An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0227
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Failure to switch interest rate
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to three loan accounts held by the Complainant with the Provider. The loan accounts were restructured on various occasions between 2008 and 2015.

The Complainant's Case

There are a number of elements to this complaint which I set out below:

1. **Interest Rate Margin and refund of interest**

   The Complainant submits that in 2004, the Provider "sold" him an interest rate margin of 1.75% which persisted until **24 September 2015** when the Complainant submits it was "*under protest, removed by the Provider*". He says that he believes the Provider had no right to remove the interest rate margin of 1.75% from loan account XXXXX845 and in this regard, the Complainant would like this interest rate margin restored and offered in any future offer letters.

   The Complainant says the Provider has refused to refund him the excess interest paid since September 2015 when the Provider "*unilaterally cancelled the interest rate margin of 1.75%*". The Complainant estimates this amount to be approximately €15,393 and is seeking a refund of this amount.

2. Mis-sale of fixed interest rate in 2008 and the resultant cost of improper provision of fixed interest rate

The Complainant states that in 2008 the Provider fixed the interest rate on his loan account for a period of 7 years and in 2015 refused to fix it again. The Complainant says that when he queried the Provider's refusal to fix the interest rate he received a letter from the Provider dated **11 November 2015** which stated that he should not have been given a fixed interest rate in 2008 and that he benefited from it. The Complainant submits that this fixed interest term should not have been "*sold*" to him in 2008.

The Complainant says that having admitted in the letter dated **11 November 2015** that the fixed interest rate should not have been "*sold*" to him in 2008, the Provider refused to correct the matter. The Complainant says that as a result he has been charged interest of approximately €165,000 over and above what would otherwise have been charged during the period from 2008 to 2015. The Complainant says that this has imposed a cost upon him in each of those years. The Complainant says that he had asked the Provider to cancel this interest by setting it off another loan held with the Provider. The Provider has refused to do this.

3. Improper surcharge interest applied

The Complainant submits that he has been charged "*extravagant amounts of interest rate premium or surcharge*" since 2012. The Complainant says that he asked the Provider to cancel the surcharge interest of €11,448 by setting it against another loan. However, the Provider has refused to do this.

4. Term loan for a stated period

The Complainant states in his complaint that the Provider's actions as outlined above have broken the trust that he had in the Provider. The Complainant says that as a result, he requested that the Provider provide him with a term loan of 30 years to deal with his remaining debt based on a margin of 1.75%. The Complainant is of the view that if he were to be offered this term loan, it would avoid attempts by the Provider to change his terms during the lifetime of the loan. The Provider has refused to provide this term loan.

The Complainant asserts that the Provider's actions have resulted in a *"financial and personal cost"* to him for which he should be reimbursed as follows:

(a) Financial

The Complainant submits that the financial cost is represented in a "static loan at a nil interest rate that the Provider want to hold against" him. In my Preliminary Decision, I had stated that the Complainant has asked that the nil interest loan held with the Provider be reduced (by approximately €176,488).

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The Complainant, in his post Preliminary Decision submission, has stated that this is incorrect. The Complainant states that what he had requested is that:

> *"what I wish is to set against it such awards as are made by the Ombudsman or Courts (subject to commitments for costs or tax liabilities)"*

At this point I would remind the Complainant that the Office of the Financial Services and Pensions Ombudsman is an alternative to the Courts. As such, once a complaint has been adjudicated on by either my Office or the Courts, then the other service is no longer in a position to adjudicate on the same complaint, other than by way of appeal of my decision to the High Court.

The Complainant has also requested that any restructure of the loans include a phased repayment of the residue with manageable increases in repayment over a long period of time.

(b) Personal

The Complainant submits that there has been a significant personal cost to him and that he has had several years of excessive mental stress, great worry as well as physical stress of carrying on his employment. The Complainant requests that this be taken into consideration and the loan/loan amounts would be adjusted accordingly as compensation for this.

(c) Professional Fees

The Complainant says that he has received legal and financial advice in respect of his dealings with the Provider and requests that the Provider contribute to the professional fees which have been incurred. The Complainant estimates these fees to be approximately €10,000 and rising.

The Complainant contends that the Provider has not acted in his best interests and in accordance with the spirit of the Consumer Protection Code. In this regard, the Complainant submits:

- The Provider has not worked with him and recognised his long history with the Provider (40 years).

- The Provider was not "*reflective of co-operation with me in context of the Code and my long history*" by issuing formal demand letters in November 2013.

- The Provider had not "*presented evidence that there is financial benefit other than to them by the sale*". The Complainant submits that his financial advisors have stated in correspondence with the Provider that the Capital Gains tax on the sale of assets would make the return on any sale less than would be expected from continuation of letting the property. The Complainant's view is that this is contrary to the Code and not in his best interests.

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The Provider's Case

In response to each of the elements of the Complainant's complaint, the Provider submits as follows;

1. **Interest Rate Margin and refund of interest**

   The Provider submits that it was the Complainant who sought to restructure his loan account XXXXX845.

   In providing the restructure requested, the Provider states that it exercised its commercial discretion when amending the loan terms offered to the Complainant.

   The Provider notes various loan offers were signed by the Complainant with the benefit of legal and financial advice and submits that the fact that it had previously agreed to keep the fixed interest rate margin at 1.75% does not oblige the Provider to do so indefinitely.

   The Provider submits that the Complainant accepted the Provider's offer in **September 2015** and is therefore bound by the terms and conditions contained in the offer.

   The Provider does not agree that the Complainant is entitled to a refund of "*excess interest"* as asserted by the Complainant as the interest rate applied to the relevant loan account was the rate set by the Provider and agreed by the Complainant.

2. **Mis-sale of fixed interest rate in 2008 and the resultant cost of improper provision of fixed interest rate**

   The Provider rejects that it "*fixed the Complainant's loan*" or that it was in any way "*fixed*" on the Provider's recommendation. In this regard, the Provider refers to correspondence between the Provider and Complainant which took place in **2008** in which fixed rate options were discussed. The Provider also refers to correspondence received from the Complainant dated **9 October 2015** where he states that;

   > "*I have endured the high fixed interest rate for some years and I took that position in 2008 for certainty*".

   The Provider contends that the relationship between both parties is based on contract and that this arises from the fact that the Complainant signed and accepted various Offer Letters from the Provider. In this regard, the Provider submits that the workings of the Complainant's loan accounts are based on the terms and conditions of the various Offer Letters which were agreed between the Provider and Complainant.

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The Provider submits that the Complainant accepted the terms and conditions of the Offer Letter dated **15 August 2008** which fixed the interest rate for a period of 7 years. The Provider also submits that a further Offer Letter which was signed by the Complainant on **22 January 2009** reiterated and confirmed the interest rate.

The Provider is of the view that it has fully adhered to the terms and conditions of each of the relevant Offer Letters.

3. Improper surcharge interest applied

The Provider states that the Complainant did not meet his scheduled repayments during the period **January 2012** and **May 2013 in** respect of the following accounts:

- Account XXXXX845 (previously XXXXX821)
- Account XXXXX334 (previously XXXXX601)
- Account XXXXX480 (previously XXXXX190 and XXXXX809).

The Provider submits that at the time the Complainant failed to meet his scheduled repayments, the Provider was relying on the terms of an Offer Letter dated **22 January 2009**. In this regard, the Provider relies on Clause 8 of the terms and conditions in the appendix to the January 2009 Offer Letter which deals with the issue of Interest Surcharges. The Provider states that "*Clause 8, or the interest surcharge, became operative as soon as the first repayment on each of the three loan accounts was not made on the agreed dates in January 2012*".

The Provider submits that the Complainant defaulted on the agreed repayment schedule in respect of each of the three accounts from **January 2012** until the Provider agreed to restructure the three loan accounts in **November 2014**. The Provider submits that pursuant to the terms and conditions of the loan agreement it was entitled to charge surcharge interest from January 2012 onwards and that such charges were validly and correctly applied to the Complainant's loan accounts. It states that it is "*satisfied that the Complainant agreed to the terms and conditions of the loan offer letters, he was advised and aware of the said terms and conditions and the consequences in the event of default*".

4. Term loan for a stated period

The Provider submits that it is under no obligation to offer the Complainant a specific alternative repayment arrangement if it deems it to be inappropriate and this includes the Complainant's request for a term loan of 30 years. The Provider is of the view that the acceptance of any proposal is at the commercial discretion of the Provider and states that previous agreement by the Provider to amend terms does not oblige it to do so indefinitely. The Provider has refused to offer a term for 30 years as requested by the Complainant.

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The Provider is of the view that this element of the complaint has arisen as a result of the loan agreements which have been entered into freely and signed and agreed by the Complainant.

The Provider submits that as the Complainant clearly states in his correspondence that he has taken legal and financial advice and that, it was a matter for his advisors to explain to the Complainant the implications of his commitment in relation to these transactions. The Provider submits that if the Complainant had any doubts about the contents of various Offer Letters, he should have raised these issues with his advisors at the time.

The Provider submits that it has adhered to the relevant provisions of the Consumer Protection Code.

The Complaints for Adjudication

The complaints for adjudication are as follows:

1. The Provider unfairly withdrew the fixed interest rate margin of 1.75% in **September 2015** and unfairly refused to refund overpaid interest since 2015;

2. The Provider mis-sold a fixed interest rate to the Complainant in **2008** and has unfairly refused to refund the Complainant the overpaid interest;

3. The Provider improperly applied surcharge interest to the Complainant's loan accounts from **January 2012**;

4. The Provider has unfairly refused to offer the Complainant a term loan for a period of 30 years in or around **January 2016**.

Decision

A Preliminary Decision was issued to the parties on 22 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 the following submissions:

1. Letter from [Named Chartered Accountants], together with enclosures, on behalf of the Complainant to this Office dated 31 January 2020.

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2. Letter from the Complainant to this Office dated 3 February 2020.

Copies of the above submissions were exchanged with the Provider, who has not made any further submission.

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.

The Complainant, has, in the course of his communications to this Office, requested, on a number of occasions, including in his post Preliminary Decision submission, that an Oral Hearing be held in this matter.

However, having reviewed and considered the submissions made by the parties to this complaint, including the post Preliminary Decision submissions, and the evidence furnished by the parties, 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.

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

At the outset, it will be useful to set out a timeline of events which sets out an overview of the changes to the Complainant's loan accounts which are the subject of this complaint.

Timeline of events

6 August 2003 Offer Letter dated **6 August 2003** issued to Complainant for:

1. Overdraft of €500; and
2. Commercial Mortgage €600,000

4 August 2004 Letter from the Provider to the Complainant stating "*I confirm the Provider has agreed to reduce its Interest Margin, on the loan to 1.75% on an ongoing basis and with immediate effect….In consideration of this reduction in margin, the [Provider] requires you to pay a once off negotiation fee of €1500 and I wish to acknowledge receipt of your cheque in payment of this fee…"*

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9 January 2008 Offer Letter dated **9 January 2008** issued to the Complainant for:

1. €517,295 (restructure A/C XXXXX821);
2. €307,000 (restructure A/C XXXXX601); and
3. Overdraft of €7,000.

15 August 2008 Offer Letter dated **15 August 2008** issued to the Complainant for:

1. €100k (restructure A/C XXXXX821); and
2. €415,043 (restructure A/C XXXXX821)

22 January 2009 Offer Letter dated **22 January 2009** issued to the Complainant for:

1. €306,363 (continuation of facility A/C XXXXX601);
2. €417,322 (continuation of facility A/C XXXXX821); and
3. €125,000 (continuation of facility A/C XXXXX190).

21 July 2010 Offer Letter dated **21 July 2010** issued to the Complainant for €116,350 (continuation of existing facility XXXXX190)

06 October 2011 Offer Letter dated **6 October 2011** issued to the Complainant for €55,000

January 2012 Arrears first arose on the Complainant's loan accounts

November 2013 Formal Demand Letters issued to the Complainant

December 2013 Formal Demand Letters issued to the Complainant

21 November 2014 Provider agreed to restructure the Complainant's Loan Accounts and issued Offer Letters dated **21 November 2014** for each account as follows:

1. **A/C XXXXX845** (restructure of A/C XXXXX821) for €420k for a term of 10 months.
2. **A/C XXXXX480** (refinance existing and overdraft facilities re A/C XXXXX601, XXXXX809, XXXXX192, XXXXX302 and XXXXX626) for €165k for a term of 10 months.
3. **A/C XXXXX334** (refinancing of existing loan and overdraft facilities relating to A/C XXXXX601, XXXXX809, XXXXX192, XXXXX302 and XXXXX626) for €260k for a term of 10 months parked at 0%.

24 September 2015 Provider agreed to restructure the Complainant's Loan Accounts on the expiry of the above three Offer Letters.

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Offer Letters dated **24 September 2015** issued to the Complainant on each account as follows:

1. A/C XXXXX845 for €427k for a term of 24 months.
2. A/C XXXXX480 for €165k for a term of 24 months.
3. A/C XXXXX334 for €262,261 for a term of 36 months parked at 0%.

15 September 2016 Provider agreed to restructure the Complainant's Loan Accounts as follows:

1. A/C XXXXX480 for €164,300 a term of 36 months.
2. A/C XXXXX334 for €262,261 for a term of 36 months parked at 0%.

27 September 2016 Provider agreed to restructure the Complainant's Loan Account as follows:

1. A/C XXXXX845 for €422,062 for a term of 36 months.

The Provider relies on the following Offer Letters which the Provider submits were accepted by the Complainant;

- Account XXXXX845 (formerly A/C XXXXX821): Housing Loan letter of offer dated **27 September 2016** signed and accepted by the Complainant on **5 October 2016** for €452,059.91 for a term of 36 months. This is a demand facility.

- Account XXXXX334: Housing Loan letter of offer dated **15 September 2016** signed and accepted by the Complainant on **27 November 2016** for €262,261 for a term of 36 months. This is a demand facility. No monthly repayments required (0% interest).

- Account XXXXX480 Housing Loan letter of offer dated **18 September 2016** signed and accepted by the Complainant on **27 September 2016** for €175,985.96 for a term of 36 months. This is a demand facility.

I will deal with each of the grounds of complaint in turn.

1. **The Provider unfairly withdrew the fixed interest rate margin of 1.75% in September 2015 and unfairly refused to refund overpaid interest since 2015**

In order to adjudicate on this aspect of the complaint it is necessary to consider the history of loan account XXXXX821 (now XXXXX845).

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The Provider issued an Offer Letter in respect of loan account XXXXX821 to the Complainant on **6 August 2003**, which was signed and accepted by the Complainant on **7 August 2003** ("***the 2003 Offer Letter***"). The interest applicable to this loan was calculated as follows:

> "*The Provider's 5 year fixed interest rate period cost of funds plus cost of liquidity, plus a Provider margin of 2.00%".*

Clause 5(ii)(3) of the ***2003 Offer Letter*** deals with the Provider's Lending Margin and states as follows:

> "*The margin is as stated earlier in this Offer Letter. Such margin may be increased at any time, at the discretion of the Provider, if, in the opinion of the [Provider], there is an Event of Default or failure to complete and deliver security in the form specified in this Offer Letter, or where the [Provider] 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*".

The ***2003 Offer Letter*** also provides information in relation Events of Default at ***Clause 10*** in the following terms:

> *"Notwithstanding the demand nature of the certain facilities, [the Provider] reserves the right to terminate its commitment to transact business hereunder and to call for the immediate early repayment of all outstandings on the occurrence of any Event of Default, unless such Event of Default has been waived in writing by the Provider.*
>
> *The following will constitute an Event of Default:*
>
> *i. The breach of any covenant, condition or terms outlined herein (if any), or in associated documentation.*
>
> *ii. If the Borrower defaults in payment of any principal, interest or other amount payable when due.*
> *…"*

By letter dated **4 August 2004**, the Provider wrote to the Complainant regarding the Provider's interest margin relating to account XXXXX821 stating that;

> "*I confirm that the Provider has agreed to reduce its interest margin, on the loan to 1.75% on an ongoing basis and with immediate effect….In consideration of this reduction in margin, the [Provider] requires you to pay a once off negotiation fee of €1500 and I wish to acknowledge receipt of your cheque in payment of this fee…"*

I note that it was not suggested in this letter that this fee was payable in order to secure the interest rate margin of 1.75% for the lifetime of the loan.

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The Provider submits that the Complainant requested a restructure/interest only repayment period in January 2008. Accordingly, an Offer Letter was issued by the Provider to the Complainant dated **9 January 2008** ("***the January 2008 Offer Letter***"). The purpose of this facility as set out in the January 2008 Offer Letter was, amongst other things, to assist in the restructure of two of the Complainant's loans with the Provider (i.e. XXXXX821 and XXXXX601).

In relation to the interest rate, the January 2008 Offer Letter provides as follows:

> "*The fixed (money market) interest rate is at present 5.21% per annum, representing the Provider's 5 Year Cost of Funds rate plus a margin of 1.75%. This rate is fixed until 11/08/2008*".

Accordingly, the fixed rate interest period provided for in the August 2003 Offer Letter expired on **11 August 2008**.

A further Offer Letter was issued by the Provider which was signed by the Complainant on **18 August 2008** ("***August 2008 Offer Letter***"). The purpose of this loan was to, amongst other matters, restructure loan account XXXXX821. The August 2008 Offer Letter provides for a fixed interest rate margin of 1.75% per annum.

A further Offer Letter was issued by the Provider and signed by the Complainant on **22 January 2009** ("***January 2009 Offer Letter"***). This offer was for the purposes of the continuation of existing facilities held by the Complainant for a term of 182 months.

The interest rate applicable to the January 2009 Offer letter is set out as follows:

> *"The fixed money market interest rate is at present 6.54% per annum, representing the Provider's 7 year Cost of Funds rate plus a margin of 1.75%. This rate is fixed until 25 August 2015*".

Therefore by the terms of the January 2009 Offer Letter the interest rate margin of 1.75% applicable to the Complainant's accounts was fixed until **25 August 2015**. The January 2009 Offer Letter also set out the information in relation to the Provider's Lending Margin and Events of Default.

The Provider submits that the Complainant adhered to the terms and conditions of the January 2009 Offer Letter until **January 2012** at which time the Complainant failed to meet the scheduled re-payments on each of the loan accounts. I note that no payments were made by the Complainant between **January 2012** and **September 2012**. Between **September 2012** and thereafter the Complainant made monthly payments of sums of his own choosing. I note that no alternative repayment arrangement was in place between the Provider and the Complainant during this time. In this regard, the Provider has furnished this office with a schedule of the dates on which re-payments were missed against the payments which were required to have been made by the Complainant.

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A formal demand letter was issued to the Complainant dated **27 November 2013** in respect of the Account No. XXXXX821.

As a result of the Complainant's request to restructure his loan with the Provider, the Provider restructured loan account XXXXX821 and furnished an Offer Letter to the Complainant which was signed by him on **24 November 2014** ("***the November 2014 Offer Letter***").

By the terms of the November 2014 Offer Letter Loan Account XXXXX821 became loan account XXXXX845. The November 2014 Offer Letter stated that "*An interest rate of 6.54% will apply until 25th August 2015*". The interest rate margin referred to in the November 2014 Offer Letter was 1.75%.

Appendix 1 of the November 2014 Offer Letter states:

> "*The Facility will expire within 10 months from restructure but may be reviewed and renewed thereafter at the total discretion of the [Provider].*
>
> *Notwithstanding any other provision contained therein, the [Provider] is not obliged to extend the Facility detailed herein for the terms detailed in this Offer Letter as the Facility is repayable by the Borrower on demand, which demand can be served at any time by the [Provider] without stating the reasons why…*"

In **September 2015**, the Provider agreed to restructure loan account XXXXX845. The Offer Letter was signed by the Complainant on **3 November 2015** ("***the September 2015 Offer Letter"***).

The interest rate was referred to in the September 2015 Offer Letter is as follows:

> "*The Variable (matrix based) interest rate is at present 5.5%".*

There followed correspondence between the Complainant, his financial advisors and the Provider in relation to the interest rate margin applicable under the September 2015 Offer Letter. I set out below reference to the relevant correspondence:

<u>Exchanges in respect of the interest rate margin</u>

I will now set out relevant exchanges between the Complainant and the Provider from **October 2015**, in relation to the interest rate margin.

The Complainant's financial advisors wrote to the Provider on **2 October 2015**, stating that the Complainant had discussed the September 2015 Offer Letter with his financial advisors and that:

> "*He accepts these terms but believes that the Provider's margin…should be 1.75% in accordance with his long standing agreement with the [Provider] in the matter.*

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[The Complainant] recalls that he paid a fee to the Provider for that margin to be applied on the loan which was placed on fixed interest terms (& which fixed interest terms ended in August 2015)…

On **9 October 2015** the Complainant wrote to the Provider and stated that:

"I enclose the attached copy of the letter confirming my purchase from the Provider of a margin applicable to loans outstanding in 2004 this margin was for the life of the loan.

While I accept the current offer and will sign if you insist that this time I will do so only under protest and with reservations of my right to re-visit. I feel I do not have a real choice in the matter.

I hope you will read carefully the letter I enclose and consider my position – up to my ears in debt….As I have said, I will, since you have emphasised time presses, if the Provider insists, sign to the present [Provider] terms…"

I note that this correspondence from the Complainant was copied to the Complainant's legal and financial advisors.

The Provider responded to the Complainant by way of letter dated **23 October 2015** and stated that:

"…I have reviewed the letter of the 04/08/2004 from my colleague…and it does not state anywhere in this letter that the margin was to apply with the life of the loan.

In addition the letter of 04/08/2004 refers to the commercial facility agreement you executed in 2003. The 2003 facility no longer governs this loan as the terms and conditions were replaced by the 2014 facility agreement. The [Provider] allowed the fixed rate to continue to be applied to the 2014 Facility to avoid breakage fees being applied.

On the expiry of your 2014 facility agreement the [Provider] is entitled to offer the new terms and conditions. The [Provider] has offered to extend further facilities subject to the new rates and repayments set out on the facility agreements forwarded to on the 23/24 September 2015.

The Complainant in his response to the Provider dated **29 October 2015** sets out as follows:

"You say the letter does not say the margin was to apply for the life of the loan. Please state what your Provider contended I was buying, if it was not for the margin for the life of the particular loan. As I have said to you in previous letters I feel I have no option but to sign your offer letters 23/24 September 2015…

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> *However I emphasise that I am signing the letters subject to the 1.75% margin on the fixed interest loan being restored retrospectively when and if my appeal on this matter confirms that the 1.75% margin is applicable for the life of that particular loan being on fixed interest terms till recently…*
>
> *Following the advice* of my financial advisers *I am signing the offer letters and when the appeal is complete, would hope that its structures, insofar as they are favourable to me will be implemented retrogressively [sic] …"*

This correspondence also confirms that the Complainant wished to appeal the loan facilities and reiterated that "*I see no alternative to signing the offer letters you have sent me but the circumstances I am in are so difficult that I must appeal them*". This letter was also copied to the Complainant's legal and financial advisors. The Complainant signed the September 2015 offer letter in relation to loan account XXXXX845 on **3 November 2015**.

I note that the Provider wrote to the Complainant by way of letter dated **22 January 2016** which stated that;

> "*We have completed a review and taken all the facts of your case into account we regret we that we are unable to agree to your request to apply an interest margin of 1.75% to loan account numbers XXXXX845 and XXXXX490 by maintaining 0% interest rate account number XXXXX034*".

The Complainant appealed the decision of the Provider with respect to the fixed interest rate margin. By letter dated **3 March 2016** the Provider outlined that it was "*unable to effect the alternative repayment arrangement proposed by you*". The Provider also informed the Complainant of his right to refer the matter to the Credit Review Office, which the Complainant did.

The opinion of the Credit Review Office (furnished to the Complainant by letter dated **15 July 2016**) was included in the Complainant's submissions to this office. The letter states that "*we do not see any basis in the claim by the Borrower that he is entitled to an ongoing interest rate margin of 1.75%*..." This statement noted that the consideration of whether the Complainant was entitled to the interest rate margin of 1.75% was outside the remit of the Credit Review Office and that if this aspect of the complaint were to be pursued, it would be a matter for the then Financial Services Ombudsman. Nevertheless, in spite of the matter being outside the jurisdiction of that Office, that Office then indicated its own opinion, seemingly on the basis of its experience of such issues.

I note from correspondence furnished by the Complainant that the Complainant was concerned that I would be influenced by the remarks of the Credit Review Office, regarding the 1.75% interest rate margin. Neither the Complainant nor the Provider should be concerned in that respect. I am an independent statutory officeholder charged with the investigation and adjudication of complaints, in accordance with ***the Financial Services and Pensions Ombudsman Act 2017***.

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While I consider all information and documentation furnished to this office by the parties to a complaint, the opinion of a third party entity with no jurisdiction to determine such issues, must of course be viewed in that specific context. I am not influenced by any individual piece of correspondence received but instead I investigate complaints in an impartial, fair and independent manner by reviewing all evidence and submissions made. Having done so I arrive at my Decision, on an independent basis.

I note that the Complainant asserts that reference in the letter of **4 August 2004** to the interest rate margin of 1.75% "*on an ongoing basis*" means that this rate should have been applied for the lifetime of the loan which the Complainant submits should now be restored and set out in any further Offer Letters furnished to the Complainant.

As set out above, the interest rate margin of 1.75% was applied to the Complainant's account until **September 2015**. The reason that the 1.75% margin continued under the terms of the November 2014 Offer Letter was *to "avoid breakage fees being applied*". This is explained in correspondence to the Complainant dated **23 October 2015**.

Furthermore Appendix 1 to the November 2014 Offer Letter makes it clear that on the expiration of that Facility the Provider was not obliged to renew the Facility on the same terms and that any such renewal and review would be at the "*total discretion of the [Provider]*". Accordingly the Provider agreed to restructure the Facility in **September 2015** and this restructure was subject to the terms set out in the September 2015 Offer Letter, including the interest rate of 5.5%.

An initial point to be considered is the Complainant's assertion that the fee of €1,500 referred to in the Provider's letter dated **4 August 2004** secured the interest rate margin of 1.75% in respect of the loan XXXXX821 for the lifetime of the loan. In this regard, the Complainant refers in his complaint to having been "sold" this interest rate margin.

Having reviewed the letter dated **4 August 2004** is it clear that the fee of €1,500 paid by the Complainant was not for the purchase of an interest margin of 1.75% but a "once off negotiation fee" paid in consideration of the Provider reducing the interest rate margin from 2% (as set out in the August 2003 Offer Letter) to 1.75%.

Therefore, I am of the view that it is not accurate for the Complainant to say that he was "sold" an interest rate margin of 1.75%. Nor can it be said that he could have expected this interest rate margin to apply for the lifetime of the loan, given the level of restructuring which was undertaken by the Complainant on this loan over the number of years since 2004.

As can be seen from the analysis above, the Complainant and his financial advisors entered into correspondence with the Provider regarding the interest rate set out in the September 2015 Offer Letter. In my Preliminary Decision I had stated that it was clear from the correspondence furnished in evidence that the Complainant had the benefit of obtaining independent legal and financial advice in advance of signing the September 2015 Offer letter.

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Both the Complainant and his Financial Advisor have made post Preliminary Decision submissions on this point. Both the Complainant and his Financial Advisor believe that the above statement does not highlight the nature of the advice that was given to the Complainant.

The Complainant's Financial Advisor, in its submission, wished for the following to be highlighted from previous correspondence it has issued:

> *"I believe this not to be in [The Complainant's] best interests and equally not in [The Provider's] best interests in the medium term"*
>
> *"[The Complainant] will probably accept the November 2014 terms proposed but it is against my advice".*

The Complainant states in his correspondence dated **29 October 2015** that he signed the September 2015 Offer Letter as he felt he had no option given his financial situation at the time. While the Complainant asserts in this letter that he is "*signing the letters subject to the 1.75% margin on the fixed interest loan being restored retrospectively",* this in my view is not a tenable position. It cannot be the case that a borrower can seek to sign an Offer Letter from a Provider on the basis of an interest rate margin other than the interest rate margin which is set out in the applicable Offer Letter and seek then to enforce another interest margin once the facility has been accepted or drawn down.

In my Preliminary Decision, I stated that as the Complainant accepted the Provider's offers with the benefit of legal and financial advice he is bound by the terms and conditions contained in those offers. The Complainant was not obliged to sign the September 2015 Offer Letter and it was open to him to accept or reject the terms set out in the offer. The Complainant has stated in his post Preliminary Decision submission that in reaching this conclusion I had failed to *"acknowledge the obvious power of [The Provider] over"* the Complainant's affairs. The Complainant further states that *"nor is any weight given to the reservations expressed in my advisors' letters to the Provider".*

During my adjudication of this complaint, I have considered all submissions made by the parties and the circumstances of the complaint. It remains my view that it was ultimately the choice of the Complainant to accept the terms and sign the September Offer Letter. While he maintains he felt under pressure by the Provider, it was ultimately his decision whether or not to take the advice of his Financial Advisor and whether or not to accept the offer.

The Provider has a right to exercise its commercial discretion when a restructure to a term loan is requested by a borrower, as was the case with the Complainant.

For the reasons outlined above, I do not uphold this element of the complaint.

/Cont'd…

2. The Provider mis-sold a fixed interest rate to the Complainant in 2008 and has unfairly refused to refund the Complainant the overpaid interest

In his letter of complaint the Complainant states that;

> *"In 2008, the [Provider] fixed my loan interest (prior to the downturn) and in 2015 refused to fix again. When I queried this I received after the matter had been checked by my manager with Dublin, a letter…which stated that I should not have been given a fixed interest rate in 2008 and that I benefitted from it. While there are no letters discussing the fixing itself I remember the discussions with the Providers salesman for it were long and at their suggestion the period of fixing was extended to seven years on their recommendation. My complaint is that this should not have been sold to me."*

As part of the documentation provided to this office, the Provider has furnished a copy of internal email correspondence dated **13 August 2008.** From this correspondence it appears that Complainant contacted the Provider and spoke with a Senior Manager where various fixed rate options were discussed. The Senior Manager emailed the Provider's Complaints Relationship Manager as follows:

> *"…He seems to be interested in fixing 400K and leaving 100k floating. I have given him 5, 7 and 10 yr rates (4.82, 4.83 & 4.92% + credit margin) and approx. repayments.*
>
> *I told him that fixed rates are approx. 0.50% lower than they were a few weeks ago and he seems keen to secure them. He said he will contact you shortly (possibly later this morning) to organise".*

On the same day, the Complainant's Relationship Manager replied and stated that:

> *"Was with [the Complainant]. I have requested a new letter of offer for the 100K which will go to variable. Should have same tomorrow at which stage [the Complainant] will call to sign. He is probably going to go with the seven year option which we can hedge".*

It appears that following this, two Letters of Offer issued, one for €100,000 under account number XXXXX480 (formerly XXXXX190) and a second for €415,043 under account number XXXXX845 (formerly XXXXX816) in ***August 2008***.

As set out previously the ***January 2009 Offer Letter*** provided for the continuation of existing 2008 facilities. In relation to the interest rate it provides as follows:

> "*The fixed (money market) interest rate is at present 6.54% per annum, representing the Provider's 7 Year Cost of Funds rate plus a margin of 1.75%. This rate is fixed until 25 August 2015*".

/Cont'd…

The Complainant also refers to a letter from the Provider dated **11 November 2015** which states that;

> *"You should have been issued with a Housing Loan Agreement in 2008 and would not have been entitled to the fixed rate you received at the time such rates were/are not available to consumers. It does not appear that you suffered any loss as a result of the Provider not issuing you a Housing Loan Agreement and actually benefit from the fixed rate being applied".*

The Complainant is of the view that this amounts to an admission from the Provider that the Complainant should not have been offered a fixed rate in 2008.

The Credit Review Office provided its observation in relation to this issue in its opinion in the following terms;

> "*We do not see any basis in the claim by the Borrower…that the fixed interest rate arrangement entered into in 2008 was inappropriate*".

I note that the Complainant raises issue with this being dealt with in the opinion given that this matter does "*not fall within the remit of the Credit Review Office*".

Again I reiterate, I act independently in my investigation and adjudication of complaints made to this office. Reference to the opinion of the Credit Review Office in relation to this aspect of the complaint is only to provide reassurance to the parties that I am aware of the contents of the opinion of the Credit Review Office given that it was submitted in evidence. I have arrived at my own decision in relation to the matters under consideration in this complaint in an independent manner.

Having reviewed the correspondence which has issued between the Provider and Complainant, it appears that the Complainant accepted the terms of ***the August 2008 Letter of Offer*** which was then restructured by the ***January 2009 Offer Letter*** which continued the fixed rate of interest for 7 years.

I note that the Provider, in its letter dated ***29 March 2016,*** acknowledges that the content of the letter of **11 November 2015** was erroneous:

> "*In respect of the 2008 fixed rate, the decision to fix was yours and yours alone, earlier correspondence which suggested that you would not have been entitled to a fixed rate was incorrect and I apologise for this error. The [Provider] offered and continues to offer fixed rates*".

Having carefully considered the documentation provided to this office during the investigation of this complaint it is my view that there was no mis-sale of the mortgage loan in **August 2008**.

/Cont'd…

It appears from the Provider's notes that the Complainant discussed the options available to him with various members of staff of the Provider and that the Complainant then accepted the fixed term in the August 2008 Letter of Offer, which was restructured with the ***January 2009 Offer Letter***.

In this regard, I also note that the Complainant in his letter of **9 October 2015** says in relation to the fixed interest rates that he "*…took the position in 2008 for certainty*".

As I have not been furnished with any evidence that the Complainant should not have been provided with a fixed interest rate loan in 2008, I do not uphold this aspect of the complaint.

3. **The Provider improperly applied surcharge interest to the Complainant's loan accounts from January 2012.**

The Complainant submits in his complaint to this office that from **2012** he was charged "*quite extravagant amounts of interest rate premium or surcharge*".

In the Complainant's letter to the Provider dated **10 April 2016**, he refers to the 'interest surcharges' on his statements as "*penalty items incurred*." He states that "*these interest surcharges are not small e.g. on one loan on November 24th 2014 as a surcharge for the previous three months I was charged €445.81. And there have been a large number of such 'surcharges' over the last few years*". The Complainant also submits in this letter that the Provider was "*imposing interest penalties at the earliest opportunity*" and that the Provider should "*credit the full amount of surcharge/penalty interest to the zero percent interest rate component of [his] loan*". He states that he does not feel he has done anything to be "*penalized in this way*".

The Provider has furnished this office with documentation which shows that the Complainant did not meet his scheduled repayments between **January 2012** and **November 2014** in respect of the following loan accounts:

- Account XXXXX548 (previously XXXXX821)
- Account XXXXX334 (previously XXXXX601)
- Account XXXXX480 (previously XXXXX190 and XXXXX809).

The Provider submits that during the period where the Complainant failed to meet his scheduled repayments, the Provider was relying on the terms of the ***January 2009 Offer Letter*** and that the repayments in respect of the above loan accounts were restructured by the Provider by the terms of the ***November 2014 Offer Letter***. The statements submitted by the Provider show that "*interest surcharge*" was applied to the Complainant's loan accounts between **May 2012** (as a result of falling into arrears in January 2012) and **November 2014**.

/Cont'd…

The Provider relies upon ***clause 8*** of the terms and conditions contained in the ***Appendix to the January 2009 Offer Letter*** which sets out the following;

> **"8 *Interest surcharges***
>
> ***8A Interest surcharges rates and amounts on which interest surcharges will be charged…***
>
> *An additional interest charge at the rate of 0.75% per month or part of a month (i.e. 9% per annum) subject to a minimum of €2.54 per month will be paid by the Borrower on the following amounts;*
>
> *i. Any amount not paid by the Borrower to the Provider by its due date*
> *ii. Any amount not repaid on the Provider's demand where such demand is made in the case of an Overdraft facility or other facility payable on demand;*
> *iii. Any outstandings which become repayable by the Borrower to the Provider following the occurrence of an Event of Default pursuant to Clause 12 of these Terms and Conditions; and*
> *iv. The amount of any overdrawn balance which has not been authorised by the Provider's prior agreement or any overdrawn balance which is in excess of the overdraft limit authorised by the Provider's prior agreement.*
>
> ***8B Periods of Accrual of Interest Surcharge***
>
> *The additional interest charge provided for above shall accrue;*
>
> ***i.*** *In the case of any sum not paid by the Borrower on its due date, from such due date until the relevant sum is paid in full;*
> ***ii.*** *In the case of any sum repayable by the Borrower on the Provider's demand (and whether such sum is outstanding by way of Overdraft or otherwise), from the date of such demand until the relevant sum is repaid in full;*
> ***iii.*** *In the case of any outstandings which have become repayable by the Borrower to the Provider pursuant to Clause 12 of these Terms and Conditions (Events of Default}, from the date from which such outstandings become payable or repayable to the Provider pursuant to Clause 12 of these Terms and Conditions until such outstandings are repaid or discharged in full;*
> ***iv.*** *In the case of any unauthorised Overdraft balance or any excess over an authorised Overdraft balance, from the date of such unauthorised Overdraft balance or excess occurs until it is repaid in full; and*
> ***v.*** *In all cases both before and after judgement as appropriate.*
>
> ***8C Surcharge Interest -Additional***
>
> *The Borrower shall discharge interest due to the Provider at the rate relevant to the amounts owing by the Borrower to the Provider in addition to any amount of additional interest as provided for in this Clause 8.*

/Cont'd…

8D When and How Surcharge Interest is Payable

The additional interest charge provided for in this Clause 8 shall be payable by the Borrower to the Provider at the same time and in the same manner as the relevant interest charge, currently quarterly. Such additional interest shall be charged to the Borrower's account or accounts with the Provider.

8E Liquidated Damages

Any such additional interest charge as is provided for in this Clause 8 intended to constitute liquidated damages to the Provider including compensation for its increased administrative and related general costs occasioned by:

i. *The Borrower's default in payment of any amount when due including when such amount becomes due on the Provider's demand; and or*
ii. *The Borrower causing any unauthorised Overdraft or any unauthorised excess over an authorised Overdraft limit to occur; and or*
iii. *The Borrower otherwise defaulting in respect of the Borrower's obligations to the Provider.*

8F Change in Interest Surcharges

The rate or minimum amount of additional interest charge provided for in Clause 8A above may at any time and from time to time be changed by the Provider at its absolute discretion, subject to the approval by the relevant Regulatory Authority.

In the event of any such change or alteration occurring during the continuance of a facility, the Provider will give the Borrower a minimum of one month's prior notice that such change or alteration is to take place.

Notice under this Clause 8F, may be given by the Provider to the Borrower by any means the Provider considers reasonable."

The Provider states in its submission to this office that "*it is satisfied that the January 2009 Offer Letter evidences that all interest surcharges were correctly and validly applied*" and that "*the terms and conditions of the loan clearly provide for the charges to be applied in the event of default*". It states in its letter to the Complainant dated **19 April 2016** that the surcharges applied to the Complainant's loan accounts over the past 6 years amounted to €11,448.02.

It is at issue whether the Provider was entitled to apply surcharge interest on the Complainant's loan accounts between **January 2012** and **November 2014**. The Complainant does not deny that the facilities were in default during the relevant period, nor does he deny that the contractual documentation provides for a surcharge interest rate in such circumstances.

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Surcharge Interest Clauses

In respect of the three loan accounts, an Offer Letter (including a set of terms and conditions) issued to the Complainant on **22 January 2009** (the **January 2009 Offer Letter**). These were accepted by the Complainant on **22 January 2009**.

I note from statements provided to the Complainant during the relevant period that when surcharge interest was applied to the accounts, it was labelled as "*interest surcharge*".

Case Law

I note that there is relevant case law in respect of this issue, which I must consider when deciding whether or not the surcharges were improperly applied to the Complainant's loan accounts. I will provide a summary of the relevant case law below, to include the key principles arising from the case law. The main issue which arises from the case law is whether or not the surcharge interest clause in this complaint constitutes a penalty clause as a matter or Irish law and is therefore unenforceable.

The leading Irish authority is the Supreme Court decision in *Pat O'Donnell & Co Ltd v Truck and Machinery Sales Ltd* [1998] 4 IR 191, which focused on the distinction between a permissible genuine pre-estimate of damage and an impermissible sum in excess of any actual damages that would possibly or probably arise from a breach.

In ACC Provider Plc v Friends First Management Pension Funds Ltd [2012] IEHC 435, the question of whether default interest in a loan contract was a penalty was considered by Finlay Geoghegan J. On the evidence, each side's expert agreed that where a facility goes into default, it would be re-categorised as impaired. This classification has cost implications for the lending Provider because it will need to set aside an increased level of capital for the anticipated loss. It appears also to have been agreed that the actual cost to the Provider would vary according to the nature of the default. Finlay Geoghegan J. concluded that the interest surcharge of 6% per annum could not be considered to be a reasonable pre-estimate of loss. The application of the surcharge trebled the margin on the facility, and almost doubled the applicable interest rate, and the entire surcharge was triggered even if one interest payment fell into arrears. This was not, therefore, akin to the minimal 1% additional interest found to be acceptable and enforceable in the UK decision of *Lordsvale Finance Plc v Provider of Zambia* [1996] QB 752. At paragraph 79, Finlay Geoghegan J. expressed the basic rule, as endorsed in *Pat O'Donnell*, as requiring the court to determine whether or not the additional sum payable is a genuine pre-estimate of the probable loss by reason of the breach.

The court should determine whether the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach, by comparing the amount that would be payable on breach with the loss that might be sustained if a breach occurred.

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In *AIB plc v Fahy* [2014] IEHC 244, O'Malley J accepted that "*a Provider is entitled in principle to charge surcharge interest where a borrower is in default*" but held the surcharge interest rate of 12% to be a penalty where the Provider offered no evidence as to the basis for its calculation so it could not be seen as a genuine pre-estimate of loss.

Most recently in *Sheehan v Breccia* [2018] IECA 286, the clause under scrutiny provided for a 4% per annum uplift in interest payments. Expert banking evidence was heard in the High Court to show that while it was not possible to accurately predict the level of loss that would be incurred on default, Providers are likely to incur additional risk and administrative costs when a loan goes into default. The default or surcharge rate was almost double that of the normal interest rate applying under the loan. The creditor, a co-shareholder in the underlying business, argued that where a precise pre-estimate of damage was impossible and the provision was commercially justifiable, the bargain made between the parties should be respected provided the surcharge was not extravagant or unconscionable.

This approach was rejected by the Court of Appeal which indicated that only the Supreme Court could reconsider the principles as to whether a surcharge interest clause is or is not a penalty. Speaking for the Court of Appeal (at paragraph 22), Finlay Geoghegan J. noted that:

a) the onus of establishing that a clause is a penalty rests on the party alleging same; and

b) the question of whether a clause is penal must be assessed at the time the agreement was entered and not at the date of breach.

Finlay Geoghegan J. held (at paragraph 40) that the question for the court to determine was "*whether or not the additional sum payable is a genuine agreement for the payment of liquidated damages*". This question then turns on whether or not the additional sum payable represents a genuine pre-estimate of the probable loss to the innocent party by reason of the potential breaches of contract to which the clause applies. The learned judge accepted that latitude ought to be applied where there is a difficulty in establishing a pre-estimate of the damage suffered where there is probable variation in what loss and damage that will in fact be suffered. As a result, Finlay Geoghegan J. held (at paragraph 44) that the question could be phrased as a determination of whether "*the clause is a genuine attempt by the parties to estimate <u>in advance</u> the loss which will result from the breach*" (emphasis added).

In *Sheehan v Breccia*, Finlay Geoghegan J. concluded that the 4% surcharge interest clause in question was not a genuine attempt to agree upon liquidated damages or estimate the loss which the original lender might suffer by reason of a relevant default. In reaching this conclusion, the learned judge noted that the clause was contained in the Provider's general terms and conditions.

Accordingly, it could not have been a genuine advance estimate of the Provider's loss arising on a breach of the specific loan agreement between the Provider and the borrowers. She further noted that expert evidence established that the probable loss depends on an interplay between the amount outstanding at the time of default, the value of the security ultimately realised, and the cost in time or effort in achieving these outcomes.

/Cont'd…

The learned judge further accepted that the experts were in agreement that the pre-estimate of probable loss in the event of default formed part of the analysis which the Provider did prior to determining the general interest rate to be applied to the facility.

Analysis

In assessing the clause in the present complaint, I accept that the Complainant bears the onus of establishing that the clause is a penalty. The Complainant submits that surcharge interest was improperly applied and has referred to it as "*penalty items*" in correspondence with the Provider.

I note that in the cases considered by the Courts, expert banking evidence was led by both sides to assist the courts in establishing whether the clauses in question were penalties. While no expert evidence is available to me in the context of the present complaint, I believe that I am entitled to note the expert evidence as cited in those cases to assist me in determining the question.

Applying the *Friends First* and *Breccia* principles to the present complaint, I note the following:

1. The question of whether the clause is penal must be assessed at the time the agreement was entered into, and not at the date of the breach (i.e. **January 2012**). The Provider has not made submissions or proffered any evidence to assist this office with assessing its rationale for including the annual 9% surcharge interest rate at the time the loan accounts were entered into in **2009**. Rather, the focus of its submissions has been to demonstrate that the interest surcharge became operative as soon as the first repayment on each of the three loan accounts were not made on the agreed dates in **January 2012** and that the terms and conditions of the loans provide for charges to be applied in the event of default.

2. The question of whether the agreement provides for the payment of liquidated damages normally falls to be decided by determining whether the clause is to be construed as a genuine pre-estimate of loss. I note that Clause 8B (Liquidated Damages) states the following:

> "*any such additional interest charge as is provided for this Clause 8 is intended to constitute liquidated damages to the Provider including compensation for its increased administrative and related general costs occasioned by*:
>
> > *(i) the Borrower's default in payment of any amount when due including when such amount becomes due on [the Provider's] demand; and or*
> >
> > *….*

/Cont'd…

(iii) the Borrower otherwise defaulting in respect of the Borrower's obligations to [the Provider]."

I am not satisfied that this wording in and of itself has a bearing on the classification of the clause as a liquidated damages or penalty clause. The real question is whether the clause can be construed as a genuine pre-estimate of loss. I have been provided with no evidence in relation to an advance estimate of the costs or losses that might accrue on the default by the Complainant.

3. Latitude ought to be applied whether there is a difficulty in a pre-estimate of the damage suffered where there is probable variation in what loss and damage will in fact be suffered. I further accept that that "[*a] default interest rate addresses the borrower's impaired credit, the true cost of which is normally impossible to quantify precisely*"; Breslin and Corcoran, paragraph 8–044. While latitude should be applied, however, the Provider who set the rate in question has not explained its rationale in imposing a 9% surcharge interest rate to the Complainant's loan facilities.

As the matter is phrased in *Breccia,* there is no evidence before me of "*a genuine attempt by the parties to estimate in advance the loss which will result from the breach*".

4. The fact that a surcharge interest clause is contained in a Provider's general terms and conditions tends to show that it could not have been a genuine advance estimate of the Provider's loss arising on a breach of the specific loan agreement between the Provider and the borrowers in question. In the present complaint, the clause in question is contained in the Provider's general terms and conditions, and there is no reference to the surcharge rate in the **January 2009 Offer Letter**. In these circumstances, the 9% rate that was applied cannot have been a genuine advance estimate of the Provider's losses arising on breach of the Complainant's loan accounts.

According to Breslin and Corcoran:

"*A typical default interest clause will provide that if the borrower defaults on a scheduled payment of interest or repayment of capital then interest on the unpaid sum will accrue at a rate higher than the contractual rate. Thus if the contractual rate is 2% per annum, the default rate might be set at 5% above that rate – making an effective rate of 7% per annum whilst the payment is in default.*

The doctrine of penalties is enlivened because the loan agreement thereby provides for payment of a sum of money on a breach of contract and the question is whether the uplift in interest is a valid liquidated damages claim, or whether it is a penalty."

(Banking Law (4th ed, 2019, Round Hall), paragraph 8–038.)

/Cont'd…

I accept that the surcharge interest clause in this complaint is similar to the kind considered and held unenforceable by the Irish courts in recent case law. The 9% surcharge interest rate applicable in the present complaint is higher than the surcharge interest rate that was struck down as unenforceable in *Friends First* and 5% higher than the surcharge interest rate held as a penalty in *Breccia.* The interest rates of the three loans in the present complaint were 4.29%, 6.54% and 4.54% during the relevant period. The loan account XXXXX334 (previously XXXXX601) was subject to a margin of 1.5% above Euribor. The loan account XXXXX548 (previously XXXXX821) was subject to a margin of 1.75%. The loan account XXXXX480 (previously XXXXX190 and XXXXX809) was subject to a margin of 1.75% above Euribor. The 9% surcharge interest rate can therefore be seen as significantly higher than the margin on loan accounts. I accept that the likelihood of default by the Complainant would have been one factor taken into account by the Provider in setting the relevant facility margin. There is no evidence before me as to what factors, if any, were considered by the Provider in determining that a 9% surcharge interest rate was appropriate to the Complainant as an individual borrower to compensate the Provider for the cost to it if the Complainant defaulted in the repayment of his loan facilities.

Crucially, as I have already stated and as with the *Breccia* clause, the surcharge interest clause in question is contained within the Provider's general terms and conditions, so could not have been a genuine advance estimate of the Provider's loss arising on a breach of the specific loan agreement between the Provider and the Complainant.

While I accept that some latitude should be applied due to the difficulties in pre-estimating damages that may be suffered on a default in loan repayments where there are a number of variables at play, there does not appear to be evidence of the Provider's attempt to estimate in advance the loss that would result from breach in the present complaint.

On the basis of the relevant legal principles and the foregoing analysis, I do not think that the surcharge interest clause in question can be properly described as providing for the payment of liquidated damages on default. Rather, the clauses appear to be designed to deter a breach of contract and hence can be properly described as penalty clauses, since there is no evidence of an attempt by the Provider to estimate in advance the losses that would result from the Complainant's failure to meet scheduled repayments under the loan facilities.

On the basis of the case law set out and analysed above, I am of the view that the clause in question, relating to this complaint, is unenforceable and therefore the entirety of the surcharge interest applied to the Complainant's loan accounts between **May 2012** and **November 2014** was wrongfully applied.

For this reason, I uphold this aspect of the complaint and direct the Provider to refund all surcharge interest charged on the Complainant’s three loan accounts, accounting for any compounding or capitalising of that surcharge interest.

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4. The Provider has unfairly refused to offer the Complainant a term loan for a period of 30 years in or around January 2016

As set out in the letter of complaint, it is the Complainant's view that the actions of the Provider have broken the trust that he had in it. Therefore, the Complainant requested that the Provider offer him a loan for a term of 30 years. The Complainant asserts that this would "*hopefully avoid further attempts to change my terms unfairly in the future following personnel or other changes in the [Provider]*".

The Provider sets out its position in relation to this element of the complaint in correspondence with this office in the following terms:

> "*The [Provider] is under no obligation to offer the [Complainant] a specific alternative payment arrangement if it deems it to be inappropriate and this includes the Complainant's request for a term loan of 30 years. The acceptance of any proposal; is at the commercial discretion of the [Provider] and decisions are made based on certain criteria. ..*
>
> *The [Provider] would like to point out that part of the [Provider's] rationale in its refusal to offer the Complainant a 30 year term loan is due to the fact that (1) the longest term the [Provider] provide for a facility of this nature is 15 years; (2) the Complainant will be 94 in 30 years time; and (3) the Complainant's financial situation is one of distress and in these instances, the Provider will only facilitate a max term of 3 years. The [Provider] is of the firm view that the Complainant needs to dispose of some of his assets".*

In this regard the Provider wrote to the Complainant on **22 January 2016** and stated that;

> *"We regret that we were unable to effect an alternative repayment arrangement with you at the present time in respect of your repayment proposal to repay the [Provider] over 30 years.*
>
> *This is due to the fact that after conducting a risk assessment in accordance with the standard prudent lending and credit management criteria we are of the view that such an alternative repayment arrangement is not sustainable from a lending risk perspective".*

I note from the opinion of the Credit Review Office furnished to this office by the Complainant that there had been engagement between the Provider and Complainant in order to identify an alternative repayment arrangement which would be acceptable to both parties.

/Cont'd…

I will set out the sequence of events in relation to the consideration of this issue by the parties below:

Following the expiration of the ***September 2014 Offer Letter***, the Provider offered the Complainant a new Alternative Repayment Arrangement (ARA). This this was not acceptable to the Complainant who responded to the Provider on **7 January 2016** seeking to restructure his loan in the following terms:

- Interest only rate of 3.3% (Cost of funds +1.75%) to be paid on Account XXXXX845 and Account XXXXX480 for a period of 2 years. Account XXXXX334 to remain 'parked' on an interest free basis for this 2 year period.

- Surplus rental income during this period to be used to repay other unsecured debts.

- Following the expiry of the 2 year interest only period, interest plus capital to be repaid on Account XXXXX845 and Account XXXXX480 over a period of 30 years at a rate of 3.3% (Costs of Funds + 1.75%) XXXXX334 to remain "parked" on an interest free basis for this 30 year period.

- Arrangement to be reviewed on a 5 yearly basis

The Provider declined this proposal but responded by letter dated **8 January 2016** and offered another potential ARA as follows:

Debt	Secured by	Margin	Interest base cost	Repayment schedule	Annual repayment
€200k	xxx	1.75%	TBC	Capital and interest based on a 20 year repayment profile. Term 5 years.	c. €14k
€400k	xxx	1.75%	TBC	Interest only. Term 5 years	c.€15k
c. €248k	xxx	1.75%	TBC	Interest only. Term - TBC	c.6K
Total – c.€848k					c.€35k

This proposal was not accepted by the Complainant who set out his reasons in correspondence to the Provider dated **14 January 2016** which are summarised below as follows:

- Lack of response in relation to compliance by the Provider with necessary procedures.

- No specific reasons given for not accepting the Complainant's proposal.

/Cont'd…

- No availability of a fixed rate option.
- No latitude provided to clear other debts.
- 20 year repayment profile not acceptable.

The Provider then suggested the following ARA which was set out in correspondence to the Complainant dated **26 March 2016**:

Account No.	**Balance**	**Interest Rate**	**Term**	**Required annual repayments (to match current repayments)**
XXXXX845	€421,726	2.5%	3 years	23,332 – Interest and part capital
XXXXX480	€163,999	2.5%	3 years	
XXXXX334	€262,261	0%	3 years	
Total	€847,986	-	-	€32,407

This offer was rejected by the Complainant by letter dated **10 April 2016** on the following grounds:

- 30 years term not offered
- Inadequate response regarding the interest rate margin of 1.75%
- No facility to clear other debts.

As can be seen from the above, it is apparent that the Provider attempted to engage with the Complainant in order to agree a mutually acceptable ARA in respect of his loan accounts.

I note that the Credit Review Office in its opinion outlines as follows:

> *"…the fact that the original agreement governing his borrowings was breached, due to the agreed repayments not being adhered to, and this being the case, the [Provider] were within their rights to seek the putting in place of an ARA. The Provider could have, had they chosen to do so, made formal demand and appointed a receiver over the properties held as security in the absence of a consensual sale of the secured assets being agreed…*
>
> *In our view that current restructure offered by the Provider is fair and reasonable…"*

/Cont'd…

I note that the negotiations referred to above culminated with the signing of the following offer letters issued by the Provider to the Complainant;

- Account No. XXXXX845(formerly account number XXXXX821) signed by the Complainant on **5 October 2016**

- Account No. XXXXX334(formerly account number XXXXX601) signed by the Complainant on **27 September 2016**

- Account No. XXXXX480(formerly account number 94895190) signed by the Complainant on **27 September 2016**

It is not a matter for this Office to interfere with the commercial discretion of a financial service provider. It is a matter for the Provider to exercise its commercial discretion when offering terms to any Borrower, including the Complainant. Whether the terms of any such ARAs are acceptable to the Complainant is a matter for the Complainant to decide.

Having regard to the interactions between the Provider and the Complainant, I accept that the Provider has engaged heavily with the Complainant to seek to agree a solution with respect to the arrears on the loan accounts and has taken the Complainant's submissions into account in offering further solutions. Whilst the outcome has not been the 30 year restructure that Complainant requested, I accept that the Provider has given sufficient reasons to the Complainant as to why this restructure is not appropriate in his particular circumstances.

I note that the Complainant has submitted that the Provider has breached the "spirit of" the Consumer Protection Code in its dealings with the Complainant. Having regard to all of the above, I am of the view that there is no evidence of any such breach.

Taking the entirety of the evidence and submissions furnished by both parties into consideration, I do not uphold this aspect of the complaint.

For the reasons outlined above, I partially uphold this complaint as it relates to the surcharge interest and direct the Provider to refund all surcharge interest charged on the Complainant's loan accounts, accounting for any compounding or capitalising of that surcharge interest.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2)(a) and (g).***

/Cont'd…

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by refunding all surcharge interest charged on the Complainant's loan accounts, accounting for any compounding or capitalising of that surcharge interest. This refund is to be made 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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

5 June 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.