



<u>Decision Ref:</u>	2020-0399
<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>	Rejected

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

This complaint relates to two mortgage loan accounts held by the Complainants with the Provider and a total overcharge of interest in the amount of €88,504.96 on both mortgage loan accounts.

Details of the Complainants' two mortgage loan accounts the subject of this complaint are listed below:

- Mortgage loan account ending **0405** was drawn down on **15 August 2006** in the amount of €330,000 for a term of 20 years and was secured on a Buy to Let property; and
- Mortgage loan account ending **0144** was drawn down on **15 August 2006** in the amount of €285,000 for a term of 20 years and was secured on a Buy to Let property.

The Complainants sold both Buy to Let properties in **2014** to a company owned by the Second Complainant. The Buy to Let property secured on mortgage loan account ending **0405** sold for €300,000 and the Buy to Let property secured on mortgage loan account ending **0144** was sold for €250,000.

The Complainants' mortgage loan accounts ending **0405** and **0144** were 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 both mortgage loan accounts and both mortgage loan accounts were deemed to be impacted under that Examination.

The Provider contacted the Complainants by way of letters dated **9 December 2016** and **19 December 2016** advising them of the errors that had occurred on their mortgage loan accounts ending **0405** and **0144** respectively. The Provider detailed the circumstances that caused the "failure to happen" in respect of both mortgage loan accounts 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 accounts 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.

It is acknowledged that all property in relation to this mortgage account is sold. We have determined our error on this account did not cause the sale of the property. This determination is based on the information available to us in our review of your account. When determining your redress, compensation and a payment towards the cost of obtaining independent professional advice we have taken the sale of the property into consideration. Details of this payment are outlined below and in the enclosed Financial Summary. "

The Provider made an offer of redress and compensation to the Complainants in respect of mortgage loan account ending **0405** in the letter dated **9 December 2016**. The offer of €60,491.14 made by the Provider to the Complainants comprised of the following;

1. Redress of €53,388.41 covering;

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- The amount overpaid while on the incorrect rate up to the point all property in relation to this mortgage account was sold.
 - Interest to compensate the Complainants for not having access to the money overpaid on the mortgage loan account (Time Value Money).
2. Compensation of €5,872.73 for the failure on the mortgage loan account.
 3. Independent Professional Advice payment of €1,230.00

The Provider made an offer of redress and compensation to the Complainants for mortgage loan account ending **0144** in the letter dated **19 December 2016**. The offer of €48,914.48 made by the Provider to the Complainants comprised of the following;

1. Redress of €42,958.99 covering;
 - The amount overpaid while on the incorrect rate up to the point all property in relation to this mortgage account was sold.
 - Interest to compensate the Complainants for not having access to the money overpaid on the mortgage loan account (Time Value Money).
2. Compensation of €4,725.49 for the failure on the mortgage loan account.
3. Independent Professional Advice payment of €1,230.00.

The period of overcharging on both mortgage loan accounts commenced on **30 June 2008**. The Provider did not restore a tracker interest rate to the Complainants' mortgage loan accounts as mortgage loan account ending **0144** was redeemed in full in **June 2014** and mortgage loan account ending **0405** was redeemed in full in **November 2014**.

In **December 2017**, the Complainants appealed the redress and compensation offerings 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 **24 May 2018** that the Complainants were unsuccessful in their appeal for the following reasons:

"The Panel carefully considered the appeal of [the Complainants] in accordance with the Terms of Reference and Panel Rules.

Having considered all information available, the Panel decided that, in the circumstances, it did not agree with [the Complainants] that the financial and non-financial losses claimed in their appeal form arose as a result of the failure by the [Provider] to apply the correct interest rate.

In coming to its decision, the Panel decided that [the Complainants] have been appropriately compensated by the Bank in accordance with the Tracker Redress Programme.”

As the Complainants have been through 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 not offered adequate redress and compensation to the Complainants by consequence of the Providers’ failure in relation to their mortgage loan accounts.

The Complainants’ Case

The Complainants state that mortgage loan account ending **0405** was drawn down on **19 February 2007** in the amount of €330,000 for a term of 20 years subject to a variable commercial rate. They outline that the purpose of the mortgage loan was to refinance a Buy to Let property (“**Property 1**”).

The Complainants detail that mortgage loan account ending **0144** was drawn down on **18 February 2007** in the amount of €285,000 for a term of 20 years subject to a variable commercial rate. They outline that the purpose of the mortgage loan was to assist in the purchase of another Buy to Let property (“**Property 2**”) secured on the mortgage loan account. The Complainants submit that both mortgage loan accounts commenced on an initial 5 year interest only repayment period.

The Complainants submit that they “*found it difficult to maintain loan repayments*” on mortgage loan accounts ending **0405** and **0144**. They state that they wrote to the Provider on **19 February 2009** requesting an “*urgent review*” of mortgage loan account ending **0405** as they felt that they were being “*grossly overcharged*.” The Complainants contend that the Provider did not formally respond to this letter “*and did not disclose whether they reviewed the rate of interest charged on the above loan account*.” The Complainants are of the view that “*it appears likely*” that their letter “*would have triggered a review by [the Provider] and the [Provider] failed to disclose to the borrowers that excess interest was being applied*.”

The Complainants detail that the Provider should have investigated their mortgage loan accounts when they requested the Provider to carry out a review in **2009**. The Complainants submit that had the Provider investigated and amended the interest rates accordingly, the Buy to Let properties the subject of each mortgage loan account would still be in the Complainants' personal possession.

The Complainants do not accept the Provider's submission that they failed to specify an exact issue to be reviewed in their letter and submit that they do not have a banking background.

The Complainants state that they sent a letter to the Provider dated **9 September 2011** "*formally requesting*" that an interest only period be applied to both mortgage loan accounts. They submit that the Provider rejected this proposal and "*continued to apply interest and capital*". The Complainants assert that the interest rate applying to both mortgage loan accounts at the time was 5.18% however subsequent correspondence from the Provider shows that the interest rate that should have been charged was 2.75%. The Complainants are of the view that their request for interest only repayments should have prompted the Provider to review the interest rates applicable to both mortgage loan accounts and identify that the interest rate charged was in excess of the interest rate detailed in the loan agreements.

The Complainants submit that they requested a restructuring of their mortgage loans in a letter to the Provider dated **03 May 2012** which was issued by the Complainants' accountants/auditors on their behalf. The Complainants detail that they advised the Provider in the letter that the "*[t]he rental income from the properties is insufficient to meet loan repayments, the shortfall is in the region of €37,000 p.a.*" They outline that the shortfall "*was being met from net salary income and has been unsustainable*".

The Complainants detailed in this letter that they wished "*to transfer the two properties into [name of company jointly owned by Complainants], and have [name of company jointly owned by Complainants] take over the related loans on the same terms and conditions as the current loans.*" The Complainants explained in the letter that "*loan repayments can be more easily funded by trading profits of [name of company jointly owned by Complainants] (net of 12.5% corporation tax), rather than from salaries earned by the individuals (net of 53%).*" The Complainants note that the Provider rejected this "*restructure proposal*".

The Complainants submit that their accountants/auditors issued a letter to the Provider dated **19 July 2012** that refers to a meeting between the Complainants and the Provider on **30 May 2012**. At that time, the Complainants detail that they had put forth another restructure proposal to the Provider which included a payment to both mortgage loan

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accounts in order to reduce the mortgage balance to “*the present market value of the properties eliminating the negative equity*” and the acquisition of Property 1 and Property 2 by the company held jointly by the Complainants.

The Complainants outline that as part of this restructure, the Provider would advance new loans to the company held jointly by the Complainants for €235,000 and €300,000 respectively repayable over 15 years and the Complainants would provide personal guarantees on the new loans. The Complainants note that the Provider also rejected this proposal.

The Complainants have provided a table in their submissions to show that “*had the correct rate of interest and loan repayments been applied, this would have significantly reduced the rent shortfall and eliminated the rent shortfall in certain years*”;

Year ended	Total gross rent	Actual loan repayments	Correct loan repayments	Gross actual shortfall in rent	Shortfall in rent if correct rate interest applied
	(i)	(ii)	(iii)	(i) –(ii)	(i) – (ii)
	€	€	€	€	€
2006	19,504	10,072	10,072	0	0
2007	31,238	31,135	31,135	0	0
2008	32,166	34,128	33,006	(1,962)	(840)
2009	24,403	29,372	17,393	(4,969)	0
2010	19,917	28,475	14,893	(8,558)	0
2011	22,801	39,727	24,990	(16,926)	(2,189)
2012	20,081	52,804	37,223	(32,723)	(17,142)
2013	21,789	49,396	31,412	(27,607)	(9,623)
2014	<u>29,100</u>	<u>38,368</u>	<u>24,847</u>	<u>(9,268)</u>	<u>0</u>
Total	220,999	313,476	224,970		

The Complainants explain that as a result of the Provider’s refusal to consider their proposals “*it was decided that [company name] (a company owned by [Second Complainant]) would purchase the two properties and use [company owned by Second Complainant] funds to repay both loans in full*”. The Complainants detail that this was achieved by the company owned by the Second Complainant by organising “*the receipt of dividend income in order to finance the purchase of the two properties which would fully eliminate the loans*”.

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The Complainants outline that Property 2 which was the subject of mortgage loan account ending **0144** was purchased by the company owned by the Second Complainant for €250,000 on **16 June 2014**.

Similarly, Property 1 which was the subject of mortgage loan account ending **0405** was purchased by the company owned by the Second Complainant for €300,000 on **2 October 2014**. The Complainants assert that “[l]oan repayments were made in full from date of drawdown to date of clearing loan and were never in arrears.”

The Complainants have calculated that the transfer of Property 1 and Property 2 to the company owned by the Second Complainant resulted in an income tax liability estimated at €43,500 and a future income tax liability of €100,500. They submit that the Provider should compensate them for this income tax liability in order to comply with its own redress rules and put them in a position they would have been in had the error not occurred. The Complainants contend that it is irrelevant that the company incurred the income tax liability and not them in a personal capacity. The Complainants do not accept the Provider’s assertion that the sale of the Buy to Let properties was for tax efficient reasons as opposed to their financial difficulties. The Complainants assert that this analysis neglects the fact that the Second Complainant’s company incurred a tax liability as a result of the transfer of properties.

The Complainants submit that when the properties were sold the remaining balance on the mortgage loan accounts was incorrect and “*overstated*”. They detail that mortgage loan account ending **0405** was shown as €289,565 when it should have been €240,408 and the remaining balance on mortgage loan account ending **0144** was shown as €252,125 when it should have been €212,778.

The Complainants submit that Property 1 was secured on mortgage loan account ending **0405** has a “*current market value*” of approximately €390,000 and Property 2 that was secured on mortgage loan account ending **0144** has a “*current market value*” of approximately €290,000.

The Complainants refer to certain typographical errors in the Provider’s additional submissions to this office and contend that they are “*another example of how the [Provider] appear[s] incapable of getting rates correct.*” The Complainants submit that the “*withholding of over €120,000 of monies they were not entitled to for a number of years and the consequences therefrom is in no way shape of form compensated by the derisory offer of compensation made by the [Provider].*”

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The Complainants contend that the redress and compensation offering of €109,404 by the Provider does not adequately compensate for its failure. The Complainants detail that the “annual overcharge” of interest between **2009** and **2014** “varies from €11,979 to €17,984”.

The Complainants have provided a table in their submissions to illustrate what they consider the total overcharge of interest which is detailed below;

Year ended	Overcharge of interest €
31/12/08	1,122
31/12/09	11,979
31/12/10	13,582
31/12/11	14,737
31/12/12	15,580
31/12/13	17,984
31/10/14	<u>13,520</u>
Total	88,504

The Complainants have provided a table in their submissions reproduced below to illustrate that they are at a total financial loss of €457,000.

	[First Complainant]	[Second Complainant]	Total
	€	€	€
<i>Loss in increase market value date of sale to date</i>		65,000	65,000
<i>Restructure costs (copy invoice required)</i>	12,500	12,500	25,000
<i>Tax Liability due</i>	144,000	-	144,000
<i>Loss of preferential rate of interest</i>	36,500	36,500	73,000
<i>Loss of increased market value</i>	-	150,000	150,000
<i>Legal/professional fees</i>	<u>TBC</u>	<u>TBC</u>	<u>TBC</u>
Total Loss	193,000	264,000	457,000

The Complainants are seeking compensation in the sum of €457,000 in respect of the following losses;

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- Compensation for the loss in value of both properties from date of sale to present which the Complainants estimate is €130,000.
- Compensation of €25,000 for fees paid to the Complainants' financial advisers in relation to the transfer/restructure of the mortgage loans.

- Compensation for additional tax liability estimated at €144,000 payable by the Second Complainant's company.

This calculation includes;

- Income tax liability estimated at €43,500 arising from the transfer of the properties, and
- Future income tax liability estimated at €100,500, assuming that the properties increase in value by €300,000 over the next 10 to 20 years.

- Compensation for the loss of the preferential interest rate from **2014** for the remainder of the mortgage loan terms, estimated at €73,000.
- Compensation for the estimated loss of €150,000 to the First Complainant in relation to the future increased market value of the properties.
- Compensation for “[l]egal & professional fees in dealing with claim (amount to be ascertained)”.

The Provider's Case

The Provider submits that it issued two Letters of Loan Offer dated **19 May 2006** to the Complainants for the amounts of €330,000 and €285,000. It outlines that both mortgage loans were drawn down on **15 August 2006** and were subject to the Provider's variable commercial base rate (4% at that time) repayable over a term of 20 years.

In response to the Complainants' submission that they requested an urgent review of both mortgage accounts by way of letter dated **19 February 2009**, the Provider states that the letter concerned provided “*no explanation or evidence as to why the First Complainant felt he was being overcharged.*” It further outlines that there is no evidence to indicate that the Complainants or the Provider “*were aware that the incorrect Terms and Conditions were attached to the Letters of Loan Offer at that time.*” The Provider details that it contacted the First Complainant by telephone on **25 February 2009** and it was explained why the variable commercial base rate was 5.13% on that date. The Provider notes that the First Complainant “*was not happy with the response and requested written confirmation and copies of the Letters of Loan Offer which were issued*” which were

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subsequently issued by the Provider on the same date with confirmation that the *“Variable Commercial Base Rate was not linked to the ECB rate index”*.

The Provider submits that its internal records show that the Second Complainant contacted the Provider on **27 April 2009** to discuss the interest rates applying to mortgage loan account ending **0405** *“and was advised the account was on the lowest rate available at that time”* and he *“confirmed that he was happy with same.”*

The Provider details that by way of letter dated **09 August 2011**, the Provider notified the Complainants that the 5 year interest only repayment periods in respect of both mortgage loan accounts had ended and capital and interest repayments on both mortgage loan accounts were due to commence the following month.

The Provider outlines that its internal records show that the Second Complainant contacted the Provider on **02 September 2011** to enquire about an interest only repayment period for both mortgage loan accounts. The Provider states that during the telephone call it advised the Second Complainant *“of the Interest Only application process, the documents which were required and how to make an appointment with his local branch to discuss the options available.”*

The Provider details that it issued the Complainants a letter dated **06 September 2011** *“explaining the process for seeking forbearance by way of Interest Only”* and enclosed a Standard Financial Statement (“SFS”) for completion by the Complainants and informed the Complainants of the requisite supporting documentation to be submitted. It outlines that it received a letter from the Complainants and the completed Interest Only application form on **09 September 2011** but the Complainants did not submit a SFS or any of the requested supporting documentation.

The Provider submits that it attempted to contact the Complainants on **13 September 2011** and the Second Complainant again on **16 September 2011**. The Provider notes from its internal records that the Second Complainant made contact on **20 September 2011** by telephone and *“advised he was not willing to complete a SFS as requested by the Bank in order to progress with an assessment of affordability as he felt it was intrusive.”* The Provider details that it advised the Second Complainant that it could not progress with the Interest Only request without this information and that this was the *“industry standard.”* It outlines that the Second Complainant stated that *“he would consider the Bank’s request for a completed SFS and would revert if he decided to proceed with the Interest Only request.”*

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The Provider further submits that the Second Complainant enquired whether the Provider *“would offer an incentive if he paid a €100,000 lump sum off the Mortgage Loan Account.”* The Provider states that it informed the Second Complainant that there was no such incentive available.

The Provider asserts that it *“did not decline the Complainants’ Interest Only request”* however the request was considered to have been withdrawn *“pending confirmation from the Second Complainant if he wanted to proceed to provide copies of the SFS and supporting information as previously sought by the Bank”*.

The Provider details that it received a letter from the Complainants’ representative on **03 May 2012** outlining a proposal to restructure the Complainants’ mortgage loan accounts by transferring the mortgage accounts to one of the Complainants’ companies.

It submits that this letter highlighted a deficit of €37,000 in the annual rent received and the annual loan repayments which equated to a deficit of €3,083.33 per month. The Provider explains that the information provided by the Complainants indicated that *“the combined rent being received for the two properties per month of €2,300 against loan payments of €4,811.34 per month”* represented a deficit of €2,511.34 per month. It details that had the Complainants been on the Buy To Let rate the deficit would have been €1,793.08. The Provider contends however that based on *“financial information provided by the Complainants’ representative the repayments on both impacted Mortgage Loan Accounts were affordable if prioritised.”* It details that the rental deficit was *“not a direct result of the difference between the two Interest Rates”*.

The Provider submits that it held a meeting with the First Complainant and the Complainants’ representative on **30 May 2012** to discuss the Complainants’ proposal to restructure the mortgage loan account and the Complainants’ representative sent a letter to the Provider dated **19 July 2012** outlining the restructure proposal.

The Provider submits that it emailed the Complainants’ representative on **27 August 2012** to query matters that would need to be addressed in the proposal and the Complainants’ representative responded to by email on **31 August 2012**. The Provider outlines that it was informed in this email that the *“Complainants’ had cash deposits of at least €510,000 which could be applied in reduction of the impacted Mortgage Loans Accounts at that time.”*

The Provider notes that the Complainants’ representative provided financial information to the Provider by way of email on **11 September 2012**. It details that the Complainants’ representative advised that the Complainants were receiving combined income of €2,300

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per month “on the impacted properties which was insufficient to meet the capital and interest repayments on the Mortgage Loan Accounts which were €4,812” at that time leaving a deficit of €2,512 which was being met by the Complainants’ salaries. The Provider submits that it was also informed that the Complainants’ joint salaries amounted to €175,992 per annum.

The Provider submits that it contacted the Complainants’ representative on **26 September 2012** by email “to advise after consideration and assessment of the overall proposal, the Bank was not in a position to facilitate the proposed restructure as presented.”

The Provider states that following a request by the Complainants for a further interest only repayment period on both mortgage loan accounts, it sent two confirmation letters to the Complainants dated **12 October 2012** notifying them that both mortgage loan accounts would convert to interest only for a period of six months commencing from **November 2012**.

The Provider details that the six month interest only periods applying to both mortgage loan accounts ended on **07 May 2013** and thereafter capital and interest repayments recommenced on both mortgage loan accounts.

The Provider states that it received a letter from the Complainants’ representative on **13 December 2013** requesting to take up the title documents on mortgage loan account ending **0144** and advised of the Complainants’ intention to dispose of Property 2. The Provider received a similar letter dated **18 December 2013** in respect of mortgage loan account ending **0405** and Property 1. The Provider states that it furnished the Complainants’ representative with the title deeds for Property 1 and Property 2 on **13 January 2014** and set out the redemption terms in respect of both loan accounts. On **16 January 2014**, the Provider explains that it received correspondence from the Complainants’ representative noting that the Complainants no longer intended to sell the properties and the title deeds were returned accordingly.

The Provider states that it subsequently received a letter from the Complainants’ representative on **03 April 2014** requesting the title documents for Property 2, the property the subject of mortgage loan account ending **0144**, and advised of the Complainants’ intention to dispose of Property 2. The Provider notes that it issued the title deeds to the Complainants’ representative on **15 April 2014** together with the redemption figures. The Provider outlines that the Complainants’ representative notified the Provider that there was a delay in the sale of Property 2. It details that it received a cheque redeeming mortgage loan account ending **0405** on **02 October 2014** and Property 1 was purchased by the Second Complainant’s company.

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The Provider submits that the Complainants were meeting the capital and interest repayments of €5,013 per annum with no arrears or missed payments for 12 consecutive months prior to the sale of the properties. It contends that as repayments to the mortgage loan accounts were affordable on the higher variable commercial base rate *“the interest rate is not deemed to have necessitated the sale of the properties”*.

The Provider outlines that the Complainants’ mortgage loans were considered to be impacted as part of the Examination in **December 2016** because the Provider furnished the Complainants with the incorrect set of **General Terms and Conditions** when they took out both mortgage loan accounts. The Provider explains that this was a *“manual error”*. The Provider notes that the terms and conditions provided to the Complainants *“gave a guarantee that the rate (the ‘Buy to let’ rate) could not be more than 1.50% over the European Central Bank (ECB) rate”* however the interest rates applicable to the Complainants’ mortgage loan accounts were often higher than this.

The Provider submits that notwithstanding this error, it *“honoured”* those incorrect terms and conditions and *“recalculated the accounts using the ‘Buy to Let’ rate whenever beneficial to the Complainants, refunding the overpayments and providing compensation for the error”*.

The Provider asserts that the redress offered by the Provider in **December 2016** aligns with the Central Bank’s Mortgage Review guidelines and *“will result in impacted customers being returned to the position they should have been if the issue had not occurred”*. It submits that where the mortgage loan accounts are no longer active it *“considers how much the customer overpaid in mortgage repayments (i.e. that they were out of pocket) because of the failure and refunds this money to the customer so they are not out of pocket.”* It details that it has also included a Time Value of Money (TVM) payment in the redress which *“compensates the customer for not having the benefit of the money overpaid to the account”*. The Provider outlines that the compensation and TVM payment was calculated at 7.5% of the interest overcharged however in later submissions, the Provider notes that this was a typographical error and should read 11%.

The Provider details that the compensation is intended to *“compensate for potential inconvenience, harm, personal suffering or hardship”* and to also be *“reasonable and reflect the detriment involved.”* It affirms that the level of compensation awarded to the Complainants is based on the Provider’s compensation model which is designed to meet the Central Bank’s principles for redress under the Examination. It outlines that *“[t]he process for calculating redress and compensation has been assured by an external independent third party in accordance with the Central Bank’s guidelines.”* The Provider notes that this complaint was heard by the Independent Appeals Panel who *“agreed that the redress and compensation received by the Complainants was sufficient.”*

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The Provider does not accept the Complainants' submission that there was a loss of value of €65,000 in respect of the mortgaged properties which were sold to the Second Complainant's company in **2014**. The Provider submits that the purchase by the Second Complainant's company was a "*commercial venture on behalf of the Complainants.*"

It details that this decision was "*made independently by the Complainants*" and of their own discretion. It asserts that at no point did the Provider inform or advise the Complainants to sell/transfer ownership of the properties. The Provider contends that the original restructuring proposal was made by the Complainants' tax advisor who the Provider submits would have advised the Complainants of the tax implications.

The Provider contests the Complainants' claim for compensation of €25,000 in respect of fees to the Complainants' financial advisors who were responsible for the transfer of the two properties. The Provider asserts that this was a decision made at the Complainants' discretion and it would not compensate them for fees incurred as a result of the sale.

The Complaint for Adjudication

The complaint for adjudication is that the Provider has failed to offer adequate redress and compensation in respect of its failure on the Complainants' mortgage loan accounts.

Decision

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

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

A Preliminary Decision was issued to the parties on 13 October 2020, outlining my preliminary determination 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

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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, within the period permitted, I set out my final determination.

The Provider has detailed that the redress and compensation offered and paid to the Complainants is in line with the Provider's Redress and Compensation Framework which is based on the Central Bank's Principles for Redress. The redress payment of €96,347.40 reflects the amount of interest overpaid (€88,504.96) on both mortgage loan accounts and includes a payment to reflect the time value of money (€7,842.44). The Provider also paid the Complainants compensation of €10,598.22 and €2,460 for the purposes of seeking legal advice in respect of both mortgage loan accounts. The Provider submits that the Appeals Panel did not uphold the Complainants' appeal. The Provider is of the view that the redress and compensation paid is fair and reasonable and the Complainants have not made out a reasonable claim for additional compensation beyond what the Provider has already paid to the Complainants.

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

The Complainants held two mortgage loan accounts with the Provider both of which are the subject of this complaint. Details with respect to those two mortgage loan accounts are as follows:

- **Mortgage loan account ending 0405**

This mortgage loan was subject to Mortgage Loan Offer dated **19 May 2006** which issued to the Complainants and was accepted by them. The Mortgage Loan Offer dated **19 May 2006** in respect of account ending **0405** details as follows;

1. *Amount:* €330,000.00 (three hundred and thirty thousand euro)
2. *Term & Nature:* 20 year Repayment Loan (including a capital moratorium for the first 60 months)
3. *Purpose of Loan:* To refinance the property located at [address of Property 1] in the amount of €330,000.
4. *Rate of Interest:* Variable at 3.75% p.a.
Rate Basis: Variable Commercial Base Rate..."

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The loan amount was €330,000 and the term was 20 years. The Loan Offer detailed that the Provider's variable commercial base rate of 3.75% would apply and that the Complainants were required to pay interest only repayments for the first 60 months/ 5 years of the term of the loan.

This mortgage loan was secured on the Complainants' Buy to Let property, which for ease of reference I will refer to as Property 1. This mortgage loan account was drawn down on **15 August 2006**.

- **Mortgage loan account ending 0144**

This mortgage loan was subject to **Mortgage Loan Offer** dated **19 May 2006** which issued to the Complainants and was accepted by them. The Mortgage Loan Offer dated **19 May 2006** in respect of account ending **0144** detailed as follows;

1. *"Amount:* €285,000.00
2. *Term & Nature:* 20 year Repayment Loan (including a capital moratorium for the first 60 months)
3. *Purpose of Loan:* Towards the purchase of [address of Property 1] at a cost of €385,000 plus fee
4. *Rate of Interest:* Variable at 3.75% p.a.
Rate Basis: Variable Commercial Base Rate..."

The loan amount was €285,000 and the term was 20 years. The Loan Offer detailed that the Provider's variable commercial base rate of 3.75% would apply and that the Complainants were required to pay interest only repayments for the first 60 months/ 5 years of the term of the loan. This mortgage loan was secured on the Complainants' Buy to Let property referred to herein as Property 2 and was drawn down on **15 August 2006**.

The **Standard Commercial Loan Conditions** attaching to each of the above Mortgage Loan Offers and furnished to the Complainants detail as following as regards the applicable interest rate;

“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 [...] [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 Provider has outlined that due to a manual error on its part, the Complainants were incorrectly provided with the **Standard Commercial Loan Conditions** with both Mortgage Loan Offer Letters dated **19 May 2006**.

As outlined above, the **Standard Commercial Loan Conditions** provided that the Provider's "Buy to Let" rate would not be more than 1.5% over the ECB rate in respect of both mortgage loan accounts.

It is detailed that the Provider's variable commercial base rate was 0.25% lower than the Provider's "Buy to Let" rate when the Complainants' mortgage loan accounts ending **0405** and **0144** were drawn down in **2006**. The mortgage loan accounts remained on that rate until **30 June 2008** on which date the Provider's Buy To Let price promise of not more than ECB +1.5% became beneficial to the Complainants. It was from this date that the mortgage loan accounts were deemed impacted by the Provider's failure.

In the period between **July 2008** and **September 2011**, the variable commercial base rate that was applied to both mortgage loan accounts (**0405** and **0144**) ranged between 4.63% and 5.88%. The tracker interest rate that would have been applied was ECB + 1.5%. Between **July 2008** and **September 2011**, the overall tracker rate (ECB + margin) fluctuated between a rate of 2.50% and 5.75%. The difference in the interest rate actually charged to the mortgage loans and the interest rate that would have been charged on the tracker interest rate is represented 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 accounts between **July 2008** and **September 2011**, is also represented in the table below at columns 5 (mortgage account ending **0405**) and 8 (mortgage account ending **0144**):

Date Range	Column 2	Mortgage Account ending 0405			Mortgage Account ending 0144		
		Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month

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Jul 08	0.03 %	€1,520.77	€1,512.5 2	€8.25	€1,313. 39	€1,306. 27	€7.12
Aug 08 – Oct 08	0.13 %	€1,617.02	€1,581.2 7	€35.75	€1,396. 52	€1,365. 64	€30.88
Nov 08	0.63 %	€1,617.02	€1,443.2 6	€173.7 6	€1,396. 52	€1,246. 45	€150.0 7
Dec 08 – Jan 09	1.13 %	Between €1,410.77 and €1,617.02	Between €1,100.0 1 and €1,306.2 6	€310.7 6	Between €1,218. 39 and €1,396. 52	Between €950.00 and €1,128. 13	€268.3 9
Feb 09 – Mar 09	1.63 %	€1,410.77	€962.50	€448.2 7	€1,218. 39	Between €831.25	€387.1 4
Apr 09 – May 09	1.88 %	Between €1,273.27 and €1,342.02	Between €756.22 and €824.98	Between €301.9 0 and €517.0 5	Between €1,099. 64 and €1,159. 01	Between €653.10 and €708.58	Between €446.5 4 and €450.4 3
Jun 09 – Mar 11	2.13 %	€1,273.27	Between €656.40 and €681.55	Between €591.7 2 and €616.8 7	€1,099. 64	€593.72	€505.9 2
Apr 11	2.43 %	€1,355.77	€687.47	€668.3 0	€1,170. 89	€593.72	€577.1 7
May 11 – Sept 11	2.18 %	Between €1,355.77 and €2,640.70	Between €755.17 and €2,274.5 5	Between €366.1 5 and €600.6 0	Between €1,170. 89 and €2,280. 61	Between €617.21 and €670.55	Between €553.6 8 and €1,610. 06

/Cont'd...

The First Complainant sent a letter dated **19 February 2009** to the Provider in relation to mortgage loan account ending **0405**, which details as follows;

"This refers to the present status of my loan account with you. As per the information on interest rate given to me, I feel that I am grossly overcharged.

In light of the above, may I request an urgent review and/or explanation on this matter as soon as possible.

I appreciate it also if you could send me a copy of the Letter of Offer for the above account.

I hope that you will give this matter your preferential attention."

The Provider's internal records dated **25 February 2009**, detail that there was a telephone call between the Provider and the Complainants as per the below internal note;

"Re letters from member – phoned member and explained reasons why commercial base is 5.13%. Member not satisfied with this and would like a written reply. Also sent out Loan Offers for three accounts as requested."

The Provider responded to the First Complainant by letter dated **25 February 2009** which details as follows;

"I am writing in response to your recent letter dated 19/02/2009 regarding the interest rate currently applied to the above loan accounts.

The interest rate applicable to your account is our Commercial Standard Variable Rate (SVR). Standard Variable Rates are not linked to European Central Bank (ECB) movements but set by the financial institution.

Given the changing economic conditions, unfortunately we have not been in a position to pass on the recent ECB rate reductions for residential investment mortgages.

Residential investment mortgages by their very nature, present a higher risk profile to [the Provider]. This higher risk assessment is representative of investment mortgages in general and is not reflective of your commercial relationship with [the Provider] to date. However, we do not price for investment mortgages on an individual basis.

/Cont'd...

While I know that the above summary does not provide any solace, I hope that it helps to explain our pricing approach.

As announced by [the Provider] on 5 December 2008 our Commercial mortgages were reduced by 0.75% in time for the January repayment.

Also as requested I have enclosed a copy of your loan offer for accounts [redacted] [mortgage loan account ending 0144] and [mortgage loan account ending 0405].

I would like to thank you for taking the time to correspond with us on these points and hope you continue to do business with [the Provider] now and into the future."

The Complainants take issue that the Provider did not address its mistake at this time. I accept that it was within the Provider's competence to notice the error with respect to the terms and conditions at that time.

I find the Provider's explanation that the Complainants had provided "no explanation or evidence" as to why they felt they were being overcharged totally unacceptable in circumstances where the Complainant clearly stated "I feel I was grossly overcharged".

I note that from **July 2008 to February 2009**, the difference between the tracker rate and the Variable Residential Investment Rate was between 0.03% and 1.65%.

The Provider sent the Complainants a letter dated **09 August 2011** informing the Complainants that the five year interest only period applying to both mortgage loan accounts was due to expire and capital and interest repayments were due to recommence.

The Provider's internal records from **02 September 2011** detail that a telephone call took place between the Provider and the Complainants as follows;

"Cfd process to apply for IO and supporting docs required. Advised to make appointment with local office to discuss options."

/Cont'd...

The initial five year interest only period on both mortgage loan accounts ended on **07 September 2011** and capital and interest repayments commenced on both mortgage loan accounts thereafter.

The First Complainant sent a letter to the Provider dated **09 September 2011**, which details as follows;

“We wish to apply for a reduction of the rate on mortgage accounts [0405] and [0144], which both currently stand at a rate of 5.18%. Please find enclosed herewith, an application for interest only facility signed by both mortgage holders.”

I note that the Complainants appear to have enclosed a letter dated **06 September 2011** that they had received from the Provider on foot of the telephone call with the Provider on **02 September 2011**, which details as follows;

“I am writing to you in follow up to your telephone conversation with our service team. As discussed please find the relevant information outlined below.

Under the Mortgage Arrears Resolution (MARF), we need to understand your current financial circumstances and we would require you to fill in the enclosed Financial Statement.

Before completing the same, it may be benefit for you to read the MARF booklet attached for a better understanding on how this process works. Along with the Financial Statement we would require some supporting documentation to help us assess your application in a timely manner.

Required Supporting Documentation		
PAYE	Self Employed	Unemployed
<i>Completed form Financial Statement</i>	<i>Completed form Financial Statement</i>	<i>Completed form Financial Statement</i>
<i>3 months current account bank statements</i>	<i>3 months current account bank statements</i>	<i>3 months current account bank statements</i>
<i>3 recent pay slips</i>	<i>Revenue balancing statement &</i>	<i>3 social welfare receipts</i>

	<i>6 months business current account statement</i>	
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Once you have been able to obtain the required information please return this to your local [Provider] office. On receipt of your documentation we will respond to you as soon as possible.

[..]"

A blank SFS was enclosed with this letter which the Provider requested the Complainants to complete and return together with 3 months current account bank statements, a Revenue balancing statement and 6 months business current account statement in circumstances where the Complainants were self-employed, as was clearly set out in the letter of **6 September 2011**.

The Complainants completed a document titled "**Application For Interest Only Facility**" seeking 24 months interest only period which was enclosed in their letter to the Provider dated **9 September 2011**. The Application details as follows;

"I/We wish to apply for an Interest Only Facility for a period of 24 months.

With this option, you only make interest payments for the period specified.

This means that your repayments will increase after this period to ensure that the full loan is repaid within the original term agreed.

Following the expiry of your interest only period, your loan repayments will be recalculated to ensure that the total outstanding capital is paid within the remaining term of the loan. This is to account for the fact that your capital had not been reducing during the interest only period as it would in an annuity loan.

Your interest charge can be reduced over the term of the mortgage by making additional repayments.

I/We confirm that we understand the workings of the Interest Only facility and wish to proceed with this application."

The Complainants signed the Application on **09 September 2011** confirming that they both understood how the interest only facility operated on their mortgage loan accounts. I understand that the Complainants chose a 24 month interest only period as "24" is handwritten on the application form.

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The Provider's internal notes detail that the Provider tried to contact both Complainants by telephone on **13 September 2011** and the Second Complainant on **16 September 2011**. On **20 September 2011**, the Provider's internal records detail as follows;

"Spoke to [Second Complainant]. He advised he felt completion of the Fin. Statement was very intrusive & he was not happy to complete this. I explained without this document, which was industry standard, we could not progress an interest only request. He is very dissatisfied with the requirements I advised we required the information to fully assess. I also advised him of the docs required for income verification (self employed) & that business a/cs & personal current account statements would be required. He asked if we would offer incentive if he were to repay 100k i.e. similar to [another named Provider] who he advised offered him 15%? If he were to repay his loan.

I asked if this loan was on a tracker rate & he confirmed it was, I advised this was possible the reason why [another Provider] were willing to negotiate repayment of loan. He will think about progressing the int only request & will revert if required."

I have not been furnished with any evidence to suggest that the Complainants proceeded with their application for a 24 month interest only period as they did not complete the SFS and they did not furnish the Provider with any of the requisite supporting financial information. The Complainants have submitted that this interest only request was rejected by the Provider, however I understand that the interest only application was deemed withdrawn as the Complainants did not furnish the Provider with a completed SFS and the supporting documentation as they viewed this to be "intrusive". The Complainants submit that their application for an interest only repayment at that time should have prompted the Provider to review their mortgage loan accounts.

I accept that it was within the Provider's competence to notice the error with respect to the terms and conditions at that time, however I am of the view that the reason why the Provider did not carry out a full assessment of the Complainants' accounts at the time was because the Complainants did not to furnish the Provider with a completed SFS and supporting documentation in relation to their current financial circumstances, as requested on **6 September 2011**.

I note the First Complainant's query in relation to whether incentives were being offered by the Provider similar to other providers if they were to repay a lump sum amount off the balance of their mortgage loan. In this regard, the First Complainant

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suggested paying €100,000 off their outstanding mortgage loan balance. In circumstances where the Complainants were in a financial position to redeem €100,000 of their mortgage loan balance and where they ultimately chose not to proceed with the 24 month interest only repayment, this would suggest that the Complainants were not in financial difficulty in or around **2011** and therefore were in a position to meet the rent shortfall which appeared to range between €1,962 and €16,926 from **2008** to **2011**, as can be seen from the table submitted by the Complainants, a copy of which appears below.

I have not been furnished with any documentation in evidence to support that the below is an accurate representation of the rental income, however it appears to be accepted between the parties that the record of gross rent is accurate.

<i>Year ended</i>	<i>Total gross rent</i> <i>(i)</i>	<i>Actual loan repayments</i> <i>(ii)</i>	<i>Correct loan repayments</i> <i>(iii)</i>	<i>Gross actual shortfall in rent</i> <i>(i) –(ii)</i>	<i>Shortfall in rent if correct rate interest applied</i> <i>(i) – (ii)</i>
	€	€	€	€	€
2006	19,504	10,072	10,072	0	0
2007	31,238	31,135	31,135	0	0
2008	32,166	34,128	33,006	(1,962)	(840)
2009	24,403	29,372	17,393	(4,969)	0
2010	19,917	28,475	14,893	(8,558)	0
2011	22,801	39,727	24,990	(16,926)	(2,189)

In the period between **October 2011** and **May 2013**, a variable commercial base rate ranging between 4.83% and 5.43% was applied to both mortgage loan accounts (ending **0405** and **0144**). The tracker interest rate that would have been applied was ECB + 1.5%.

Between **October 2011** and **May 2013**, the overall tracker rate (ECB + margin) fluctuated between a rate of 2.25% and 3.00%. The difference in the interest rate actually charged to the mortgage loans 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 + 1.50%) had been applied to the mortgage accounts between **October 2011** and **May 2013**, is also represented in the table below at column 5 (mortgage account ending **0405**) and column 8 (mortgage account ending **0144**):

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Date Range	Column 2	Mortgage Account ending 0405			Mortgage Account ending 0144		
		Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Actual Monthly Repayments
Oct 11 – Dec 11	2.43%	Between €2,641.11 and €2,683.96	Between €2,274.55 and €2,234.77	Between €366.56 and €449.19	Between €2,280.96 and €2,317.96	Between €1,930.03 and €1,964.39	Between €350.93 and €353.57
Jan 12 – Jul 12	2.33%	€2,582.05	€2,196.29	€385.76	€2,229.96	€1,896.79	€333.17
Aug 12 – May 13	2.58%	Between €1,256.57 and €2,650.25	Between €576.42 and €2,223.65	Between €426.60 and €680.15	Between €1,085.22 and €2,288.85	Between €497.82 and €1,920.43	Between €368.42 and €587.40

The Complainants' tax advisor sent a letter to the Provider's arrears support unit dated **03 May 2012**, which details as follows;

"I have been retained to advise [the Complainants] in relation to two residential investment properties that they jointly own which are mortgaged with [the Provider]. The loan account numbers are set out above, repayments on both loans have been met from the outset and are currently up to date – capital and interest is being repaid.

The rental income from the properties is insufficient to meet loan repayments, the shortfall is in the region of €37,000 p.a. This shortfall is being met from net

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salary income and has become unsustainable, for [the First Complainant] in particular.

The borrowers are committed to continuing to service the loans at present levels but need the consent of [the Provider] to a restructuring of their affairs to facilitate this.

Both men are partners in a [type of business redacted] operated by a company [company jointly owned by Complainants]. They wish to transfer the two properties to [company jointly owned by Complainants] and have [company jointly owned by Complainants] take over the related loans on the same terms and conditions as the current loans. Loan repayments can be more easily funded by [company jointly owned by Complainants] from trading profits (net of 12.5% corporation tax), rather than salaries earned by the individuals (net of 53% tax) [Second Complainant] is also able to assist [First Complainant] with funding through this structure.

We would ask you to facilitate this proposal with a minimum of administrative cost on the basis of the performance of the borrowers to date and given that there is no change in security and personal guarantees will be provided. I appreciate you may need further information on the individuals and the company. Their position is a little complex and I would be very grateful if we could meet briefly to discuss the detail and I can then deal with whatever documentation you need. I can meet at your office at your convenience."

The Complainants submit that the Provider rejected this proposal, however I note that a meeting took place between the First Complainant, the Complainants' representative and the Provider on **30 May 2012** for the purposes of discussing a restructuring proposal and valuations were provided for both properties.

The Complainants' representative sent a follow up letter to the Provider on foot of that meeting dated **19 July 2012**, which details as follows;

"I refer to our meeting on 30 May last attended also by [First Complainant] and [third party]. The background had been outlined in my letter of 3 May 2012, in essence the borrowers are having difficulty in meeting current loan repayments on these residential investment properties and are seeking consent to transfer the properties to their trading company which will resolve the difficulty.

Our proposal is as follows:

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1. *Our clients will introduce funds to reduce the current loans to the present market value of the properties eliminating the negative equity that currently exists.*

At our meeting we gave you open market valuations indicating €235,000 for [property address secured on mortgage loan account ending 0144] and €300,000 for [property address secured on mortgage loan account ending 0405].

2. *The two properties will be acquired by [company jointly owned by Complainants]. Financial statements for [company jointly owned by Complainants] for the year ended 31 July 2011 are enclosed along with a copy of the company Memo & Arts.*
3. *[The Provider] advance new loans to [company jointly owned by Complainants] for €235,000 and €300,000 respectively repayable over a fifteen year term.*
4. *[The Complainants] will provide personal guarantees on the new loans.*

I would be very grateful if you would consider this proposal and let me know if you need any further information. Our clients are keen to progress the matter as quickly as possible.”

It is clear from the above that the Complainants proposed to introduce funds of approximately €50,000 to eliminate the negative equity and reduced the outstanding balances on both mortgage loan accounts to match the current value of Property 1 and Property 2 at the time. It was proposed that the two mortgaged properties would be acquired by the Complainants' company subject to loans in the name of that company for the amounts of €235,000 and €300,000, being the respective values of both properties at the time. It was proposed that the company loans would be subject to a term of 15 years and would be subject to personal guarantees of the Complainants. I note that the Complainants' accountant never raised any issue with the interest rate applicable to the mortgage loan accounts in his correspondence to the Provider at this time.

The Provider's internal notes detail that a letter was received on **24 August 2012**. It is unclear as to whether it was the Complainants' letter dated **19 July 2012** that was received on that date. The Provider's internal note details as follows;

“In Discussions with Borrowers Accountants [name of Accountants] Bwrs wish as already stated back in May to convert the joint loans of [the Complainants] to be transferred into [company owned jointly by Complainants] who will fund repayments further and will substantially reduce the capital in line with current

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property values but also personally guaranteeing the facilities to the end also...negotiations begin now..."

I note that the account manager of the Provider e-mailed the Complainants' representative/accountant on **27 August 2012** on review of the Complainants' proposal. The e-mail from the Provider details as follows;

"I refer to our previous conversation and recent e mail. Before I take this proposal here to the next stage I require a response to the Following points:

- 1) Can you advise of any Tax implications in relation to the proposed transfer of the existing deals from Joint Personal Names to Limited Company names Guaranteed by All Parties?*
- 2) Have the proposed deals been approved by the Revenue and if so, could we have a copy of the Approval?*
- 3) In relation to the deal which relates to the property at [address] my recollection was that this relates to [First Complainant and third party name] private residence? If so has Legal opinion been obtained in relation to the transfer of this property from Personal names to the Limited Liability Company? Are there any Tax and Legal implications?*
- 4) Can you kindly advise as to how much Capital you propose to reduce the borrowings here by and the source of these funds?*
- 5) Can you please provide us with a Certified Statement of Affairs for All Parties involved here?"*

The Complainants' representative/accountant reverted to the Provider on **31 August 2012** as follows;

"Taking your points in order:

- 1. The only tax arising on the transfer is Stamp Duty that will be funded by the company making the purchase. No CGT arises, any VAT arising will not be a cash cost.*
- 2. Revenue approval is not required or necessary, the properties are being transferred at open market value as independently assessed.*
- 3. [Property address] is an investment property and not the residence of [First Complainant and third party name].*
- 4. The capital being introduced to reduce loans is €510,000 approximately to reduce loans to market value of properties as outlined in earlier correspondence, this is being funded from cash deposits.*

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5. *Statements of Affairs provided by [name of group] (accountants to the group – I am acting solely in relation to the reorganisation) are attached.*

As I mentioned on the telephone some weeks back, [First Complainant], it is now proposed that the properties at [a different property location] and [different property address] will now be acquired by the group parent company, [holding company]. This strengthens the proposal further.

There is a degree of urgency as funding in the present structure is becoming difficult. I would appreciate it if you could move the proposal along as quickly as possible and I am available at any time if it is useful to meet or if you need further information.”

The above e-mail suggests that the Complainants intended to acquire two other investment properties through a holding company and that the restructuring proposal for the mortgage loan accounts ending **0405** and **0144** and Property 1 and Property 2 , the subject of this complaint, were not the only properties that the Complainants’ intended to be acquired by their companies.

The Complainants’ representative/accountant e-mailed the Provider further information on **11 September 2012**, which details as follows;

“This is to confirm, as requested:

Director Salaries

[First Complainant] €175,992

[Second Complainant] €115,488

Monthly rental income

[property address] €3,500

[property address] €1,600

[property address of Property 2] €1,100

[property address of Property 1] €1,200”

Based on the above figures, the combined rental income in respect of Property 1 and Property 2, being the Buy To Let mortgaged properties the subject of this complaint, at this time was €2,300 (€27,600 per annum) which the Complainants’ submit was “*insufficient*” to meet the monthly capital and interest repayments. The monthly capital and interest

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repayment on mortgage loan account ending **0144** from **January 2012** to **October 2012** was €2,229.96 and €1,085.22 for the remaining months of the year amounting to a total of €24,470.04 for the year.

The monthly capital and interest repayment on mortgage loan account ending **0405** was €2,582.05 from **January 2012** to **October 2012** and €1,256.57 for the remaining months of the year amounting to a total of €28,333.64 for the year. This was a combined total payment of €52,803.68 leaving an annual overall shortfall of rent in the amount of €25,203.68.

I note that if the correct rate of interest was applied to both accounts the total annual repayments in respect of account ending **0144** would have been €19,674.67 and €23,000.09 in respect of account ending **0405** which equates to a total of €42,674.76. This is €10,128.92 less than the amount that they paid. This would have resulted in an annual overall shortfall of rent in the amount of €15,074.76 as opposed to €25,203.68.

In the letter from the Complainants' representative dated **3 May 2012** as detailed above, an annual overall shortfall of rent amounting to €37,000 is referred to. The Complainants also submitted the following table into evidence outlining what they consider to be the rent shortfall for **2012**. The figures below compiled by the Complainants are slightly higher as compared to my analysis above. The Complainants have factored that the total gross rent was €20,081 as opposed to €27,600. I have not been furnished with any documentation that evidences the monthly rental repayments received by the Complainants. The contemporaneous evidence details that rent receivable was €27,600.

<i>Year Ended</i>	<i>Total gross rent</i> <i>(i)</i>	<i>Actual loan repayments</i> <i>(ii)</i>	<i>Correct loan repayments</i> <i>(iii)</i>	<i>Gross actual shortfall in rent</i> <i>(i) – (ii)</i>	<i>Shortfall in rent if correct rate interest applied</i> <i>(i) – (ii)</i>
	€	€	€	€	€
2012	20,081	52,804	37,223	(32,723)	(17,142)

The Complainants state that the shortfall was being met by their salaries which combined, amounted to approximately €291,490 per year/ €24,290 per month. Furthermore, the Complainants outlined in their correspondence to the Provider on **31 August 2012** that they had €510,000 in cash deposits that could be utilised to reduce the mortgage loan balances in respect of both mortgage loan accounts as part of their proposal.

The Provider e-mailed the Complainants' representative on **26 September 2012** as follows;

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"I refer to our telephone conversation last evening and I regret to advise that [the Provider] is NOT in a position to facilitate the transfer of the Four Accounts from Joint & Several Liabilities to the respective Limited Co's with Personal Guarantees of those mentioned above together with a reduction in the overall exposure of approx. €500k

As [the Provider] is no longer lending in any capacity and has nt [sic] for 3 years and as our Commercial Division is deleveraging, managing its Book we were not in a position to carry out what was effectively a transfer to Commercial Lending. It, also, would not have been possible to have been able to apply the same rates with respect to the [Second Complainant] & [redacted] exposures.

I can assure you [the Provider] gave this proposal due consideration, particularly in light of the Track Record and of course the substantial reduction in overall exposure proposed.

If you have any queries on receipt of this mail please feel free to contact me or alternatively if you wish to meet please do not hesitate to request it."

It appears that on foot of consideration of the Complainants' proposal, the Provider decided to reject it. The Provider states that it was not in a position to facilitate the transfer of four properties (to include Property 1 and Property 2) and the related loan balances (to include the balances on mortgage loan account ending **0144** and **0405**) from the Complainants' names to a company structure. The Provider's e-mail referred to above indicates that the commercial division of the Provider was deleveraging and closed for any new business such as an application by the Complainants for company loans.

On **16 October 2012**, the Provider's internal notes show that the Complainants' accountant sent a request to the Provider for a 12 month interest only period in respect of both mortgage loan accounts.

The Provider's internal notes detail as follows;

"Request by BWRS advisor [Complainants representative] to put in place Interest only on 2 joint accounts of [Complainants] only for 12 months, paper to [Provider department], agreed for 6 months interest only, letters issued to BWRS."

I have not been provided with any evidence by the Complainants as to the reason for this request nor does it appear that the Complainants furnished the Provider with a SFS with details of their up to date financial circumstances to support their request for a

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further interest only repayment period in **October 2012**. I note that the Provider issued two letters to the Complainants on **12 October 2012** approving a 6 month interest only repayment period for mortgage loan accounts ending **0405** and **0144**.

Both mortgage loan accounts converted to interest only repayments with effect from **1 November 2012** for 6 months until **April 2013**. Both letters to the Complainants dated **12 October 2012** detail the following;

“During the interest only period you will only pay interest on your loan each month. Your capital balance will not reduce during this period. In light of this we strongly advise that you review any mortgage protection or insurance related products associated with this loan. You may wish to seek independent legal and/or financial advice with regards to this arrangement. The interest will continue to be calculated as per your original loan agreement. Your loan term is not affected by this arrangement.”

The Provider sent the Complainants a letter dated **04 April 2013** informing the Complainants that the interest only repayment periods in respect of both mortgage loan accounts were due to expire. The six month interest only periods expired on **07 May 2013**.

In the period between **June 2013** and **June 2014/October 2014**, the variable commercial interest rate that applied to the mortgage loan accounts (ending **0144** and **0405**) was 5.08%. The tracker interest rate that would have been applied was ECB + 1.5%. Between **June 2013** and **June 2014/October 2014**, the overall tracker rate (ECB + margin) that would have applied to the Complainants’ mortgage loan accounts ranged between 1.75% and 2%. 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 + 1.50%) had been applied to the mortgage loan accounts between **June 2013** and **June 2014/October 2014**, also represented in column 5 (mortgage account ending **0405**) and column 7 (mortgage account ending **0144**) of the table below:

		Mortgage Account ending 0405	Mortgage Account ending 0144
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Date Range	Column 2	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Jun 13 – Nov 13	3.08%	€2,323.00	€1,889.87	€433.13	€2,689.79	€2,188.27	€501.52
Dec 13 – Jun 14	3.33%	€2,323.00	€1,859.11	€463.89	€2,689.79	€2,152.66	€537.13
Jul 2014 – Sep 2014	2.58%	N/A	N/A	N/A	€2,689.79	€2,137.38	€552.41
Oct 2014	3.53%	N/A	N/A	N/A	€2,689.79	€2,123.87	€565.92

The Complainants have submitted the following table into evidence outlining what they consider to be the rent shortfall in respect of both properties for **2013** and **2014**;

<i>Year Ended</i>	<i>Total gross rent</i>	<i>Actual loan repayments</i>	<i>Correct loan repayments</i>	<i>Gross actual shortfall in rent</i>	<i>Shortfall in rent if correct rate interest applied</i>
	<i>(i)</i>	<i>(ii)</i>	<i>(iii)</i>	<i>(i) – (ii)</i>	<i>(i) – (ii)</i>
	€	€	€	€	€
2013	21,789	49,396	31,412	(27,607)	(9,623)
2014	<u>29,100</u>	<u>38,368</u>	<u>24,847</u>	<u>(9,268)</u>	<u>0</u>

I have not been furnished with any evidence from the Complainants to show the specific rental income during this period. However it appears from the above that the amount of shortfall in rent decreased slightly in **2013** which was likely due to the fact that the Complainants were making interest only repayments for approximately the first five months of the year. Based on the amortisation table furnished by the Provider, I note that the total actual mortgage repayments in respect of both mortgage loan accounts

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for **2013** was €49,995.79 however the correct loan repayments if the tracker interest rate applied amounted to a total of €36,921.65.

I understand that this left a shortfall in rent of approximately €15,132.65 if the correct rate of interest applied as compared to €9,623 which the Complainants have stated in the table above. The rental income appears to have increased in **2014** despite Property 2 having been sold in **June 2014** and Property 1 having been sold in **October 2014**, therefore, I understand that the Complainants would not have been in a position to collect rent on Property 2 for 6 months and for 2 months in respect of Property 1.

The Complainants' solicitor sent the Provider a letter dated **13 December 2013** in respect of Property 2 and mortgage loan account ending **0144**, which details as follows;

"We refer to the above and enclose herewith our clients' authority to take up title documents on accountable trust receipts and provide the usual undertaking. Our clients propose to dispose of their interest in the property and redeem the mortgage. We would be obliged if you could make the title documents available to us on accountable trust receipt at your earliest convenience, and thank you for your assistance."

The Complainants' solicitor sent the Provider a similar letter dated **18 December 2013** in respect of Property 1 and mortgage loan account ending **0405**.

The Provider sent the Complainants' solicitors two separate letters dated **13 January 2014** in respect of each mortgage loan account and enclosed the title deeds for Property 1 and Property 2 with each of those letters.

The Complainants' solicitor returned the title deeds for the Property 2 secured on mortgage loan account ending **0144** to the Provider with a letter dated **16 January 2014** detailing that the Complainants had *"decided not to proceed with the proposed sale"*.

The Complainants' solicitor subsequently sent a letter dated **03 April 2014** to the Provider requesting the title deeds for Property 2 as the Complainants had *"now decided they in fact do wish to dispose of their interest in this property"*. The Provider responded to the Complainants' solicitors by letter dated **15 April 2014** and enclosed the title deeds for Property 2.

The Complainants' solicitors at the time requested redemption figures from the Provider by way of letters dated **14 May 2014**, **21 May 2014**, **03 June 2014** and **09 June 2014** in respect of mortgage loan account ending **0144** which the Provider responded to

with the redemption figures on **19 May 2014, 04 June 2014, 11 June 2014** and **17 June 2014**.

The Complainants detail that Property 2 secured on mortgage loan account ending **0144** was sold for the amount of €250,000 to the Second Complainant's company and the mortgage loan account ending **0144** was redeemed and closed on **18 June 2014**.

The Complainants' solicitors at the time requested redemption figures in respect of mortgage loan account ending **0405** from the Provider in a letter dated **29 August 2014**. The Provider reverted with the requested redemption figures in its letter to the Complainants dated **01 September 2014**. The Complainants' solicitors sent a letter to the Provider on **02 October 2014** enclosing the cheque to redeem mortgage loan account **0405** in respect of Property 1. The Complainants have outlined that the Property 1 was sold on **03 October 2014** for the sum of €300,000 to the Second Complainant's company. The mortgage loan account ending **0405** was redeemed and closed on **04 November 2014**.

The Complainants' solicitors at the time sent the Provider a letter dated **28 May 2015** to the Provider as they did "*not appear to have received the vacated mortgage*" in order to discharge their solicitors' undertaking in respect of mortgage loan account ending **0405**. The Provider responded by way of letter dated **11 June 2015** stating that the mortgage charge had been discharged by way of e-discharge with the Property Registration Authority of Ireland on **16 October 2014**.

The Complainants have outlined that on foot of the Provider's refusal to "*consider any of the several proposals put to [the Provider], referred to above, it was decided that [company owned by the Second Complainant] (a company owned by [Second Complainant]) would purchase the two properties and use [company owned by the Second Complainant's] funds to repay both loans in full.*" The Complainants detail that the company owned by the Second Complainant had to organise dividend income in order to finance the purchase of Property 1 and Property 2.

The evidence does not support the assertion that there were "*several proposals*" rejected by the Provider and that this resulted in the Complainants' decision to sell the mortgaged properties. I note that other than the two interest only applications detailed above, the Complainants did not seek any other forbearance from the Provider, did not enter into arrears and consistently met the capital and interest repayments.

As outlined above, the Complainants' initial application for an interest only repayment period in **September 2011** was deemed withdrawn as the Complainants failed to complete the application by providing the requested financial information. In **May 2012**,

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the Complainants sent a letter to the Provider outlining a proposal to restructure their mortgage loans and their reasons behind the proposed restructure.

As noted above, the Provider met with the Complainants and their representatives to discuss this proposal and further information was requested. I understand that this proposal was ultimately rejected by the Provider in **September 2012**. In **October 2012**, the Complainants requested a 12 month interest only repayment period in respect of both mortgage loan accounts however the Provider only granted a 6 month interest only repayment period. The Complainants did not seek an extension to this forbearance measure on either mortgage loan accounts in **May 2013** when the 6 month interest only repayment periods expired.

I have not been provided with any evidence of income shortfalls on the part of the Complainants during the terms of the loans.

It would appear to me that there is in fact evidence to the contrary, in that, the Complainants had funds of €100,000 available to them in **September 2011** when they made enquiries regarding incentives if they were to pay a lump sum off their mortgage. Furthermore, the Complainants appear to have built up funds in the amount of €510,000 by **July 2012**. The Complainants closed the sale on Property 2 and €251,125.66 was applied to mortgage loan account ending **0144** and the loan was redeemed in full in **June 2014**. The Complainants closed the sale on Property 1 and €288,222.87 was applied to mortgage loan account ending **0405** and the loan was redeemed in **November 2014**. Accordingly, the Complainants' effectively cleared their liabilities to the Provider in full in **2014**. As outlined above, in **December 2016** the Provider calculated the redress and compensation due to the Complainants on foot of its failures to the Complainants' mortgage loan accounts from **30 June 2008**, when the mortgage loan accounts were first impacted. The Provider did not restore a tracker interest rate to the Complainants' mortgage loan accounts in **December 2016** as mortgage loan account ending **0144** was redeemed in full in **June 2014** and mortgage loan account ending **0405** was redeemed in full in **November 2014**.

The Complainants contend that the redress and compensation offering of €109,404 by the Provider does not adequately compensate for its failure. Rather, the Complainants assert that they have suffered a total financial loss of €457,000 as a result of the Provider's failures as outlined in the table of losses submitted by the Complainants which is referred to in earlier paragraphs.

I will now consider the financial losses that the Complainants submit they have incurred below;

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Loss in increase market value of Property 1 and Property 2 from date of sale to date

The Complainants contend that there was a combined loss in market value of both mortgaged properties in the amount of €65,000 when the properties were sold to the Second Complainant's company in **2014**.

They have outlined that the current valuation at the time for the Property 1 secured on mortgage loan account ending **0405** was €390,000 and the property was sold for €300,000. The valuation for Property 2 secured on mortgage loan account ending **0144** was €290,000 and the property was sold for €250,000. The loss in market value on the basis of these figures, would indicate a loss of €130,000 as opposed to €65,000. The Provider contends that that this was a "*commercial venture*" on behalf of the Complainants.

It is important for the Complainants to understand that that they chose to voluntarily sell/transfer ownership of both properties to the Second Complainant's company and at no point did the Provider advise the Complainants that this course of action was necessary or advisable. The fluctuation in value of a property is not something that can be accurately predicted and the evidence shows that the Complainants made the decision to sell the properties of their own accord. The Complainants were meeting full repayments at the time the properties were sold. I accept that the Complainants were making over payments on their mortgage loan at the time, when they would not have been doing so, if the correct interest rate was applied to their mortgage loan. However, in any event, even if they were making repayments on the mortgage loans on the tracker interest rate, there was still a shortfall in rent receivable as against the mortgage repayments, such that the Complainants would have been required to supplement the repayments on the mortgage loans from their other income. The evidence is clear that the Complainants were seeking to devise a structure whereby the loan repayments would be funded through their company vehicle, rather than their salaries. The tax advantages for the Complainants of doing so were outlined to the Provider in the correspondence of **03 May 2012**. Ultimately the Complainants pursued a different structure of outright sale of the properties to a company wholly owned by the Second Complainant. Therefore the Second Complainant effectively retained control of both properties through his company.

Given the above, I do not accept that the sale of the properties and the loss in increase market value can reasonably be linked to the overcharge in interest on the Complainants' mortgage loan accounts.

Compensation for fees paid to financial advisors in relation to the transfer/restructure

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The Complainants assert that they are due €25,000 in compensation as a result of fees paid to financial advisors in relation to the transfer and restructure of the Complainants' mortgage loan accounts. I note that an invoice was issued to the Complainants' solicitors at the time issued an invoice dated **21 May 2014** in respect of professional fees and outlay in relation to the sale of the Property 2 secured on mortgage loan account **0144** to the Second Complainant's company for the amount of €2,051.95 (including VAT).

I note that another firm of solicitors issued an invoice to the Second Complainant's company dated **05 June 2014** in respect of professional fees and outlay in relation to the purchase of Property 2 secured on mortgage loan account ending **0144** in the amount of €6,971.33 (including VAT).

An invoice in the amount of €5,897.98 (including VAT) was issued to the Second Complainant's company on **29 August 2014** in respect of the purchase of Property 1 secured on mortgage loan account ending **0405**.

The cost of the restructure appears to amount to €14,921.26 based on the invoices furnished in evidence. It is unclear where the balance of €10,078.74 was been incurred however I note that I have not been provided with an invoice in respect of fees in relation to the sale of Property 1 to the Second Complainant's company. I note that "*copy invoice required*" is detailed in the table submitted by the Complainants. As two of the invoices issued to the Second Complainant's company those costs were incurred by the company as opposed to the Complainants themselves, which are separate legal entities. There is no rightful claim to reimbursement of these fees by the Complainants.

It has already been established that the decision to sell/transfer ownership of the properties to the Second Complainant's company was a decision made solely by the Complainants. I do not accept that the Provider can reasonably be held accountable for the professional fees incurred by the Complainants with respect to the sale of the properties.

Compensation for tax liability due

The Complainants have outlined as follows in respect of the tax liability incurred;

"Liable income tax to date - €43,500

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- Where properties sold by individual normal CGT rate applied
- Where property held by a Limited Company the sale of the property triggers CGT for the company and the remaining surplus triggers and income tax liability when paid to shareholder.
- The company purchased property for €550,000 the book value is €680,000 which gives a surplus of €130,000 (€680k - €550k).
Company CGT @ 33% = €43,000 (€130k @ 33%)
- The remaining profit to the company is €87,000 (€130k - €43k) **liable to income tax at say 50% = €43,500. (50% of €87,000).**

Furthermore, the Complainants have outlined the future tax liability as follows;

“Liable future income tax €100,500

- The next 10/20 years of property market is unknown
- If the two properties increase in next 10/20 years by €300,000
- **Company CGT = €99,000 (€300K @ 33%).**
- The remaining profit to the company is €201,000 (€300k – 99k) which is **liable for income tax at say 50% = €100,500 (50% of €205,000)**”

I note that when the Complainants’ representative/accountant submitted the restructure proposal to the Provider in **July 2012**, the Provider questioned whether there would be any tax implications in respect of any of the parties in relation to the proposed transfer of the properties from the joint names of the Complainants to a limited company. The Complainants’ representative/ accountant noted the following is response to the Provider’s query;

“The only tax arising on the transfer is Stamp Duty that will be funded by the company making the purchase. No CGT arises, any VAT arising will not be a cash cost.”

I accept that it was the role of the Complainants’ representative/accountant to advise the Complainants of the tax implications in transferring the ownership of the properties in **2012** in order for them to be in a position to fully assess their options in this regard. If the Complainants were not satisfied with the potential tax liabilities they could have chosen not to transfer the mortgaged properties to the Second Complainant’s company. Again, this was a decision made by the Complainants in consultation with their tax advisor/accountant.

It is important for the Complainants to understand that the liabilities of the Second Complainant’s company which was not a party to the mortgage loan accounts that are

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the subject of this complaint, are the liabilities of the Second Complainant's company and not those of the Complainants. The Second Complainant's company is also not a party to this complaint and is not eligible to be a party to this complaint. Again the evidence does not support the Complainants' claim for additional compensation in the amount of €144,000.

Compensation for loss of benefit of preferential interest

The Complainants submit that the *"mortgage loan account was at a preferential rate of interest"* and the *"loan was eliminated and the preferential rate was lost"*.

The Complainants refer to the Provider's rate of interest as of **October 2014** as 1.55% compared with current interest rate of approximately 4% that is now applicable to the new mortgage loans secured on the properties in the name of the Second Complainant's company.

The Complainants redeemed mortgage loan accounts ending **0144** and **0405** in full in **June 2014** and **November 2014** respectively. It was the Complainants' decision to set up new loan accounts in the name of a limited company which attracted a different interest rate.

The mortgage repayments in respect of the new loan accounts are being paid by the Second Complainant's company as opposed to directly by the Complainants themselves. Therefore, it cannot be considered as part of this investigation.

Compensation for the estimated loss of €150,000 to the First Complainant in relation to the future increased market values of the properties

The Complainants contend that if the First Complainant was not *"forced to sell"* the two mortgage properties than he would continue to hold 50% interest in these properties. As a result, the Complainants are of the view that the First Complainant will lose 50% of any increase in the future market values of the properties. The Complainants estimate a loss of €150,000 based on *"50% of an increase in the property values of €300,000 (over next 20/30 years)"*.

As detailed above, the Buy to Let properties are now owned by the Second Complainant's company. I accept that as the Second Complainant is a shareholder of the company, he may benefit from any increase in the value of the properties in question. However, the First Complainant agreed to sell the Buy to Let properties to the Second Complainant's company. If he was not satisfied with this arrangement he did not have to agree to that transaction.

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The decision to sell Property 1 and Property 2, was an entirely independent decision made by the Complainants and there is no justification for the compensation as claimed by the First Complainant.

Compensation for the Complainants' legal/professional fees incurred in dealing with this claim

In respect of the legal costs incurred, the Complainants detailed "TBC" in their table.

The Complainants did not have a representative on record in making their complaint to this office, so it is unclear what professional fees were incurred. Nor is it necessary for a complainant to be represented in making a complaint to this office. In any event, the ***Financial Services and Pensions Ombudsman's Act 2017*** does not make provision for awards of legal or other costs in making complaints to this office.

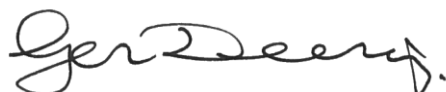
In light of the above, it appears to me that the evidence does not support the Complainants' claim for compensation of €457,000. I accept that the Complainants were overpaying on their mortgage loan accounts on a monthly basis of sums from €15.37 per month in **July 2008**, rising to €974.02 per month in **June 2014**. I accept that the Complainants should not have been overpaying on their mortgage loans over the 6 year period. However the Provider has paid compensation of €10,598.22 to the Complainants, together with redress of €96,347 (interest overpaid and time value of money payment) and an independent professional advice payment of €2,460.00. In the circumstances of this matter I accept the compensation paid by the Provider to be reasonable.

In these circumstances and for the reasons set out in this Decision, I do not uphold the complaint.

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.



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**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

4 November 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.