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| <b><u>Decision Ref:</u></b>             | 2020-0416   |
| <b><u>Sector:</u></b>                   | Banking   |
| <b><u>Product / Service:</u></b>        | Tracker Mortgage  |
| <b><u>Conduct(s) complained of:</u></b> | Failure to offer a tracker rate throughout the life of the mortgage |
| <b><u>Outcome:</u></b>                  | Partially upheld  |

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

##### **Background**

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' Residential Investment Property.

The Letter of Approval detailed that the loan amount was €210,000 and the term was 22 years. The Letter of Approval which was signed on **20 January 2006** outlined the loan type as *"Two Year Fixed Residential Investment Loan (Interest Only)"*.

The Provider transferred its interest in the Complainants' mortgage loan account to another regulated financial service provider in early **2019**.

##### **The Complainants' Case**

The Complainants' mortgage loan account ending **4234** held with the Provider was drawn down on a two year fixed interest rate. On expiry of the two year fixed rate period in **February 2008**, the Complainants' mortgage loan account defaulted to a tracker interest rate of 5.05% (ECB + 1.05%).

Between **May 2013** and **September 2014**, the interest rate applying to the Complainants' mortgage account was not amended to accurately reflect the movements of the ECB rate. By letter dated **24 November 2014**, the Provider informed the Complainants of this, apologised and refunded the overcharged amount of €1,396.70 to the mortgage loan account, which was in arrears of €2,099.54 at that point in time.

The Complainants submit that the Provider applied the refund to the mortgage loan account to reduce the arrears without an explanation or any prior discussion with them;

*“We have not received an explanation to date how this happened, how the rate of overcharging was calculated, or why they took the refund without prior consultation with us, their customers.”*

The Complainants submit that during the period when their mortgage loan account was being overcharged in interest, they received a **letter of demand** from the Provider dated **02 July 2014**. The Provider demanded that the Complainants deliver up vacant possession of the property within 10 days of the date of the letter, or, alternatively discharge the total amount outstanding on the mortgage, €211,661.86, at that date. The Complainants submit that they were very concerned about the mortgaged property and the letters from the Provider. The Complainants detail that they moved to the west of Ireland as it was substantially cheaper to rent a house and rent out their family home to help fund the mortgage repayments.

The Complainants state that it was not until **31 December 2015** that they were informed that the Provider had corrected their Irish Credit Bureau record in respect of their mortgage loan account. The Complainants outline that the Second Complainant was running a private business from **2013** to **2016** and, as a result of their reduced credit rating caused by the overcharge on the mortgage loan account, she found it *“impossible”* to get credit to run her business efficiently. The Second Complainant submits, consequently, she had to take extra work with an agency, *“going up/down the Country to fund [her] equipment/assessments and practice outgoings on top of running a private practice”*.

The Complainants submit that during the period between **17 December 2016** and **23 December 2017** they received a total of 27 phone calls from the Provider. They outline that *“all the constant phone calls were very upsetting, and we felt this was harassment from the bank. We also wrote a letter of complaint to the bank regarding the phone calls ... We have constantly complied with the [Provider] attending meetings at our branch In [Location], filling in SFS forms, numerous phone calls with mortgage advisors, and collections departments. We also regularly attended meetings (at least every six months) in our local [Provider] branch in [Location], with the Manager – [Redacted] (or her designated deputy), and filled in numerous SFS financial statements with evidence provided.”*

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The Complainants detail that *“We finally received a letter from the [Provider] regarding their review on the 9<sup>th</sup> of October 2018. This was over 5 years since they started charging the incorrect interest rate. There was a 5 line explanation, saying that they made an error and they had reduced our mortgage.*

*We have not received an explanation to date how this happened, how the rate of overcharging was calculated, or why they took the refund without prior consultation with us, their customers.”* They outline that the Provider’s offer of €5,000 *“is confusing, and this offer seems to relate only to the letter of the 9/10/2018. We do not feel the offers from the [Provider] compensates us for all the issues associated with this case”.*

The Complainants submit that the Provider sold their mortgage to another regulated financial service provider in **February 2019**. They state that *“There are no arrears on the property; we have requested an explanation as to why they have sold our loan. As the full mortgage is paid every month and we are not in arrears.”*

The Complainants are seeking compensation for the following;

- (a) “The adverse impact which the actions of the bank had on the complainants and in particular the ability to earn a living and run a business due to damage to [the Complainants’] credit rating and inability to obtain credit terms.*
- (b) Compensation for the impact on the complainants and their family, who as a direct result of the actions of the bank had to vacate their family home and relocate in an attempt to try and discharge their mortgage repayments.*
- (c) Compensation for loss, distress and anxiety caused as a result of the manner in which the bank engaged with the complainants”.*

### **The Provider’s Case**

The Provider submits that the Complainants’ residential investment loan was drawn down on **15 February 2006** on a two year fixed interest rate of 3.7% for the loan amount of €220,000 repayable over 22 years. It states that the loan agreement envisaged a two year fixed rate period followed by a variable rate, and there was *“no entitlement to a tracker rate of interest at the end of the fixed rate period or at any other time.”* It further details that the loan was interest only for an initial period of 3 years, with capital and interest repayments commencing at the end of the interest only period.

The Provider states that from **mid-2006** until **mid-2009** *“the Bank gave certain fixed rate customers who did not have a contractual entitlement to a tracker rate an option of a tracker rate”.* It further details that from **late 2006** to **mid-2008**, the Provider’s default interest rate applied to accounts on the expiry of a fixed rate if no option selection was

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made by the customer(s), was the tracker rate option. The Provider states that rate options were issued to the Complainants in **2008** accordingly and when they did not select an option, the Provider applied the tracker interest rate of 5.05% (ECB + 1.05%) to their mortgage loan account on **15 February 2008**.

The Provider outlines that the mortgage loan account remained on interest only payments until **January 2011** when the Provider requested that the Complainants commence making capital and interest payments in accordance with the terms of the contract. It details that the Provider provided an alternative option *“that the account could remain on interest-only payments if the Complainants agreed that the rate would thereafter be a variable rate and that there would be an increase of 1% in the rate they were paying on account ending 4234.”* It states that the Complainants signed an **Endorsement** on **1 May 2011** agreeing to the alternative option.

The Provider submits that the conditions in the **Endorsement** stipulated that the interest rate applicable to the Complainants' mortgage account would no longer be the tracker rate that had applied to the mortgage but rather would be a variable interest rate of 3.05% which could be varied from time to time at the discretion of the Provider, and would apply to the mortgage for the remainder of the term *“and irrespective of whether the [loan] remains on interest only payments or is reviewed and becomes repayable by repayments of principal and interest”*.

The Provider details however, that it continued to apply a tracker interest rate on the account and the interest rate of 3.05% was in fact comprised of the Residential Investment Loan Tracker Rate of ECB + 1.05% plus an additional 1.00%. It states that *“This was consistent with the Bank's approach to other Interest Only Residential Investment Property mortgage loans at the time.”*

The Provider states that in a letter to the Complainants dated **9 October 2018** it inadvertently and inaccurately informed the Complainants that the rate of interest on their account ending **4234** had been changed to a variable rate in **May 2011** and had thereafter remained on a variable rate. The Provider submits that it apologises for this shortcoming and would like to offer a *“gesture payment”* of €5,000 to the Complainants.

The Provider outlines that on **3 May 2013** an ECB rate reduction of 0.25% was not applied to the mortgage account and it remained on the rate of 2.80% (ECB + 2.05%). It states that the Provider did not amend the interest rate thereafter and continued to apply the tracker mortgage rate of ECB + 2.05% to the account. It outlines that during the course of a review of certain loan accounts in **2014**, the Provider noted that reductions in the ECB rate had not been applied, of 0.25% in **May 2013**, 0.25% in **November 2013**, 0.10% in **June 2014** and 0.10% in **September 2014**. The Provider submits that the total interest overcharged on

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the Complainants' mortgage loan account amounted to €1,396.70, which was applied to the account in **November 2014** which resulted in a reduction of the amount of arrears then applying from €2,099.54 to €702.84.

The Provider states that it wrote to the Complainants on **24 November 2014** to inform them that *"due to an internal processing error, certain interest rate changes had not been applied correctly to their account between May 2013 and September 2014"*. The Provider maintains that it clarified the details of the refund to the Complainants in a satisfactory manner.

The Provider maintains that it *"acted appropriately when making contact with the Complainants in regards to any arrears on mortgage loan account ending 4234"*. The Provider outlines that under **Provision 8.8** of the **Consumer Protection Code 2012 (CPC 2012)** it was obligated to send the Complainants an updated version of the status of their account, including information laid out in **Provision 8.6** of the CPC 2012, every three months until the arrears were cleared in full, even where the Complainants had a repayment arrangement in place.

The Provider submits that insofar as incorrect interest amounts were charged to the account in the period between **May 2013** and **November 2014**, *"the account would have been in arrears even if the correct amount of interest had been applied to the account"*.

The Provider details that a **Letter of Demand** issued to the Complainants on **2 July 2014** and a further **Letter of Demand** issued on **20 September 2014**. It states that the Provider *"issued this correspondence in the normal course following a period where there was no customer engagement with the Bank in respect of the arrears in spite of the bank's efforts to engage with the Complainants. Previously, the Bank had made repeated efforts to facilitate the Complainants' financial situation and to maintain contact with them"*. The Provider submits that it is *"a matter of regret to the Bank that the Complainants and their family suffered stress due to their financial circumstances"*.

With respect to the Complainants' submission that the Provider telephoned them 27 times between **17 December 2016** and **23 December 2017**, the Provider states that the Complainants' mortgage loan account which is the subject of this complaint *"was not discussed on these calls"*.

The Provider outlines that when any amendment of an Irish Credit Bureau (ICB) profile is completed by the Provider, this is done on the ICB online update screen. It states that any such amendment is automatically notified to the ICB after close of business on the same day and the Provider's requested amendment is processed by the ICB on the next working day. It details that the Provider's mortgage loan account profiles are reported to the ICB on

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the tenth day of each month and *“the profiles are calculated based on the arrears as at the tenth day of each month divided by the monthly bill minus one month.”* The Provider outlines that arrears are only reported on loans which are greater than two full monthly payments in arrears and one month’s grace is always applied.

The Provider states that during the period from **May 2013** to **November 2014** the Provider made certain ICB reports in respect of mortgage account ending **4234** in accordance with its reporting procedure. It states that the arrears on the account gave rise to this reporting. It outlines that following the revision of the account in **November 2014**, it was necessary to review the ICB historical record of the account in respect of the period from **May 2013**, which resulted in an amendment of the historical ICB record from **April 2014** to **November 2014**. The Provider details that on **30 November 2015** it made the relevant amendment entries to the ICB online update screen which showed the account ending **4234** to be up to date with scheduled payments for the months of **April 2014 - November 2014** inclusive.

The Provider submits that the issue which impacted the Complainants’ account *“was identified as part of a wider project to identify a number of accounts that had missed out on the relevant ECB rate changes. This review took longer than anticipated and the required ICB amendment could not be completed until the review had been concluded. The priority of the project was to ensure all accounts were remediated, and when complete, the additional work regarding any potential impact on the ICB was completed.”*

The Provider submits that the Complainants have produced no evidence in support of their submission that they found it *“impossible”* to obtain credit in order to run a business efficiently as a result of their ICB rating for the months of **April 2014 - November 2014**. It states that *“the Complainants have provided no financial or other documentation in respect of the business to which this relates and no evidence of any application to or refusal of credit by any lender”*.

The Provider details that in **early 2019** it transferred the Complainants’ mortgage loan account to another regulated lender. It outlines that the sale comprised a portfolio of Non-Performing Loans. The Complainants’ loan was categorised as one of the Provider’s Non-Performing Loans as it had been restructured during the term of the loan, although it was not in arrears at the time of the sale. The Provider states that the sale of its Non-Performing Loans *“was part of the Bank’s strategy to reduce the overall proportion of NPLs on its books in line with the stated policy of the Irish and European Regulatory Authorities.”*

The Provider further submits that **Clause 1.15** of the **General Mortgage Loan Approval Conditions** to the Complainants’ loan provides that the Provider may at any time transfer the benefit of the mortgage to any person or company in accordance with the Mortgage Conditions and the terms and conditions do not allow the Complainants to object to the

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sale of their loan to another financial service provider. It states that the transfer of the Complainants' loan was permitted by law and under the terms of the loan agreement.

### **The Complaints for Adjudication**

The complaints for adjudication are as follows;

- (a) the Provider failed to apologise or compensate the Complainants for "*sending threatening letters*" during the period when their mortgage loan account was operating on the incorrect interest rate between **May 2013** and **November 2014**;
- (b) the Provider applied the €1,396.70 refund to the Complainants' arrears in **November 2014** without any prior consultation with the Complainants;
- (c) the Provider failed to explain how the overcharged interest amount was calculated, and;
- (d) the Provider failed to explain why there were delays in having the Complainants' ICB credit rating amended.

### **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 **8 September 2020**, outlining my preliminary determination in relation to the complaint.

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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 following submissions were received from the parties:

- Letter from the Provider to this office dated **28 September 2020**
- Email from the Complainants to this office dated **6 October 2020**, attaching;
  - Letter from the Complainants to this office dated **16 September 2020**
  - Letter from the Complainants to the Provider dated **6 October 2020**
- Email from the Complainants to this office dated **9 October 2020** attaching;
  - Letter from the Complainants to the Provider dated **7 October 2020**

Copies of these additional submissions were exchanged between the parties. Following the consideration of the additional submissions from the parties and all of the submissions and evidence on the file, my final determination is set out below.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider during the period of overcharging between **May 2013** and **November 2014**.

The Letter of Approval dated **20 January 2006** details as follows;

|                    |   |
|--------------------|---|
| <i>“Loan Type:</i> | <i>Two Year Fixed Residential Investment Loan (Interest Only)</i> |
|--------------------|---|

|  |                       |
|--|-----------------------|
| <i>Purchase Price / Estimated Value:</i> | <i>EUR 345,000.00</i> |
| <i>Loan Amount:</i>                      | <i>EUR 210,000.00</i> |
| <i>Interest Rate:</i>                    | <i>3.70%</i>          |
| <i>Term:</i>                             | <i>22 year(s)”</i>    |

The **Special Conditions** to the Letter of Approval details as follows;

***“Special Conditions***

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A. [THE PROVIDER] WILL ACCEPT MONTHLY REPAYMENTS, AS SET OUT IN THE LETTER OF APPROVAL, REPRESENTING PAYMENT OF INTEREST ONLY (AS MAY BE VARIED FROM TIME TO TIME AND INCLUDING INSURANCE PREMIUMS WHERE APPLICABLE) FOR THE FIRST THREE YEARS FROM THE DATE OF CHEQUE ISSUE OR SUCH OTHER PERIOD AS [THE PROVIDER] MAY DECIDE.  
[THE PROVIDER] RESERVES THE RIGHT TO REVIEW THE DEFERRAL OF THE REAPYMENT OF PRINCIPAL AT ANY TIME DURING THE TERM OF THE LOAN, INCLUDING THE FIRST THREE YEARS OF THE TERM AND MAY REQUIRE THE APPLICANT TO CEASE THE INTEREST ONLY REPAYMENT AND REQUIRE THE REPAYMENT OF PRINCIPAL AND INTEREST AND THE APPLICANT WILL IMMEDIATELY ARRANGE TO PAY THE REVISED MONTHLY REPAYMENT COMPRISING THE REPAYMENT OF PRINCIPAL AND INTEREST CALCULATED OVER THE REMAINING TERM SO THAT THE PRINCIPAL AND INTEREST WILL BE DISCHARGED WITHIN THE EXISTING TERM OF THE LOAN.

B. THE PRINCIPAL AND INTEREST WILL, IN SUCH CIRCUMSTANCES, BE REPAID UNDER A PAYMENT SCHEDULE BASED ON THE AMOUNT OF THE LOAN OUTSTANDING AT THE DATE OF REVIEW, THE REMAINING TERM OF THE LOAN AND THE INTEREST RATE APPLICABLE AT THAT TIME AND AS MAY BE VARIED FROM TIME TO TIME THEREAFTER. IF NO REVIEW IS MADE DURING THE TERM OF THE LOAN OR IF A REVIEW OR REVIEWS ARE MADE WHICH RESULT IN THE CONTINUATION OF THE DEFERRAL OF PAYMENT OF PRINCIPAL FOR A FURTHER PERIOD OR PERIODS, A PAYMENT EQUAL TO THE PRINCIPAL (TOGETHER WITH ANY OTHER REPAYMENT DUE UNDER THE MORTGAGE) MUST BE PAID AT THE EXPIRY DATE OF THE TERM OR ON THE REDEMPTION DATE OF THE LOAN, IF EARLIER FOR ILLUSTRATION PURPOSES, THE MONTHLY REPAYMENTS OF PRINCIPAL AND INTERST ON A EUR100,000 FACILITY AT 4.8% APR OVER 10,15 OR 20 YEARS WOULD BE:

20 YEARS = EUR643.49, 15 YEARS = EUR775.25 AND 10 YEARS = 1046.05

NOTE: THE INTEREST RATE AND REAMINING TERM APPLICABLE AT THE TIME OF ANY REVIEW MAYBE DIFFERENT TO THAT SHOWN ABOVE.

...

F. GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 "CONDITIONS RELATING TO FIXED RATE LOANS" APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE."

**Condition 1.15** of the **General Mortgage Loan Approval Conditions** outlines;

*"[The Provider] may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions."*

**General Condition 5** of the **General Mortgage Loan Approval Conditions** outlines;

- "5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*
- 5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
- 5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of, and at the time of such repayment, pay whichever is the lesser of the following two sums:*
- (a) a sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed Rate Period, or*
  - (b) a sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum to that being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.*
- 5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to variable rate loan agreement which will carry no such redemption fee."*

The **General Mortgage Loan Approval Conditions** also outline;

*IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:*

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*“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.”*

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **23 January 2006**. The Acceptance of Loan Offer states as follows:

*“1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval Condition*
- iii. [the Provider’s] Mortgage Conditions.*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us.”*

It is clear to me that the Letter of Approval envisaged a two year fixed interest rate and thereafter the option of a variable rate. The variable rate in this case made no reference to a tracker or the ECB rate, rather it was a variable rate which could be adjusted by the Provider. The Letter of Approval also provided for monthly repayments of interest only for the first three years from the date of drawdown. The Complainants accepted the Letter of Approval having confirmed that the Loan Offer had been explained to them by their solicitor on **23 January 2006**.

The Complainants sent the Provider an undated letter which was stamped received by the Provider on **6 February 2008**. The letter outlined as follows;

*“I would like to continue for a further two years to repay this account on an **interest only basis**. I have received agreement from you for an increase in my home mortgage of €100,000 for an extension to our home property (following planning permission) and have a new born baby which is adding to our current expenditure. Please note that this property is worth nearly twice what the current mortgage is and therefore I trust that this interest only mortgage will not be problematic.”*

[Emphasis original]

It is not clear to me why the Complainants requested a continuation of the interest only repayments in **February 2008**, in circumstances where the initial three year interest only

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repayment period was not due to end until **March 2009**. In any event, there is no evidence before me which shows whether the Provider responded to this request at that time.

The Provider has submitted that it issued **rate options** to the Complainants prior to the expiry of the initial two year fixed interest rate period in **February 2008**. I am disappointed to note that the Provider has not provided a copy of the correspondence issued to the Complainants in evidence to this office. Nor has it provided any explanation as to why this documentation has not been furnished.

**Provision 49 of the Consumer Protection Code 2006 (the "CPC 2006")** (which was fully effective from **01 July 2007**) outlines as follows;

*"A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."*

**Provision 11.5 and 11.6 of the Consumer Protection Code 2012** contain terms to the same effect as **Provision 49** of the **CPC 2006**. The Complainants' mortgage loan was inceptioned for a term of **22 years** commencing from **February 2006** and the options form purportedly issued in **2008**. The Provider's interest in the mortgage loan was transferred to another regulated financial service provider in **2019**.

The Provider is obliged to retain documentation on file for six years from the date the relationship with the mortgage holder ends. However it is unclear to this office, in the

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*Principal and Interest* - Currently 3.05% 1226.66

...

- *[The Provider's] Loan Approval conditions in relation to interest only mortgages are still applicable."*

The Complainants signed the form on **5 March 2009** and selected the interest only repayment option of 3.05% (ECB + 1.05%). The signed options form was stamped received by the Provider on **9 March 2009**. As set out above the **mortgage loan statements** show that the tracker interest rate of 3.05% (ECB + 1.05%) was applied on **13 February 2009**.

During the period between **March 2009** and **April 2011** the **mortgage loan statements** detail as follows;

| <b>Date</b>          | <b>Tracker Interest Rate of ECB + 1.05%</b> | <b>Monthly Repayment</b> |
|----------------------|---|--------------------------|
| Mar 2009 – Apr 2009  | 3.05%                                       | €526.51                  |
| May 2009 – Jun 2009  | 2.30%                                       | €392.29                  |
| July 2009 – Apr 2011 | 2.05%                                       | €349.06                  |

The Provider wrote to the Complainants by letter dated **4 January 2011** and detailed as follows;

*"I am writing to inform you that the Interest-Only period on your mortgage account **will end on 01 May 2011**.*

*Under the Terms and Conditions of your Letter of Approval, your mortgage will then convert to repayments of **Principal and Interest** from the above date.*

*New mortgage repayment:*

|  |              |                       |
|--|--------------|-----------------------|
| <b>Principal and Interest – Currently:</b> | <b>2.05%</b> | <b>€1,235.27" ...</b> |
|--|--------------|-----------------------|

...

*We understand this may represent a significant change in your current repayment schedule on your mortgage. However, by paying **Principal & Interest** on your mortgage:*

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1. *You will pay a lot less interest over the term of the mortgage as you will be paying interest on a reducing principal balance and not on the full amount.*
2. *Your monthly payments will be much lower if you switch to a principal and interest repayment schedule earlier in the mortgage term, as remaining on Interest only will mean you will have less of your mortgage term remaining within which to clear the principal balance outstanding."*

The Provider wrote to the Complainants again by letter dated **21 January 2011** which stated as follows;

*"Following your recent enquiry, please find enclosed your option(s) following the review of your Interest Only Mortgage. The full details of which are outlined in the enclosed endorsement forms. Your new monthly repayments for each option would be as follows:*

*Option 1 – Remaining on Interest Only - €538.44*

*...*

*This is an important decision and we recommend when making your choice that you receive independent legal advice."*

The **reverse side** of the letter detailed as follows;

***"Important Information regarding Interest Only repayments***

*When you have an Interest-Only mortgage, your monthly repayments to us do not include any repayment of the principal balance outstanding. As a result, your regular monthly repayment includes only the interest on that amount.*

*Because of this, the full balance outstanding remains payable on your mortgage.*

*By staying on an Interest-Only repayment schedule you should understand what it means:*

1. ***You are moving from a Tracker Mortgage onto a variable rate mortgage.***

*This means that the interest rate applicable to this variable rate loan may vary from time to time at the discretion of [the Provider] and therefore without regard to variations in the ECB rate. [Emphasis original]*

2. *By accepting the enclosed endorsement, you acknowledge that you have foregone the right to revert to a tracker mortgage at any time into the future. Please also*

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*note that if you choose to fix your mortgage in the future, on expiry of any fixed interest rate period, no tracker interest rate will be available to you as an interest rate option.*

3. *You could pay a lot more interest over the term of the mortgage as you will be paying interest on full amount you owe and not on a reducing principal balance.*
4. *Your monthly repayments could be much higher when you eventually switch to a Principal and Interest repayment schedule, as you will have less of your mortgage term left, within which to clear the principal balance outstanding.*
5. *You may have to extend the term of your mortgage if you cannot pay the Principal and Interest monthly repayments needed to clear the mortgage over its original term.*
6. *If you decide to sell up, you will have less equity in your property (Equity is the difference between the value of your property and the loan you still owe).*

...

*[The Provider] Loan Approval conditions in relation to Interest-Only mortgages are still applicable."*

The **Endorsement Form** enclosed with the Provider's letter states as follows;

***"ENDORSEMENT – OPTION 1***

***AGREEMENT TO CONTINUE PAYMENT OF INTEREST ONLY MONTHLY MORTGAGE PAYMENTS***

***THIS AGREEMENT*** dated the 1 day of May 2011 made between you (hereinafter called "the Mortgagor") of the one part and [the Provider] (hereinafter called "[the Provider]") whose registered office is at [the Provider's address] of the other part.

Account Number: [Complainants' account number]

Mortgagor Name(s)\* [Complainants' names]

*\*Note: even if not named above, all mortgagors (i.e. all persons on the mortgage), must sign overleaf.*

Mortgagor Address: [Complainants' address]

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**Payment Details:**

|                          |                                   |         |     |
|--------------------------|-----------------------------------|---------|-----|
| <b>New Rate:</b> 3.0500% | <b>New Monthly Payment Amount</b> | €538.44 | ... |
|--------------------------|-----------------------------------|---------|-----|

*The interest rate quoted above is based at today's rates and is subject to change.*

...

**WHEREAS:**

- A. *Under the provisions of the mortgage entered into between the Mortgagor(s) and [the Provider] under Account No. [ending 4234] ("the Mortgage"), the monthly payments, comprising of interest only, may be reviewed at any time or after expiry of a certain period(s) as specified therein, such that the monthly payments would change from payments of interest only to monthly repayments of principal and interest.*
- B. *[The Provider] has reviewed the Mortgage Account of Mortgagor(s) accordingly and now requires that the monthly repayments will comprise of principal and interest.*
- C. *The Mortgagor(s) has requested that [the Provider] postpone the change to repayments of principal and interest and has requested the continuation of interest only payments until further reviewed by [the Provider] in accordance with conditions of the Mortgage.*
- D. *[The Provider] has agreed to accept monthly instalments comprising of interest only for a further 2 years but reserving its right to review the payment of interest only at any time in accordance with the conditions of the Mortgage and subject to the conditions hereinafter contained.*

**NOW THIS AGREEMENT WITNESS THAT:-**

1. *In consideration of the Agreement of [the Provider] to postpone the requirement for payment by the Mortgagor(s) of monthly repayments consisting of principal and interest and in lieu thereof to continue to accept payments of interest only, the Mortgagor(s) agrees:*
  - i) *that the interest rate applicable to the Mortgage will **no longer be the tracker interest rate** which currently applies to the Mortgage i.e. it will no longer be at a margin or percentage over the European Central Bank Refinancing Rate ("the ECB rate") but will be the variable interest rate quoted above under "Payment Details" above which may vary from time to*

/Cont'd...

*time at the discretion of [the Provider] and therefore without regard to variations in the ECB rate. The interest rate quoted under "Payment Details" above, as may be varied from time to time, will apply to the Mortgage for the remainder of the term of the Mortgage (and irrespective of whether the Mortgage remains on interest only payments or is reviewed and becomes repayable by repayments of principal and interest).*

- ii) *that on expiry of any fixed interest rate period, **no tracker interest rate will be available to the Mortgagor(s)** either as an interest rate option and/or where the tracker interest rate may be provided for on expiry of the fixed rate period under the conditions of the Mortgage.*
- iii) *to continue to make interest only payments as specified under "Payment Details" above **until the interest only payments are next reviewed by [the Provider].**" [Emphasis original]*

2. *The Mortgagor(s) confirms acceptance of the foregoing changes and further confirms the conditions of the Mortgage relating to interest only payments and the right of [the Provider] to review such payments as provided therein.*

3. *The Mortgagor(s) confirms that the Mortgagor(s) has received independent legal advice or acknowledges that the Mortgagor(s) has been given an opportunity to obtain independent legal advice prior to the signing of this Agreement and has/have indicated which option may they have chosen hereunder.*

*I/We have received independent legal advice*

*I/We waive the right to independent legal advice*

4. *In all other respects the provisions of the Mortgage remain unchanged."*

The Complainants ticked the box above to indicate that they had waived the right to independent legal advice.

**Page 1** of the **Endorsement Form** has the date **1 May 2011** handwritten on it. However I note that the **Form** was stamped received by the Provider on **2 February 2011**. The **mortgage loan statements** show that the rate change to 3.05% was applied to the mortgage loan account on **3 May 2011**.

The Provider has submitted that *"The Bank acknowledges that the wording of clause 1(i) of the Endorsement as set out above provides that a variable interest rate would apply to the Complainants' account from May 2011 onwards. However, the Bank continued to apply a*

/Cont'd...

*tracker interest rate on the account and the interest rate of 3.05% was in fact comprised of the Residential Investment Loan Tracker Rate of ECB + 1.05% plus an additional 1.00%.”*

It is very disappointing to note that it was outlined in the **Endorsement Form** that the mortgage loan account would be adjusted from the tracker interest rate to a variable interest rate in circumstances where this is not what ultimately occurred. I note that the Provider has indicated that this was “*consistent with the Bank’s approach to other Interest Only Residential Investment Property Loans at the time*”. I find it wholly inappropriate that the **Endorsement Form** would outline that a particular type of interest rate would apply, when it was in fact a different type of interest rate that was actually applied. I also find it to be completely unacceptable that the Provider considers the incorrect detail in the **Endorsement Form** to be acceptable or in some way justified because it was “*consistent*” with its approach on other similar loans.

However, in any event, the Complainants appear to be satisfied that a tracker interest rate of ECB + 2.05% continued to apply to their loan from **May 2011**, even in circumstances where the Complainants agreed to the application of a variable interest rate to the mortgage loan and gave up their right to a tracker interest rate at the time. The consequence of this is that the Complainants’ continued to have the benefit of a tracker interest rate (ECB + 2.05%), albeit at rate of 1% higher, than the previous tracker interest rate (ECB + 1.05%) that had applied.

During the period between **May 2011** and **December 2011** the **mortgage loan statements** detail as follows;

| <b>Date</b>          | <b>Interest Rate</b> | <b>Monthly Repayment</b> |
|----------------------|----------------------|--------------------------|
| May 2011             | 3.05%                | €410.93                  |
| Jun 2011 – Aug 2011  | 3.30%                | €589.66                  |
| Sept 2011 – Nov 2011 | 3.55%                | €630.57                  |
| Dec 2011             | 3.30%                | €586.10                  |
| Jan 2012             | 3.05%                | €542.44                  |

It appears from the **mortgage loan statements** that arrears started to accrue on the Complainants’ mortgage loan account in **January 2012** when the monthly repayment direct debit of €542.44 was returned unpaid. This was approximately seventeen months before the Provider failed to apply the first ECB rate reduction as it should have in **May 2013**.

By **May 2012** the account was in arrears of €2,712.20. The Provider’s internal records outline as follows;

/Cont’d...

|                      |   |
|----------------------|---|
| <b>13 April 2012</b> | <i>"rang [Second Complainant], no answer, left message. Rang [First Complainant]. he advised he couldnt talk at the moment and agreed for me to call him back this afternoon. numerous missed payments here. need update"</i> |
| <b>30 May 2012</b>   | <i>"no answer left voicemail with name and number... looking for update as [Complainant] said she would be clearing all arrears end of may no payments have been received"</i>  |

The Complainants made two cash lodgements totalling €1,713.00 on **17 and 18 May 2012** which reduced the arrears on the account to €999.20 before the arrears were cleared in full on **8 August 2012**. Subsequently it appears that the mortgage loan account fell into arrears again on **15 August 2012**.

The Provider wrote to the Complainants by letter dated **17 September 2012** in relation to arrears of €395.67 on the mortgage loan account.

The Provider's internal record dated **26 September 2012** details as follows;

*"no answer here*

*client missed sept payment sending a letter outlining same"*

The evidence shows that the Provider issued a further letter to the Complainants on **17 December 2012** in relation to arrears of €848.35 on the mortgage loan account.

I note that on **20 December 2012** the Complainants entered into an alternative repayment arrangement to apply reduced repayments of €490.00 to the account for a period of 6 months.

The Provider's internal records of telephone calls from the Provider to the Complainants, detail as follows;

|                        |  |
|------------------------|--|
| <b>27 January 2013</b> | <i>"[First Complainant] adv his account is restructured, and he told us this 3 times already, cust was frustrated with call, apologised for same."</i> |
| <b>7 March 2013</b>    | <i>"[Complainant] asked for a call back later."</i>  |

|                     |   |
|---------------------|---|
| <b>7 March 2013</b> | <i>"[Second Complainant] had been made redundant 2 years ago, and they have been on reduced earnings since. Advised of missed payment on rel a/c 620, [First Complainant] thought he made all lodgements. Offered to send out statement, he said it was fine and no need. Will over lodge the next few months to address the missed bill, can meet the bills on all three a/cs going forward"</i> |
|---------------------|---|

The Provider issued a further letter to the Complainants on **19 March 2013** in relation to arrears of €835.36 on the mortgage loan account.

The Provider has detailed that an ECB rate reduction of 0.25% was not applied to the mortgage loan account in **May 2013**. I note that at that time the monthly repayment was €495.67 and the arrears on the account stood at €1,326.70.

Further letters issued from the Provider to the Complainants on **15 May 2013** and **17 June 2013** in relation to the arrears on the mortgage loan account.

The Provider's internal record dated **6 August 2013** details as follows;

*"No answer. On review- customer already spoken to today."*

The Provider issued a further letter to the Complainants on **16 September 2013** in relation to the arrears on the mortgage loan account.

The Provider's internal records of telephone calls from the Provider to the Complainants, detail as follows;

|                         |  |
|-------------------------|--|
| <b>9 October 2013</b>   | <i>"Advised customer of the arrears on the accounts. Has been meeting restructured bills, should be ok meeting restructured bills going forward. Agreed to RF to restructure end date. Consent to contact."</i>  |
| <b>27 November 2013</b> | <i>"No answer"</i>   |
| <b>4 December 2013</b>  | <i>"No answer"</i>   |
| <b>10 December 2013</b> | <i>"[Second Complainant] answered didnt want to take call but wanted to know want [sic] it was about i advised that i can only go over information when i dpa account she also advised that she is getting calls late at night and its harassment"</i> |

The Provider has detailed that an ECB rate reduction of 0.25% should have been applied to the Complainants' mortgage account in **November 2013** but was not. At that time the monthly repayment was €495.67 and the arrears stood at €1,300.72.

The Provider issued a letter to the Complainants on **16 December 2013** in relation to the arrears on the mortgage loan account.

The Provider issued a further letter to the Complainants on **18 March 2014** in relation to the arrears on the mortgage loan account.

The Provider's internal records show that it contacted the Complainants by telephone on the following dates;

|                      |  |
|----------------------|--|
| <b>19 March 2014</b> | <i>"vm. no msg"</i>  |
| <b>21 March 2014</b> | <i>"Spoke with [First Complainant], he advised that he will make payment for March bill at the end of the month with cash at the branch. Not in position to make payment today ... Customer cut call short."</i> |
| <b>31 March 2014</b> | <i>"Customer advised that 550 was lodged by his wife this morning with cash. Not showing on [redacted] yet. Customer advised at beginning of call that he was busy so I did not continue script."</i>            |

The Provider's internal records show that it contacted the Complainants by telephone on the following dates and detail as follows;

|                     |  |
|---------------------|--|
| <b>7 May 2014</b>   | <i>"with a Wrong Party"</i>  |
| <b>7 May 2014</b>   | <i>"[First Complainant] advised he had made agreement to pay 50.00 per month off arrears. I advised him that there is no agreement currently in place and that if he continues paying this amount that account will stay in arrears for over two years from now. I advised him we require SFS and outlined benefits of completing. [First Complainant] hung up the line while I was speaking."</i> |
| <b>4 June 2014</b>  | <i>"with a Wrong Party"</i>  |
| <b>10 June 2014</b> | <i>"with a Wrong Party"</i>  |
| <b>11 June 2014</b> | <i>"with a Wrong Party"</i>  |
| <b>12 June 2014</b> | <i>"with a Wrong Party"</i>  |
| <b>13 June 2014</b> | <i>"with a Wrong Party"</i>  |
| <b>16 June 2014</b> | <i>"with a Wrong Party"</i>  |
| <b>17 June 2014</b> | <i>"with a Wrong Party"</i>  |
| <b>18 June 2014</b> | <i>"with a Wrong Party"</i>  |

/Cont'd...

The Provider has outlined that an ECB rate reduction of 0.10% should have been applied to the Complainants' mortgage loan account in **June 2014** and was not. At that time the monthly repayment was €495.67 and the arrears stood at €1,661.86.

The Provider sent a further letter to the Complainants on **16 June 2014** in relation to the arrears on the mortgage loan account.

The Provider's internal records show that it contacted the Complainants by telephone on the following dates and detail as follows;

|                     |   |
|---------------------|---|
| <b>17 June 2014</b> | <i>"with a Wrong Party"</i>   |
| <b>18 June 2014</b> | <i>"with a Wrong Party"</i>   |
| <b>23 June 2014</b> | <i>"Reason given for arrears was Other. property was vacant but now not rented going to do sfs ... customer advised not in a position to make any lp off arrears, customer advised property now just recently rented for 1000 p/month, advised ok going forward but appointment in branch for Thursday 26/6 in [branch] re sfs"</i> |

The Provider sent a further letter to the Complainants on **23 June 2014** in relation to the arrears on the mortgage loan account and enclosing a **Standard Financial Statement** for completion.

The Provider's internal records detail that it contacted the Complainants by telephone on the following dates;

|                     |  |
|---------------------|--|
| <b>27 June 2014</b> | <i>"Advised of arrears, advised we need sfs booked in or a payment against the arrears, would not engage with either, tried to explain benefits of same, would not agree to sfs advised will continue to lodge 550 p/month, advised of consequences and advised of legal action, customer disconnected call during call"</i> |
| <b>28 June 2014</b> | <i>"Payment needed to stop account from rolling."</i>  |

The Provider issued a **Letter of Demand** to the Complainants on **2 July 2014** which outlined as follows;

***"Urgent Action Required: 10 Days Notice – LETTER OF DEMAND***

...

/Cont'd...

*The conditions of your mortgage provide that if you fail to make your mortgage repayment as required by those Conditions, payment of the Total Debt will become due.*

*You have defaulted in the making of two monthly repayments. Accordingly, the Total Debt outstanding has become immediately due and payable.*

*Under the Conditions of your mortgage, the Bank is entitled to possession of the Property when the Total Debt has become payable and accordingly the Bank demands that you deliver up vacant possession of the Property within 10 days of the date of this letter or alternatively and entirely without prejudice to the Bank's entitlement that you discharge the total amount outstanding on the mortgage name, €211,661.88\* by that date.*

...

*If you wish to discuss any of these matters with the Bank, you can contact us at: [the Provider's telephone number].*

...

***\*The total Debt outstanding quoted above is not a redemption figure and is subject to a daily accrual of interest and may not include other sums due under the mortgage"***

The Provider wrote to the Complainants again on **7 July 2014** and outlined as follows;

*"We refer to the above numbered Mortgage Account and to your recent communication with [the Provider].*

*In order for us to fully understand your financial situation and consider the most suitable option which may be available to you, an appointment with a Specialist in your local branch is required and completion of a Standard Financial Statement (SFS)."*

A **Standard Financial Statement** was completed and signed by the Complainants on **14 July 2014** and details as follows;

|                                  |                 |
|----------------------------------|-----------------|
| <i>"Total Net Monthly Income</i> | <i>3,710.00</i> |
| <i>Less Monthly Expenditure</i>  | <i>2,739.14</i> |

/Cont'd...



|  |                          |
|--|--------------------------|
| <i>Sub Total</i>                           | 970.86                   |
| <i>Less Mortgage Repayments Being Paid</i> | 550.00                   |
| <i>Less Other Monthly Debt Being Paid</i>  | 1,575.58                 |
| <i>Total (Surplus/Deficit)</i>             | <b>-1,154.72 DEFICIT</b> |

I note from the evidence that the Provider placed telephone calls to the Complainants on the following dates which were not answered;

|                       |   |
|-----------------------|---|
| <b>17 July 2014</b>   | <i>"to advise that we need accountants cert or tax balancing cert for [Second Complainant]"</i> |
| <b>16 August 2014</b> | <i>"no ans no v/mail"</i>   |
| <b>18 August 2014</b> | <i>"Advised could not take the call and asked for a call back later"</i>                        |
| <b>19 August 2014</b> | <i>"disconnected due to poor signal in area"</i>  |
| <b>21 August 2014</b> | <i>"call answered but noone spoke"</i>  |
| <b>23 August 2014</b> | <i>"no answers. Need confirmation of next Idgmt into a/c sfs submitted"</i>                     |

A further **SFS** was completed and signed by the Complainants on **25 August 2014** which outlined the same details regarding net monthly income and monthly expenditure as set out above. In response to the question *"Reason Review/Arrears"* the Complainants stated *"Redundancy/unemployment"*.

The Provider's internal record of a telephone call between the Provider and the First Complainant on **29 August 2014** details as follows;

*"[First Complainant] was not happy he is receiving the call. He has spoken to people several times and had repeatedly said that he can't pay. He said all we do is chase him for money. I advised the customer that this is collections and that the reason I was calling was to see if he could make a payment towards arrears or lodge Augusts bill amount. He said he has submitted his SFS and been to speak to someone in the branch. He said he was told the calls would stop. Not happy that his wife is receiving calls either. He had 6 missed calls yesterday and said its harassment. Explained that the ASU have his SFS and that process is ongoing. In the meantime his account is 106 days in arrears and we need a payment to stop a/c progressing further down collections route. Repeated that he could not pay and wants his wife's number taken off a/c. Advised I can't do that. No CTC as he said he won't be answering"*

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The Provider has outlined that an ECB rate reduction of 0.10% should have been applied to the Complainants' mortgage loan account in **September 2014** and was not. At that time the monthly repayment was €495.67 and the arrears stood at €1,608.20.

The Provider wrote to the Complainants by letter dated **15 September 2014** which stated as follows;

**“Current Interest rate:** 2.800%

**Date Into Arrears:** 15/08/2012

**Payments Missed:** 4

**Interest Rate applicable to arrears:**

*Current interest rate as outlined above*

...

*We refer you our above detailed account and specifically to the arrears balance quoted.*

*We understand that customers have genuine concerns with regard to meeting their mortgage obligations. If you are not in contact with us already, it is important that you contact us soon as possible to enable us to assess your financial situation.*

*At [the Provider], we appreciate that you may require some specific and expert help at this time, we have a team of people willing to meet you and discuss the options that may be available to you in an effort to put in place a repayment arrangement appropriate to your circumstances.*

...

*It is important that you seek independent financial advice. You may wish to contact the Money Advice & Budgeting Service (MABS). It is a national, free, confidential and independent service for people in debt or in financial difficulty. Contact 1890 283 438, 9am-8pm, or visit their website at [www.mabs.ie](http://www.mabs.ie).*

*Please phone us at the number below to arrange an appointment at either a convenient location or a convenient [Provider] branch. We would like to have the opportunity to meet with you.”*

/Cont'd...

I note that the Provider issued a further **Letter of Demand** to the Complainants on **20 September 2014** which outlined as follows;

*"You have defaulted in the making of two monthly repayments. Accordingly, the Total Debt outstanding has become immediately due and payable.*

*Under the Conditions of your mortgage, the Bank is entitled to possession of the Property when the Total Debt has become payable and accordingly the Bank demands that you deliver up vacant possession of the Property within 10 days of the date of this letter or alternatively and entirely without prejudice to the Bank's entitlement that you discharge the total amount outstanding on the mortgage name, €211,608.20\*, by that date.*

...

*If you wish to discuss any of these matters with the Bank, you can contact us at: [phone number].*

...

***\*The total Debt outstanding quoted above is not a redemption figure and is subject to a daily accrual of interest and may not include other sums due under the mortgage.\****

I note from the evidence that the Provider placed telephone calls to the Complainants on the following dates which were not answered;

|                          |   |
|--------------------------|---|
| <b>23 September 2014</b> | <i>"no answer no vm"</i>                                    |
| <b>29 September 2014</b> | <i>"no ans no vm"</i>                                       |
| <b>23 October 2014</b>   | <i>"Phone rang twice then h/u"</i>                          |
| <b>23 October 2014</b>   | <i>"Attempted to manually dial customer"</i>                |
| <b>24 October 2014</b>   | <i>"Rang out"</i>   |
| <b>24 October 2014</b>   | <i>"Rang out, no message left"</i>                          |
| <b>28 October 2014</b>   | <i>"no ans no vm"</i>                                       |
| <b>29 October 2014</b>   | <i>"no ans no vm"</i>                                       |
| <b>29 October 2014</b>   | <i>"call answered and could just hear background noise"</i> |

It is apparent from the evidence that the Provider contacted, or attempted to contact the Complainants by telephone on multiple occasions between **April 2012** and **October 2014**. However I note that the majority of the Provider's telephone calls were not answered by

/Cont'd...

the Complainants. On the occasions that the Complainants did answer the telephone calls it appears to me that the Complainants were not willing to engage in discussions with the Provider over the phone regarding the arrears on the mortgage loan account. In my view there is no evidence that the telephone calls from the Provider to the Complainants constituted “*harassment*” as the Complainants have submitted.

**Provision 8.6 and 8.8 of the Consumer Protection Code 2012 (“CPC 2012”)** state as follows;

- 8.6 *“Where an account remains in **arrears** 31 calendar days after the arrears first arose, a **regulated entity** must within three **business days** inform the **personal consumer** and any guarantor of the loan, on paper or on another **durable medium**, of the status of the account. This information must include the following:*
- a) the date the account fell into **arrears**;*
  - b) the number and total amount of repayments (including partial repayments) missed (this information is not required for credit card accounts);*
  - c) the amount of the **arrears** to date;*
  - d) the interest rate applicable to the **arrears**;*
  - e) details of any **charges** in relation to the **arrears** that may be applied;*
  - f) the importance of the **personal consumer** engaging with the regulated entity in order to address the **arrears**;*
  - g) relevant contact points;*
  - h) the consequences of continued non-payment, including where relevant, sharing of data relating to the **consumer’s arrears** with the Irish Credit Bureau or any other credit reference agency;*
  - i) if relevant, any impact of the non-payment on other accounts held by the **personal consumer** with that **regulated entity** including the potential for off-setting of accounts, where there is a possibility that this may occur under existing terms and conditions; and j) a statement that the **personal consumer** may wish to seek assistance from MABS and contact details for the MABS National Helpline and the link to the MABS website.*

...

- 8.8 *Where the **arrears** persist, an updated version of the information required in Provision 8.6 must be provided to the **personal consumer**, on paper or on another **durable medium**, every three months.”*

Under **Provision 8** of the **CPC 2012** the Provider is obliged to issue correspondence to customers in arrears.

The Provider issued a letter to the Complainants on **24 November 2014** stating that;

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“...due to an internal processing error, the interest rate applying to this account was not amended to reflect movements in the European Central Bank Refinancing Rate (the “ECB Rate”) since May 2013.

There have been a total of 4 ECB Rate reductions since this date as follows:

|       |                |       |
|-------|----------------|-------|
| (i)   | May 2013       | 0.25% |
| (ii)  | November 2013  | 0.25% |
| (iii) | June 2014      | 0.10% |
| (iv)  | September 2014 | 0.10% |

In order to fully correct this error and to provide full remediation, we have taken the following actions:

1) The interest rate on your mortgage account was amended on 13/11/2014 to reflect the combined ECB rate reductions as stated above. We will send you details of your revised monthly repayment under separate cover.

2) We have recalculated your account on the basis that you had received the ECB Rate reductions as the fell due and determined the difference in interest charged up to 13/11/2014 is €1,396.70 which represents the refund due to you. As your mortgage account is currently in arrears of €2,099.54, this refund has been applied to your mortgage account in reduction of these arrears.”

The Provider has furnished a table setting out the overcharge as follows;

| “                            | Actual (Asis) | Revised (ToBe) | Difference      |
|------------------------------|---------------|----------------|-----------------|
| Opening Balance @ 30/4/2013  | -211,612.38   | -211,612.38    | -               |
| Interest Applied             | -8,908.47     | -7,561.46      | 1,347.01        |
| Interest Accrued Not Applied | -195.04       | -145.35        | 49.69           |
| Interest Overcharge          |               |                | <b>1,396.70</b> |
| Closing Balance @ 13/11/2014 | -212,066.67   | -210,669.97    | <b>1,396.70</b> |

/Cont’d...

Difference

|   |
|---|
| - |
|---|

For noting:

Arrears (-) @ 13/11/2014

|           |         |           |
|-----------|---------|-----------|
| -1,603.87 | -239.30 | 1,364.57" |
|-----------|---------|-----------|

The interest overcharge on the Complainants' mortgage loan account totalled €1,396.70 during the period between **May 2013** and **November 2014**. Throughout the 18 month period, the Complainants did not know the true position with respect to the repayments that were actually due and owing on the mortgage loan. The evidence shows that throughout the 18 month period between **May 2013** and **November 2014** the overcharge averaged about €73.51 per month. These are significant sums on a monthly basis. I have no doubt that the Complainants suffered inconvenience as a result of the Provider's overcharging.

The Complainants take issue with the fact that the Provider refunded the overcharge of interest to the mortgage loan account in **November 2014** in reduction of the arrears on the account, without prior consultation with them. In circumstances where the Complainants were paying interest only repayments at the time, it appears to me that had the correct interest rate been charged then the Complainants would have been required to pay less in their monthly repayments.

In the Preliminary Decision issued to the parties on **8 September 2020** I outlined as follows:

*"It would appear that the appropriate course of action for the Provider to take would have been to refund the Complainants the overpaid interest and allow them the opportunity to reduce the arrears owing at the time with the overpaid interest sum of €1,396.70. However I also accept that there was a benefit to the Complainants of reducing the arrears on the mortgage loan account at the time by the overpaid interest sum of €1,396.70. This had the effect of reducing the arrears from €2,099.54 to €702.84."*

In the Provider's post Preliminary Decision submission dated **28 September 2020** it stated that;

*"The Bank would like to clarify that the reference to interest being overpaid is inaccurate in the Preliminary Decision in circumstances where there are arrears on the account. The Bank acknowledges that there has been an interest overcharge by the Bank in applying this amount of interest to the Complainants account but it has not been paid by the Complainants and has instead accrued as arrears on the account. In putting the Complainants back in the position they would have been in*

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*but for the Bank's error, the Bank reduced the Complainants arrears balance by the interest overcharge amount. To do otherwise would be to give the Complainants a refund of money that had never actually been paid by them."*

In the particular circumstances of this matter I accept the Provider's submission that the interest was overcharged, as distinct from being overpaid, in circumstances where the mortgage loan was in arrears. I accept that the Provider's action placed the Complainants in the position they would have been in had the overcharge not occurred.

I note that the Complainants' Irish Credit Bureau (ICB) record in respect of the Complainants' mortgage loan account was amended by the Provider in **November 2015**. The Provider has outlined that the required ICB amendment could not be completed until its review of a number of mortgage accounts had been completed by it, which took longer than anticipated. It detailed that the *"priority of the project was to ensure all accounts were remediated, and when complete, the additional work regarding any potential impact on the ICB was complete."* I accept that the Provider had structured the project to remediate accounts and then carry out the work on the ICB profiles of customers affected. However it is extremely disappointing that the Complainants' ICB profile was not updated until **30 November 2015**, some 12 months after the overcharge on the Complainants' mortgage loan had been identified.

This office treats as very serious any matter that impacts wrongly and in a negative way on the credit rating of customers. I find the delay of 12 months to rectify the Complainants' ICB profile to be most unreasonable on the part of the Provider.

The Complainants submit that they found it *"impossible"* to obtain credit to fund the Second Complainant's business as a result of the Provider's failure to correct their ICB rating until one year after the failure had been identified on their mortgage loan account in **November 2014**. The Complainants have not submitted any evidence which supports their submission that they were refused credit from other lenders, or indeed that their ICB record was the primary reason for any such refusal of credit.

The Complainants have submitted that the Provider sold their mortgage loan account to another regulated financial service provider in **February 2019** without any explanation to them as to why the mortgage was sold.

**Condition 1.15** of the **General Mortgage Loan Approval Conditions** outlines;

*"[The Provider] may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions."*

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It is important for the Complainants to understand that, regardless of whether or not their loan was categorised by the Provider as a Non-Performing Loan, it is clear from the Terms and Conditions that the Provider did not require the consent of the Complainants prior to the sale of the mortgage. I further note that there were no outstanding arrears on the Complainants' mortgage loan account at the date of transfer and the Provider has stated that they were meeting their obligations in relation to the mortgage loan account. It appears to me that the conduct complained of had no bearing on the sale of the loan, as the Complainants have suggested.

The Provider has outlined that in a letter to the Complainants dated **9 October 2018**, it erroneously informed the Complainants that their mortgage loan account was switched to a variable interest rate in **May 2011** on the expiry of the interest only repayment period and that the account had thereafter remained on a variable rate. The Provider "*in acknowledgement of these shortcomings*" offered the Complainants a gesture of €5,000, which remained open to the Complainants to accept. I understand that since this office issued its Preliminary Decision on **08 September 2020** the offer of €5,000 has now been accepted by the Complainants and credited to the Complainants' nominated account.

To conclude, a tracker interest rate of ECB + 2.05% has continued to be applied to the Complainants' mortgage loan account since **May 2011** in circumstances where the Complainants had agreed to give up their right to a tracker interest rate and agreed to the application of a variable interest rate from that point in time. This has been to the benefit of the Complainants. In my Preliminary Decision dated **08 September 2020**, I detailed as follows:

*"I accept that it would have been more appropriate for the Provider to repay the interest overcharge of €1,396.70 to the Complainants directly in **November 2014**. The Provider explained in its letter to the Complainants dated **24 November 2014** how the overcharge was calculated. However there was a benefit to the Complainants in reducing the arrears owing on the account at the time."*

Having regard to the submissions of the Provider I accept that the interest was overcharged, as distinct from being overpaid and the Provider's action placed the Complainants in the position they would have been in had the overcharge not occurred.

It is clear from the Terms and Conditions that the Provider did not require the consent of the Complainants prior to the sale of the mortgage.

As outlined above, it is disappointing that the Complainants' ICB profile was not updated until **30 November 2015** to reflect the overcharging on their mortgage loan account. The Provider has detailed that the offer of €5,000 is solely to compensate the Complainants for

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its error in its letter of **9 October 2018** and that *“there is no further issue in respect of which the offer was made.”*

In these circumstances and for the reasons set out above, I partially uphold the complaint. To mark the Provider’s shortcoming for failing to update the Complainants’ ICB record in a timely manner, I direct the Provider to pay the Complainants a sum of €2,000 compensation, if this additional compensation has not already been paid by the Provider.

### **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)(b)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider pay the Complainants the sum of €2,000 in compensation, to an account of the Complainants’ choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**



**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

18 November 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.

