



<u>Decision Ref:</u>	2021-0175
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Application of interest rate Delayed or inadequate communication Failure to provide product/service information
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint arises out of a commercial mortgage and the suggested overcharging by the Bank at the end of a fixed rate period

The Complainant's Case

The Complainant states that in **October 2007**, to purchase property, he took out a 15 year mortgage with a fixed interest rate for the first 5 years. The letter of loan offer refers to a rate of cost of funds plus 2%, which on the date of the loan offer letter of **28 September 2007**, stood at 6.73% (being 4.73% cost of funds plus 2% margin).

When the loan was drawn down in **October 2007**, this cost of funds rate had changed to 4.64%, as a result of which, taking account of the 2% margin, this gave rise to a drawdown rate of 6.64%, fixed for 5 years.

The Complainant states that after this 5 year period in **2012**, he received no options notification letter. He says that the loan should have reverted to a variable rate of approximately 2 – 2.3%. The Complainant states however, that the Provider without his consent, rolled over the loan to a fixed rate of 4.7% (being cost of funds of 2.7% plus margin of 2%) which remained in place for a further 5 years to October 2017.

The Complainant states that he discovered this when reviewing the account statements in 2018, and he had an appointment at a branch of the Provider in **August/September 2018** where he raised his concerns about this error. The Complainant says that the Provider showed him that the mortgage account was still fixed at this stage, notwithstanding the fact that interest had been reverted to 2.3% since **January 2018**.

The Complainant states that the terms of his offer letter were not met by the Provider and that he received no notification of interest options after the first 5 year fixed term. The Complainant states that he never missed a payment on the mortgage but that if the interest rate had been reverted back to the variable rate after the end of the first fixed term, it would have been a huge help to him.

The Complainant states that he had to wait until **May 2019** for the Provider to meaningfully engage with him and at that point, he met a representative of the Provider who asserted that he had previously met with the Complainant in **October 2012** to discuss the fixed rate being rolled over and to discuss other options. The Complainant refutes this entirely and states that no such meeting took place in 2012 and that the Provider appears to have no paperwork to support this. The Complainant also asserts that he was informed at this meeting in May 2019 that he was due a sum of €12,000 in interest difference for the 5 year period between October 2012 and October 2017 and he was offered a settlement figure of €6,000 which the Complainant refused.

The Complainant states that the Provider later contacted him to inform him that €12,469 had been written off his loan account. The Complainant states that he had been willing to settle for a sum of €20,000 to reflect the difference between 4.7% fixed interest rate and 2 – 2.3% variable rate between the period October 2012 to October 2017. The Complainant wishes to receive another €8,000 to 10,000 on top of the €12,469 credit that he has already received from the Provider.

The Provider's Case

The Provider in its final response letter of 4 June 2019, asserts that the Complainant met with an adviser of the Provider on **20 August 2012**, prior to the end of the first fixed rate period so that a Business Needs Review could be conducted. The Provider asserts that during this meeting a number of products were discussed including the upcoming fixed rate term expiry. The Provider says that its notes on file, confirm that the Complainant indicated that he would consider fixed rate options when the fixed rate expired on **23 October 2012**. The Provider says that the Complainant's standing order in the amount of €2,350 continued to credit his account until 23 October 2012.

The Provider states that it does not hold a copy of the instruction by the Complainant to the Provider in October 2012, to move the loan account to the 5 year fixed rate of 4.7%, but it is satisfied that the conduct of the Complainant is evidence of his acceptance of the rate in question. In this respect, the Provider relies upon the Complainant's amendment of a standing order on an account he held with a third party Bank (which facilitated payments to the Provider for this borrowing).

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The Provider also says that following the rollover of the account to another fixed rate of 4.7%, a confirmation of rollover letter issued to the Complainant. The Provider asserts that the Complainant then amended his standing order to reflect a reduced payment of €1,893 per month and that this amount reflected the reduction in the fixed interest rate from 6.64% to 4.7%. The Provider asserts that the standing order arrangement was with a third party Bank and that no change to the payment coming from that account with the other Bank, could have happened without the Complainant's knowledge or consent.

The Provider goes on to state that it performed a calculation on the loan comparing what interest actually accrued, against what interest would have accrued if the account had rolled onto a variable rate (which in practice is calculated as the Provider's cost of funds for a 3 month period) which would have been 2.7% plus 2% margin to begin, but would have varied over the period. Having done so, the Provider says that it arrived at an interest differential of €12,469.24.

The Provider states that the Complainant met with one of its representatives on **22 May 2019** at his premises where as a conciliatory gesture by the Provider, he was offered a refund of half of the interest differential but this was declined by the Complainant. The Provider states that it cannot accede to the Complainant's request for a payment of €20,000 but it arranged a refund of the full interest differential in the amount of €12,469.24 to his loan account, which was credited on **29 May 2019**. In addition, the Provider explains that the debit interest that has accrued but not yet charged, has been reduced by €7.59.

In addition to the foregoing, on **23 March 2020** the Provider wrote to the Complainant offering a further gesture of €500 in an effort to resolve the dispute and this offer remains open to be accepted by the Complainant.

The Complaint for Adjudication

The complaint is that in October 2012, the Provider failed to exercise reasonable care and skill in its dealings with the Complainant, when it applied an incorrect interest rate to his borrowing, at the time of the fixed rate period roll over, as a result of which he was overcharged on a continuing basis until 2017.

The Complainant believes that he has been overcharged by approximately €20,000 and therefore he wishes to receive another €8,000 to €10,000 on top of the €12,469 that he has already received from the Provider.

Decision

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

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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 **11 May 2021**, 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.

I have been supplied with a copy of the offer letter dated 28 September 2007 which was signed by the Complainant on **3 October 2007**, by way of acceptance.

Amongst others, the offer letter sets out the interest rate as follows:

Interest Rate

The rate(s) set out in this offer letter are indicative only in respect of the new facilities details and are subject to change between the date of this offer letter and the actual drawdown of the facility. The actual rate will be determined on drawdown and subsequent rollover dates (if applicable) and as set out in clause 5 of the standard Terms and Conditions set out in the appendix hereto.

5 year Cost Of Funds plus 2% which today equates to 6.73%

Clause 5 of the terms and conditions provides as follows:

- *Fixed*

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

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

[My emphasis]

The Complainant has stated in a submission dated **10 June 2019** that at the end of the first 5 year fixed term, he got no option letters or notification from the Provider about the term rolling over or any interest charges or options available to him. He states that the Provider subsequently fixed the rate again for a period of 5 years, with an interest rate of 4.7% (2.7% plus 2% margin).

According to the Complainant, he only realised this, when he saw that his interest payments had halved from **October 2017**. I note that, at that point, the second 5 year fixed rate period had ended and the Provider's cost of funds had reduced to 0.36%.

The Provider on the other hand states that it met with the Complainant prior to the expiry of the first 5 year fixed term and discussed options with him and it states that it is satisfied that the Complainant requested to move to the new fixed rate period in October 2012. In addition, the Provider states that it notified the Complainant in writing on 24 October 2012 to advise him of the change in his interest-rate.

There is considerable disagreement between the Complainant and the Provider as to what precisely occurred almost 9 years ago, in relation to the end of the first 5 year fixed term and what followed thereafter. I am satisfied however that the documentary evidence before me is of assistance in addressing this.

The Provider asserts that there was a meeting held between a representative of the Provider and the Complainant in August 2012 and it states that a business needs review was completed off site, on 22 August 2012, the notes of which were inputted to the Provider's system on 30 August 2012. The Provider states that the Complainant was unsure at that time as to the choice he would make, but ultimately he elected for a further 5 year fixed rate at 4.7% and the Provider applied this on 24 October 2012.

The Complainant refutes this and the Provider does not hold a copy of the instruction from the Complainant to the Provider. The Provider however relies on a number of evidential factors which it states, demonstrates that its understanding is correct.

The Provider has provided a statement dated **26 June 2019** from its representative who says he met with the Complainant on 22 August 2012. This statement states, amongst other things:

"In summary, I booked this appointment and wrote into my diary August 2012 (see attached). I use a tick when meetings take place and also input location.... I recall this meeting for a number of reasons.

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Location of premises was difficult to find and I was slightly late for meeting. Secondly, client mentioned to me injuries he received as a result of an assault in [location].....I completed a BNR and information regarding assets, wife's name and children's ages were not known to me beforehand or were on file. I subsequently input this info on file a few days following meeting. We also discussed how injuries could financially impact him. Finally we discussed briefly interest-rate which was due for rollover October 2012 and that savings could be used to start a pension (pension campaign commenced around late August or September annually.

I am disappointed, insulted and shocked that client would suggest meeting did not take place. Having dealt with approx.. 1000 clients over 29.5 year period this is certainly a first."

An extract from the above person's diary was included and there is an entry for Wednesday, 22 August at 2 PM which states "[Complainant] ([location])". There is a tick inserted on this entry.

In addition, a copy of a business needs review notes dated 30 August 2012 have been supplied. This record identifies the Complainant by name and refers to the account number. It notes, amongst other things "will consider fixed rate options when existing fixed term expires 23 October 2012".

Furthermore, the Provider has furnished a copy letter dated **24 October 2012** addressed to the Complainant. It states, amongst other things, as follows:

The interest rate on the under mentioned loan account has fallen due for rollover and the details below apply to the account as from rollover date: 24 October 2012

*Account type: loan account
account number: 8018****
current balance: €181,039.07*

*Interest rate applicable: 4.700%
cost of funds: 2.7000%
cost of liquidity: 0.000 %
margin: 2.000%*

Next interest rollover date: 23 October 2017

The terms and conditions of our existing offer letter with you will continue to apply to any rollover of an interest period or the provision of a further fixed rate period. If you need further details on rollovers and fixed rate periods please refer to the terms of your offer letter or contact your relationship manager.

In addition, the Provider says that the Complainant initially had a standing order in place in the sum of €2,350 in favour of the Provider from an account held by a third party Bank in order to meet his repayments under the initial 5 year fixed interest-rate.

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The Provider notes that the standing order in this amount continued to credit into the business loan account, until 23 October 2012, that being the day before the application of the new fixed rate.

The Provider then says that on **11 December 2012**, a sum of €1,893 was lodged into the Complainant's business loan account and that this sum represented the capital and interest payments due on the business loan when the interest rate was 4.7% (being the new fixed rate). The Provider goes on to state that the Complainant's standing order from the third party Bank changed on **21 December 2012**, in order to reflect the reduced amount of the standing order to the sum of €1,893. The Provider goes on to explain that the standing order with the third party Bank could only have been amended on the instruction of the Complainant to his third party Bank.

A copy of the loan account statements with the Provider have been supplied and I accept that they demonstrate these figures. I also accept that the contemporaneous documentary evidence demonstrates that a meeting took place between the Provider and the Complainant in August 2012, before the expiry of the first fixed rate period in October that year, and that a business needs review was carried out by the Provider. I am satisfied that no decision was made by the Complainant at that time, but the note refers to the Complainant having discussed and considered a new fixed term, and he indicated that he would decide in October 2012.

Whilst it is disappointing that the actual instruction from the Complainant to the Provider is not available, I note that the Provider wrote to the Complainant on **24 October 2012** to inform him of the new fixed rate arrangement under Clause 5 of the Loan Agreement. Although the fact that the Complainant amended his standing order to reflect the reduced payments at an interest rate of 4.7%, is persuasive in this regard, I am satisfied that this evidence merely indicates that the Complainant understood that his payments would reduce at the time of rollover, but it does not clarify whether the Complainant formed that understanding on the basis of a new fixed rate, or whether he understood the reduction to have occurred because of a variable interest rate put in place, even though he was notified of the new fixed rate period by letter of 24 October 2012.

The audio recordings of the various telephone calls between the Complainant and the Provider do not materially influence the issues raised by this complaint. Many of the calls from October 2018 onwards, pertain to the complaint made by the Complainant to the Provider. Another call relates to a complaint of fees charged to an account and another, deals with a request by the Complainant to open up a business account for a limited company.

On **11 July 2018**, the Complainant telephoned the Provider to state that his accountant had informed him that his loan should only have been charged 2.3% since **2012**. The complaint appears to have been made in September 2018 and the Provider wrote to the Complainant on 11 October 2018 acknowledging the complaint and stating that it was being investigated.

A further seven letters were sent between 9 November 2018 and 7 May 2019 and ultimately, the final response letter was issued on 4 June 2019.

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It appears that the Complainant does not recall having agreed a fixed interest rate of 4.7% at the time of the roll over in October 2012. I am satisfied from the evidence before me that whatever discussions ensued between the parties in the months before the pending roll over in October 2012, ultimately, the Provider notified the Complainant of the precise terms of the roll over it had applied, and the Complainant took action to reduce the repayment amount to be made by standing order. I take the view that if the Complainant had had a difficulty with this rate at the relevant time, he would have communicated his disagreement directly to the Provider in late 2012 or certainly by early 2013. I also take the view that if the Complainant had believed in October 2012, that he had agreed a variable rate, he would have expected to see a variation in the repayments falling due over the following months and years, and he would have taken action when no such variation happened.

It is important for the Complainant to understand that the terms and conditions of his loan agreement made clear that it was a matter entirely of the Provider's discretion as to whether a fixed or variable interest rate would be made available to the Complainant, at the time of the roll over. Consequently, even if the Complainant had in clear terms, sought a variable rate from the Provider at the relevant time in October 2012, there was no requirement for the Provider to agree to that request.

I note however, that in order to address the Complainant's concerns surrounding the application of interest, the Provider performed a calculation on the loan, in order to compare (i) the amount of interest which had been applied to the account from when the interest rate rolled over in October 2012, with (ii) the interest which would have accrued if, as the Complainant now suggests, the loan had rolled over onto a variable interest rate to which the 2% margin would have applied.

I am conscious in this regard that because of the practice of the Provider (to calculate a variable rate as cost of funds for a 3 month period) the variable rate in October 2012 would have been calculated at 2.7% plus margin of 2%, making a total rate of 4.7%, which would have been the very same as the new fixed rate, at this point in time in October 2012. Although the rate remained the same over the second 5 year fixed rate period, it would of course have varied over that 5 year period, if the variable rate arrangement had been put in place. I am also conscious that, at this remove, it is clear that the variations would have given rise to an overall benefit to the Complainant in the amount of more than €12,000, but of course in October 2012, the parties will have been unaware as to which option would ultimately be more expensive into the future.

Although there is no evidence available of any communication by the Complainant to the Provider from October 2012 indicative of his intention to select a variable rate, nevertheless, having performed this interest differential calculation, the Provider arrived at a figure of €12,469.24. I note that the Provider offered the Complainant 50% of the figure in question which the Complainant declined. Ultimately, the Provider arranged for a refund of the entirety of the interest differential which was applied to the Complainant's loan account on 29 May 2019, as a gesture of conciliation, and this was confirmed to the Complainant in the body of a final response letter sent by the Provider dated 4 June 2019.

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I note that, by virtue of the refund made by the Provider to the account in 2019, the Complainant has had the same benefit as if he had agreed with the Provider in October 2012, to move the interest rate to a variable one. I am conscious therefore that even if there was some misunderstanding between the parties in October 2012, the Complainant has ultimately recouped the differential at issue. Whilst I note that he believes that he should recover more by way of compensation, because of the financial difficulties which the loan repayments placed on him over the relevant period, I accept that the Provider's actions in 2012, have not been shown by the evidence to have been wrongful, and indeed, more recently, the Provider has sought to apply a refund to the Complainant's account which essentially gives him the benefit which he would have secured, had an agreement been reached in October 2012 to apply a variable rate.

Accordingly, in the absence of evidence of wrongdoing by the Provider in the circumstances which have been outlined, I do not consider it appropriate to uphold this complaint. Whatever confusion arose in October 2012, in respect of which the Provider and the Complainant now have different opinions, nevertheless, in light of the significant gesture made by the Provider to the Complainant at the end of May 2019, to address the concerns which he had indicated, I am satisfied that the Complainant's complaint of overcharging by the Provider, has been adequately met.

I further note that the Provider has made an additional gesture to the Complainant in the form of offering an additional compensatory payment of €500, in order to resolve his complaint. As I understand this offer to remain open to the Complainant for acceptance, it will be a matter for the Complainant to make direct contact with the Provider if he wishes to accept that additional payment.

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**

2 June 2021

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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.

