



<b><u>Decision Ref:</u></b>	2019-0400
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Application of interest rate Dissatisfaction with customer service Failure to process instructions in a timely manner Errors in calculations
<b><u>Outcome:</u></b>	Substantially upheld

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

### **Background**

The complaint relates to the application of an investment property interest rate to a mortgage loan notwithstanding that the Complainants had moved their primary residence to the property the subject of the mortgage, and informed the Bank of this development.

### **The Complainants' Case**

In **June 2001** the Complainants, who were living in the UK at the time, took out a mortgage loan with the Respondent Bank in order to fund the purchase of a holiday home in County X. The Complainants submit that, during the period in which the mortgage property operated as their holiday home, the mortgage loan was subject to the applicable investment property interest rate.

The Complainants explain that on **14 December 2002**, they began living in the property following a permanent relocation from the UK to enable the Second-named Complainant to take up a teaching position in a national school in County X. The Complainants state that they notified the Bank of the change in their residency status on **16 December 2002**.

The Complainants state that from December 2002 onwards, all correspondence relating to their various accounts held with the Bank was then issued to their home address (i.e. the mortgage property in County X). The Complainants point out furthermore that salary payments from the Department of Education issued on a fortnightly basis to their current account.

They also state that during this period they held a number of facilities with the Bank, including a personal loan account, a savings account, a Visa account and indeed household insurance, which was incepted through the Bank and which identified the property as being "owner occupied".

The Complainants submit that in or around **October 2014**, they discovered that since December 2002 they had, unknowingly, been repaying their mortgage at an investment variable rate rather than at the standard variable rate (SVR), the rate that should have been charged to their mortgage account given that the mortgage property was functioning as their principal primary residence. The Complainants submit that since discovering the error they have endeavoured to seek redress from the Bank, without success. The Complainants argue that an incorrect rate of interest was charged to their account for a prolonged period and that the situation has continued unrectified.

The Complainants point out that the Mortgage Loan Offer dated May 2001 makes no reference to an investment interest rate, nor does the Registered Mortgage Deed dated June 2004. The Complainants submit further that annual mortgage statements received do not refer to an investment interest rate, nor do the annual Certificates of Interest issued by the Bank.

The Complainants are extremely aggrieved at the Bank's failure to amend the interest rate applicable to their mortgage loan from December 2002, following notification to the Bank's [location] branch, on the 16 December 2002, of their change in residency. The Complainants submit that the entire matter has caused them a great deal of financial hardship and distress. They argue that the Bank's communications regarding their mortgage are, at best, vague, and at worst, highly misleading. They submit that they were overcharged for almost 15 years. They now want this "unfair situation" resolved.

The complaint is that the Bank wrongfully applied an investment property rate of interest to the Complainants' mortgage loan, when in fact the Complainants should have been charged a lower rate of interest since December 2002, on the basis that the mortgage property was from that time, functioning as their principal primary residence or 'Private Dwelling House' [PDH].

On their Complaint Form dated the 22 October 2017, when asked how they would like the Financial Service Bank to put things right, the Complainants stated the following:

*"Repayment of the interest wrongly charged since December 2002. That is: the difference in investment property rates and the standard PDH rates. We are not seeking any compensation for the hardship or distress caused."*

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### **The Bank's Case**

The Bank disputes that it received notification that the property was the Complainants' family home (and therefore a PDH property) prior to 9 September 2015, the date upon which it received a letter from the Complainants detailing this. (This was the first written communication from the Complainants addressing the matter in writing with the Bank, after they say they discovered the issue in October 2014.) The Bank has declined to backdate the rate to 2002. The Bank states that it is the responsibility of the account holder *"to make sure that the mortgage account is on the correct rate for them at all times"*

The Bank states that, following receipt of the Complainants' aforementioned letter, it submitted forms (a Mortgage Form of Authorisation [MFA]) to enable the Complainants to amend the applicable rate to the PDH rate. The Bank submits that the Complainants did not complete and return the form following which it resubmitted the forms to the Complainants in March 2016 and August 2016. The Bank maintains that the Complainants again failed to complete and return the MFA form and it furnished the Complainants with the forms once again under the cover of its Final Response Letter of **13 September 2017**. The mortgage account was redeemed in full on 7 December 2017.

### **The Complaint for Adjudication**

The complaint is that the Bank wrongfully applied an investment property rate of interest to the Complainants' mortgage loan, when in fact the Complainants should have been charged a lower rate of interest since December 2002, on the basis that the mortgage property was from that time, functioning as their principal primary residence or 'Private Dwelling House' [PDH].

### **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.

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A Preliminary Decision was issued to the parties 25 October 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.

It should be noted that the conduct which is the subject of this complaint, spans a prolonged period from December 2002 onwards. In this respect the FSPO is satisfied that the conduct which is the subject of the complaint falls within **Section 51(5)** of the **Financial Services and Pensions Ombudsman Act 2017** constituting conduct of a continuing nature. Consequently, the entirety of the conduct complained of falls within the jurisdiction of the FSPO.

### **Analysis**

The Complainants applied for and were granted a mortgage in respect of a property in County X. At the time when the mortgage was created, the property represented an investment property (a holiday home) rather than a principal primary residence or 'Private Dwelling House' [PDH]. Accordingly, there is no complaint, relating to the fact that the mortgage was initially subject to the Bank's 'Investment Variable Interest Rate' (IVIR).

Rather, the Complainants say that they informed the Bank of their relocation to County X in December 2002, and that this and/or various other aspects of their dealings with the Bank, made clear that the property was their private residence and this should have prompted the Bank to transfer the mortgage to the non-investment or standard variable rate applicable to PDHs.

In addition, the Complainants assert that there was an abject failure on the part of the Bank to communicate to them the fact that the borrowing secured on the property was subject to this 'Investment Variable Interest Rate' and not subject to a standard variable rate. They argue that, had this been clear, they would have made efforts to have the rate amended at a far earlier time. In support of their contention, the Complainants point to various documents issued by the Bank.

Turning to the first aspect of the complaint, the Complainants maintain that they informed the Bank about their change of primary residence in December 2002. The Bank states it received "*no notification*" of this until September 2015 and it maintains that, with regard to the notification allegedly provided in 2002, it has "*no record of this on file*". The suggested notification in December 2002 appears to have been oral. In their letter of 18 August 2017 to the Bank, the Complainants state as follows:

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*On Monday, December 16<sup>th</sup> 2002 I informed the Bank of a change in residency status. I informed bank staff that we were no longer resident in the UK and had moved permanently to our recently purchased house in Lxxx, Co X.*

In their letter of 16 November 2018, the Complainants expanded as follows:

*We did inform the Bank of the commencement of our residency at the above address. This was done in person on the 16<sup>th</sup> December 2002.*

The Complainants do not contend that they made any request, oral or otherwise, for a transfer or amendment of the rate in 2002. They simply assert that they informed the Bank of their change of residency, insofar as they had moved to live at their property in Co. X. I have no difficulty in accepting that this is true, notwithstanding that the Bank has no record of it. This information however, would not necessarily have triggered the Bank staff at the branch, to turn their attention to the particular prevailing rate applying to the Complainants' mortgage loan agreement. Likewise, I am not convinced that the Bank should have automatically triggered a review of the account, on the basis of the other items of extraneous evidence highlighted by the Complainants (such as their various bank accounts and the insurance policy incepted via the Bank). I take the view that, in order to effect a change to the terms of the mortgage, the Complainants needed to make a direct request to do so.

It appears to me however that it is likely that the Bank would have agreed to a request for a rate change, if it had been made at that earlier time, but no such request was in fact made to the Bank.

The Complainants are annoyed also because they say that there was a failure to communicate to them the fact that the property was subject to the 'Investment Variable Interest Rate' and not subject to a standard rate. They say that if this had been made clear at an earlier time, this would have prompted them to make the required formal application. This aspect of the complaint is clearly explained in the Complainants' letter of 16 November 2018 in the following terms:

*Finally, the Bank fails to address the issue of clarity of information from 2003 – 2014 in (1) Annual Mortgage Statements; (2) Rate Amendment Notifications. Nowhere, in correspondence from the Bank, does it state that we were repaying at an 'Investment Rate'. It is only from Oct 2014 that the 'Investment Standard Variable Rate' is cited. Had this information been evident on all earlier correspondence, we would have identified this error much sooner.*

The Bank's response to this allegation was that it sent multiple letters to the Complainants which recorded the relevant information. In particular, the Bank stated in November 2018, as follows:

*"The Bank issued twenty eight (28) rate change notification letters from 18 September 2001 to 13 September 2017 which advised the Complainants of the investment rate applicable to the mortgage loan account. The Bank has enclosed a*

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*copy of the Bank's letter history to the Complainants evidencing the issue of these letters. On each of these letters the "Mortgage Product Type" is "Investment STD Variable Rate". Annual mortgage statements also evidenced the rate of interest being charged to the mortgage loan account. The bank submits that the Complainants received twenty five (25) Rate Change Notifications and Annual Mortgage Loan Statements over a 13 year period [2002 (when the Complainants state they moved into the property) - 2015 (when the Bank was first notified)] and despite all of these communications from the Bank which highlighted the interest rate being charged, the Complainants never notified the Bank that the property was no longer an investment property."*

[underlining added]

In the course of the adjudication of the complaint, it was noted however that a copy of only one of the 22 Rate Change Notifications issued by the Bank to the Complainants between December 2002 and October 2014 had been furnished, being the final one dated 7 October 2014. In circumstances where the Bank had referred to 21 additional Rate Change Notification letters pre-dating the October 2014 notification and, given that the Bank sought to rely on the contents of those interest rate notifications, the FSPO made further enquiries of the Bank regarding the evidence available to verify the content of the letters and, in particular, whether the precise content included a specific reference to the "Investment Variable Interest Rate" as the Bank had very firmly maintained. The Complainants were also requested to supply a copy of such Interest Rate Notifications if they held a copy, so that the contents could be considered by the FSPO.

In February 2019 the Complainants furnished this office with a copy of a number of the Interest Rate Notifications in question, none of which referred in any manner to the "Investment Standard Variable Rate". In March 2019 the Bank, having reviewed the evidence in question, firstly confirmed that it accepted the Complainants' submission that the evidence furnished did not include any specification of the type of interest rate applicable to the mortgage loan account as an Investment Variable Interest Rate, in the context of the Rate Change Notification letters. The Bank also confirmed that it was not in a position to reproduce a copy of those notifications from its own system, as the correspondence is "system generated" and cannot be reproduced once issued.

The Bank apologised for the incorrect information which had been made available for the purpose of the investigation of this complaint and indicated that all references to the incorrect information in question could be "removed" from the evidence. The Bank also confirmed however that it stood over its position that when the Complainant were issued with the Rate Change Notification in October 2014 (which specifically stated "Investment Standard Variable Rate") the Complainants did not then bring the matter to the Bank's attention until almost a year later, in September 2015.

The Bank has continued to assert that if the Complainants had requested a rate change in 2002, and if the rate change had not occurred, it would be reasonable to assume that the Complainants should have followed up with the Bank arising therefrom. This is to overlook the fact however that the Complainants have not suggested that they asked the Bank in December 2002 to change the rate on their mortgage account.

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Rather, the Complainants say that they now understand that when they notified the branch staff that they had moved their residence to the home in County X, that the Bank should have turned its attention to the nature of the rate of interest which was applying to the loan. The Complainants maintain that once they notified the branch staff that they had taken up permanent residence at County X, they were informed that their “details” would be updated. The Complainants point out however, that at no time were they advised that they would need to make a formal application to change their mortgage rate.

The Bank has also stated that, following receipt of the Complainants’ letter in 2015, it submitted forms to the Complainants so that they could apply to amend the applicable rate to the PDH rate. The Bank says that although it resubmitted the forms to the Complainants in March 2016, August 2016, and again with its Final Response Letter of **13 September 2017**, the Complainants have never applied to have the rate amended. The Complainants have made it clear however that they did not accept the Bank’s offer to change the rate to the PDH rate with effect from September 2015, because they were unwilling to accept a position which excluded compensation for the numerous years during which the incorrect rate had been applied to their account.

In July 2019 the Bank wrote to this office to advise that having considered the matter further (and specifically by way of acknowledgment of the inaccurate information detailed in the Bank’s response, regarding the Rate Change Notification letters issued to the Complainants prior to 2014) the Bank wished to be afforded the opportunity to resolve the matter amicably with the Complainants, and it offered a sum of €5,000 to the Complainants in open correspondence.

In August 2019, the Complainants explained that in the absence of any confirmation of the figures, it was not possible for them to assess whether the offer of €5,000 was reasonable in the circumstances. They sought details of the difference between the total interest they had paid, and what they would have paid if the rate had been changed in December 2002. Ultimately, in September 2019 it came to light that the total difference amounted to €9,221, and in those circumstances the Complainants elected to decline the Bank’s settlement offer.

I am conscious that the notification of the actual percentage of the interest rate being applied, would not have alerted the Complainants to any issue. The Complainants’ grievance is that they did know they were on an Investment Variable Interest Rate and that, by extension, they were unaware that a more favourable rate was surely available for non-investment properties. The key issue is thus whether the nature of the applicable rate was expressly identified over the years as the ‘Investment Variable Interest Rate’, in a way which would have alerted the Complainants to this issue, earlier than in October 2014.

Having considered this matter at length, I am satisfied that the Complainants’ record keeping and their personal recollection of their dealings with the Bank staff, are more reliable than the Bank’s records which are noticeably incomplete and which, for reasons unknown and unexplained, suggested to the Bank that the Rate Change Notification letters included a specific content, which in fact they clearly did not.

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I am also satisfied to accept the Complainants' contention that if the Interest Rate Change Notifications had contained the information which the Bank originally believed that they contained, the Complainants would indeed have been alerted to the issue at an earlier time. This would have enabled the Complainants to have addressed this issue many years ago and seems likely to have avoided this current investigation. It is noted that because the Complainants did not receive any notifications over the years from the Bank in order to confirm that the rate was still on an investment property basis, they were not in a position to request that the rate in question be changed. Had they done so, it seems likely that such a request would have been acceded to, in circumstances where the property was then a private dwelling house. Indeed, the Bank has not suggested that a request of that nature would have been declined, if it had been made.

In those circumstances, I am satisfied that the absence of any definitive information from the Bank over the years of the borrowing (whether in annual Statements of Account or Rate Change Notifications) regarding the specific nature of the interest rate which continued to apply, led to a situation where over the period in question the Complainants remained unaware that they were paying a rate of interest higher than necessary for their private dwelling house and as a result, they incurred interest totalling €9,221 which might otherwise have been avoided.

I note that the complaint maintained against the Bank is that it wrongfully applied an investment property rate of interest to the Complainants' mortgage loan account over a period of time, when in fact the rate ought to have been changed to the lower PDH rate. I am also satisfied that the investment property rate of interest which applied to the loan was correctly applied from the outset as the Complainants were not originally resident at the property. I am satisfied however, that this complaint should be substantially upheld as the Complainants were entitled to have the rate altered once the property in question became their private dwelling house.

It is unclear to me why, given the very considerable evidence made available by the Complainants from which their residence at the property since 2002 cannot really be in doubt, the Bank did not simply elect to backdate the changes in question. Whatever the explanation, I am satisfied that in order to do justice as between the parties the Complainants are entitled to be compensated for the interest rate charges which they incurred over the years, prior to the loan being fully redeemed in December 2017.

I believe that it is appropriate to take into account that the Complainants were out of pocket in respect of the over-paid interest in question, for a very considerable period of time. In those circumstances, noting that the Bank's calculations of the interest variation, amounts to €9,221, I direct the Bank to make a compensatory payment to the Complainants in the sum of €10,000.



## **Conclusion**

- My Decision is that this complaint is substantially upheld, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, on the grounds prescribed in **Section 60(2)(c)** and **(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Bank to make a compensatory payment to the Complainants in the sum of €10,000 to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Bank. 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.

MARYROSE MCGOVERN  
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

19 November 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.