Decision Ref:	2022-0277
Sector:	Banking
Product / Service:	Mortgage
Conduct(s) complained of:	Application of interest rate
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint arises from the interest rate applicable to the Complainants' mortgage loan account which the Complainants hold with the Provider. The complaint concerns the contention that a clause of the agreement 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 2015, reference to "this Office" should be taken to include both the FSPO and its predecessor, the FSOB.

The Complainants' Case

The Complainants entered into a mortgage loan agreement with the Provider in and around **12th January 2004**. The Complainants assert that they agreed with the Provider to switch their interest rate from a tracker rate to a standard variable rate in and around **February 2006**. The Complainants also switched from annuity repayments to interest only repayments at that time, and at the time of making the complaint, were repaying interest only, on their mortgage loan.

The Complainants contend that the Provider is not entitled to charge any interest rate it chooses. The Complainants object that their mortgage interest rates have not reduced while worldwide interest rates have dropped to all-time lows. The Complainants contend that the Provider is in breach of the UTCC Regs. In April 2015, they stated that the interest rate applied to their mortgage account was 5.965% per annum.

The Complainants argued that they were making monthly loan repayments of €397.49 by standing order which is the amount they contended they should be paying if they were on the correct interest rate. The Complainants state that any term apparently allowing such charges is an unfair term, not binding on them, and entitling them to a refund of all excess interest so charged.

The Complainants contend that the Provider was, as of **April 2015**, offering new loans at rates below the rate that the Provider was seeking to charge on their borrowings. They submit that they should be entitled to know the margin which is being charged by the Provider over and above the cost of funds, since the inception of the loan.

The Complainants argue that the previous decision of this Office in *Millar v Financial Services Ombudsman* [2015] IECA 127 relied on by the Provider is not relevant because in that complaint, the Complainants did not rely on the UTCC Regs. They submit that the UTCC Regs provide the duty to give a valid reason for a change in the interest rate. They submit that the provision in their loan agreement allowing the Provider to unilaterally vary the interest rate, is a prima facie breach of provisions 1(j) and (k) of Schedule 3 the UTCC Regs. They submit that subparagraph 1(j) must be read together with provision 2(b) which limits subparagraph 1(j) to allow for variable interest rates but only "*where there is a valid reason*". They submit that a reason must be supplied by the Provider to justify the increase in the interest rate and this Office must be satisfied that that reason is valid. If not, they argue, the UTCC Regs are breached.

The Complainants submit that the Provider's reference to Reg 4 UTCC Regs is misconceived on the basis that their complaint is that the Provider's clause allows for a unilateral variation of the interest rate and it is the power to vary the rate that is unfair, rather than the price itself.

The Complainants argue that the Provider's reliance on the fact that it has not exercised its discretion for an improper purpose, capriciously or arbitrarily is not the test to be applied. They submit that the UTCC Regs require that a "*valid reason*" must be proven by the Provider and therefore the Provider has to establish a valid reason to increase the rate by whatever amount it was increased. Furthermore, the Complainants argue that administrative law compels a decision maker to provide reasons for its decision. It submits on this basis that the Provider is obliged to give the reason behind its decision to increase the interest rate.

The Complainants reject the Provider's argument that a variation of an interest rate does not fall within provisions 1(j) and (k) of Schedule 3 to the UTCC Regs. They submit that the rate of interest is a characteristic of the loan and if a term permits the rate of interest to be altered, it falls foul of the relevant provisions. They submit that this argument is supported by provision 2(b) which limits subparagraph 1(j) to allow for variable interest rates but only "*where there is a valid reason".* They submit that if the Provider was correct with its argument, provision 2(b) would have been unnecessary.

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In a later submission, the Complainants argue that they had received an offer from the Provider of an interest rate reduction of almost 1%. They argue that this is proof of historical overcharging, as there have not been any matching drops in worldwide interest rates.

The Complainants argue that in **2004** and for many years before and after, mortgage rates were linked closely to the cost of funds. They submit the while they may not have been expressly stated to be trackers, mortgage rates effectively worked as trackers. They argue that there was competition amongst banks, so that individual banks did not display an inappropriate greed. If it were to be otherwise, they argue that everyone would have gone for a tracker mortgage. The Complainants argue that it could not have been expected that banks would suddenly change their modus operandi and commence charging "*absolutely exorbitant rates*".

The Complainants argue that the cost of funds to the Provider plateaued, but the Provider continued to increase its rates. They submit therefore that variations that have occurred to the interest rate, are not primarily based on what it costs the bank to make the funding available, as it has argued.

The Complainants submit that it is inconsistent for the Provider to argue that its variable rates are not linked to the ECB rate, but then also to argue that its interest rates are related to the cost of funding. The complainants also pointed to comments made by the CEO of the Provider at one point to an Oireachtas Committee, in which the Provider's CEO stated that it was the Provider's strategy to encourage customers to move to fixed rates.

The Complainants disagree with the Provider in respect of the jurisdiction of this Office to consider the UTCC Regs. The Complainants argue that varying an interest rate is 'conduct' and this Office has the power find that conduct was contrary to law.

The Complainants argue that the Provider can only change the terms of the loan contract with a valid reason. They submit that the "*relevant changes here are the increase in interest rates from about 1.5% to 2% (over cost of funds) to 5.5% over cost of funds*". The Complainants argue that the Provider's standard variable interest clause wording has changed from **2017** onwards and now expressly refers to the Provider agreeing to "*vary the interest rate by reference to one or more factors identified in the summary statement of policy for variable rate mortgage loans*".

The Complainants argue that the Provider's variable rate policy now gives different reasons for variations from those that were given to the Complainants. They argue that the reasons set out in that policy statement, do no stand up to scrutiny in respect of previous interest rate increases because, amongst other things, the cost of funds has dropped and it is anti-competitive to promote fixed rates. It is argued that the amendment is an attempt to "*close off their non-compliance with the UTCCR or to limit such dangers*".

The Complainants want this Office to ensure that the Provider complies with the UTCC Regs and to retrospectively make the appropriate reduction in the interest rate applying to their loan into the future, and to refund them for the extra charged historically.

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The Provider's Case

The Provider submits that the Complainants' mortgage loan account relates to a residential investment property. It states that the loan account was drawn down pursuant to a letter of loan offer dated **8 January 2004**, signed and accepted by the Complainants on **12 January 2004**, and classified as a buy-to-let (**BTL**) investment property.

The Provider submits that the mortgage account is on a variable rate of interest. The mortgage account drew down on a one year fixed rate, and the account rolled to a variable rate of interest **on 8th March 2005,** in line with the terms and conditions.

The Provider submits that in accordance with provision 6.6 of the ***Consumer Protection Code 2012*** (**CPC**), it advised the Complainants by letter of any change in interest rate on their loan. Pursuant to provision 6.7, it confirms that it provided notification at least 30 days in advance for the three interest rate changes that occurred from **22 September 2011**.

The Provider submits that the loan offer stated that the interest rate would be an initial fixed rate of 2.99% for 12 months followed by a variable rate of 4.1% for the remaining 168 months. It submits the ***General Condition 6(a)*** of the terms and conditions of the mortgage loan clearly states that the variable rate offered by it is one that can be amended at the lender's discretion, rather than an interest rate that follows the movement of the European Central Bank (**ECB**) repo rate. It submits that the mortgage loan offer letter contains no mention of an interest rate that aligns to the ECB repo rate.

The Provider submits that the interest rate applying to the mortgage account is a variable rate. It states that it is:

> "*not obliged to divulge market sensitive details of funding costs on a case-by-case basis. The [Provider] is willing to say that the pricing of the [Provider's] 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 states that the pricing of its variable rates "*takes into account a number of different internal and external factors including but not only market rates and market conditions*."

The Provider submits that this Office has previously accepted that banks are not obliged to openly disclose the criteria they apply when making decisions to alter variable rates by reference to market conditions, in the case of *Millar v Financial Services Ombudsman* [2015] IECA 127.

The Provider submits that its entitlement to vary the variable interest rate was set out in the conditions of the mortgage loan accepted by the Complainants on **12th January 2004**. It further submits that the mortgage loan offer clearly advised the Complainants in bold print to seek independent legal advice, before signing it.

The Provider advised in January 2016 that the rates offered to new investor customers (or BTL customers) for variable and fixed rates ranged from 4.6% to 5.1%. It advised that the Complainants' BTL mortgage was on a rate of 5.965%. The Provider submitted that the Complainants were availing of a variable rate of interest which can move at the discretion of the Provider. It submitted that it was not obliged to offer new and existing customers the same variable rate products and it can legitimately choose to offer discounted rates to new customers.

It argues that the criteria relied on it when making its decision to increase the variable standard rate is a commercial decision. The Provider submits that ***General Condition 6(a)*** supports its position that the variable rate can be amended at its discretion and not by reference to current market rates. It submits that there is no promise in ***General Condition 6(a)*** that the Provider will vary the rate in any particular circumstances or at any particular time.

The Provider submits that there is no ground for the allegation that it is in breach of the UTCC Regs regarding the interest rate applied to the mortgage account. It submits that the condition makes it clear that it can vary the interest rate upwards or downwards at its discretion and it is not pegged to the ECB repo rate or any other reference rate. It submits that ***General Condition 6(a)*** is plain and intelligible in its terms and is not unfair by reference to Reg 4 UTCC Regs. Further it submits that it is an implied term of contract law that the Provider will not exercise its discretion to vary the interest rate dishonestly, for an improper purpose, capriciously or arbitrarily in reliance on the UK decision in *Paragon Finance v Nash* [2001] EWCA Civ 1466. It submits that there is no evidence to suggest that it has exercised this discretion capriciously or otherwise. It has submitted that the rates being charged by it are not markedly out of line with rates for similar business being charged by the Provider's competitors in Ireland.

The Provider does not accept that provisions 1(j) and (k) of Schedule 3 to the UTCC Regs apply in this case. It submits that the mortgage loan contract provides for a rate that is variable. Therefore, in varying the interest rate over time, it submits that this merely involves the Provider operating a clause and the variability of the interest rate is the primary characteristic of that clause. The Provider submits that it has not unilaterally altered the contract or the characteristics of the variable rate. It follows from this, it argues, that there is no obligation to offer a valid reason for a variation.

The Provider further submits that provision 2(b) of Schedule 3 only obliges a valid reason to be given, where the amendment occurs without prior notice to the borrower. It argues that this 'valid reason' relates to the reason why prior notice was not given and after the alteration itself. It further submits that provision 2(b) does not oblige a lender to notify the borrower as to what the valid reason for the interest rate change was. It argues that in the case of each interest rate change, the Complainants were given advance notice so provision 2(b) does not apply to the Complainants' case. Technical submissions are made by the Provider in this regard in respect of syntax and the equivalent text in the French version of the UTCC Directive, to support its argument in respect of what 'valid reason' relates to.

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The Provider submits that the Complainants are in error when they submit that this Office must decide on what is a valid reason for varying the interest rates. Likewise it submits that it does not have the burden of proving the validity of the reason for varying the rate.

The Provider points to a range of regulatory provisions regarding changes in interest rates – including the **Consumer Protection Code 2012, the Mortgage Credit Directive 2014/17/EU, and Consumer Credit Regulations SI 281/2010**. It submits that in none of those provisions is there a requirement that the lender notify the customer of the reason for the variation. It submits that this is for sound policy reasons, because to provide otherwise could potentially oblige a lender to disclose sensitive commercial information.

The Provider submits that its argument based on the ***Paragon Finance*** case is that, under contract, a lender could not exercise its discretion to set rates unreasonably, even where the loan contract allows the lender to vary rates at its discretion. The discretion is not completely unfettered as a matter of contract law based on the presumed intention of the parties. It submits that there is nothing in that judgment to support the Complainants' assertion that the Provider must notify a borrower of valid reasons for a change in interest rate before it implements that change. Further, it submits that the Complainants' argument on the basis of administrative law has no application in a determination of a dispute between parties to a contract.

In a later submission, the Provider clarified that the interest rate reduction offered to the Complainants was a two-year fixed rate and in response to their dissatisfaction regarding the variable interest rate that applies to their mortgage. It further argues that the Complainants appear to be confusing the fixed rate offering, with a reduction in the variable rate applying to the mortgage and that this was not the case. It submits that the fixed rate offer made to the Complainants, represents what was available to all customers.

The Provider denies that it can be in breach of the UTCC Regs and submits that the Regulations set out how unfair terms in consumer contracts are to be treated as a matter of contract law (ie not binding on the consumer). It argues that an unfair term is not, in addition, a breach of regulation. It further denies that any remarks made by its CEO have any relevance to the UTCC Regs. It submits that a strategy of encouraging borrowers to move to competitive fixed rates is a prudent and stable option for customers and the Provider and is fair.

The Provider argues that this Office has no jurisdiction to rule a term unfair under the UTCC Regs and submits that that power is reserved to the courts alone under Reg 8, either at the behest of a party to litigation before the court or on the application of an 'authorised body'. It argues that the statutory function of this Office is not to handle legal disputes but rather to deal with disputes which arise out of conduct, referencing sections 44 and 60 of the ***Financial Services and Pensions Ombudsman Act 2017*** (the **2017 Act**). The Provider argues that this Office has no role in determining that the clause in question is unfair (as this power is reserved to the courts) and, accordingly, the only possible role is to consider whether the conduct complained of was unreasonable, unjust, oppressive, or improperly discriminatory in its application to the Complainants.

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Consequently, it argues, the question of whether the standard variable rate was excessive cannot be decided by reference to the exact rate imposed, which was of general application to a general class of borrowers. The Provider argues that *Millar v Financial Services Ombudsman* [2015] IECA 127 is authority for the proposition that variable interest rates altered at the discretion of a bank by reference to market conditions, are not ambiguous terms such as could be rendered unenforceable. The Provider also references UK case law to argue that the bargain was not unconscionable, nor the rate of interest set dishonestly, for an improper purpose, capriciously or arbitrarily.

The Provider highlights an addendum to the CPC effective from **1 February 2017** which obliges it to set out a summary statement of policy criteria for setting variable interest rates and a statement of grounds for any increase in a variable rate. The Provider argues that it has complied fully with this obligation. The Provider argues that the provision of mortgage finance to consumers on a variable interest rate basis, is a long-established and valuable commercial practice. It further submits that a borrower always has the right to transfer his or her mortgage obligation to a different and more economic lender, if available.

The Provider argues that the question of any variation in interest rates depends not merely on an objective view of market conditions but may also depend on the individual commercial profitability needs of the lender. It submits that this is recognised as a legitimate criterion by the CPC addendum. The Provider argues that this Office cannot simply attempt to determine if the generally applicable interest rates charged, were excessive.

The Complaint for Adjudication

The complaint is that the Provider wrongfully failed to vary the Complainants' mortgage interest rate downwards, in line with market conditions and in failing to do so, in reliance on its terms and conditions breached the UTCC Regs.

Decision

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

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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A Preliminary Decision was issued to the parties on **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 at the outset, that a large number of submissions were made by both parties to the present complaint, and that these submissions are of an extremely detailed, complex and legal nature. I have considered these submissions in full. Insofar as any of those submissions have not been referred to in this decision, I have endeavored to highlight, discuss and adjudicate on the main arguments being made by each party to the complaint. This decision analyses the complaint that was made, the key legal provisions that apply, and the main arguments made by both parties.

Any specific argument not referenced was not considered sufficiently material to the decision, to warrant inclusion in light of the scope of the complaint made and the volume of submissions received.

Further, a complaint was made by the Complainants in respect of an offer of a tracker mortgage rate in **2006** that was not implemented by the Provider. The Complainants were advised by letter dated **9 June 2015** that the tracker aspect of their complaint occurred more than 6 years before the making of their complaint and accordingly fell outside of the jurisdiction of this Office at that time. Subsequently, that element of complaint was pursued separately. This investigation therefore concerns only the second aspect of the complaint ie the unfair terms complaint.

I note that a **Mortgage Loan Offer Letter** dated **8 January 2004** issued to the Complainants. Part I of the Loan Offer provided as follows:

> *"IMPORTANT INFORMATION AS AT 08 JANUARY 2004*
>
> | | | |
> |---|---|---|
> | *1. Amount of Credit Advanced* | | *€255,000* |
> | *2. Period of Agreement* | | *15 years* |
> | *3. Number of Repayment Instalments* | *Instalment Type* | *4. Amount of Each instalment* |
> | *12* | *Fixed at 2.990%* | *€1,758.84* |
> | *168* | *Variable at 4.100%* | *€1,888.55 …* |
>
> | | |
> |---|---|
> | *5. Total Amount Repayable* | *€338,382.48* |
> | *6. Cost of This Credit (5 minus 1)* | *€83,382.48* |
> | *7. APR* | *4%. …."* |

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The Loan Offer identified the property in Munster that was to be purchased and the purchase price of €238,000. The Special Conditions provided that the loan be secured by a first legal mortgage over the property to be purchased and by a first legal mortgage over a second property also in Munster. The correspondence address for the Complainants was different from both of those addresses and is in a different county.

I note that the Offer Letter 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*."

Part 5 of the Offer Letter set out the General Conditions applicable to the 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)."*

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 borrower at the address of the property 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, accordingly, the Complainants say they have been overcharged by the Provider in respect of their mortgage repayments.

The Provider has submitted evidence that it notified the Complainants by letter in advance of each variation of the interest rates that was applied to their mortgage loan account.

The variable interest rates applied to the account between **2005** and **2022** were as follows:

Date	Rate
08/03/2005	4.1%
14/12/2005	4.25%
16/03/2006	4.49%
22/06/2006	4.74%
15/08/2006	4.94%
17/10/2006	5.14%
19/12/2006	5.34%
21/03/2007	5.59%
14/06/2007	5.84%
22/01/2008	5.94%
09/07/2008	6.29%
03/11/2008	5.79%
13/11/2008	5.29%
16/12/2008	4.915%
28/01/2009	4.665%
10/08/2010	5.115%
22/09/2011	5.615%
23/01/2012	5.465%
24/10/2012	5.965%

The indicative interest rate in the **2004 Offer Letter** was 4.1%. In those circumstances, I note that the variable interest rate had increased by 1.865% from that indicative rate by **2012,** and remained at 5.965% for some time thereafter.

I am satisfied based on the evidence before me that the Provider properly notified the Complainants in advance of each interest rate change in accordance with its obligations under ***General Condition 6(b)***. It also notified them in accordance with its obligations under provisions 6.6 and 6.7 of the Consumer Protection Code 2012 (**CPC**). The fact of prior notification is not contested by the Complainants.

Jurisdiction

The question arose in the investigation of this complaint whether this Office is entitled to make a finding that a term is unfair under the UTCC Regs when adjudicating a complaint. The Provider strongly argued that it is not.

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.

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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]

I am also conscious that the courts have allowed appeals striking down the 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 useful 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.

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 failure to consider a relevant legal provision can result in the complaint being remitted by the High Court for further determination.

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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 made available. The UTCC Regs do not purport to limit or identify the forums which can hear or determine a claim to the effect that a term was unfair. 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. 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.*"

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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 seems unlikely that it would 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, it should be otherwise unable to consider the UTCC Regs, when investigating complaints.

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, in any event, might breach certain European law principles.

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.' …*

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> *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."*

I am satisfied that 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.

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 were 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.

Turning to the other strand of the Provider's arguments against jurisdiction in this matter, complaints can be made to this Office in relation to the conduct of a financial service provider involving the provision of a financial service, or an offer or failure to provide such a service.

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On completing an investigation, this Office must make a determination that a complaint is upheld, substantially upheld, partially upheld, or rejected. A complaint can only be upheld on one or more of seven grounds under section 60(2) of the 2017 Act:

a) the conduct complained of was contrary to law;
b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;
d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;
e) the conduct complained of was based wholly or partly on a mistake of law or fact;
f) an explanation for the conduct complained of was not given when it should have been given;
g) the conduct complained of was otherwise improper.

The Provider has argued that a finding that a term is unfair is not "*contrary to law*", which is one of the bases on which this Office is entitled to uphold a complaint, and that, accordingly, this Office is confined to a consideration of whether a breach of the UTCC Regs amounts to conduct that was "*unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant*" under section 60(2)(b). I do not accept this argument.

This Office is entitled to determine the legal rights and obligations of parties to a complaint to determine whether the conduct that occurred 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 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.

Further, an as explained above, the FSOB was directed by Kearns P to consider a comparable provision in the ***Family Home Protection Act 1976*** in *Haverty*. Finally, this Office is also entitled to find that a complaint is substantiated where "*the conduct complained of was otherwise improper*" so the consequences of a finding that a contractual term is unfair (ie that it ought not to have been applied by the financial service provider concerned) might potentially also fall into this category.

Taking all of this into account, I am of the view that it is appropriate to consider all relevant law in adjudicating on the present complaint, including the terms of the UTCC Regs and in that context, it is appropriate to consider, in the present complaint, whether ***General Condition 6(a)*** of the Provider's terms and conditions constitute an unfair term within the meaning of the UTCC Regs.

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UTCC Regs

The UTCC Regs apply only to natural persons acting for purposes outside their business. The definition of consumer under the UTCC Regs is narrower than the definition of consumer for the purpose of complaints to this Office. Accordingly, a Complainant may fall within the definition of consumer for the purposes of a complaint to this Office, while falling outside the definition of consumer under the UTCC Regs.

I note that the Complainants' mortgage loan account relates to a residential investment property or buy-to-let property. It does not relate to the Complainants' principal private residence (**PPR**). The loan is secured against the investment property and another property which also does not appear to be the Complainants' PPR (though I have no direct evidence on this, other than by way of the Complainants' correspondence address).

As the mortgage loan was entered for the purposes of investment, the Complainants may not fall within the definition of consumer for UTCC purposes. No evidence has been offered by the Complainants in this regard. I note that the Complainants appear to have professions unrelated to the letting of property, but that is not the end of the analysis. It is possible for someone to have a primary profession and then to operate a further business.

There is insufficient evidence available to determine this aspect of the matter. I note, however, that the Provider has not raised any objection to the Complainants' reliance on the UTCC Regs on this ground. While the Provider has argued strenuously against the jurisdiction of this Office to consider the UTCC Regs and against the proposition that ***General Condition 6(a)*** is an unfair term, it has not suggested that the Complainants do not fall to be treated as consumers under the UTCC Regs. Further, I note that the Loan Offer issued to them in compliance with the ***Consumer Credit Act 1995***. As a result, I consider it appropriate to proceed with this adjudication on the assumption that the Complainants are consumers within the UTCC definition, though the issue is unclear; the Complainants bear the burden of establishing that they are consumers under the UTCC Regs.

The UTCC Regs apply only to contractual terms that have not been individually negotiated. It is common case between the parties that the term in dispute forms part of the Provider's terms and conditions, so it 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."*

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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 are 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 good and services supplied*." While it relates to the interest rate that will be applied to the loan and, in particular, to the Provider's discretion to vary it, it is not the "a*dequacy*" 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, this is not the approach that has been adopted more recently by the Supreme Court in *Cannon*, as discussed below.

Furthermore, decisions of the CJEU suggest that a 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'*."

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*".

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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.

For all of these reasons, 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.

I do not consider that factors (ii) or (iii) are directly relevant to the analysis in this matter. 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 Complainants 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 contract in **2004** or indeed since. In terms of factor (iv), I do not accept that there was anything unfair or inequitable in the manner that the Provider dealt with the Complainants. They were notified of the Provider's intention to vary the interest rate applicable to the mortgage loan on each occasion that it was varied. They were given 30 days' notice on each occasion. Further, it was possible at any time for the Complainants to either select a fixed rate of interest from the rates then on offer from the Provider, 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.

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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).*
>
> *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*

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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 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*

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> *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 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, it would seem that an interest variation clause – whereby the lender can vary the rate at its own discretion and without reference to a reference rate – should not be seen as an unfair term. Indeed, in a recent submission, the Complainants acknowledge that they agree with much of the above analysis, and they agree that

> It is correct that both cases cited (Pepper and Grant v. Laois County Registrar) held that variable interest rates are not ipso facto unfair. However, neither of those cases dealt with the point in this case as to whether a reason must be given by a Bank to justify an increase in interest rates expressed with sufficient particularity so as to allow the Ombudsman or the Court to decide whether the reason for that increase is "valid".

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The Complainants also articulate a view that there has been a further error by this Office, with reference to the contents of the preliminary decision of this Office which stated that:

> *"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 important considerations within which to determine whether **General Condition 6(a)** amounts to an unfair term."*

In that regard the Complainants say that:

> The nub of the error is that we have never said that variable interest rates are ipso facto unfair. It is incorrect as a matter of law to characterise the case law which has upheld variable interest rates as being against our case. Indeed, our case is that the requirement that an objectively valid reason be given for a rate increase is one of the "myriad of protections" available to borrowers. It is a protection because, if complied with, the Ombudsman can analyse the figures provided in the context of the reason given by the Bank to decide whether the reason for the increase is valid.

I disagree. It is not the role of this Office to forensically examine the supporting figures behind any commercial decision by a financial service provider, in approaching a rate variation. Rather, the role of this Office is to examine the Provider's conduct which is the subject of the Complainants' complaint, to determine whether it has been wrongful, within the meaning of ***s60*** of the ***Financial Services and Pensions Ombudsman Act 2017***. In this instance, the complaint is that the Provider wrongfully failed to vary the Complainants' mortgage interest rate downwards, in line with market conditions and in failing to do so, in reliance on its terms and conditions, it breached the UTCC Regs.

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;"*

The Provider has argued that this provision does not apply to the variation of interest rates because the variation is provided for by contract and hence no alterations of the terms of the contract have been undertaken by it. While I note and understand the logic to this argument, I do not accept it. The Loan Offer that issued to the Complainants in **2004** provided for a fixed interest rate of 2.9% for one year and a variable rate of 4.1% thereafter. While ***General Condition 6(a)*** provides that the Provider can vary the variable interest rate at its discretion, this does not necessarily mean that the contract between the parties was not varied.

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The interest rate applicable to the loan is a part of the contract and while a variation of the rate was conducted on many occasions in accordance with ***General Condition 6(a)***, the interest rate payable and hence the terms of the contract were unilaterally varied by the Provider on those occasions. Further, there is no valid reason set out in the contract for the unilateral variation. Accordingly, I am satisfied, that the ***General Condition 6(a)*** falls within provision 1(j) of the Schedule 3 and (subject of course to provision 2(b)) may be considered as to whether it is unfair.

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, it appears to me 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. 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 note that the Provider has argued that it is not obliged to provide a valid reason for the variation, because the amendment of the interest rate did not occur 'without notice' to the Complainants. It argues that as the variations all occurred with notice to the Complainants, provision 2(b) should not be read as requiring a valid reason for the alteration. It further argues that the valid reason required, refers to the failure to provide notice, rather than the alteration.

Whether or not the Provider is correct in these arguments (and I do not consider it necessary to decide these very interesting points of interpretation in the context of the present complaint) I am of the view that the variation of its interest rates under ***General Condition 6(a)*** falls within the provision 2(b) exemption. I am satisfied 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 when the outstanding mortgage amount is required to be repaid.

Since the preliminary decision of this office was issued on 20 June 2022, the Complainants have made clear in their submissions, that they believe this analysis by this Office, is incorrect; I am satisfied on the evidence however that the analysis set out above, represents the correct position.

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Certainly, there seems to have been nothing preventing the Complainants from switching to another mortgage provider. The only arrears that appear to have accumulated on the account were due to the conscious decision of the Complainants to pay interest at a level that they considered appropriate, rather than what was provided for under the contract. It seems that this arrears position was subsequently resolved by them.

As to the question of whether a valid reason was provided for the variation of the interest rates, (if indeed this is required, and it may not be under provision 2(b) owing to its phrasing and syntax) I am satisfied that there was. I acknowledge that the Provider was not exactly prescriptive in outlining the factors it considers in setting its interest rates at first instance but as early as in its letter of **27 May 2014**, it explained as follows:

> "*the Bank's funding costs on variable rates are not directly linked to the ECB and can fluctuate due to market conditions. Our rates are reviewed on an ongoing basis and are set primarily on the basis of what it costs the Bank to provide the funding, and this can fluctuate over time.*
>
> *It is critical for the Bank that it charges rates that are sustainable for its business and reflects the overall costs of funds, while allowing the Bank to continue to provide fair and competitive rates to its customers*."

This explanation was reiterated in a letter dated **13 January 2015**.

In submissions to this Office, the Provider asserted that interest rates were varied based on a "*number of different internal and external factors including, but not only, funding costs*" and further that the pricing of its variable rates "*takes into account a number of different internal and external factors including but not only market rates and market conditions*."

I note that the Central Bank of Ireland (**CBI**) introduced an addendum to CPC, effective from **1st February 2017**. This 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 the **21 March 2016**. The Complainant correctly point out that their loan agreement was entered into before that statutory instrument came into effect.

I note that 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*."

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; **[referred to further below]**
• 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."

The policy statement also clarifies that different standard variable rates can apply, inter alia, depending on whether money is borrowed for a house for oneself, as opposed to a buy-to-let property. Accordingly, there is now more recently, a detailed public list available to the Complainants of the factors that go into the setting of the variable interest rate. These might not seem sufficient to the Complainants, but these are relevant factors, in my view, to the setting of interest rates. Not all factors will be relevant to every specific rate change. Some of these factors listed were identified to the Complainants in earlier correspondence and before the regulatory requirement on the Provider to publish its policy; others were not.

I do not believe that this has any bearing on the issues arising, however, given that a sufficient rationale for variations of the interest rate was provided to the Complainants from the outset. They have no entitlement to disclosure of the 'margin' that has been applied to their loan.

In a recent submission, the Complainants have said that:

*"The final matter on which we wish to make a submission is that one of the generic list of factors published by [Provider] and set out at pages … of the Preliminary Decision is: "*to encourage or promote fixed rates*". That is consistent with what was said by [Provider's] Chief Executive Officer that it was the Bank's strategy to encourage customers to move onto fixed rates (as set out at page 3 of the Preliminary Decision)*

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Those statements raise an issue within the Ombudsman's jurisdiction of [Provider] using its market position to force borrowers onto fixed rate mortgages, which was not considered by the Ombudsman notwithstanding that it was one of the main arguments which we advanced and is material to the outcome of this complaint. The failure to consider an issue, amounts to an error of law. Such a reason cannot, as a matter of law, constitute a "valid reason" for the purpose of paragraph 2(b0 because it is not related to the cost of funds, the risk of the loan, or any other financial reason"

In my opinion, the legitimate strategy of any bank to encourage or promote fixed rates at any given time, or indeed to discourage fixed rates at other times, does not necessarily equate to "*using its market position to force borrowers*", which in my opinion, is language that is suggestive of the abuse of a dominant position. This Office has no role to play in respect of such a suggestion, which is more appropriate for the Competition and Consumer Protection Commission (CCPC).

I am satisfied that the explanations supplied 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 introduced excerpts from a number of terms and conditions documents which they claim issued from the Provider during different years. Their argument is that the Provider has attempted to 'mend its hand' in respect of the its clause providing for variable interest rates as the Provider's terms now (since **2017**) refer to a statement of its policy for setting each variable mortgage interest rate while the pre-existing clause (including the one in their contract) did not refer to this statement or to any other factors that would be taken into account by the Provider in determining the applicable variable interest rate.

Even if I were to consider those excerpts as relevant to the present complaint (and I do not consider they are, given that my focus is on the Provider's conduct in the provision of a financial service to the Complainants and not its provision of service to its other customers), I do not accept that the subsequent amendment of the relevant clause establishes the argument that the first Complainant relies on.

It is not surprising that the Provider's variable interest clause has been amended to reflect a new regulatory requirement imposed on the Provider from **February 2017**. There was no regulatory obligation on the Provider to produce such a statement before **February 2017** nor any express regulatory obligation to otherwise notify its customers of the basis on which it sets its variable interest rates. Further, even if the Provider had decided on a unilateral basis to provide further clarity to its customers of the basis on which its sets its variable rates in the absence of a regulatory requirement, this would not necessarily mean that there was anything wrongful in its previous approach, but rather that it was striving for greater transparency.

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Accordingly, I do not accept that any more recent amendment to the Provider's special or general terms and conditions with regard to variable interest rates (which do not in any event affect its contract with the Complainants) has any bearing on the question of whether or not the clause in question, is an unfair term.

I have set out above my analysis of the good faith requirement pursuant to Schedule 2. I do not accept that there is any indication of bad faith on the part of the Provider in this matter. As the Provider has pointed out, 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 Provider is correct in arguing that the setting of interest rates applies to all of its customers, and I am satisfied that the individual Complainants were not singled out for higher rates. They did not avail of the opportunity to agree a lower fixed rate of interest, when this was offered to them.

I do not accept that the ***General Condition 6(a)*** creates a *significant* imbalance in the rights and obligations of the parties, contrary 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 regard 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, in my opinion, is notable.

In light of all of the above, and in particular the decision of the Supreme Court in *Cannon* and the reasons set out therein, I do not accept that ***General Condition 6(a)*** is an unfair term within the meaning of the UTCC Regs.

In terms of the detailed submissions received in respect of the effect of *Paragon Finance v Nash* and the obligation in administrative law, for a decision maker to provide reasons for its decisions, I do not consider it necessary or appropriate to determine this, in order to fairly adjudicate on the complaint made by the Complainants. 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.

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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 tried 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.)

Moving to the Complainants' argument that an obligation to give reasons applies to the Provider by analogy with administrative law principles, I do not accept this argument. The Provider is clearly a private commercial entity and not a public office holder or quasi-judicial tribunal that would be required to give reasons for a decision taken as a matter of natural justice.

I do not regard the decision of *Millar v Financial Services Ombudsman* [2015] IECA 127 as 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.

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 would however 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. This is in light of the transparency expected of financial service providers and the requirements of the CPC.

For the reasons outlined above, this complaint is not upheld.

I note that the Complainants have been seeking to re-negotiate their interest rate, with the Provider, and as recently as in January 2022, the Provider sent the Complainants details of its range of interest rates, which are available to them.

It will be a matter now for the Complainants to either decide to remain on the Provider's variable rate, or to select one of the alternative rates that are available to them for their borrowing. It may be prudent in that regard for the Complainants to seek independent financial advice, before deciding about whether or not to move interest rate arrangements, for the loan in question.

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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)

22 August 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—

(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.