



<b><u>Decision Ref:</u></b>	2019-0084
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer appropriate compensation or redress CBI Examination
<b><u>Outcome:</u></b>	Substantially 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.

The complaint was received by this office in June 2011. It detailed that the conduct complained of was that the Provider failed to fully advise the Complainants of the consequences of breaking the fixed interest rate period that applied to their mortgage loan account in January 2009 and the refusal to return the Complainants to a tracker interest rate.

This complaint was placed on hold by this office between May 2012 and February 2015 as a result of High Court and Supreme Court litigation that was ongoing at that time. The litigation was not in relation to this complaint but dealt with similar issues to those arising in relation to this complaint.

On conclusion of the litigation, engagements then took place between the Central Bank of Ireland (the “Central Bank”) and the Provider with respect to a scheme of redress for mortgage account holders who were affected by particular conduct of the Provider.

The Complainants’ mortgage loan account was considered by the Provider under the Provider’s Mortgage Redress Programme (the “MRP”). The Complainants’ complaint remained on hold within this office throughout the process.

An offer was made to the Complainants by the Provider in August 2015 as part of the MRP in relation to admitted failures of the Provider regarding the Complainants' mortgage loan account, as follows;

*"On 01/01/2009 [the Complainants] broke from the fixed interest rate period which applied to [the Complainants'] mortgage account at that time. This break took place before the scheduled maturity date of the fixed interest rate period.*

*In breaking from [the Complainants'] fixed interest rate period early, [the Complainants] lost a contractual right to avail of a tracker mortgage at the scheduled maturity date of the fixed interest rate period.*

*However at the time that [the Complainants] broke from [their] fixed interest rate period, [the Provider] did not inform [the Complainants] that [they] would be unable to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period."*

In the offer made to the Complainants in 2015, the Provider proposed to provide redress to the Complainants by returning them to the tracker rate of interest and compensate the Complainants as follows;

### **(1) Tracker Rate Mortgage Option**

*"the opportunity to move to the tracker rate mortgage you would have been entitled to move to at the maturity of your fixed interest rate period if you had chosen to do so. That rate will reflect the loan conditions of your mortgage with [the Provider]. The rate of interest charged on this product is based on the ECB Refinancing Rate (the "ECB Rate") plus a margin of 0.80% (in practice this equals a tracker rate today of 0.85%)"*

### **(2) Redress and Compensation**

#### **Part One – Balance adjustment and possible net refund to you**

*"We have established that your current loan balance would have been €311,131.87, which is €40,430.08 less than your loan balance at present.*

*We have calculated a net refund of overpayments due to you of €21,137.27"*

#### **Part Two – Compensation**

*"This payment will include two elements;*

*Firstly, it will include a payment of €6,265.53 in recognition of our failure in this matter.*

*Secondly, it will include €400.00 (including VAT) which you may use to pay for independent advice if you choose to seek advice in respect of this letter. You will have full discretion as to the use of this money”*

A Mortgage Rate Instruction Form was signed by the Complainants accepting the Provider’s proposal at **(1)** above in relation to the tracker interest rate on 27 November 2015.

The part of the initial complaint relating to the Complainants’ entitlement to a tracker interest rate on their mortgage loan account has therefore been resolved. The conduct complained of that is now being adjudicated on by this office and that is the subject of this Decision, is as follows;

- (a)** The Provider has not offered adequate compensation to the Complainants by consequence of the Provider’s failure in relation to their mortgage loan account, and
- (b)** The format of repayment of the sum overcharged by the Provider is not acceptable to the Complainants.

As the Complainants have been through the Provider’s Customer Appeals Programme therefore, 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 under the MRP does not adequately take account of the financial hardship, distress and upset that they have suffered as a result of the conduct of the Provider.

In relation to the redress, the Complainants submit that the sum of €63,567.35, being the sum that they were overcharged (less any mortgage arrears owing) should be returned to the Complainants’ current account; and that the capital value of the Complainants’ mortgage loan would be substantially reduced if the correct rate of interest had been applied. The Complainants submit that the Provider should correct this.

The Complainants also submit that their credit rating with the Irish Credit Bureau (the “ICB”) has been severely affected by the Provider’s conduct and have submitted that the Provider should arrange for all records of non-payment with the ICB to be removed. The Complainants submit that by consequence of the report by the Provider to the ICB they have been unable to secure finance by way of loan or credit card from any other financial institution.

In relation to the compensation offered, the Complainants submit that the sum of €6,265.53 offered by the Provider is unacceptable. The Complainants submit that they were deprived of the sum of €63,567.35 since November 2009, because of the Provider's conduct.

The Complainants submit that the Court rate of interest in respect of the repayment of that sum would be 8% per annum compounded. The Complainants submit that if the Court rate of interest was applied that this would result in a payment of €20,798.82 to them in interest.

The Complainants submit that the compensation does not adequately compensate them for the distress caused to them. The Complainants submit that their disposable income and their standards of living were severely impacted. The Complainants submit that they were under considerable stress to meet the mortgage repayments demanded by the Provider. These repayments were higher than they should have been as the Complainants were being over charged. The second-named Complainant submits that she was living on negligible disposable income due to having to make repayments that she had not budgeted for and that this severely affected her quality of life and she was obliged to seek professional assistance during this period to assist her in dealing with her stress levels.

The Complainants also submit that they incurred significant legal fees in having the issues regarding the interest rate being applied to their mortgage loan account addressed, this was in excess of the sum of €400 offered by the Provider in respect of independent advice.

The Complainants have requested the following from the Provider;

- (a) Confirmation that the tracker rate of ECB + 0.80% will remain in respect of their mortgage loan account;
- (b) That the sum of €63,567.35 be repaid to the Complainants' current account which the mortgage payments are deducted from;
- (c) That the capital value of the Complainants' outstanding mortgage facility be reduced so that they are put in the position that they would have been in had the correct rate of interest been applied;
- (d) Restoration of the Complainants' ICB record in full;
- (e) A realistic offer of compensation and a contribution towards legal fees.

### **The Provider's Case**

The Provider submits that as a result of an investigation by the Central Bank the Provider identified a failure in connection with the management of certain mortgage accounts, including the Complainants' mortgage loan account.

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The Provider submits that the failure that occurred with regard to the Complainants' mortgage loan account was the Provider's failure to inform the Complainants that, by breaking early from the fixed interest rate period in January 2009, they would lose their entitlement to a tracker interest rate in the future.

The Provider submits that the MRP was implemented and the purpose of the Provider's redress and compensation offer pursuant to the MRP was to return the Complainants' mortgage account to the position that it would have been in had the failure not occurred and to compensate the Complainants for the failure. The Provider submits in its letter of 04 August 2015, that the Provider's failure was explained to the Complainants and that details of the redress and compensation proposal were given to the Complainants.

The Provider submits that the Mortgage Rate Instruction Form was signed by the Complainants. The balance adjustment on the mortgage loan account, the refund of the overpayments and the compensation amount, have still not been completed as the Provider has not received the signed Payment Authorisation and Account Adjustment Form from the Complainants.

The Provider submits that an appeal was submitted by the Complainants to the Customer Appeals Programme (the "CAP") which is an independent appeals panel established by the Provider. The Provider submits that it replied to the Complainants' submission to the CAP. A decision was reached by the CAP not to uphold the Complainants' appeal and the Complainants rejected the CAP decision.

The Provider submits that the offer of the mortgage account balance adjustment of €40,430.08, plus a refund of overpayments in the amount of €23,137.27 would return the Complainants' mortgage loan account to the position it would have been in had the mortgage loan account been placed on a tracker interest rate of ECB + 0.80% on 20 November 2009 (the maturity date of the Complainants' initial two year fixed interest rate period).

The Provider submits that the offer made to the Complainants was based on giving them the benefit of the assumption that had they been informed that by breaking early from their fixed rate period, they would lose their entitlement to a tracker interest rate and that as a result, they would not have done so and that the Complainants would instead have chosen to remain on the fixed interest rate until the scheduled maturity date, at which point it is assumed that they would have selected a tracker interest rate.

The Provider submits that an amount of €6,265.53 was an appropriate level of compensation to be given to the Complainants and that an additional amount of €400 was also provided to enable the Complainants to avail of independent advice if they wished. The Provider submits that it is unclear as to the amount the Complainants are seeking from the Provider by way of further compensation.

The Provider submits that the compensation was reasonable and that this was supported by the CAP decision of March 2016. With regard to the appeal to the CAP, the Provider submits that the Complainants sought the sum of €5,750 plus VAT in fees. The Provider submits that

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as the Complainants were unsuccessful in their appeal the Provider is not responsible for the discharge of those fees. In this regard, the Provider also submits that the supporting fee notes and details of the legal services rendered related to the Complainants' complaint to this office.

The Provider accepts its failure in respect of the Complainants' mortgage loan account and submits that the failure has been redressed as part of the MRP.

In relation to the format of the repayment, the Provider submits that it understands that the Complainants are now satisfied with the Bank's explanation of how the Provider adjusted the loan balance and calculated the net refund of the overpayment.

The Provider has offered the Complainants, in recognition of the delay, which has occurred in relation to their complaint to this office, the sum of €5,000 towards the agreed resolution of their complaint with this office, which was separate and distinct to the offer of compensation as part of the MRP of €6,265.53. The Complainants rejected that offer. The Provider then made an offer of €15,000 in full and final settlement of the complaint, as a gesture of goodwill recognising that the complaint to this office had been ongoing for some time.

### **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 6 November 2018, 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

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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 issuing of my Preliminary Decision, additional submissions received from the parties as follows:

1. Letter from the Provider to this office dated 27 November 2018, together with attachments, including a recording of telephone calls between the Provider and the Complainants.
2. E-mail from the Complainants to this office dated 18 January 2019, a copy of which was transmitted to the Provider for its consideration. The Provider advised this office under cover of its letter of 30 January 2019 that it had no further submission to make.

I have now considered these additional submissions, together with all of the evidence submitted, and set out below my final determination.

With respect to the evidence furnished in response to the Schedule of Evidence/Information Required it is most disappointing that the Provider was *“unable to locate”* the telephone recordings that were requested. The Provider submitted that this was owing to *“the passage of time”*.

I note however that the Provider made detailed and lengthy references to telephone conversations with one of the Complainants spanning the period between 2011 and 2015, when responding to the Complainants’ appeal to the CAP in May 2015. It is both disappointing and unacceptable that the Provider could not locate the same telephone records some two years later in June 2017, particularly in circumstances where the Provider was aware that a complaint was ongoing in this office with respect to this mortgage loan account.

This was something which I drew attention to, and expressed my dissatisfaction with, in the Preliminary Decision.

Since the Preliminary Decision issued the Provider has submitted some telephone recordings and a call log in evidence. It is noted that the Provider has submitted that these documents were omitted in its response to the Schedule of Evidence due to an oversight and the Provider has sincerely apologised for the omission. I have considered these telephone recordings in the course of preparing this Legally Binding Decision.

I will consider the conduct complained of in this complaint under the headings below.

**(A) The Provider has not offered adequate compensation to the Complainants by consequence of the Provider’s failure in relation to their mortgage loan account**

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I note that the Provider has detailed that the primary objective of the MRP was to return all affected customers to the position they would have been in, had the Bank's failure not occurred.

Furthermore, the Provider has submitted that it conducted a review of the Complainants' mortgage loan account to establish the overall impact of the Provider's failure on the Complainants.

The Provider has submitted that based on the information to hand when the review was undertaken that the Provider determined that the balance adjustment of €40,430.08, the net refund of €23,137.27 and the additional compensation amount of €6,265.53 was an appropriate level of redress and amount of compensation to be given to the Complainants. I note that the Provider later increased its offer of compensation to €15,000.

The Provider submits that the level of redress and compensation was reasonable and that this is further supported by the decision made by the CAP on 3 March 2016. The Provider has further submitted that *"CAP assessed the Complainants' Appeal and determined that the Complainants' situation did not merit an award of additional compensation above that already offered by the Bank."*

The Complainants have sought additional compensation and provide the following supporting arguments.

The Complainants are of the view that account has not been taken by the Provider of the detriment and stress suffered by the Complainants, in the compensation awarded to the Complainants through the MRP.

I note that the impacted period extended for six years from November 2009 to November 2015 (the "impacted period"). In order to assess whether the compensation adequately takes account of the alleged detriment and hardship suffered by the Complainants during that period, I have firstly considered the history on the Complainants' mortgage loan account during that period. In this regard, I note that there were significant interactions with the Provider's Arrears Unit and that the Complainants were deemed by the Provider to be in continuous arrears during that time, the details of which I set out in the following paragraphs.

I note that in July 2010, the Complainants sought and were approved for a payment holiday of 3 months from August 2010 to October 2010. I note that the reasons given by the Complainants at that time for the request was to repay a credit card balance, replace a broken fridge and a possible job change.

In October 2011, the Complainants contacted the Provider advising that they would not be in a position to make the October repayment. At that time the Complainants were advised to complete a Standard Financial Statement to enable the Provider to assess their situation for a possible mortgage restructure. I note that the Provider wrote to the Complainants by letter dated 29 December 2011, informing them that arrears had accrued on their mortgage

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loan account of €1,837.75. I further note that the account again fell into arrears in January 2012 in the amount of €1,661.29.

Arrears continued to accrue and at September 2012, arrears were shown in the amount of €4,690.02, increasing further to €6,166.96 by December 2012, increasing further to €7,642.07 by March 2013, and increasing further to €12,067.40 by June 2013.

The Complainants submitted a Standard Financial Statement in August 2013, which was assessed by the Provider. In response, it offered the Complainants an Arrears Repayment Plan in September 2013.

I note that the Arrears Repayment Plan offered the Complainants a monthly repayment of €1,554.10 for 410 months which included full capital and interest repayments, plus an overpayment to clear the arrears. This agreement was accepted by the Complainants on 29 September 2013. I note that by this time arrears on the mortgage loan were deemed to have reached €16,495.37 by the Provider.

In December 2013, a letter issued to the Complainants advising that the direct debit to the Provider had been returned unpaid and that an instalment of €1,720.61 was outstanding and that this amount would continue to accrue interest until the arrears of €18,060.64 were fully discharged.

The direct debit was returned unpaid in January 2014, March 2014 and April 2014. According to the Provider, arrears at that time stood at €17,576.77. In May 2014, a six month review was conducted by the Provider on the Complainants' mortgage loan account and stage two of the Arrears Repayment Plan was proceeded with; €15,976.77 was capitalised on the account and a revised instalment of €1,666.09 was agreed.

The account was again deemed to have fallen into arrears in July 2014 and September 2014. In October 2014, arrears were deemed to stand at €3,400.66. The arrears were cleared in December 2014, but the account again fell into arrears in February 2015. As of August 2015, when the Complainants' mortgage loan account was identified as impacted as part of the MRP the arrears on the mortgage loan account were at €3,221.27.

However, it now appears from the mortgage redress statement that issued as part of the MRP that the Complainants' mortgage loan account would never have been in arrears during the impacted period, had the correct interest rate been charged. The mortgage redress statement shows that the Complainants had in fact mostly been making pre-payments on the mortgage loan account throughout the impacted period. It is significant to note the following examples of interactions between the Complainants and the Provider during the impacted period in relation to "arrears" when in fact the mortgage loan account was in credit with respect to the correct liability due;

- In June 2013, when the Complainants were being informed by the Provider that they were in arrears of €16,495.37, they had in fact made pre-payments on their mortgage loan account of €10,766.38

- In September 2013, when the Complainants were being informed by the Provider that they were in arrears of €16,495.37 and entered an Arrears Repayment Plan, they had in fact made pre-payments on their mortgage loan account of €9,796.89
- In April 2014 when the Complainants were being informed by the Provider that they were in arrears of €17,576.77, they had in fact made pre-payments on their mortgage loan account of €12,989.01

The summary of interest charged is also of particular note as it demonstrates that during the impacted period the difference between the interest that was charged and interest that should have been charged was significant on a monthly basis. This varied from month to month. By way of examples, the interest over charged in November 2009 was €183.21, in February 2012 was €963.51, in October 2014 was €1,131.05 and in March 2015 was €1,131.50.

The Complainants have submitted that they were under considerable stress during the impacted period to meet the mortgage repayments demanded by the Provider. The second-named Complainant's circumstances are particularly relevant in this matter, in that, it appears that the second-named Complainant was servicing the mortgage herself. I understand that this is a matter that was known to the Provider. It is unclear whether the Provider was aware of this from the inception of the mortgage loan. However, it was certainly aware since September 2013, when the SFS was assessed as the Provider noted this on the assessment form. Furthermore, I am also aware from the evidence before me that the second-named Complainant had a period of unemployment during the impacted period, and that she recommenced employment in September 2013. It has been submitted that the second-named Complainant was living on negligible disposable income due to having to make repayments that she had not budgeted for, and that this severely affected her quality of life.

In the circumstances of this matter and given the gravity of the overcharge on a monthly basis, I accept that both Complainants experienced significant difficulties during the impacted period. In particular I am mindful of the difficulties experienced by the second-named Complainant. The second-named Complainant found herself in the unfortunate circumstances of a period of unemployment during the impacted period and as it now transpires she was being over-charged on her mortgage loan account during this same period. I have no doubt that this would have caused significant stress and difficulties for the second-named Complainant and impacted her finances, including her disposable income, her well-being and her standard of living. In this regard, I believe that owing to the level of overcharging that occurred, the second-named Complainant was denied the opportunity during that impacted period to make informed decisions about how to best manage her finances and her life choices. Furthermore, in this respect I am also cognisant that the second-named Complainant had significant engagement with the Provider's Arrears Unit by letter, telephone calls and emails, during the impacted period when, it has now transpired that, her account was in fact not in arrears during that period.

The Provider has submitted that the level of redress and compensation offered to the Complainants was “reasonable”.

Taking the points submitted by the Complainants and the evidence before me into consideration and specifically the fact that the level of interest over charged was of such a significant magnitude, the overcharging spanned a time period of six years and the position the Complainants found themselves in with respect to engaging with the Provider on arrears that had not, in fact, been accrued, I am of the view that the level of compensation offered is not at all sufficient or reasonable to compensate the Complainants for the hardship suffered and is not reasonable in the circumstances.

I also note that the second-named Complainant has submitted an email from a named Counselling Service Provider which details that the second-named Complainant attended the service during the period November 2009 to November 2014 with “stress related issues” and detailed that the total fees paid during the period were €13,930.

The Complainants have submitted that they have been “wrongfully deprived of the use of up to €63,567.35 since November 2009” and that the Court rate of interest in respect of the repayment of the sum of €63,567.35 would be 8% per annum compounded, which if applied in this case would result in a repayment of €20,798.82 to them in interest alone.

In this regard, I would highlight that section 22(1) of the Courts Act 1981 provides;

*“Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgement.”*

I must first observe that the provisions of the Courts Act 1981 only apply in the circumstances provided for under 60(6) of the Financial Services and Pensions Ombudsman Act, 2017 and these are not the specific circumstances relevant to this complaint.

However, that being said, I am of the view that the Complainants should be entitled to a payment with respect to the time value of the money/interest on the money that was overpaid on the mortgage loan account to the Provider during the impacted period. I note that the Provider has included a payment in this respect in the overall net refund calculation.

I am of the view however that the Complainants were not deprived of the use of up to €63,567.35 for the full period of the overcharge.

In this regard, the Complainants have not taken into account that the sum of interest overpaid accrued over the impacted period of six years. The calculations submitted by the Complainants assume that they would have had that lump sum available to them commencing from November 2009, which is not the case.

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The Complainants have sought compensation for the payments made by them in respect of legal costs of circa €5,980 (plus VAT), which includes legal advice in corresponding with the Provider, with respect to the redress and compensation offering and the appeal to the CAP, and in respect of the complaint to this office.

With regard to any costs the Complainants incurred in making their complaint to this office, I would point out that the Complainants were notified by letter dated 20 June 2011 that;

*“whereas the use of Solicitors, or any other professional assistance, to handle an application to the Bureau is quite acceptable, it is important to note that any costs incurred, legal or otherwise, are entirely the responsibility of the Complainant. There is no provision for awarding costs under this scheme.”*

Consequently, I will not be taking into account any legal fees incurred in making a complaint to this office in my direction of compensation.

With respect to the costs incurred for the appeal to the CAP, the Provider submitted that *“as the Complainants were not successful with their Appeal to the CAP, the Bank is not responsible for the discharge of the Complainants’ costs of the Appeal.”*

However, given the particular circumstances and the complexity of the issues arising from the gravity of the overcharge and the length of time that it persisted, I accept that the Complainants found it necessary to engage legal assistance in their dealings with the Provider and I will take this into account in my direction for compensation.

**(B) The format of repayment of the sum overcharged by the Provider is not acceptable to the Complainants**

In relation to the format of the repayment, the Provider originally submitted that although the Complainants initially complained about the format of the overpayment of the sum overcharged it was of the understanding that the Complainants were later satisfied with the Bank’s explanation of how the Provider adjusted the loan balance and calculated the net refund of the overpayment.

The Complainants reject this and detail that no explanation has been given *“aside from an extremely confusing mortgage redress statement”*. The Provider details that if the Complainants were not satisfied then the Provider was happy to address any further queries.

I note that the Provider has detailed that it established that the;

*“Complainants had overpaid their Mortgage account in an amount of €63,567.35.....this overpayment did not consist solely of interest.....When the Complainants broke from their fixed rate period on 02 January 2009, they continued to make repayments at a higher variable rate of interest, instead of a tracker rate of ECB + 0.8%.*

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*As the repayments were set at a higher rate of interest, the principal balance reduced at a slower rate, thereby incurring more interest than would otherwise have been the case had the Mortgage been on a tracker rate of ECB + 0.8%.*

*In an effort to return the Complainants' Mortgage Loan Account to the position it would have been in had the Bank's failure not occurred, the Bank sought to reduce the principal outstanding balance of the account, to reflect the position it would have been in had the tracker rate of ECB + 0.8% been applied on 20 November 2009. The remaining funds overpaid by the Complainants, in the amount of €23,137.27 were offered to the Complainants as a net refund of overpayments to their nominated account."*

I note that the Complainants are not satisfied with the Provider's proposed manner of payment, that is the reduction of the principal outstanding balance of the mortgage loan account to restore it to the position it would have been in and payment of the balance to a nominated account of the Complainants.

As set out above the Complainants have sought, among other things, the following from the Provider:

- (1) That the sum of €63,567.35 be repaid to the Complainants' current account which the mortgage payments are deducted from;
- (2) That the capital value of the Complainants' outstanding mortgage facility be reduced so that they are put in the position that they would have been had the correct rate of interest been applied;

In this regard, I accept the Provider's explanation as set out above with respect to the calculation of the balance adjustment figure and how this figure was reached by the Provider.

Had the correct interest rate been applied to the Complainants' mortgage loan account during the impacted period, the principal balance would have reduced at a faster rate. The calculation that has been conducted by the Provider to provide redress to the Complainants has been to restore the Complainants' mortgage loan account to the position it would have been had the correct rate been applied during the impacted period.

During the investigation of this complaint, I queried the Provider in relation to fluctuations in the balance adjustment and the net refund in overpayments between different statements issued by the Provider to the Complainants at different points in time.

I accept that these figures have fluctuated in circumstances where the Complainants have not accepted the redress and the arrears position on the mortgage loan account has affected this calculation.

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It is important for the Complainants to be aware that they cannot avail of both **(1)** and **(2)** above in circumstances where the application of both would not restore the Complainants to the position they would have been in and would instead result in the Complainants receiving a sum of money over and above what is calculated as the sum owed by the Provider to the Complainants.

I am of the view that given the purpose of the MRP is to put mortgage account holders in the position that they would have been had the failure on their mortgage loan account not occurred, that the correct course of action is for the Complainants' mortgage loan account to be adjusted to reflect the manner in which the account would have amortised had the correct interest rate been applied during the impacted period. The appropriate course of action is for the Provider to carry out the necessary balance adjustment and provide the Complainants with a net refund of overpaid interest.

### **(C) Other Issues**

In the email of 22 August 2017 the Complainants have detailed that the Provider did not comply with the fact that redress and compensation was to be paid to impacted customers up front and at the point of offer.

The right of impacted customers to be paid redress and compensation up front and at the point of offer is affirmed in Central Bank's Principles for Redress and in the update issued by the Central Bank in October 2017.

In this regard I note that the Complainants were informed by the Provider by letters dated 04 August 2015, 14 October 2015, and 16 November 2015 that the Payment Authorisation and Account Adjustment Instruction Form had to be completed before any payment could be paid and that this did not prejudice the Complainants' right of appeal to the appeal panel, nor the right to make a complaint to the then Financial Services Ombudsman (and the current Financial Services and Pensions Ombudsman).

The Complainants' representative ultimately wrote to the Provider enclosing the rate instruction and detailing that it was being furnished on the strict understanding that this was the only element of the proposal being accepted by the Complainants.

In this respect, I am of the view that the Provider gave the Complainants the option to accept the redress and compensation offer up front and at the point of offer, whilst still maintaining their right of appeal to the MRP and the then Financial Services Ombudsman. Furthermore the Provider reminded the Complainants of this in further correspondence. It was a matter for the Complainants to accept this or not and they did not accept.

I note that the Complainants have requested that the Provider restore the Complainants' Irish Credit Bureau ("ICB") record. In this regard, I note that the Provider has submitted that a review of the Complainants' ICB record will be conducted once the Complainants' account has been redressed and following receipt of the signed account adjustment form from the customer.

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I note that the Provider has further detailed that it will honour its commitment to amend the Complainants' ICB record, and to provide the Complainants with any assistance required once the redress has been effected. I do not see why the Provider would need to wait until the redress has been put in order to correct the ICB record.

I direct that the Provider carry out the required rectifications with respect to the Complainants' ICB record. Having a negative credit rating with the ICB has very serious consequences and I note the Complainants have indicated that this affected their ability to borrow over the period. I will take this into account in my direction for compensation.

The Complainants have requested that the Provider confirm that the tracker rate of ECB + 0.80% will remain in respect of their mortgage loan account. I am of the view that it would not be appropriate for this office to interfere with any prospective or future changes to the Complainants' mortgage loan account which might be mutually agreed in the future and therefore, it is not my intention to make any direction in this regard.

It is clear to me that the conduct of the Provider in overcharging the Complainants for their mortgage over an extended period had a serious and negative impact on the Complainants and their quality of life. It is evident that the overcharging and the consequences that flowed from this overcharge for the Complainants, has been a major source of stress and inconvenience for them. It has denied them control over important decisions relating to their finances and their lives in general. I am not satisfied that the sum of compensation offered by the Provider, initially of €6,265.53 and later €15,000 was in any way sufficient compensation in all the circumstances of this complaint.

Therefore I direct that pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, the Provider carry out the appropriate balance adjustment on the Complainants' mortgage loan account to leave it in the position it would have been had the failure not occurred. I also direct the Provider to pay a sum of €45,000 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered and direct that the Provider correct the Complainants' ICB records.

For the avoidance of doubt, the sum of €45,000 compensation I direct is in addition to the appropriate balance adjustment (which stood at €43,430.08 when the review was undertaken) and the net refund of interest (which stood at €23,137 when the review was undertaken). I acknowledge and accept that there may be a variation in balance adjustment and refund of interest to allow for the passage of time and payments made since the review was undertaken. For the avoidance of doubt, the total sum of compensation of €45,000 includes the sum of €6,265.53, which was already offered to and was not accepted by the Complainants for the Provider's failure in 2015.

## **Conclusion**

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

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider (i) rectify the conduct complained of by carrying out the appropriate balance adjustment on the Complainants' mortgage loan account to leave it in the position it would have been had the failure not occurred, (ii) pay a sum of €45,000 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered (such sum to be paid into an account of the Complainants' choosing within a period of 35 days of the nomination of account details by the Complainants to the Provider) and (iii) correct the Complainants' ICB records.

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**

04 March 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,

/Cont'd...



**(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.**

