



<b><u>Decision Ref:</u></b>	2020-0287
<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>	Rejected

#### **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 €35,676.15 on that mortgage loan account.

The mortgage loan was drawn down in **March 2006** in the amount of €281,250. The mortgage loan was initially classified as a Buy to Let mortgage loan and the term was 20 years. This loan was re-classified to a Private Dwelling House mortgage loan in **2010**. The mortgage loan account was redeemed in **February 2015**.

The Complainants' mortgage loan account was considered by the Provider as part of the Central Bank directed Tracker Mortgage Examination (the "Examination"). The Provider identified that an error had occurred on the mortgage loan account and that mortgage loan account was deemed to be impacted under that Examination.

The Provider contacted the Complainants on **9 December 2016** advising them of the error that had occurred on their mortgage loan account. The Provider detailed the circumstances giving rise to "*a failure on our part*" as follows;

*“When you took out your mortgage we gave you the wrong set of terms and conditions due to a manual error. Despite this error, we have now decided to honour these terms and conditions. These terms and conditions gave you a guarantee that your rate (the ‘Buy to Let’ rate) could not be more than 1.50% over the European Central Bank (ECB) rate. But the actual rate on your account was often higher than this.”*

With respect to the effect of the failure on the mortgage loan account the Provider outlined as follows;

*“What does this mean for you?*

*Now that we have completed the detailed review of your mortgage account we have been able to calculate the redress and compensation that is due from 30/06/2008, which was when your account was first impacted.”*

The Provider made an offer of redress and compensation to the Complainants in the letter dated **9 December 2016**. The offer of €44,597.92 made by the Provider to the Complainants comprised of the following;

1. Redress of €38,246.02 covering;
  - The amount overpaid while on the incorrect rate.
  - Interest to compensate the Complainants for not having access to the money they overpaid on the mortgage account (Time Value of Money).
2. Compensation of €5,736.90 for the Provider’s failure.
3. Independent Professional Advice payment of €615.00.

The Provider did not restore a tracker interest rate to the Complainants’ mortgage loan account as the mortgage loan account had been redeemed in full on **5 February 2015**.

In **February 2017**, the Complainants appealed the redress and compensation offering to the Independent Appeals Panel. The basis of the Complainants’ appeal was the level of compensation offered by the Provider. The Appeals Panel decided on **25 April 2018** that the Complainants were unsuccessful in their appeal for the following reasons:

- *“that it did not agree with the customers’ claim that the sale of [the mortgaged property] arose as a result of the failure by the Bank to apply the correct interest rate.*
- *“that the redress package received by the customers addresses the financial losses claimed in respect of the payments made by the guarantor.”*
- *“that the stamp duty and purchase costs are not related to the failure by the Bank to apply the correct interest rate.”*

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- *“that it did not agree with the customers’ claim that the non-financial losses claimed by the customers arose as a result of the failure by the Bank to apply the correct interest rate.”*

When the Complainants completed the Provider’s internal appeals process, this office was in a position to progress the investigation and adjudication of the complaint.

The conduct complained of that is being adjudicated on by this office is that the Provider has failed to offer adequate redress and compensation to the Complainants by consequence of the Provider’s failure in relation to their mortgage loan account.

### **The Complainants’ Case**

The Complainants submit that the compensation offer made by the Provider only *“partially”* compensates them for the losses that they have incurred and that they *“have not been returned to the position [they] would have been had this overcharge not been made”*.

The Complainants submit that in or around **January 2010**, they *“discussed”* the rate on the account with the Provider and they *“were advised that the only way to move on to a lower rate was to convert the loan to a PDH.”* The mortgage loan account was converted from a BTL to a PDH property in **January 2010** and the rate on the account was amended from the commercial base rate of 4.63% to the then standard variable rate of 2.63%. The Complainants have queried why it did not become apparent to the Provider *“at the time of the switch”* that they were being overcharged. They submit that *“even upon switching to the PDH loan [the Complainants] continued to be overcharged on the contracted rate...and numerous subsequent rate increases further increased this”*. The Complainants submit that they had to restructure the loan at this time as they *“struggled”* with payments.

The Complainants submit that from **February 2011** onwards, in order to meet the monthly mortgage repayments they had to borrow €200.00 per month from their father, who was a guarantor on the mortgage loan. They outline that from **January 2013 to November 2014** they had to borrow €300.00 per month from their father. They submit that they have endured *“inconvenience and embarrassment”* because they had to borrow a total of €12,300 from their father over a 47 month period.

The Complainants submit that from **November 2014** onwards, their father could no longer lend them money following his retirement. They state that following this, they could no longer afford the mortgage repayments *“as it was not affordable without his assistance”*. They submit that they had *“no choice”* but to sell the mortgaged property in **February 2015** *“resulting in a crystallised loss of €73,000”*.

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The Complainants have queried why the Provider did not identify the overcharging when they requested redemption figures from it in **2015**. They submit *“clearly at this point [the Provider] should have spotted that the interest calculations had been incorrect for 6.5 years and [the Complainants] should have been informed.”*

The Complainants are seeking either of the following from the Provider;

- (A) That the Provider facilitate the purchase of a new property. In this regard the Complainants are seeking;
- (i) That the Provider issue them with a new mortgage in line with their original terms and conditions in the amount of the outstanding balance when their mortgage loan account was redeemed following the sale of the property in **2015**, and
  - (ii) That the Provider make a cash payment to the Complainants to cover the difference in cost between the amount of the mortgage and the purchase price of the new property, inclusive of fees and stamp duty.

Or,

- (B) Compensation in the sum of €83,950 for the following losses;
- (i) The cost of selling the property which was the subject of the mortgage loan account at a loss of €73,000.
  - (ii) 15% additional compensation, to the value of €10,950.

Or,

- (C) Compensation with respect to the following;
- (i) The Time Value of Money,
  - (ii) The inter family loan of €12,300,
  - (iii) The loss on the sale of the property to include stamp duty, legal fees and other costs of €98,896.

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

The Provider submits that the Complainants drew down a mortgage of €281,250 on **02 March 2006** for a term of 20 years under a Mortgage Loan Offer Letter dated **31 August 2005**.

The Provider details that the Complainants are siblings and the purpose of the loan was to assist in the purchase of a residential investment property. The security for the loan comprised of the residential investment property and a joint and several guarantee from

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the Complainants' parents. The Provider states that the mortgaged property cost €375,000 and was funded by the mortgage loan of €281,250, with the balance of €93,750 plus associated charges of €40,000 funded by way of a gift to the Complainants.

It submits that the monthly loan payments were funded from a third party account from drawdown in **March 2006** until **March 2007**, after which the loan was paid from a loan funding account which was opened in **February 2007** by the Complainants, to receive rental income. The Provider submits that it is evident from the funding account for the loan that the Complainants were in receipt of rental income of €1,000 up to €1,300 per month from **February 2007**. It states that this compares to capital and interest repayments of €1,128 per month at the peak of the higher rate charged or an average of €1,000 per month.

The Provider submits that on **9 January 2010**, it received a signed written request from the Complainants to reclassify the loan account from Buy-to-Let ("BTL") to Private Dwelling Home ("PDH"), which was actioned by the Provider on **14 January 2010**, which resulted in the interest rate being converted from the commercial base rate of 4.63% to the standard variable rate of 2.63%.

The Complainants then requested on **21 January 2010** to extend the term of the loan from the original maturity date of **2026 to 2045** and to amend the repayment structure from interest only to capital and interest repayments from **February 2010**. Both requests were approved and applied by the Provider.

The Complainants sold the mortgaged property and redeemed the mortgage loan on **5 February 2015**.

The Provider outlines that the Complainants' mortgage loan was considered to be impacted as part of the Examination in **December 2016** because when the Complainants took out their mortgage the Provider gave them the wrong set of General Terms and Conditions. The Provider submits that this was due to a manual error, which meant the terms and conditions which were given to the Complainants included a clause which stated that the interest rate would not exceed ECB + 1.5% (a product feature known as a 'price promise'). It states that the Provider has now honoured the incorrect General Terms and Conditions and rectified and redressed the mortgage loan account to put the Complainants in the position they would have been in had the price promise been applied to the account at all times.

The Provider submits that the redress and compensation payment made to the Complainants is "*fair*" and "*reasonable*". The Provider details that it refunded the Complainants the interest overpaid by them in the sum of €35,676.15. The Provider outlines that the time value of money payment of €2,569.87 compensates the

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Complainants for not having the benefit of the money they overpaid and is calculated by selecting the best annual deposit rates the Provider offered during the impacted period and applies these on a monthly basis to the amounts that were overpaid during the impacted period.

It states that in order to determine the level of compensation for the Complainants, it calculated compensation based on a percentage of the interest overcharge plus a percentage of the time value of money payment. The Provider submits that in this case, where the impacted mortgage loan account relates to a Private Dwelling Home (“PDH”) that has been sold and was never in a legal process, the percentage applied is 15% of the overcharged interest. The Provider details that the 15% compensation payment was €5,736.90.

The Provider submits that the Complainants sold the property in **February 2015** on a voluntary basis. The Provider submits that there is no evidence on its files of the Complainants requesting a tracker interest rate on their loan. It states that all monthly repayments were met on the mortgage loan account since inception and there is no evidence to suggest the Complainants were having trouble meeting their mortgage repayments. The Provider submits that it does not have on file details of income and expenditure for the Complainants at the time of the property sale in order to assess affordability. The Provider submits that it was never advised of a decrease in other income sources or any material change in the Complainants’ circumstances since information was last received in **2010**. It submits that in addition, there is no evidence on the Provider’s file of any requests for forbearance prior to or at the time of the sale.

The Provider submits that it is happy to assess a new mortgage application for the Complainants under its current lending criteria, should the Complainants wish to avail of a new mortgage. The Provider believes that the compensation and redress paid to the Complainants is “*fair and reasonable*”.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider has failed to offer adequate redress and 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

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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 **16 July 2020** 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 Complainants made further submissions by email to this Office on **16 July 2020**, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submissions.

Having considered the Complainants' additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

The Provider has detailed that the redress and compensation offered and paid to the Complainants aligns to the principles outlined under the Central Bank's Principles for Redress. The Provider has detailed that the redress payment of €38,246.02 reflects the amount of interest overpaid (€35,676.15) on the mortgage loan account and includes a payment to reflect the time value of money (€2,569.87). The Provider also paid the Complainants compensation of €5,736.90 and €650.00 for the purposes of seeking legal advice. The Provider submits that the redress and compensation paid is fair and reasonable and the Provider also established an independent appeal process through which the Complainants appealed their case.

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

The Complainants submitted a **Buy to Let Application Form** to the Provider which was signed by the Complainants on **06 June 2005**. The **Declaration and Consents** section of the Application Form was signed by the Complainants' mother "*as power of attorney*" on **26 August 2005**. It appears from the Application Form that both of the Complainants were students at the time and did not have any income. The Application Form records a "*Projected Rental Income per annum*" as €12,000.

The Loan Details section of the Application Form records that the purchase price of the property was €375,000 and that would be funded by a mortgage loan from the Provider of €281,250 and €120,250 would be funded from the Complainants' parents which included the costs of stamp duty and fees. The Complainants selected the Loan Type option of "*Interest Only*".

The Provider's **Loan Report** has been submitted in evidence which records that the Complainants' mother had power of attorney for the Complainants who were both abroad at the time of the application. The Key Risks and Recommendations section of the Loan Report details as follows:

*"On the negative side the applicants are not earning at present, have no property/home of their own, have no letting experience and could not hope to cover the shortfall on the proposed loan.*

*However their parents who are financially strong are guaranteeing the loan, providing a gift of 120k [REDACTED] resulting in reasonable RIP [Residential Investment Property] exposure of 75% in a good letting area where the projected rental should be achievable and repayment cover should be adequate.*

*We would normally ask for the parent/s to be joint borrowers in a case like this but as [REDACTED] is a Manager with [the Provider] approval is recommended as presented with herself and [REDACTED] as guarantors as they are very unlikely to allow their input of €120k to be endangered."*

A **Loan Offer** dated **31 August 2005** issued to the Complainants which detailed as follows;

1. Amount: €281,250.00 (*two hundred and eighty one thousand, two hundred and fifty euro*)
2. Term & Nature: *20 year Repayment Loan (including a capital moratorium for the first 60 months).*

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3. *Purpose of Loan:* Towards the purchase of a Residential Investment Property located at [Property Address] at a cost of €375,000 plus fees.

4. *Rate of Interest:* Variable at 3.25% p.a.  
*Rate Basis:* Variable Commercial Base Rate

5. *Repayments:* €761.72 per month comprising interest only for the first 60 months payments based on the above variable rate.

*After expiry of the initial 60 months capital moratorium, payments shall comprise of principal and interest and shall be calculated to amortise the loan and interest thereon over the remaining term by equal instalments.*

*All Payments shall be made by monthly direct debit on dates as may be determined by [the Provider] and advised to the Borrower in writing. Payments will vary in line with movements in the interest rate."*

The "**Principal Details of the Loan**" section of the **Loan Offer** detailed as follows;

*"THE PAYMENT RATES ON THIS COMMERCIAL LOAN MAY BE ADJUSTED BY [THE PROVIDER] FROM TIME TO TIME."*

The **Standard Commercial Loan Conditions** detail as follows;

**"1. DEFINITIONS**

...

*"Buy to Let Rate" shall be the rate as determined by [the Provider] from time to time for variable residential investment loans. The dates on which the "Buy to Let Rate" shall vary shall be determined by the timing of changes to the ECB Rate and shall take place on the sooner of:-*

...

*Subject to the timing differences outlined above, [the Provider] shall undertake that the variable "Buy to Let" Rate shall not at any time be higher than 1.5% over the ECB rate, throughout the term of the Loan."*

The **Acceptance** of the loan was signed by the Complainants' mother as "**Power of Attorney**".

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The Complainants' mortgage loan account was drawn down on **02 March 2006**. The Provider submits that the "*monthly loan payments were funded from a third party account*" from drawdown in **March 2006** to **March 2007**. It has not been disputed by the Complainants that this is the case. I have not been provided with any evidence from the parties as to who the third party payer was. The interest rates and monthly repayments applicable to the mortgage loan in the period from **March 2006** to **July 2008** are outlined in the table below.

<b>Date Range (inclusive)</b>	<b>Interest rate applied</b>	<b>Monthly Repayments</b>
Mar 2006 – Jun 2006	Between 3.50% and 3.75%	The first payment was €1,753.30. The monthly payment was then €878.91
July 2006 – Oct 2006	Between 4.00% and 4.25%	Between €937.19 and €995.76
Nov 2006 – March 2007	Between 4.50% and 4.75%	Between €1,054.34 and €1,112.91
April 2007 – April 2008	Between 5.00% and 5.25%	Between €1,171.49 and €1,230.47
May 2008 – July 2008	Between 5.330% and 5.53%	Between €1,249.22 and €1,296.10

I note from the **Bank Statements** that have been furnished in evidence that the Complainants received rental income of €1,300 per month during the period from **March 2007** to **July 2008**.

It was at this time that the failure that was subsequently identified in **December 2016** as part of the Examination occurred on the Complainants' mortgage loan account, in that, the interest rate applicable to the Complainants' mortgage loan could not be more than 1.5% over the ECB rate. However from **July 2008** the actual rate on the account was higher than the ECB + 1.5% rate.

In the period between **July 2008** and **January 2010**, the mortgage account remained on the Provider's variable commercial rate which fluctuated between 4.63% and 5.88%. The tracker interest rate that should have been applied was ECB + 1.5%. Between **July 2008** and **January 2010**, the overall tracker rate (ECB + margin) fluctuated between a rate of 5.75% and 2.5%. The difference in the interest rate actually charged to the

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mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 1.5%) had been applied to the mortgage loan account between **July 2008** and **January 2010**, is also represented in the table below:

<b>Date Range (inclusive)</b>	<b>Difference in Interest rate charged vs the tracker interest rate</b>	<b>Actual Monthly Repayments</b>	<b>Monthly repayments if the mortgage was on the Tracker Rate</b>	<b>Overpayment per month</b>
Jul 2008 – Nov 2008	Between 0.03% and 0.63%	Between €1,296.10 and €1,378.13	Between €1,230.47 and €1,347.66	Between €7.03 and €147.66
Dec 2008	1.13%	€1,378.13	€1,113.28	€264.85
Jan 2009 – Mar 2009	Between 1.13% and 1.63%	€1,202.35	Between €820.30 and €937.50	Between €264.85 and €382.05
Apr 2009 – May 2009	1.88%	Between €1,143.75 and €1,085.16	Between €703.10 and €644.50	Between €440.65 and €440.66
June 2009 – Jan 2010	2.13%	€1,085.16	€585.90	€499.26

I note from the **Bank Statements** that have been furnished in evidence that the Complainants received rental income during the period from **July 2008** and **January 2010**, as follows;

<b>Date Range (Inclusive)</b>	<b>Monthly Rental Income</b>
July 2008 – June 2009	€1,300
July 2009	€1,200
Aug 2009 – Jan 2010	€1,100

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It appears that the Complainants made contact with the Provider in **January 2010**. The Complainants completed a form titled "**Request to reclassify loan account from buy-to-let to homeloan**". The Complainants confirmed in that form that their "*principal residence*" was an address other than the address of the mortgaged property. From the evidence submitted, the address that was confirmed as the Complainants' principal residence is the same address as the Complainants' parents' address.

The Complainants submitted documentation to support this request to the Provider. The documents submitted included the following;

- The First Complainant's payslips from **November 2009** showing a net pay of €2,346.76 and from **December 2009** showing a net pay of €2,013.46;
- Two utility bills in the First Complainant's name with a recorded address at a third address;
- The Second Complainant's payslips dated **04 December 2009** showing a net pay of €1,092.71 and dated **18 December 2009** showing a net pay of €2,946.49; and
- A tuition fee payment form from a university to the Second Complainant showed fees of €4,835 for attendance at a part-time masters for the academic year **2009/2010**.

A letter from the Complainants to the Provider dated **21 January 2010** details as follows;

*"Please amend the term on loan reference [number] to 35 years from February 2010. Our loan has been converted from an Investment Property to Residential. New Life Cover has been set up for the new term.*

*We also request that loan comes off Interest only and reverts to Annuity from February 2010."*

A letter dated **15 February 2010** addressed to the Complainants' parents as guarantors detailed as follows;

*"I am writing to inform you that, following a recent request, we have extended the term on the above loan account.*

*The loan will now mature in January 2045."*

In a post Preliminary Decision submission dated **16 July 2020**, the First Complainant details as follows:

***"3. [The Provider] Case Summary (Error of Fact)***

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*"It states that all monthly repayments were met on the mortgage loan account since inception and **there is no evidence to suggest the Complainants were having trouble meeting their mortgage repayments.**"*

*I am surprised you did not challenge or address this in your [preliminary] decision? When I restructured the loan [the Provider] ensured my parents remained as guarantors. They also had access to the mortgage account (which I provided to you) showing a payment by "Dad" for six years. They knew that the account was being supported by my parents and they kept them as guarantors. If this was not the case then they approved the extension without looking at the loan account. This would be bizarre. I spoke to [the Provider] about this but don't believe me just look at the statements."*

I have not been provided with any evidence to the effect that the Complainants sought for their parents to be removed as guarantors on the mortgage loan at the time the term was extended in **January 2010**. The mortgage loan was taken out by the Complainants in **2006** with their parents as guarantors for the term of the loan. The fact that the term was extended did not oblige the Provider to remove the Complainants' parents as guarantors at that time or any other time. The extension of the term of the mortgage loan in **January 2010** pre-dates the Complainants' father commencing making payments to the Complainants' joint bank account from **January 2011**.

In the period between **February 2010** and **January 2011**, the mortgage loan account remained on the Provider's variable commercial rate which fluctuated between 2.63% and 3.83%. The tracker interest rate that should have been applied to the mortgage loan account was ECB + 1.5%. Between **February 2010** and **January 2011**, the overall tracker rate (ECB + margin) was 2.5%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 1.5%) had been applied to the mortgage account between **February 2010** and **January 2011**, is also represented in the table below;

Date Range (inclusive)	Difference in Interest rate charged vs the tracker interest rate	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Feb 2010 – Apr 2010	0.13%	€1,025.16	€1,002.38*	€22.78
May 2010 – Jul 2010	0.73%	€1,118.26	€1,002.38	€115.88
Aug 2010 – Jan 2011	1.33%	€1,215.07	€1,002.38	€212.69

The evidence submitted by the Provider shows that if the mortgage loan had been on the tracker interest rate of 2.5% then a monthly repayment of €1,763.34 would have been required in **February 2010**. It is unclear to me how a repayment of this amount would have been required in **February 2010** in circumstances where the repayment that was actually made on an interest rate that was 0.13% higher was €1,025.16.

I note from the **Bank Statements** that have been furnished in evidence that the Complainants received rental income during the period from **February 2010** and **January 2011**, as follows;

Date Range (Inclusive)	Monthly Rental Income
1 February 2010	€1,100
1 March 2010	€1,200
26 Mar 2010 – 27 July 2010	€950
25 August 2010	€1,115
27 Sept 2010 – 22 Dec 2010	€965
12 January 2011	€1,000

The Complainants submit that *“Over the course of the Economic Downturn [the Complainants’] ability to be able to meet the monthly mortgage repayments came into difficulty. In order to meet the interest payments in full from February 2011 [the Complainants] began to borrow €200 per month from [name] father”*.

In the period between **February 2011** and **February 2015**, the mortgage account remained on the Provider’s variable commercial rate which fluctuated between 3.83% and 4.93%. The tracker interest rate that should have been applied was ECB + 1.5%.

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Between **February 2011** and **February 2015**, the overall tracker rate (ECB + margin) fluctuated between 1.55% and 3.00%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 1.5%) had been applied to the mortgage account between **February 2011** and **February 2015**, is also represented in the table below;

<b>Date Range (inclusive)</b>	<b>Difference in Interest rate charged vs the tracker interest rate</b>	<b>Actual Monthly Repayments</b>	<b>Monthly repayments if the mortgage was on the Tracker Rate</b>	<b>Overpayment per month</b>
Feb 2011 – Mar 2011	1.33%	€1,215.07	€1,002.38	€212.69
Apr 2011	1.93%	€1,314.45	€1,002.38	€312.07
May 2011 – Jul 2011	1.68%	€1,314.45	€1,038.47	€275.98
Aug 2011 – Sept 2011	1.68%	€1,356.68	€1,075.53	€281.15
Oct 2011 – Nov 2011	1.93%	€1,399.38	€1,075.53	€323.85
Dec 2011	1.93%	€1,356.82	€1,038.19	€318.63
Jan 2012 – Jul 2012	1.83%	€1,298.38	€1,001.92	€296.46
Aug 2012 – May 2013	2.08%	€1,298.38	€966.38	€332.00
Jun 2013 – Nov 2013	2.58%	€1,338.70	€931.99	€406.71
Dec 2013 – Jun 2014	2.83%	€1,338.70	€899.14	€439.56
Jul 2014 – Sept 2014	2.93%	€1,338.70	€885.94	€452.76
Oct 2014 – Nov 2014	3.03%	€1,338.70	€873.35	€465.35

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Dec 2014 – Feb 2015	2.78%	€1,299.76	€873.35	€426.41
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I note from the **Bank Statements** that have been furnished in evidence that the Complainants received rental receipts during the period from **February 2011** and **February 2015**, as follows;

Date Range (Inclusive)	Monthly Rent Received
03 Feb 2011 – 05 Apr 2011	€1,000
5 May 2011	€500
7 June 2011 – 05 Nov 2013	€1,000
28 Nov 2013	€1,100
24 Dec 2013 – 30 Jul 2014	€1,200
26 Aug 2014	€1,075
26 Sept 2014	€1,170
28 Oct 2014	€1,200
31 Dec 2014	€1,260

The Complainants have also submitted bank statements in evidence which show that the Complainants' father made payments into the Complainants' bank account. This was the same bank account where the rental receipts were received, as follows;

- From **January 2011** to **December 2012** of €200 per month.
- From **January 2013** to **January 2014** of €300 per month
- From **March 2014** to **October 2014** of €300 per month
- **December 2014** of €1,100

The Complainants submit that they *“did not want to sell the property but given that the interest payments were not manageable without the assistance of [father’s name] [the property] was put on the market. The single rationale for the decision to sell the property was the unaffordability due to incorrectly [Provider] overcharging the interest on the account (by November 2014 [the Provider] overcharging on the mortgage was in excess of €700 per month). It is clearly not a rational decision to sell a property at a loss of €73k at a time when all market indicators at the time all pointed towards house price inflation [House price article supplied]. And it was only sold following [name] retirement.”* [Complainants’ emphasis]

The Complainants’ submission that by **November 2014**, the *“overcharging”* on the mortgage account was in excess of €700 is not entirely accurate. It is correct to say that

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the difference between the interest charged on the variable interest rate of 4.58% and the interest that should have been charged on the tracker interest rate of 1.55% in **November 2014** was €706.10. However the Complainants in making this submission are failing to appreciate that the capital balance of the mortgage loan would have amortised differently had the tracker rate been applied since **July 2008**. If the Complainants had not redeemed the mortgage loan in **February 2015** then a portion of the interest overpaid would have been taken off the capital balance. The more relevant figures for the purpose of this complaint are monthly repayment overpayments which are represented in the tables throughout this decision. By **November 2014** the Complainants were making monthly overpayments of €465.35. I am of the view that this is significant overpayment for a mortgage holder to bear on a monthly basis.

It appears from the evidence that the decision to sell the property was made in **October 2014**. The evidence shows that the Complainants' solicitor wrote to the Provider by letters dated **24 October 2014** and **29 October 2014** requesting redemption figures and the title documents for the mortgaged property on accountable trust receipt. The Provider responded by letters dated **30 October 2014** and **04 November 2014** with the required information and documentation. The Complainants' solicitor and the Provider were again in contact with respect to redemption figures in **January 2015**. The Complainants' solicitor wrote to the Provider on **05 February 2015**, enclosing a cheque in the sum of €261,870.99 in redemption of the mortgage loan. The Complainants have furnished an extract from the Property Price Register which shows the sale of the Complainants' property on **04 February 2015** for €302,000.

I have summarised the position from **January 2011** up to **October 2014** which is when the evidence shows the decision was made to sell the property as follows;

Total mortgage repayments made	Total mortgage repayments that should have been made	Total monthly overpayments	Rental receipts	Money received by the Complainants' from their father
€60,602.31	€44,559.57	€16,042.74	€48,645	€10,900

It appears that had the Complainants been charged the correct interest rate on their mortgage loan the total repayments that the Complainants would have been required to make during the period between **January 2011** and **October 2014**, would have been €16,042.74 less than the repayments that they were required to make. Further, it appears that the rental receipts totalling €48,645 would have exceeded the actual mortgage repayments required of €44,559.57 had the tracker interest rate been charged during this period. In these circumstances, I accept the Complainants' submission that the money they

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received from their father may not have been required had they been charged the correct interest rate on their mortgage loan. However, I do not accept that the sale of the property was solely attributable to the incorrect interest rate being charged on the mortgage loan account at that point in time. I accept that the level of mortgage repayments when compared against the rent receivable would have been a factor in the Complainants' decision to sell the mortgaged property at the time, however I am of the view that it is not the only relevant factor.

In a post Preliminary Decision submission dated **16 July 2020**, the First Complainant details as follows:

*I paid 60.6k between January 2011 up to October 2014 versus rental receipts of 48.6k. This is clearly a loss making investment in terms of generating income. In fact it is a €12,000 loss. It is reasonable that someone would sell a loss making property.*

*Had I been on the correct rate I would have had to make payments of 44.6k versus rental receipts of 48.6k. This would then be a profitable investment and I would not have sold. In addition to the 4k profit the loan was amortising so I was also creating equity in the property. Also as of September/ October the income versus rent was income positive.*

*Your [preliminary] decision does not address the fact that what should have been profitable was made loss making. If you have considered the profitability of my investment to be irrelevant you should state this in the decision.*

*In addition to being loss making I had to borrow money from a parent to cover the payment. So it was not only unprofitable but it mea[n]t we had to take on debt from a parent.*

*[this] was not addressed in the decision. Is it the case you feel the profitability of the investment was not relevant? Was this considered? As an investor I am not an irrational loss seeking person. If something is profitable I would not sell. If it is loss making I would sell."*

I accept that the level of mortgage repayments when compared against the rent receivable was a factor in the Complainants' decision to sell the mortgaged property at the time. However, I remain of the view that this was not the only relevant factor.

Whilst I note that the Complainants were in receipt of money from their father to assist in the deficit between the monthly mortgage repayments required and the monthly rent receivable, I have not been furnished with any evidence to show that the Complainants

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could no longer afford the mortgage repayments *“as it was not affordable without [their father’s] assistance”*. The evidence shows that this mortgage loan was incepted in **March 2006**, at a time when both Complainants were students and neither of them were earning an income and that the Complainants received a gift of €120,000 from their parents to assist with the purchase of the property at the time. The evidence shows that by **December 2009** both of the Complainants were in employment and in receipt of a salary. No further evidence has been submitted to show the Complainants overall financial position so as to substantiate their claim that the mortgage repayments were not *“affordable”* to them in **October 2014** and as such the Complainants made the decision to sell the property.

After the Preliminary Decision issued, the First Complainant submitted the following into evidence;

- A copy of a **Savings Account Statement** dated **30 October 2014** which shows transactions between **18 November 2014** and **24 October 2014**.
- A copy of **Current Account Statements** which show transactions between **January 2014** and **September 2014**

The Savings Account and Current Account is in the names of the First Complainant and a Third Party. The First Complainant submits that the Second Complainant is *“not in a position to supply any statements”*.

In this regard, the First Complainant details as follows in his post Preliminary Decision submission dated **16 July 2020**:

*“As you will see from [the statements] from the end of December 2013 to when the property was sold in October 2014 I saved a grand total of 500 Euro. Throughout the year I was constantly trying to save but had to draw back out only ending the year with total savings of 6,000 (as my life savings). This is up from 5500 at the end of the previous year. See my savings account statement attached.*

*Over the course of January to end of September 2014 I was regularly in additional debt by way of being overdrawn. I have attached all my current account statements for these 9 months. Clearly here you will see I was regularly overdrawn coming up to payday.*

*By looking at my current account and savings you will clearly see there was no excess but for 500 euro over the 9 months. I was unable to make up this shortfall.”*

The evidence shows as follows:

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- The First Complainant was overdrawn in the joint account by €10.61 on **21 March 2014**. At the time there was a balance of €5,200.11 in the First Complainant's joint savings account.
- The First Complainant was overdrawn in the joint account by €27.04 on **24 April 2014**. At the time there was a balance of €5,000.11 in the First Complainant's joint savings account.
- The First Complainant was overdrawn in the joint account by €408.24 on **22 May 2014**. At the time there was a balance of €5,000.11 in the First Complainant's joint savings account.
- The First Complainant was overdrawn in the joint account by €80.87 on **24 July 2014**. At the time there was a balance of €4,500.11 in the First Complainant's joint savings account.
- The First Complainant was overdrawn in the joint account by €131.19 on **22 August 2014**. At the time there was a balance of €4,500.11 in the First Complainant's joint savings account.
- The First Complainant was overdrawn in the joint account by €16.07 on **24 September 2014**. At the time there was a balance of €5,000.11 in the First Complainant's joint savings account.

On each occasion the First Complainant's overdraft was discharged quickly by way of a transfer of funds from the joint Savings Account or receipt of salary. The evidence shows that a lodgement of €4,400.00 was made to the joint Savings Account on **18 November 2013**. There were various transfers in and out of that account of amounts between €100 and €1,500. There does not appear to be any regular transfer pattern. The balance on the account as at **24 October 2014** was €6,000.11

This office has not been provided with full evidence to show both of the Complainants overall financial position so as to substantiate their claim that the mortgage repayments were not "*affordable*" to both of them in **October 2014** and that this was the reason the Complainants made the decision to sell the property. In this regard, the Complainants will be aware that they were both jointly and severally liable for the mortgage loan debt.

The Complainants have submitted an extract in evidence from an Irish Times article written by "*industry experts*" in **January 2015** which they submit shows a "*consensus*" that house prices "*were all predicted to increase*".

<b>David Byrne</b> <i>Director of residential property, Lisney</i>	5%-10% in Dublin
<b>John McCartney</b> <i>Director of research, Savills</i>	8%-12% in Dublin
<b>Kelth Lowe</b> <i>Chief executive DNG</i>	5%-10% in Dublin
<b>Marlan Finnegan</b> <i>Chief economist, Sherry FitzGerald</i>	>10% (led by the regional centres)
<b>Angela Keegan</b> <i>Managing director, myhome.ie</i>	Low single digit growth nationally, but faster price growth in Dublin
<b>Pauline Daly</b> <i>SCSI president</i>	5%-10% nationally
<b>Pat Davitt</b> <i>Chief executive IPAV</i>	Dublin <10% and country >10%

\*In 2014 prices in Dublin rose 24%; nationally 16%

Whilst I note that this article indicates growth predictions of between 5% and 12% in 2015 in Dublin, these growth predictions are lower than the price increase in 2014 where prices rose by 24% in Dublin. In any event, any fluctuation in the value of the property is not something that can be accurately predicted. This article does not in any way evidence a definitive future valuation of the Complainants' property such that the Complainants could have accurately known the future value of the property at the time they decided to sell the property in **October 2014**.

I note that the overcharge on the Complainants' mortgage loan account occurred for just under seven years from **July 2008** to **February 2015**, when the mortgage loan was redeemed. However I do not accept that the sale of the property and the consequent "crystallised" loss of €73,000 was as a sole result of the overcharge. The Complainants purchased the property for €375,000 which was funded by the mortgage loan of €281,250, with the balance of €93,750 plus associated charges of €40,000 funded by way of a gift to the Complainants. The Complainants sold the property for €302,000 and the mortgage balance of €261,870.99 was paid on **05 February 2015**.

The Provider has paid compensation of €5,736.90 to the Complainants, together with redress of €38,246.02 (interest overpaid and time value of money payment) and an independent professional advice payment of €615. In the circumstances of this matter I accept that the compensation paid by the Provider to be reasonable.

For the reasons set out above, I do not uphold the complaint.

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**Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

31 August 2020

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.**