was always set at its Prime interest rate. This is a variable interest rate and is therefore subject to change and, as the Complainants' account statements demonstrate, it has fluctuated significantly over the term of the loan.

The Provider's submissions include a document recording the interest rates applied to the Complainants' loan account between **1 April 2005** and **17 July 2018**, which is the Prime Rate on the relevant date, plus 0.75%. I am satisfied that this is in line with the terms of the First Letter of Sanction. Furthermore, the Complainants have not challenged this document nor have they furnished any evidence which contradicts the interest rates applied by the Provider to their loan account. In light of the submissions of the parties and the documents furnished to this Office, I do not accept that the Provider wrongfully increased the Complainants' interest rate in the manner alleged by the Complainants.

**Complaint 2(i)**

This aspect of the complaint arises from the Provider's failure to record and acknowledge that the Complainants' loan account was subject to interest-only repayments between **March 2012** and **August 2013**. The Provider refused to acknowledge that the Complainants' loan account was subject to interest only repayments during this period. However, it was not until the Complainants made their Subject Access Request, pursuant to data protection legislation, that a document called *Commercial Banking Pricing adjustment Memorandum* dated **19 December 2012** revealed that such an arrangement had been agreed between the Provider and the Complainants. The relevant part of this document states:

*"In March '12, facility of E1137k placed on interest only to December '12 and we are currently proposing continuation of interest only until October 2013."*

Subsequent to this, in an email dated **22 October 2014** from the Provider to the Complainants' advisor, the Provider states:

*"In April 2012 clients requested 12 months interest only and the [Provider] agreed to same subject to the existing rate changing from Prime +0.75% to BLR +1.25%."*

From the documents furnished in evidence, by the parties, the Provider first informed the Complainants' advisor of arrears on their loan account of €78,206, by email dated **19 November 2014**. It is accepted that this was an incorrect calculation.

The Provider issued two letters to the Complainants in respect of this aspect of their complaint dated **15 March 2017** and **23 March 2017**. The Provider acknowledges that these letters did not adequately deal with the questions raised by the Complainants. I agree with the Provider in that respect. The letters demonstrate that the Provider failed to engage with the Complainants' query in respect of their account balance, and further failed to identify that there was an interest-only arrangement in place prior to **August 2013**.

I accept that there was an interest-only arrangement in place between the Provider and the Complainants between **March 2012** and **August 2013**. However, the Provider failed to properly record the existence of this interest-only arrangement. This resulted in the Provider wrongfully categorising the capital portion of the contracted repayments for this period, as arrears. This further led to the Provider then misstating the amount outstanding in respect of unpaid capital for the period **March 2012** to **April 2015** when the interest-only arrangements were in place. The Provider understated the unpaid capital amount by almost €200,000.

In a further submission to this Office the Provider states that it has checked with the Irish Credit Bureau and the Central Credit Register and has confirmed that there has been no negative reporting in respect of the Complainants' loan account and consequently, the Complainants' credit rating has not been affected by the matters raised in this complaint. The Provider has also provided further clarity to the Complainants regarding the balance on their loan account.

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### **Complainant 2(ii)**

The First Letter of Sanction requires the Complainants to make consecutive repayments of €9,511 per month commencing on **30 March 2005**. Repayments in this amount were made up to **2 October 2006**. Following this, repayments of €10,500 commenced on **31 October 2006** until **2 February 2011** after which repayments were reduced to €8,900 on **16 March 2011**. During these periods as per the Complainants' loan account statements, their loan account balance was reduced by the amount of the relevant payment.

The Complainants have furnished a *Mortgage Profile* document to this Office. This appears to be the document that the Complainants are relying on, to support this aspect of their complaint. The *Repayments* column begins on **3 May 2005** and continues to **30 April 2024** and lists consecutive payments of €9,580.59. This is not a record of the payments actually made by the Complainants in respect of their loan account and rather, as the title of the document suggests, it is a profile of their loan account. This document records repayments in amounts less than and in excess of the repayments actually made by the Complainants. Furthermore, it records future repayments not yet made by the Complainants. The repayments actually made by the Complainants are recorded in their account statements and not this document.

I do not accept that the Complainants can rely on the *Mortgage Profile* document as an accurate means of ascertaining their loan account balance. Therefore, I do not believe that it is appropriate to accept that the Complainants' actual loan account balance did not correctly reflect their increased repayments.

### **Offer of Resolution**

In its initial submission to this Office dated **15 August 2018** the Provider made the following goodwill gesture:

*"The Provider would formally like to request to re-engage with the Complainants by way of face to face mediation in order to have the opportunity to:-*

- *Sincerely apologise for the confusion caused in relation to the interest only period*
- *Clarify in detail, the position in relation to the loan account and the revised repayments*
- *Offer a goodwill gesture of €5,000.00 to the Complainants for the [Provider's] failings in this case.*
- *Refund to the account the sum of €6,243.96 in reversal of interest that has accrued on the account between April 2015 and current date.*
- *Refund the surcharge interest amount of €392.63 that was charged to the account on 17 December 2012. The above figure would be deducted from the outstanding balance on [the Complainants' loan account]."*

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By way of further update dated **6 November 2018** the Provider stated:

*“... the Incorrect Interest that has accrued on the account as a result of the higher balance since April 2015 is, as of today **08<sup>th</sup> November 2018**, €7,318.25 including the surcharge interest figure of €392.63. ...*

*Therefore, the above figure is not due to be refunded back to the Complainants in the form of a cheque, it is only due to be refunded from the overall outstanding loan balance. ...”*

I consider the Provider’s offer to re-engage with the Complainants to be a reasonable offer. Furthermore, I consider the goodwill gesture offered by the Provider to be a reasonable sum of compensation for the inconvenience caused to the Complainants arising from this complaint, although it is regrettable that these issues were not more adequately addressed at an earlier juncture. In these circumstances, on the basis that this reasonable offer was made to the Complainants shortly after the formal investigation of the complaint was commenced, and also on the basis that this offer remains available to the Complainants, I do not consider it necessary to uphold any aspect of this complaint.

I would suggest that the Provider immediately correct the interest on the account and implement the appropriate changes, to ensure that no similar errors occur on the account calculation from this date. As previously indicated, it will be a matter for the Complainants to contact the Provider directly, if they wish to accept the compensatory payment of €5,000, which the Provider has offered to them in recognition of its errors. Since the Preliminary Decision issued on 9 July 2019, this office has facilitated contact between the parties for this purpose.

### **Conclusion**

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

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

**MARYROSE MCGOVERN**  
**DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES**

31 July 2019

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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.

