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| <b><u>Decision Ref:</u></b>             | 2019-0433  |
| <b><u>Sector:</u></b>                   | Banking  |
| <b><u>Product / Service:</u></b>        | Repayment Mortgage   |
| <b><u>Conduct(s) complained of:</u></b> | Failure to provide calculations<br>Delayed or inadequate communication |
| <b><u>Outcome:</u></b>                  | Partially upheld   |

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

**Background**

This complaint concerns the Complainants' mortgage loan account with the Provider.

The complaint is that the Provider has incorrectly or unreasonably failed to honour the conditions of the mortgage loan account, as agreed in **January 2009**, which set the maturity date of the loan account to **November 2020**.

**The Complainants' Case**

The Complainants submit that in **July 2004** they drew down a 20 year term mortgage loan account with the Provider for the sum of €180,000. The Complainants submit that the mortgage loan account was due to be paid off in full in **August 2024**.

The Complainants submit that in **January 2009**, the Provider contacted them to discuss a mortgage loan account fixed overpayment repayment scheme, and upon agreement of this scheme, they began to make overpayments to their mortgage loan account in the sum of €250 per month, which commenced in **February 2009**.

The Complainants say that in **January 2009**, data from the Provider's calculator showed that a monthly overpayment figure of €250 inclusive of their standard mortgage loan

repayments, for a period of forty four months, would clear the mortgage loan by **November 2020**.

The Complainants submit that on **30 January 2018**, they contacted the Provider to request a 'statement of payments' up to the maturity end date of **November 2020** and the Provider did not supply them with this requested information. The Complainants submit that on **9 February 2018**, they contacted the Provider again to request this information, at which time, the Provider advised them that the current maturity date of the mortgage loan account is **August 2022**.

The Complainants submit that in order to ensure that the mortgage loan account matured in **November 2020** they honoured the fixed overpayment amounts inclusive of their standard mortgage loan repayments, as contracted in **February 2009**, and in doing so, have always made the agreed repayments in full and on time. The Complainants submit that the maturity date of **August 2022**, as set out by the Provider in **2018**, is an additional twenty one months and a total overpayment of €40,750, exclusive of additional interest rate charges, rather than the overpayment amount of €35,500, should the mortgage loan mature in **November 2020**, as advised to them in **2009**.

The Complainants submit that the Provider removed the overpayment amount to their standard monthly mortgage loan repayments on **14 February 2018** without their permission. The Complainants state that they have "*no idea why (the Provider) chose to take this unilateral action*".

Further to the Provider's response to this complaint, the Complainants made further submissions via email dated **1 July 2019** wherein they submitted that they signed up for a fixed overpayment on their mortgage and this is evidenced by the term "*fixed overpayment*" being used as the title of the form which they signed. They submit that the term "*incremental mortgage*" was never mentioned in the form which they signed and they state that the term was introduced by the Provider in order "*to cover their mistake and to muddy the waters*".

The complaint is that the Provider incorrectly or unreasonably failed to honour the conditions of the mortgage loan account, as agreed in **January 2009**, which set the maturity date of the loan account to **November 2020**.

Ultimately, the Complainants want to know what the outstanding balance on this mortgage would be if the Provider had applied the fixed overpayments correctly and they want to redeem the mortgage as soon as possible on the basis of this figure.

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

By way of response, the Provider submits that the First Complainant contacted the Provider on **15 January 2009** to discuss applying an overpayment of €250 per month to the Complainants' then current monthly mortgage loan account repayments. The Provider

submits that during this telephone call the First Complainant did not state that he wanted to reduce the maturity date of the mortgage.

The Provider also states that during this telephone call, the Provider's agent told the First Complainant that he would need to complete a form which the First Complainant confirmed he had received as an insert with his **January 2009** mortgage loan account statement. The Provider also submits that the Provider's agent confirmed to the First Complainant during this call that if the interest rate on the loan was to rise, the Complainants could discontinue making the overpayments.

The Provider further says that the Complainants submitted an instruction by way of a *Mortgage Fixed Overpayment Form* signed by the Complainants on **13 January 2009**, to increase their repayment amount by €250 commencing on **1 February 2009**.

The Provider states that the Complainants agreed to this increase of €250 per month over and above the regular repayments. The overpayment form also confirms that:

*"Any additional sum over the standard repayment will be treated as an overpayment. Depending on interest rate fluctuations, the additional payment may increase or decrease. For as long as this new repayment amount is greater than your standard repayment due, the additional amount will be applied in reduction of your capital balance each month."*

The Provider submits that the above indicates that the agreed overpayment being set by the Complainants would reduce their capital balance only, each month.

The Provider states that once the overpayment form was received, the Provider put in place the overpayment of €250 per month as per the express instruction received. The Provider submits that this overpayment was used to reduce the balance of the mortgage loan account and this resulted in the overall mortgage balance reducing, which in turn meant that their standard monthly repayments reduced over the term of the mortgage.

By way of background to this complaint, the Provider submits that variable rate customers are offered the flexibility of overpaying to potentially reduce the term of their mortgage or reduce their standard repayment. The overpayment can be adjusted or removed on request at any time to suit their needs. If an overpayment is to be removed, the standard repayments will be recalculated based on the reduced balance outstanding and the original maturity date. Customers also have the option to reduce the term to when they would like the mortgage to end, and the repayments would be adjusted accordingly.

The Provider submits by way of explanation, that there are two main types of overpayment and describes each as follows:

*"1. Set/fixed repayment – A set payment is put in place. For example €1,200 per month. If the rate and standard repayment reduces the set payment remains at the fixed level and the overpayment reduces the term."*

*2. Incremental overpayment – An incremental overpayment is set above the standard repayment. For example €250 per month over the standard repayment. The increment remains the same until further notice however the standard and overall repayment will reduce if the rate reduces. As the repayments will reduce the term will not be affected.”*

The Provider submits that the Complainants requested to put an incremental overpayment in place and that this was actioned and implemented by the Provider accordingly. The Provider submits that the effect of this overpayment was as follows:

*“In effect on month 1 the Complainants made their standard capital and interest payment plus the extra €250 is reduced from their capital balance. Therefore, the Complainants balance is €250 lower so will accrue less interest. This continued each month reducing the amount of interest due each month and therefore in effect accelerating the decrease in the mortgage balance due. If all variables on the mortgage loan account remained the same then this would reduce the Complainants cost of credit and may redeem their mortgage early. However, this was not the case as the variables did not remain the same i.e. tracker interest rate.”*

The Provider submits that in the event of a repayment event change (i.e. interest rate change, term change, repayment date change, lump sum reduction etc.) then the Complainants would gain the advantage of having a lower balance compared to them not having the extra €250 per month so their standard monthly repayment calculated would have been lower. The process of the extra €250 then begins again and accelerates the decrease in the balance. In effect there could be a situation where a customer’s interest rate increases and their overall payment decreases.

The Provider further submits that a set repayment is slightly different in that a customer tell the Provider the minimum payment they wish to make monthly. Assuming that their standard repayment does not increase above this level then they will pay this amount monthly until their mortgage redeems. This will have the effect of again accelerating the decrease in their balance due and therefore their overall interest charge as any amount above their standard repayment will reduce their balance. Again this is effective for the period during which it is implemented and once removed would ensure that the customer’s monthly repayment is less than if they did not have this set payment on their account.

In this instance, the Provider submits that the Complainants have benefitted from reduced contractual monthly repayments every time the rate reduced/changed as the balance had been reduced each month by their incremental overpayment. As the maturity date did not change, at each rate recalculation, the Complainants’ previous overpayments were taken into account in the lower capital balance resulting in a lower contractual monthly payment (on top of which the Complainants then added an additional €250. The Provider also submits that at no point does the overpayment form signed by the Complainants state that there would be any reduction in the term of the loan and in fact it states that *“the additional amount will be applied in reduction of your capital balance each month”*.

In relation to the calculator used by the First Complainant in **2009**, the Provider states that it is unable to comment on this as it is no longer available. However, it submits that the calculator is for illustrative purposes only and therefore could only provide indicative results. The Provider further states that any calculation provided by such calculator in no way amends the contractual agreement the Complainants have with the Provider and furthermore, the calculator assumes that all variables remain constant for the duration of the loan. Therefore, it submits that any past or current calculators should not be relied upon by the Complainants as a guarantee.

In relation to the removal of the overpayment on **14 February 2018**, the Provider submits that on **9 February 2018**, the First Complainant contacted the Provider's mortgage team. During this telephone call, the Provider's agent misunderstood that the First Complainant wanted a reduced maturity date and this was completed. A letter issued in relation to this on **14 February 2018** which confirmed the new repayment amount and maturity date of **30 September 2022**. The Provider acknowledges that the Complainants did not provide their express instruction to remove the overpayment on their mortgage loan account, nor to reduce the maturity date during this phone call. In its response to this complaint, the Provider apologises for any inconvenience caused to the Complainants as a result of this removal of the overpayment.

The Provider confirms that the current expected maturity date for the mortgage loan account is **30 September 2022** and there is currently no overpayment on the account based on this maturity date. The Provider confirms that the current balance outstanding on the account is €33,554.56 as of **23 July 2019**. The Provider also confirms that if the Complainants had asked for a reduced maturity date by 44 months in **January 2009**, their balance would now be €20,133.39 with a maturity date of **31 December 2020**. The Provider states that the Complainants would have made a further €13,421.17 in repayments over the period from **February 2009** to present had they requested a reduction in maturity.

Regarding the Complainants' request for a statement of payments, the Provider accepts that the First Complainant referred to repayments since **2009** during his telephone call with the Provider's agent on **30 January 2018**. Therefore, the Provider acknowledges that it should have issued statements on the mortgage loan account dating back to **2009** to give the Complainants the full record of repayments since the overpayment was put in place. The Provider has enclosed all statements on the mortgage loan account since the date of inception in the evidence submitted in response to this complaint. Furthermore, the Provider apologises that these statements were not provided at the time.

In essence, the Provider submits that the Complainants put an incremental overpayment in place in respect of their mortgage loan account - not a term reduction. The Provider states that at no point was a maturity date of **2020** ever agreed between the Provider and the Complainants. The Provider states that it is satisfied that it has honoured its contractual obligations with the Complainants in regard to their express request to put a fixed overpayment in place on their mortgage loan account.

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### **The Complaints for Adjudication**

The complaint is that the Provider incorrectly or unreasonably failed to honour the conditions of the mortgage loan account, as agreed in **January 2009**, which set the maturity date of the loan account at **November 2020**. The Complainants also say that the Provider failed to provide a statement of payments for the mortgage loan account since **2009**, as requested, by the First 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 Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on 7 November 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 consideration of an additional submission from the Complainants, the final determination of this office is set out below.

The Complainants say that the Provider incorrectly or unreasonably failed to honour the conditions of the mortgage loan account, as agreed in **January 2009**, which set the maturity date of the loan account at **November 2020**. I am however unable to accept that the Provider agreed at that time to a reduction to the maturity date of the loan. I note that the form that the Complainants submitted in relation to the overpayment referred to a "*fixed overpayment*" and I also note that the form clearly stated that:

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*“Any additional sum over the standard repayment will be treated as an overpayment. Depending on interest rate fluctuations, the additional payment may increase or decrease. For as long as this new repayment amount is greater than your standard repayment due, the additional amount will be applied in reduction of your capital balance each month”.*

[My emphasis]

This clearly stated that the agreed overpayment by the Complainants would reduce their capital balance each month, not the term of the loan, but it seems from the submissions of the Complainants that they were under the mistaken impression that they had entered into a “fixed repayment” as opposed to a “fixed overpayment” agreement with the Provider.

I note that if the Complainants had entered into a “fixed repayment” as opposed to a “fixed overpayment” agreement, then their mortgage repayments would not have increased or reduced when interest rates went up or down. I accept that the Complainants received multiple statements from the Provider between **2009** and **2018** and that despite the level of their repayments varying during this period, they did not query their repayments with the Provider until early **2018**. The extra payment made each month by the Complainants however, has been of significant benefit in reducing the level of interest which they would otherwise have incurred on the borrowing during that period.

The Complainants also say that the Provider failed to provide a statement of payments for the mortgage loan account since **2009** at the request of the First Complainant during a telephone call on **30 January 2018**. I note that the Provider has acknowledged that it failed to provide this information and it has subsequently made available all statements on the mortgage loan account since the date of inception. Furthermore, I note that the Provider has apologised that these statements were not made available at the time of the request.

I further note that this failure on the part of the Provider amounts to a breach of provision 3.3 of the Consumer Protection Code 2012 (as amended) which provides that

*“a regulated entity must ensure that all instructions from or on behalf of a consumer are processed properly and promptly”.*

In relation to the issue surrounding the potential inaccuracy of the online calculator utilised by the Complainants in **2009**, I accept that these calculators at the time were indicative only. I note that although the Complainants say that “[the [former provider] online calculator which we used in 2009 is the same calculator that is available TODAY on the [Provider] website”. The FSPO cannot accept that this online tool has not been the subject of multiple software updates since the Complainants used such an online calculator in 2009. In those circumstances, it would simply not be appropriate to draw any particular conclusion from the manner in which the Provider’s current online calculator now operates in 2019. Furthermore, I accept that the indicative information available using such an online calculator, did not serve in any way to vary the specific terms of the overpayment agreement entered into by the Complainants with the Provider in 2009, which were properly and clearly set out in the written overpayment form, they signed and submitted to the Provider.

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It is important for the Complainants to be aware that they have a contractual obligation to repay the monies borrowed to the Provider (or more recently, to the entity which purchased the loan from the Provider), in the manner which was set out to them, clearly and unambiguously in **July 2004** and as varied in 2009. Accordingly, while I understand the frustration the Complainants feel, I accept that the Provider is not obliged to permit a further variation of the arrangements, so as to facilitate the Complainants' request to reduce the term of the loan to **November 2020**. I can see no reason however why the Complainants and the new loan owner should not be able to explore the possibility of agreeing to mutually acceptable terms, to enable the now very much reduced balance, to be paid in full in repayment amounts and indeed over a term which is mutually satisfactory to both parties.

Having regard to the particular circumstances of this case, in particular the failings on the part of the Provider to promptly comply with the First Complainant's request for a statement of payments on the mortgage loan account since **2009**, I propose to partially 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 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 make a compensatory payment to the Complainants in the sum of €500, 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.**

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

6 December 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.

