



<u>Decision Ref:</u>	2022-0177
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Failure to process instructions
<u>Outcome:</u>	Partially upheld

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

This complaint arises from the Complainants' allegation that the Provider misapplied their funds, and failed to follow their instruction to reduce the term of their mortgage loan.

The Complainants' Case

The Complainants hold a joint mortgage account with the Provider.

The Complainants submit that on **10 January 2007** the first Complainant attended at the Provider's branch and lodged €10,000 (ten thousand Euro) into the mortgage account. The first Complainant states that he did not want this sum to reduce the balance of his mortgage, and instead he requested for the term of his mortgage to be reduced.

The first Complainant submits that he discussed this instruction in the Provider's branch. Following this, he held the understanding that his mortgage would be reduced by a term of two years.

In **2018**, the Complainants enquired with the Provider as to the remaining term on their mortgage and learned that the term had not been reduced in **2007**. Instead, the €10,000 (ten thousand Euro) had reduced their capital balance on the mortgage, and their monthly repayments had consequently decreased.

In response to the Provider's submissions, the representative for the Complainants stated in a letter of **30 June 2020** that:

"The logic of the argument by the [Provider] is in our view, dubious, that they claim the complainant lodged €10,000 to his mortgage account without a clear instruction and that the [Provider] had no processes in place to deal with such a transaction."

The Provider's Case

In its reply to the formal investigation of this Office, the Provider explained that the Complainants drew down a mortgage on **15 January 2004** for a term of 20 years. This agreement provided for a three-year fixed interest rate of **4.24%** from the date of drawdown. On **9 January 2007**, the Complainants signed an agreement for a further three-year fixed rate of **4.65%**.

The Provider calculates that if the term of the mortgage had been reduced on **12 January 2007** by way of the application of the lodgment of €10,000 (ten thousand Euro) into the account, the term would have been reduced by two years and one month. This would have required the Complainants to maintain the agreed repayments of €740.10 (seven hundred and forty Euro and ten Cent), although this figure would have increased with the agreement for the fixed rate of 4.65%.

The Provider submits that it is not in a position to confirm the details of the suggested conversation on or around **10 January 2007**. It states that the Complainants did not provide a description of the staff member who dealt with the matter at that time, and it has not been able to request a statement of recollection from this individual. Further, the Provider submits that it would be:

"highly unlikely that anyone, including the Branch Representative, would be able to recall with any accuracy (if at all) a conversation with a customer on what was ultimately a routine request, namely a lodgment into a mortgage account that took place nearly 14.5 years ago."

The Provider states that it has no record of issuing correspondence to the Complainants to advise them of the requirement of a written authority for a reduction in mortgage term. It states that it has no record of requests for this information from the Complainants.

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The Provider submits that the Complainants may be mistaken in their recollection of this issue. It says that it has an entry on its system which states:

“Customer remembers the conversation he had with an adviser in [Branch] in 2010 and he is adamant that he asked for the term to be reduced and not the monthly repayment.”

The Provider says that it also noted an entry on its **Mortgage Desktop Activity Log of 31 March 2010**, which recorded a branch call from the Complainants regarding *“lump sum calculations”*. The Provider submits:

“While the Provider can provide no further details of this call, in circumstances where the only lump sum payment ever made to the mortgage loan accounts, was on 10 January 2007, it would be reasonable to conclude that the Complainants are conflating two incidents: one where a lump sum was paid without instruction given to the bank (January 2007); the other where a query made in relation to a proposed lump sum repayment that was never followed through (March 2020).”

The Provider states that the term of the mortgage could only be reduced with the written consent of the Complainants, and that it did not receive this form of consent from them.

In relation to the Provider’s obligations under the **Consumer Protection Code 2006** (CPC), the Provider refers to its understanding of the Complainants’ confusion. In relation to the requirement that its staff must have effective training, the Provider has stated that it has not retained the training records from more than 14 years ago. However, it submits that it was highly likely that its staff would be trained in respect of the Complainant’s alleged request, as this type of request *“would not be uncommon”*.

The Provider submits that the Complainants received the *“full value pro tanto”* for the lump sum payment. The repayment amount subsequently paid by the Complainants was reduced from €741.48 (seven hundred and forty-one Euro and forty-eight Cent) to €696.86 (six hundred and ninety-six Euro and eighty-six Cent) on **30 January 2007** as a result of this payment, and the interest rate increased from 4.24% to 4.65% due to the fixed rate agreement, from **9 January 2007**.

The Complaint for Adjudication

The complaint is that the Provider failed in **2007** to reduce the term of the Complainants' mortgage when they made a lump sum payment of €10,000.

The Complainants want the Provider to reduce the term of their mortgage.

Jurisdictional Determination

Following a query from the Provider regarding the jurisdiction of the FSPO to investigate a complaint made in **2018**, regarding a suggested error dating from **2007**, it was noted by this Office that the Complainants maintain that it was only in 2018, that it came to their attention that the funds lodged to the account in 2007 had been mis-applied.

Thereafter, further submissions were received from the parties, and it was noted that the Statement of Account for 2007 disclosed the lump-sum payment of €10,000 described as "part redemption". The mortgage statement also detailed that the Complainants' monthly repayment fell from €741.48 to €696.86, after the application of the lump-sum payment.

In those circumstances, the FSPO determined that although it was possible to deduce from the statement that the reduction in the monthly repayment amounts (following the lump-sum payment) came about through a reduction in the capital balance, as opposed to a term reduction, such information was not readily apparent from a review of the mortgage statement, in particular, because the statement did not contain any information as to how the lump-sum was applied to the mortgage account and neither did it specify the term of the mortgage.

In those circumstances, the FSPO determined that there was no evidence to suggest that the Complainants became aware, or ought reasonably to have become aware of the conduct given rise to the complaint on receipt of the mortgage statement in January 2008, nor that the Complainants' date of awareness of the conduct complained of, was earlier than 2018, being the date on which the Complainants state that they made enquiries as to the term remaining on the mortgage.

Consequently, the FSPO determined that the complaint fell within the jurisdiction of this Office and the adjudication of the complaint has proceeded on that basis.

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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 **21 January 2022**, 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Evidence

I note the screenshot of the **Mortgage Desktop Activity Log of 31 March 2010**, which is reproduced below:

Central Log Entry

Date Entered 31/03/2010 10:55:36 Entered By

Log Type Call Enquiry Department Phone

Caller Category: Branch/Store
Standard Enquiry Type: General Account Query
Call Notes: lump sum calculations.

Large View --> Save Close

The Complainants say that on **10 January 2007**, the first Complainant's instructions, as given by him in the Provider's branch were not followed by the Provider. The Provider submits that the Complainants' recollection is "*unreliable*" and that they did not give the instructions, which are now suggested to have been given in **2007**. It states that a written authorisation would have been required from the Complainants, and that this was never received.

Given the passage of time, it is understandable that there are difficulties faced by the Provider in undertaking the necessary steps to adequately investigate the Complainants' assertion, or to provide a definitive submission regarding any conversation between the first Complainant and the Provider's staff member on **10 January 2007**. I accept that the first Complainant had a discussion of some nature with the Provider's staff member on **10 January 2007** and indeed this conversation may have explored the possibility of reducing the mortgage term with a lump-sum payment. Indeed, he contends that he expected a two-year reduction in the term, which somewhat aligns with the calculations of the Provider of what the Complainants "could" have expected, with that particular instruction at that time.

Additionally, I consider it unlikely that the first Complainant made an in-branch credit to his account of **€10,000** (ten thousand Euro) without giving any instructions whatsoever to the Provider's staff member, or that the staff member in question would have neglected to ask what the first Complainant's instructions were, in relation to the funds. What is absent however is any reliable contemporaneous record of what those instructions were at that time. This is disappointing. If adequate records had been kept of the Complainant's instructions in 2007, this might have avoided any complaint arising in this matter.

As noted by the Provider, the Complainants do not appear to have been supplied with information on how a mortgage term could be reduced or any explanation that an authorisation in writing was required. In the absence of such information, there was no

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reason for the Complainants not to believe that an oral instruction would be sufficient in this regard, to effect the transaction to reduce the mortgage term. I am also conscious however that having paid a significant lump-sum to the Provider, there was no communication from the Provider to the Complainants to confirm how the monies had been applied to the account, and neither did the Complainants seek any confirmation from the Provider in that regard.

In my opinion, the Complainants bear some responsibility for the misinterpretation of their instructions (if indeed clear instructions were given on 10 January 2007) insofar as the position might more easily have been corrected, if it had been raised as an issue by the Complainants, sooner than it was raised in **2018**, more than ten years after the lump-sum payment had been made.

I am mindful that the Complainants received a financial benefit from the application of their lumpsum of €10,000 to the principal balance of their mortgage loan, resulting in the reduction of their monthly repayment amount, over the following years. This has given rise to a significant ongoing financial benefit to them each month, over that period of more than a decade.

Given the dearth of evidence available, I do not consider it appropriate to make a finding that the Provider failed to implement the Complainants' instructions. Rather, I consider it appropriate to find that the Complainants' instructions in January 2007 were not adequately recorded or documented at that time.

Chapter 2 of the Central Bank of Ireland's **Consumer Protection Code 2006** ("CPC 2006") placed an obligation on regulated financial service providers to ensure that all instructions from or on behalf of a consumer are processed properly and promptly and that the date of both the receipt and transmission of the instruction is recorded. I am conscious that CPC 2006 was introduced in August 2006, although it did not come fully into effect until 1 July 2007.

Whether or not the Provider in early 2007 stood in breach of the relevant CPC provision, I believe that the provider has a case to answer to the Complainants, arising from its failure to record their instructions, if any, at that time, regarding the manner in which the funds were to be applied to their account. I consider this failure to have been unreasonable within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

At this remove, I do not consider it appropriate to make a direction to the Provider to apply the Complainants' lump-sum payment from 2007, in reduction of the term on the mortgage account. If I were to do that, it would give rise to a requirement for the Complainants to

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make good and repay the Provider every monthly “saving” which they have benefitted from, since that time.

Rather, I consider it appropriate to direct the Provider to make a compensatory payment to the Complainants, in recognition of its shortcomings in failing to adequately document their instructions, if any, and its subsequent failure to communicate the manner in which the lump-sum payment had been applied to the account.

In those circumstances, I consider it appropriate to partially uphold this complaint and to direct the Provider to make a compensatory payment to the Complainants, as directed below, in order to conclude.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(b)**.
- Pursuant to **Section 60(4)(d) and Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider make a compensatory payment to the Complainants in the sum of in the sum of €2,500 (two thousand five hundred Euro) to an account of the Complainants’ choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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



MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

27 May 2022

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.