



<u>Decision Ref:</u>	2020-0121
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Failure to provide correct information Delayed or inadequate communication Failure to process instructions in a timely manner
<u>Outcome:</u>	Upheld

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

This complaint concerns the Provider's administration of a mortgage loan account held by the Complainants.

The Complainants' Case

The Complainants took out a mortgage with the Provider in 2008. The Complainants state they had agreed interest only repayments for a term of 20 years. It is suggested that the Provider began to deduct significantly increased repayments by direct debit without the Complainants' knowledge, causing the First Complainant's account to be overdrawn and other direct debits to be returned unpaid. The Complainants state that this has caused them distress and coincided with a time when the First Complainant was having serious health issues.

The Complainants state that the agreed repayments of €850.00 were never missed, but in June 2017 the Provider began to deduct €2,087.49 by direct debit. When they contacted the Provider they state the Provider claims it issued an "interest only options" letter in April 2017 to which it received no response, thereby causing the mortgage account to revert to full capital and interest repayments. The First Complainant states that during this period he was very ill, and the Provider's actions contributed to his poor health and caused them both a lot of stress. They also believe that the Provider did not respond to their complaint in a timely manner.

The complaint is that the Provider failed to keep to the agreed interest only repayment arrangement, increased the direct debit instruction from €850.00 to €2,087.49 without consent and caused stress to the Complainants contributing to the First Complainant's poor health.

The Provider's Case

The Provider states that it issued correspondence on 3 April 2017 to inform the Complainants that the agreed interest only repayment period was due to end on 1 June 2017, and outline the following options to the Complainants:

1. Convert to repayments of principal plus interest;
2. Remain on repayments of interest only until the next review date.

The letter also set out the new repayment sum for each option and stated that, should the Provider not receive written instructions from the Complainants before 1 June 2017, the loan repayments would automatically revert to capital plus interest repayments. It states a further letter was issued on 6 June 2017 informing that the mortgage repayments had been changed to capital plus interest.

In its final response letter of 6 July 2017, the Provider apologises for a delay in responding to the Complainants' complaint, but maintains that in the absence of a response to the April letter the mortgage correctly reverted to capital plus interest repayments and will remain on such repayments going forward.

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 16 January 2020, outlining my preliminary determination 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 issue of my Preliminary Decision the Complainant made a further submission under cover of his e-mail to this Office dated 3 February 2020, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submissions.

I note that the Complainant has, in the post Preliminary Decision submission dated **3 February 2020**, raised the issue of the sale of the loan to a third party which occurred on **4 February 2019**.

The sale of the loan to a third party did not form part of the original complaint that was received by this Office on **17 May 2018**, it was also not part of the investigation that was undertaken by this Office. As this matter was not part of the original complaint nor has it been investigated by this Office, I am not in a position to adjudicate on this issue.

Having considered the Complainant's additional submission and all of the submissions and evidence furnished to this Office, I set out below my final determination.

By mortgage loan offer letter dated 5 June 2008 the Provider offered a loan of €230,000 to be repaid over 20 years.

The loan type was described in the letter of approval as "1yr Disc Variable (>80% LTV) Int Only Home Loan". The loan was drawn down on 25 March 2010 on a discounted variable rate and repayments were interest only.

Special condition 5 of the loan reads as follows:

"[the Provider] will accept monthly repayments, as set out in the approval letter representing payments of interest only (as may be varied from time to time and including insurance premiums where applicable) for the first 2 years from cheque issue, where the ratio of the loan amount to the value of the security ("LTV" see page 1) exceeds 75%, or for the first 5 years where the LTV is less than or equal 75% or such other period(s) as [the Provider] may decide in either case. [The Provider] may review the deferral of the repayment of principle at any time, including the first 2 or 5 years of the term (whichever applies) and may require that the applicant immediately arrange to make revised monthly repayments of principal and interest so that the principal and interest will be discharged within the existing term."

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The LTV for the Complainants' loan was described as 87%.

The "Description of Product" portion of the European Standardised Information Sheet (ESIS) repeats the above term – that repayments will be interest only for 2 years (in the case of the Complainants') loan, but always subject to review by the Provider.

The "Amount of Each Interest Payment" portion of the ESIS states that the monthly instalment represents interest only, but that the lender reserves the right to review the arrangement where interest only is paid and may require payment of principal.

In essence, the mortgage terms allowed the Provider to end the interest only term at any stage. If a situation developed whereby the Provider attempted to do so within the applicable 2 or 5 year period as set out in special condition 5, in my view a customer could have had reasonable grounds for dispute. This situation did not arise in this complaint.

In fact, the Complainants' account proceeded on an interest only basis for the first 5 years. The Complainants made the requisite repayments, and the Provider did not seek to end the interest only period.

On 2 April 2013, the Provider wrote to the Complainant advising them that their interest only period would end on 1 June 2013 and advised them of two options:

1. Convert to repayments of principal and interest;
2. Remain on repayments of interest only until the next (unspecified) review date.

The letter noted that if the Complainants *"choose to remain on an interest only mortgage your principal balance will not reduce and if you decide to switch at a date in the future your monthly repayments will be higher. This will come about because your repayments will be calculated on a reduced mortgage term"*.

The letter also stated that if no response was received by 1 June 2013, the mortgage would revert to principal plus interest repayments.

The Complainants signed a form (on 8 April 2013) indicating their choice to remain on interest only repayments (then €821.08).

On 1 April 2015 another "interest options" letter was sent to the Complainants, in identical terms to the 2013 letter above.

The Complainants signed a form (on 9 April 2015) indicating their choice to remain on interest only repayments (then €855.61).

On 3 April 2017 an identical "interest options" letter to those set out above was sent to the Complainants, giving them a deadline of 1 June 2017 to respond.

The Complainants did not respond to this letter. On 1 June 2017 the Provider issued correspondence to them confirming that their mortgage loan had reverted to principal plus interest repayments.

On 12 June 2017 the First Complainant telephoned the Provider to say that he had been away but his wife had called him about a letter from the Provider. It is not entirely clear whether this refers to the letter of 3 April 2017 or the letter of 1 June 2017.

Recordings of telephone calls between the Complainant and the Provider have been provided in evidence. I have considered the content of these calls. During the call on 12 June, the First Complainant explains that he wants to go back to his interest only repayments. He is firstly told that he had asked to be converted to principal plus interest (which was clearly incorrect). The agent then discusses the matter with another staff member who explains to the agent that the customer needs to submit the interest options letter with the interest only box ticked, and that there would probably not be any issue in reverting the account to interest only repayments. The agent then goes back to the call with the First Complainant. Crucially, she does not tell him to submit the form immediately. Instead she tells him that she will email the appropriate department regarding the issue and someone from the Provider will contact him.

The Complainant therefore, and not unreasonably, is led to believe that the matter now rests with the Provider and that the Provider will contact him in due course.

The Provider states that the following day an internal email was sent to the telephone agent stating that as the Complainants had not returned the options form, the Mortgage switched to principal and interest on 1 June 2017.

During the next few months, the Complainants' nominated account is debited the full principal plus interest repayments. It appears that there were sufficient funds in that account to meet the now increased direct debits. The first direct debit returned unpaid takes place in October – 25 October 2017 according to the statements provided. At this stage, the increased repayments appear to have depleted the funds in the Complainants' nominated current account. The Complainants subsequently explained that the direct debits caused this account to go fully into its overdraft limit.

From this point onwards the loan account is in arrears, and the Complainants begin receiving arrears warning letters and telephone calls in line with Provider's obligations under the Consumer Protection Code.

On 16 November 2017 the First Complainant telephoned the Provider to complain that the Provider had changed the agreement from interest only to full principal plus interest repayments. He explains that he has been seriously ill for the previous six months, and it is not possible for them to make the full principal plus interest repayments.

The Provider notes, and I accept, that this is the first time it was informed of the First Complainant's illness.

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The First Complainant states that he never received any letter informing him of a change in his repayments. This does not precisely tally with what was stated in the June phone call. Having said that, after the June telephone call the Complainant would likely have been expecting correspondence from the Provider on foot of what the agent had told him, and it is likely he was referring to having received no letter on foot of that phone call.

Having told the Provider that the full interest and principal repayments could not be met, an appointment was set up for the Complainant to complete a standard financial statement (SFS) in branch on 28 November 2017.

The Provider offered a two month interim arrangement, but the First Complainant explains that he will have to open a new current account as the account that was then being used for the direct debits would be too depleted to take even the reduced payments from.

On 20 November 2017 the First Complainant contacted the Provider seeking copies of the correspondence that issued to him "from May 2017" and the signed mortgage loan agreement to be sent to his house, which is a new address as he states he has moved house as he is separated from his wife (the co-borrower).

He is told that there is no problem in amending his correspondence address but it would have to be done by way of written request. The First Complainant does not accept this as reasonable, but agrees that the documentation can be sent to the original address and he will collect it. There is a concern on the part of the agent that the documentation might not arrive to that address in time for the meeting. Ultimately the call is disconnected on the First Complainant's end while the Provider's agent is attempting to finalise matters with him.

The meeting on 28 November 2017 did not proceed because the First Complainant had not received the documentation sought.

I do not believe it is reasonable for the meeting to have not proceeded on that basis, given that he sought the documentation so close to the meeting time, and I am not satisfied the documentation was necessary for the Complainants and the Provider to make progress in filling out an SFS.

Ultimately, the signed acceptance of loan documentation was sent to the Complainants on 11 December 2017. I do not find this to have been an unreasonable delay in sending the documentation, it was explained to the Complainant at the outset that the loan offer letter had to be sourced at another location and could take some time.

During the months from November to February the Provider continued to issue arrears correspondence and sought to contact the Complainants using the details that the Complainants had given to it. After refusing to proceed with the meeting on 28 November 2017, the Complainants did not engage with the Provider again until 5 February 2018. However, the First Complainant was in hospital for January (and perhaps all of this three month period) with a serious illness requiring major surgery.

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On 5 February 2018 the First Complainant's sister contacted the Provider by telephone to speak on his behalf. She explained that the First Complainant has been in hospital (and indeed was currently in hospital). She explains that the First Complainant has just had major surgery.

She stated that, as per the mortgage loan agreement, the Complainants' mortgage should be on an interest only basis and the Provider has moved it to principal and interest without notifying them. She also notes that the Complainants' credit rating is likely to have been affected by this issue.

The Provider's agent explains about the April and June letters, but the First Complainant's sister explains that no such letters were received.

Dismissing the possibility that the Second Complainant might have seen the letter, the First Complainant's sister during this call states that both borrowers live in the same house and the First Complainant deals with the financial matters. Copies of the April and June letters are requested (these are sent on 14 February 2018).

Further arrears letters issue during February 2018. On 12 March 2018 the First Complainant contacts the Provider and arranges an appointment in branch for 21 March 2018. On 16 March 2018 the First Complainant contacts the Provider seeking to speak with the person whose name is on letters sent by the Provider. It is explained that although this person's name is on the letters he would not be in a position to take the call. In that regard it is not uncommon nor is it wrongful conduct for a bank to send letters signed by, perhaps, the head of a department but that the said department head may not be available for direct calls from the customer.

The First Complainant takes issue with the description of him and his co-borrower as "not co-operating". "Not co-operating" is a defined term under the Code of Conduct on Mortgage Arrears (CCMA), and while I appreciate that a customer may not be pleased at being classified as "not co-operating", it is not a personal sleight and I can find no evidence to suggest that the Complainants were not correctly classified as "not co-operating" within the meaning of the CCMA.

The First Complainant is understandably irritated at this stage that his complaint has not been resolved. The First Complainant attempts to change his address on file but again is told that this cannot be done over the phone. It is clear that the First Complainant's understanding of the purpose of the meeting on 21 March 2018 is to resolve the issue of the repayments being changed, whereas the Provider wants to meet to complete an SFS.

The First Complainant attends the 21 March 2018 meeting and instead of completing an SFS he presents a letter of complaint in the branch.

At this stage, the Complainants had become entrenched in their position that the Provider was not entitled to convert the repayments from interest only to principal plus interest. It appears no engagement occurred after this point with regard to a restructure or recapitalisation. By March 2018, in order for any restructure or recapitalisation to be considered, the Complainants would have had to fill out an SFS which would have had to have been assessed in the normal course. Unfortunately this did not happen.

In February 2019 the Complainants' loan was included in a suite of loans that was sold by the Provider to a third party provider.

Analysis

The first, and fundamental issue that the Complainants have in this complaint is their belief that the Provider simply was not entitled to convert their loan to principal plus interest repayments from interest only repayments in June 2017, and that their loan was locked in to interest only repayments for 20 years.

This is not a correct interpretation of the mortgage terms. Special Condition 5 permits the Provider to convert the loan to principal plus interest "on review".

Special Condition 5 gives a broad discretion to the Provider to convert the repayments, and forms part of the agreement offer that the Complainants accepted.

The real issue here, in my view, is whether or not the procedure adopted by the Provider was a fair one. A letter was written on 3 April 2017 which was clear in its terms. Indeed, it was identical to letters written in previous years that the Complainants had received and returned with instructions to remain on interest only repayments.

Another letter was sent on 1 June 2017, confirming that as no response had been received the account had converted to principal plus interest.

I am not satisfied that the Complainants can rely on a contention that they did not receive either of these letters. The Complainant's telephone call of 12 June 2017 was prompted by one or both of these letters.

However, during that telephone call of 12 June 2017, the First Complainant was not told to return the form opting for interest only repayments as he should have been.

This error, combined with the First Complainant's illness and the overdraft on his current account, meant that the Complainants were not aware that they were being charged principal plus interest until they began to receive arrears letters after the October 2017 direct debit was returned unpaid.

The Provider could not have been aware at this point of the First Complainant's illness, nor was it aware until later that – as stated by the First Complainant – he was separated from his wife (the co-borrower).

The fact of the First Complainant's illness and the apparent separation of the co-borrowers are a double edged sword – on one hand, serious illness in particular is a cause for leeway to be given and extra time and space to be permitted to get affairs back in order; on the other hand, however, both are material changes in personal circumstances that can reasonably cause a bank to require updated standard financial statements from both borrowers in order to assess the long term sustainability of a mortgage.

At this point the Provider and the Complainants came to something of an impasse. The Complainants believed, incorrectly, that they were entitled to interest free repayments as a matter of right. The Provider required an SFS to be completed in order to assess the sustainability of the loan.

This impasse flowed, at first instance, from the seemingly minor omission of the Complainants to return an interest only options letter within the 40 days first given to them by the 3 April 2017 letter.

Even by 12 June 2017, it appears from the telephone call that this omission could have been resolved – in other words, the account could still have been reverted to interest only repayments without much trouble at that point.

However, by late 2017 and into early 2018, the Provider required an SFS due to the arrears and due to significant changes in the personal circumstances of the borrowers.

The Complainants became entrenched in their position, essentially stopped making any repayments, and the loan went further into arrears, ultimately being sold on to a third party provider in February 2019.

The Provider was entitled to convert the Complainants' mortgage to principal plus interest repayments when it did so in June 2017.

The Provider then, in error, failed to properly advise the First Complainant on 12 June 2017, at a time when it seems there was a good chance that the loan could have been restored to interest only repayments.

By November 2017 matters had moved on and, due in no small part to a material change in the Complainants' circumstances, reverting to interest only repayments had become a more complicated process (requiring an updated SFS to be filled out).

The Complainants did not provide an updated SFS, despite two meetings being arranged for that purpose. The Complainants provided some conflicting information during telephone calls (whether or not letters were received; whether or not the borrowers were separated/living together), and at certain points adopted what was, in my view, an unhelpful uncooperative stance.

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What is in no doubt, however, that during late 2017 and into 2018 the First Complainant suffered a serious illness resulting in major surgery.

The Provider was responsible for some, but certainly not all, of the Complainants' difficulties.

In my view, the October and November missed repayments occurred because the First Complainant was ill, and could not have been reasonably expected to keep on top of an issue like this when he was suffering from serious illness and because he had been told (wrongly) on the 12 June 2017 telephone call that someone from the Provider would contact him.

I am satisfied that the failure of the Provider's agent to inform the First Complainant to return the "interest options" letter form with the "interest only" option ticked constitutes a failure of the Provider to communicate clearly and correctly with a customer.

While this was an innocent and relatively minor mistake on the Provider's agent's behalf, it combined with other circumstances to begin a domino effect ultimately resulting, on one view, in the loan falling into significant arrears and being transferred to a third party.

On another view, the reason the loan remained in arrears was due to the Complainants' difficulty in completing an SFS and generally putting the Provider back in a position where it could assess the long term sustainability of the loan. The First Complainant's illness was undoubtedly a significant cause of this difficulty.

I must consider the Provider's wrongful conduct in the context of not properly informing the Complainants all of the other factors (for which the Provider was not responsible) that combined to make this loan account go into, and remain in, significant arrears.

I accept that the wrongful conduct on the part of the Provider in failing to properly advise the First Complainant combined with the Complainant's illness to cause the June, July, August and September repayments to be made on a principal plus interest basis without the Complainants realising.

The interest only repayment would have been €855.61, the principal plus interest repayment was €2,087.49 – a difference of 1,231.88 per month. From June to September this was a total repayment difference of €4,927.52. That is, in my view, the limit of what can reasonably be attributed to the Provider's failure during the 12 June 2017 phone call.

For the reasons outlined above, I uphold this complaint and direct that the Provider make a payment of €4,927.52 to the Complainants. I also direct the Provider to amend the Complainants' credit record for the period from June to September 2017 so that no adverse record exists in relation to this matter for that period.

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Conclusion

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

Pursuant to **Section 60(4) (d)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to (i) make a payment to the Complainants in the sum of €4,927.52, 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 and (ii) amend the Complainants' credit record for the period from June to September 2017 so that no adverse record exists in relation to this matter for that period.

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.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

10 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.