



<u>Decision Ref:</u>	2021-0493
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Maladministration (mortgage) Dissatisfaction with customer service Failure to provide accurate account/balance information Selling mortgage to t/p provider Fees & charges applied (mortgage) Failure to implement payment terms
<u>Outcome:</u>	Rejected

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

The complaint concerns a mortgage loan account that the Complainants held with the Provider. The mortgage loan was sold by the Provider to a third party, effective on **1 February 2019**.

The Complainants' Case

The first Complainant submits that in **February 2004** the Complainants entered into a mortgage loan agreement with the Provider for the sum of €225,000 to be repaid over a period of 25 years. He argues that it was an equity release variable rate loan at 3.55% variable interest rate. The first Complainant submits that this action was taken in order to finance an extension to the house. As they needed to finalise the build, the equity was to be held in a holding account from which they could withdraw funds without any further need to apply for finance. The first Complainant submits that the advantage in choosing this mortgage loan product was that the funds held in the holding account would not be charged interest until they were withdrawn, nor would the Complainants benefit from accruing interest on the funds, so it would be cost neutral from an interest point of view.

The first Complainant submits that the Provider issued them with their letter of approval on **17 November 2003** and within this document it is clearly stated that the loan amount was €225,000 over 25 years and that the interest rate on the loan was 3.55%. The first Complainant submits that the letter of approval also informed them of the cost of the loan in the event of a 1% interest rate change at the start of the year in which the interest rate and the calculations were based.

The first Complainant submits that upon taking into account the European Fair Terms Directive together with the legal obligations of the Consumer Credit Act 1995, a reasonable person would be of the opinion that they had borrowed €225,000 over 25 years to be repaid over 300 instalments.

The first Complainant submits that the terms and conditions of the loan set out the interest charged on the loan and included the funds that were held in the holding account. The first Complainant submits that it is the Provider's position that they had taken out a new mortgage with it on each occasion they withdrew funds from the holding account and that this position was not noted within the letter of approval.

The first Complainant states that the Provider destroyed records in relation to the holding account, making it impossible for them to have an accountant do a proper analysis of that account. The first Complainant submits that the records of the funds held in the holding account were central to their mortgage records. The first Complainant has queried if the Provider has any proof that any money had been withdrawn from the holding account as a result of the misplaced records. The first Complainant contends that by mislaying the records of the holding account, the Provider has acted in poor practice.

The first Complainant states that the Complainants entered into the mortgage loan agreement based on the legally binding terms of the letter of approval which stated that the loan was for €225,000 over a 25 year term, with 300 repayment instalments.

The first Complainant submits that as a result of economic downturn in **2008/2009** and its effect on their financial situation, the mortgage loan account in question went into arrears. The first Complainant submits that as the Provider failed to follow the terms of the original loan agreement as set out under the letter of approval, it had a negative impact on the amount of the repayments on the loan. The first Complainant submits that the calculation of the mortgage loan arrears was incorrect as the drawdown of their mortgage had deviated from the letter of approval that was issued to them by the Provider. The first Complainant submits that this miscalculation on behalf of the Provider resulted in a delay in them resolving the arrears on the loan account and it has also resulted in unfavourable reporting to the Irish Credit Bureau (**ICB**) and the Central Credit Register (**CCR**).

The first Complainant submits that in **2017**, their financial situation had improved and they sought to resolve the arrears on the mortgage loan account. The first Complainant submits that they switched from the standard variable rate of 4.5% to the Provider's managed variable rate of 3.7%.

The first Complainant submits that he used the Competition and Consumer Protection Commission (**CCPC**) mortgage calculator in respect of their mortgage which showed that at 3.7% for a mortgage of €225,000 over a 25 year term, the monthly mortgage payment was €1,150.68. The first Complainant states that their total repayments, including tax relief at source (**TRS**), was €1,356.66. The first Complainant states that they were surprised that they been paying €200 more than the figure set out in the CCPC mortgage calculator and questions if the arrears had been taken into account on their mortgage loan when they switched from the standard variable interest rate to the managed variable rate.

The first Complainant submits that the repayments for the remaining term of the loan from **June 2017** (when they switched to the managed variable rate of interest of 3.7%) appeared to show that the arrears were capitalised into the new monthly repayments but the arrears remained on their account. The first Complainant submits that he queried the difference with the Provider on **6 November 2017**. He states that he had read news articles around that time about a practice called 'automatic capitalisation' with arrears still showing on the relevant mortgage loans, and as such he felt it necessary to raise this matter with the Provider in respect of their own mortgage loan account.

The first Complainant submits that in **February 2018, July 2018, August 2018, 6 September 2018, 3 October 2018, 15 October 2018, 31 October 2018, 1 January 2019 and 11 January 2019**, he wrote the Provider with queries in relation to the mortgage account. The first Complainant submits that within these correspondences to the Provider, he had informed it that the capital balance on the mortgage loan account had not reduced at the start of the mortgage in **2004**, in line with the amortisation schedule provided to them. Further, he pointed out that by **February 2008**, they were €5,375 behind that schedule with no arrears listed and this was way off track. The first Complainant submits that he also requested all of the statements on the loan account in question as statements from **2004 to 2006** were missing.

The first Complainant submits that the Complainants did not receive an acceptable response to their queries from the Provider during those dates and that in **August 2018**, they received a letter from the Provider informing them that the mortgage loan account was being sold to a third party. The first Complainant submits that they had asked the Provider to withdraw the mortgage loan account from the sale to the third party.

The first Complainant submits that despite their queries to the Provider dating back to **November 2017**, it has failed to investigate the matter and issue them with a reply that could be considered by their qualified professional. The first Complainant submits that the Provider failed to resolve the matter in a timely manner and report any errors on its part. The first Complainant further submits that while the loan account is no longer in arrears, they continue to pay monthly repayments based on incorrect figures due to the Provider's errors and that this is causing them financial hardship in addition to significant levels of stress.

The Complainants state that they were not willing to accept the offer of €3,000 made by the Provider. They argue that the conditions of the mortgage and the EU Directive on Unfair Term support their understanding that they borrowed €225,000 over 25 years and that they understood that the capital would be repaid over the 25 year term. They argue that the agreement provided that no interest would be charged on monies held in the holding account but that withdrawing funds from the holding account should not have had any impact on the terms and conditions, as the repayment of capital which they have borrowed was to be repaid as set out in the letter of approval. The Complainants argue that upon drawdown, they were liable to repay the full capital payment from the outset.

They argue that the Provider treated every withdrawal from the holding account as a new mortgage and this began a process where the capital balance outstanding was reducing at a completely different amortisation schedule than that provided to them on drawdown. This meant that the capital balance was reducing at a much smaller rate and that, over time, they would be charged more interest. They argue that the situation was compounded when they went into arrears during the financial crash of **2008/2009**.

The Complainants want the Provider to:

- apply the correct balance on the Complainants' mortgage loan account in line with the correct terms and conditions of the loan agreement and refund them for any excess charges that had been applied to the mortgage loan account;
- rectify their credit rating with the ICB and CCR;
- provide monetary compensation for the alleged errors on the mortgage loan account and for the stress resulting from this complaint; and
- take the mortgage back from the third party to which it was sold, so that they can avail of new lower-cost products available to existing customers of the Provider.

The Provider's Case

The Provider denies that the funds withdrawn from the holding account had any bearing on the original mortgage loan agreement between the Complainants and the Provider. It states that the terms of the mortgage loan and the holding account were clearly outlined in the terms and conditions of the mortgage loan account. The Provider states that it issued a letter of approval to the Complainants on **17 November 2003** for an equity release loan. It points to Special Conditions D and E of that letter of approval in respect of sums to be transferred to a holding account. It further points to clause 11 of its General Mortgage Loan Approval Conditions concerning equity release loans.

The Provider argues that the Complainants' equity release loan drew down in the amount of €225,000 in **February 2004** for a term of 25 years. It argues that the amount of €121,000 issued to the Complainants' solicitor by way cheque and the amount of €104,000 was transferred to a holding account in the joint names of the Complainants. The Provider states that on **16 February 2004**, the Complainants' solicitor issued correspondence to it enclosing a Confirmation of Closing of Loan and, on receipt of this, the funds in the holding account became available for withdrawal by the Complainants.

The Provider argues that the funds that were issued by cheque to the Complainants' solicitor in the sum of €121,000 became immediately due and repayable in accordance with General Condition 11.8(a), and that interest was charged on this amount. The Provider argues that the funds placed in the holding account in the sum of €104,000 were not charged interest while on deposit.

As the Complainants made withdrawals from the holding account, however, the Provider argues that each withdrawal amount was applied to the overall loan balance and interest was applied at the appropriate variable rate in accordance with General Condition 11.8(b).

The Provider argues that it does not hold a copy of the transaction history of the Complainants' holding account but it does hold some evidence of its history. It argues that its internal system log shows that a holding account of the number indicated in the letter of approval was created at that time. Further, on review of the first Complainant's current account, the Provider argues that a lodgement of €10,000 was transferred from the holding account on **17 February 2004**. The Provider argues that the Complainants jointly held current account evidences a lodgement in the amount of €25,000 transferred from the holding account on **11 April 2005**. Further, it argues that the Complainants' holding account was closed on **29 December 2005** which evidences that the €104,000 was fully drawn down prior to the closure date of **29 December 2005**.

The Provider argues that in accordance with its obligations under the Consumer Protection Code 2012 (**CPC**), it is not obliged to retain account details in excess of six years after a transaction taking place on the account. It further argues that is not appropriate for it to retain records pertaining to customers for an extended period of time when there is no longer a business case for doing so. As the Complainants' holding account closed on **29 December 2005** and, prior to the submission of this complaint, the Complainants had not raised any query or raised an issue regarding the transaction history, the Provider argues that the holding account was removed from its records on **27 May 2013**.

The Provider argues that while it does not hold the transaction history pertaining to the holding account, it is satisfied that interest calculations were applied to the equity release loan correctly over the term of the loan. The Provider notes the Complainants' comments in relation to the illustrative amortisation table provided with its letter of approval but argues that the table is provided as part of the Voluntary Code of Conduct on Pre-contractual Information for Home Loans and is for information purposes only. It argues that the table is based on several assumptions, including that the total loan was drawn down on the last day of the month of the loan offer.

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It argues that while the Complainants' loan drew down in full on **10 February 2004**, a portion was placed in the holding account with an interest rate of 0%. It argues that following each withdrawal from the holding account by the Complainants, the withdrawal amount was added to the outstanding loan balance for the purposes of interest calculation. It argues that while the balance at drawdown on **10 February 2004** was noted as €225,000, the monthly repayment amount was initially set at €659.20 per month. It argues that calculating the amount of €225,000 over 25 year term at an interest rate of 3.55% would result in a monthly repayment of €1,132.44. It argues that this confirms that the rate of 3.55% was not applied to the full equity release loan balance of €225,000 from drawdown.

The Provider argues instead that €104,000 transferred to the holding account. After €10,000 was transferred from the holding account on **17 February 2004**, it argues that the balance outstanding for the purpose of interest calculation increased from €121,000 to €131,000 and the first repayment was therefore calculated at €659.20 per month. The Provider argues that there was no interest rate change between **February 2004 and December 2005** but the mortgage account statements clearly show that the monthly repayment amounts increased in **March 2005, April 2005, July 2005, September 2005, and December 2005**. It argues that following each withdrawal, the withdrawal amount was added to the account balance and interest applied at a rate of 3.55%, but the funds in the holding account remained at an interest rate of 0%.

The Provider submits that the repayment change on **11 April 2005** provides an example. The Provider argues that amount of €25,000 was transferred from the Complainants' holding account on **11 April 2005** which resulted in the sum of €25,000 being added to the Complainants' equity release loan balance for the purposes of interest calculation on that date. As a result, the Complainants' monthly repayment increased at that time from €700.40 to €752.27.

The Provider argues that by **December 2005**, the full balance of €104,000 had been withdrawn from holding account. Further it argues that the variable interest rate increased from 3.55% to 3.7% on **29 December 2005**. As of that date, it argues that the term remaining on the account was 278 months and the full outstanding balance was €217,447.81. This resulted in monthly repayments being calculated at €1,165.86.

The Provider argues that it applied a capitalisation restructure agreement on the Complainants' mortgage on **21 November 2018**. It argues that the Complainants fell into arrears in **July 2011** and a Standard Financial Statement (SFS) was received by it on **5 March 2018** and was assessed in accordance with the Mortgage Arrears Resolution Process (MARP). It argues that a restructure agreement was initially offered to the Complainants on a trial basis for six months between **May and October 2018**. Following the successful completion of the six-month trial, a full restructure was offered to the Complainant on **8 November 2018** and this was signed and accepted by the Complainants on **16 November 2018**. The Provider argues that on **21 November 2018**, the Complainants' arrears balance of €23,289.12 was capitalised to the mortgage balance, leaving a mortgage balance outstanding of €161,666.07.

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The Provider argues that it is satisfied the Complainants were fully aware of the capitalisation of arrears and argues that their acceptance of the restructure is evidenced by the signed capitalisation restructure form. The Provider argues that it does not apply penalty interest on an arrears balance but its general interest rate applies to the overall balance outstanding including any outstanding arrears which increases the interest ultimately payable. It argues that following the capitalisation, the arrears balance reverted to €0.00 and a new monthly repayment amount was recalculated based on the remaining term, the full outstanding amount, and the interest rate applicable to the loan. The new monthly repayment amount was calculated in **November 2018** after the capitalisation of arrears at €1,524.26.

The Provider states that it issued several final response letters to the Complainants in an effort to address the issues raised. It further notes that it offered to arrange a face-to-face meeting with the Complainants to fully discuss their concerns in order to provide clarity but the Complainants declined to accept.

The Provider accepts that its letters of **20 December 2018, 11 February 2019 and 14 February 2019** outlined conflicting information with regard to the Complainants' drawdown date and holding account details. The Provider apologises for the confusion caused. The Provider argues that it complied with its obligations under the CPC to seek to resolve the complaint but acknowledges that more of an effort could have been made to clarify matters to the Complainants. In particular, the Provider accepts that more information could have been provided with regard to the Complainants' holding account and the drawdown process pertaining to that account. The Provider further apologises that it cannot provide the full transaction history for the holding account. The Provider states that it is satisfied that it was within its rights to remove the records from the system based on the time elapsed from the closure date, but it accepts that to have these records to hand would have assisted in the resolution of the Complainants' queries.

The Provider acknowledges that full mortgage statements were not furnished to the Complainants at their request in **February 2018**. It acknowledges that it omitted to include statements from **February 2004 to April 2006** until **September 2018**. The Provider expresses its regret that it did not offer sufficient clarification to the Complainants in relation to the issues raised. It further acknowledges that it did not issue a response to the Complainants' correspondence in a timely manner on some occasions.

In light of the service issues identified, the Provider offered an amount of €3,000 in compensation. It indicates that the offer will remain open to the Complainants.

The Complaints for Adjudication

The first complaint is that the Provider failed to adhere to the original terms and conditions of the mortgage loan account as set out in the letter of approval which resulted in a negative impact on the Complainants' repayment of the loan and their credit rating.

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The second complaint is that the Provider failed to investigate the Complainants' complaint in a timely manner.

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 2021, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Complainants made a submission to this Office under cover of their e-mails and attachments dated 26 September 2021 and 14 October 2021, copies of which were transmitted to the Provider for its consideration.

The Provider advised this Office, under cover of its letters dated 1 and 20 October 2021, that it had no further submissions to make.

Having considered the Complainants' additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

Repayments on the Equity Release Loan

The letter of loan approval dated **17 November 2003** provides for an equity release loan to the Complainants. The amount of the loan is set at €225,000 with an interest rate of 3.55% and a term of 25 years. The monthly instalments were indicated at €1,132.44. Special Conditions D and E provide as follows:

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"D. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGE LOAN APPROVAL CONDITIONS.

E. THE LOAN WILL BE ADVANCED BY WAY OF LOAN CHEQUE AND WILL BE FORWARDED TO THE APPLICANT'S SOLICITOR AS TO EUR121,000.00 AND BY WAY OF TRANSFER TO [A PROVIDER] HOLDING ACCOUNT IN THE APPLICANT'S NAME(S) AS TO EUR104,000.00. THE APPLICANT(S) WILL HAVE ACCESS TO THE LOAN AMOUNT IN THE HOLDING ACCOUNT ON PRODUCTION TO [THE PROVIDER] OF A CONFIRMATION OF CLOSING OF LOAN FORM DULY SIGNED BY THE APPLICANT'S SOLICITOR."

The European Standardised Information Sheet issued under the "*Voluntary Code of Conduct on Pre-contractual Information Home Loans*" provides as follows:

"This document does not constitute a legally binding offer.

The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.

...

Nominal Rate:

The interest rate is 3.55 percent.

The interest rate may vary from time to time. Notice will be given in respect of rate increases. No notice will be given for decreases in rates.

The option to apply for a fixed rate product (if available) may be exercised by you at any time otherwise the rate will remain a variable rate. . . .

Annual Percentage Rate (APR)

3.60 percent

Amount of Credit Advanced *EUR 225,000.00*

Duration of Home Loan Agreement

25 Year(s)

Number and Frequency Of Payments

300 repayments, payable monthly.

Repayment Home Loans: Amount of each instalment

EUR 1,132.44. Amount may vary due to changes in interest rate. . . ."

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The following page is an “*Illustrative Amortisation Table*” and is based on a number of assumptions. The indicative monthly instalment amount is €1,132.44 and it provides a year on year indication of the capital and interest repayments on the loan account over a period of 25 years. The assumptions include the following:

*“The total loan is drawn down on the last day of this month.
All repayments are made on the last day of each month. ...”*

In respect of the repayment of the equity release loan in question, the following clauses of the General Mortgage Loan Approval Conditions are pertinent:

“11.2 The Applicant may prior to approval request that all or part of a [equity release loan] be transferred to a holding account (“Holding Account”) in the name of and to the credit of the Applicant on drawdown.

...

11.4 For the purpose of the calculation of interest, the daily balance of the [equity release loan] shall be reduced by the then credit balance (if any) in the Holding Account. The credit balance in the Holding Account shall be reduced by the amount of withdrawals on the date of the withdrawal irrespective of when the withdrawal cheque is cashed. No interest will be payable to the Applicant on the balance held in the Holding Account.

...

11.6 The Applicant may make withdrawals from the Holding Account, in such manner as [the Provider] may, in its absolute discretion, permit or appoint from time to time.

...

11.8 [Equity release loans] will be repaid or amortised as follows:

- a) those sums advanced and not transferred to a Holding Account, by monthly or other periodic repayments as agreed with [the Provider], over the term of the loan in accordance with clause 6.2 of these Conditions;*
- b) those sums withdrawn from the Holding Account, by monthly repayments or other periodic repayments agreed with [the Provider] over the remainder of the term of the loan from the date of withdrawal in accordance with clause 6.2 of these Conditions;*
- c) those sums transferred to the Holding Account, by equal annual repayments (calculated, at the outset, without reference to withdrawals) over the term of the loan or as set out in the Letter of Approval, or as determined from time to time by [the Provider], and made by deduction from the Holding Account subject to the proviso that the amount be so repaid out of the Holding Account will be reduced*

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by the amount of withdrawals. The Applicant hereby irrevocably authorises [the Provider] to debit the Holding Account for the purposes of making such repayments."

Clause 6.2 as referenced in clause 11.8 provides that that monthly repayments should include the repayment of interest and capital as follows:

"These conditions are intended to provide for repayment of capital and payment of interest primarily by combined payments at monthly intervals save where [the Provider] has stipulated that repayments in respect of all or part of the Advance may be made at intervals other than monthly intervals."

I accept that the letter of loan approval provided for the split of the total loan amount of €225,000 into a direct payment of €121,000 to the Complainants' solicitor and the balance of €104,000 into a designated holding account. The applicable interest rate was the standard variable rate then at 3.55% but liable to increase or decrease at various intervals over the term of the loan. The term of the loan is 25 years. I accept that the Amortisation Table gave illustrative repayment figures of €1,132.44 per month over 25 years but based on two key assumptions – first, that the total sum of €225,000 was drawn down by the end of **November 2003** and second, that each repayment was paid in full on the due date.

It is accepted by both parties that the mortgage loan account was in arrears since 2011 prior to a capitalisation of arrears agreement entered into between the parties in **November 2018**. This agreement and the missed payments leading up to it had a knock on effect on the remainder of the repayments such that each monthly instalment would be higher after capitalisation to ensure that the entire loan amount was repaid by the end of the term. This appears to have been accepted by the Complainants over the course of their complaint and following responses from the Provider.

While the €225,000 loan was drawn down in February 2004, only €121,000 was paid directly to the Complainants at that point. The balance of €104,000 in the holding account was, it appears, withdrawn gradually over a period of almost two years to cover the cost of building work. Both parties agree that there was no interest payable on the balance of the holding account at any given time, as is made clear in clause 11.4.

The kernel of the dispute is whether the Provider ought to have included the entire €225,000 in calculating monthly repayments in respect of capital repayments from the date that the loan monies were released to the Complainants to their solicitor and into the holding account on or about **10 February 2004**. The Complainants argue that the failure of the Provider to include the holding account balance in the capital repayments during the first two years or so of the loan means that their remaining 23 years of repayments were higher, and ultimately cost more in interest. The Provider argues that each time a withdrawal from the holding account was made, the monthly repayments was recalculated to include the capital and interest associated with each withdrawal so that the Complainants' monthly repayments gradually increased from €659.20 in **February 2014** to €1,167.37 in **January 2016** as the balance of the holding account was being reduced by gradual withdrawals which, the Provider argues, was in accordance with the loan conditions.

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The clause that governs this question is clause 11.8 on the repayment of equity release loans. Clause 11.8(a) provides that the sum of €121,000 advanced directly to the Complainants' solicitor would be repaid by monthly repayments "*over the term of the loan*". In contrast, clause 11.8(b) provides that "*sums withdrawn from the Holding Account*" would be repaid by monthly repayments "*over the remainder of the term of the loan from the date of withdrawal*". Clause 11.8(c) deals with sums remaining in the holding account in respect of which the Provider can seek annual repayment or repayments "*as determined from time to time*" by the Provider.

There is a clear distinction between the repayment terms in respect of sums advanced directly to the Complainants under clause 11.8(a) and sums withdrawn from the holding account under clause 11.8(b). The former are repaid "*over the term of the loan*" (that is, over the full 25 year term of the loan) while the latter are repaid "*over the remainder of the term of the loan from the date of withdrawal*". If the Complainants were correct and each monthly repayment from **February 2004** was to include a proportionate repayment of the capital of €225,000 – despite the fact that the Complainants had not yet accessed the funds in the holding account – there would be no reason to have two separate clauses here. In other words, the distinction drawn in clause 11.8 must mean something.

On my interpretation, the wording of the clause supports the approach adopted by the Provider – that the monthly repayments were calculated by reference to the monies that had been accessed by the Complainants either through the cheque to their solicitor or withdrawals made by them from the holding account. Every time a withdrawal from the holding account was made, the monthly repayments had to be recalculated so ensure that the interest payable on and the capital amount of each withdrawal was repaid over the remaining term of the loan. In that way, withdrawals from the holding account were to be repaid "*over the remainder of the term of the loan from the date of withdrawal*".

I appreciate that the Complainants have been confused by the language of the general conditions and the amortisation table. I accept that the letter of approval could have made the issue a little clearer to them in respect of draw down and capital repayments but I note that they were legally represented and acknowledged in their loan acceptance dated **28 November 2003** that they accepted the terms and conditions and that the full terms and conditions of the loan had been explained to them by their solicitor. In respect of the amortisation table, I have highlighted above that it was based on two assumptions that did not apply in the present case. While the full loan amount was drawn down in **February 2004**, the sums transferred to the holding account were not repayable under clause 11.8(b) until withdrawn. Further, the amortisation table was stated to be illustrative and not legally binding. Finally, even the Complainants accept that there was no interest payable on the balance of the holding account so the figures provided in the table could never have been correct unless they withdrew the full balance of the holding account during the first month of the loan.

The Complainants, in a post Preliminary Decision submission, disagree with my acceptance of clause 11.8(b). The Complainants also disagree with my decision to find that the Provider acted in accordance with the general conditions in calculating the Complainants' monthly repayment in the manner that it did.

Having considered all the evidence and submissions, including the Complainants' post Preliminary Decision submission, I do not accept that there was any error made by the Provider in calculating the Complainants' monthly repayments in respect of the sum transferred to the holding account.

It is unfortunate in light of the issue that has arisen that the Provider did not retain full transaction records of the withdrawals made from that holding account but I accept that it was within its rights to destroy the records in **2013** as the holding account was closed in **December 2005**. From the records and calculations it has submitted, it appears that the monthly repayments were correctly calculated in accordance with the general conditions. Certainly, the upward trend visible in the monthly repayments reflects an ever-decreasing balance in the holding account. While I appreciate that the Complainants now feel that they would have paid more off their capital balance in **2004 and 2005** if repayments had been calculated on the basis of the entire loan amount of €225,000 from the beginning, the fact is that they did not make monthly repayments to reflect the amortisation table in **2004 and 2005** and therefore had a cashflow benefit at that time in respect of lower repayment amounts.

In any event, and as set out above, I am satisfied that the Provider acted in accordance with the general conditions in calculating their monthly repayment in the manner that it did.

In my Preliminary Decision I indicated that I did not accept the submission that the clause or clauses in question are unfair within the meaning of the European Communities (Unfair Terms in Consumer Contracts Regulations) 1995, SI 27/1995.

The Complainants made further arguments in their post Preliminary Decision submissions that the clause or clauses in question are unfair within the meaning of the European Communities (Unfair Terms in Consumer Contracts Regulations) 1995, SI 27/1995.

However, I remain of the view that the clause or clauses in question are not unfair within the meaning of the European Communities (Unfair Terms in Consumer Contracts Regulations) 1995, SI 27/1995.

Response to Queries and Complaints

There are several issues raised in the correspondence between the parties between **November 2017 and 2019** that are not relevant to the complaint currently under investigation and for that reason, I propose only to focus on correspondence and portions of correspondence dealing with the complaints at issue.

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The Provider has accepted that it was slow to respond to queries raised by the Complainants in respect of the calculation of their repayments. It has further accepted that it ought to have provided a clearer and fuller response to the Complainants' queries when it did reply.

The first Complainant first raised a query by letter dated **6 November 2017** in respect of mortgage repayments. The first Complainant pointed out that the indicative monthly mortgage repayments in **2004** were €1,132.44. The letter stated that their current monthly repayments was €1,281.60 which was the equivalent of more than 1% increase and asked if someone could explain this to them. The letter indicated that by including the TRS, the repayment was more than €200 a month above the figures first quoted to them and questioned if this had been taken into account in the overall balance.

The first Complainant raised the same complaint on a call to the provider on **21 February 2018** that is, the discrepancy between the repayment schedule outlined in **2004** and what they were now paying and referred to his previous letter.

By letter dated **20 February 2018**, the first Complainant wrote to the Provider indicating that the Complainants had serious concerns regarding the mortgage and queried if they were being charged an incorrect amount. He argued that based on his own calculations, it appeared that they were being overcharged by approximately €150 per month based on the draw down documentation. He requested that all mortgage statements be sent to him.

By email dated **2 May 2018**, the first Complainant stated that his query was "*a simple one*" that is, "*why was I being billed on my mortgage payments more than my original drawdown document said*". He questioned why this had not been answered and stated that if they were being overcharged as seems to be the case, this had greatly added to the stress they have been under in relation to arrears in the last number of years. He noted that they had now sent several letters seeking a complete record of all transactions on the accounts. The first Complainant noted that their original repayments should have been approximately €1,150 per month but they were now paying €1,360 month. I note that the first Complainant also raised these issues on a call to the Provider on the same date of **2 May 2018**.

By letter dated **18 July 2018**, the first Complainant wrote to the Provider indicating that he had not yet had an update or answer to his queries regarding his mortgage and overcharging. He stated that he had received statements from **2006** onwards on his request but that the Provider had failed to furnish him with statements for the years **2004 and 2005**. He questioned why they were paying €1,577 a month when the monthly repayments as outlined to them when they drew down a mortgage should have only been €1,150. He made a follow up call on **25 July 2018** referring to his complaint and again requesting the **2004 and 2005** statements.

The first Complainant called the Provider on **7 August 2018** and raised the queries in respect of the divergence in the payment amounts, explained he was still awaiting a reply to his queries/complaint and was still awaiting his statements from **2004 and 2005**.

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He had been sent the **2015** statement in error after the last call. The Provider stated that the statements would be sent out as a matter of urgency and the representative would contact the resolution centre as the Complainants were very anxious to get the situation resolved.

The Complainant wrote to the Provider's CEO on **8 August 2018**, explaining that he had raised a query in respect of apparent overcharging in **October 2017** and again in **February 2018** but has not had an answer. The Complainant emailed the Provider on **13 August 2018** following a call to the customer service in respect of his mortgage not being paid off according to the drawdown documents. He noted that he had an existing query regarding overcharging on the accounts and suggests that as far back as **2008**, there appeared to be an incorrect principal balance on the account bearing in mind the repayment schedule that had been provided to them.

By letter dated **20 August 2018** in response to a call from a representative of the Provider, the Complainant attempted again to set out his concerns in respect of overcharging and monthly repayments. He pointed out what the repayment ought to have been in **February 2004** and what they should have risen to on the basis of increased interest rates at various points. He argued that they were way behind the payment schedule given to them at drawdown by €5,375 in **February 2008**. He further argued that the reducing capital balance was behind schedule and that his accountant required the **2004/2005** statements to investigate the issue.

The first Complainant wrote to the Provider by letter dated **23 August 2018** explaining his query in respect of the figures on the mortgage account on the basis of the documentation provided to him with indicative monthly repayments of €1,132 per month. He argued that his own calculations using mortgage calculators indicate they were being overcharged. He further indicated that he was still missing statements from **2004, 2005 and early 2006**.

The first Complainant wrote again to the Provider's CEO on **6 September 2018** stating that he had raised issues the previous **November** and again in **February 2018** but had not yet received appropriate responses. He argued that statements provided to him did not contain the years **2004, 2005 and early 2006**. He argued that the statements indicate that the figures in respect of the capital balance are incorrect and by extension, the arrears must be incorrect. He argued that the mortgage figures were far away from what was set out in the draw down documents. He argued that they were initially due to pay €1,132 per month but they were then paying €1,577 per month as part of the restructure to capitalise €23,000 in arrears. Based on the calculations, he argues that it seems that a larger sum had been capitalised.

In all of this period from **November 2017 to September 2018**, all that was received by the first Complainant in response to his frequent calls and letters was a series of acknowledgements and holding letters from the Provider in respect of the complaint and statements from 2006 onwards.

By letter dated **28 September 2018**, the Provider wrote to the Complainants stating that the statements from **2004 and 2005** had been dispatched to their home address. It indicated that one of its representatives was investigating his query regarding the interest and capital balances computation. This was now 10 months after he had initially raised the query regarding the computation of his repayments.

The first Complainant wrote to the Provider on **3 October 2018** noting that he had not yet had a response to letters dated **6 November 2017** and **21 February 2018** in which he had asked for explanations in respect of what seemed to be overcharging. He further indicated that they had not yet received outstanding statements from the period **2004 to 2006**.

By letter dated **9 October 2018**, the Provider referred to the Complainants' correspondence and suggested that due to the nature of the query, the Complainants should meet with a portfolio manager and requested that they contact the Provider to arrange the appointment. By email dated **26 October 2018**, the first Complainant indicated that they would require responses to the queries before they could meet with a portfolio manager.

This was followed by a further letter from the first Complainant to the Provider's CEO on **2 November 2018** which again requested responses to their queries in writing prior to the suggested meeting and highlighted the discrepancy in the monthly repayments from what had been indicated in **2004** to what was actually being requested of them. The Complainants further indicated that they had still not received complete statements. They argued that the fact that the capital balance had not reduced according to the schedule given to them was a major concern. The first Complainant argued that by **February 2007**, the capital balance was €4,273 behind the schedule and by **February 2008**, this had grown to €5,375. The Complainants argued that the amortisation schedule for repaying the capital should have been complied with it or it would not be possible to repay the mortgage on time. They argued that had the errors not taken place, the capital balance would be smaller than it is today, even allowing for the arrears.

By letter dated **2 November 2018**, the Provider responded to a number of other queries that the Complainants had raised but failed to deal with their queries in respect of repayments. The first Complainant responded by email dated **7 November 2018** pointing out that there was no answer to his queries in respect of the apparent overcharging and again set out comparisons of what they had understood they would be paying versus what they were being asked to pay. He argued that the Provider's argument that the table was for information purposes only is not correct as the Consumer Credit Act 1995 is very specific about providing such information. By email dated **8 November 2018**, the first Complainant wrote to the Provider stating that he had two missed calls from the Provider but no voicemail was left and that he did not wish to speak to the Provider on the phone.

By letter dated **9 November 2018**, the Provider explained that it suggested a meeting or telephone call to determine the exact nature of the complaint. It argued that the required repayments according to the original schedule would only be correct if all payments were made in line with the original schedule and interest rates do not change.

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It pointed out that there were multiple interest rate changes and numerous restructure arrangements on the account. It pointed out that there was an interim arrangement in **July and August 2017** and a further trial arrangement in **March 2018**. The Provider indicated that the capitalisation offer was issued on **8 November 2018**. The Provider enclosed copies of the missing statements from **February 2004 to April 2006**.

In my view, the explanation provided in the letter of **9 November 2018** went nowhere close to clarifying the repayment position to the Complainants. I note that the Provider had attempted to speak directly to the Complainants by way of face-to-face meeting or telephone call so that it could better understand the query that was being raised.

Face to face meetings or contact of this nature is something to be welcomed and encouraged. However, in relation to this complaint, in my view the numerous letters and emails that had been sent and calls made by the first Complainant were clear in respect of the Complainants' concerns that the monthly repayment sum that was being sought from them was very different from what had been indicated in the amortisation schedule at the start of their mortgage in **2004**. Considering the length of time that it has taken the Provider to respond, by now almost a full year, it is surprising and disappointing that such a poor explanation was offered.

By letter dated **27 November 2018**, the Provider wrote to the Complainants noting that billing can appear confusing and for this reason the Provider suggested a face-to-face meeting to hear their exact queries so the Provider could better investigate and resolve them. It suggested that the Provider considered that the investigation was now complete. I note that this letter was sent in response to an email from the first Complainant dated **19 November 2018** regarding the repayment billing on the account, but I do not appear to have been furnished with a copy of this email.

On **4 December 2018**, the first Complainant emailed the Provider indicating that there were issues that remained unresolved. He indicated that he now understood that the repayments would be more than €1,150 per month on the basis of the capitalisation of arrears that occurred in **November 2018**. He stated that he still had an issue, however, in respect of the capital balance of the mortgage not reducing in accordance with the schedule given to them as part of the drawdown package. He argued that the mortgage statements show serious deviations from the planned reduction in the capital balance. He argued that the capital balance was thousands of euros more that it should have been before they got into repayment problems due to pay cuts.

By letter dated **20 December 2018**, the Provider wrote to the Complainant and stated that *"the full balance was not drawn down immediately"* so the *"full capital and interest payments varied and were not in line with the schedule that assumed drawdown of the full balance"*. It further stated that the difference in the payment schedule *"is due to not drawing down the full balance and the number of Arrangements that were on your account."* The Provider stated that after each arrangement, the schedule was recalculated in order for the balance to be cleared within the term.

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I note that the Provider has now argued that the full €225,000 was drawn down in **February 2004** as set out above, albeit that repayments including interest were not calculated on the monies in the holding account until those funds were withdrawn. The explanation provided was therefore incorrect and incomplete. This explanation does not go anything close to providing a full explanation to the Complainants as to why the repayment amounts were so different to what they had been initially advised. It was apparent from the extent and frequency of their correspondence that the Complainants were genuinely confused by the difference in the repayment amounts and did not understand why the repayments that they were being asked to make were so far from what had originally been envisaged.

Considering the unreasonable length of time that it took the Provider to furnish any explanation whatever to the Complainants in respect of the repayments, it is most disappointing that such an ill-considered, inaccurate and brief explanation was provided to them.

The first Complainant reverted by email dated **26 December 2018** disputing the contention that they had not drawn down full capital balance at the outset. He argued that the mortgage statements show that they did drawdown full amount, though part of it was lodged to a holding account. He argued that in effect, the Provider's position is that the monies in holding account were repayable over 23 years rather than the 25 years as set out in the letter of offer. The first Complainant argued that the payments sought by the Provider were less than in the payment schedule which left them behind in terms of making the capital repayments.

The first Complainant wrote to the Provider's CEO on **1 January 2019** and argued, amongst other things, that the drawdown documents had not been followed by the Provider and that there were shortfalls in the original plan. He disputed the position taken by the Provider in a letter dated **20 December 2018** on the basis that they had drawn down the full €225,000 in **February 2004**, albeit that part of the funding was placed in the holding account. He argued that they were paying erratic capital repayments from **March 2004**, although they were meeting all monthly bills due on the account.

The first Complainant sent a follow-up email dated **5 February 2019** to the Provider indicating that they awaited answers and were concerned that the mortgage terms and conditions had not been complied with in respect of repayment of the capital, including the money in the holding account. He argued that they drew down €225,000 on **10 February 2004** and that while interest should not have been charged on the holding account, the schedule set out the capital repayment plan which was clearly underpaid despite the Complainants meeting the debits sought by the Provider. A follow-up email on the same lines was sent on **6 February 2019**.

By letter dated **11 February 2019**, the Provider stated that the equity release loan operated in line with its terms and conditions and that the Provider did not charge interest on the account. It stated (incorrectly) that *"the full balance was not drawn down in February 2004"*.

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The Provider set out as follows:

“While your statements show the Balance reducing from €225,000 from February 04 the debit interest accrued and the billing amounts are based only on the amount drawn down (Holding Account balance is excluded). As such you can see the interest and billing amount change after there are additional funds drawn down from your Holding Account. No interest is charged on the Holding Account balance until after it is drawn down.

At each additional drawdown from the Holding Account the interest accrual changes (debit interest) and the repayment amount is recalculated based on the drawn down balance, term and Interest rate.

In January 2006 your balance with the remaining term of 277 months at a rate of 3.55% was correctly €1167.22.

You noted that there was no information provided in relation to the Holding Account. As all the available funds in your Holding Account were drawn down, the account was closed in December 2005. As a result of the closure the records for this account were removed from our system in May 2013 and we have no further documentation relating to this account.”

A further letter was sent by the first Complainant to the Provider’s CEO on **11 February 2019** which likely crossed-over with the Provider’s final response letter of **11 February 2019**. The first Complainant again set out his understanding of the terms and conditions and the complaint that the Provider has not sought full capital repayments from **February 2004** which meant there was a shortfall on their payments. The Provider responded by letter dated **13 February 2019**, referring to its letter of **11 February 2019** and indicating its understanding the issue had been dealt with. By email dated **14 February 2019**, the first Complainant indicated he was not satisfied that the Provider had operated repayments in accordance with the terms and conditions of the loan. He requested that the Provider consider his letter of **11 February 2019** before he took further action.

By letter dated **15 February 2019**, the Provider stated that the equity release loan operated in line with the terms and conditions of the mortgage. The Provider explained that the monthly payment of €628.89 in **March 2004** was based on:

“the balance drawn down x the interest rate x days pasted. (sic) The repayment amount was equally calculated based on the balance you had drawdown and it was recalculated when additional funds in the holding account were withdrawn. Your debit interest varied monthly due to the number of days in the month and the reducing balance due to the payment that were made. (sic) When additional funds were withdrawn from the holding account you can see the interest increase and the billing amount also increase.

The amortisation schedule as previously advised was based on drawdown of the full balance. The full balance was not drawdown in February 2002. (sic)

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There was no error at the start of your mortgage, your repayments and interest has been correctly calculated in line with the [equity release loan] terms and conditions. (sic) We understand that information of this kind is not easy to communicate via letter and we did previously offer a meeting and/or phone calls but your preference was written communications.

In January 2006, the funds in the holding account had all been drawn down. The account was closed and interest and payments were calculated on your full balance remaining at that time. Your balance with the remaining term of 277 months at a rate of 3.55% was correctly €1167 22."

I am satisfied that the letter of **15 February 2019** represented a better attempt by the Provider to explain the repayment situation to the Complainants, though it was still inaccurate as regards the drawdown of the loan. In my view, this was the first time that real clarity of been brought to bear on the issue for the Complainants. Although the Complainants did not accept the explanation provided to them (as was made clear by a further email dated **16 February 2019** from the first Complainant), I am satisfied that by this point, the Provider attempted to explain what had arisen to the Complainants in an acceptable way.

As can be seen from the above, there were several shortcomings in the Provider's response to the multiple queries raised by the first Complainant in respect of the calculation of their mortgage repayments. First, there was the unexplained and significant delay in its response to the complaint. The complaint was initially raised in **November 2017** but it was a year (and numerous further complaints) later before the Provider even attempted to respond and to explain the difference in the repayments. It was not until **February 2019** that a substantive reply was received by the Complainants. This delay is completely unacceptable, especially considering how poor the Provider's initial response was to the queries.

Second, the Provider failed to provide a clear or comprehensive explanation to the Complainants in its initial responses. In fact, misleading information was provided in several letters as regards whether the loan was fully drawn down or not in **February 2004**. Third, I note that there was a serious delay in the Provider sending statements from **2004 and 2005** to the Complainants. These were requested in **February 2018** and following several reminders, sent by post in **September 2018** though not apparently received until resent in **November 2018**.

The Provider has a number of obligations under the Consumer Protection Code 2012 (CPC) as regards the provision of information to customers and responding to complaints.

The most relevant of these are follows:

“A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

2.6 makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;

2.8 corrects errors and handles complaints speedily, efficiently and fairly;

4.1 A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.

4.2 A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following:

a) the urgency of the situation; and

b) the time necessary for the consumer to absorb and react to the information provided.”

I am of the view that these provisions were not complied with by the Provider.

I note that the Provider has accepted its shortcomings in this regard and has offered a sum of €3,000 in compensation to the Complainants. In my view, the sum of €3,000 is reasonable to compensate the Complainants for the service failure identified above. This is particularly the case given that I do not accept that there was any breach of contract by the Provider or overcharging.

For this reason, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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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

8 December 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.