



<u>Decision Ref:</u>	2020-0195
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Loans
<u>Conduct(s) complained of:</u>	Application of interest rate
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant company entered into a loan agreement with the Provider Bank. The interest rate that applied to the loan was agreed at a fixed money market rate. The Provider wrote to the Complainant company in October 2011 advising of the fact that the Provider was changing the method of calculating its interest rate to a rate based on Bank Cost of Funds (BCOF).

The complaint is that the Provider wrongfully changed the manner in which the interest on the loan was calculated.

The Complainant's Case

The Complainant company stated its complaint as follows:

- *"The bank added a .7% increase to the interest rate of the term loan without any fair warning, or consultation*
- *I do not believe they had a right to do this or a valid reason".*

The resolution sought by the Complainant is as follows:

- *"An approx calculation of the overcharge incurred is attached*
- *I believe I am entitled to refund /rebate of €32,000 (approx.)".*

The Provider's Case

The Provider's position is that it amended the method of calculating the rate of interest in accordance with the agreed terms and conditions of the loan agreement.

Evidence

The offer letter is dated 13 November 2007 and was issued by the Provider's business banking to the Complainant company. It details the facility figure and the purpose of the facility is recorded as:

"Continuation of existing facilities, reduced to the amount, on terms and conditions previously accepted by [the Complainant company]"

The information regarding the Interest Rate as per the offer is recorded as follows:

*"The rate(s) set out in this Offer Letter are indicative only in respect of the new facilities detailed and are subject to change between the date of this Offer Letter and the actual drawdown of the facility. The actual rate will be determined on drawdown and subsequent roll-over dates (if applicable) and **as set out in Clause 5 of the standard Terms and Conditions set out in the Appendix hereto**". (My emphasis)*

"The fixed (money market) interest rate is at present 5.23% per annum, representing the Bank's 1 month Cost of Funds rate plus a margin of 1%. This rate is fixed until 14th November 2007".

The attached conditions to the Offer Letter, included, the following:

"5. Interest

(i) [Provider] Rates:

The rate(s) set out in this Offer Letter, whether fixed or variable will be determined by the Bank by reference to the Borrower's category, term, purpose and security proposed for the facility. Fixed rates are rates fixed for a period in excess of one year, determined on the date of original drawdown.

- Variable

On a rate change occurring in the [Provider] Variable Rates, (whether Prime or otherwise), the new rate will automatically apply to the facility as and from the date of such change and the Bank will give details thereof to the Borrower in the statement which issues following such rate changes.

/Cont'd...

- Fixed

Any fixed rate quoted is the prevailing fixed rate as of the date of offer. Due to possible fluctuations in interest rates, the Bank cannot guarantee that the said fixed rate will apply on drawdown. This being the case, the Borrower can decide to accept the fixed rate applying on the date of drawdown or take a variable rate. At the end of a fixed rate period, the Borrower may request the Bank to provide a further fixed rate period, based on the then existing fixed rate or may revert to the normal variable rate.

However, the provision of any further fixed rate period from time to time, or any conversion referred to in Clause 6 (2)(b) hereof, will be at the sole discretion of the Bank. If no further fixed rate period is granted at the end of any particular fixed rate term, the facility will revert to a variable rate. Either way, the new rate applying will be notified to the customer.

On occasion, the Bank, on request, will quote fixed rates which are tied to the money markets. These should be viewed as Market Related Loans for the purpose of liquidity costs, margins, drawdown and rollover procedures. The Cost of Funds will be agreed with the customer on an individual basis prior to drawdown.

(ii) Market Related Rates

These are Market Related Rates and are fixed for periods not exceeding 12 months. The Market Related Rate(s) set out in this Offer Letter will be determined by the Bank, **with reference to three components:**

(1a) Cost of Funds

The rate determined by the Bank on the date of drawdown and calculated by reference to the rate at which the Bank can borrow money on the Euro Interbank Market, for a period corresponding to the relevant interest rate period. The interest rate will be set on the date of drawdown and shall be reset on the first day of each interest rate period.

OR

(1b) EURIBOR

The rate determined by the Bank, two Rate Fixing Days prior to drawdown and calculated by reference to the rate at which Euro Interbank term deposits, (quoted for spot value on an adjusted 365 day count basis, for a period corresponding to the relevant interest rate period) are being offered within the EMU zone, by one prime bank to another at 11.00 a.m. (Brussels time).

Euribor will be quoted to the Bank on a 360 day count basis, adjusted to a 365 day count to take account of existing market practice in Ireland. The amount of interest will vary only to the extent of differences attributable to rounding, when the rate is adjusted from 360 to 365 days.

Euribor can be availed of on any Rate Fixing Day. Rate Fixing Day means any day on which banks are open for general business in Ireland and 'Target' is operating. 'Target'

/Cont'd...

means the 'Trans European Automated Real-Time Gross Settlement Express Transfer' System to facilitate, inter alia, large value inter-bank same day payments, which is scheduled to operate every day excluding Saturdays, Sundays, Christmas Day, 26 December, New Year's Day, Good Friday, Easter Monday and 1st May.

(2) Liquidity Costs / Reserve Asset Cost

Such additional percentage rate as the Bank shall determine to be necessary to compensate the Bank, for the cost to the Bank, during the period of the facility, of funding or maintaining a facility in the relevant amount, by reason of the Reserve Asset Requirement relative to such period. Reserve Asset Requirement means any liquidity, reserve ratio, special deposit or similar requirement (or other requirement having the same or similar purpose) of any Regulatory Authority, whether or not having the force of Law with which the Bank has complied.

(3) Bank Lending Margin

The margin is as stated earlier in this Offer Letter. Such margin may be increased at any time, at the discretion of the Bank, if, in the opinion of the Bank, there is an Event of Default or failure to complete and deliver security in the form specified in this Offer Letter or where the Bank has permitted drawdown without satisfaction of Conditions precedent in this Offer Letter. Such increase in margin will be notified to the Borrower in writing and will be effective from the date specified therein.

Market Related Drawdown / Rollover Procedures

Drawdowns and rollovers of facilities may only be accommodated on a Business Day. For a facility which will be determined, inter alia, by reference to Euribor, the Bank must be advised on a Business Day, which is two Rate Fixing Days prior to date of the proposed drawdown. For all other facilities, the Bank may be advised on the day of drawdown.

All facilities based on Market Related Rates are subject to interest rate period determined on the date of original drawdown or such other period (i.e. 1, 3, 6 or 12 months), as may be agreed between Banker and Borrower.

On the termination of the original interest rate period and all subsequent interest rate periods determined, unless the Bank is contacted by the Borrower in accordance with these provisions, the Bank will rollover the facility for the same interest rate period, as originally determined, at the prevailing interest rate on the date of rollover, for the relevant interest period.

In the case of a rate being determined, inter alia, by reference to Euribor, the rate applicable will be set two Rate Fixing Days prior to rollover.

The Borrower will be notified in writing of the new interest rate and next rollover date.

Calculation of Interest and Conversions

For all facilities set out in this Offer Letter, the Bank will determine the rate of interest. Interest will be calculated and accrued daily on the basis of a 365 day count and be computed and payable by the Borrower on the daily balance outstanding (after adjustment is made for items in the course of collection) on the facility and shall be compoundable at such quarterly or other periodic rests as the Bank, in its absolute discretion, shall determine and in accordance with the Bank's practice for accounts, from time to time.

For all facilities subject to a repayment schedule, any variation in the interest rate (whether arising because of an adjustment of interest rates, as between one fixed rate period and another fixed rate period or otherwise) may be accommodated at the discretion of the Bank by way of:

(a) an adjustment to the amount of the repayments during the remaining period of the facility:

Or

(b) an adjustment of the number of repayments within the remaining period of the facility:

Or

(c) an adjustment in the amount of the final repayment.

If no such adjustment is made, repayments will continue until the facility, together with interest, is repaid notwithstanding that this may alter the period originally envisaged.

Change in the Method of Calculation of Interest for all facilities set out in this Offer Letter

*The method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Bank's absolute discretion, **whether to take account of a change in prevailing market conventions in Ireland or otherwise. In the event of such change occurring during the continuance of this facility, the Bank will give to the Borrower one month's prior notice that such change is to take place with effect from the date of expiry of such notice**". (My emphasis)*

A letter from the Provider to the complainant company of 11 October 2011 stated that:

"Since 2007, [The Provider] has experienced a significant increase in its funding costs, driven by prevailing market conditions which are outside of our control. During this time, the Bank has been paying a premium over publicly quoted Interest reference rates to fund its lending to customers.

/Cont'd...

In an effort to recoup some of these higher input funding costs, with effect from 16th November 2011, [the Provider] is changing the method of calculating its interest rate on your term lending facility(s) from the current Euribor / Euro Interbank derived reference rates to a reference rate based on Bank Cost of Funds ("BCOF").

The BCOF will be calculated on a daily basis and will represent the cost to the Bank of funding in the domestic and international market from consumer, business and Institutional sources. The BCOF will be available to customers through our Branch Network and Relationship Managers.

This amendment to our pricing structure is already provided for within the existing terms and conditions of your facility letter and thus there is no requirement for you to sign any additional loan documentation.

The Bank will introduce the BCOF reference rate following the expiry of the contractual one month's notice period from the date of this letter. As a result the BCOF will be applied at the next interest rate rollover date on your facility on or after the 16th November 2011, In the case of Prime Rate term loan borrowers the new rate will apply on the 16th November 2011.

Based on the Bank's funding costs, it is anticipated that the change from your current reference rate to the BCOF will add a premium of approximately 0.7% to the interest rate on your facility. This rate will change in line with the movement in the Bank's overall cost of funding.

We do appreciate that this increase in interest costs may be difficult for some customers to absorb. Should you have concerns in this regard your Relationship Manager will endeavour to assist you with managing the impact of this change and look at potential solutions for your business including that of maintaining your repayments at their current level and extending the term of your loan.

We very much regret the need to pass on this increase, however the Bank's continued absorption of these increased funding costs is no longer sustainable.

If you also hold a business overdraft with [the Provider], it is important to note that we are not changing the method by which overdrafts are priced at this time.

This advice letter should be read in conjunction with the attached appendix. Please do not hesitate to contact your Relationship Manager if you have any further queries". (My emphasis)

The appendix to the above stated as follows:

"1. Change in the method of the calculation of Interest and Interest Rate

/Cont'd...

In accordance with the clause in the Terms and Conditions of your accepted offer letter headed "Change in the Method of Calculation of Interest for all facilities set out in this Offer Letter" [the Provider] can change the method of calculating interest or the interest rate to reflect prevailing market conventions or otherwise. Accordingly the method of calculation of your interest and the interest rate are being changed in the manner described below:-

- In respect of Euribor based loans

If your facility is calculated according to Euribor it will in future be calculated according to the Bank Cost of Funds Rate ("BCOF"). The definition of the BCOF Rate is explained below. The current reference to Euribor in your facility letter will no longer be applicable.

- In respect of Cost of Funds based loans

We are changing the existing method of calculation of Cost of Funds as outlined in the facility letter. The current definition of Cost of Funds in your facility letter will no longer be applicable and will be replaced by the following definition:-

"Bank Cost of Funds means the rate determined by the Bank on the date of drawdown or Interest rate rollover and calculated by reference to the cost to the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select. The interest rate will be set on the date of drawdown and shall be reset on the first day of each interest rate period."

- In respect of [Provider] Prime Rate

The new [Provider] Business Prime Rate definition will replace the current definition of [Provider] Prime Rate in your facility letter(s) in respect of term facilities as follows:

"[Provider] Business Prime Rate means the rate determined by the Bank and calculated by reference to (i) the cost to the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select and (ii) such other funding rates or factors as the Bank may deem appropriate in its absolute discretion from time to time."

2. Do these changes affect my loan even though the loan is a consumer loan and was not used for business purposes?

The changes notified in this letter will not affect your loan if it is a consumer loan. In this regard a consumer loan is a loan that the Bank has made to you for non-business purposes that do not relate to a trade or profession as determined by the Bank. Non impacted consumer loans are regulated by and documented in accordance with the Consumer Credit Act 1995 or the Consumer Credit Agreement

Regulations 2010. If you are in doubt as to whether your loan is classified as a consumer loan for these purposes please contact your Relationship Manager.

3. What is the impact of the Bank Cost of Funds Rate?

Based on indicative rates as of 10th October 2011, the change to BCOF Rate will involve an approximate 0.7% increase in the cost of funding to term loan customers.

The impact is outlined in the example below:

Business customer with a Term loan of €480,000 repayable over 7 years

<i>Current Interest Rate*</i>	<i>4.09%</i>
<i>Current Loan Repayment</i>	<i>€6,580.93 per month</i>
<i>New indicative interest Rate**</i>	<i>4.79%</i>
<i>Revised Loan Repayment</i>	<i>€6,737.01 per month</i>

** Incorporates an appropriate loan margin*

*** Based on the indicative BCOF rate as per current calculations”.*

The Provider's position is that it sanctioned loan account ***304 under Letter of Offer dated 13 November 2007. The Provider states that the purpose of this loan was the continuation of existing facilities, reduced to the amount €.. on the terms and conditions previously accepted by the Complainant a limited company. The Provider says that the interest rate applicable at the time of drawdown was a fixed money market rate which was calculated by totalling the following:

1. The Bank's Cost of Funds for the selected period.
2. Cost of Liquidity (if applicable).
3. The Bank's fixed margin of €1 % per annum.

The Provider submits that the Complainant agreed to be bound by and fully accept all of the terms and conditions contained therein by signing the Form of Acceptance on 19 November 2007.

The Provider states that since 2007 it has experienced a significant increase in its funding costs, driven by prevailing market conditions outside of its control. The Provider says that during this time it has been paying a premium over publicly quoted interest reference rates to continue to fund its lending to customers. The Provider states that it endeavoured to absorb these additional costs for some time, but unfortunately it was unable to sustain this position. The Provider therefore states, in 2011 it took a commercial decision to change the method of calculating its interest rate.

/Cont'd...

The Provider states that on 11 October 2011 it wrote to customers that were affected to advise that, with effect from 16 November 2011, the Provider was changing the method of calculating its interest rate on term loans from the current Euribor Euro Interbank derived reference rates to a reference rate based on Bank Cost of Funds (BCOF).

The Provider states that the change in method of calculation of the interest rate was something the Complainant was clearly forewarned about pursuant to the terms of the Offer Letter (page 1 and Clause 5).

The Provider says that it has a clear right to change the (i) interest rate and (ii) the interest rate calculation method in respect of the Loan documented under the Offer Letter. The Provider says that this is explicitly called out in Clause 5 of the general Terms and Conditions in the appendix to the Offer Letter, as follows:

“The method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Bank’s absolute discretion, whether to take account of a change in prevailing market conventions in Ireland or otherwise”.

The Provider therefore states it does not agree with the Complainant’s assertion that the Provider cannot apply a different mechanism or formula for the calculation of interest. The Provider states that the Complainant signed and agreed to the Offer Letter which contained clause 5.

The Provider states that if the Complainant did not agree with the terms of clause 5 they were free to reject the Offer Letter presented to it for signature. The Provider submits that the fact the Complainant did not reject the Offer Letter and instead freely signed the Offer Letter means that the Complainant agreed to enter the Loan which included giving the Provider the right to change the interest rate and the interest rate calculation method.

The Provider states that the effect of Clause 5 is to give the Provider an overriding discretionary power to alter the provisions of the Loan in respect to interest rates or the manner in which interest rates are calculated. In this regard, the Provider states that in accepting Clause 5 the Complainant must have understood that for example in the event of it being wholly uneconomic to maintain the lending for whatever reason (including a massive divergence between the cost of borrowing to the Provider and EURIBOR) that the Provider could, provided it gave one month’s notice, vary the interest rate provided for under the Offer Letter or vary the method of calculation of the interest rate at the Provider’s sole discretion.

The Provider submits that in this connection the reference to Cost of Funds would mean to any reasonable observer the rate that the Provider can raise funds at. The Provider states that since this is the rate that now forms the basis of the calculation methodology applying to the Complainant’s Loan, the Provider does not see how the Complainant would see the

/Cont’d...

Provider's actions as being outside their contemplation or intention. The Provider states that since it cannot raise funds at a EURIBOR rate, BCOF must mean the rate that the Provider is charged to borrow money on the wholesale markets.

The Provider submits that furthermore it does not believe that it is legitimate for the Complainant to expect that the Provider is forced to provide funds to its customers at a lower cost than the wholesale cost of those funds to the Provider. The Provider submits that in this connection the Bank as a provider of funding is acting in an entirely reasonable manner in ensuring that it can pass on the increased cost of its own funding to the Complainant.

The Complainant Company's position is that the bank added a .7% increase to the interest rate of the term loan without any fair warning or consultation. It does not believe the Bank had a right to do so or a valid reason for doing so.

The Complaint for Adjudication

The complaint is that the Bank wrongfully changed the manner in which the interest on the loan was calculated.

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 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.

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 **17 April 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.

/Cont'd...

No further submissions were received from the parties, within the period permitted and my final determination is set out below.

Analysis

I note that the offer letter referred to the fact that the offer contained “*indicative rates*” of interest and the actual rate would be determined on the date of draw down and any subsequent roll over dates “*and as set out in Clause 5 of the standard Terms and Conditions*”.

Clause 5 of the terms and conditions provide for the calculation of the rate on the relevant date by reference (i) to the cost of funds (1a) or by reference to the EURIBOR (1b), (ii) liquidity costs (if applicable) and (iii) the lending margin.

The Provider sent correspondence dated 11 October 2011 to the Complainant advising of the fact that from 16 November 2011 the Provider was changing the method of calculating the applicable interest rate from the then current Euribor / Euro Interbank derived reference rates ‘*to a reference rate based on Bank Cost of Funds (“BCOF”)*’

The Provider relies on the provisions of the final paragraph of clause 5 on page 9 of the terms and conditions of the loan agreement, which includes the following:

“The method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Bank’s absolute discretion, whether to take account of a change in prevailing market conventions in Ireland or otherwise.”

I accept that this is a clear statement of the fact that the Provider had a discretion to amend the method of calculation. I accept that when the Provider applied the change in the method of calculating the rate of interest it was acting within the stated terms and conditions of the loan agreement.

I accept that the agreement gave the Provider a wide discretion, based on either market conditions or other conditions that the Provider believed justified a decision, to change the method of the calculation of the interest rate.

In the above regard I note that in the correspondence dated 11 October 2011 the Provider advised that the continual increase of funding costs experienced by the Provider since 2007, driven by market conditions outside its control, led to the decision to change the method of calculating the Complainant’s interest rate. I accept that the reason communicated to the Complainant by the Provider complies with the provisions of clause 5 of the loan agreement.

The evidence submitted shows that the Complainant signed his acceptance of the Provider’s loan offer on 19 November 2007. The acceptance included the following signed acknowledgement by the Complainant company:

/Cont’d...

“I / We have read and agree to be bound by and fully accept all of the terms and conditions contained in this Offer Letter and in the appendix to this Offer Letter. Accepted for and on behalf of [Complainant company] pursuant to a resolution of the Board of Directors”.

The Complainant acknowledged that he had read and accepted the contents of the terms and conditions. The content of clause 5 of the terms and condition state that the *“method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Bank’s absolute discretion”.*

I accept that this is a clear assertion of what the Provider could do with regard to the interest rate, and if the Complainant was unwilling to accept this condition the Complainant company had the option not to accept the offer.

The Complainant Company does not argue that it was misled by the Provider when accepting the loan offer from the Provider. Neither does the Complainant Company argue that it misunderstood what it was agreeing to.

I consider that the evidence does not substantiate the Complainant’s claims that there was a change to the interest rate of the loan without any fair warning, or consultation by the Provider. I also accept that the evidence does not support the Complainant’s argument that the Provider did not have a right to change the interest rate, or have a valid reason for making the change.

I consider that the evidence does not show that the Provider acted in breach of the loan agreement or otherwise acted wrongfully, in the manner in which it changed the method of calculating the rate of interest that was to apply to the Complainant’s loan agreement.

Having regard to all of the above, I do not uphold this complaint.

Conclusion

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

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

27 May 2020

/Cont’d...

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

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

