



<b><u>Decision Ref:</u></b>	2021-0218
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to implement payment terms Dissatisfaction with customer service
<b><u>Outcome:</u></b>	Upheld

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

The complaint concerns a mortgage loan account held with the Provider.

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

The Complainants submit that they wrote the Provider on **24 March 2009** to request that their mortgage loan repayments be switched from principal and interest to interest only, to allow for the provision of funds for unexpected house repairs. The Complainant submits that the Provider subsequently confirmed approval of interest only repayments, for a period of 24 months.

The Complainants assert that they made contact with the Provider in **2017** to make enquiries in relation to making lump-sum payments to the mortgage loan account. They say that at this stage it was identified that the interest only repayment schedule had remained in place from 2009, instead of the intended 24 month only period.

The Complainants submit that they signed an agreement on 14 March 2009 amending repayments from principal and interest to interest only and this agreement clearly stated that the repayment schedule was for a period of two years. The Complainants submit that as a result of the mortgage remaining on interest only repayment terms, they are at a financial loss due to extra interest being paid, because the principal was not being reduced for a number of years between 2011 and 2014.

The Complainants argue that the mortgage was taken out in **2005** for repayment of principal and interest. They point to the terms and conditions of the Provider from **2012** which indicate that any changes to a repayment schedule will be by way of written notice. They argue that the deferral agreement signed in March 2009 indicates that the interest only repayment period was for two years. The Complainants argue that while this agreement states that the Provider had the right to revert to repayments on the account of principal and interest, this is not the same thing as the Provider having the right to keep them on interest only, for as long as it wished.

The Complainants argue that they acted as consumers at all times and never requested an extension of the two-year period of interest only payments. They argue that they were not given any notice by the Provider that it had unilaterally decided to extend the deferral of repayment of the capital sum, and they were not warned that its decision to extend the period would increase the cost of credit. The Complainants argue that they would not have agreed to a further deferral of the repayment of capital and they presumed that the repayments would automatically revert to capital and interest on the expiration of two-year period. They argue that they did not appreciate when viewing any statements sent, that the balance was not reducing year-to-year or that they had not been repaying capital.

The Complainants want the Provider to recalculate the remaining sum of their mortgage account, correctly and fairly.

The Complainants have rejected an offer from the Provider of a principal waiver of €15,356.15 (to represent a refund of the capital and interest repayments the Complainants would have paid from May 2011 to January 2012 if the account been switched back to capital and interest repayments in May 2011, including interest accrued and time value for money) and compensation in the sum of €1,000. The Complainants argue that they were on interest only repayment for 63 months instead of the 24 months agreed and are seeking a full refund of 39 months of interest.

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

The Provider states the Complainants' original loan agreement consists of a letter of approval dated **22 June 2005**, its general mortgage loan approval conditions, its mortgage conditions, and the acceptance of loan offer dated 5 July 2005. The Provider indicates that the loan amount was €550,000 repayable over a term of 25 years at a variable interest rate.

The Provider draws attention to its general terms and conditions which oblige customers to promptly pay sums due under the mortgage. It also points to clause 2.2 of its mortgage conditions which indicate that the mortgage is intended to provide for repayment of capital and interest primarily by combined payments. It points to clauses 2.6 and 2.7 which allow the Provider to extend the term of the loan or suspend, increase or decrease repayment obligations, or to vary repayment amounts from time to time, by way of written notice. The Provider argues that it is entitled to vary the repayment schedule on the mortgage account at its discretion and that the Complainants accepted all terms of the mortgage in their acceptance dated **5 July 2005**.

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The Provider highlights and sets out the terms of an agreement to change repayments from principal and interest to interest only, dated **14 March 2009**. The Provider argues that the agreement outlines the Provider's entitlement to switch the Complainants' monthly mortgage repayments to interest only, for an initial period of two years, with the Provider reserving the right to revert to principal and interest repayments, or allowing the account to remain on interest only repayments following a review at any time during the term of the loan, to include any time before or after the initial two years. The Provider argues that the terms of the agreement entitled it to revert the Complainants' mortgage repayment to principal and interest at any time, at its discretion.

The Provider highlights correspondence from the Complainants dated **24 March 2009** requesting that the mortgage repayments switch to interest only repayments. The Provider argues that the Complainants advised that their circumstances had changed but did not request a specific interest only term. The Provider highlights that the agreement dated **24 March 2009** reserved the right of the Provider to allow the account to remain on interest only for a period longer than two years, at its discretion.

The Provider argues that the term of this agreement was clear and it rejects the Complainants' assertion that they received an agreement for a set period of 24 months. The Provider argues that the agreement states that an interest only period would remain in place for an initial two years (subject to review at any time) and for any period thereafter, following a review of the Complainants' account and at the Provider's discretion. The Provider states that the Complainants signed and accepted the agreement on 14 March 2009, indicating that they had received or been given the opportunity to obtain independent legal advice before signing the agreement.

The Provider argues that in accordance with the agreement of 24 March 2009, it switched the Complainants' mortgage account to interest only payments from **1 May 2009**, at which point the Complainants' monthly repayment amount reduced from **€2,730.79** per month to **€1,039.20** per month. The Provider argues that the account remained on interest only for the initial two years as outlined in the agreement. It further argues that, at its discretion and in accordance with the terms of the agreement, the account remained on interest only until the Provider reviewed the account in **May 2014**. The Provider argues that following a review, it issued correspondence to the Complainants on 3 June 2014 advising that the interest only period was due to expire on 1 August 2014. The Provider argues that this correspondence included options for completion, including conversion to repayments of principal and interest in the amount of €3,627.57 per month or remaining on interest only in the amount of €1,747.47 per month until the next review date. The Provider argues that its letter outlined that if no option was chosen, the loan would default to principal and interest repayments from 1 August 2014. The Provider argues that as it did not receive a signed and completed options form from the Complainants, it switched the account to principal and interest repayments on **1 August 2014**.

The Provider concludes that it is satisfied that the agreement did not provide for a two year interest only term. The Provider states its opinion that the agreement clearly stated that the interest only term was to be applied for an initial period of two years, and for a longer period if the Provider so decided.

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The Provider accepts that it did not contact the Complainants in **May 2011** following the initial two year interest only period. The Provider argues that the interest only period was applied to the account in accordance with the agreement, on the basis that would remain in place until such time as the Provider would review the account, at a time of its choosing. It argues the while the interest only period was to be applied for a period of two years initially, the Provider was clear and its agreement outlines that it reserved the right to review the account at any time, either during the initial two years or at any period thereafter. As a result, it submits that there was no obligation on the Provider to contact the Complainants in **May 2011** as the agreement in place remained in force.

The Provider argues that the Complainants contacted it on **28 November 2011** to enquire about making a lump sum payment to the mortgage account, and requested details of the revised repayment amount. At the time, the Provider indicates that the Complainants' interest only repayment amount was €2,174.62 per month. The Provider states that it issued correspondence to the Complainants on **28 November 2011** indicating the revised monthly repayment depending on the level of the capital reduction amount. The Provider argues that the Complainants did not proceed to make a lump sum payment and the interest only repayment amount remained unchanged.

The Provider argues that the Complainants were in receipt of mortgage account statements every January between 2009 and 2014, detailing the interest only repayment amount billed on the account during that time, and noting the principal account balance which remained unchanged during the 5 year interest only period. The Provider notes its opinion that it was not reasonable for the Complainants to assume that the account would revert to principal and interest repayments in May 2011 as the mortgage repayment amount did not significantly change at that time. The Provider gives the example that the interest only amount on the Complainants' mortgage account in **July 2014** was **€1,685.83** per month. It states that when the account was switched to principal and interest in **August 2014**, the repayment amount increased to **€3,552.36** per month.

Notwithstanding its argument that it was never obliged to return the Complainants' loan account to capital and interest repayments on the expiry of the two-year term, the Provider indicates that it can appreciate that the Complainants did not intend to avail of an interest only arrangement for a period of five years. The Provider notes that the Complainants were of the opinion that the repayments switched automatically to principal and interest in May 2011, even though the monthly repayment amount did not change. The Provider also notes the Complainants would have received a mortgage account statement in January 2012, nine months later. Based on those assumptions, the Provider states that it is of the opinion that it would have been reasonable the Complainants to review the mortgage account statement in January 2012 and query the matter at that time.

The Provider has made an offer of a principal waiver (together with interest accrued and including added time value for money) to represent a refund of the capital and interest repayments the Complainants would have paid from May 2011 to January 2012 if the account had been switched back to capital and interest repayments in May 2011.

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The offer is calculated as follows:

Capital amount calculated	€11,580.41
Interest amount:	€228.21
Time value for money:	<u>€3,547.53</u>
Total waiver amount offered	<b><u>€15,356.15</u></b>

The offer of the principal waiver was made to the Complainants on **15 August 2019**. By letter dated 29 January 2020, this offer was repeated and in addition to the offer of a principal waiver of €15,356.15, the Provider offers compensation in the sum of €1,000 to the Complainants. The Provider states that the offer remains open to the Complainants if they wish to accept it at a later date.

### **The Complaint for Adjudication**

The complaint is that the Provider:

- mismanaged the Complainants' mortgage account by retaining an interest only repayment agreement for a longer period of time than was understood to be agreed by the Complainants; and
- caused financial loss to the Complainants due to the extra interest being paid and the principal not being reduced.

### **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.

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A Preliminary Decision was issued to the parties on **2 June 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.

By letter dated **24 March 2009**, the Complainants wrote to the Provider indicating that they would like to switch their mortgage to interest only repayments. The stated reason for the request was due to *“unexpected expenditure in the house for repairs”*. The Complainants stated that there was a cut in the first Complainant’s bonus paid in 2008 and 2009 but that his salary would remain at €9,000 gross per month. The letter indicated that if they were on interest only, they would make any additional instalments that they were in position to. There was no particular period requested in respect of the interest only repayments.

I have been supplied with a copy agreement to change repayments on the loan, from principal and interest to interest only dated **14 March 2009** made between the Provider and the Complainants. The agreement noted that the loan was repayable by way of payment of principal and interest, and that the mortgagor (i.e. the Complainants) had requested the Provider to alter the method of repayment so that the loan would be repayable by interest only which the Provider *“has agreed to do in the manner and subject to the conditions herein set forth”*. The agreement provided as follows:

*“1. The provisions of the Mortgage will be varied so that the monthly repayments will consist of interest only (as may be varied from time to time and including insurance premiums where applicable) for the first 2 years from the start of the first Interest Only payments or for such other period to period as [the Provider] may decide.*

*2. [The Provider] reserves the right to review the deferral of the payment of principal at any time during the term of the loan including the first 2 years from the date of the first repayment of Interest Only and may require the Mortgagor(s) to cease Interest Only repayments and require repayment of principal and interest and the Mortgagor(s) will immediately arrange to repay the revised monthly repayment comprising the repayment of principal and interest calculated over the remaining term so that principal and interest will be discharged within the existing term of the loan. In such circumstances, the principal and interest will be repaid under a payment schedule based on the amount of the loan outstanding at the date of the 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(s), a payment equal to the principal (together with any other repayment due under the Mortgage) must be repaid at the expiry date of the term or at the redemption date if earlier.*

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3. *[The Provider] hereby agrees the deferral of the repayment of principal (also referred to as "capital") in the manner above-described and subject to the above conditions.*

4. *The Mortgagor confirms that the Mortgagor has received independent legal advice or acknowledges that the Mortgagor has been given an opportunity to obtain independent legal advice prior to the signing of this Agreement.*

5. *In all other respect the provisions of the Mortgage remained unchanged."*

The agreement was signed by both Complainants and on behalf of the Provider. A warning was set out in bold letters at the bottom of the agreement as follows:

**Warning: Your current capital balance will still be outstanding at the end of the interest only period.**

To my mind, the agreement contained the following key agreements:

- monthly repayments on the loan would henceforth consist of interest only for a period of 2 years or for such other period to period as the Provider may decide;
- The Provider reserved the right to review and cease the interest only repayments at any time, including during the first two years; and
- If no review was made during the term of the loan or if a review or reviews were made which resulted in the continuation of the deferral of payment of principal for a further period(s), a payment equal to the principal must be repaid at the expiry date of the term or at the redemption date if earlier.

The anticipated two-year period of interest only repayments would have come to an end in **May 2011**. There was no review of the interest only repayments during the two-year period. Neither would it appear that the Provider reviewed the interest only repayments on the expiry of the two-year period. As the interest only repayments were not reviewed in May 2011, there was no notification to the Complainants that the Provider wished to continue interest only arrangement or that it desired their repayments to revert to capital and interest repayments.

I accept the argument of the Provider that on a strict interpretation of the agreement of 14 March 2009, the Provider was under no obligation to cease the interest only repayment structure or to review the repayment structure at the expiry of the 2 year period. As a result, I am not of the view that there was any contractual breach involved by the Provider's failure to review the interest only repayment structure though I believe that it ought to have notified the Complainants that their interest only repayments would continue at the expiry of the two-year period, if this was what the Provider had decided, on review.

The agreement is couched in language that reserved all rights to the Provider as regards the cessation or extension of the interest only repayment period, but the Complainants were acting at all times as consumers, and in my opinion, the Provider had a duty to them, to inform them as to pertinent developments.

Despite the reservation of rights contained in the agreement to the benefit of the Provider, I am satisfied that many or most consumers in the position of the Complainants would have understood from the Provider's correspondence and the terms of the agreement that the interest only period was for two years only. I am therefore sympathetic to the Complainants' arguments that they had assumed that their mortgage repayments would revert to capital and interest repayments on the expiry of the 2 year interest only period.

I am of the view that the Provider's failure to review the repayment structure in May 2011 and/or to notify the Complainants of the extension of the interest only period beyond the initial 2-year period was unfair, and indeed it was unreasonable and unjust, within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

Furthermore, it was not in the best interests of the Complainants that they remain indefinitely on an interest only repayment schedule when, it would appear, they had affordability to make full interest and capital repayments on the mortgage borrowing. It is noteworthy that when the Complainants requested a period of interest only repayments in respect of the mortgage, they indicated the reason for the request was due to unexpected house repairs which implied a short-term need only for interest only repayments. Chapter 1 of the **Consumer Protection Code 2006** provides that the Provider must ensure in its dealing with customers that it:

- “1. acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;
2. acts with due skill, care and diligence in the best interests of its customers...
6. makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer”.

I am not satisfied that any of these obligations were met in the present situation. On that basis, I am of the view that the Provider breached Chapter 1, Provisions 1, 2 and 6 of the Consumer Protection Code 2006 in failing to review the interest-only repayment structure in May 2011 and/or in failing to notify the Complainants that it intended to extend the interest-only period beyond the initial two years.

I note that the first Complainant appears to have contacted the Provider on **13 February 2014** to inquire as to why the balance on his mortgage account was not reducing. The available note suggests that the first Complainant did not agree, when told that his account was on interest-only repayments, which supports the argument that the Complainants had assumed that the interest-only period had expired by that point, even if they had had the means to discover this before February 2014.

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It was only after the issue had been raised by the first Complainant that the Provider then conducted a review of the repayment schedule and by letter dated **3 June 2014** it requested that the Complainants indicate whether they wished to remain on interest-only repayments or revert to principal and interest repayments. As no option was selected by the Complainants by **1 August 2014**, the account reverted to principal and interest repayments that month.

A complaint was raised by the Complainants by phone on **27 September 2017**. In its final response letter dated 6 October 2017, no wrongdoing was accepted by the Provider and no offer of compensation was made. After a complaint was made to this Office, the offer outlined above, of a principal waiver to reflect principal and interest repayments between May 2011 and January 2012, was made. This was improved in January 2020 to the previously offered principal reduction, plus €1,000 in compensation.

It is apparent to me that the Complainants had no option but to make a complaint to this Office at the time they did, owing to the position initially adopted by the Provider. I consider it appropriate to uphold the present complaint on the basis that the conduct complained of was unreasonable and unjust with regard to the Complainants. For that reason, I consider that a compensatory measure or a reduction in the loan balance owing by the Complainants on the mortgage account, is appropriate.

On one hand, I am satisfied that the Provider's conduct fell short in respect of its management of the Complainants' mortgage account. I accept that the unrequested extension of the term of interest only repayments has resulted in the Complainants being left with a higher mortgage balance and higher interest costs, than would have been the case if their repayments had automatically switched back to interest and capital repayments from May 2011 onwards. On the other hand, I am conscious that the Complainants did not make any repayments towards the capital owing on their mortgage loan between May 2011 and August 2014. As they were paying interest only, they had the benefit of access to their improved cash flow, during those intervening years. They did not make any additional payment against the mortgage balance during this time.

Furthermore, and as pointed out by the Provider, the Complainants do not appear to have paid heed when their monthly mortgage repayment did not increase from May 2011. A small discrepancy in monthly repayments by customers is not necessarily noticeable, but it is noteworthy that the Complainants' monthly repayments were approximately €2,700 – €3,000 per month when they were paying principal and interest up to March 2011, whereas their interest-only repayments reduced to approximately €1,500 per month thereafter.

Due to the fluctuation of interest rates, by **10 June 2011**, the interest only repayments on the mortgage account were more than €2,000 for some seven months, and then reduced during 2012 and 2013 to approximately €1,600 per month. Owing to the fluctuating interest rates, I accept that it would be unfair to the Complainants to suggest that it should have been obvious to them at all times, that the monthly repayment was too low, if indeed they had believed themselves to have been making capital and interest repayments.

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I am of the view however, that the Complainants should have realised at some point between 2011 and 2014, and especially when the monthly repayments reduced to approximately €1,600 per month from **September 2012** onwards, that the level of monthly repayments fell considerably short of the pre-March 2009 “capital and interest” level. In addition, I accept the Provider’s argument that the mortgage statements sent to the Complainants in January 2012, January 2013, and January 2014 alerted or ought to have alerted the Complainants to the fact that the capital balance on the loan was not reducing and that their monthly repayments were only meeting the interest chargeable on the loan.

In light of the above considerations and taking all of the circumstances into account, I am of the view that it is appropriate to direct a principal reduction on the Complainants’ account to reflect the unrequested and un-notified extension of the interest only period. I consider that an appropriate reduction will be for a sum of €500 per month, for each month between May 2011 and August 2014, to be applied by the Provider retrospectively to each month’s repayment against the account balance for each of those months, and the account recalculated on that basis.

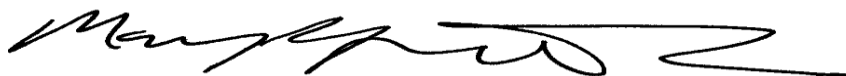
This reflects the lack of opportunity given to the Complainants to make payments against principal during the relevant period and will, when applied, result in an ongoing reduction in the interest payable on the account balance.

In all of the circumstances, the complaint is upheld.

### Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld on the grounds prescribed in **Section 60(2)(b) and (g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider within a period of 35 days from today to rectify the conduct complained of, by the Provider retrospectively applying a principal reduction of €500 per month to the Complainants’ account balance, for each month in the period between May 2011 and August 2014, and the Provider recalculating the account on that basis.
- I also direct that interest is to be paid by the Provider on the overall monetary benefit to the Complainants from that recalculation, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the recalculation is not applied to the 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.



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

25 June 2021

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.