



<b><u>Decision Ref:</u></b>	2020-0255
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Mortgage
<b><u>Conduct(s) complained of:</u></b>	Refusals (banking)
<b><u>Outcome:</u></b>	Rejected

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

#### **Background**

This complaint concerns a mortgage loan account. The Complainants submit that they are “entitled” to take six payment breaks over the term of their mortgage and that the Provider has failed to grant them payment breaks on several occasions from 2013 to date.

#### **The Complainants’ Case**

The Complainants have a flexible mortgage loan with the Provider, originally taken out with a third party provider in **2006** which later merged with the Provider. The Complainants state that they were “told that [they] could avail of six breaks during the period of the mortgage, provided [their] account was in order”. They further state that the leaflet they were given at the time of taking out their mortgage set out the following:

*“Please note that when you start to pay your full mortgage payment again, your monthly repayments will be increased to include the additional unpaid interest from your payment break”.*

The Complainants emphasise in their submissions that this leaflet did not state that customers wishing to avail of a payment break needed “to pay the interest first”.

The Complainants state that in **2014**, they complained to the Provider, regarding the Provider’s “refusal” to give them a mortgage break and its refusal “to put the reason why in writing”. They state they were told at that time that

*“ .. in order to have a mortgage break it would be necessary for [them] to ensure that six months interest was in the available facility.”*

The Complainants contend that they were *“not sure if this was necessary, under the agreement”* but that they decided to lodge the required funds in **March 2015**, in order to avail of a break. They further contend that despite expecting to have a payment break thereafter, the Provider deducted the mortgage payment from their facility account on **25 March 2015**, and that they contacted the Provider which returned this payment to their account. They state that they were *“eventually granted a break for five months from April 2015-25 August 2015”*.

The Complainants submit that they applied for another break of six months on **26 August 2016**, having paid their mortgage *“for a full twelve months before requesting another break”*, with the break to come into effect from **25 September 2016**. They state that their request was *“verbally declined”* due to *“insufficient facility”*.

The Complainants contend that they requested a written explanation for the refusal, and after receiving a *“bizarre letter”* from the Provider dated **13 September 2016**, they received a letter on **30 September 2016** stating that they were being refused a mortgage payment break due to *“insufficient available facility”*.

The Complainants state that they *“decided not to accept”* the Provider’s offer of a goodwill gesture in the amount of €150, made in its letter dated **1 November 2016**, and that the Provider confirmed on **3 November 2016** that the Complainants would not be offered a mortgage break despite their willingness to pay the interest for the break period *“as a lump sum”*. The Complainants submit that they asked the Provider to clarify, at that point, how they might avail of a mortgage break, and that they were told that if they *“paid in a lump sum, it would be deducted from the principal and not count towards ‘the available facility’”*.

The Complainants contend that they received little clarity at this time, despite engaging with the Provider, but that the Provider stated on **11 November 2016** that the difference between the Complainants’ *“facility”* and the *“agreed facility”* was *“approximately 6,000 euro, and so to avail of a six-month break [they] would need to put about 6,000 in [their] account!”*.

The Complainants also contend that the Provider offered an alternative option at this time, which was to *“over-pay [their] mortgage by 100 euro a month for 18 months”* before requesting a break. They contend that the explanations offered by the Provider *“made no sense”* as they had been asked in **2015** to pay six months’ interest to secure the break, and shouldn’t now be asked to *“over-pay for 18 months”*. The Complainants assert that there did not appear to be *“anything in the terms and conditions of [the] mortgage to explain this, or to explain why [they] could not make a lump sum to cover interest due”*.

The Complainants state that they expected their request for a payment break to be facilitated and they believed that it was their *“entitlement, as advertised in the leaflet*

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*describing the [flexible] mortgage's advantage". However, they further state that a few days later the Provider reverted to advise that it was "unable to offer a mortgage break", but offered the Complainants a goodwill gesture in the amount of €1800.*

The Complainants accepted this gesture, on the basis that they could still proceed with a complaint to the Financial Services and Pensions Ombudsman.

The Complainants submit that they subsequently received a letter from the Provider, dated **15 November 2016**, advising them as to how they might avail of a mortgage break in **2017**. This consisted of an overpayment of €100 per month for eight months, so that the Complainants' "available facility" would "exceed the remaining balance". The Complainants state that the Provider also advised that they might not be successful in their request for a six month break in **2017**, due to the reduction in the "available facility" during the period of the six month requested payment break.

The Complainants take the view that they "were entitled to six breaks in the course of the mortgage" provided that their account was "in order". They state that the Provider confirmed that their account "has always been in order". They further state that they believe they should "still be eligible for two more breaks", given that they have taken four payment breaks.

The Complainants contend that the leaflet they were given when they took out the mortgage implies that the interest "can be calculated at the end of the break", but that the Provider has told them in the past that they need to "pay the interest for a break in advance". The Complainants submit that although the Provider has "repeatedly used the term 'insufficient available facility' to decline [them] mortgage breaks, [it has] failed to adequately explain how this system works". They maintain that the promotional leaflet given to them when they took out the mortgage suggested that if their account was in order, they would be entitled to a break and that repayments would increase after the break. They state that there "is no mention of building up a facility, or overpaying to gain a break".

The Complainants submit that due to the lack of clarity from the Provider they have been unable to plan financially and have incurred "significant extra credit costs.... Since being refused breaks since April 2013". They contend that the goodwill gestures from the Provider in **2015** and **2016** (a combined sum of €2,550) "are inadequate in addressing the financial consequences of..... failing to give [them] a mortgage break". They state that they seek a compensatory sum that will "adequately" compensate them for the "stress, and financial loss" they have experienced due to the Provider's unwillingness to grant requested payment breaks, and for its poor communication throughout.

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

The Provider submits that the first Complainant telephoned the Provider on **22 February 2013** to "enquire about the Available Facility" as she wanted to apply for a payment break; the Provider states that it advised the Complainants three days later that there was no Available Facility.

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The Provider further submits that this enquiry indicates that the Complainants were *“aware of the need”* for there to be an Available Facility in order to avail of a payment break. The Provider states that subsequently, on **24 April 2013**, the Complainants wrote seeking a six month payment break effective from **May 2013**, and were advised two days later that there was no Available Facility.

The Provider contends that the Complainants were advised on **1 May 2013** that a payment break was *“subject to enough Available Facility being in place, and also that a payment break was subject to the terms and conditions of the mortgage”*. The Provider further contends that the Complainants wrote again on **8 July 2013**, *“asking for a written response as to the reason why their request for a payment break was declined”*. The Provider states that the Complainants acknowledged at this time that they had been advised that they had *“insufficient facility”* in place, and it further states that the Complainants’ request for a payment break was reviewed at this time and declined, due to insufficient Available Facility.

The Provider submits that the Complainants sought updates on their payment break request, and that the outcome was communicated to them by telephone on **5 September 2013**. The Provider states that on **3 January 2014** the Complainants requested a written response as to why the Provider declined their request for a payment break in **May 2013**.

The Provider states that the Complainants wrote on **20 October 2014**, requesting a six month payment break, *“effective from October 2014”* and that the first Complainant telephoned to request an update on **31 October 2014**. The Provider submits that the Complainants were advised during the call that *“the letter would be reviewed, and the response would be forthcoming”*, and that they were also advised that *“certain criteria must be met in order to qualify for a payment break”*. The Provider states that the Complainants telephoned again on **13 November 2014** to request an update, and that they were

*“advised that the mortgage did not qualify for a payment break at that time based upon the status of the mortgage account (i.e. not enough Available Facility on the account).”*

The Provider submits that the Complainants wrote to the Financial Service and Pensions Ombudsman (then the Financial Services Ombudsman) on **1 December 2014**, in relation to their grievances with the Provider, and that it issued its Final Response on **18 February 2015**. This response upheld the *“service elements”* of the complaint, but did not uphold the fact that the Complainants’ payment break request was declined as it was due *“to the Complainants’ mortgage account having insufficient available facility”*.

The Provider states that the Complainants accepted the Provider’s offer of €750 and that *“this sum was paid to the Complainants’ account”* on **27 February 2015**.

The Provider contends that the Complainants were advised on **12 March 2015** that there was not enough available facility on their mortgage account to be approved for a payment break. However, the Provider states that on **1 April 2015**, a six month payment break was approved, *“with a refund of the March 2015 repayment included”* and that the Complainants wrote on **2 April 2015** to thank the Provider *“for ensuring that [they would] receive the requested six-month mortgage break, backdated to March 2015”*.

The Provider states that the Complainants wrote on **26 August 2016** to request a six month payment break effective from **September 2016**, and that they telephoned the Provider on **9 September 2016** to request an update.

The Provider further states that its mortgage department wrote to the Complainants on **13 September 2016** advising them that they *“were due to pay ‘full’ monthly repayments from September 2016 onwards”*, and that during a call to the Complainants the next day, the mortgage department advised that the recent request for a payment break was *“declined due to insufficient facility”*.

The Provider submits that the Complainants then made a formal complaint, and that shortly thereafter the Provider wrote to them to *“confirm that their request for a payment break was declined”*.

The Provider states that it issued its Final Response on **1 November 2016**, wherein it noted:

*“One of the criteria which must be met to avail of a payment break is sufficient available facility to cover the interest that would accrue during the period of the break.”*

The Provider refers to the following information in its Final Response, setting out the details of the Complainants’ *“available facility”* at that time:

Your available facility is currently €192.34. If you make a lump sum it will not have an effect on the available facility. The available facility increases when the capital balance goes down against the Agreed facility

For example: Your details are as follows:

Agreed Facility: €93,250.00  
Available Facility: €192.34  
Balance: €93,057.66

The €192.34 is the difference between the balance owed and the available facility.

Your payment break was refused because there was insufficient available facility; you need to have enough available facility to cover the interest charges for the period of time you want the payment break for.

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The Provider further states that the Complainants' mortgage at the time was "up to date" and that it had received a monthly repayment each month. It emphasised "unless there is enough credit in the available facility as discussed to cover the interest only repayments over the payment holiday period, the payment holiday will be declined" as the request would fall outside the Provider's approval criteria. However the Provider did acknowledge certain customer service shortcomings and offered a goodwill payment in the amount of €150 as a result.

The Provider submits that the Complainants wrote again on **8 November 2016**, to express their dissatisfaction at the Provider's response, and as a result the complaint "was reopened". The Provider further submits that three days later, on **11 November 2016**, the Provider spoke to the Complainants to advise that the position had not changed regarding their requested payment break. The Provider sets out that it advised the Complainants that:

- The Provider was "unable to give the payment break";
- The Available Facility is "any monies where there is a difference between the facility and the total borrowing (which is the "Agreed Facility")";
- The available facility "represents the amount that can be withdrawn at any time", subject to the Provider's approval;
- The Agreed Facility reduces each year on the anniversary of drawdown;
- The Available Facility was less than the balance outstanding, and therefore the Provider could not agree to a payment break.

The Provider contends that it offered the Complainants an "increased goodwill offer of €1,400, which was not accepted" as the Complainants took the view that the offer should be "substantially increased" due to the poor communication and customer service proffered by the Provider regarding the payment break facility. The Provider submits that the Complainants requested "€4,200.00 (i.e. the amount of the payment break) in addition to a sum of compensation".

The Provider states that it spoke with the Complainants again on **14 November 2016**, and advised that it was "not in a position to offer €4,200.00 plus a sum of compensation". The Provider further states that it reiterated at this time, that the payment break was subject to approval, that there was not enough available facility in the account, and that the payment break was declined "as per the terms and conditions". The Provider submits that an increased offer of €1,800 was made to the Complainants, "in an attempt to settle the matter amicably" and that this offer was accepted.

### **The Complaint for Adjudication**

The complaint is that the Provider has, since 2013, wrongfully declined to grant payment breaks to the Complainants and that it has proffered poor communication throughout with regard to how a payment break may be taken.

## Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **6 July 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.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The Complainants took out their flexible mortgage with a third party provider (hereinafter referred to as Bank A) in **2006**. This type of mortgage offsets the balance of the borrower's current or savings account against the outstanding mortgage loan, so that interest is only charged on the sum remaining when the balance of the linked account is subtracted from the outstanding mortgage amount. One of the advantages of this type of flexible mortgage account is the option to take payment breaks/holidays, provided the financial service provider is satisfied that all accounts concerned are operating in good order and that any payment break availed of does not breach the terms and conditions of the mortgage account.

From the evidence submitted, I note that on **26 July 2006** the Complainants signed the Letter of Loan Offer issued by Bank A on **11 July 2006**, and that this document was forwarded to Bank A on the day of signing by the Complainants' solicitor. The Complainants have submitted in evidence a copy of the General Terms and Conditions of their mortgage loan, issued to them when they signed Bank A's Letter of Loan Offer. These Terms and Conditions are dated "*As of Nov. 2005*".

I note that Condition 46, relating to Withdrawals, states:

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*"You may not make any withdrawals of transfers from the Facility Account and [Bank A] will not be obliged to carry out any standing instructions to make payments out of the Account:*

- i. if, without [Bank A's] prior written consent any mortgage payment has not been paid on time and there are insufficient funds in the Facility Account to discharge the mortgage payment(s); or*
- ii. if you have overdrawn on your Facility Account or if the payment would cause the Facility Account to be overdrawn".*

Condition 44 of these Terms and Conditions sets out the following:

*"[Bank A] reserves the right at all times to introduce new services, terms and conditions and to vary existing terms and conditions upon notice thereof to the Accountholder by any means [Bank A] considers reasonable, in which circumstances the Accountholder shall be free to dissolve this contract with [Bank A] and upon so doing shall forthwith discharge all and any outstanding liabilities to [Bank A]."*

I am therefore satisfied that the requirement for sufficient funds to be available in the facility account to discharge any mortgage payments was set out in the original terms and conditions furnished to the Complainants when they accepted Bank A's loan offer in July 2006. Furthermore, I accept that in signing the Letter of Loan Offer from Bank A, the Complainants agreed to abide by Condition 44, amongst others, which set out the lender's entitlement to vary existing terms and conditions once reasonable notice of any changes or variations is given.

The Provider submits that Bank A wrote in September 2006 to all of its customers who held this particular type of flexible mortgage to inform them of some changes to the account, including the account type name. The Provider contends that it has been unable to locate a copy of the specific letter issued to the Complainants due to the passage of time, however, it has furnished a copy of the text of the letter and a copy of the associated Terms and Conditions.

Under Condition 3 '**Operation of the Account**', section (c) states:

*"You are not able to instruct us to make payments from your Account (regardless of any Monthly Payments you make to repay the Total Borrowing) unless you have an Available Facility".*

Condition 6 relates to '**Payment Holidays**' and states:

*"You may suspend making the Monthly Payments or pay part of them, during any period (not being more than six months in any rolling 12 month period) where we agree. Such agreement is dependent on all payments due on your Account being up to date and paid in full and all your other accounts with us (if any) are operating in a satisfactory manner. If we do agree, we will tell you the date on which we will*

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*recommence collecting the Monthly Payments (in full) and the amount of the Monthly Payments applicable. Interest will continue to be applied to the Account each month at the Interest Rate calculated in accordance with Condition 4. This arrangement will immediately cease and you must restart making Monthly Payments (in full) if the Facility will be exceeded”.*

The Complainants have not disputed that they received notification of the amended terms and conditions, and I accept, therefore, that the Complainants were informed by Bank A in **2006**, that the terms and conditions of their account did not allow for their Facility to be exceeded, and that payments could not be made from their account unless there was an Available Facility.

However, I also acknowledge that it may not have been clear to the Complainants that the interest deducted during a payment break would constitute a “*payment*” from their account that required an Available Facility.

From the evidence submitted, I note that the Complainants’ first payment break was approved in **February 2008** “*for 3 months only*”. Their statement of account dated **11 January 2008** showed an Available Facility in the amount of €1,621.61.

A second payment break, for a period of six months, was requested by the Complainants in **January 2010**, and this was approved within a week. Their statement of account dated **11 January 2010** showed an Available Facility in the amount of €3316.97.

A third payment break, for a period of six months, was requested by the Complainants in **August 2011**, which was again approved within a week. Their statement of account dated **11 July 2011** showed an Available Facility in the amount of €2,284.68.

The Complainants requested a fourth payment break in **April 2013**, which was declined by the Provider due to insufficient Available Facility. I note that the Complainants’ statement of account dated **11 April 2013** showed that the Available Facility amount was -€2,092.45 (i.e. the mortgage account balance was greater than the Agreed Facility at that time, and therefore there was no Available Facility). Call notes submitted by the Provider in evidence show that the first Complainant spoke with the Provider by telephone on **1 May 2013**, and that she was advised “*how available facility builds up and reduces*” as well as how a payment break is “*subject to available facility sufficient to cover missed MRPs*”. This call note also states: “*Advised [Available Facility] builds up through overpayments made on the account*” and that the first Complainant stated “*loan offer doesn’t specify this*”.

The Complainants wrote to the Provider in **July 2013**, requesting a written response as to why their request had been declined, however the Provider did not issue a written response, having spoken with the first Complainant by telephone regarding the requested payment break.

The Complainants made a request for a payment break again in **October 2014**, which was declined by the Provider as there was no Available Facility. I note that their statement of account dated **10 October 2014** showed an Available Facility in the amount of €2,090.58. Ordinarily, this amount would have been sufficient to cover the Complainants’ interest

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payments during the six month break period, however, the Agreed Facility was due to reduce (as it did each year) in **November 2014**, thereby also reducing the Available Facility. I accept that the Provider was obliged to consider this when reviewing the Complainants' application. I note that by **January 2015**, the Complainants' Agreed Facility had decreased by over €6,000, due to the annual reduction, two months previously.

A further request from the Complainants for a six month payment break was declined in **March 2015** as there was no Available Facility. Their statement of account dated **9 January 2015** showed that the Available Facility was -€2,417.61 (i.e. the mortgage account balance was greater than the Agreed Facility at that time, and therefore there was no Available Facility).

I note that when the Complainants' next statement of account issued on **10 April 2015**, the Available Facility had 'increased' to -€676.83. As a result of a complaint from the Complainants, the Provider proposed an "innovative solution" whereby a "relatively small lump sum payment" of €675 was lodged by the Complainants to their mortgage account later that month which would cover the interest payments on the mortgage during the period of the break. On this basis, a five month break was applied to the account, with the March repayment refunded.

I also note that the Complainants accepted the Provider's offer, made in its letter dated **18 February 2015**, of a monetary payment of €750 in acknowledgement of the Provider's lapse in its service to the Complainants. The Provider credited the Complainants' facility account with this amount on **27 February 2015**.

I note that the Provider's Final Response to the Complainants' complaint regarding its refusal to grant their requests for payment breaks, issued in **February 2015**, included the following:

*"The available facility is defined in the... terms and conditions as follows:*

*'Any monies where there is a difference between the Facility and the Total Borrowing and represents the amount you can withdraw at any time subject to our approval'."*

The Provider also states in this letter:

*"To clarify, at the times when you requested a payment holiday on 4 April 2013 and 20 October 2014, you did not have sufficient available facility to meet the interest that would apply during the payment holiday requested"*

And:

*"In order to avail of [a] payment holiday, you would need to build up the available facility on your... mortgage. You can do this by either increasing your monthly mortgage repayments or making lump sum payments to your mortgage account. The credit built up in the available facility would then be used to cover the interest portion of your mortgage while you were on a payment holiday or could lead to an*

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*early redemption of your mortgage..... However, unless there is enough credit in the available facility as explained above to cover the interest only repayments over the payment holiday period, the payment holiday will be declined as the request will fall outside our approval criteria”.*

Furthermore, the Provider has apologised *“if this was not explained to you when you contacted us previously”.*

The Provider included a copy of the mortgage terms and conditions with its Final Response, these conditions including:

*“‘Facility’ means the total amount we have approved in your Loan Offer Letter that you can drawdown which reduces over the term”.*

*“You may not make any withdrawals which increase the Total Borrowing to more than the Facility or otherwise allow the Total Borrowing on your Account to be more than the Facility”.*

*“You may suspend making the Monthly Payments or pay part of them, during any period (not being more than six months in any rolling 12 month period) where we agree. Such agreement is dependant on all payments due on your Account being up to date and paid in full and all your other accounts with us (if any) are operating in a satisfactory manner. If we do agree, we will tell you the date on which we will recommence collecting the Monthly Payments (in full) and the amount of the Monthly Payments applicable. Interest will continue to be applied to the Account each month at the Interest Rate calculated..... This arrangement will immediately cease and you must restart making Monthly Payments (in full) if the Facility will be exceeded”.*

I accept therefore, that in **February 2015**, the Provider set out to the Complainants what was required from them in order for them to meet its criteria for a payment break. Thereafter, on the basis of what the Provider had set out in its letter dated **18 February 2015**, the Complainants applied for another payment break on **26 August 2016**, stating:

*“We would prefer a complete break for six months, but if it is not possible to facilitate this, we are prepared to pay the required interest monthly, or as a lump sum before the break”.*

I note that the Complainants’ statement of account dated **11 July 2016** showed an Available Facility in the amount of -€1,649, and that a six month payment break beginning in August would take in the period during which the Agreed Facility was decreased in **November 2016**, resulting in a further reduction in the Available Facility. The Provider refused this request, again because there was insufficient available facility, and the Complainants made a complaint on foot of this refusal.

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In its response dated **1 November 2016**, the Provider again set out the requirement for *“sufficient available facility to cover the interest that would accrue during the period of the break”*. The Provider explained the Available Facility at that time was €192.34 which would be insufficient to cover the mortgage interest payments during the break period. The Provider further explained that a lump sum payment at that time

*“would not have an effect on the available facility” as “the available facility increases when the capital balance goes down against the Agreed facility.”*

The Provider went on to state:

*“To clarify should you make a lump sum now the available facility is due to be recalculated in November 2016. This in turn would decrease the current available facility. If you made a lump sum payment to the mortgage now it would not necessary (sic) be left as an overpayment but credited off the mortgage thus reducing the minimum monthly repayment rather than covering accrued interest over the six month period”.*

The Provider reiterated that unless there was *“enough credit in the available facility as discussed to cover the interest only repayments over the payment holiday period, the payment holiday will be declined as the request will fall outside our approval criteria”*, but it offered the Complainants a monetary payment of €150.

While the Provider restated its position at the end of the above referenced letter, I am of the view that the passage relating to the impending recalculation of the Facility was poorly worded. The Complainants’ Agreed Facility decreased annually each November, in line with the decrease in the amount outstanding on the mortgage. Because of this expected annual decrease, *“the available facility is utilised and cleared”* and therefore any lump sum lodged to the facility account would likely be offset against the mortgage before the Agreed Facility was decreased, so that it would not be *“cleared”* from the facility account.

I acknowledge that this may have been confusing for the Complainants, and it would have been helpful if the Provider had clarified that the lump sum lodgment option might have been suitable at another time, when the decrease of the Agreed Facility was not imminent or in process.

The Complainants were unhappy with the Provider’s response, and made a complaint in this regard. The Provider spoke with the first Complainant by telephone on **11 November 2016** clarifying that the Agreed Facility at that time was €86,500, and the amount outstanding on the mortgage was €92,443, meaning that the Available Facility was around -€6,000. In order to avail of a payment break, the Complainants needed to make a lump sum payment to the facility account. It is important to note that the annual decrease in the Agreed Facility would have been effected by the Provider around the beginning of that month. The Provider set out that in order to build up an Available Facility, the Complainants would need to increase their repayments by approximately €100 per month over twelve to eighteen months. Having listened to the recording of this call, it is clear that

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the first Complainant was unhappy about this, describing the circumstances as “*idiotic*” and stating that the Provider’s logic is “*beyond my comprehension*”. The Provider acknowledged during the call, the way the Available Facility builds up, may not have been adequately explained to the Complainants, and it therefore increased its previous compensatory offer to the Complainants of €150 to €1,400, to take account of the communication lapse. The first Complainant indicated that this was not sufficient, and when asked by the Provider what would resolve the matter, the first Complainant replied that €4,200 would resolve it. I note that €4,200 was the approximate ‘cost’ of a payment break at that time, in terms of a lump sum that would be required to be lodged by them.

The Provider reverted three days later, advising that it was not willing to accede to the Complainants’ request for €4,200 in compensation, but increased its offer to €1,800 and stated that the Complainants could accept this offer and still pursue the matter with this Office. The Complainants accepted this offer, on that basis.

I note that throughout, the Complainants continue to refer to the “*promotional leaflet*” received from Bank A when they were taking out their mortgage. In their recent submission to this Office dated **5 April 2020** they state:

*“... I would like to reiterate that our understanding (from [Bank A’s] leaflet) regarding our flexible offset mortgage was that in the course of the mortgage we would be entitled to six breaks in any twelve month period, provided our account was in order.”*

It is important to emphasise that the statements contained in a promotional brochure do not necessarily form part of the terms and conditions of a mortgage loan. The Letter of Loan Offer issued to the Complainants by Bank A on **11 July 2006** states the following:

*“Please ensure that you fully understand all conditions in relation to this loan, including the ... General Terms and Conditions which are contained in a booklet attached hereto and which form part of this Loan Offer”.*

The terms and conditions that pertain to the Complainants’ mortgage are those outlined in the Letter of Loan Offer, along with the full account terms and conditions, and not the statements made in Bank A’s promotional brochure.

I further note that the Complainants are of the view that they are “*entitled*” to a payment break under the terms and conditions of their mortgage. This view is repeatedly stated in correspondence and telephone calls with the Provider. It is important to emphasise that under the terms and conditions of their mortgage, the Complainants may not “*allow the Total Borrowing on [their] Account to be more than the Facility*”.

In the event of insufficient Available Facility arising at any time during a payment break period, the terms and conditions of the mortgage loan would be breached, and there is no entitlement to a payment break in such circumstances. The Provider, in order not to breach the terms and conditions of the account, must ensure that there is sufficient

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Available Facility to cover interest only repayments during any period of payment break. Accordingly, I am satisfied that where the Complainants did not have sufficient Available Facility to cover such repayments, the Provider was entitled to refuse a payment break.

The Complainants are also of the view that their Loan Agreement with the Provider did not explicitly state that “overpayments” might be necessary in order for them to avail of a payment break. While I agree that the Letter of Loan Offer signed by the Complainants did not explicitly state this, it did state as follows:

*“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Conditions and the General Terms and Conditions... explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified”.*

Furthermore, I note that under the “IMPORTANT INFORMATION” section of the Letter of Loan Offer, it stated:

*“It is not permitted to borrow in excess of the amount available in the Facility Account”.*

I note that the Complainants signed the Letter of Loan Offer in the presence of their solicitor, and I am satisfied that the mortgage loan terms and conditions had been explained to them in advance of signing the above mentioned letter, as they attested to this by signing.

Having reviewed all the documentary evidence submitted by the parties, and having carefully considered the audio evidence submitted by the Provider, I am of the view that the Provider made the Complainants aware in **2013** that sufficient Available Facility was required in order for them to be able to avail of a payment break.

The first Complainant telephoned the Provider on **22 February 2013** to request details of the Available Facility amount in advance of applying for a payment break, which certainly indicates that the Complainants were aware at that time that sufficient Available Facility was required, in order to avail of a payment break.

The Provider also explained the need for sufficient Available Facility to the first Complainant during a telephone call on **1 May 2013**. The Provider wrote to the Complainants on **18 February 2015** on foot of their complaint regarding the Provider’s refusal of their application for a payment break in **October 2014**. In this letter, the Provider stated that unless there was:

*“enough credit in the available facility... to cover the interest only repayments over the payment holiday period, the payment holiday will be declined as the request will fall outside our approval criteria” and “you must have enough credit in your available facility to cover the interest portion of the payment for the length of the payment holiday.”*

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In addition, the Provider, in its call with the first Complainant on **11 November 2016**, set out the relationship between the Agreed Facility, the outstanding mortgage loan amount, and the Available Facility, as well as setting out what would be required in order for the Complainants to avail of a payment break. I accept, therefore, that the Provider has advised the Complainants, on several occasions since **2013**, that sufficient Available Facility is a requirement for the facilitation of a payment break.

However, I am unhappy with the standard of the Provider's communication and customer service at times, particularly with regard to giving a written response to the Complainants when requested to do so. The Provider has stated that its policy is to inform a customer of the outcome of their payment break request by telephone, and, if contact cannot be made by telephone, that the Provider issues a letter to the Complainant asking them to telephone. It is not clear to me why this is the Provider's policy, and I am of the view that the Complainants are entitled to a written reply when they request one, particularly where their query relates to a service that has been refused.

The first Complainant also requested, during some of her calls with the Provider, to speak with someone who was familiar with her mortgage product. It does not appear that this request was granted, and I am of the view that it would have been helpful for someone familiar with this type of flexible mortgage to liaise with the Complainants in order to clarify the details which they had been formally advised of, on several occasions.

I note that the Provider paid the Complainants a compensatory sum of €750 in **February 2015**, and that the payment of a further sum of €1,800 was agreed between the parties on **14 November 2016**. On the basis of the sums already paid to the Complainants, in the total of €2,550, I believe this to be a generous amount of compensation for the Provider's acknowledged customer service shortcomings, and I do not therefore consider it necessary or appropriate to 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.**



**MARYROSE MCGOVERN  
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

28 July 2020

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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.

