An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0252
Sector:	Banking
Product / Service:	Mortgage
Conduct(s) complained of:	Failure to apply the correct tracker rate as part of the Examination
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint arises from the interest rate applicable to the Complainants' two mortgage loan accounts which the Complainants hold with the Provider. The complaint concerns the contention that a clause in the agreements, providing for a variable rate of interest is an unfair term within the meaning of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (**UTCC Regs**).

As the complaint was first received by the Financial Services Ombudsman's Bureau ("FSOB") in 2013, references in this Decision to "this Office" should be taken to include both the Financial Services and Pensions Ombudsman and its predecessor, the Financial Services Ombudsman's Bureau.

The Complainants' Case

The Complainants submit that they were never offered the option of a tracker mortgage interest rate at any time during the period **July 2002 to October 2008**. The Complainants state that during this period "*tracker mortgage interest rates were generally being offered to [the Provider] to its customers*."

The Complainants say that the conduct complained of, started in **July 2002** at the time of their first mortgage and continued until **October 2008** when the Provider ceased to offer tracker rates to its customers. The submit that this amounts to conduct of a continuing nature so should be taken to have occurred when it stopped in **October 2008,** in accordance with ***section 57BX(5) of the Central Bank Act 1942*** (the **1942 Act**).

The Complainants argue that the Provider's letter of **2 April 2015** in which it notes that a variable interest rate and two fixed rates would have been offered to the Complainants on **11 December 2006,** demonstrates that no tracker rate was offered to them despite that fact that such rates were generally being offered by the Provider to its customers.

The Complainants argue that the Provider has offered no written evidence that they were offered a tracker rate. They submit that they have no recollection of being offered a selection of interest rates and rather they accepted whatever rate the Provider offered to them. They submit that the Provider was in breach of the ***Code of Practice for Credit Institutions 2001*** in failing to offer a tracker rate to them and that the Provider bears the burden of proof of compliance with regulatory requirements.

The Complainants contend that a condition attaching to their mortgage agreements entered into with the Provider in **August 2002** and **November 2005** is unenforceable as "[*t]here cannot be an agreement by a borrower to an interest rate that is entirely at the Lender's discretion.*"

The Complainants question how a clause that allows the lender to fix an interest rate entirely at its discretion, can be enforceable. They submit that the correct procedure for agreement in advance to the level of the interest rate, is by adding an agreed margin to a reference interest rate such as EURIBOR. They argue that the reference interest rate and agreed margins should be clearly stated in the mortgage conditions. The Complainants point out that a minimum rate of 0.1% over the EURIBOR is provided for in the contract but that there is no maximum rate and that the lender's discretion is not an independent objective valid criterion for the determination of the rate to be applied to their mortgage accounts.

The Complainants argue that in the first six years of their mortgages between **2002 and 2007**, the margin taken by the Provider was in the region of 1.3% to 1.5% with little variation. They submit that that margin increased progressively from the year **2008** onwards up to 4.29% at one point, which is almost treble the margin taken in the first six years of the mortgage.

They argue that this is unfair, and that no reasonable consumer could have expected that the Provider would treble its margin and pass it off under the guise of a change in interest rate. They submit that, contrary to the Provider's arguments of the drastic implications for variable mortgages in Ireland, striking down the variable rate would be favorable for variable rate mortgage holders.

The Complainants submit that the manner in which the Provider has increased the variable interest rate to increase its margin over the ECB and Euribor interest rates, from about 1.5% to 4.29% using a vague clause is an unfair and misleading commercial practice within the meaning of ***sections 41 – 46 of the Consumer Protection Act 2007*** (the **2007 Act**).

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The Complainants further submit that ***General Condition 6(a)*** is an unfair term under the UTCC Regs as it covers the risk of only one party to the contract (ie the Provider). They argue that the margin over ECB/Euribor almost trebled from what it was at draw down and the Provider has failed to pass on ECB rate reductions to its variable rate customers. They argue that they had no strength in bargaining position vis-à-vis the Provider, and were offered two inducements to agree to the term: (i) a margin at the time the mortgage was drawn down of about 1.5% over ECB/Euribor; and (ii) a discounted variable rate for the first year of the **2005** mortgage. The Complainants argue that the Provider has not taken into account their legitimate interests and it has penalised them for its risky lending practices.

The Complainants rely on the decision of the CJEU in *Aziz v Catalunyacaixa* (Case C-415/11) and argue that in individual contract negotiations they would not have accepted a variable interest rate clause that had the potential to allow the Provider to increase its margin by almost treble.

The Complainants argue that certain European case law specifies that the mortgage documentation should have specified exactly how and in what circumstances the variable interest rate would be increased so that at the time of signing, the Complainants could foresee what might happen to the interest rate. Copies of the relevant case law were submitted. For example, the Complainants argue that the decisions of the CJEU in *Matei* (Case C-143/13) and *Marc Gomez del Moral Gausch v Bankia SA* (Case C-125/18) support their argument that the variable interest clause is an unfair term. The Complainants argue that the ***General Condition 6(a)*** did not set out the risk that the margin could almost treble.

The Complainants argue that the decision of *Financial Services Ombudsman v Millar* [2015] IECA 127 (relied on by the Provider) is not relevant as it was worded differently by reference to market conditions and the issue of unfair terms was not raised in that complaint. They also deny that the case of *Paragon Finance v Nash* relied on by the Provider is relevant, as it does not concern the same provisions as their complaint.

The Complainants argue that they should be entitled to make a complaint in respect of unfair terms to this Office. They point out that the UTCC Regs were enacted before this Office was created, so the lack of reference to this Office in the UTCC Regs makes sense in that context. The Complainants argue that the Provider is carrying on a trade of banking and a business of banking under the ***Consumer Protection Act 2007***.

The Complainants disagree with the Provider that this Office cannot investigate their complaint in respect of unfair terms as they previously communicated the substance of their complaint to the Provider complying with section 57BX(6) of the 1942 Act and the Provider has addressed it extensively.

The Complainants argues that under Reg 5 of the UTCC Regs, in cases of doubt as to the meaning of a term, the interpretation most favourable to the consumer shall prevail. They submit that based on the case law, the interpretation of the variable interest rate clause most favourable to them should prevail and they request that interest be refunded on their mortgage in excess of ECB rate plus a margin of 0.75%.

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The Complainants are seeking a refund of the difference between interest calculated at the suggested tracker rate, and the variable rate, from commencement date on their mortgages to date, and they are seeking the application of the tracker interest rate to each of the accounts henceforth.

The Provider's Case

The Provider submits that the complaint primarily concerns the contention that the Complainants were not offered tracker rates in **2002** and **2005** and therefore that complaint is time barred under section 57BX(3)(b) of the ***Central Bank Act 1942***.

The Provider accepts that tracker interest rates were widely available when Offer Letters issued to the Complainants on **26 July 2002 and 21 November 2005**. It argues that it is the mortgage adviser's role to explain the options available but it makes no recommendation as to rates, which is a decision for the customer to make. It submits that the Offer Letters prove that the Complainants were willing to accept a non-tracker variable rate.

The Provider argues that there is no provision for a tracker rate in either Offer Letter and it refers to the terms of ***General Condition 6(a)*** which allows it to vary the interest rate at its discretion. It argues that it was under no obligation to insert a provision in either Offer Letter offering a tracker rate and there is no evidence on file that the Complainants ever sought a tracker rate in **2002 or 2005**.

The Provider argues that the tracker rate was not always seen as the most attractive option. It notes that both Offer Letters issued prior to the introduction of the ***Consumer Protection Code 2006*** (**CPC 2006**).

The Provider states that a rate options letter issued to the Complainants on **11 December 2006** prior to the expiry of the discounted variable rate. At the time of responding to this Office, it said that the letter had issued more than 8 years previously, and a copy was no longer available. It argues that the letter was not returned by the Complainants.

The Provider submits that the Complainants have failed to adduce any evidence that they requested a tracker rate in the period **8 November 2007** to **8 October 2008**. The Provider argues that it was not obliged under any regulatory provision to unilaterally offer to customers in general, the option to amend terms and conditions simply because it provided other customers with products with different attributes.

The Provider argues that the mortgage condition is enforceable and that its variable rate is broadly aligned with rates provided by its competitors in Ireland.

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The Provider objects to this Office considering a complaint in respect of unfair terms as there was no reference to unfair terms in the complaint form submitted to this Office on **6 November 2013** which was framed as a complaint about tracker rates. The Provider argues that the Complainants failed to invoke its internal complaints procedure on the question of ***General Condition 6(a)*** and the Provider's discretion thereunder. Accordingly, it argues that this Office is precluded under section 57BX(6) of the 1942 Act from investigating the assertions concerning ***General Condition 6(a)***.

The Provider further argues that only the Circuit Court or High Court has power to declare a term drawn up for general use in contracts to be unfair, pursuant to regulation 8 UTCC regs as amended. It submits that it is clear that in framing the UTCC Regs, the Minister exclusively empowered the courts to make such a declaration and did not empower administrative bodies such as this Office, to do so. Furthermore, it submits that this Office is not an authorised body which is entitled to apply to the Circuit Court or High Court for such a declaration. When responding, it argued that this Office could only find a complaint to be substantiated for the reasons set out in section 57CI(2) 1942 Act (now, Section 60 of the Financial Services and Pensions Ombudsman Act 2017) which makes no mention whatever of the UTCC Regs. The Provider submits that there cannot be any implied power for this Office to make a finding in respect of UTCC Regs.

In respect of its discretion to vary the interest rate, the Provider relies on the wording of ***General Condition 6(a)*** which allows it to vary the rate upwards or downwards. It submits that the Offer Letters were clear on the nature of the variable interest rate being offered. It argues that the Complainants were advised to take legal advice on the offers. The Provider submits that the Complainants did not seek from it an interest rate that was a margin above a reference rate (eg Euribor) before signing the offer letters. It argues that the offer letters make no provision for an interest rate that is an agreed margin above Euribor, or any other reference rate. It argues that only a minimum margin is provided for.

The Provider argues that the agreement between the parties allows the interest rate to be varied at the Provider's discretion. It submits that provision for such discretionary rates have been commonplace in the Irish market for decades, and remain so. It submits that its discretionary power is not completely unfettered and there is an implied term that it cannot exercise the power to vary interest dishonestly, for an improper purpose, capriciously or arbitrarily; *Paragon Finance plc v Nash* [2001] EWCA Civ 1466.

The Provider argues that there is no obligation on a lender to provide for a mortgage interest rate to be an agreed margin above a reference rate and, if there was, it must be provided for in the offer letter.

It submits that ***General Condition 6(a)*** is fair, including by reference to *Paragon Finance plc v Nash* [2001] EWCA Civ 1466. It submits that there is an implied term that an apparently unfettered discretion will not be exercised arbitrarily, capriciously or unreasonably (in the *Wednesbury* sense).

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The Provider denies that the case law relied on by the Complainants substantiates their contention regarding the unfairness of ***General Condition 6(a)***. It argues that the case of *Matei* concerned a phenomenon of Swiss franc mortgages for Eastern European customers which is a notorious social political issue, with no parallel in eurozone countries like Ireland. It argues that it would seem that the bank in that case, could change interest in a discretionary manner but with no comparable implied term restricting the exercise of that discretion. It accepts that the CJEU indicated that the term was not a core term, but clearly left it to national courts to determine if a clause allowing variation in interest rates is or is not a core condition. It submits that ***General Condition 6(a)*** typifies a longstanding well recognised type of term in a consumer mortgage in an Irish context and that Irish courts should regard it as a core term. Alternatively, it argues that if it was not a core term, ***General Condition 6(a)*** is not unfair.

The Provider argues that the Complainants' position overlooks the point that ***General Condition 6(a)*** allows the lender to vary the interest rate upwards as well as downwards. It submits that the initial interest rate on the Complainants' mortgage account was 4.74% which was 0.3% higher than the interest rate of 4.34%, which applied in May 2016. It submits that the rate has been reduced to as low as 2.54% and only exceeded the initial rate of 4.74% in the very particular conditions in the period **March 2007 to November 2008** (when it reached a high of **5.79**%). The Provider said in May 2016, that if the bank had never exercised its discretion to vary the interest rate, the Complainants would have been charged more than €14,500 more on interest on each mortgage account in the period from drawdown, a total of more than €29,000.

The Provider argues that the question as to whether a term is unfair must take into account the nature of the goods and services and all circumstances attending to the conclusion of the contract and all other terms of the contract. It argues that the circumstances in this complaint are that two mortgage loans were advanced in **2002 and 2005** in circumstances where a variable interest rate was commonplace in the Irish market, and had been for decades before that.

The Provider further argues that to be unfair, a term must cause a significant imbalance to the detriment of a consumer but that the operation of ***General Conditions 6(a***) has predominantly favored the Complainants, compared to the initial rate that applied to their loans.

The Provider submits that the Complainants are effectively seeking a tracker rate, as they seek to force the Provider to reduce its interest rates to a margin above a reference rate.

The Provider argues that this Office has no jurisdiction to strike out a generally applicable term and that this would have fundamental and drastic implications for many thousands of standard variable rate mortgages written in Ireland, since **1995.**

The Provider argues that the complaint is time barred insofar as it concerns anything that happened more than six years before the complaint was made to this Office.

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The Provider argues that the mortgage offer letter dated **26 July 2002** for mortgage loan account *****530 provided that the interest rate would be a variable rate for the term of the loan. It submits that the mortgage offer letter dated **29 November 2005** for mortgage loan account *****092 provided that a discounted standard variable rate would apply for the initial 12 months, and thereafter the prevailing home loan variable rate, for the remaining term of the loan. It submits that ***General Condition 6(a)*** to both offer letters clearly states that the variable rate offered by the Provider is one that can be amended at the lender's discretion, rather than an interest rate that follows the movement of the ECB repo rate.

The Provider argues that:-

> "*the pricing of its variable rates for mortgages is a commercial decision for the Provider which takes into account a number of different internal and external factors including, but not only, funding costs*."

The Provider refers to a decision of this office referenced in *Financial Services Ombudsman v Millar* [2015] IECA 127 where it was accepted that a bank was not obliged to openly discuss the criteria it applies for making decisions to alter variable rates, by reference to market conditions. The Provider argues that this position is correct and it is not obliged to disclose financially sensitive information of that sort.

The Provider submits that ***General Condition 6(a)*** is clear in its wording and permits the Provider to vary rates upward and downwards, at its discretion. It submits that there is no promise in that condition that the Provider will vary the rates in any particular circumstance or at any particular time.

The Complaint for Adjudication

The complaint is that:

1. the Provider acted wrongfully and/or unreasonably in not having offered the option of a tracker mortgage rate to the Complainants in respect of their mortgage loans at any time, during the continuing period from **July 2002 to October 2008**, when such interest rates were generally being offered by the Provider to its customers; and

2. the Provider has wrongfully amended the variable rate of interest which applies to the Complainants' mortgage loan, which variable interest clause comprises an unfair term under the UTCC Regs.

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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 **20 June 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.

I note that a **Mortgage Loan Offer Letter** dated **26 July 2002** issued to the Complainants in respect of mortgage account *****530. Part I of the Loan Offer provided as follows:

> *"IMPORTANT INFORMATION AS AT 26 JULY 2002*
>
> *1. Amount of Credit Advanced* — *€190,000*
> *2. Period of Agreement* — *20 years*
>
> | *3. Number of Repayment Instalments* | *Instalment Type* | *4. Amount of Each instalment* |
> |---|---|---|
> | *240* | *Variable at 4.740%* | *€1,224.85* |
>
> *5. Total Amount Repayable* — *€293,964.00*
> *6. Cost of This Credit (5 minus 1)* — *€103,964.00*
> *7. APR* — *4.8%. ….*
>
> *10. Effect on amount of instalment of 1% increase in first year in interest rate €105.05*"

Under Part 4 of the Loan Agreement, headed "**The Special Conditions",** the variable nature of the interest rate was made clear.

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The loan stated that:-

> *"(iii) [t]he interest rate applicable to this loan is the Bank's Homeloan variable rate. Being a variable rate, the interest rate may change upwards or downwards."*

I note that another **Mortgage Loan Offer Letter** dated **21 November 2005** issued to the Complainants in respect of mortgage account *****092. Part I of the Loan Offer provided as follows:

> *"IMPORTANT INFORMATION AS AT 21 NOVEMBER 2005*
>
> *1. Amount of Credit Advanced* *€225,000*
> *2. Period of Agreement* *20 years*
>
3. Number of Repayment Instalments	*Instalment Type*	*4. Amount of Each instalment*
12	*Variable at 2.690%*	*€1,212.55*
228	*Variable at 3.600%*	*€1,310.51*

> *5. Total Amount Repayable* *€313,346.00*
> *6. Cost of This Credit (5 minus 1)* *€88,346.88*
> *7. APR* *3.5%. ….*
>
> *10. Effect on amount of instalment of 1% increase in first year in interest rate €113.11"*

I note that under Part 4 of the Loan Agreement headed "**The Special Conditions",** the following was set out at (i):

> *"The interest rate applicable to the loan has been discounted by 0.91% per annum on the amount of the Loan for a period of 12 months from the date of drawdown of the Loan. At the end of the said discount period the reduction shall cease and the interest rate applicable to the loan shall revert to the then prevailing Home Loan variable rate. The discount set out in this special condition is the discount which would apply if the Loan were drawn down today. There is no guarantee that this discount will be available when the loan is in fact drawn down. The actual discount that will apply shall be the discount then offered by the Lender at the date of drawdown."*

I note that immediately below "**The Special Conditions**", both Offer Letters contained the following warning:

> "*This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices as set out on the last page of this Offer Letter*."

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Part 5 of both Offer Letters set out the General Conditions applicable to each mortgage loan. ***Clause 6*** entitled ***Variable Interest Rates*** provides as follows:

> *"(a) Subject to clause 6(c), at all times when a variable rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
>
> *(b) The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c), or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
>
> *(c) Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR)."*

I note that ***General Condition 1(c)*** provides that any notice or demand shall be sufficiently given to or served on the borrower if left or sent by ordinary prepaid post addressed to the borrowers at the address of the property or at the borrower's last known place of abode. It states in the case of joint borrowers, any notice or demand shall be sufficiently given or served on all borrowers, if given or served on the first name borrower only.

It is argued on behalf of the Complainants that ***General Condition 6(a)*** – "*at all times when a variable rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards*" – amounts to an unfair term within the meaning of the UTCC Regs and that, accordingly, the Complainants have been overcharged by the Provider in respect of their mortgage repayments.

Procedural Background

As there are a number of issues arising in this complaint in respect of jurisdiction, time limits and scope of complaint, I consider it useful to briefly set out the chronology. This Office received a complaint from the Complainants in relation to the conduct of the Provider on **8 November 2013**. The Complainants hold two mortgage loan accounts with the Provider bearing account numbers *****530 and *****092. The initial complaint concerned the rate of interest applied to the mortgage loan accounts and, in particular, the suggested failure of the Provider to offer a tracker interest rate to the Complainants, when they say that this ought to have been done.

By letters dated **24 March 2015**, the Complainants and the Provider were invited by this Office to consider mediation of the complaint before a formal investigation. As the complaint was not resolved, the Complainants and the Provider were informed by letter dated **15 April 2015** that the complaint would proceed to formal investigation and adjudication.

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By letter dated **14 April 2015** to this Office, the Complainants raised an issue in relation to the rate of variable interest being applied to their mortgage loan accounts, having previously raised the issue with the Provider.

To commence the formal investigation, a Summary of Complaint was sent by this Office to the Provider on **28 May 2015** and this raised certain questions with, and requested certain documentation from, the Provider. The Provider fully responded to these requests by letter dated **25 September 2015**.

By letter to this Office dated **27 August 2015**, the Complainants contended, amongst other things, that ***General Condition 6(a)*** of their mortgage loans was an unfair term pursuant to the UTCC Regs. In its letter of **25 September 2015**, the Provider expressed its view that no complaint about the variable interest rate was raised in the initial complaint.

In a letter to the Provider dated **26 November 2015**, the Complainants suggested (inter alia) that ***General Condition 6(a)*** of their mortgage loans was an unfair term pursuant to the UTCC Regs. The Complainants also said that the Provider had engaged in unfair and misleading commercial practise contrary to the ***Consumer Protection Act 2007*** (the **2007 Act**). The Provider responded by letter dated **4 December 2015** that the issues raised "*overlap with your current complaint*" before this Office "*and in particular your dispute as to the efficacy and enforceability of clause 6A*".

A second complaint was submitted to this Office by the Complainants on **14 December 2015** which was focused on the unfairness of the variable interest clause. The Complainants contended, amongst other things, that ***General Condition 6(a)*** of their mortgage loans was an unfair term pursuant to the UTCC Regs. The Complainants also said that the Provider had engaged in unfair and misleading commercial practice contrary to the 2007 Act. The Complainants confirmed by letter dated **20 January 2016** that they only wanted the second complaint investigated, if the issues could not be investigated under this complaint.

By letter dated **24 February 2016**, this Office determined that it was unnecessary to separate the two aspects of the complaint (ie the tracker complaint and the complaint about the variable interest rate clause). The Provider was invited to submit any further observations or comments that it wished to make in respect of the more recent aspect of the complaint.

By letter dated **25 May 2016**, the Provider submitted that this Office has no power under section 57CI of the ***Central Bank Act 1942*** to strike down ***General Condition 6(a)*** as the Complainants had requested. It also reiterated that there was no reference to ***General Condition 6(a)*** in the initial complaint to this Office.

By letters dated **30 May 2016**, this Office indicated to the Complainants and the Provider that it must consider whether it would be appropriate to make a determination to discontinue its investigation into the unfair terms' aspect of the complaint, because the issues raised may be more appropriate for, and may warrant the views of, the High Court.

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By letter dated **20 June 2016**, the Provider stated that it agreed that the investigation should be discontinued. It further argued that the complaint was time barred as regards anything that happened more than 6 years before the complaint was made.

By letter dated **21 June 2016**, the Complainants submitted that the complaint falls within the jurisdiction of this Office and that there was no alternative and satisfactory means of redress available to them in relation to the conduct complained of.

By letters dated **7 December 2017**, this Office wrote to the Complainants and the Provider to inform them that, having taken legal advice, it was not necessary to make a referral to the High Court as this Office had formed the unequivocal opinion that it is entitled to consider and take into account the provision of the UTCC Regs in the context of its adjudications. It notified the parties of its intention to progress the investigation and adjudication of the complaint.

By letter dated **10 November 2020**, this Office wrote to the Provider identifying that the nature of the complaints made by the Complainants were expanded since the Summary of Complaint had issued on **28 May 2015,** to include arguments that ***General Condition 6(a)*** is an unfair term. The Provider was requested to confirm the reasons underlying its amendments to its variable rate of interest and whether such explanation had previously been given to the Complainants. The substance of the Provider's response, by letter dated **19 November 2020,** is set out above.

Scope of Complaint

As communicated in a letter to the Provider dated **24 February 2016**, this Office determined that it was unnecessary to separate the two aspects of the complaint – ie the aspect relating to the failure to offer a tracker rate and the aspect relating to the variable interest clause – from the ongoing investigation. The Provider was invited to submit any further observations or comments that it wished to make, in respect of the second aspect of the complaint.

I am satisfied that the Complainants raised the issue of the variable interest rate (including argument as to unfair terms and misleading commercial practices) at an early point in the investigation of the complaint and had previously brought an issue in respect of the extent of the Provider's discretion in varying interest rates, to the attention of the Provider by letter dated **2 March 2015**.

The Complainants raised those complaints directly with the Provider by letters dated **26 November 2015** but the Provider responded that the issues raised were being dealt with in the context of the present complaint. In addition, this Office raised further questions of the Provider in respect of its variation of interest rates by letter dated **10 November 2020** so a further opportunity was given to the Provider to respond to that aspect of the complaint.

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I am satisfied that the Provider has had ample opportunity to make any submissions it considers necessary on the operation of the variable interest clause, including as to unfair terms and misleading commercial practices, and therefore no question of any prejudice arises. I am further satisfied that the Complainants availed of the Provider's internal complaint procedure by letters dated **2 March 2015** and **26 November 2015**, and the Provider responded to each with a final response letter.

Accordingly, the two aspects of the complaint come within the adjudication set out by this Office in this Decision.

Tracker Complaint and Time Limit

One aspect of the present complaint is the suggested failure by the Provider to offer the Complainants a tracker rate on their mortgage loan at the time they took out their mortgages in **August 2002 and November 2005** or at any time thereafter, until the Provider withdrew its tracker rate offering in **October 2008**.

The present complaint was received on **8 November 2013**. Pursuant to section 57BX of the ***Central Bank Act 1942*** (as amended) (the **1942 Act**) which was applicable at the time the complaint was received:

> *"(3) A consumer is not entitled to make a complaint if the conduct complained of—*
> *….*
>
> *(b) occurred more than 6 years before the complaint is made ….*
>
> *(5) For the purpose of subsections (3) and (4), conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred*."

Similar provisions are prescribed by the ***Financial Services and Pensions Ombudsman Act 2017*** (the **2017 Act**.

The Complainants have argued that the conduct started in **July 2002** at the time of their first mortgage and continued until **October 2008** when the Provider ceased to offer tracker rates to its customers. The submit that this amounts to conduct of a continuing nature, and that therefore it should be taken to have occurred when it stopped in **October 2008,** in accordance with section 57BX(5) of the 1942 Act.

This Office wrote to the Complainants by letter dated **9 December 2013** noting its opinion that the conduct referred to was not of a continuing nature, as contended. This Office also asked for any evidence that the Complainants had specifically sought a tracker rate from the Provider at any time from **8 November 2007** (ie within 6 years of the receipt of the complaint).

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The Complainants were asked to address the Provider's initial response that both mortgages were on variable rates, so the Complainants always had the option to change to a tracker rate at any stage up to **October 2008**.

The Complainants argued that the option of a tracker rate was never communicated to them by the Provider at any stage and that it was conduct of a continuing nature.

This Office confirmed by letter to the Complainants dated **10 March 2015** that due to the time limits applicable, no issue prior to **8 November 2007,** would be examined.

In a letter dated **2 April 2015**, the Provider notified the Complainants that it could not locate a copy of a rate offer letter that it had issued to them on **11 December 2006**. It stated that the rate offer would have included the Homeloan Standard Variable rate (4.64% at the time), the one-year fixed rate of 4.45% and the two-year fixed rate of 4.49%. The Complainants argue that this submission from the Provider demonstrates that no tracker rate was offered to them, despite that fact that such rates were generally being offered by the Provider to its customers.

I do not accept that the conduct complained of by the Complainants was continuing conduct within the meaning of the governing legislation, and therefore the position remains as already communicated to the Complainants, in **March 2015**, that no issue prior to **8 November 2007** will be examined.

In respect of the alleged failure of the Provider to offer a tracker rate in **2002 and 2005** when the mortgages were taken out, this complaint cannot be investigated because it falls outside the 6-year time limit. Further, in respect of the allegation that the option of a tracker rate was not offered by the Provider in the letter of **11 December 2006**, again this aspect falls outside the 6-year time limit. In addition, I do not consider any alternative time limit to be relevant, given the Complainants' awareness, at all times throughout the relevant period, that no tracker rate had been offered to them.

There is no reference to the provision of a tracker rate or tracker rate option in the Offer Letters accepted by the Complainants in **2002 and 2005** and I am satisfied on the evidence, that the Complainants had no contractual entitlement to such an offer. It does not appear that the Complainants requested a tracker interest rate from the Provider from **8 November 2007**, or indeed at any time. The kernel of their complaint seems to be that they should have been offered such a rate at some point by the Provider.

I do not accept that the Provider was under any such obligation. There is no ongoing obligation on a financial service provider to keep its customers apprised of new or different product offerings or interest rates that might be available to those customers at any given point in time.

Consequently, I do not consider it appropriate to uphold this aspect of the complaint.

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Since the preliminary decision of this Office was issued on 20 June 2022, the Complainants have submitted, amongst other things, that

> *"We suggest you defer your decision until the Central Bank of Ireland publishes its findings on the Tracker Mortgage Examination of* [Provider] *to give us an opportunity to make a further submission based on those findings and to give you the opportunity to consider if any of the findings are relevant to your decision."*

I do not consider it suitable to postpone the final adjudication of this complaint, because a separate and very different process directed by the Central Bank of Ireland (CBI), in its capacity as the regulator of financial service providers, may remain ongoing. The Tracker Mortgage Examination directed by the CBI, will not make any findings regarding the individual contractual arrangements between the Complainants and the Provider.

UTCC Regs Jurisdiction

The question arose in the investigation of this complaint whether this Office is entitled to find that a term is unfair under the UTCC Regs in adjudicating a complaint. The Provider has argued that it is not, and it says that this Office is not empowered to strike down or disapply a clause that it considers to constitute an unfair term, that power being reserved for the courts.

The legislature has empowered this Office to investigate complaints in relation to the conduct of financial service providers. In so doing, it has not specified the particular laws that are appropriate for this Office to consider.

The courts have specified, on appeals from decisions of this Office, that this Office is obliged to consider certain legal provisions, including an obligation to consider general consumer law of which the UTCC Regs form a part. In *Irish Life and Permanent plc v Financial Services Ombudsman* [2011] IEHC 439, for example, White J held that:

> "*This Court is of the view that the Financial Services Ombudsman, in considering the complaint of the Notice Parties should have applied the provisions of the Consumer Protection Code August 2006, the obligations of the Appellant under its own rules, regulations and code of conduct, and general consumer law*." (my emphasis)

Further, the courts have allowed appeals against findings of this Office in situations where the court considered that there were legal provisions or principles that had not been considered by this Office in making its determination.

A good example of this is the case of *Haverty v Financial Services Ombudsman* [2013] IEHC 233 where Kearns P allowed an appeal against a finding of the then FSOB and remitted the matter for further consideration of the possible implications for the validity of charges on a family home, in the absence of a written consent of the second appellant pursuant to the ***Family Home Protection Act 1976***. Notably, the potential impact of the 1976 Act, had not been raised by either party when the complaint was being investigated by the FSOB.

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Section 3 of the ***Family Home Protection Act 1976*** contains similar legislative language to Reg 6 of the UTCC Regs. Section 3(1) provides as follows:

> "*Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void*."

Section 3 does not identify the courts or bodies that are entitled to make a determination that the purported conveyance is void for lack of prior written consent. Section 4 of the 1976 Act specifies that "*the court may . . . dispense with the consent*" (section 4(1)) and section 10 confirms that the Circuit Court and the High Court have concurrent jurisdiction in this regard, subject to the rateable valuation of the family home.

Although the question of the FSO's jurisdiction to consider the 1976 Act does not appear to have been canvassed at the Haverty hearing, it is implicit in this decision that Kearns P was of the view that the FSO was obliged to consider the possible application of section 3 thereof; specifically whether the purported conveyance was void without the prior written consent of the second named appellant. The limitation contained in section 4 as to the jurisdiction of the court to make an order dispensing with consent, did not impact upon this conclusion by the High Court.

On the basis of this case law, I am of the view that this Office is obliged to consider relevant legislation (including consumer law legislation), case law, and Central Bank of Ireland Codes of Conduct when adjudicating complaints. A material failure to consider a relevant legal provision can result in the complaint being remitted by the High Court for further determination.

There is no compelling argument, in my view, that would preclude me from consideration of the UTCC Regs in this context, for the following reasons:

Council Directive No 93/13/EEC on unfair terms in consumer contracts (the **UTCC Directive**) is not prescriptive on the forum in which determinations can be made as to whether a term is unfair. The recitals to the UTCC Directive confine themselves to stating:

> *"Whereas persons or organisations, if regarded under the law of a Member State as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a Court or before an administrative authority competent to decide upon complaints or to initiate appropriate legal proceedings…*
>
> *Whereas the Courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts."*

Thus, the Directive leaves it to the Member States to determine the manner in which facilities for initiating proceedings challenging unfair terms, are to be provided.

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The UTCC Regs do not purport to limit or identify the fora in which a claim to the effect that a term was unfair, can be heard or determined. Rather it simply sets out that *"[a]n unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer*"; Reg 6(1).

Reg 8(1) of the UTCC Regs (as amended by the ***European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013***) provides that an authorised body (including the Competition and Consumer Protection Commission and the Central Bank of Ireland) can apply to either the Circuit Court or the High Court for a declaration prohibiting the use of any terms in contracts concluded by sellers or suppliers adjudged by the Court to be an unfair term.

I note that Reg 8(9) then provides that:

> "*Paragraphs (1) and (4) of this Regulation are without prejudice to the right of a consumer to rely upon the provisions of these regulations in any case before a court of competent jurisdiction*."

The Supreme Court described the Reg 8 power in the following terms in *Pepper Finance Corporation (Ireland) DAC v Cannon* [2020] IESC 2:

> "*113. Article 8 of the Regulations confers a power on an authorised body (the Central Bank, the Competition and Consumer Protection Commission, or an authorised consumer organisation) to apply to either the Circuit Court or High Court for a declaration that any term drawn up for general use in contracts concluded by sellers or suppliers, or any similar term used or recommended by any seller or supplier, is unfair. The Court may grant an order prohibiting the further use of such a term. Injunctive relief is available ancillary to this jurisdiction, which does not appear to have been widely invoked. The power is without prejudice to the right of a borrower to rely upon the Regulations.*"

This Office is not an authorised body for the purposes of applying to the court under Reg 8. As an impartial arbiter of disputes between consumers and financial service providers, it may not be an appropriate body to make such applications. But in my opinion, it does not follow that simply because this Office is not empowered to seek a declaration before the courts under Reg 8, that it should be otherwise unable to consider the UTCC Regs when investigating complaints about the conduct of financial service providers.

Reg 8 does not, in my view, specify the bodies or courts that can determine whether a term is unfair under the UTCC Regs. I am of the view that the purpose of Reg 8(9) is simply to confirm, for the avoidance of doubt, that a consumer still had the right to rely upon the UTCC Regs in any case before a court of competent jurisdiction, in circumstances where an authorised body is being given the right to apply to the Circuit Court or the High Court for certain, specified reliefs. The purpose is not, in my view, to suggest that the UTCC Regs cannot be relied upon in any other forum, including in a complaint to this Office. In my opinion, such a conclusion is not mandated by the UTCC Regs and might in any event breach certain European law principles.

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In *Minister for Justice v Workplace Relations Commission* [2020] 2 IR 244, [2017] IESC 43, Clarke J held that:

> *"6.1 In the ordinary way questions relating to the procedure, which needs to be followed before national courts or tribunals, in cases involving an assertion of rights under European Union law, are left to the procedural law of the Member State concerned. That rule of European Union law has been described as one which confers procedural autonomy on the Member States. It is also clear, as a matter of Union law, that a similar approach is adopted to national rules which determine the court or tribunal which is to have jurisdiction in respect of any particular matter in which it is sought to enforce Union law rights. …*
>
> *6.2 First, it may be that European Union law itself makes provision for at least some aspects of the procedure which requires to be followed. …*
>
> *6.3 Second, any measure of national procedural law must comply with the principle of equivalence. Under this principle the procedure to be followed in enforcing a claimed entitlement under Union law must be equivalent to the procedure which would be followed in the same national court by a party seeking to pursue an analogous claim based purely on national law.*
>
> *6.4 Third, national procedural law must comply with the principle of effectiveness. Under this principle the procedures required to be followed in proceedings seeking to place reliance on entitlements guaranteed by Union law must be such as provide an effective remedy being one which is not 'practically impossible or excessively difficult.' …*
>
> *6.8 It follows that it is constitutionally permissible to confer what are described as 'limited functions and powers of a judicial nature' on a body or tribunal which does not qualify as a court. However, if such a body is dealing with matters which are governed or influenced by European Union law then such a body must, as a matter of Union law, have any necessary power or jurisdiction required to ensure that Union law can be effectively enforced in Ireland. There may also be circumstances where a body or tribunal (or indeed a lower court) which is properly seised of proceedings of a particular type must be held to have a jurisdiction to ensure that Union law is fully effective in any case properly before it. In those circumstances a measure of national procedural law which would require that a case properly before the tribunal or lower court concerned could not provide a full remedy (without referring some aspect of the case to another court) may not be permissible as a matter of Union law."*

There is an obligation under EU law on national courts and other competent authorities in applying domestic law giving effect to a directive, to interpret it, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by that directive. This is referred to as the doctrine of harmonious interpretation.

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As explained by Charleton J, "*In circumstances where an ambiguity arises, both this court and any administrative body . . . is obliged to construe national legislation in the light of the obligation under European law in which it had its origin*."; *Minister for Justice, Equality and Law Reform v Director of the Equality Tribunal* [2010] 2 IR 455.

This Office is a competent body called upon to interpret national law in the context of adjudicating complaints about the conduct of financial service providers, and therefore is bound by the doctrine of harmonious interpretation in its interpretation of the UTCC Regs. The recitals to the UTCC Directive refer to the responsibility of Member States to ensure that contracts concluded with consumers, do not contain unfair terms.

Allied to this consideration is the principle of equivalence which provides that rights under European law should be treated no less favourably than those granted by national law. Any argument that this Office has no jurisdiction in relation to the UTCC Regs (based, for example on Reg 8(9) UTCC Regs) could amount to a breach of the equivalence principle as it would allow this Office to take account of principles of Irish law but not a measure with an EU law genesis. At a minimum, if it was intended that this Office should have no role in considering and applying the UTCC Regs, it is my view that this would have to be set out expressly and clearly in the UTCC Regs. I do not consider that the wording of Reg 8(9) UTCC Regs sets this out.

This Office is called upon to interpret national law and having regard to EU principles of equivalence, effectiveness and harmonious interpretation, I am of the view that the Office is under an obligation to apply all relevant EU law, where necessary and appropriate. This includes, in the present case, the UTCC Regs.

I do not accept the argument that simply because the 1942 or 2017 Acts do not specify that a complaint can be upheld under the UTCC Regs, that this precludes the consideration of the UTCC Regs. No specific legal provision is identified in the governing legislation in this regard. This Office is entitled to determine the legal rights and obligations of parties to a complaint, to determine whether the conduct that occurred, *inter alia*, was "*contrary to law*".

If a contractual term is adjudicated as unfair and hence is not binding upon the consumer under Reg 6(1) UTCC Regs, the previous purported application of that term by the financial service provider could be described as conduct that is contrary to law, on the basis that the Provider had no legal entitlement to apply the unfair term in the first place, so its application was in contravention of the parties' rights and obligations under the contract. This analysis will, of necessity, depend on the precise issues arising in the individual complaint and the effect, if any, of the application of the unfair term. In such a situation, the complaint might potentially be upheld under another sub-section of section 60(2) of the 2017 Act.

In light of all of these considerations, I am of the view that this Office can consider the UTCC Regs in the investigation and adjudication of this complaint.

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Unfair Term under the UTCC Regs

The UTCC Regs apply only to contractual terms that have not been individually negotiated. It is common case that the term in dispute between the parties, forms part of the Provider's terms and conditions and so is a standard form clause, that was not individually negotiated with the Complainants. Reg 3(2) UTCC Regs defines an unfair term as follows:

> "*a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.*"

Reg 3(3) provides that regard should be had to the matters specified in Schedule 2 in determining whether a term satisfies the requirements of good faith. These will be considered below.

Reg 4 UTCC Regs provides that "*A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language*." Accordingly, a term cannot be found to be unfair under the UTCC Regs if it relates to the main subject matter of the contract or to the adequacy of the price and remuneration provided that the term in question is expressed in plain, intelligible language.

I do not consider that ***General Condition 6(a)*** relates to the main subject matter of the contract or to the "*adequacy of the price and remuneration, as against the goods and services supplied*." While it relates to the interest rate that will be applied to the loan and, in particular, the Provider's discretion to vary it, it is not the "*adequacy*" of the price or remuneration as against the service provided, that is at issue. While certain Irish case law has considered interest rate variation clauses to fall outside the scope of the UTCC Regs on the basis of Reg 4 UTCC Regs, this is not the approach that has been adopted more recently by the Supreme Court in *Cannon*, as discussed below.

Further, decisions of the CJEU suggest that an interest variation clause should not fall within the derogation. In the case of *Matei* (Case 143-13), the CJEU pointed out that:

> "*63. Finally, those terms also appear to fall outside the scope of Article 4(2) of Directive 93/13 because, subject to verification by the referring court, it would seem to be the case from the documents submitted to the Court that their unfairness is raised not on account of the alleged inadequacy of the level of the altered interest rate as against any consideration that may have been supplied in exchange for the alteration, but the conditions and criteria enabling the lender to make that alteration, in particular on the ground alleging 'significant changes in the money market'*."

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Further, the interest rate variation clause must be drafted in plain, intelligible language:

> "74. *It follows, in particular from Articles 3 and 5 of Directive 93/13 and Paragraph 1(j) and (l) and Paragraph 2(b) and (d) of the annex to that directive that it is of fundamental importance, for the purpose of complying with the requirement of transparency, to determine whether the loan agreement sets out transparently the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the lender's remuneration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it*".

It would not appear to me that those criteria are met by ***General Condition 6(a)*** so even if the clause concerned the main subject matter/adequacy of the price (and I do not accept that it does) the clause, in my opinion, does not transparently set out the reasons and mechanism for altering the interest rate and therefore, it is not drafted in plain, intelligible language.

Since the preliminary decision of this Office was issued on 20 June 2022, the Complainants have submitted, that:

> *"This conclusion does not appear to have been given enough significance in the Preliminary decision."*

I disagree. It is because of that conclusion that I am of the view that the clause does not benefit from the Reg 4 derogation, and I must therefore consider whether ***General Condition 6(a)*** it is unfair under the UTCC Regs.

Reg 6(1) UTCC Regs provides that "*An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer*."

The UTCC definitions mirror those of the parent UTCC Directive. In particular, Art 6(1) states that:

> "*Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer*"

In assessing the requirements of good faith for the purposes of Reg 3(2), account must be taken of the following factors set out in Schedule 2:

i. the strength of the bargaining position of the parties,
ii. whether the consumer had an inducement to agree to the term,
iii. whether the goods or services were sold or supplied to the special order of the consumer, and
iv. the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account.

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I do not consider that factors (ii) or (iii) are directly relevant to the analysis in this matter. I do not accept that the Complainants were offered an inducement to agree to the variable interest term, as suggested. Contrary to what they contend, in my opinion, there was no guarantee or commitment given to them at any time in respect of a margin about 1.5% over ECB/Euribor, or any margin. Further, I do not accept that there was any connection between the discounted variable rate offered for the first year of the 2005 mortgage and ***General Condition 6(a)***. In other words, there is no evidence that the discount was offered in return for their agreement to the variable interest rate clause.

In terms of factor (i), I am satisfied that the Provider had the stronger bargaining position in this case and the standard contractual terms were offered to the Complainant on a '*take it or leave it*' basis. That said, the Provider was not the only entity offering mortgage products at the time, and so the Complainants were not without choice of mortgage provider, when they elected to enter the contracts in **2002** and **2005**, or indeed since.

In terms of factor (iv), I do not see that there was anything unfair or inequitable in the manner that the Provider's dealings with the Complainants. ***General Condition 6(b)*** provides for notification of the Provider's intention to vary the interest rate applicable to the mortgage loan.

In addition, a 30-day notice period is mandated under provisions 6.6 and 6.7 of the ***Consumer Protection Code 2012*** (**CPC**). There is no suggestion that these obligations were not complied with. Further, it seems to have been possible at any time, for the Complainants to either select a fixed rate of interest from the rates then on offer from the Provider (such as in December 2006) or to switch their mortgage to another provider, which may have offered a more appealing rate. In examining the issues raised as part of the within complaint, I have noted the Supreme Court decision in the case of *Pepper Finance Corporation (Ireland) DAC v Cannon* [2020] IESC 2, which provides useful guidance as to the application of the UTCC Regs in the context of certain terms in mortgage agreements, including an interest variation clause, whereby the variable rate of interest would vary either upwards or downwards at the lender's discretion.

In respect of the interest variation clause or "*price variation clause*", the Supreme Court identified as follows:

> "*129. The appellants have not challenged any of the main terms of the agreement. In the case of a standard mortgage I take these to be the borrower's obligation to repay the loan and to provide security for it, and the lender's right to take possession of the security in the event that the loan is not repaid. In contending that they have a strong appeal, the appellants focus in particular on the "price variation" clause (that is, the provision that the interest rate would vary at the lender's discretion), the "acceleration" clause (that is, the provision entitling the lender to demand early repayment of the principal and accrued interest in the event that any repayment was not made on the due date), the power to enter into possession of the property in the event of a missed payment or other breach on the part of the borrower and the "transfer of rights" clause (that is, the entitlement of the lender to sell on all or part of the security without notice to the borrower).*

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130. In assessing any given contractual term for unfairness, it should be remembered, firstly, that the primary consequence of a finding that it is unfair is that it becomes unenforceable as against the consumer. The contract remains in being provided it can exist without the unenforceable term. Secondly, where an impugned clause was not in fact invoked against the borrower, it is examined only for the purpose of drawing such inferences as may be appropriate if it is found to be unfair. Such inferences must, it seems to me, relate to the question whether the lender has dealt with the borrower in good faith as defined by the regulations and Directive. Thirdly, the requirement to consider all of the circumstances means that the assessment of fairness should take into account inter alia any relevant EU provisions and any relevant aspects of the national regulatory regime with a view to the remedies against unfairness available to the consumer under national law. There is now in existence a wide range of consumer protection legislation which may apply to mortgages, and the following discussion should not be seen as exhaustive.

131. On the face of it, the interest variation clause comes within the exemption in Article 2(b) of the Regulations (which relates to subparagraph (j) of the Annex to the Directive), permitting a supplier of financial services to reserve the right to alter the interest rate without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party at the earliest opportunity and that the latter can dissolve the contract immediately. Of course, dissolving the contract will not extinguish the debt, which may limit the practical desirability of this option from a borrower's point of view. However, there are other relevant considerations.

132. Prior to 2016 the primary information that had to be furnished to consumers entering into mortgage agreements was set out in the Consumer Credit Act 1995. This included a statement of the total cost of the credit being provided, and also a calculation of the effect of an increase in the interest rate of 1%. This information was provided to the appellants. The obligations in respect of information are now largely dealt with in the European Union (Consumer Mortgage Credit Agreements) Regulations (S.I. 142/2016), which, in addition to the information requirement already discussed, stipulate that the borrower must be informed of the change in the interest rate and of the consequent change in the payment instalments. As a result it may be that, depending on the circumstances, a failure to inform the borrower in due course would result in a court refusing to find that the extra sums claimed were due.

133. Another consideration is that if a lender were to attempt to apply an increased interest rate to sums due where a payment is late, then if such a rate is set at a level that is not fairly related to the costs of the lender, the clause is likely under Irish law to be found to constitute an unenforceable penalty by reference either to common law or to Article 29(2) of the European Union (Consumer Mortgage Credit Agreements) Regulations 2016.

134. It appears that in this case the lender reduced, rather than raised, the interest rate after the expiry of the fixed rate period. The consequence was that the monthly instalments were reduced from a figure in excess of €4,800 to c. €3,700. I cannot see

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that any inference of lack of good faith can be drawn from this, and nor does it support the contention that the total sum claimed might not have been due and owing. The appellants have not, therefore, put anything before the Court that could lead to a finding that they can make out any defence in relation to the interest variation clause."

Variable interest rate clauses were also considered in the context of the UTCC Regs by McDermott J in *Grant v The County Registrar from the County of Laois* [2019] IEHC 185. The clause in question permitted the lender to vary the interest rates at its own discretion, and without reference to any factors that it would consider in so doing. The learned judge formed the view that payment of a variable interest rate on the principal sum concerned the main subject matter of the contract and/or the adequacy of the price for advancing the principal sum to the borrowers and, therefore, fell outside the UTCC Regs.

This conclusion must be seen as in possible conflict with the subsequent Supreme Court decision in *Cannon* (above). In my opinion, it is implicit in the Supreme Court's analysis that the interest rate variation clause at issue did not fall within Reg 4 'adequacy of price' derogation, though it is not expressly set out.

In *Grant*, McDermott J further held that if he was incorrect in his opinion, that the clause fell outside the UTCC Regs, it would not in any event amount to an unfair term:

"*110. I am satisfied that the court should take into account whether the contractual terms impugned in this case are normally and regularly included in mortgage loan contracts between consumers and mortgage loan Providers. There is nothing surprising in the inclusion of a variable interest mortgage term in a mortgage loan. I am satisfied that variable interest mortgage loans have been a feature of such contracts for many years. It could not be in any sense regarded as surprising to the consumer in this case as it is of a type commonly used. They have been a feature of the provision of finance to individuals and couples seeking to set up a family home in this jurisdiction and indeed, the interest rate has fluctuated considerably over decades, reflecting for the most part a shift in the interest rate in money markets and has long been regarded as an important element in the provision of finance to families seeking to improve and/or purchase a family home. This is a well-recognised feature of family home purchase and finance in Ireland. Thus in* Millar v. Financial Services Ombudsman *[2015] IECA 126, the Court of Appeal noted that a variable interest rate is a normal term of such a mortgage loan and any abuse of the term may be the subject of complaint to the Financial Ombudsman under Part VIIB of the Central Bank Act 1942, as amended by s. 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 and as further amended by the Financial Services and Pensions Ombudsman Act 2017.*

111. I am satisfied that the variable interest term is one that is regularly used in legal relations in similar contracts in this State and that there is an objective reason for the existence of such a term: it enables financial institutions to provide finance for mortgages on an ongoing basis to borrowers seeking to purchase and /or improve homes and, therefore, serves an important social purpose. I am also satisfied that

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*though financial institutions are demonstrably stronger entities when compared with family home borrowers, there are protections against the abuse of such terms by the institutions. It is also clear that if a significant loan were to be advanced without the security provided by a mortgage and charge on the family home, it would likely be on the basis of a much higher rate of interest. In addition, the existence of a variable interest rate term is subject to an implied contractual term that it will not be exercised 'dishonestly', for an improper purpose, capriciously or arbitrarily (*Paragon Finance plc v. Nash *[2002] 1 WLR 685).*

112. Furthermore, while acknowledging that the examination of the variable interest clause for unfairness, if it fell within the scope of the Directive, would be in terms of its general, as well as specific effect, it is clear that the applicants in this case were the subject of a diminution in interest rate applicable during the period of the contract.

113. I am not satisfied that the variable interest clause was unfair even if it fell within the scope of the Directive and Regulations."

On the basis of the above case law, I am satisfied that interest variation clauses – whereby the lender can vary the rate at its own discretion and without reference to a reference rate – should not be seen as unfair terms. The courts have noted that the provision of mortgage financing is heavily regulated, and a myriad of protections are available to borrowers. The courts have also noted that variable interest rate clauses have been a feature of the Irish mortgage market for many years. These are all important considerations within which to determine whether ***General Condition 6(a)*** amounts to an unfair term.

I note that the Complainant shave recently submitted, specifically regarding the judgment in Cannon, that:

"Had the defendant submitted the reasons why the interest variation clause was deemed unfair in the same detail as we have in our submissions to you, the judgement would have been different"

I do not consider it appropriate to engage in conjecture as to what the outcome of any court litigation may have been, had different evidence been available. Rather, I note the relevant case law which I am satisfied indicates that interest variation clauses – whereby the lender can vary the rate at its own discretion and without reference to a reference rate – should not be seen as unfair terms.

In addition, I note that the Provider has submitted that the initial interest rate on the Complainants' mortgage account was 4.74% which is 0.3% higher than the interest rate of 4.34% in 2016. It submits that the rate has been reduced to as low as 2.54% and only exceeded the initial rate of 4.74% between **March 2007** and **November 2008.** The Provider has argued that if it had never exercised its discretion to vary the interest rate, the Complainants would have been charged more than €14,500 more in interest on each mortgage account in the period from drawdown, a total of €29,000.

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When I issued the preliminary decision of this Office on 20 June 2022, I noted that the Provider had not submitted evidence to substantiate these assertions, but neither had they been denied by the Complainants. Since then, the Complainant have also submitted that:

> *While we agree that the amount of interest charged was slightly lower that what would have been charged if the initial interest rate hadn't been varied, it should have been very significantly lower if the Provider had not trebled its margin. The trebling of its margin is very clear evidence of bad faith on the part of the provider and cost us well in excess of €100,000. There can be no justification why the Provider was increasing its variable interest rate at times when interest rates generally were falling as shown on the table in Paragraph 2(c) of our submission dated 27th August 2015.*

I do not accept that the Complainants' submission in that regard is evidence of bad faith on the part of the provider. It is not disputed that the Provider's discretion to vary the interest rates applicable to the Complainants' mortgage loans, has been to their financial benefit, as the rate has been lower than that provided for in each offer letter, for much of the term of each contract (resulting in the Complainants paying some €29,000 less in interest than they would have up to 2016, if the rates set out in the offer letters had prevailed). These factors, in my opinion, go against any argument that there has been bad faith on the part of the Provider.

Schedule 3 of the UTCC Regs, known as the "*grey list*", contains a non-exhaustive illustrative list of contract terms, which may (not must) be found to be unfair, including:

> "*1. Terms which have the object or effect of:*
>
> *(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract*;"

Provision 2(b) of Schedule 3 provides as follows:

> "*Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately*."

From this and from the Supreme Court's dicta as set out in some detail above, I take the view that the interest variation clause, whereby the rate would vary either upwards or downwards at the lender's discretion falls within the exemption provided for in provision 2(b) of Schedule 3 of the Regulations. I do not accept the Complainants' recent contention in that regard that Provision 2(b) of Schedule 3 does not apply because "*it clearly fails the test in the words of the judgement in In Bogdan Matei, Ioana Ofelia Matei v SC Volksbank Romania (2015) (Case C-143/13) the Court of Justice of the European Union (CJEU) delivered stated in judgement on 26lh February 2015."*

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The exemption carved out within provision 2(b), as applicable to subparagraph 1(j), permits a supplier of financial services to reserve the right:

> "*to alter the interest rate payable by the consumer, … without notice where there is a valid reason, provided that the supplier is required to inform the [consumer] at the earliest opportunity and that the latter can dissolve the contract immediately*."

I am of the view that the variation of interest rates under ***General Condition 6(a)*** falls within the provision 2(b) exemption. It appears that the Complainants were informed of each variation promptly and 30 days in advance of each variation. I am also satisfied that they were entitled to dissolve the contract at any time, albeit that, as noted by the Supreme Court in *Cannon*, this entitlement may be of limited use where the outstanding mortgage amount was required to be repaid, especially where borrowers are in arrears.

I am satisfied that a valid reason was provided for the variation of the interest rates, though there was no explanation offered earlier in the investigation.

In response to questions from this Office, the Provider submitted (in **2020**) that "*the pricing of its variable rates for mortgages is a commercial decision for the Provider which takes into account a number of different internal and external factors including, but not only, funding costs*." It further submits, and I accept, that it is not obliged to disclose financially sensitive information in respect of the criteria it applies for making a decision to alter variable rates by reference to market conditions, in reliance on the decision in *Financial Services Ombudsman v Millar* [2015] IECA 127.

The Provider's position in respect of its variable interest rate criteria must of course be viewed in light of regulatory changes introduced in **2017**. The Complainants have indeed referred in their recent submissions, to these regulatory changes referenced in the preliminary decision of this Office. It should be noted in that respect that the CBI introduced an addendum to Consumer Protection Code, effective from **1st February 2017**, which obliges a regulated lender to produce a summary statement of its policy for setting each variable mortgage interest rate in respect of loans to personal consumers, and to update the policy when it changes. The statement must clearly identify the factors that may result in a change, and the criteria and procedures applicable to the setting of the rate. A copy of the statement, and any change to it, must be provided to the consumer. It should be noted however, that these amendments to the Code were made on foot of the ***European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (SI 142/2016***), which apply to agreements entered into after **21 March 2016**.

The relevant CPC provisions provide as follows:

> "*4.28a A regulated entity must produce a summary statement of its policy for setting each variable mortgage interest rate, for those rates that it makes available to a personal consumer, excluding a tracker interest rate, and update that summary statement when the policy changes.*

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4.28b A regulated entity must ensure that the summary statement produced in accordance with Provision 4.28a:

i. clearly identifies the factors which may result in changes to the variable interest rate;
ii. clearly outlines the criteria and procedures applicable to the setting of the variable interest rate;
iii. clearly outlines where the regulated entity applies a different approach to setting the variable interest rate for different cohorts of borrowers and the reasons for the different approach;
iv. is in such form and contains such content as set out in Appendix F to this Code; and
v. where a regulated entity operates a website, is at all times published on such website.

4.28c Where a regulated entity is offering a mortgage with a variable interest rate, excluding a tracker interest rate, to a personal consumer, the regulated entity must provide, with the offer document, a copy of the currently applicable summary statement produced in accordance with Provision 4.28a.

4.28d Where a regulated entity makes a change to a summary statement produced in accordance with Provision 4.28a, it must, as soon as possible, provide personal consumers to whose mortgage that summary statement applies, with a notification, on paper or on another durable medium, setting out the changes, and make available the updated summary statement to those personal consumers."

This addendum was introduced by CBI "*for the purposes of increasing transparency and facilitating consumer choice for variable rate mortgage holders.*"

I note that the Provider's published Variable Rate Policy Statement provides as follows:

"*What do we consider when setting our variable interest rates?*

i. We may change the standard variable rate at any time. Here is a list of the factors that may result in our changing our standard variable rates:

• To reflect any change in our cost of funds (i.e. the cost of borrowing the money we use in our residential mortgage business in the Republic of Ireland), for example, caused by any change in market interest rates or by other factors outside of our control;
• To reflect any change in the variable rates which mortgage lenders other than us charge on loans secured on residential property in the Republic of Ireland;
• To ensure we are competitive;
• To encourage or promote fixed rates;
• To enable us to increase the rate we pay to customers with deposit accounts in the Republic of Ireland to the level needed to retain their money;

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• To ensure that the amount we receive from borrowers will enable us to maintain a prudent level of reserves and/or to meet any regulatory requirements that apply to us;
• To ensure that the amount we receive from borrowers will enable us to maintain long-term sustainability of our residential mortgage business in the Republic of Ireland;
• To reflect any change in the costs we reasonably incur in administering borrowers' accounts;
• To reflect the risk to us that our customers will not be able to make their mortgage payments in full and on time. In measuring that risk we consider the general economy and the effects it has on the ability of customers to meet mortgage payments; and on the value of properties mortgaged to us to secure mortgage loans;
• To reflect any change in your circumstances or in the economy as it affects you. For example, if such things make it more difficult for you to meet your mortgage payments or increase the risk of the loan to us;
• To reflect any change in taxation which affects the profit we earn from our ordinary activities; and
• To reflect a change in the law, or in any code of practice which applies to us, or a decision or recommendation by a court, ombudsman or regulator

ii. We may change a standard variable rate because one or more of the factors we have listed has occurred or we know the factors will occur or are likely to occur."

There is therefore now, in more recent times, a detailed and public list available to the Complainants of the factors that go into the setting of the variable interest rate. I am of the view that these factors represent a sufficient rationale for variations of the interest rate.

I am satisfied that the explanations provided by the Provider in respect of its reasons for varying its standard variable rates are "valid" reasons within the meaning of provision 2(b) Schedule 3 UTRR Regs (if such reason is in fact required). I am satisfied that ***General Condition 6(a)*** falls within the exception. While this does not determine of itself the question of whether the term is unfair, I do not view the term as falling within the 'grey list'.

The Complainants have referred to and quoted from decisions of the CJEU in arguing that the term in question is unfair. Their recent submissions again press their contention, in that respect. For example, they rely on *Marc Gomez del Moral Guash v Bankie SA* (Case C-125/18) and the following quote:

"*Directive 93/13, in particular Article 4(2) and Article 5 thereof, must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, that term not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or*

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her financial obligations. Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard include (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and (ii) the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated."

I do not accept that the judgment establishes that the clause at issue is unfair. First, the clause that was under examination by the CJEU in that case, was a very different one from the one at issue. As appears from that decision, Spanish law provides for different national index rates in respect of the setting of mortgage interest rates. The clause in question purported to link the interest rate applicable to the borrower's mortgage loan with one of those index rates. The question arose whether this had been done in a manner that was clear and transparent enough for the borrower. In the present case, no reference rate is linked to the variable rate that applies to the Complainants' mortgages and there are no national reference rates provided for in legislation, as there appear to be in Spain.

Second, the focus of the discussion on the transparency of the method of calculation was in the context of deciding whether the clause fell within the main subject matter/adequacy of price derogation clause. Article 4(2) of the UTCC Directive provides that where the term concerns the main subject matter of a contract or adequacy of price, the term will fall outside the unfair terms assessment, but only provided that the clause is written in plain, intelligible language. In other words, even a clause dealing with the main subject matter or adequacy of price will be assessed for unfairness, unless it was written in plain, intelligible language. It will only get the benefit of that derogation if it is written in plan, intelligible language. Further Art 5 of the UTCC Directive provides for an equivalent of a contra proferentem interpretation of contractual terms where they are not written in plain intelligible language. It is in that context that the ruling of the CJEU must be read.

I take the view that this is not a decision that gives any guidance on when a term should be considered to be unfair within the meaning of the UTCC Directive but rather when a term will not be considered to have been drafted in a sufficiently plain intelligible manner to benefit from the Art 4(2) derogation. I have already indicated above that I do not accept that ***General Condition 6(a)*** falls within the derogation, so it is appropriate for this Office to assess it for potential unfairness.

As regards the requirement to read any interpretation ambiguity in favour of the consumer, I take the view that there is no contra proferentem reading of ***General Condition 6(a)*** that would be of any benefit to the Complainants. The clause is clear that the variable rate can be varied at the Provider's discretion, whether upwards or downwards. The Complainants seek the creation of a term that would provide for a rate of a specified margin over a reference rate, such as the ECB or Euribor rate, on the basis of what they argue was the normal practice of the Provider at the time they entered into the mortgage loans. Such a clause is a tracker interest rate and not a variable interest rate. It is not what ***General Condition 6(a)*** provides and I do not accept that such a condition can be read into the variable interest clause, through the operation of Reg 5 UTCC or otherwise.

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A comparable analysis to that undertaken in respect of the *Moral Guash* decision, applies to several of the other cases relied on by the Complainants, such as *Matei* (Case C-143/13) and *Van Hove* (Case C-96/14). The case of *RWE Vertrieb AG* (Case C-92/11) is unhelpful as the judgment is premised on the UTCC Directive in conjunction with Directive 2003/55/EC on common rule for the internal market in natural gas, which has no application in Ireland, and so the judgment is not considered relevant. Further, many of the cases relied on (including that of *Aziz* (Case C-415/11) were expressly considered by the Supreme Court in *Cannon* (above) so the *Cannon* judgment incorporates the CJEU's views.

I do not accept that any of the European case law relied on by the Complainants advance their argument that ***General Condition 6(a)*** is an unfair term under the UTCC Regs.

I have set out above my analysis of the good faith requirement pursuant to Schedule 2. I do not believe that there is any indication of bad faith on the part of the Provider in this matter. There was no commitment at any time from it, that its variable interest rate would be set by reference to any reference rate, including the ECB repo rate. Its discretion in that regard is open-ended. Further, the setting of interest rates applies to all customers, and I am satisfied that the individual Complainants were not singled out for higher rates. They did not avail of any fixed rate of interest over the relevant period, which may have been lower.

I do not accept that the ***General Condition 6(a)*** creates a *significant* imbalance in the rights and obligations of the parties, contract to the requirement of good faith, when one considers the contract at issue and the legal and regulatory protections available to the Complainants. I am conscious that the courts have consistently declined to hold that interest variation clauses amount to unfair terms. The most coherent analysis is the decision in *Cannon* in which (after a discussion of relevant European case law), the Supreme Court pointed to a significant number of protections available to borrowers under relevant legislation.

In this regard, and until the addendum to the CPC introduced by CBI in **2017**, there was no obligation on lenders to identify the factors it considers when it decides to vary its interest rates. While several regulatory provisions impose obligations on the Provider as regards interest rates (such as provisions 6.6 and 6.7 CPC), none have attempted to require that variable interest rates be linked to a reference rate or to prescribe an upper margin over cost of funds in the context of the mortgage market. Considering that CBI is well aware of how pervasive interest rate variation clauses (such as the one at issue) are in the Irish mortgage market, the fact that the CBI has not intervened (other than in respect of the **2017** addendum) in respect of the power of banks to fix their variable rates, is notable.

The Complainants have recently submitted that:

> *"The Central Bank do not deal directly with consumer complaints and would therefore not be aware that there may be a UTCC issue with variable interest rate clauses. If you wish to disclose our complaint to them, we authorize you to fully disclose our complaint to the Central Bank of Ireland"*

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I do not however consider it necessary or appropriate to refer this decision to the CBI, because on the basis of the evidence before me, and, in particular, given the decision of the Supreme Court in *Cannon* and for the reasons set out therein, I do not consider that ***General Condition 6(a)*** to be an unfair term within the meaning of the UTCC Regs.

In addition to the fact that I am not satisfied that ***General Condition 6(a)*** is an unfair term and hence there has been no conduct by the Provider, which is contrary to law, I am not satisfied that there is any evidence that the Provider's conduct in this matter has been unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants. The Provider has simply exercised its entitlement under contract, to vary its standard variable interest rate at various points and provided sufficient notice to the Complainants each time it did so.

I consider it appropriate however to urge the Provider to provide a more detailed list of factors that influence the variation of its variable interest rate, or at least point customers to its variable interest rate policy, when responding to customers who raise concerns about variable rates, in complaints or other correspondence, in light of the transparency expected of financial service providers and the requirements of the CPC.

In terms of the submissions received in respect of the effect of *Paragon Finance v Nash* and/or *Millar v Financial Services Ombudsman*, I do not consider it necessary or appropriate to make a decision on this in order to fairly adjudicate on the complaint that arises.

For completeness, however, my understanding of the *Paragon Finance* principle is merely that a contractual party who has a contractual discretion to vary interest rates is not entitled to do so in a completely unfettered manner, such that its discretion cannot be exercised dishonestly, for an improper purpose, capriciously or arbitrarily. I do not consider this proposition of contract law to be controversial and while I am not aware of whether the decision has been the subject of detailed judicial discussion in Ireland, it has been referred to in case law. Therefore, if the Provider sought to exercise its discretion under ***General Condition 6(a)*** for a dishonest reason, for example, it might be precluded from doing so under those principles. (I would point out however, that there is no evidence of any such exercise in this matter).

I do not regard the decision of *Millar v Financial Services Ombudsman* [2015] IECA 127 as particularly helpful to the present analysis, as the facts were different, the variable interest rate clause at issue was drafted in different terms and by express reference to market conditions, and the legal arguments were different. Further, the decision has now been overtaken in some respects by the 2017 addendum to the CPC.

Consumer Protection Act 2007

The Complainants have argued that the Provider's actions in this matter have amounted to breaches of the ***Consumer Protection Act 2007*** (the **2007 Act**).

Section 42 of the 2007 Act states that "*a trader shall not engage in a misleading commercial practice*".

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I note that "Trader" is defined under the Act as:

> *"(a) a person who is acting for purposes related to the person's trade, business or profession, and*
> *(b) a person acting on behalf of a person referred to in paragraph (a)*."

The Provider is a legal person, which appears to fall within this definition, as opposed to a consumer which is defined as a 'natural person' acting outside the course of their business. 'Services' are defined to include financial services.

Under the 2007 Act, a range of unfair, misleading and aggressive trading practices are banned if they harm or are likely to harm the interests of a consumer.

Section 41 prohibits unfair commercial practices. A commercial practice is considered 'unfair' under subsection (2) if it:

> *"(a) is contrary to one or both of the following (the requirements of professional diligence):*
>
> *(i) the general principle of good faith in the trader's field of activity;*
>
> *(ii) the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers,*
>
> *and*
>
> *(b) would be likely to—*
>
> *(i) cause appreciable impairment of the average consumer's ability to make an informed choice in relation to the product concerned, and*
>
> *(ii) cause the average consumer to make a transactional decision that the average consumer would not otherwise make."*

For the reasons outlined in detail above in respect of the UTCC Regs, I do not consider that the Provider's commercial practices have been contrary to the requirements of professional diligence in section 41(2)(a) because there is no evidence of bad faith or a lack of skill and reasonable care on the Provider's part.

Neither do I accept that the Provider has engaged in misleading commercial practice, contrary to section 42. There is no evidence of false or misleading information being provided by the Provider. There was no reference made at any time by the Provider to the movement of interest rates in line with reference rates. The Complainants may have made assumptions as to how the Provider would price its variable interest rate into the future, but in my opinion, no misleading information was given to them by the Provider in that regard.

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I am satisfied that the agreement between the parties, was that the interest rate could be varied at the lender's discretion and so it has been, both upward and downwards, since the borrowings were drawn down.

For all of the reasons set out above, I do not consider it appropriate to 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.

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)

28 July 2022

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—

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(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.