



<b><u>Decision Ref:</u></b>	2020-0098
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to process instructions Application of interest rate
<b><u>Outcome:</u></b>	Substantially upheld

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

**Background**

The Complainants entered into a mortgage loan agreement with the Provider in **June 2001**. When entering this agreement, the Provider did not offer the Complainants a tracker interest rate. The Complainants submit that such a rate should have been offered to them when they drew down their loan. The Complainants made three lump sum payments to their mortgage loan account between **April 2008** and **November 2013** on the express instruction, they say, that these payments were to be used to reduce the term of the loan. The Complainants submit that the Provider misapplied these payments and did not reduce and/or correctly reduce the term of the loan. Finally, the Complainants state that the Provider applied an incorrect interest rate during the first year of the loan.

**The Complainants' Case**

The Complainants state that they entered into a joint mortgage loan with the Provider in **2001** and certain matters came to their attention when they more recently queried the duration of the remaining term of the loan. The Complainants state that they received an unhelpful response from the Provider in respect of those matters. The Complainants submit that the Provider has

*“... treated us very unfairly and have not been transparent in their dealings with us about our mortgage ...”*

***Lump Sum Repayments***

The Complainants state that they queried the impact of the overpayments made to their loan account over the past number of years. The Complainants point out that three additional lump sum payments of €3,000 each were made and, in addition, their monthly repayments were increased to €935 per month which was more than the required monthly repayment. The Complainants submit that:

*“... the €3000 instalments were specifically paid in order to reduce the mortgage term and this was expressed to [the Provider] by [the Second Complainant] at the time. ... These instalments were only paid with the intention of reducing the mortgage. We would have no other reason to pay these instalments.”*

The Complainants believe that they were treated unfairly by the Provider in this regard and if they had been asked to put their request in writing they would have done so but the Provider did not make such a request. The Complainants continue by stating that the Provider *“... did advise that the instalments would dramatically reduce the mortgage term.”*

In the context of the Final Response letter dated **4 August 2016**, the Complainants state that the Provider *“... did not respond to our question as to how the other overpayments (€935 per month would impact the mortgage)”*.

#### ***Incorrect Interest Rate***

The Complainants also queried with the Provider why an incorrect interest rate was applied to their mortgage during the first year. The Complainants state that this error was not advised to them at the time, nor was there any compensation to resolve the matter, including any interest. The Complainants are dissatisfied with the Provider's response and do not understand how the figure of €17.75 was derived, when it was credited to their account, and they are unclear as to whether that figure is correct.

#### ***Failure to Offer Tracker Interest Rate***

The Complainants state that when querying the mistake with their interest rate, they also enquired as to the reason why the Provider did not offer them a tracker interest rate *“... when taking out the mortgage originally.”* The Complainants question why this was not offered to them and whether they have lost money because of this. The Complainants consider the Provider's response to be lacking and they point out that they did not receive the letter referred to by the Provider at paragraph 5 of the Final Response letter.

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

The Provider states that the Complainants signed a mortgage loan offer on **19 June 2001**. At that time the Provider had not introduced tracker mortgage rates. The Provider advises that tracker mortgages were introduced in **August 2001**.

#### ***Lump Sum Repayments***

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The Provider states that the Complainants made three part redemption repayments in **April 2008**, **November 2011** and **November 2013** respectively. These repayments were applied to the Complainants' loan account as per condition 6(a) of the mortgage loan offer letter. The Provider explains that when a part redemption payments is made to a mortgage loan account, the funds will reduce the outstanding current balance of the loan and if no alternative instruction is received, for example to reduce the term of the loan, the Provider will recalculate the monthly repayment amount due and a reduced monthly repayment amount. In terms of the three respective lump sum payments, the Provider has made the following submission.

On **25 April 2008**, the Complainants lodged €3,000 to their loan account and the funds were applied to the account as a part redemption. The Provider states that it correctly applied the payment to the account and in line with condition 6(a) of the mortgage loan offer letter. The Provider submits that no instruction was received from the Complainants advising that this payment was to reduce the term of the mortgage. The Provider states that the payment was applied as follows:

- 1) the outstanding balance on the loan was reduced; and
- 2) monthly repayments were recalculated based on the reduced balance.

On **28 November 2011**, the Complainants lodged €3,000 to the loan account as a part redemption. The Provider states that an instruction was received from the Complainants requesting that the current repayments be maintained. This is documented on the Provider's systems as follows:-

*"Hi. Customer is making lump sum pymt today of 3k. Please have pymts remain at current level. Thereby reducing the term."*

The Provider states that the payment was therefore applied as follows:-

- 1) the outstanding balance on the loan account was reduced; and
- 2) monthly repayments were not recalculated based on the reduced balance.

On **5 November 2013**, the Complainants lodged €3,000 to the loan account as a part redemption. The Provider states that it applied this payment in the same manner as the one received in **November 2011**, as it received an instruction from the Complainants which was documented on its systems as follows:-

*"Customers have enquired with me as to the term left on this mortgage. Can you provide me with the term that has been taken off this mortgage with the overpayments that have been made to this account.*

*They are currently paying an extra e66 pm on this a/c. can you tell me the term this takes off the mortgage.*

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*they have also paid off an extra small e3k yesterday on this mortgage. can you tell me what interest and term this takes off the mortgage ...”*

The Provider states that each lump sum payment was clearly marked on the Complainants’ account statement as *part redemption*. Accordingly, the payments were applied to reduce the overall balance outstanding. The Provider states that given the two payments in **November 2011** and **November 2013**, and the fact that the Complainants’ monthly repayments have not been reduced (except for interest rate changes) since **December 2011**, the mortgage loan is due to finish in **November 2020**.

#### ***Incorrect Interest Rate***

The Provider states that the Complainants’ loan was drawn down on **7 December 2001** and an interest rate of 4.8% was applied. The Provider points out that the interest rate should have been 4.5%. On **20 December 2001**, some 2 weeks later, the Provider states that it amended the Complainants’ interest rate to the correct rate of 4.5%. The Provider advises that while in the process of preparing its response to this complaint, “... *it has come to light that the applicable refund of IP£17.75 (€22.54) was not applied to the account back in December 2001 ...*” The Provider states that based on relevant interest rate, fair value and euro conversion this equates to €36.41. The Provider stated in its letter dated **17 April 2017** that:

*“... it offered a gesture of goodwill payment of €250.00, which was not accepted by the Complainants by way of an apology for its shortfall of customer service. This offer remains open to the Complainant.*

#### ***Failure to Offer Tracker Interest Rate***

The Provider states that the Complainants’ loan account was not subject to a tracker interest rate until the terms of lending were amended by mortgage form of authorisation signed on **11 July 2005**. The Provider states that it automatically issued a mortgage form of authorisation to the Complainants on **4 November 2002**, offering interest rate options to the Complainants at the end of their one year fixed rate period. The Provider states that no response was received to this letter. The Provider states that it issued a product rollover letter to the Complainants on **4 December 2002** confirming that the loan would roll over to a variable rate from the expiry of the fixed rate. The Provider states that these letters are not available to view on its system. The Provider states, referring to condition 7(b) of the mortgage loan offer letter, that the loan rolled over to a standard variable rate until the Complainants requested a tracker interest rate in **2005**. The Provider states that the Complainants’ loan then moved to a tracker rate on **14 July 2005**.

#### **The Complaint for Adjudication**

The complaint is that the Provider was guilty of maladministration, insofar as it:

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- 1) failed to follow the Complainants' instructions in respect of the lump sum payments made;
- 2) applied an incorrect interest rate during the first year of the loan; and
- 3) failed to offer the Complainants a tracker interest rate in 2001.

### **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 30 January 2020, 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 additional submissions from the parties, the final determination of this office is set out below.

#### ***Time Limit for making Complaints to the FSPO***

The Complainants made a complaint to the Financial Services Ombudsman in December 2016 following the submission of a formal Complaint Form. Complaints made to this office (including to the former Financial Services Ombudsman) must be made within the time limits currently prescribed within **Section 51** of the **Financial Services and Pensions Ombudsman Act 2017**, as amended ("the Act").

**Section 51** prescribes that a complaint about a "long-term financial service" within the meaning of the Act (which includes the Complainants' mortgage) must be made within whichever of the following periods is the last to expire:-

*"(i) 6 years from the date of the conduct giving rise to the complaint;*

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(ii) 3 years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;

(iii) such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.”

**Section 51(3)** makes it clear however, that any complaint concerning a “long-term financial service” within the meaning of the Act must, in itself, meet certain requirements being (i) that the “long-term financial service” concerned has not expired or otherwise been terminated for a period of more than 6 years before the complaint was made and, in addition, (ii) the conduct complained of must have occurred during or after 2002.

In this instance, the Complainants’ grievance regarding the Provider’s failure in 2001, to offer them an interest rate on their mortgage borrowing, which would track the European Central Bank rate, is conduct which occurred in or about **2001** and therefore falls outside the jurisdiction of the FSPO. Likewise, the Complainants’ grievance regarding the mis-application by the Provider, of the interest rate to their borrowing during the first number of weeks of the period of the loan, commencing in **2001**, similarly falls outside the jurisdiction of this office, though I note that the Provider has, in its response to this complaint, identified the failure in question which occurred in 2001, and has made it clear as to how it has addressed that error.

It is also notable that **Section 51(5)** of the Act is relevant to this complaint as it prescribes that conduct that is of a continuing nature is taken to have occurred at the time when it stopped, and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred. The Complainants’ grievance regarding the manner in which their lump sum overpayments to the account were applied by the Provider, is noted to concern overpayments made in **2008, 2011** and **2013** respectively and this office is therefore satisfied that the conduct in question constitutes conduct of a continuing nature for the purpose of **Section 51(5)** of the Act.

Owing to the limits of the jurisdiction of this office, the only element of the Complainants’ grievance which falls within the jurisdiction of the FSPO, is their complaint that the 3 lump sum payments which were made to the account in 2008, 2011 and 2013 respectively, were mis-applied by the Provider which failed to administer the mortgage borrowing in the manner which the Complainants had requested. The Complainants submit that these payments were made on the basis of an express instruction from them to the Provider, to reduce the term of the loan.

#### The 2008 Lump Sum Payment

In an email to this Office dated **16 April 2018**, the Second Complainant states:

*“When I paid off the three separate 3000.00 euros I specifically requested that the repayments remain the same and there and not be changed and that the 9000.00*

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*would take down the lifetime of the mortgage and reduce the number of years dramatically.”*

[My emphasis]

In a further email to this Office dated **16 April 2018**, the Second Complainant states:

*“The Facts are that we were told by [the Provider] when we paid 3000.00 euros three times on each occasion that it would reduce the term of the loan but they never sent out a letter confirming this ...”.*

The Second Complainant explains in an email to this Office dated **28 October 2019** that:

*“On the questions of the first 3000.00 that was paid off and you state that we did not request it to be taken of the term of years, I know I asked the person in the Bank who was dealing with me to reduce the term of years, I did it verbally not written down. My whole aim was to reduce the term of years of the mortgage.”*

During the telephone conversations that took place between the Second Complainant and the Provider in **2016**, the Second Complainant states on a number of occasions, that she had given instructions that the lump sum payments were not to reduce the monthly repayments.

The documentary evidence includes a note to the system of the Provider in both 2011 and 2013 which appears to capture the instructions of the Complainants. It is clear in that regard that the Complainants were not requested to put their instructions in writing and rather, the Provider documented the instructions as they were understood. Whilst the parties are at odds as to the instructions which were given in respect of the first lump sum payment in 2008, I take the view that the documentary evidence available regarding the Complainants' clear instructions in 2011 and 2013, is persuasive, and suggests to me that the Complainants, in each of the three instances, were seeking to have the lump sum payments applied in a way which would reduce the term of the mortgage loan, from the original period of 20 years, so that the Complainants could fully redeem the mortgage at an earlier date. I note in that regard that the Complainants continued to make repayments at the same level every month and I am satisfied that they understood that the lump sum payments in question would achieve their desired outcome, i.e. to reduce the overall term of the borrowing.

It is disappointing that when the lump sum payments were received by the Provider, no confirmatory letter appears to have been issued to the Complainants confirming receipt of the money in question or indeed confirming the manner in which the lump sum payments would be applied.

The Provider in that regard seeks to rely upon the terms and conditions of the loan and has quoted Condition 6(a) of the Mortgage Loan Agreement, which prescribes as follows:-

*“Subject to Clause 6(c), at all times when a variable interest rate applies to the loan the interest rate chargeable will vary at the bank's discretion upwards or downwards.*

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*If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the loan without penalty."*

I am not satisfied however, that the details in this condition, within the Loan Agreement, placed the Complainants in any way on notice that the Provider would apply a lump sum payment, by reducing the balance and recalculating the monthly repayment which fell due. It is very disappointing in those circumstances that the Provider failed to notify the Complainants on any of the three occasions as to how the lump sum payment in question would be applied. Had it done so, this issue seems likely to have come to light at an earlier time and the Complainants would have been in a position to correct the issue directly with the Provider.

I have noted from the Provider's entry on its system in November 2013 that the branch was seeking confirmation at that time, as to precisely how much of the term was taken off the mortgage, by virtue of the lump sum payment being made. If the mortgage division of the Provider responded to the branch, it is certainly not apparent from the evidence which has been submitted. If information had been made available at that time, as to precisely the manner in which the mortgage was being calculated, this would also have given an opportunity to the Complainants to address the issue at that earlier time.

The Provider has pointed out that each lump sum payment was clearly marked on the Complainants' account statement as "*Part Redemption*". I am not satisfied however, that these two words would have given a clear indication to the Complainants as to how their lump sum payments had been applied by the Provider in its mortgage account calculations.

The evidence nevertheless confirms that the November 2011 and November 2013 lump sum payments, were applied by the Provider in accordance with the Complainants' instructions. The loan value was reduced as a result and monthly payments were not recalculated, as a result of which the Complainants' increased lump sum payments also continued to have an effect. It is however disappointing, that the first lump sum payment was not applied by the Provider in the manner in which the Complainants had requested. If the Provider's process of communication with its account holders had been more effective at that time, it seems likely that this issue would have been discovered at an earlier time and the Complainants would have been in a position to correct it.

I note that when the borrowing was originally drawn down, the repayment term was anticipated as a period of 240 months, i.e. a period of 20 years, to expire in May 2021. The current position, based on the Complainants maintaining their current repayments is that the mortgage will fall due to fully redeem in November 2020, some 6 months early.

The Provider, in its letter to this office of 14 October 2019 noted the Second Complainant's request in her email of 24 September 2019, for the total amount paid over the required repayments, to be refunded to the Complainants and for the original maturity date to be reinstated on the mortgage loan. The Provider confirmed that if the Complainants indeed still wished to do so, they could simply confirm the particular account that they wished for the funds to be credited to; this was an option which remained open to the Complainants to pursue, if they wished to do so.

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Quite apart from the Complainants' decision regarding that reimbursement, I take the view, based on the conduct of the Provider in failing to clearly notify the Complainants on three separate occasions, regarding the manner in which the lump sum payments would be applied to the account, the changes to the calculations and/or variation of the term of the mortgage, and indeed any implications arising for any life assurance policies in place, that the Provider has a case to answer to the Complainants as a result of the poor level of communication and absence of clarity as to how the mortgage account would be administered.

Accordingly, I consider it appropriate to substantially uphold this complaint and to direct the Provider to make a compensatory payment to the Complainants in the sum of €4,000, in order to conclude.

When the Preliminary Decision was issued to the parties in January 2020, I noted that it would be a separate matter then for the Complainants to decide whether they wished to proceed with the refund of their total overpayments of €9,000, as the Provider has offered to make available to them. I note that since that time, the Complainants have secured additional information from the Provider regarding the consequences of effecting the reimbursement of the lump sum payments in question, and have in fact elected to do so and they have been issued with the required payment instruction form by the Provider, for completion, to enable that reimbursement to proceed.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially 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 Complainants in the sum of €4,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the 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**

11 March 2020

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.**