



<u>Decision Ref:</u>	2019-0028
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer appropriate compensation or redress CBI Examination
<u>Outcome:</u>	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainants with the Provider and an overcharge of interest in the amount of €9,759.24 on that mortgage loan account.

A complaint was received by this office in December 2017. It detailed that the conduct complained of was that the Provider had failed to apply the correct interest rate to the Complainants' mortgage loan account over a period of 8 years and that they had not been offered adequate compensation by the Provider to compensate them for this failure.

The Complainants have two mortgage loan accounts with the Provider, the first mortgage loan was for €100,000 drawn down in 2003 and the second was a top-up loan of €30,000 drawn down in 2009.

The Provider considered the Complainants' mortgage loan accounts under the Provider's Tracker Mortgage Examination. The Provider identified that an error had occurred on the primary mortgage loan account and as such that account was deemed to be impacted. The Complainants' top-up loan was deemed not impacted.

The Provider contacted the Complainants in August 2016 advising them of the error that had occurred on their impacted mortgage loan account.

The Provider apologised and returned the Complainants impacted mortgage loan account to a variable buy to let interest rate where the interest rate would be no higher than 1.50% above the ECB rate. The Provider noted as follows in their letter dated 17 August 2016:

“In order to ensure that you do not experience any further detriment as a result of our failure, the first step we are taking is to reduce your current interest rate 3.70%, to the ‘Buy to Let’ interest rate that your account should be on which is the European Central Bank (ECB) rate (currently 0.00%) plus a margin of 1.50%. Your new rate is 1.50%.”

A redress and compensation offer was made to the Complainants by the Provider in December 2016 in relation to admitted failures of the Provider regarding the Complainants’ mortgage loan account, as follows;

“Your mortgage account had the ‘Buy to Let’ rate which could not be more than 1.5% over the ECB rate. At a point during your mortgage the interest rate moved to a different rate type. While the interest rate you moved to was lower for your benefit at the time, we didn’t tell you that as that interest rate moved you might end up paying more than 1.50% over the ECB Rate.”

The Provider details that the total interest overcharged totalled €9,759.24 and that the period of overcharging started in July 2008 and continued until November 2016. The Provider proposed to redress and compensate the Complainants’ as follows;

1. Redress of €6,764.69 covering;

“The amount overpaid while on the incorrect rate, adjusted for any underpayments (arrears) on your account. Interest to compensate you for not having access to the money you overpaid on your mortgage account (Time Value of Money). We have now corrected your mortgage account and reduced your balance to €57,409.96.”

2. Compensation of €1,515.92;

“Compensation for our failure at 15.00% of the interest overcharged plus 15.00% of TVM – or an appropriate minimum amount, whichever is higher.”

3. Independent Professional Advice Payment of €615.00;

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“A payment towards the cost of obtaining independent professional advice that you may wish to seek on this matter.”

As part of the redress and compensation offer the balance on the Complainants’ mortgage loan account was also reduced by €3,341.44.

The conduct complained of that is being adjudicated on by this office is that the Provider has not offered adequate compensation to the Complainants by consequence of the Providers’ failure in relation to their mortgage loan account.

As the Complainants have been through the Provider’s internal appeals programme, this office is now in a position to progress the investigation and adjudication of the complaint and issue a legally binding decision.

The Complainants’ Case

The Complainants submit that the offer made by the Provider does not adequately take account of the emotional, personal and financial strain placed on the Complainants’ entire family as a result of the conduct of the Provider.

The Complainants further submit that they have incurred financial losses under the following headings;

1. Credit Union Loans

The Complainants submit that they had no other choice but to borrow elsewhere in order to keep up their mortgage repayments. The Complainants say they took out an overall loan of €9,000 from the credit union in order to manage their cash flow in April 2012 and November 2012. They submit that this loan cost almost €11,000 over its lifetime until it was fully paid off. They submit that this loan was required in order to ensure there was enough in reserve to meet the mortgage and top up loan.

2. Extension of Term of Loans

The Complainants submit that following advice from the Provider in 2012, they were encouraged to extend the term of both their loans by 13.5 years in order to reduce payments. Restructuring occurred at a time when they were being over charged €119.21 per month. They submit that this has resulted in a potential €47,000 in extra

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repayments over the lifetime of the loans. They further submit that this was as a direct result of being overcharged on their mortgage loan account by the Provider.

3. Redemption Figures

The Complainants submit that had the correct rate been applied in the first place, they may not have had to restructure and when they eventually sold, more of the mortgage would have been paid leaving them with less to settle with the bank.

4. Stress and Hardship

The Complainants submit that being overcharged on their mortgage loan account affected them emotionally, financially and personally. They submit that the stress suffered resulted in one of the Complainants being forced to take sick leave from work in April 2012 for 2 months. The Complainants feel this aspect of their complaint has not been adequately addressed by the Provider. They submit it has been a constant distraction from and interference with their family unit and placed an unnecessary strain on their marriage.

The Complainants are seeking the following from the Provider;

- a) €47,000 as an additional financial loss.
- b) €11,000 as an additional financial loss.
- c) Further compensation for stress and hardship suffered.

The Provider's Case

The Provider submits that in December 2016 €8,895.61 was paid to the Complainants for redress and compensation. In addition a balance adjustment of €3,341.44 was undertaken on the Complainants' mortgage loan account. The Provider concludes that the overcharge of €9,759.24 as claimed by the Complainants has been repaid in full to the Complainants (Refund of €6,417.80 + mortgage adjustment of €3,341.44). The Provider submits that this has put the Complainants back in the position they should have been in had the error not occurred.

The Provider submits that the redress and compensation payment included a compensation payment of €1,515.92 to compensate for pain, harm, personal suffering, inconvenience or hardship. The amount was calculated based on the Provider's approved compensation

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model for customers who were impacted by the tracker issue. In accordance with this compensation model, in the case of the Complainants the compensation amount was calculated at 15% of the interest overcharged plus 15% of the time value of money, as the impacted property was previously the Complainants' principal private residence.

With regard to the specific headings of loss claimed by the Complainants, the Provider has made the following submissions:

1. Credit Union Loans

The Provider submits that there is no evidence to suggest that the credit union loans were directly related to the failure of the Provider to apply the correct interest rate. The Provider notes that the first credit union loan was availed of at the same time as the Complainants application for interest only payments in April 2012. The Provider approved the interest only payments which reduced the level of payments from €550.24 to €176.20 for the subsequent six months. The Provider submits that it is not aware of the purpose of the credit union loans.

2. Extension of Term of Loans

The Provider submits that at the time of the extension of the loan in October 2012 the financial circumstances of the Complainants were such that even had the correct interest rate been applied they would have been unable to service the impacted mortgage account.

They say that if the correct rate had been applied the repayments would have been €619 per month as opposed to €768 per month. As a result they say it is evident that there would have still been a shortfall of €149.

The Provider submits that the term extension of the loans was justified as it was necessary to ensure mortgage repayments would be sustainable taking into account the reduced payment capacity of the Complainants at that particular time.

The Provider also submits that the Complainants had the option of substantially reducing the projected additional financial losses claimed by increasing their loan repayments and/or seeking to reduce the loan terms on both loans back to the terms which applied prior to the 2012 term extensions, if they believed their household income was sufficient to cover the loan repayments on the reduced term.

The Provider also submits that the Complainants have been refunded the over payments made to the impacted loan and that as the loan has been redeemed in full

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in July 2017 (within its original contracted term) and with no penalty interest incurred. It concludes that the Complainants are therefore not out of pocket and their claim for a potential additional cost of credit of €47,000 is no longer applicable.

3. Redemption Figures

The Provider submits that as the impacted loan was restored in 2016 to the position it should have been in had the error not occurred, the balance that was redeemed in July 2017 is the balance based on the correct rate being applied on the impacted account since inception of the loan.

4. Stress and Hardship

The Provider submits that the purpose of the compensation payment of €1,515.92 is to compensate for pain, harm, personal suffering, inconvenience or hardship. The Provider submits that the amount of compensation was calculated based on the Provider's approved compensation model for customers who were impacted by the tracker issue. In the case of the Complainants the compensation amount was calculated at 15% of the interest overcharged plus 15% for the time value of money, as the impacted property was previously the Complainants' principal private residence.

The Complaint for Adjudication

The complaint for adjudication is whether the Provider has offered adequate compensation to the Complainants by consequence of the Provider's failure in relation to their mortgage loan account.

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.

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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 17 January 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.

In the absence of additional submissions from the parties, I set out below my final determination.

I note that the Provider has detailed that the total amount of interest overcharged to the Complainants of €9,759.24 has been repaid in full (Refund of €6,417.80 interest overpaid + mortgage adjustment of €3,341.44).

I note that the Provider has detailed that the purpose of the compensation payment of €1,515.92 is to compensate for pain, harm, personal suffering, inconvenience or hardship and that this amount was calculated based on the Bank's Approved Compensation Model for customers who were impacted by the tracker issue.

I will now consider if this compensation is sufficient given the individual circumstances of the Complainants.

The Complainants have sought additional compensation by reference to certain asserted losses. I will deal with each asserted loss in turn.

With regard to credit union loans, the Complainants have submitted that they had no other option than to take out a credit union loan of €9,000 in order to "keep the show going" which they say cost them a total of €11,000 in repayments. The Complainants say they were in financial difficulty in April 2012 and as a result they were forced to take out a loan of €6,000 from the credit union to cover personal expenses and a further loan of €3,000 from the credit union in November 2012.

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The Provider submits that there is no evidence to suggest that the credit union loans were directly related to the failure of the Provider to apply the correct interest rate.

I note from the documentation submitted that the €6,000 loan from the credit union was drawn down on 02 April 2012. Within 9 days of drawing down this loan on 11 April 2012, the Complainants also sought a 6 month interest only facility on their mortgage loan account by way of application together with standard financial statement. The reason identified in their application form for the 6 month interest only facility was 'house move'. Of further note, an internal letter dated 12 April 2012 which accompanied the Complainants' application and the standard financial statement records detailed that the Provider's representative had met one of the Complainants who was "visibly upset" and that he had explained to the Provider's representative that they had to move out of their mortgaged property and into rented accommodation for the following reason;

"house on each side of them is rented and that criminals have moved into the houses. They have been there for some time but things have gotten worse recently. They are being threatened and have had no choice but to move out. They have had their house up for sale for roughly a year and their intention was to stay in the property until they had it sold however they have had no luck whatsoever in selling the property.

They have been left with no option but to move out of the property and moved to a different property in [named location]. They therefore require interest only for a 6 month period. They are aware that interest only is a short term solution. We spoke about term extension also which they may decide to do in 6 months time.

I hope you can facilitate this request. They are a very genuine couple who are in need of short term assistance."

The standard financial statement (April 2012) assessed the Complainants' income and expenditure and recorded that their monthly deficit totalled €546. The Complainants' expenditure at this time included a payment of €650 per month in rent in addition to their monthly mortgage repayment of €759.

I note from the Balance Adjustment that was conducted on the Complainants' mortgage loan account as part of the Tracker Mortgage Examination that during the 6 month interest only period April 2012 – September 2012, the monthly overcharged amount varied from €66.72 to €119.21 per month and totalled €621.01. Therefore, at the time when the Complainants sought the loan of €6,000 from the credit union and for the six month period thereafter, their monthly expenditure would have well exceeded their income regardless of the overcharge. I am of the view that this was on account of the Complainants' situation

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with respect to having to seek rental accommodation, which resulted in a significant amount of additional monthly expenditure to the Complainants as opposed to being as a result of the Provider's interest overcharge.

That being said however, it is of relevance to also observe that the interest overcharge during that six month period from April to September 2012 totalled €621.01, which is marginally less than the €650 per month rental payment that the Complainants were making. I am of the view that this is of particular relevance to the Complainants' complaint that they suffered stress and hardship as a result of the Provider's overcharge which is dealt with further below.

With regard to the further loan of €3,000 which was drawn down on 13 November 2012. I note from the documents submitted that the Complainants had submitted a standard financial statement to the Provider a month earlier in October 2012 seeking a term extension of 25 years on their mortgage loan accounts. The reason for the term extension on this was also identified in the standard financial statement as a "*House Move*". At that time, the Complainants had a monthly deficit of income as against expenditure of €365. Again, this was taking account of a monthly rent payment of €650 and the full mortgage repayment of €768.

The balance adjustment that was conducted on the Complainants' mortgage loan account as part of the Tracker Mortgage Examination shows that in November 2012, the Complainants were over charged €74.64 per month on their mortgage. Consequently, I am of the view that even if they had been paying the correct level of interest at this time, the Complainants would nevertheless have had a deficit in their finances.

I am therefore of the view that the Complainants have not submitted any evidence to establish a causal link between the Provider's failure to apply the correct interest rate and the Complainants sourcing funds in April and November 2012 from the credit union. Rather I am of the view that the evidence has established that had the correct interest rate been applied, the Complainants may have required the personal lending in any event owing to the unfortunate personal circumstances that the Complainants found themselves in with respect to having to seek alternative rental accommodation as they were unable to live in their home.

With regard to the extension of the term of their mortgage loans, the Complainants submit that following advice from the Provider in 2012, they were encouraged to extend the term of their loans in order to reduce payments. The Complainants are claiming that had the correct rate been applied by the Provider they may not have had to restructure their

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mortgage loans which added 13.5 years to their mortgage loans and argue that this resulted in a financial loss of €47,000 over the extended lifetime of the loans.

The term extension was approved by the Provider in October 2012 and extended the term on their mortgage loan accounts from 2023 to 2037. As detailed above, the Complainants sought to extend the term of their loan and submitted a standard financial statement with the reason identified as "*House Move*". The balance adjustment that was conducted on the Complainants' mortgage loan account as part of the Tracker Mortgage Examination shows that in October 2012, the Complainants were being over charged €119.21 per month on their mortgage. As detailed above, at this time their monthly deficit of income as against expenditure was €365. Consequently, it appears to me that even if they were not overcharged the amount of €119.21 in October 2012 at this time, they would have had a monthly deficit of €245.79.

Taking the evidence before me into consideration, I am of the view that this restructure would have been necessary regardless of the error of the Provider in overcharging interest on the Complainants' mortgage loan account. The Complainants' personal circumstances forced them into taking up private rental accommodation as well as having to service their mortgage loan.

Even if the overcharging had not occurred the evidence before me shows that given the Complainants' personal circumstances and financial means at this time, the expense of rental accommodation on top of their mortgage loan was not affordable for the Complainants. The term extension was therefore necessary in order to reduce their mortgage expense.

With respect to the extension of the term of the mortgage loans, the Complainants also submit that if the term extension had not been applied that when they sold their property more of their mortgage loan would have been paid. For the reasons outlined above, I am of the view that the Complainants were not in a position to service the mortgage loan in full and on the original terms in October 2012 and therefore the term extension was necessary, which took account of their reduced repayment capacity. I therefore also cannot accept the Complainants' claim with respect to the redemption figures as they did not have the capacity to make higher payments. In this regard, it is also of note that the Complainants redeemed their mortgage loan account in July 2017, which was within the original term of the mortgage loan and as the Complainants' loans were on variable rates of interest, they did not incur any penalty interest.

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With regard to the Complainants' claim for stress and hardship, the Complainants submit that they suffered emotionally, financially and personally because of the error on their mortgage loan account by the Provider, as the Provider was "collecting on average over €100/month for 95 months".

The Complainants further submit that in April 2012, one of them was forced to take leave from work for two months due to stress. The Complainants submit that "it has been a constant distraction from and interference with our family unit and it has put unnecessary strain on our marriage". The Complainants also outline "A single income with 2 children, we live a very simple lifestyle, with no extravagancies as we can't afford the luxuries that others of the Celtic tiger era are accustomed to".

I note the impacted period extended for some 8 years and 4 months, from August 2008 – November 2016.

I have summarised the overcharging that occurred on this account during the impacted period in the table below:

Date Range (inclusive)	Amount Overcharged per month
August 2008 – April 2010	Between €5.19 and €5.91
May 2010 – March 2011	Between €26.94 and €48.81
April 2011 – April 2012	Between €61.91 and €71.31
May 2012 – October 2012	Between €105.29 and €119.21
November 2012 – November 2013	Between €74.64 and €96.46
December 2013 – May 2015	Between €101.52 and €104.32
June 2015 – August 2016	Between €79.98 and €88.38
September 2016 – November 2016	€15.40 per month

I accept the Complainants' submission that for a family of four who are relying on a single income for financial support, the loss of €97.50 on average per month for a period of eight years and four months is significant. In particular, I am conscious that during the six month period from May to October 2012, as I have referred to earlier in this finding, the overcharge essentially equated to a month's rental payment of €650. I am cognisant that at this time the Complainants were under considerable pressure owing to the fact that they had to move from their home into rental accommodation and I am of the view that it would have been significant for them at that time to have that money available to them during that period.

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The significance of the overpayments on the Complainants' mortgage loan account during the four year period from November 2012 up until the correct interest rate was restored to the mortgage loan account in November 2016 is also of note. The amount overcharged varied from €74.64 to €104.32 per month.

During this time, the Complainants were seriously challenged financially as they were servicing their mortgage loan (in accordance with the agreed extended period) and paying their monthly rent of €650. I have no doubt that this in and of itself placed a strain on the Complainants' finances, however it cannot but be the case that the unavailability of the sums of money overcharged on a monthly basis (circa €100) caused additional hardship and inconvenience to the Complainants during this four year period. As has been submitted by the Complainants and noted above, the Complainants are a single income family of four and I accept that the Complainants submission that they live a modest lifestyle and that these sums were significant to them.

It is evident from the Complainants' submissions that it has been a source of inconvenience and stress as they had to forego any kind of luxury during the impacted period and it put significant strain on them.

Taking into consideration all of the evidence before me in terms of the level of overcharging and the extended period over which the overcharging occurred, the impact such overcharging had on the Complainants, I am of the view that the level of compensation offered of €1,515.92 is not sufficient or reasonable to compensate the Complainants for the loss, stress and inconvenience suffered by the Complainants during the impacted period.

Therefore, I uphold this complaint and direct that pursuant to **Section 60(4)** of the Financial Services and Pensions Ombudsman Act 2017, the Provider pay a sum of €4,500 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered. For the avoidance of doubt the total sum of compensation of €4,500 is inclusive of the €1,515.92 compensation already offered to the Complainants for the Provider's failure.

Conclusion

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

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Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €4,500, 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 February 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.