



<u>Decision Ref:</u>	2019-0440
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Application of interest rate
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background and the Complainant's Case

The complaint concerns the interest rate on a mortgage. The Complainant states that his mortgage is on an incorrect interest rate and that he is being over-charged interest on his mortgage. He states that his mortgage should be on the Provider's Standard Variable Rate "*or the same cost structure*" but that the Provider has informed him that he is on a rate which is not connected to the Standard Variable Rate. The Complainant states that he was led to believe by the Provider that he would receive the "*Standard Variable rate*" and that it would move in line with the commercial base interest rate and that "*they were the same thing*".

The Complainant also contends that the Provider has acted unprofessionally in its dealings with him. He states that it belittled the magnitude of his complaint.

The complaint is that the Provider wrongfully applied an incorrect interest rate to the Complainant's mortgage. The Complainant would like the Provider to "*correct rate to Standard Variable Rate immediately and to compensate for all financial occurrence with this over-charging throughout*". The Complainant would also like the Provider to "*respond to queries professionally*".

The Provider's Case

The Provider submits that the Complainant entered into a loan agreement for €950,000.00 in 2008 on a 24 month "*interest only*" basis which then converted to a capital and interest

mortgage. It states that the interest rate is “*discounted commercial base rate for months 1 to 24 followed by variable commercial base rate thereafter*”. The Provider asserts that this is set out in the Complainant’s loan agreement.

The Provider states that a capital reduction was made to the mortgage in October 2008 in the sum of €360,080.

The Provider set out that as at 11 March 2016 the Standard Variable Rate for owner occupiers was 3.70% and that the variable commercial base rate for buy to let customers was 5.08%.

The Complaint for Adjudication

The complaint is that the Provider wrongfully applied an incorrect interest rate to the Complainant’s mortgage.

Decision

I note that in the course of the investigation of this complaint, the Complainant raised data protection issues. Any matters relating to a possible breach of data obligations are not a matter for this office, and are instead a matter for the Data Protection Commission.

The Complainant also made submissions regarding a Finding of the Financial Services Ombudsman published on the then Financial Services Ombudsman website in a “*Sample of Complaints Findings July-November 2009*”. It is important for the parties to be aware that the particular circumstances of each complaint made to the Financial Services and Pensions Ombudsman, or to this office, are examined on their own individual merits. Although many borrowings will appear to have similar terms and conditions, it is the particular and specific contractual arrangement between the parties, that is relevant when this office adjudicates on a complaint.

During the investigation of this complaint, which was commenced by the Financial Services Ombudsman’s Bureau, 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.

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 was 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 was also satisfied that the submissions and evidence furnished were sufficient to

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enable a determination to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Finding was issued to the parties on 21 September 2017 outlining the preliminary determination of the Financial Services Ombudsman 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 Finding would be issued to the parties, on the same terms as the Preliminary Finding, in order to conclude the matter.

Following the commencement of the ***Financial Services and Pensions Ombudsman Act 2017***, on 1 January 2018, the final determination of this office is now issued to the parties, by way of this Legally Binding Decision of the Financial Services and Pensions Ombudsman.

Submissions from the Complainant and submissions from the Provider, were received by the Ombudsman after the issue of the Preliminary Finding to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional submissions.

I have considered the contents of these additional submissions for the purpose of setting out the final determination of this office below. I note that since the Preliminary Finding issued to the parties, the Complainant has advanced “new evidence” and offered additional arguments regarding the nature of the security made available for the loan, and his periods of residence in the properties, which are the subject of the loan.

In examining the issues raised by the complaint, it is useful to consider the terms of the underlying contractual documents.

Documentary Evidence:

➤ **Loan Offer dated 15 January 2008**

The Complainant’s loan offer signed by the Complainant by way of the acceptance “*on the terms thereof*” on the **30 January 2008**, included the following “***Principal Details of the Loan***”

“IMPORTANT INFORMATION AS AT 15/01/08

1. <i>Amount of credit advanced</i>	€950,000.00
2. <i>Period of Agreement</i>	25 year ...
...	
7. <i>APR</i>	5.3%
....	

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THE PAYMENT RATES **ON THIS COMMERCIAL LOAN** MAY BE ADJUSTED BY [THE PROVIDER] FROM TIME TO TIME (Does not apply while the loan is at a fixed rate)"

[my emphasis]

The letter continued:

"We are pleased to inform you that ... approved loan facilities ... on the terms and conditions detailed below and in the **attached schedule of Standard Commercial Loan Conditions**.

1. Amount: €950,000.00 ...
2. Term & Nature: 25 year Repayment Loan (including a capital moratorium for the first 24 months)
3. Purpose of Loan: Towards the construction of the properties at 16A ... and 16B... and to refinance existing ... loan of €540,000.00

4. Rate of Interest: Months 1-24 (incl.):
Variable at 4.75% p.a.
Rate Basis: **Discounted Commercial Base Rate**

After month 24:
Rate Basis: **Variable Commercial Base Rate**
(currently 5.25% p.a.)

Important Notice:

The actual rate applicable shall be the rate available from [the Provider] on the date of drawdown, using the Rate Basis shown and may be higher or lower than that quoted above.

5. Repayments: €3,760.42 per month comprising interest only for the first 24 months payments **based on the above variable rate**. After expiry of the initial 24 months capital moratorium, payments shall comprise of principal and interest ...**Payments will vary in line with movements in the interest rate.**

6. Security: The Security for this loan shall comprise:-

a First Legal Mortgage over the properties of the Borrower at:

167 ...

16...

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16B...".

➤ **Standard Commercial Loan Conditions**

Appended to this loan offer, the Provider attached its "Standard Commercial Loan Conditions" which set out, inter alia, as follows:-

"Definitions

...

'Commercial Property Rate' shall be the rate as determined by [the Provider] from time to time for variable rate loans or fixed rate loans for defined periods for commercial property loans.

'Residential Investment Rate' shall be the rate as determined by [the Provider] from time to time for variable rate loans or fixed rate loans for defined periods for residential investment loans.

'Commercial Base Rate' shall be the base rate for commercial loans as determined from time to time by [the Provider] for variable rate and fixed rate loans for defined periods..."

[my emphasis]

➤ **Statement of Suitability**

On the same date as its loan offer, the **15 January 2008** the Provider sent a "Suitability Statement" to the Complainant. It included the following:-

"Thank you for choosing [the Provider] for your Residential Investment Loan. This letter outlines the principal features of the mortgage that you have chosen and the reasons why this mortgage is deemed suitable for you.

The loan has been individually assessed for affordability and the repayments have been deemed to be sustainable based on the information you have provided and you believe that you will be able to meet these requirements based on your circumstances.

Loan Type

Annuity

You have opted for an Annuity loan as you have stated that you want to make capital and interest repayments each month in order to repay your loan in full within the selected loan term.

...

Interest Rate Type

Standard Variable Rate

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You have opted to borrow at a variable rate of interest as you have stated that you wish to avail of prevailing market rates and do not require certainty of repayments... You also wish to have the flexibility to make overpayments without penalty..."

[my emphasis]

➤ **Application Form**

On the **28 January 2008**, after the loan offer had issued, the Complainant completed the application for a "Buy to Let" loan with the Provider. The application form included the following:-

"Loan Details

Loan Type...

*Interest Rate **Variable ✓ Fixed or Split*

*... **Variable interest rates increase and decrease with changes in market rates."*

[my emphasis]

The issues giving rise to the complaint arise from the events in 2015, and it is useful to consider the chronology of events.

Chronology:

- On the **2 April 2015** the Provider sent a "final response" letter to the Complainant in relation to a separate complaint about its refusal of his request to switch security on the loan; this letter enclosed a copy of its Suitability Statement letter originally issued on the 15 January 2008.
- On **1 May 2015** the Provider (referred to below as **Provider 2**) published the following notice:-

" [Provider 1] , [Provider 2] and [Provider 3] reduce mortgage interest rates

- *Reduction of 0.25% in [Provider 1] and 0.38% in [Provider 2] and [Provider 3] standard variable rates*
- *Standard Variable Rates now 3.90% ([Provider 1]), 3.95% ([Provider 2]) and 3.97% ([Provider 3])*
- *Lower standard variable rates for new and existing customers from early June*
- *Lower Loan to Value (LTV) and Fixed rates for new and existing customers from early May.*

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[Provider1] Group today (Friday 1st May) announces a number of reductions to its mortgage rate for owner occupier and buy-to-let mortgagers. These include a cut of 0.25% for [Provider 1] Standard Variable Rate (SVR) customers and 0.38% for **[Provider 2]** and [Provider 3] SVR Customers...

Summary of Variable Changes announced:

VARIABLE RATES	[Provider 1]			[Provider 3]			[Provider 2]		
	Current	New	Reduction	Current	New	Reduction	Current	New	Reduction
Owner Occupier									
Standard Variable Rate	4.15%	3.90%	0.25%	4.35%	3.97%	0.38%	4.33%	3.95%	0.38
...									
Buy to Let	Current	New	Reduction						
Standard Variable Rate	5.35%	5.10%	0.25%						

- On the **9 November 2015** an internal email between staff in the Provider stated the following:-

"... Spoke with customer today ...he is not happy with the explanation. He has sent me a copy of the press release... which clearly states that [Provider1] Group.... have made the rate cut and that he is therefore entitled to same..."

The Provider staff member responded stating that *"... number of queries... regarding this exact issue...the customer is unhappy with this and we emphasise [sic] with same we will not be reducing his interest rate based on his interpretation of a Press release..."*

- On the **10th November 2015** the Provider wrote to the Complainant as follows:-

"I refer to your query re the interest rate which [the Provider] charge to the above loan. The rate at present is 5.08% and unfortunately [the Provider] are not in a position at present to reduce same. I am sorry the outcome cannot be more favourable however residential investment rates are constantly under review and if there is a change they will let you know."

- The Complainant wrote to the Provider in a letter dated the **15 February 2015** (should be 2016) as follows:-

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"I wish to make a complaint in relation to a query I made in 2015 to receive a reduction in interest rate.... I have not received a fair or clear response.... I am now being charged approximately 2% higher than existing business rates for home mortgages.... My ... monthly repayment has risen from €2,030.31 in September 2009 to the present day monthly repayment of €3,179.84.... The announcement by [the Provider] is clear that it affects buy to let rates and the Standard Variable Rate. The Standard Variable Rate is specifically mentioned in my initial contract with [the Provider]... This correspondence ... was undermining a legitimate issue raised I find this overall communication hurtful, unhelpful and extremely unprofessional... The correspondence dated 10 November was unsatisfactory and did not address the core issue of my query... [The Provider] has announced a reduction in standard variable rates but has not passed this onto my account, despite passing on all the increases to this point".

- On the **11 March 2016** the Provider responded as follows:-

"...you make reference to the Press Release of the 1 May 2015... please note the table of rate changes on page 3. You will note the reduction in [Provider 1] Buy to Let rate of 0.25%, however there is no change in [Provider 2] or [Provider 3] rates. Your offer letter... outlines the rate structure as Discounted Commercial Base Rate... Followed by Variable Commercial Base Rate... the current Standard Variable Rate for owner occupiers is 3.70% however the Variable Commercial Base Rate for Buy to Let customers is 5.08%..."

- On the **22 March 2016** the Complainant wrote to this Office:

He complained that the interest rate applicable to his loan with the Provider *"did not decrease despite an announcement of the 1st May 2015... that states a reduction of ".38% for [Provider] and [Provider 3] SVR customers".* He goes on state that he *"also would have understood that any variable commercial base rate would move in line with the Standard Variable Rate, although at the time [he] was led to believe they were the same thing".*

I note that the Provider used the term *"Standard Variable rate"* in the Statement of Suitability letter sent to the Complainant on the day the loan offer issued. The Complainant submits that this led him to believe that he was receiving a Standard Variable Rate equivalent to the Standard Variable Rates offered to Principal Private Dwellings *"supported by the fact that my Principal Private Dwelling was part of the stated purpose of the loan. I understood that [the Provider's] use of Standard Variable Rate and Commercial Base Rate interchangeably, meant that the rate referred to in my contract was the Standard Variable Rate and would vary both up and down with all Standard Variable Rates offered by [the Provider]. The rates did actually move identically for the first 8 months of the loan..."*. He states that if this was not what the Provider meant that this was a breach of the Consumer Protection Code.

The Provider states that the *"Statement of Suitability"* letter describes why the loan type, interest rate type and loan term are considered to be suitable. It states that the paragraph titled *'interest rate type'* on the suitability statement describes what a variable interest rate means in terms of *'availing of prevailing market rate and ... not require certainty of*

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repayments'. This is not confirmation of the type of variable rate applicable to the mortgage account. The actual type of variable rate applicable to the Complainant's mortgage account is stated on the Loan Offer letter... under Rate of Interest".... The Complainant did not apply for a home loan mortgage and therefore could not reasonably expect that the variable interest rate applicable to the buy to let mortgage account was the home loan mortgage variable interest rate... The Statement of Suitability does not form part of the mortgage contract".

- In a letter dated 7 November 2016 the Provider set out that

"Standard Variable Rate in relation to Commercial (Buy to Let) borrowings is referenced as Variable Commercial Base rate. Standard Variable Rate in relation to loans for the purchase of Principal Private Residence or Private Dwelling House are referenced as Variable Base Rate. Discounted loans are referenced as Discounted Commercial Base Rate or Discounted Base Rate. As per previous responses the Letter of Offer, which was signed and accepted by the Complainant and forms the basis of the mortgage contract, laid out the rate structure applicable to the loan, i.e. Discounted Commercial Base Rate converting to a Variable Commercial Base Rate. The Suitability Statement does not form part of the mortgage contract".

- The Complainant responded setting out that

"the purpose of my loan included a Principal Private Residence, therefore the links they now provide indicate that I should expect at least half of the loan to be at the Standard Variable Rate for Principal Private Dwellings. Do [the Provider] except [sic] that this loan was partially for a Principal Private Residence and that even by their arguments I should have been entitled to this rate? (on a minimum of the relevant portion of the loan.)

Naturally I would never have accepted such a rate if I knew that I was receiving a less attractive rate than I was entitled to as a purchaser of a Principal Private Dwelling. I was not informed of this and understood the rate to be identical in rate as they were at the time the loan was drawn down. [The Provider] was fully aware that the loan related to my Principal Private Dwelling.

...

It appears [the Provider] is making the argument that the lower rate only applied to Principal Private Dwellings. This is a new argument by the [the Provider] and an unusual one as 50% of the stated purpose of the loan was to acquire a Principal Private Dwelling. Since [the Provider] is deciding to make this argument, they should immediately accept this portion of the loan should have been assigned at the lower rate and thus a refund is due. Can [the Provider] please confirm that they will immediately refund for the disparity in rates charged? I naturally believe it should be 100% at the Standard Variable Rate, but at the very least [the Provider] should adhere to their own argument in this case and refund the monies immediately relating to this. At this stage I would like to remind [the Provider] and the ombudsman that my Principal Private Residence is now 16.... 16A..., my previous Principal Private Dwelling was sold (in 2016) due to the financial predicament brought about by this

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dispute. All loan statements pre-2016 were sent to my Principal Private Residence, 16 A... I notified [the Provider] of my change in address in February 2016.

...

In Summary, it is now becoming abundantly clear that [the Provider's] arguments indicates that at least a portion of the loan should be on a Principal Private Residence rate. I have clarified further points on why I had understood that I was on a rate identical to the Principal Private Residence Rate for the full portion of my loan. While [the Provider] has made numerous errors in rates on their correspondence with the Ombudsman, they contest they clearly defined the differential rates to be me, this is simply not plausible. I believe they led me to believe I was on a Standard Variable Rate which would move in sync with variable rates for Principal Private Dwellings, as my loan in fact involved my Principal Private Dwelling.

The Complainant states that he has resided in one of the properties securing the loan, 16, since 2015. The Provider agrees that the purpose of the loan included the *"Construction of the Complainant's Principal Residence, however all securities offered for the Loan were buy to let properties at that time... sanctioned a buy to let loan... in order to have this property reclassified as a home loan... a new application ... required in order to split loan into the relevant parts relating to the principal private residence and the buy to let property..."*

The Provider states that the Loan offer does not state that the interest rate *"was directly linked or tracking the variable rate applicable for home loan mortgages or any other variable rate"*. It states that the Complainant has been on a *"variable rate index which is applicable to buy to let properties, the 'variable commercial base rate' since the mortgage drew down in March 2008"*. The Provider states that there is no ambiguity in the terms and conditions and that it *"rejects that there is any applicability of the contra proferentem principle"*.

The Complainant contends that it is

"inconceivable to call two rates the same name, have the same rate at draw-down but then expect a loan applicant to comprehend that these two rates could move in opposite directions....I do not accept that [the Provider] can call my loan a Standard Variable Rate, move all Standard Variable Rates in sync for eight months and then subsequently seek to separate the rates...".

He states that the Provider led him to believe that he was

"on a Standard Variable Rate which would move in sync with variable rates for principal Private Dwellings, as my loan ... involve my Principal Private Dwelling".

He states that he did not raise any objection

"at the time of taking out the loan, as I understood the rate I was to receive was identical irrespective of its classification".

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The Provider states that the commercial base rate applicable to buy to let mortgages and the variable base rate applicable to principal private residence mortgages did move in line for the first 8 months of the Complainant's mortgage during 2008. It states, however, that

"these variable rates are entirely independent of each other. The loan offer letter does not state that the ... Commercial Base Rate ... was directly linked or tracking the variable rate applicable for home loan mortgages or any other variable rate in [the Provider]".

Analysis

The Complainant's loan offer issued on 15 July 2008, on paper emanating from the Provider's "Residential Investment Loans" Division. I note that the loan offer specifies on its face that it is a "commercial loan", and it refers to the interest rate as a variable "discounted commercial base rate" for the first 24 months followed by a "variable commercial base rate" for the remainder of the mortgage term.

I note that on the very first page of the Loan Offer letter, the "IMPORTANT INFORMATION" confirms:

"THE PAYMENT RATES ON THIS COMMERCIAL LOAN MAY BE ADJUSTED BY [THE PROVIDER] FROM TIME TO TIME (Does not apply while the loan is at a fixed rate)"

I also note that the Complainant applied for a buy to let mortgage, by completing a "Buy to Let Application Form" and the loan offer clearly refers to "commercial" rates. The commercial base rate is clearly described as an interest rate, which is determined by the Provider; there is no mention of a link to any other interest rate on offer by the Provider:

"Commercial Base Rate" shall be the base rate for commercial loans as determined from time to time by [the Provider] for variable rate and fixed rate loans for defined periods".

The loan agreement also states that payments will vary in line with movements in the interest rate. While the Provider's use of the term "standard variable rate" in its suitability letter of the 15 January 2008 is disappointing and certainly confusing, I note that the interest rate stated in its loan offer was clearly a variable commercial interest rate. Furthermore, while the term "variable" is used in the letter of loan offer, the term "standard variable rate" is not used at any point within the loan offer letter; I note that this loan offer was accepted by the Complainant on the 30 January 2008.

I am satisfied that the terms and conditions in the loan agreement itself are clear and unambiguous and the Provider's entitlement under the agreement is to alter the rate at its discretion and not in line with any other interest rate it offers. I am of the view in light of the terms and conditions of the loan offer that the Complainant cannot realistically have assumed that he was being offered a "standard variable rate" which would move in sync with the interest rate applicable to a home loan with the Provider. While the Provider may

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decide to increase or decrease the commercial interest rate, in line with its home loan mortgages, as it did in the past, there is no continuing obligation on it to do so. I am also satisfied that the terms and conditions clearly set out that the agreed interest rate is a “commercial” rate and there is no reference to the interest rate applicable to a mortgage for a home loan.

The Complainant requested an Oral Hearing to explore the issues raised, particularly in light of the “complexity of the argument and prolonged discussion” with the Provider. I also note that he has made reference to ‘verbal discussions’ about the Standard Variable Rate as well as advice he requested from the Provider regarding obtaining the “lowest” interest rate, before the loan was drawn down in March 2008. He also states that, had he been correctly advised, he would have “the PPR loan created on 167 to 16A at time of sale of house”.

Having reviewed and considered the submissions made, however, I am satisfied that an Oral Hearing is not required; the submissions and evidence submitted are very clear and sufficient in my opinion to enable a Decision to be made without the necessity for holding an oral hearing. Whatever options were discussed, as a prelude to the Provider’s formal assessment of the Complainant’s application for facilities, it is ultimately the terms confirmed in writing to the Complainant by way of a formal letter of offer, which outlined the specific basis on which the loan facilities would be made available by the Provider, which are relevant to the parties’ relationship. I am also conscious of the fact that any such discussions took place more than 11 years ago, and I note the comment of Hedigan J., in Caffrey v. Financial Services Ombudsman [2011] IEHC 285 that “one might question what account persons would have been able to give of a ... conversation that had happened some five years previously”.

I am also cognisant that the parol evidence rule provides that when parties put their agreement in writing, all prior and contemporaneous oral or written agreements merge in the writing. Courts do not permit integrated or written contracts to be modified, altered, amended, or changed in any way by prior or contemporaneous agreements that contradict the terms of the written agreement.

I note that McGovern J. of the High Court in **Ulster Bank v Deane** [2012] IEHC 248 stated that the defendants in those High Court proceedings were:-

“... seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the ‘parol evidence’ rule. See Macklin v. Graecen & Co. [1983] I.R. 61, and O’Neill v. Ryan [1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement.”

Consequently, for the reasons outlined, I am satisfied that the commercial loan offer dated 15 January 2008 accepted by the Complainant on the 30 January 2008, including the related commercial terms and conditions, formed the basis of the contractual agreement between

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the parties from that time, and continue to do so. While the Complainant states that he did not obtain legal advice on the loan offer, I note that the Complainant had a solicitor who acted on his behalf, in respect of the mortgage documentation, Certificate of Title and legal matters necessary to draw down the loan.

For the reasons set out above, I am satisfied on the evidence, that the Provider did not apply an incorrect interest rate to the Complainant's borrowing and that it is entitled to vary the interest rate "*with changes in the market rates*". I am of the view that the Complainant's interest rate on his mortgage account and consequently his monthly repayments, can be varied at the discretion of the Provider, in response to changes in the market rates, over the lifetime of his mortgage. Accordingly, the substantive aspect of the complaint cannot be upheld.

The Complainant states that he has resided in one of the properties securing the loan, 16, since 2015. I note that the Provider stated that the Complainant could apply to split his loan account to take this into account and that if "*the Complainant is approved ... to split the loan account...evidence ... confirming this as his principal private residence since February 2016 is provided, [the Provider] will recast the loan and refund the Complainant accordingly*".

I note indeed that following the issue to the parties of the Preliminary Finding of the Financial Services Ombudsman in September 2017, the Provider issued a refund cheque to the Complainant on the 30 November 2017, in respect of the period from June 2015 to July 2017, in recognition of the fact that the Complainant was living at 16.

The Complainant now submits that he should be "*compensated from loan inception to June 2015 for the portion relating to my PPR*". The Complainant set out that "*I lived in 167 ...and original loan offer was sent to this address. Both my PPR at time of loan application (167...) and at time of first loan statement (16A...) are covered by [the Provider's] security on loan...*"

In relation to 167, the submissions made by both parties indicate that the Complainant resided in this property when he entered into the loan in January 2008. The loan offer is addressed to him at that address, and it is identified as his address on his "*Buy to Let Application Form*". Therefore, the Complainant could make the case in respect of the period while he continued to live in 167 and it was held as security for his loan with the Provider that he should have benefited from an owner occupier rate on a pro rata basis for this element of the security.

I see that the Complainant has confirmed that he moved into 16A in March/April 2008. At the time the loan drew down, and for 8 months thereafter, the Standard Variable Rate applicable to owner occupiers was in fact, the very same as the commercial base rate applicable to the Complainant's loan. As a result, no recasting of the loan would be required for that period, as the Complainant is in the same position vis a vis the applicable rate, as he would have been in, if he had been on the owner occupier rate for the period January to March/April 2008.

In respect of 167, the Provider referred to a "FLM" (first legal mortgage) on 167 under the "*Property address*" in loan statements sent to the Complainant from 2008 to 2014 inclusive,

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yet the Provider confirmed that this property was released from its security in 2008 and the Complainant did not dispute this, so this appears to be an error.

The Complainant confirmed that he moved into 16A in March/April 2008. The Complainant asserts that 16A is “covered by [the Provider’s] security” on his loan and, therefore, should also benefit from the Standard Variable Rate for an owner occupier, for the period he lived in 16A.

In support of his assertions the Complainant sets out that “16A...is referenced as security in virtually all communications outside of the contract” in particular pointing to loan statements. The Provider set out that the “reference to 16A... under the heading “Property Address” on the annual loan statement is an error and should have stated 16B..., as confirmed in the Loan Offer”.

I note that the Provider referred to a “FLM” (first legal mortgage) on 16A under the “Property address” in loan statements sent to the Complainant from 2008 to 2012 inclusive. This error is disappointing. I am satisfied however that the loan offer clearly set out that the security for the loan, was provided by properties at 167, 16 and 16B; the Complainant was on notice of the property that the Provider intended to take as security, when he accepted the loan offer and the Provider did not refer to the property at 16A as security for the loan.

Furthermore, the Complainant has set out on several occasions, in the course of his communications with this office, that 16A was not security for the loan. In a letter to the Provider dated 17 February 2015, the Complainant requested that the Provider switch the security for his loan replacing 16 with 16A. This clearly indicates that 16A was not already held as security. In addition, in his letter dated 22 March 2016, the Complainant advised that

“I personally lived in 16A until 2016 which is not related to this loan”.

Furthermore, on 14 March 2017, the Complainant advised that

“[the Provider and] I agree that all securities offered at the time were rental properties and did not include 16A...Both [the Provider] and I agree that I did not reside in the houses that were used as security at the time, although I have since 2016” [thereafter shown to be June 2015].

Therefore I am not persuaded that the Complainant’s loan should be recast to provide for a pro rata application of the owner occupier rate, on the basis that 16A formed part of the security for the loan.

The Complainant submits that the changes outlined in the Provider’s press release of the 1 May 2015, should affect his loan. While it would have been helpful if the main part of the press release had clearly set out that the rate reduction did not apply to the Provider’s buy to let mortgages, I am satisfied that this was evident in the “Summary” tables at the end of the press release. In any event, I am satisfied that the issue of a press release by the Provider did not alter the contract agreed between the Provider and the Complainant on the 30 January 2008.

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The Complainant also contends that the Provider's instruction to "*empathise*" in its internal email of the 9 November 2015 was belittling and hurtful. He also submits that its response to his query was unclear. While on balance, I do not accept that the Provider's letter of the 9 November 2015 could reasonably be considered to be belittling and hurtful, I am of the view that the response issued was overly brief and that it would have been good practice for the Provider to have offered a better and more detailed explanation to the Complainant regarding the interest rate applicable to his account.

There have been a series of errors on the Provider's part, in its dealings with the Complainant, which have done little to engender a frictionless relationship between the parties. It was remarkably unprofessional for the Provider to have inadvertently sent, with its letter of the 9 November, an internal email discussing the issue; the contents understandably added to the Complainant's annoyance to see his query referred to by the Provider's staff member as "*his interpretation of a press release*".

It was also disappointing that the Provider initially furnished the Complainant with an incorrect "*rate history*" and used unexplained acronyms, which caused understandable confusion to the Complainant. Likewise, the use by the Provider of the term "*standard variable rate*" in its Suitability Statement of the 15 January 2008, which was furnished again by the Provider as part of its response to a separate complaint by the Complainant (regarding the Provider's refusal to switch security) was inappropriate and is disappointing.

I also note the incorrect labelling of the security held, on loan statements issuing to the Complainant from 2008 to 2013. These referred to 16A rather than to 16B and included 167, notwithstanding that 167 had been sold in 2008 and thereby released from the Provider's security. This was careless and one can well understand how this could have led to, or contributed to, confusion in the mind of the Complainant. I believe that the Provider has a case to answer to the Complainant, in that regard.

In light of the Provider's shortcomings in these respects, I believe that it is appropriate for the Provider to compensate the Complainant for the inconvenience caused. Accordingly, I direct the Provider to make a compensatory payment to the Complainant in the sum of €1,500.00, to an account of the Complainant's choosing within 35 days of the Complainant's nomination of account details to the Provider.

For the reasons outlined above my Decision is that the complaint is partially upheld.

Conclusion

/Cont'd...

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, as amended is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(g)**
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant, in the sum of €1,500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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

3 July 2019

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, as amended, 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