

Decision Ref:	2019-0424
<u>Sector:</u>	Banking
Product / Service:	Personal Loan
<u>Conduct(s) complained of:</u>	Failure to provide accurate account/balance information Application of interest rate
<u>Outcome:</u>	Upheld

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

This complaint relates to mortgage loan account **ending 289** that the Complainants held with the Provider. The mortgage loan account is secured on a commercial property that the Complainants purchased as tenants in common, along with other purchasers. The Provider has transferred its interest in the mortgage loan to another regulated lending institution. The mortgage loan account was redeemed in December 2015.

### The Complainants' Case

The Complainants entered into a loan agreement with the Provider in January 2001.

The Complainants submit that the Provider did not furnish them with bank statements or certificates of interest paid "despite repeated requests from [the Complainants] throughout the years to the [Provider]". They were "eventually furnished to [the Complainants] following correspondence and reminders".

The Complainants submit that on **06 January 2015**, they were informed that the Provider had *"contracted to sell"* their mortgage loan account to another regulated lending entity.

In **2015**, the Complainants engaged the services of a third party Audit Firm (the "Audit Firm") to review their mortgage loan account and the interest charged by the Provider. The Complainants assert that following this review, the Audit Firm identified that the

Complainants were overcharged interest in the amount of €23,751.37 over the lifetime of the mortgage loan account (from **23 January 2001** to **31 December 2015**).

The Complainants submit the Audit Firm identified that the facility letter dated **15 December 2000** shows that the interest rates to "...*be applied are an initial 5- year fixed interest rate followed by a variable interest rate. Interest to be charged quarterly in arrears*". The Complainants submit that the Audit Firm goes on to assert that the facility letter states that at the end of this fixed rate period, the "*interest rate charged will be based upon the Cost of Funds + a margin of 1.5%, "ruling day by day"*.

The Complainants' Audit Firm is of the view that the "*Cost of Funds*" interest rate applicable to the Complainants' account is the "*EURIBOR*" interest rate. They further submit that in "...all previous, settled cases involving [the Provider] loans (with the exact same wording on the contracts) settlements with [the Provider] have been based upon a reworking of the account using the relevant EURIBOR rates + a margin of 1.5%". They submit that the EURIBOR rate's shortest available period is a 1- week rate changing on a daily basis and it "was agreed" with the Provider in previously settled matters that "the 1week rate, changing each day, would be the acceptable alternative".

The Complainants' Audit Firm state the Provider "...advised [the Audit Firm] of the correct interest rate to be used in the calculation, i.e day-to-day EURIBOR (1 week) + 1.5%, and instructed that the calculations be carried out on this basis".

The Complainants further submit that the Provider has "obfuscated and procrastinated in relation to [their] claim for the interest it overcharged" the Complainants.

The conduct complained of is:

- 1. The Provider failed to issue the Complainants with bank statements or certificates of interest paid on a regular basis, despite requests from the Complainants; and
- The Provider overcharged interest on the Complainants' mortgage loan account in the amount of €23,751.37 for the period from 23 January 2001 to 31 December 2015.

The Complainants are seeking the following:

- The Provider refund the amount of interest overcharged on the Complainants' mortgage loan account in the amount of €23,751.37; and
- The Provider compensates the Complainants for the amount spent on "charges and costs" in relation to identifying the overcharge of interest, totalling approximately €10,500.

#### The Provider's Case

The Provider submits that the interest rate on the mortgage loan account was to be fixed for 5 years, and on the expiration of the fixed rate period "...the [Providers] variable rate Cost of Funds plus a margin of 1.50% to be applied to the loan thereafter. This variable rate was to be applied in the absence of a further fixed rate entered into by the customer. As no further fixed rate was entered into, the variable rate of Cost of Funds + 1.50% was applied to the loan".

The Provider submits that it undertook to recalculate the interest charged on the Complainants' mortgage loan account in **September 2016** on foot of the complaint received from the Complainants. The Provider submits that this recalculation identified an undercharge of interest in the amount of €3,450.11 on the Complainants mortgage loan account as opposed to an overcharge. The Provider further submits that the rate of interest applicable was as per the facility letter which was "*Cost of Funds and not Euribor*". The Provider further states that it also overcharged the Complainants by charging interest monthly as opposed to quarterly and offered to refund the Complainants.

The Provider submits that the "recalculation of the loan as provided by [the Audit Firm] was based on a Euribor rate, which was incorrect and we could not rely on it as an accurate calculation of the loan interest"

The Provider further submits in its Final Response letter to the Complainants that forgoing the above, the "Euribor rate of interest was used in error in the charging of interest on your account from 23 January 2006 rather than the [Providers] Cost of Funds rate of Interest" and "Interest was charged monthly in error for the duration of the loan, rather than quarterly in arrears"

The Provider submits that in **January 2006**, the Provider's Cost of Funds interest rate was calculated using "3 month Euribor plus the Reserve Asset Cost. This is the rate (plus the [Providers] margin) that the loan should have been placed on when the loan was placed on the variable rate in January 2006".

The Provider goes on to submit that, following investigations, the Complainants' facility letter states that on the expiry of the fixed rate period, should the Complainants not "... by prior notice in writing to the [Provider]" choose a further fixed rate, then the interest rate applicable "...will be the rate of interest which may be increased or reduced by the [Provider] from time to time and at any time (the variable interest rate)". The Provider submits that in light of this, they recalculated the interest charged on the Complainants'

mortgage loan account and this indicated an overcharge of €4,829.44, which the Provider offered to refund to the Complainants in addition to an offer of compensation of €4,000 in light of the delays and confusing information provided bringing the total offer of redress to €8,829.44.

In respect of issuing the Complainants' statements and certificates of interest, the Provider is "...satisfied that in line with [their] process and as per [their] regulatory obligations, regular statements were issued to the customers on at least an annual basis at a minimum". The Provider goes on to state that a delay to a letter dated 20 March 2016 was due to it "...having been misdirected within the [Provider]".

The Provider also rejected that it "...acted in any way a disingenuous manner in dealing with [the Complainants] case or that it in any way tried to delay a response being provided".

## The Complaints for Adjudication

The complaints for adjudication are:

- 1. The Provider failed to issue the Complainants with bank statements or certificates of interest paid on a regular basis, despite requests from the Complainants; and
- The Provider overcharged interest on the Complainants' mortgage loan account in the amount of €23,751.37 for the period from 23 January 2001 to 31 December 2015.

### **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 **29 October 2019**, 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 issue of my Preliminary Decision, the Provider made a further submission under cover of it's letter to this office dated **14 November 2019**, a copy of which was transmitted to the Complainants for their consideration.

The Complainants have not made any further submissions.

Having considered the Provider's additional submission and all of the submissions and evidence furnished to this Office, I set out below my final determination in respect of this complaint.

# 1. The Provider failed to issue the Complainants with bank statements or certificates of interest paid on a regular basis, despite requests from the Complainants;

The Complainants have asserted that the Provider did not furnish them with bank statements or certificates of interest paid "despite repeated requests from [the Complainants] throughout the years to the [Provider]". They were "eventually furnished to [the Complainants] following correspondence and reminders".

I note that by way of letter from the Provider to the Audit Firm dated **4 May 2016**, the Provider submitted that "...the Bank has removed functionality to order statements or transaction lists beyond 7 years, notwithstanding that any claims for such periods would be statute barred".

It is disappointing that the Provider did not make such important documents in respect of the Complainants' mortgage loan account readily available or accessible. I note that at some point, the Provider did make these documents available to the Complainants.

It is a matter for the Provider to set its retention periods for documentation, having regard to the legislative regime. However, where a mortgage loan account remains active, the Provider should retain bank statements and certificates of interest in respect of the

mortgage loan account applicable during the term of the loan for six years from the date the relationship with the mortgage holder ends. **Provision 49 of the Consumer Protection Code 2006** and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows;

"A regulated entity must maintain up-to-date consumer records containing at least the following

a) a copy of all documents required for consumer identification and profile;
b) the consumer's contact details;

c) all information and documents prepared in compliance with this Code;

d) details of products and services provided to the consumer;

e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;

f) all documents or applications completed or signed by the consumer;

g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and

*h) all other relevant information [and documentation] concerning the consumer.* 

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."

The mortgage loan account was incepted originally for a term of **13 years** commencing from **January 2001**, and the mortgage was purportedly redeemed in full **December 2015**. As such, it appears to me that with respect to the Complainants' mortgage loan account that the Provider has failed to make the documents readily available in compliance with the Consumer Protection Code.

The Provider has acknowledged potential failings in respect of the Consumer Protection Code and in its letter to this office dated **10 August 2018** and states that "…I am satisfied that in line with our process and as per our regulatory obligations, regular statements were issued to customers on at least an annual basis…I am upholding this aspect and any benefit of the doubt, that there were further requests of information that were not responded to, has been applied in the customer's favour...To resolve all matters in the complaint and in recognition of any CPC breaches, the [Provider] wishes to offer the amount of €3,500.00 to resolve all matters."

Following the issue of the Preliminary Decision on **29 October 2019**, the Provider made additional submissions in respect of this determination. The Provider further acknowledged in its letter to this office dated **14 November 2019** that the information

provided in the letter dated **04 May 2016** was incorrect, and submits that this does "*not reflect the* [Provider's] *policy or processes*".

The Provider has submitted that it has a "Records Retention schedule in place for all types of records created and received with the" Provider. The Provider has stated that it conducted a recent "internal and independent review of the full Records retention Schedule and all record class codes was undertaken and the review confirmed that [the Provider is] compliant" with their "obligations under legislation and regulation including the Consumer Protection Code 2012". The Provider has further stated that on foot of my comments, it has "escalated" the matter internally to "ensure that all staff are clearly aware of the processes around the production of historic duplicate statements".

However, I am disappointed to note that despite the Provider claiming that they *"have a Records Retention schedule in place"*, it remains the case that the Provider gave the Complainants incorrect information when they sought copies of their statements. I am of the view that it is imperative that all employees and representatives of the Provider are fully trained in records retention policies and the Provider's obligations under the Consumer Protection Code 2012. It is apparent from the content of the letter issued in May 2016, that not only did the author of the letter write to the Complainants' representative regarding the Provider's removal of the *"functionality to order statements or transaction list beyond 7 years"*, they also referred to having previously *"discussed"* this with the Complainants' representative.

## The Provider overcharged interest on the Complainants' mortgage loan account in the amount of €23,751.37 for the period from 23 January 2001 to 31 December 2015;

The Complainants contend that the Provider has charged the incorrect interest rate on their mortgage loan account in the amount of €23,751.37. The Provider has made various assertions regarding what the applicable interest rate was in various correspondence.

It is entirely unclear what interest rate is applicable to the Complainants' mortgage loan account, with the Provider submitting various different, conflicting interest rates in its correspondence. These range from the Provider claiming to both undercharge the Complainants the amount of €3,450.11 and overcharge the Complainants the amount of €404.71 at the same time, as set out in the letter from the Provider to the Complainants dated 26 September 2016, to the Provider claiming to overcharge the Complainants the amount of €4,829.44 and offering compensation as set out in the letter from the Provider to this office dated 12 December 2018. The Provider consistently refers to the Provider's "Cost of Funds" rate plus 1.5% being the correct applicable rate – not the Euribor rate, yet does not define this "Cost of Funds" rate. Eventually the Provider submits that the Cost of Funds rate applicable "*was 3 Month Euribor plus the Reserve Asset Cost*". This is incredibly confusing for any customer and wholly unsatisfactory. The conflicting interest rates submitted by the Provider are surmised below:

Date	Interest rate submitted by Provider
04 May 2016	"the [Provider] has applied interest monthly in arrears
Letter from the Provider to	rather than quarterly in arrears. In crude terms, the
the Audit Firm	customer has been overcharged interest on one month's
	interest for the term of the loan"
09 May 2016	The facility letter here refers clearly to "Cost of Funds".
Letter from the Provider to	This is a broadly accepted banking term, which replaced
the Audit Firm	the old "Prime Rate"."
	<i>"Indeed, it appears to me that there has been an under charge of c. 0.5% per annum since the fixed rate period endedthe [Provider] will not act re the under charging in this instance"</i>
26 September 2016	"The interest rate applicable to your account should have
Letter from the Provider to	been the Cost of Funds"
the Complainants	<ul> <li>"However, the following two errors have been identified on your account.</li> <li>The Euribor rate of interest was used in error in the charging of interest on your account from 23 January 2006 rather than the [Provider's] Cost of Funds rate of Interest which is specified in your facility letter of 15 December 2000.</li> <li>Interest was charged monthly in error for the duration of the loan, rather than quarterly in arrears which is also specified in your facility letter of 15 December 2000."</li> </ul>
	"I have arranged for an interest recalculationThe Balance outstanding as per the interest re-calculation is €392,990.00 based on the correct Cost of Funds interest rates being applied and the interest charged quarterly. These figures represent an undercharge by the Bank to you

20 October 2016 Letter from the Provider to the Complainants 10 August 2018 Letter from the Provider to this office	of €3,450.11as a gesture of goodwill and in recognition of any inconvenience or upset this error may have caused you, the [Provider] will not be claiming any of this interest undercharge from you." "As a result of charging you interest on a monthly basis rather than a quarterly basis, the [Provider] owes you a total of €404.71 in interest refund (interest being charged on interest). The [Provider] would like to offer you €890.26 (€404.71 refund interest plus interest on this amount @8% p.a x 15 years of €485.55). "As previously advised a full recheck of the interest calculation and the interest charged on your account from drawdown on 22 January 2001 to 31 March 2015 had been completed which showed an undercharge of €3,450.22 to you rather than an overcharge of interest on your account". The Loan was governed by the facility letter of 15 December 2000. The facility letter detailed that the loan interest was to be fixed for 5 years with this Bank's variable rate Cost of Funds plus a margin of 1.50% to be applied to the loan thereafter. This variable rate was to be applied in the absence of a further fixed rate was entered into by the customer. As no further fixed rate was entered into, the variable rate of Cost of Funds + 1.50% was to be applied to the loan.
	"The recalculation of the loan undertaken by [the Audit Firm] contained a significant flaw in that they used a Euribor rate. The loan facility letter, which binds both the customer and the [Provider], states the loan interest was based on this [Provider's] Cost of Funds (apart from any rate fixed). [The Audit Firm's] recalculation of interest was therefore not accurate and could not be relied upon in this matter."
12 December 2018 Letter from the Provider to this office	"Our Treasury team have checked the archived records and confirm that in January 2006; [Original Provider] Cost of Funds was 3 Month Euribor plus the Reserve Asset Cost. This is the rate (plus the [Providers] margin) that the loan

	should have been placed on when the loan was placed on the variable rate in January 2006."
	"In light of the above, the [Provider] has undertaken a recalculation of the interest on the loan, based on [the Original Provider's] Cost of Funds rate as detailed above. I attach a copy of this recalculation which shows that the loan was overcharged by €4,829.44. We offer to refund this amount to the customer".
12 January 2019	"The historic Cost of Fundswas based on the 3 Month
Email from the Provider to	Euribor rate This is the right approach to adopt as it is
this office	consistent with the terms of the accepted facility letter"

I note that **Condition 8** of the **Terms and Conditions** of the Loan Offer letter dated 15 December 2000 (the "Facility Letter") details as follows:

"Interest on all amounts outstanding under this Loan Facility will be calculated by the Company at an annual rate equivalent to the aggregate of 1.5% (one and one half percent) above the Cost of Funds Rate determined by the Company at date of drawdown for the appropriate period plus Reserve Asset Costs, ruling day by day ("Facility Interest Rate") currently 6.80% and this rate will be fixed for a period of five years. Interest shall be charged quarterly in arrears on a reducing basis." [My emphasis]

Condition 8 makes it clear that the interest rate applicable to all amounts due and owing on this mortgage loan account will be calculated at the aggregate of 1.5% above the "*Cost of Funds Rate*" plus the "*Reserve Asset Costs, ruling day by day*". This Cost of Funds Rate was fixed at 6.80% for a period of five years and it is clear to me that on the expiry of the 5 year period, the aggregate of 1.5% above the current applicable Costs of Funds rate plus the Reserve Assets Cost was to apply to the mortgage loan account. A difficulty arises because there is no definition of "Cost of Funds" interest rate in the Facility Letter, nor the "*reserve assets costs*". In addition, it is unclear how this interest rate is affected by "*ruling day by day*". No definition of this interest rate has been furnished in any submissions by the Provider which is quite unsatisfactory as it remains very unclear as to what interest rate is applicable.

Notwithstanding the above, it appears to me from reviewing the documentation received as part of the submissions from the Complainants and the Provider, that the crux of the issue now revolves around whether the Euribor interest rate used in the calculation of the Provider's Cost of Funds interest rate, was the 3 month Euribor interest rate as submitted by the Provider or the Euribor "1-week rate, changing each day" as submitted by the

Complainants. The Provider contends that using their 3 month Euribor interest calculation, the amount of interest overcharged was €4,829.44. The Complainants asserts that based on their Euribor interest rate calculations, the amount of interest overcharged is €23,751.37. The Provider has not disputed this figure is incorrect based on the interest rate asserted by the Complainants, but has disputed the interest rate applicable. There is obviously quite a substantial difference between the two figures.

I am of the view that given the facility letter is entirely unclear as to what interest rate is applicable and based upon the fact the Provider has contradicted itself on numerous occasions as to how the "Cost of Funds" interest rate is calculated, I believe it is just and fair and in accordance with the principle of *Contra Proferentem* that the wording of the facility letter is interpreted in favour of the Complainants. Therefore, I believe the "*Cost of Funds Rate determined by the Company at date of drawdown for the appropriate period plus Reserve Asset Costs, ruling day by day*" should be construed as the 1 week Euribor interest rate, on a daily basis, to be paid quarterly. In the circumstances, I am unsurprised the Complainant sought the services of the Audit Firm.

In addition, the Complainants have submitted that it has cost them approximately €10,500 in "charges and costs" trying to identify the interest overcharge. I am of the view that given the length of time it has taken and the various confusing responses given by the Provider as to the correct interest rate applicable, it was reasonable that the Complainants sought external independent advice to identify the correct rate of interest applicable.

I note that the Provider made an offer of compensation in the amount of  $\leq$ 3,500 by way of letter dated **10 August 2018**, and made a higher offer in the amount of  $\leq$ 4,000 by way of letter to this office dated **12 December 2018**, neither of which were accepted by the Complainants. I am of the view that this offer of compensation was inadequate.

For the reasons set out above, I uphold this complaint and direct that the Provider pay a sum of €35,000.00 in compensation for the loss and inconvenience caused. For the avoidance of doubt, this sum takes into account the previous offers of compensation made by the Provider, and I am of the view that €35,000 is appropriate compensation for the totality of this complaint.

## **Conclusion**

My Decision is that this complaint is upheld pursuant to *Section 60(1)* of the *Financial Services and Pensions Ombudsman Act 2017*, on the grounds prescribed in *Section 60(2) (b)* and *(g)* 

I direct pursuant to *Section 60(4) (d)* of the *Financial Services and Pensions Ombudsman Act 2017,* that the Respondent Provider to pay a sum of €35,000.00 in compensation for the loss and inconvenience caused to an account of the Complainants choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in *Section 22* of the *Courts Act 1981*, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with *Section 60(8)(b)* of the *Financial Services and Pensions Ombudsman Act 2017.* 

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

## GER DEERING FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

11 December 2019

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.