



<u>Decision Ref:</u>	2021-0151
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer appropriate compensation or redress CBI Examination
<u>Outcome:</u>	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to a mortgage loan account held by the Complainant with the Provider and an overcharge of interest in the amount of €71,427.92 on that mortgage loan account.

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

The Provider contacted the Complainant on **12 December 2017** advising him of the error that had occurred on his mortgage loan account. The Provider detailed how it "*got things wrong*" as follows;

"In our review, we found that when you moved to a fixed rate from a tracker rate we failed to provide you with sufficient clarity as to what would happen at the end of that fixed rate. Because of this, you may have had an expectation that a tracker rate would be available to you at the end of the fixed rate period. The language used by us in your documentation may have been confusing as to whether it was a variable interest rate which varied upwards or downwards tracking the ECB Rate or a variable interest rate which varied upwards or downwards at our discretion."

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

“How this failure affected you

As a result of our failure, we can confirm that you were charged an incorrect interest rate between 30 Dec 2008 and 28 Nov 2017.”

The Provider made an offer of redress and compensation to the Complainant by letter of **12 December 2017**. The offer of €82,893.87 made by the Provider to the Complainant comprised the following;

1. Redress of €74,903.52 covering;
 - Total interest overpaid by the Complainant in the amount of €71,336.69
 - Interest to reflect time value of money of €3,566.83
2. Compensation of €7,490.35 for the failure on the mortgage loan account.
3. Independent Professional Advice payment of €500.

The Provider restored the Complainant’s mortgage loan account to a tracker interest rate of 1.25% on **29 November 2017**.

The Complainant signed the Acceptance Form on **21 December 2017** and the amount of €82,893.87 was paid into the Complainant’s nominated bank account.

On **30 November 2018** the Provider wrote to the Complainant to state that a “*rounding error*” had occurred in the letter of **12 December 2017**, and that the correct redress and compensation offering was as follows:

1. Redress of €74,999.32 covering;
 - Total interest overpaid by the Complainant in the amount of €71,427.92
 - Interest to reflect time value of money of €3,571.40
2. Compensation of €7,499.93 for the failure on the mortgage loan account.

The Provider states that an additional Top Up payment of €105.38 was paid into the Complainant’s account on **30 November 2018**, which covered the difference.

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In **April 2018**, an appeal was submitted to the Independent Appeals Panel by the Complainant. The basis for appeal was the level of compensation offered by the Provider. The Appeals Panel decided on **21 May 2018** that the appeal was upheld and awarded additional compensation of €10,000.00 to the Complainant. The key factors in determining the decision by the Appeals Panel were as follows;

“The Panel had regard to the very significant level of the overpayment and its impact on the Customer’s specific financial and personal circumstances, as supported by detailed evidence in the Customer’s appeal. Having done so, the Panel was not satisfied that on the balance of probabilities the Customer’s decisions to dispose of [Investment Property] and cease pension and savings payments were made as a consequence of the overcharging”.

The Complainant’s Representative wrote to the Appeals Panel on **12 July 2018** deeming their response “*not satisfactory or acceptable*”. The Appeals Panel wrote to the Complainant on **24 July 2018** stating that it “*cannot bring this matter any further for*” the Complainant. The Complainant submitted a complaint to this office on **01 August 2018**, rejecting the decision of the Independent Appeals Body.

As the Complainant had 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 compensation to the Complainant by consequence of the Provider’s failure in relation to his mortgage loan account.

At the outset, due to the number of properties and mortgage loan accounts being considered in this Decision, I have prepared the following table which sets out the position regarding each mortgage loan account:

Property	Mortgage Loan Account	Subject of this complaint
[The Impacted Property]	Mortgage Loan Account ending 2250	Yes
[Buy to Let Property 1]	Mortgage Loan Account ending 7192 ; Mortgage Loan Account ending 4842 ; and	No

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	Cross secured on Mortgage Loan Account ending 2740	
[Buy to Let Property 2]	Mortgage Loan Account ending 2740	No

The Complainant's Case

The Complainant submits that the compensation offer made by the Provider is *"grossly inadequate"*.

The Complainant contends that he informed the Provider that it was a mistake not designating his mortgage loan account ending **2250** as having a tracker interest rate *"...on at least two occasions in or around 2007"*.

The Complainant outlines that due to the overcharge of approximately €7,926 per year by the Provider, he had to make *"unplanned decisions during the period of this overcharge which had major financial implications for him"*. The Complainant submits that he suffered from health issues exacerbated by the *"stress & depression suffered as a result of pressure applied by the [Provider] over a prolonged period"*.

The Complainant details that after three or four years of *"mounting pressure"*, he realised he was facing *"serious difficulties"* as his payments on mortgage loan account ending **2250** had increased from €1,100 per month to €2,276 per month, he approached the Provider. The Complainant submits that he requested reduced mortgage repayments and he submits that the outcome of this was the extension of his mortgage by *"10/11 years"*.

The Complainant submits that from **2008** to **2012**, he had been overcharged almost €32,000 by the Provider *"which he could ill afford"*. The Complainant outlines that during those 4 years, he required €70,000 which was funded by way of loans from his family and spouse totalling €38,000, €13,000 from the Bank and €19,000 from a cashed in life policy. He submits that he sold his the **Buy to Let Property 1** in **2012** and had sought €35,000 from the Provider from the sale but this was declined. The Complainant submits that after *"considering the removal of all the [Family] business from [the Provider], the [Provider] eventually agreed to release 13k"*.

The Complainant submits that he sold the **Buy to Let Property 1** for €265,000 in **2012** and a valuation dated 01 February 2018 outlines that **Buy to Let Property 1** was worth €375,000, which the Complainant contends led to an opportunity loss of €110,000.

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The Complainant submits that his plan was to retain the **Buy to Let Property 1** *“indefinitely as part of his pension plan & similarly build up a cash option by way of regular monthly contributions”*.

The Complainant further submits that in **September 2012** when assessing the Complainant’s *“...overall asset/liability situation...they were happy to include [Buy to Let Property 1] in support of their own view/argument”*.

The Complainant submits that there was an alternative solution to selling his **Buy to Let Property 1** which was that the Provider could have restructured his borrowings and released €35,000 as sought by the Complainant for specific personal needs. The Complainant submits that he requested the Provider to utilise the sale proceeds of his **Buy to Let Property 1** to *“reduce the borrowing with the highest interest rate, i.e. [mortgage loan account ending 2250] (which should have been a tracker) was declined/ ignored and instead, €215k was applied to [mortgage loan account ending 2740] already on Tracker on a much lower rate and €28k went to clear the loan on Buy to Let Property 1.”*

The Complainant submits that 12 months after approaching the Provider for reduced mortgage repayments his business closed, resulting in his mortgage loan account being *“domiciled in the Arrears Support Unit & consequently attributed a negative rating & downgrade”*. The Complainant further submits that his business closing resulted in debts and *“the regular visit of the Sheriff which caused untold embarrassment”*.

The Complainant goes on to submit that he had to borrow money from a family member due to *“considerable costs in relation to a family matter”*. The Complainant further submits that as he was self-employed, he was not entitled to any state benefits.

The Complainant submits that he was over charged around €7,926 per annum by the Provider from **2009 to 2017** inclusive (8 years). The Complainant outlines that had this money been available to him, he would not have had to:

- a. Sell a **Buy to Let Property 1** with *“substantial equity - €240k”* in **2012**;
- b. Lose the potential appreciation and rental income on the **Buy to Let Property 1** referenced above from **2012**;
- c. Ceased paying his pension contributions of €253.94 per month from **2009** ; and
- d. Borrow €25,000 from family members.

The Complainant submits that his spouse was also affected by the Provider's failure as she had to cease her monthly saving policy contributions of €76.14 per month. The Complainant outlines that had his spouse continued to make this monthly payments, the "encashment value would be estimated to be at least €9k greater".

The Complainant details that the financial loss suffered due to the incorrect tracker rate being applied to his mortgage loan account was as follows;

"- Property had to be sold	€110k approx.
- Potential Rental Income	€72k "
- Pension Fund Contribution ceased	€20k "
- Savings Policy – see above	€9k "
Total:	€211k "

Not included: Projected capital Appreciation on sale of Property?"

The Complainant further submits that as the Provider "...admittedly...removed funds from the Complainant's account" due to its overcharging, the Provider has "...no right whatsoever to speculate as to what purpose the Complainant might have put the funds to" now.

The Provider's Case

The Provider submits that the Complainant drew down a mortgage of **€290,000** on **22 July 2004** for a term of 20 years under Mortgage Loan Offer Letter dated **06 February 2004**, which was signed and accepted by the Complainant on **24 March 2004**. The Provider details that the letter of offer provided for an introductory fixed rate of interest of **2.79%** for 12 months, reverting to a standard variable rate thereafter. The Provider details that the letter of offer did not provide for a tracker rate of interest.

The Provider submits that the Complainant made a number of changes to the interest rate applicable to the mortgage loan as follows;

- On the expiry of the initial fixed interest rate period in **July 2005**, the mortgage loan account reverted to the Provider's "investment standard variable rate".
- The Complainant signed a Mortgage Form Authorisation ("MFA") on **19 August 2005** choosing to apply a tracker interest rate of **ECB + 1.30%** to the mortgage loan account, which was implemented on **31 August 2005**.

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- At the Complainant's request, it issued an MFA by letter dated **22 September 2005**, affording the Complainant 10 years of interest only repayments which they submit the Complainant accepted on **29 September 2005**. The Provider submits that this interest only repayment arrangement was a product being offered at this time and was not in response to any repayment difficulties.
- The Provider agreed to a reduced tracker interest rate of **ECB +1.25%** following a request from the Complainant and submits that this was implemented on **27 April 2006**, without the requirement of an MFA.
- On **06 October 2006**, the Complainant requested that the mortgage loan account revert back to full capital and interest repayments and this reversed the MFA signed on **29 September 2005**.
- The Complainant signed an MFA on **22 December 2006**, amending the interest rate on the mortgage loan account from a tracker interest rate of ECB + 1.25% to a 2 year fixed interest rate of 4.79%.
- Prior to the expiry of the 2 year fixed rate period on **28 November 2008**, the Provider issued the Complainant with an MFA setting out what rates were available at this time. The MFA did not include the option of a tracker rate.
- The mortgage loan account rolled on to a standard variable rate on **30 December 2008** and remained on this rate until **14 December 2017** when the Complainant opted for a further 2 year fixed rate by MFA dated 27 June 2017.
- The mortgage loan account moved to a tracker interest rate of ECB + 1.35% on **29 November 2017** as a result of the Central Bank directed Tracker Examination.

The Provider outlines that the Complainant's mortgage loan account was considered to be impacted as part of the Examination in **December 2017** because the Provider found that when the Complainant moved from a tracker rate to a fixed rate in **December 2006**, the Provider failed to provide the Complainant with sufficient clarity as to what would happen at the end of the fixed rate in **December 2008** and the language used by the Provider may have been confusing and misleading. The Provider details that it made an offer of redress and compensation to the Complainant by letter dated **12 December 2017** to restore the Complainant to the position he would have been in had he been offered and had chosen a tracker rate at a margin of 1.25% in the MFA of **November 2008**.

The Provider submits that an appeal was submitted by the Complainant to the Independent Appeals Panel. The Provider submits that a decision was issued by the Independent Appeals Panel on **21 May 2018**. The Independent Appeals Panel upheld the Complainant's appeal. The Independent Appeals Panel awarded the Complainant an additional €10,000 in compensation "*given the high level of overpayments and its impact on the Customer*".

The Provider submits that it “...stands over the outcome of the Independent Appeals Process as providing adequate compensation to the Complainant when added to the initial offer made”.

The Provider submits that the redress and compensation payment made to the Complainant is “reasonable”, “fair” and “adequate”. The Provider submits that the Complainant has not made a “reasonable claim” for any additional compensation beyond what the Provider and Independent Appeals Panel have already provided for.

The Provider contends that it has no record of the Complainant raising that the Impacted Account should have been a tracker mortgage in **2007**.

The Provider submits that the Complainant sought a number of arrangements on his mortgage loan account from in or around **December 2010**.

The Provider further submits that the Complainant submitted a financial review form to the Provider dated **02 December 2010**, received by the Provider on **08 March 2011**. The Provider submits that the Complainant’s request stated that his rental income had dropped over the last number of years so he was seeking one year of interest only repayments on the mortgage loan account. The Provider outlines it agreed to this and offered the Complainant 12 months fixed reduced repayments of €1,100 per month.

The Provider submits that this arrangement expired in **April 2012** and the Provider contends it wrote to the Complainant on **13 March 2012** inviting him to contact the Provider should he require further forbearance. The Provider submits that no repayments were received for May or June 2012 so the mortgage loan account accrued arrears.

The Provider outlines that it received a “Buy to let Mortgage – Repayment Amendment Request” on **4 July 2012** and it approved a 3 month arrangement. The Provider submits it noted that this request stated that the Complainant wanted to clear the mortgage on the **Impacted Property** he owned, by selling the **Buy to Let Property 1** and that he would pay off the remaining amount in the mortgage loan account of his **Buy to Let Property 1** property with the rent received from the **Impacted Property**.

The Provider submits that there was a number of factors which may have influenced the Complainant’s decision to sell **Buy to Let Property 1** in **2012**, not simply the incorrect interest rate being applied. The Provider submits that the Complainant requested to sell **Buy to Let Property 1** and retain €35,000 for personal needs. The Provider details that this was initially declined and the Provider sought that the full proceeds of sale be applied against the mortgages.

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The Provider outlines that the Complainant again requested the retention of €13,000 for personal matters or he would not complete the sale, and the Provider submits that it agreed to this request.

The Provider details that the Complainant had a clear personal need at this time and this was the reason behind his decision to sell the **Buy to Let Property 1**. The Provider contends that it did not pursue or initiate the sale of the **Buy to Let Property 1**.

The Provider details that the Complainant lodged repayments on **18 July 2012** and maintained the monthly repayments thereafter. The Provider submits it was in a position to remove all arrears on the mortgage loan account on receipt of an MFA received in **September 2012**.

The Provider asserts that the Complainant has not made a *“reasonable claim”* for any additional compensation beyond what the Provider and Independent Appeals Panel have already provided for, as set out below:

(i) “Forced” sale of “Buy to Let Property 1 in 2012 for €265,000

The Provider outlines that the **Buy to Let Property 1** was secured by 3 separate mortgage loan accounts held by the Complainant with the Provider, not including the mortgage loan account ending **2250**, the mortgage loan account the subject of this complaint. The Provider contends that the Complainant submitted an application seeking the release of the charge over the **Buy to Let Property 1** to facilitate a sale in 2012. The Provider agreed to this request *“...at a shortfall”*. The Provider *“refutes any assertion”* that the sale of the **Buy to Let Property 1** was forced. The Provider contends that the **Buy to Let Property 1** was sold at the Complainant’s request *“to release funds for his personal needs”*.

The Provider submits that the Complainant’s *“need to release equity from the sale of an asset arose from personal reasons not connected to the question as to whether a tracker rate should have applied after December 2008”*. The Provider refers to written evidence and contends that at no point does it mention that *“interest cost or the absence of a tracker rate or, more generally, the cost of servicing the mortgage as a factor”* in the Complainant’s decision to sell the **Buy to Let Property 1**. The Provider submits that in 2012, the Complainant was *“obviously satisfied with sale price being obtained”* and refers to a valuation submitted by the Complainant on **11 October 2012** confirming that the sale price represented *“the best price reasonably obtainable”*.

The Provider is of the view that the “*overwhelming probability is that the Complainant would have sold [Buy to Let Property 1] as an answer to his personal need regardless of the interest rate charged on mortgage loan account [ending 2250]*”. The Provider outlines that the Complainant has offered no evidence “*...to support the contention that the tracker issue was in any way the proximate or even indirect cause of the Complainant’s personal decision to sell [Buy to Let Property 1]*”.

The Provider submits that the consequences are “*too remote*” from the question of “*insufficient clarity within the Mortgage Form of Authorisation in mortgage accounts that do not even directly concern [Buy to Let Property 1]*”.

(ii) Loss of rental income from the Buy to Let Property 1 – The Complainant submits the average rental income from the property was €1,100

The Provider submits that it does not “*accept the claim for a loss of capital appreciation, the Provider equally does not accept the claim for a loss of rent*”. The Provider further submits that the points made regarding remoteness in respect of point (i) apply equally to this claim.

(iii) Pension Fund Contributions - the Complainant submits that he ceased contributions in 2009 and is claiming losses of €20,000 in this regard

The Provider contends that the Complainant has not provided any evidence or reason to support the contention that he ceased his pension payments in **2009** because of the “*tracker issue*”. The Provider submits that the Complainant maintained full capital and interest repayments during the fixed rate period between **December 2006 and December 2008**. The Provider details that the mortgage loan account reverted to the standard variable rate of 4.915% from **30 December 2008 until 28 January 2009** when it reduced to 4.665% - which the Provider submits, it is important to note that the variable rate payments from **February 2009 until August 2010** were less than the previously maintained fixed rate payments (€1,938.19 per month versus €1,921.71).

The Provider submits that it holds no record of the Complainant contacting it in **2009** to state he was in financial difficulty. The Provider further submits that it had no reason to suppose the Complainant was in financial difficulty until he sought forbearance in **2011** following a decrease in rental income.

The Provider further submits that the points made regarding remoteness in respect of point (i) apply equally to this claim.

(iv) Savings policy – the Complainant submits that his wife ceased paying into a savings policy in 2012 which he says resulted in losses of €9,000

The Provider submits that it does not accept that it is open to the Complainant to make a claim on behalf of a loss allegedly suffered by his wife who is not a party to the mortgage loan account. The Provider outlines that there is no evidence to establish that the Complainant's spouse's personal decision to cease contributing to her savings policy is in any way connected to the tracker issue.

The Provider refers to its points made at (i) which sets out the Complainant's personal needs in **2012** which may have been the reason his spouse ceased her savings policy in 2012.

The Provider further submits that the points made regarding remoteness in respect of point (i) apply equally to this claim.

The Provider submits that the Complainant submitted a further "SFS" on **4 February 2013** requesting a maximum term extension in order to return to full capital and interest repayments which the Provider approved and was accepted by the Complainant on **14 February 2013**.

The Provider further details that it is not satisfied that the Complainant's decision to cease pension and savings payments were as a consequence of "*the conduct complained of i.e. uncertainty in the documentation giving rise to the fixed rate in December 2006*" and further submits that the Complainant's overall financial circumstances deteriorated from depressed rental income and decrease in the values of his rental properties. The Provider submits that it appears likely to the Provider "*that the Complainant's personal reasons and circumstances could equally have given rise to the decision to ease payments to the pension fund and savings policy*".

The Complaint for Adjudication

The complaint for adjudication is that the Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider's failure in relation to his mortgage loan account.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence.

The Complainant was 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 **22 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 days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. Letter from the Provider to this office dated **16 November 2020**;
2. Letter from the Provider to this office dated **30 November 2020**;
3. Letter from the Complainant to this office dated **10 December 2020**;
4. Letter from the Provider to this office dated **18 December 2020**;
5. Email from the Complainant to this office received on **06 January 2021**;

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6. Letter from the Provider to this office dated **15 January 2021**; and
7. Email from the Complainant to this office received on **21 January 2021**;

Copies of these additional submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office by both parties, I set out below my final determination.

The Provider has detailed that the redress and compensation offered and paid to the Complainant 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 €74,999.32 reflects the amount of interest overpaid on the mortgage loan account and includes a payment of €3,571.40 to reflect the time value of money. The Provider also paid the Complainant compensation of €500 for the purposes of seeking independent professional advice. The Provider submits that the Provider paid 10% compensation under the framework and the Appeals Panel added a further sum of €10,000 which the Provider is bound by. The Provider submits that the Complainant has not made out a reasonable claim for additional compensation beyond what the Provider and the Appeals Panel has already provided for and was paid by the Provider to the Complainant.

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

The Complainant's mortgage loan account was drawn down on **22 July 2004** on a 12 month fixed interest rate mortgage loan of 2.79%. A Loan Offer Letter dated **06 February 2004** issued to the Complainant which detailed as follows;

"

1. <i>Amount of Credit Advanced</i>	€290,000.00
2. <i>Period of Agreement</i>	240 Months
3. <i>Number of Repayment Instalments</i>	12@ €1,577.09 228@ €1,689.80

Part 2 – The Additional Loan Details, detail as follows:

" 11. <i>Type of Loan (e.g. Annuity or Endowment):</i>	<i>Annuity</i>
12. <i>Interest Rate & whether Fixed or variable:</i>	<i>2.79% Fixed</i> "

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Part 3 – THE GENERAL AND SPECIAL CONDITIONS detail as follows;

“6. Variable Interest Rates

- (a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Bank’s discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- (b) *The Bank shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.5% over one month’s money at the Euro Inter Bank Offered Rate (EURIBOR).*

7. Fixed Interest Rates

- (a) *The Bank may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. **The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Bank’s fixed rate available for the fixed rate period selected by the Borrower at the date of draw down.***
- (b) *The Bank shall have sole discretion to provide any further or subsequent fixed rate period. If the Bank does not provide such a further or subsequent fixed rate period or if the Bank offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*

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(c) *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower will be liable to pay a sum to be calculated in accordance with the following formula: (Amount x (R-R1) x Time) divided by 36500 and for the purpose of this formula, the variables are defined as follows: "Amount" means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments; in the case of an endowment loan, this will equal the full amount of the early repayment conversion. "R" means the cost of funds for the Bank for fixed rate periods as incorporated in the existing interest rate applying to the Loan. "R1" means the interest rate available to the Bank for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period. "Time" means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period.*

(d) *At the Borrower's request, the Bank may, at its absolute discretion agree to add any sum payable in accordance with clause 7(c) to the principal amount from time to time owing and this may be accommodated at the discretion of the Bank by way of: (i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan AND it shall be a condition of any such adjustment that the Borrower shall immediately effect, maintain and assign to the Bank a suitably amended Life Policy (or Endowment Policy as appropriate) in respect of this additional amount."*

The evidence shows that on **19 August 2005** the Complainant signed a **Mortgage Form of Authorisation**, applying a tracker interest rate of ECB + 1.30%, which detailed as follows;

"APPLICATION FOR CHANGE TO TRACKER MORTGAGE

...

The interest rate shall be no more than 1.3% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate") for the term of the Loan.

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APPLICATION FOR CHANGE OF INTEREST RATE:

I/We wish to apply for the tracker mortgage variable interest rate as detailed above for my/our mortgage loan (the "Loan").

...

I acknowledge that following the acceptance by [the Provider] of this Application the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation and I accept the said conditions and agree to be bound by them.

...

In converting the Loan to a Tracker Mortgage Loan, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage stated on page 1 above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate") for the term of the Loan. Variation in interest rate shall be implemented by [the Provider] not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time, the Repo rate is certified by [the Provider] to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate."

On **29 September 2005** the Complainant signed a **Mortgage Form Authorisation** in which he opted to change his repayment terms to 10 years interest only. The Provider outlines that this product was not offered in response to any repayment difficulties.

The Provider has submitted into evidence a screenshot dated **21 April 2006** from its "internal mortgage management system" which detailed as follows:

- 1. treasury have approved trd less 0.25% for the full term*
- 2. rate of ecb +1.25% for the full term....."*

It can be seen from the evidence that the Provider agreed to a reduced interest rate of ECB + 1.25%. This reduced rate applied to the mortgage loan account from **27 April 2006**.

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The Provider has submitted into evidence screenshots from its “*internal mortgage management system*” from **October 2006**, detailing that the Complainant requested for the mortgage loan account to revert back to interest and capital repayments and this request was implemented. A screenshot dated **06 October 2006** detailed as follows:

“Customer actually wants to change FROM interest Only To interest and capital. There was no heading that could say this.

This is an investment property. The customer went onto interest only in September 2005 and now wants to change back.”

A screenshot dated **10 October 2006** detailed as follows:

“...

Repayments now EUR 1,862.60 next payment due 15/10/06”

The evidence shows that on **22 December 2006** the Complainant signed a **Mortgage Form of Authorisation**, applying a fixed interest rate of 4.79% for a period of two years.

Prior to the expiry of the two year fixed rate period, the Provider issued the Complainant with an MFA dated **28 November 2008**, and the MFA did not include the option of a tracker interest rate. The Complainant did not make a selection, and the mortgage loan account rolled on to the standard variable rate on **30 December 2008**. It was at this time that the failure that was subsequently identified in **2017** as part of the Examination occurred on the Complainant’s mortgage loan account.

In the period between **30 December 2008** and **December 2009**, the standard variable interest rate that applied to the mortgage loan fluctuated between 4.66% and 4.91%. Between **30 December 2008** and **December 2009**, the overall tracker rate (ECB + margin) that would have applied to the Complainant’s mortgage loan ranged between 2.25% and 3.75%. 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 + 1.25%) had been applied to the mortgage account between **30 December 2008** and **December 2009**, is also represented in the table below:

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Date (Inclusive)	Difference in rate charged vs the tracker interest rate	Actual monthly repayments	Monthly repayments if the mortgage was on the tracker rate	Overpayment per month
Jan 2009	1.16%	€1,954.87	€1,804.02	€150.85
Feb 2009	1.41%	€1,921.71	€1,740.16	€181.55
Mar 2009	1.91%	€1,921.71	€1,682.16	€239.55
Apr 2009	2.16%	€1,921.71	€1,652.04	€269.67
May 2009 – Dec 2009	2.41%	€1,921.71	€1,623.20	€298.51

The Complainant has submitted that because he was overcharged on his Impacted Account, he had to cease paying his pension contributions of €253.94 per month from **2009**. The Complainant has submitted into evidence a letter from his pension provider dated **08 January 2009** which detailed:

“....

Thank you for your recent correspondence and request to avail of the premium holiday option.

With effect from 1st January 2009, this scheme has been placed on a premium holiday. The premium collection on the scheme will recommence on the 1st July 2009. “

The evidence suggests that the Complainant stopped making pension repayments of €253.94 per month from **January 2009** to **July 2009**. It is unclear from the evidence submitted whether the payment break continued beyond **July 2009**, however it appears from the Complainant’s submissions that he is claiming this is the case and he is seeking €20,000 from the Provider in respect of this.

It is apparent from the evidence that the Complainant requested a payment break on his pension at some point before the pension provider issued the letter dated **08 January 2009**. I note from the **bank statements** that the Complainant’s first repayment on the incorrect interest rate came out of his account on **15 January 2009**. Therefore, it appears that the decision to pause his pension contributions for 6 months was made before the overcharging began and therefore could not be directly related to the overcharging.

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There is also no evidence before me that the Complainant made no pension contributions after **July 2009** as the letter submitted only refers to a “*premium holiday*” lasting until **01 July 2009**. Based on the evidence submitted, I do not accept the Complainant’s contention that he stopped making pension contributions from **January 2009** due to the overcharging on his mortgage loan account. Nonetheless, I accept that the overcharging on the Complainant’s mortgage loan account which commenced in **January 2009**, had an impact on the finances available to the Complainant at the time. In this regard, I note that in **2009** the overpayment per month ranged between €150.85 and €298.51.

In the period between **January 2010** and **May 2011**, the standard variable interest rate applied to the Complainant’s mortgage loan fluctuated between 4.66% and 5.11%. Between **January 2010** and **May 2011**, the overall tracker rate (ECB + margin) that would have applied to the Complainant’s mortgage loan ranged between 2.25% and 2.50%. 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 + 1.25%) had been applied to the mortgage account between **January 2010** and **May 2011**, is also represented in the table below:

Date (Inclusive)	Difference in rate charged vs the tracker interest rate	Actual monthly repayments	Monthly repayments if the mortgage was on the tracker rate	Overpayment per month
Jan - Jul 2010	2.41%	€1,921.71	€1,623.20	€298.51
Aug 2010 – Mar 2011	2.86%	€1,978.25	€1,623.20	€355.05
Apr – May 2011	2.61%	€1,978.25	€1,648.62	€329.63

It is clear to me that by **May 2011**, the Complainant had been overcharged €8,818.93 in total on his monthly repayments. This is a very significant overcharge over the course of a 2 year 5 month period. This is particularly serious given that the Complainant had found it necessary to stop paying his pension policy in **2009** thus indicating that he was already under financial pressure before the overcharging began.

I note from the evidence that the Complainant submitted a “Buy to Let Mortgage Financial Review Form” (the “2010 Form”) to the Provider dated **20 December 2010** in respect of the mortgage loan account the subject of this complaint. It detailed as follows:

Property Address	Year Acquired	Value (€)	Mortgage Balance (€)	Repayment (€ monthly)	Rent* (€ monthly)	For Sale (Y*/N)	Current Lender (A/C No. if [Provider])
[Buy-to-Let Property 1]	1996	350k	40k	830	1000	N	[Mortgage Loan Account ending 7192] [Mortgage Loan Account ending 4842]
[Impacted Property]	2004	250k	227k	1978	850	N	[Mortgage Loan Account ending 2250]
[Buy to Let-Property 2]	2006	156k	274k	516	675	N	[Mortgage Loan Account ending 2740]

.....

Income (Weekly/Monthly)	€	Outgoings (Weekly/Monthly)	€
Salary /Wages....	Approx €2265 p/m.	Mortgage	3,300 pcm
Social Welfare Payments (e.g unemployment,		Credit Union Loans	

/Cont'd...

<i>children's allowances, family income support etc)</i>			
<i>Retirement Pension</i>		<i>Bank/ Finance Loans</i>	<i>575 pcm</i>
<i>Rental Income</i>	<i>2525</i>	<i>Maintenance Payments</i>	
<i>Maintenance</i>		<i>Credit Card Payments</i>	
<i>Mortgage Interest Subsidy</i>		<i>Any other Credit</i>	
<i>Other Income (please specify)</i>		<i>Store Cards</i>	
		<i>[Health Insurance Provider]</i>	<i>67 p/m</i>
TOTAL	€4790	<i>Mgmt Fees Approx</i>	<i>40 p/m</i>
			€3985

Please provide any other information which you believe to be relevant to above:

It is my intention to sell either [Buy to Let Property] [Property secured against mortgage subject of this complaint] as soon as market improves

Reason for Review (please specify and provide background as appropriate):

My rental income has dropped in last couple of years [illegible] like on year of interest only on A /C [the Impacted Account] to put some money aside

It is clear from the above that the Complainant held 4 mortgage loan accounts with the Provider, secured against 3 properties. It appears that the Complainant was paying €3,300 per month in mortgage repayments in respect of all four of his mortgage loan accounts in **December 2010**. I note that when the Complainant submitted the **2010 Form in December 2010**, he was being overcharged **€355.05** per month on the mortgage loan account ending **2250**. If he had this amount available to him at the time, his total mortgage outgoings would be reduced to €2,944.95 per month.

I note that in **December 2010**, the Complainant has submitted that his total monthly income was €4,790 and total monthly outgoings, which only appear to include mortgage,

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loan, management fees and health insurance outgoings, was €3,985, leaving €805 available to the Complainant monthly for any other expenses.

Had the Complainant not been overcharged on the impacted mortgage loan account, he would have had €1,160.05 (€805 + €355.05) available to him monthly. I am of the view that this was a very significant amount of money that should have been available to the Complainant in **December 2010**, given the margin between his income and expenditure at this time and this may have had an effect on his decision to seek forbearance from the Provider in **December 2010**.

The Provider has submitted into evidence a "Financial Review Assessment Form" dated **04 April 2011** which seems to have issued in response to the **2010 Form** which stated "*Recommend FP €1100 FOR 12 months*".

The Provider has submitted into evidence a MFA signed by the Complainant on **12 April 2011** detailing:

"I/We wish to apply to change my/ our Mortgage Loan (the "Loan") repayments to a REDUCED REPAYMENT Loan of €1100 per month for a period of 12 months (Agreed Period)"

It appears from the **bank statements** submitted, that reduced monthly interest only repayments of €1,100 on the mortgage loan account ending **2250** were implemented from **June 2011**.

I will now consider the Complainant's mortgage loan account during the period between **June 2011** and **January 2013**. In the period between **June 2011** and **January 2013**, the standard variable interest rate that applied to the loan fluctuated between 5.465% and 5.965%. Between **June 2011** and **January 2013**, the overall tracker rate (ECB + margin) that would have applied to the Complainant's mortgage loan ranged between 2.00% and 2.25%. 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 + 1.25%) had been applied to the mortgage account between **June 2011** and **January 2013**, is also represented in the table below:

Date Range (inclusive)	Difference in Interest rate charged vs the tracker interest rate	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Jun 2011	2.61%	€1,100	€1,100	N/A
Jul – Sep 2011	2.36%	€1,100	€1,100	N/A
Oct 2011	2.86%	€1,100	€1,100	N/A
Nov 2011	3.11%	€1,100	€1,100	N/A
Dec 2011 – Jan 2012	3.36%	€1,100	€1,100	N/A
Feb – Apr 2012	3.21%	€1,100	€1,100	N/A
May – Jun 2012	3.21%	€2113.44	-	N/A
Jul 2012	3.46%	€1,100	€1100 [plus 2 additional lodgements of €1100]	N/A
Aug – Sep 2012	3.46%	€1,100	€1,100	N/A
Oct 2012	3.46%	€1,427.30	€1,427.30	N/A
Nov 2012 – Jan 2013	3.96%	€1,123.25	€351.75	€771.50

I note from the **bank statements** provided that the Complainant's impacted mortgage loan account moved to reduced interest only repayments of €1,100 per month from **June 2011** and the Provider contends in its formal response that these reduced repayments were due to expire in **April 2012**. The reduced repayments resulted in the Complainant spending approx €500 per month less on the mortgage loan, when compared to what he had been paying up to **June 2011**.

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This reduction has a significant impact, given that the Complainant had been overpaying more than **€300** per month in the months leading up to his application for forbearance.

The Provider submits in its formal response to this office that it wrote to the Complainant on **13 March 2012** advising him that the repayment arrangement of €1,100 per month was due to expire in **April 2012**, and invited the Complainant to contact the Provider should further forbearance be required. It is disappointing to note that the Provider did not furnish a copy of this letter to this office.

I note from the **bank statements** provided that in **May 2012**, the monthly repayments increased to **€2,113.44**, and the May and June repayments were not paid by the Complainant. I note that the MFA signed by the Complainant on 12 April 2011 stated that reduced repayments of €1100 were to apply for 12 months, however it appears that his repayments increased after only 11 months of reduced repayments.

The Provider has outlined that the Complainant's impacted mortgage loan account fell into arrears between **May and July 2012**. The Provider has submitted into evidence a document entitled "*Buy-to-Let Mortgage – Repayment Amendment Request*", which has been signed by the Complainant on **18 April 2012** and appears to have been received by the Provider on **04 July 2012**, which detailed the following:

Property Address	Value (€)	Mortgage Balance (€)	Repayments (€ monthly)	Rent (€ monthly)	For Sale (Y/N)	Current Lender (A/C No. if [Provider])
[Impacted Property]	160k	230k	1100	840	N	[Provider]
[Buy-to-Let Property 1]	275kk	30k	670	940	Y	[Provider]
[Buy to Let-Property 2]	150k	275k	[Illegible]	675	N	[Provider]

.....

/Cont'd...

Income (Monthly)	€	Outgoings (Monthly)	€
Salary /Wages (Net not Gross)	2160	Mortgage	2246 pm
Unemployment Benefit	----	Financial commitments (total of Commitments listed above)	
Family Income Support		Food/Housekeeping/Personal Care	150 pm
Children's Allowance	-----	Maintenance Payments	
Retirement Pension	-----	Childcare	
Invalidity/ Sickness Benefit		Telephone/ Cable	
Carers Allowance	-----	Heating (Gas/Oil)	
Health Board	----	Electricity	
Mortgage Interest Subsidy		Transport (Car/Petrol etc)	150 pm
Maintenance	----	Health Insurance	100pm
Rental Income	2400pm	House Insurance	200 pm
Dependant's Contribution		Mortgage Protection	----
Other Income (Please Specify)			
TOTAL	4560		2846

.....

Reason for Request (please specify and provide background as appropriate):

I want to clear my mortgage attached to [Property Secured by Impacted Account] by selling [Buy-to let Property]. I will pay off [Buy to Let Property] mortgage. “

The **bank statements** show that the Complainant made 3 lodgements of €1,100 on **18 and 19 July 2012**.

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The Provider has submitted into evidence a letter dated **26 July 2012** from it to the Complainant, which stated that the Complainant's impacted mortgage loan account was in arrears of €3,040.32, and states that the Provider is "*writing to confirm [the Complainant's] short term revised repayment instalment in respect of the above mortgage loan account. The agreed reduced amount of €1037.36 per month is for a maximum period of 3 months*".

The Provider has submitted into evidence a letter from the Complainant to the Provider dated **13 August 2012**, in which he outlined:

"I currently owe 32k on [Buy to Let Property 1] and 230k on [Impacted Property]. I want to sell [Buy to Let Property 1] to pay off that mortgage and reduce [Impacted Property] by as much as possible but leaving 20/25k after auctioneer fees etc for my wife and I to do something personal that is very important to us.

.....

As soon as I get a reasonable offer I will be in contact with you. If this happens and you agree to the sale it will clear my mortgage on [Buy to Let Property 1] and reduce my mortgage on [Impacted Property] from 2200 per month to c 500 per month and reduce my debt to the bank by c 230k which not many are doing at the moment."

It is clear from the above that the Complainant required between €20,000 and €25,000 for personal reasons, and had decided in **August 2012** to sell the **Buy to Let Property 1** to clear the mortgage on this property, reduce the mortgage on the Impacted Account by as much as possible, and to retain between €20,000 and €25,000 for personal reasons. I note that in his submissions to this office, the Complainant indicated that he required and had requested €35,000 from the sale of the Buy to Let Property, however based on the evidence, he appears to have requested between €10,000 and €15,000 less at this point in time.

The Complainant enclosed a further **Standard Financial Statement** dated **23 July 2012** with this letter, and in this the Complainant detailed that his total monthly income was **€4,615** which comprised of his net monthly salary of **€2,160** and his monthly rental income from the 3 properties as set out below was **€2,455**. The Complainant also detailed that his monthly household expenditure was **€1,039.50** and his monthly expenses in respect of his three buy to let properties was **€450**.

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The Complainant also outlined the information below regarding properties he held:

“

	Property (give details below)	Property Type (e.g. Buy to let)	Ownership - Ship Type	Current Value (est) €	Loan Balance €	Arrears Balance €	Monthly Rental Income €	Monthly Expenditure (e.g., upkeep, maintenance)		Restructured Y/N
E 1	1	I	sole	250	32	-	940	100-		
E 2	2	I	sole	200	230		840	200		
E 3	3	I	sole	150	275		675	150		
E 4	4									
E 5	Total						B9	C36		

[Table Continued Below]

Monthly Mortgage Payments		Lender	For Sale Y/N
Due €	Being Paid €		
630	630	[The Provider]	Y
1100	(int only)	[The Provider]	N
458	(int only to 2016)	[The Provider]	N
	D17		

/Cont'd...

Property Assets (other than Primary Residence)		
Property	Address	Date of Purchase
1	[Buy-to-Let Property]	1996
2	[Impacted Property]	2004
3	[Buy to Let- Property 2]	2006
4		

It appears to me from the above that the Complainant was paying a total of **€2,188** per month in mortgage repayments against his three investment properties, in addition to monthly expenses in respect of same of **€450**. This combined with his total monthly household expenditure of **€1039.50**, brings his total monthly expenditure to **€3677.50**. I note he had indicated that his total monthly income was **€4,615** which left him with a monthly surplus of **€937.50**.

However, I also note that the Complainant was on interest only repayment arrangements in respect of mortgage loan account ending **2250** and ending **2740**, so it is unclear whether the Complainant would still be in a surplus on his return to both capital and interest monthly repayments on these mortgage loan accounts.

The Provider has submitted into evidence a letter dated **03 September 2012** from the Complainant's Estate Agents, which details as follows:

"...

We placed the property on our books for sale on Monday 13th August 2012. We quoted a guide price of €270,000 – open to offers, with the hope of achieving the strongest figure possible in today's market.

...

There were numerous enquiries and viewings of the property and the final offer achieved on the property was €265,000 (two hundred and sixty five thousand euro)."

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The Provider has submitted into evidence a MFA signed by the Complainant on **17 September 2012** detailing:

"I wish to apply to change the terms and conditions of my Mortgage Loan (the "Loan") so that I make reduced repayment instalments for a period of 6 months (the "Agreed Period").

In the Agreed Period, I agree to pay instalments on my Loan each month. Each instalment will be the greater of:-

- a) €1,100.00 (the "Minimum Payment") or*
- b) The amount of interest due for payment on the Loan on the date when the repayment instalment is due"*

It appears from the above and the bank statements provided that the Complainant sought to remain on reduced repayments each month for a further 6 months.

The Provider has submitted into evidence a chain of emails between the Complainant's Solicitor and the Provider on **18 October 2012**, which detail as follows:

From the Complainant's Solicitor:

"Further to our telephone conversation please note [the Complainant] hopes to utilise €35,000 from the sale proceeds of €265,000".

From the Provider:

"Is there any reason for withholding 35k from the sale proceeds?"

From the Complainant's Solicitor:

"For personal reasons which we understand were previously outlined to your Branch Team. [The Complainant] and his Wife require the funds in order to undertake [Personal Reason]. We are instructed that the cost of undertaking this [Personal Reason] is in the region of \$120,000.00 and this €35,000 would go towards paying this amount".

A further email was sent from the Provider to the Complainant's Solicitor on **19 October 2012** detailing the following:

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“Bank will approve partial release of security subject to Gross sale proceeds of Eur 265k being lodged as follows;

[Account ending 7192] to clear in full

[Account ending 4842] to clear in full

And balance to [account ending 2740] for which the property is held as security collaterally with [Buy to Let- Property 2].

Please confirm you [sic] client will accept these terms.”

The Provider has submitted into evidence a document entitled “SFS/ Product Amendment Assessment Form” dated **16 October 2012**, and it details the following:

“Summary of Customer Position:

[Buy to Let Property 1] is for Sale @ 26500 less Legal fees 3600 Auct Fees 2500 Accountancy 250 – TOTAL 6350 and Capital Acqu 2369 Tote [sic] deductions 8469 = 256531

[Buy to Let Property 1] is collaterally secured against [mortgage loan account ending 2740] and also account [ending 7192]/ [ending 4842] + A80

[Buy to Let Property 2] the other property has an MTM [Reference Number] PDH is in sole name of His Wife and with [Different Provider]

[The Complainant] is proposing to reduce mortgages by 221k. 35k is being used for personal reasons outlined by solicitor and 8469 Solr Auct Account and Capital Acquisitoss[sic].

[Redacted] has confirmed valuation now stand at 70/80 k Max – Tax designated area with 25 town houses taken over by a received[sic] and one recently sole [sic] for 90k

If we accepted [the Complainant’s] proposal to lodge 221K this would have to be lodged against [mortgage loan account ending 2740] for which security is collaterally held with [Buy to Let Property 2] this would reduce this mortgage by

/Cont’d...

193495 net proceed leaving a balance of 81947 and would be unlikely to attain this amount or the property

Phone Original Valuer for Property @ [Impacted Property] and he advises v. 110/135k which diminishes our security to 135%

*Therefore recommend that full sale proceeds be lodged to accounts [ending **7192**, ending **4842** & ending **2710**] (Security accounts) leaving a balance of 38k against a property of 70/80K. ”*

The Provider has also submitted into evidence an internal document dated **25 October 2012** which details as follows:

“ ...

As you are aware, [the Complainant] has agreed sale of [Buy to Let Property 1] for 265k, which represents good value in the current market. As you are also aware for personal reasons he is seeking to release some value from a completed sale to enable him to fund a [personal reason]. If this isn't possible he advises that it will not be in his interest to complete the sale, and it has dragged on for some time now.

By way of compromise I am proposing we accept a reduction of 243k from the sale proceeds, this will leave a residual debt of 60k secured against [Buy to Let Property 2], value 80k, LTV 75%. After costs this will give [The Complainant] maybe 13k to assist in [personal reason] that needs to be resolved.

The benefit for [the Provider] is that the sale will complete, mortgages will be cleared against [Buy to Let Property 1], and reduced to acceptable levels against [Buy to Let Property 2], and also these are on Tracker mortgages.”

The Provider has submitted into evidence a letter dated **07 November 2012** from it to the Complainant's solicitor which details:

“ ...

*Our credit department has approved the proposed release of the property at [Impacted Property address] subjected to the sale proceeds of €243,000 to be used to clear mortgage accounts [ending **7192** and ending **6842**] with the remainder being applied as a partial reduction of [ending 2740].”*

/Cont'd...

Submitted into evidence is a letter from the Complainant's Solicitor to the Provider dated **02 January 2013** which details:

"...

We refer to the above and to your letter of the 7th of November last copy enclosed for ease of reference). We now enclose herewith cheque in the sum of €243,000.00 as agreed and would be obliged if you would please now make arrangements for an appropriate Discharge in relation to the above Property be furnished to the Registry of Deeds so that we can be released from our Undertaking to the Purchaser solicitor."

I note that the Complainant is of the view that the Provider could have restructured his borrowings in **2012** in a way that gave the Complainant the €35,000 he required, without him having to sell **Buy to Let Property 1**.

The Complainant in his post Preliminary Decision submission dated **10 December 2020**, has submitted as follows;

"...the Complainant did disclose intimate family details because the Provider wanted to know the purpose for which the Complainant wanted the funds.

The Complainant sought €35k from the Provider but on threatening to remove all family related business from the bank, the Provider reluctantly agreed to allow €13k to be used for this most intimate family matter.

At no stage did the Provider offer a more appropriate alternative to the disposal of property as previously outlined by the complainant."

The Provider has submitted as follows in its post Preliminary Decision submission dated **18 December 2020**:

"...

1.4 ... [the Complainant's representative] appears to contend that the Bank should have offered the Complainant a "more appropriate alternative to the disposal" of [Property Address] (the "Property"). It is important to note that this contention is made in circumstances where the Complainant approached the Bank in 2012 requesting permission to sell the Property, an option which he had been considering since in and around March 2010, having already consulted with an auctioneer who was to put it on the market for €240,000 (recorded in the enclosed [system] notes) and maintaining that he would not proceed with the sale unless he could retain

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funds from the proceeds of sale (see enclosed screenshots from [system]). Contrary to [the Complainant's representative] contention, the Bank only offers forbearance options to a customer following a formal request initiated by the customer. The Bank does not unilaterally approach customers with forbearance options, nor would it be appropriate for the Bank to do so. In this case, the Complainant did not request forbearance, nor did he engage with a NAM regarding forbearance. Therefore, the possibility of the Bank offering any alternative options to the Complainant simply did not arise. The Sale of the Property ultimately served to reduce the Complainant's overall exposure and provided him with access to the equity he required.

1.5 ... [the Complainant's representative] contends that the Bank "reluctantly agreed" to the retention of €13,000 upon the Complainant "threatening to remove all family related business from the bank". No evidence of any such threat has been presented by the Complainant or has been identified by the Bank and this allegation is factually incorrect. The Bank has a commercial discretion with regards to any decision to sanction a voluntary sale of a property which is cross-secured, and is entitled to object to the release of security where there may be a concern as to affordability."

In his post Preliminary Decision submission dated **06 January 2021**, the Complainant has submitted as follows:

"...

1.4. Yes, I still contend that [Provider] should have offered a restructure, for in a situation where, at a time of the lowest property values, the Complainant had an overall Loan to Value of 65% to 70%.

1.5 Yes, the threat of removing all family connected accounts from [Provider] had some impact on their decision to the release of funds as they subsequently changed their minds."

The Provider responded as follows in its post Preliminary Decision submission dated **15 January 2021**:

"...

Point 1.5 – Threat to Remove Family –Connected Accounts

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[The Complainant's representative] has repeated the allegation that the Bank ultimately agreed to the retention by the Complainant of €13,000 as a result of a threat to remove "all family connected accounts" from the Bank. This statement is factually incorrect and entirely fails to address the point made by the Bank, in its submissions dated 18 December 2020, that no evidence of any such threat has been presented by the Complainant or has been identified by the Bank in a review of its records."

I have reviewed the evidence submitted, together with both parties' post Preliminary Decision submissions.

It remains the case that no evidence has been submitted to this office that the Complainant requested a different type of restructuring arrangement which would provide him with €35,000. In any event, regardless of whether the Complainant requested a different type of restructuring arrangement or not, it is a matter for the Provider's commercial discretion whether it would agree to such an arrangement, the same as it is a matter for the Complainant as to whether to agree to such an arrangement. If the Complainant had requested "*a more appropriate alternative to the disposal of property*" it was within the Provider's discretion to decide whether or not to accede to any such request. There was no obligation on the Provider to offer the Complainant forbearance on his mortgage loan at the time.

The evidence shows that the Complainant requested to sell **Buy to Let Property 1**, and to use the proceeds of this sale towards paying off mortgage loan account ending **2250** and withholding €35,000 of the sale proceeds for personal reasons. I note that the Provider, in exercising its commercial discretion, did not agree to this proposal and instead agreed to use the proceeds of the sale of **Buy to Let Property 1** towards repaying mortgage loan accounts ending **2740, 7192** and **4842**, as these were secured against **Buy to Let Property 1**, whereas mortgage loan account ending **2250** was secured against the **Impacted Property**. It is standard practice for a provider to seek that the mortgage loan that relates to a secured property is discharged from the sale of that secured property. In this instance mortgage loan accounts ending **7192, 4842** were secured on **Buy to Let Property 1** and there was a cross security with respect to mortgage loan account **2740**. These securitisations were agreed by the Complainant when those mortgage loans were taken out with the Provider. It was not unreasonable for the Provider to decline to use the proceeds of the sale to repay a debt which was not secured against the **Buy to Let Property 1**. In addition, the Provider agreed to release €13,000 from the proceeds of the sale to the Complainant for personal reasons, as opposed to the sum requested, which again, was completely within the Provider's commercial discretion to do. It was entirely up

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to the Complainant whether he wished to accept the Provider's offer or not. No evidence has been provided to this office which supports the Complainant's submission that the Provider "*ultimately agreed to the retention by the Complainant of €13,000 as a result of a threat to remove "all family connected accounts" from the Bank.*" Mortgage loan accounts ending **7192** and **4842** were redeemed and mortgage loan account ending **2740**, was partially redeemed and these three mortgage loan accounts were on tracker interest rates, leaving the Complainant with mortgage loan account ending **2250** which was incorrectly on the Provider's standard variable rate. I note that the Provider in its internal assessment note dated **25 October 2012**, as quoted above, specifically records the fact that the mortgage loans which were being cleared (accounts ending **7192** and **4842**) and reduced (mortgage loan account ending **2740**) were all tracker mortgages which was in its view a "*benefit*" for the Provider.

I further note that the Complainant submits that from **2008 to 2012**, he had been overcharged almost €32,000 by the Provider "*which he could ill afford*". In this regard, from the date of the first incorrect repayment (**January 2009**) to the date he entered into the alternative repayment arrangement (**June 2011**), the total amount he overpaid amounted to **€8,818.93**. Therefore, the amount of money which was unavailable to the Complainant due to the Provider's overcharging was **€8,818.93**.

The alternative repayment arrangement lasted until **October 2012**, and from **November – December 2012**, a further **€1,543** was overpaid by the Complainant, bringing the total amount unavailable to the Complainant from **January 2009 to December 2012** to **€10,361.93**, not **€32,000** as the Complainant has suggested. I note that ultimately the disposal of the **Buy to Let Property 1** resulted in the Provider being in a position to release €13,000 from the proceeds of the sale to the Complainant for personal reasons, which is a more proximate sum to the amount overpaid by the Complainant by that time. Had the Complainant not entered into an alternative arrangement during this period, the amount overpaid might very well have been higher. In any event the evidence does not support the Complainant's submission that between **2008** and **2012**, he had been overcharged almost €32,000.

The Provider submits that the Complainant has "*offered no evidence to support the contention that the tracker issue was in any way the proximate or even a direct cause of the Complainant's personal decision to sell his investment property at [Buy to Let Property 1]*". I note the Provider has also made submissions that the sale of the **Buy to Let Property 1** arose from the Complainant's personal reasons and was not "*...connected to the question of whether a tracker rate should have applied after December 2008*".

I find it highly speculative that the Provider has put forward arguments suggesting that it in some way knows that the Complainant's decision to sell the **Buy to Let Property 1** in

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August 2012 was not in any way connected to the monthly overcharge of interest on his mortgage loan account. It is disingenuous in the extreme for the Provider to put forward an argument suggesting that it knows why the Complainant made certain decisions regarding his finances in **August 2012** with no basis whatsoever to these assertions.

What is evident to me, is that in or around **August 2012**, the Complainant made the decision to sell his **Buy to Let Property 1**. Based on the evidence, it appears to me that this decision was made by the Complainant as he required €35,000 for personal reasons. In this regard, I note that the Provider's internal note dated **25 October 2012** as referenced above, records that if the release of some of the value to him was not possible then "*he advises that it will not be in his interest to complete the sale*".

The contemporaneous evidence is clear that a motivating factor in the sale of **Buy to Let Property 1** was the release of value as the Complainant needed funds for personal reasons. While it may have been the case that the Complainant intended on keeping this property as a long term investment, his circumstances had changed such that he required funds for personal reasons at the time.

At this remove, it is not possible for the Provider, or this office to determine whether the Complainant would have not have sold the Buy to Let Property 1 at the end of **2012** should he not have been overcharged on his mortgage loan account ending **2250**. I accept that the Complainant, with the benefit of hindsight, believes he would have not sold the **Buy to Let Property 1**, where there is no way that this can be proven, it is certainly a reasonable argument.

What the evidence does clearly demonstrate is that the Complainant sold the **Buy to Let Property 1** in order to acquire a lump sum of **€13,000**, in circumstances where he had been overcharged by **€10,361.93** at the time by the Provider in respect of mortgage loan account ending **2250** and had been on an alternative repayment arrangement for over a year. I am of the view that the Provider's overcharging may well have had an impact on the Complainant's decision to sell the **Buy to Let Property 1**.

Prior to entering alternative repayment arrangements with the Provider in **April 2011**, the Complainant was overpaying by between €298.51 and €355.05 per month on his mortgage loan ending **2250** and had overpaid by **€8,818.93** in total, in circumstances where he should not have been overpaying on his mortgage loan account at all. The Complainant was deprived of knowing his true financial position and was deprived of the opportunity to make fully informed decisions on the basis of that true financial position. It is my view that the decision to enter into alternative repayment arrangements and then subsequently the decision to sell the **Buy to Let Property 1** were both significant decisions. I believe that it

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cannot but be the case that the Complainant's financial decisions were impacted by the fact that he was overpaying on his mortgage loan ending **2250** at the time. The evidence shows that the Complainant was conscious of his finances at the time and had the amount overpaid monthly been available to him, he may have made different financial decisions that would have been far more beneficial to him in the long term.

I note that the Complainant is also seeking €72,000 in lost potential rental income due to selling the **Buy to let Property 1** in late **2012**. Assuming this figure represents rental income from **January 2013 to December 2018**, this represents a loss of on average €1,200 per month.

However, the Complainant has not taken into account that had he held the **Buy to Let Property 1**, he would have had to have continued making monthly mortgage repayments which, as per the SFS dated **03 September 2012**, were €630 per month, in addition to the "monthly expenditure" in respect of the **Buy to Let Property 1** which was indicated by the Complainant to be €100 per month.

The Provider, in its post Preliminary Decision submission dated **16 November 2020**, detailed that it intended to make a submission on the Preliminary Decision within the following category;

"...

2. An Error of Fact in concluding that the Provider has been "disingenuous in the extreme", together with clarification that any enforcement steps that were taken against the Complainant, were not taken by the Provider.

..."

In its post Preliminary Decision submission dated **30 November 2020**, the Provider details as follows;

"...the Bank is of the view that the Preliminary Decision contains material errors of law and fact which appear to have influenced the determination reached.

1. Error of Fact in concluding that [the Provider] has been "disingenuous in the extreme"

1.1 In the Preliminary Decision, the FSPO states that "I find it highly speculative that the Provider has put forward arguments suggesting that it in some way

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knows that the Complainant's decision to sell the Buy to let Property 1 in August 2012 was not in any way connect to the monthly overcharge of interest on his mortgage loan account. It is disingenuous in the extreme for the Provider to put forward an argument suggesting that it knows why the Complainant made certain decisions regarding his finances in August 2012 with no basis whatsoever to these assertions".

- 1.2 *The suggestion that the Bank's actions in the investigation of the complaint have been "disingenuous in the extreme is a very serious allegation and is one of particular concern to the Bank.*

In particular, the Bank is concerned that there has been a mischaracterisation in the Preliminary Decision with regard to its position in relation to the Complainant's decision to sell what is referred to as "Buy to Let Property 1" in 2012 (the "Property").

- 1.3 *To this end, the FSPO's position appears to be based on an inaccurate account of the facts in this dispute and the submissions made by the Bank to date. To be clear, the Bank's position is that no evidence has been adduced by the Complainant that the overcharging of interest on mortgage account [ending 2250] directly led to his decision to sell the Property. This cannot be equated with the Bank suggesting that it "in some way knows that the Complainant's decision...was not in any way connected to the monthly overcharge of interest". The Bank has not expressly or impliedly made such a suggestion, and the FSPO appears to be drawing a conclusion from the Bank's submissions that is entirely mistaken.*

- 1.4 *In circumstances where no contemporaneous evidence of causation has been advanced before the FSPO by the Complainant, it is not possible to conclude with any degree of certainty what the Complainant's motivations were for selling the property on 2012. The fact that the Complainant maintained at the time that he would not proceed with the sale unless he could retain €13,000 from the proceeds of the sale indicates that his personal need was one of the primary incentives. Furthermore, it is possible that the Complainant's other indebtedness, unrelated to his mortgages with the Bank, could also have contributed to his decision. For the avoidance of doubt, the Bank is not aware of the details of the Complainant's other indebtedness and no enforcements action has been taken at any stage by the Bank against the Complainant. As set out in the evidence file, the Bank*

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afforded the Complainant alternate payment arrangements on each occasion it was requested. Indeed, the Bank offered further forbearance to the Complainant in April 2012, but received no response to that offer.

- 1.5 *It is notable that the FSPO appears to agree with the Bank's views in this regard at page 33 of the Preliminary Decision:*

"At this remove, it is not possible for the Provider, or this office to determine whether the Complainant would have not sold the Buy to Let Property 1 at the end of 2012 should he not have been overcharged on his mortgage loan account ending 2250".

- 1.6 *In all the circumstances, and based on the evidence available, it is entirely reasonable for the Bank to contend that the Complainant's decision to sell the Property was not directly caused by the overcharging of interest on his loan account and that, although it may have been one of a number of factors which influenced his decision, it was not the primary factor. This view is based on the evidence presented by the Complainant himself and is in line with the common law rules of causation and proximity.*

- 1.7 *For the avoidance of doubt, the Bank accepts and has always accepted that the overcharging of interest on the Complainant's mortgage account [ending 2250] may have contributed to the overall financial difficulties he experienced. The Bank has not in any of its submissions or communications with the Complainant made any statements to the contrary.*

...

- 1.10 *The Bank respectfully submits that it is therefore unreasonable and unwarranted for the FSPO to characterise its position as being "disingenuous in the extreme" and we would invite the FSPO to reflect on the comments made in the Preliminary Decision in that regard. If the FSPO is minded to maintain that finding, the Bank would remind the FSPO of its obligations to provide reasons. On the Bank's reading of the Preliminary decision, no such reasons have been provided for this very serious allegation against the Bank."*

In his post Preliminary Decision submission received on **06 January 2021** the Complainant has submitted;

"1 'Error of Fact'

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Not alone do I consider the term "disingenuous in the extreme" quite appropriate but I would also add that the Provider has shown little or no empathy or understanding in this case, the detrimental consequences of which the Complainant continues to have to live with.

*Having again perused the Provider's submission of the 30/11/20, I fail to identify any 'Error of Fact'.
..."*

I do not accept the Provider's submission that I have mischaracterised the Provider's position in the Preliminary Decision in relation to the Complainant's decision to sell the Buy to Let Property 1. Nor do I accept the Provider's submission that there was any failure on my part to provide my reasons for forming this view.

I note that in its post Preliminary Decision submission, the Provider has outlined that it *"accepts and has always accepted that the overcharging of interest on the Complainant's mortgage account [ending 2250] may have contributed to the overall financial difficulties he experienced. The Bank has not in any of its submissions or communications with the Complainant made any statements to the contrary."*

In this regard I note that in the Provider's formal response to this office dated **31 December 2018**, the Provider outlined as follows;

" ...

In the Provider's view, the Complainant's mortgage loan account [ending 2250] had no bearing in the decision to sell [Buy to Let Property 1].

...

The Complainant himself identified his formal principal private residence as a means to release equity for personal reasons.

...

In the Provider's view, the overwhelming probability is that the Complainant would have sold [Buy to Let property 1] as an answer to his personal need regardless of the interest rate charged on mortgage loan account [ending 2250]. It cannot be fairly and reasonably said that the Complainant's choice to sell his former residence and the consequent loss against capital appreciation after the sale in any way

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results from the conduct complained of. In other words, such consequences are too remote from the question of insufficient clarity within the Mortgage Form of Authorisation in mortgage accounts that do not even directly concern [Buy to Let Property 1].

...

The Provider reiterates that there were a number of factors which may have influenced the Complainant's decision to sell his property including the overall financial circumstances of his additional mortgage lending which was in negative equity and a s personal need to release capital for personal circumstances of his additional mortgage lending which was in negative equity and a personal need to release capital for personal circumstances.

...

The Provider is of the view that the Complainant has not offered any evidence that the decision to sell the property at [But to Let property 1] would not have happened but for the tracker rate issue.

...

The Complainant seeks (in effect) to have the FSPO find there is a causative link between the question of tracker and his decision to: A) sell his investment property at [Buy to Let Property 1 Location] ...The Provider submits that the claim is too remote for the tracker issue to attract additional compensation and it would be unfair and unreasonable to allow compensation for loss for such a remote claim. The decision to sell [Buy to Let Property 1] did not arise from the conduct complained of; or because the Provider was (e.g.) unreasonable, unjust or oppressive. Replies in this submission and the enclosed evidence demonstrate that the Complainant's decision to sell [Buy to Let Property 1] was driven by his personal need for the release of equity and not the tracker issue".

It appears to me that the Provider's submission of **31 December 2018**, is at odds with its post Preliminary Decision submission of **30 November 2020**. It is clear from its own submission of **31 December 2018** that the Provider was of the view that the Complainant's decision to sell the Buy to Let Property 1 did not "in any way" result from the conduct complained of and rather was "driven" by the Complainant's "personal need for the release of equity". I remain of the view that it is highly disingenuous for the Provider to suggest that it knows why the Complainant made certain decisions regarding his finances in **August 2012**. It appears from its post Preliminary Decision submissions that the Provider now accepts that the overcharging on the Complainant's mortgage loan account "may have been one of a number of factors which influenced his decision" to sell the Property. In my

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view this is not the same argument that was put forward previously by the Provider in its submissions to this office.

This is further evidence that if the Provider had engaged with, and listened to, the Complainant and made any attempt to understand the consequences of its conduct on him and his family it might, possibly, have taken a less adversarial approach to dealing with the Complainant's appeal for a reasonable sum of compensation. However, it did not. The Provider took the approach of simply arguing that everything that befell the Complainant was "too remote" from the overcharging by the Provider to merit compensation. It simply cannot be the case that the Provider can overcharge the Complainant the amount of money it did, over the period that it did, and conclude that its actions were too remote to have had any of the impacts that the Complainant asserts they did.

For the avoidance of doubt, I do not accept the Provider's submission that there was an Error of Fact in the Preliminary Decision issued on **30 October 2020**. I would remind the Provider that my Preliminary Decision was reached on the basis of the submissions made by both parties to this office.

The Complainant's mortgage loan account remained on the standard variable rate from **February 2013** until **29 November 2017**, when the Provider returned the mortgage loan account to a tracker interest rate of ECB +1.25%. Between **February 2013** and **November 2017**, the overall tracker rate (ECB +1.25% margin) reduced from 2.00% to 1.25%.

The difference in the interest rate actually charged to the mortgage loan and the interest rate that would 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 + 1.25%) had been applied to the mortgage account between **January 2013** and **November 2017**, is also represented in the table below;

Date Range (inclusive)	Difference in Interest rate charged vs the tracker interest rate	Actual monthly repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Feb 2013	3.96%	€2,276.75	€1,716.22	€560.53

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Mar – Apr 2013	3.96%	€1,520.28	€968.99	€551.29
May – Oct 2013	4.21%	€1,520.28	€945.17	€575.11
Nov -2013 – May 2014	4.46%	€1,520.28	€921.50	€598.78
Jun – Aug 2014	4.56%	€1,520.28	€912.15	€608.13
Sep 2014 – Mar 2016	4.66%	€1,520.28	€903.07	€617.21
Apr 2016 – Jan 2017	4.71%	€1,520.28	€898.02	€622.26
Feb – Nov 2017	3.74%	€1,481.49	€898.02	€583.47

The evidence shows that the Complainant submitted a further **Standard Financial Statement (SFS)** to the Provider dated **02 January 2013**. The SFS shows that the Complainant’s total monthly net salary at the time was €2,160.00 and total rental income was €1,490.00 with a **total monthly income of €3,650**. The SFS showed that the Complainant’s total monthly household expenditure was €1,056. In addition the Complainant had monthly mortgage repayments of €1,223 which consisted of €1,123 per month in respect of the Impacted Property and €100 per month in respect of the Buy to Let Property 2, in addition to monthly repayments of €400 for expenditure in respect of these properties, bringing his **total monthly expenditure to €2679**, which resulted in an overall **monthly surplus of €971**.

I note that at the time the Complainant submitted this SFS, he was overpaying €771.50 per month on mortgage loan account ending **2250**, and had he not been overcharged by the Provider his monthly surplus would increase to €1,742.50 which is a very significant increase and a very significant amount to be deprived of. The Complainant detailed the following in the SFS:

*“I sold [illegible] property in December 2012. Apart from clearing mortgage no [ending **4842**] and reducing [ending **2740**] (from 275k to 55k) I will also have €100 per month extra. I am a non-smoker, occasional drinker who works 60 hours in a week so I cant see how i can reduce by any more.”*

The Complainant has further detailed the following in the SFS:

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"I need to extend mortgage [ending 2250] to 2- years minimum in order to be able to make capital and interest".

The Provider has also submitted into evidence a "CASE ASSESSMENT RECORD" in respect of mortgage loan account ending **2250**:

"Customer is married with no dependents. Customer is the owner of [Business] in [Location] and he is seeking term extension on mortgage a/c # [ending 2250]. Mortgage a/c # [ending 2740] is on Interest Only since d/down. [The Complainant] is married however only name on mortgage and states on SFS that his partner contributes towards majority of household bills. Low LTV overall and no arrears on these accounts. Customer has recently sold property @ [Buy to Let Property 1] and used funds to clear 2 mortgages and reduce mortgage on a/c [ending 2740].

...Overall good a/c operation here. Customer is showing willingness to meet mortgage repayments. Small surplus as per figures input however outgoings are very low and I fell [sic] customer is under some pressure. I would recommend approval of 11 year term extension, bringing customer up to age 70, on a/c [ending 2250]. These repayments would be more affordable and would ensure long term affordability of this mortgage."

The evidence shows that the Complainant signed an **MFA** on **14 February 2013** detailing the following:

"I wish to extend the period of the Loan for 132 months to a new loan maturity date of 15/07/2035. The Lender's estimate of my repayment instalments under the new alternative repayment arrangement is €1,530.91 each month. This estimate is based on the amount I owe on this Loan and the rate of interest that applies today. The actual amount of the repayment instalments may differ (e.g. to reflect changes in interest rates)".

The Complainant's **bank statements** submitted into evidence, show that from **February 2013**, the Complainant's monthly mortgage repayments were reduced to €1,520.28 per month from **February 2013 onwards to January 2017**.

The evidence shows that the Complainant signed an **MFA** on **09 February 2017** electing to apply a "BTL 2 Year Fixed LETV 50-70%" interest rate of 4.990% to mortgage loan account

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ending **2250**, having been on the Provider's standard variable rate since 30 December 2008. The bank statements show that the Complainant's repayments moved to €1,481.49 until **November 2017** when the error was identified by the Provider and the correct tracker interest rate of ECB + 1.25% was applied to the mortgage loan account.

I note that the Complainant has also indicated that he had to borrow €25,000 from family members during the impacted period. The Complainant has not provided any evidence to this office of any borrowings or monies loaned to him by family members during the impacted period.

It is not possible to determine with any degree of certainty whether the various alternative arrangements would have been required had the Complainant's mortgage loan ending **2250** been on the tracker interest rate that it should have been from **January 2009**.

However based on the evidence before me, in particular, the high levels of overcharging, in some months as high as €771.50 per month I am of the view that, on the balance of probability, given the longevity of the overcharging and the high amounts of overcharge, it had to have a very significant bearing on the Complainant's numerous requests for forbearance on mortgage loan account ending **2250**.

I note that the total amount of money overpaid by the Complainant monthly between **January 2009** and **November 2017** amounts to **€46,137.34**, as indicated in a table I have prepared below. I was unable to determine what the overcharge would have been for the year 2012 as the Complainant was making fixed interest only repayments during this year:

Year	Annual Overpayment on Mortgage loan Account ending 2250
2009	€3,229.7
2010	€3,864.82
2011	€1,724.41
2012	€1,543
2013	€7,082.83
2014	€7,287.13
2015	€7,406.52
2016	€7,451.97
2017	€6,546.96
Total	€46,137.34

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This total overcharge of €46,137.34 is a large sum of money which should have been available to the Complainant over an 8 year period, particularly in circumstances where the evidence shows he required a large sum of money for personal reasons towards the end of **2012**. The figure of €46,137.34 is the amount of money that would have been available to the Complainant during the impacted period, and forms part of the total amount of interest overcharged of €71,427.92. Had the mortgage loan amortised as it should have, a portion of the overpaid interest (€25,275.58) would have been applied against the capital of the mortgage loan. In effect this money would not have been available to the Complainant as disposable income.

Having been presented with the evidence during the investigation of this complaint of the impact of its conduct in overcharging the Complainant, the Provider consistently stated that it does not believe the Complainant has demonstrated that there is any proximity between the various financial difficulties he faced during the impacted period and the Provider's failure to apply a tracker interest rate to mortgage loan account ending **2250**.

I cannot understand how any reasonable person can examine the evidence in this complaint and come to the conclusion that the Complainant's financial difficulties were at least in part as a result of the Provider's conduct in overcharging him on his mortgage loan.

It is very worrying that the Provider seems to be oblivious to the devastating impact of its conduct on the Complainant. In addition to the obvious inconvenience caused to the Complainant as outlined above, it has been necessary for the Complainant to disclose the most intimate of family details throughout the process in order to achieve suitable compensation. I believe this could have been avoided by a more empathetic and understanding approach from the Provider.

I note that the Provider made a post Preliminary Decision submission to this office dated **30 November 2020**, and detailed as follows;

“...

1.8 In addition, the Bank would like to address the following statement contained in the Preliminary Decision relating to “personal reasons” which the Complainant had in 2012:

“...it has been necessary for the Complainant to disclose the most intimate of family details throughout the process in order to achieve suitable

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compensation. I believe this could have been avoided by a more empathetic and understanding approach from the Provider.”

- 1.9 *The above statement is factually incorrect. The Bank has not, at any stage, requested that the Complainant disclose any personal details, related to his “personal reasons” in 2012 or otherwise, as part of the Tracker Mortgage Examination, the appeals process or in the Bank’s submissions relating to the complaint. The Bank is very conscious of its customers’ privacy and rejects the FSPO’s assertion that it lacked empathy and understanding in its dealings with the Complainant.”*

In his post Preliminary Decision submission dated **10 December 2020** the Complainant’s representative submitted as follows:

“...

2. *An Error of Fact*

In its submission under this heading the Provider fails to identify any “Error of Fact” in all of its 10 paragraphs.

Alternatively, it goes on a completely different tangent to critic the terminology used in order to detract from the real issue in this case, that the bank illegally removed €71,336 from the Complainant’s account over a period of 9 years and its related consequences for the Complainant and his family.

“...

In relation to paragraph 1.8, the Complainant did disclose intimate family details because the Provider wanted to know the purpose for which the Complainant wanted the funds.”

The Provider submits as follows in its post Preliminary Decision submission of **18 December 2020**:

“...

1.1 *With regard to the suggestion that the Bank “wanted to know the purpose for which the Complainant wanted the funds” and in some way pressed the Complainant to disclose his personal details, the Bank reiterates that it did not, at any stage, press for details to be disclosed to the Bank, in relation to his “personal reasons” in 2012 or otherwise, as part of the Tracker Mortgage Examination, the appeals process or in the Bank’s submissions relating to this complaint.*

1.2 *When the request from [the Complainant] solicitor was received on 18 October 2012 to withhold €35,000 from the sale proceeds, the Bank queried “Is there any reason for withholding 35k from the sales proceeds?” Seeking further*

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details in this generic manner is reasonable and in line with the Bank's policies and procedures in the context of sanctioning the sale of a property. The Complainant's personal reasons were subsequently voluntarily disclosed by his solicitor in response to the email and the Bank sought no further information from the Complainant. As set out in the Bank's submissions of 30 November, it is very conscious of its customers' privacy, and the personal details were not recorded in any manner whatsoever on the Bank's internal systems. To this end, we enclose extracts from the Bank's internal mortgage note system, [name of system redacted], which provide: "Customer needs to retain 35k (please call me regarding reason for this...)"

The Complainant's representative submitted as follows in his post Preliminary Decision submission received on **06 January 2021**:

"...

1.2 At no stage did the Complainant claim he was forced/pressed to disclose the purpose of the funds sought.

1.3 The Provider was made aware of the Complainant's "Personal Needs" long before his Solicitor provided the "purpose". The Complainant clearly remembers the staff members he dealt with in the [Provider] who initially declined his request.

"..."

No evidence has been provided to this office which suggests that the Complainant was at any stage "forced" or "pressed" to disclose personal or intimate details to the Provider in **2012**. I am of the view that it was reasonable for the Provider to query with the Complainant his reason for retaining a portion of the sales proceeds in **2012**.

However, I note the Provider takes issue with my statement that it has been necessary for the Complainant to disclose the most intimate of family details throughout the process in order to achieve suitable compensation and my belief that this could have been avoided by a more empathetic and understanding approach from the Provider."

The Provider, in its post Preliminary Decision submission, states that this statement is factually incorrect. It is not factually incorrect. I believe the Provider is once again being disingenuous. The Provider ought to be well aware that during the complaints process within this office, in order to support his case for compensation appropriate to the Complainant's particular situation, the Complainant had to disclose to this office intimate details of his personal circumstances and the inconvenience that he suffered because of

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the particular circumstances of his family during the overcharging period. I would like to make clear that my view as referred to above was, and remains firmly that, had the Provider treated the Complainant's particular situation more empathetically and with any level of understanding, of the consequences its conduct for the Complainant when deciding what compensation to grant to the Complainant, it ought to have come to a different conclusion. If it had done so, the Complainant may not have felt the need to complain to this office and be required to express in detail how his "*personal situation*" was affected by the Provider's overcharging in order to achieve suitable compensation. This is particularly true in a situation whereby the Provider has been aware of the Complainant's personal circumstances since **2012** and the matter has been ongoing for approximately nine years.

In the Preliminary Decision dated **30 October 2020**, I indicated my intention to direct that the Provider make a compensatory payment in the sum of €110,000 (inclusive of the €17,499.93 compensation already offered to the Complainant for the Provider's failure) to the Complainant for inconvenience he has suffered.

The Provider has detailed the following in its post Preliminary Decision submission dated **30 November 2020**:

- " ...
- 2.1 *The Preliminary Decision directs the Bank to pay the sum of €110,000 to the Complainant in compensation for the "inconvenience" suffered as a result of the overcharging.*
 - 2.2 *The quantum of this award is, in the Bank's view:*
 - (a) *disproportionate relative to the amount of redress already paid to the Complainant; and*
 - (b) *contrary to the legal principles relating to the assessment of compensation for "inconvenience" by the FSPO.*
 - 2.3 *Furthermore, it is the Bank's submission that no reasons have been given in the Preliminary Decision as to:*
 - (a) *how the FSPO arrived at its decision to make an award to the Complainant for his inconvenience;*
or

/Cont'd...

- (b) *how the quantum of that award was arrived at, which the Bank respectfully submits renders the decision itself flawed.*
- 2.4 *...the Preliminary Decision proceeds to award the Complainant €110,000 for “inconvenience”, without any explanation of the basis for the award in law or in fact and without explaining how the quantum of that award has been calculated.”*
- 2.5 *The Complainant has not at any stage advanced a claim for inconvenience and, given the absence of any reasons in the Preliminary Decision as to why the FSPO has found that the Bank should compensate the Complainant for inconvenience, the Bank can only conclude that the reference to “inconvenience” is to be given its common meaning, i.e. stress and distress, not amounting to personal injury.*
- 2.6 *In that regard, the issue of compensation for inconvenience, and in particular, the appropriate quantum for such awards made by the Financial Services Ombudsman (as it was then) was considered by Ms Justice O’Malley in Carr v Financial Services Ombudsman.*
- ...
- 2.7 *In her judgment, Ms Justice O’Malley makes express reference to the appropriateness of “relatively small” awards of compensation for inconvenience. It is also clear from the decision that there is no jurisdiction for the FSPO to deal with substantive personal injury claims, which would attract significantly higher awards. It is the Bank’s submission that the FSPO has erred in law by making an award which is entirely disproportionate and contrary to the principles of assessing compensation for “inconvenience” outlined by Ms Justice O’Malley in Carr v the Financial Services Ombudsman.*
- 2.8 *The award contained in the Preliminary Decision is 1100 (or 11 times) the amount of additional compensation awarded by the Appeals Panel and is far in excess of both the actual amount overcharged on mortgage account [ending 2250] and the redress and compensation paid to the Complainant as part of the Tracker Mortgage Examination. Furthermore, and as a fundamental point, it is not clear from the Preliminary Decision what specific “inconvenience” the FSPO is purporting to compensate the Complainant for.*
- 2.9 *The quantum determined by the FSPO is, in the Bank’s view, grossly inflated. Insofar as the FSPO is attempting compensate the Complainant for anything other than the stress and distress directly flowing from the overcharging of*

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interest on mortgage account [ending 2250], this is flawed as a matter of law. The decision in Carr v the Financial Services Ombudsman is clear that awards for inconvenience should be relatively small and, in that regard, the compensation awarded by the FSPO in the Preliminary Decision is entirely inconsistent with that decision”.

The Complainant’s representative in his post Preliminary Decision submission dated **10 December 2020** has submitted as follows:

2. *An Error of Law*

...

That said I have thoroughly read the case “Carr v Financial Services Ombudsman” on which such emphasis is placed by the Provider.

There is no similarity whatsoever between the Architect’s claim as detailed in the aforementioned case and that of [Redacted name], the Complainant.

At this point I would respectfully recommend that the Provider refers again to the Statutory basis for the FSO’s jurisdiction. This is clearly outlined at no. 16 and is contained in Part VII B of the Central Bank Act, 1942 as inserted by s. 16 of the Central Bank and Financial Authorities Act, 2014. Particular reference is made to 16(4). “The FSO is entitled to perform the functions imposed, and exercise the powers conferred by this Act free from the interference by any other person and, when with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to Technicality or Legal Form”

The Architect’s claim was substantially based on the failure of [third party Provider] to provide a proper level of service during the period September 2008 to April 2010, i.e. 19 months.

[The Complainant’s] claim is based on facts, decisions/ mistakes made by [the Provider] and the corresponding detrimental consequences for [the Complainant] and his family.

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To avoid repetition I would further suggest that the Provider refers to the Complainant's letter dated 30/01/2019 to FSPO [Employee name redacted] in response to the Provider's letter of 31/12/2018.

Now to the real issue of the provider's submission, "inconvenience" and its interpretation.

In an attempt by the provider to mitigate its relevance in [the Complainant's] case the dictionary gives other meanings such as "Trouble" or "Difficulty".

If the Provider were to change places with the Complainant, it is then and only then that the Provider would understand what [the Complainant] has been subject to by the [Provider].

This happened at a time of [Complainant and Complainant's spouse] greatest need, which was known to the [Provider] and should have been dealt with compassionately and sensitively.

...

Again, I pose the question, where is the comparison between [the Complainant's] case and that of the Architect? None, absolutely none. The Complainant's claim for €211k+ is based principally on the negligence of the Provider over the period of 107 months –fact.

The Architect's claim of €800k+ against [a different Provider] was for failure to provide a proper level of service over a period of 19 months. No money was removed illegally by the [different Provider] from the Architect's account."

The Provider submits as follows in its post Preliminary Decision submission dated **18 December 2020**:

"2. Error of Law with regard to the award for "inconvenience"

2.1 *It is submitted by [Complainant's representative], on behalf of the Complainant, that "there is no similarity whatsoever" between Carr v the Financial Services Ombudsman and the within complaint.*

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- 2.2 *To be clear, the Bank has at no stage maintained that there are factual similarities between the two cases. Rather, the decision of Carr v the Financial Services Ombudsman is relevant to the complaint as it specifically deals with the FSPO's jurisdiction to award compensation for "inconvenience" and the appropriate quantum for same. The case is cited as precedent in relation to the issue of compensation for inconvenience.*
- 2.3 *As set out in the Bank's submissions of 30 November last, it is of the view that the FSPO has erred in law by making an award which is entirely disproportionate and contrary to the principles of assessing compensation for "inconvenience" as outlined by Ms Justice O'Malley in Carr v the Financial Services Ombudsman."*

The Complainant's representative in the post Preliminary Decision submission dated **06 January 2021** has outlined;

...

2.1 *There is no similarity whatsoever between the "Carr v Financial Services Ombudsman" case & that of the Complainant - see response under heading 2.2*

2.2 *In the Provider's own words there are "no factual similarities" between the two cases.*

In a previous submission by the Provider "the Bank accepts & has always accepted" that the overcharge of interest on the Complainant's account may have contributed to the overall financial difficulties experienced by [the Complainant].

This is a very unsympathetic admission by the Bank & was only admitted after strong pressure was applied by various sources & eventually came about after 9 years of illegally removing funds from [the Complainant's] account to the tune of €71,336 (seventy one thousand three hundred & thirty six euro).

The Bank was forced to admit the error of its actions & appropriate sanctions/fines are being applied by The Central Bank on all financial institutions found guilty of their illegal activity.

In relation to the Financial Services & Pensions Ombudsman's jurisdiction governing such cases, I would again respectfully suggest that [Named Employee], Solicitor for the Provider, analyses the "Carr v FSO" case & the relevant Act under which the

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FSPO operates which clearly outlines the Ombudsman's jurisdiction in relation to redress.

I make specific reference to section 37 which clearly sets out the maximum limit for compensation at €250k.

[The Complainant's] claim is for €211k+

Accordingly, in this case the Ombudsman has, after considering all submissions, the powers to increase the quantum as he deems appropriate.

Therefore, there is no similarity whatsoever to the "Carr v FSO" case & to say so gives the false impression that there is precedent in relation to the issue of compensation.

2.3 See response to heading 2.2

3.1(i) The payment of €92,999.25 by the [Provider] to the Complainant includes €71,336 of the Complainant's own money which was illegally removed from the Complainant's account over a period of 9 years.

Had this not happened, the Complainant would not have lost possession of his property at [Buy to Let Property 1], lost his Pension fund & his wife would not have cashed in her Savings Policy.

3.1(ii) to 3.1(iv) Issues under these headings are all consequential on the detrimental action by the [Provider] of illegally removing funds from [the Complainant's] account over a period of 9 years.

This didn't end for [the Complainant] after 9 years, it continues & it's impact will be felt by him & his family into the future."

The Complainant's representative in the post Preliminary Decision submission received on **21 January 2021**, submits as follows;

"I refer to recent correspondence in this matter & in particular to the Provider's submission of the 15th inst.

I'm amazed at [named Provider employee] attempts to continue to trivialise/mitigate the seriousness of the Provider's wrongdoing & it's consequences on [the Complainant] & his family over such a prolonged period.

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Does [named Provider employee] not take cognisance of the fact that the [the Provider] has paid out hundreds of millions of euro in compensation, so far, due to the Tracker Related Scandal?

The Complainant stands 100% over his submissions to-date in fact & figures & is adamant that the failures of the [the Provider] were a contributing factor in the detrimental consequences which continue to impact on him & his family.

I would suggest [named Provider employee] reviews the Complainant's submissions for her own enlightenment & desist from making accusations by using words & terminology which were not part of the Complainant's submissions."

I note the Complainant's representative's suggestion that if the Provider were to change places with the Complainant, it would understand what the Complainant has been subject to by the Provider. It is clear from the approach taken by the Provider to this complaint that it has no interest in understanding the position of the Complainant or the impact of its conduct in seriously overcharging the Complainant over a prolonged period had on the Complainant, at a particularly difficult time for his family.

The Provider has clearly, in its approach to this complaint, demonstrated that it is either unwilling or incapable of showing any empathy or understanding of the impact of its conduct on the Complainant at an already difficult time for him and his family.

I would remind the Provider of my powers under the **Financial Services and Pensions Ombudsman Act 2017** when it comes to the investigation and adjudication of complaints. Under **Section 60(3)** of the **FSPO Act 2017**, any decision issued by this office must contain the following:

“(3) A decision of the Ombudsman under this section shall be communicated to the parties by the Ombudsman and such decision shall include the following:

(a) the decision under subsection (1);

(b) the grounds for the decision under subsection (2);

(c) any direction given under subsection (4).”

Section 60(4)(d) of the **FSPO Act 2017** provides that this office has the following powers:

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“(4) Where a complaint is found to be upheld, substantially upheld or partially upheld, the Ombudsman may direct the financial service provider to do one or more of the following

...

(d) pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of.”

I have set out my reasons in the Preliminary Decision, and also in this Decision, as to why I am of the view that €110,000 is appropriate compensation in the circumstances of this particular complaint.

I am empowered to direct compensation to a maximum of €500,000. The compensation I intend to direct in this complaint at **€110,000** is well within the confines of the governing legislation and regulation.

Having considered all of the submissions and evidence, including the extensive post Preliminary Decision submissions made by both parties, I remain firmly of the view that this is an appropriate amount of compensation.

The Provider has offered to pay compensation of €17,499.93 (inclusive of €10,000 as directed by the Independent Appeals Panel) to the Complainant, together with redress of €74,999.32 and an independent professional advice payment of €500.

It is unclear from the evidence whether the Provider paid the Complainant the €10,000 directed by the Independent Appeals Panel, in circumstances where it appears that although that offer was not in full and final settlement, the Complainant rejected that offer. Taking into consideration all of the evidence before me I do not accept that the compensation proposed of €17,499.93 is at all reasonable or sufficient to compensate the Complainant for the inconvenience suffered by him.

The conduct of the Provider has caused grave inconvenience to the Complainant and I find that the Provider has demonstrated a complete lack of empathy or understanding during its entire dealings with the Complainant from the date of its conduct in overcharging the Complainant to its dealing with the complaint during the investigation by this office.

Therefore, I uphold this complaint and direct that pursuant to **Section 60(4)** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Provider pay a sum of €110,000 compensation to the Complainant in respect of the inconvenience that the Complainant has suffered. For the avoidance of doubt, the total sum of compensation of

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€110,000 is inclusive of the €17,499.93 compensation already offered to the Complainant for the Provider's failure.

Conclusion

For the reasons set out above, my Decision is that this complaint is upheld pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017** on the grounds prescribed in **Section 60(2) (b) and (g) for its unreasonable and improper conduct.**

I direct, pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, that the Provider make a compensatory payment in the sum of €110,000 (inclusive of the €17,499.93 compensation already offered to the Complainant for the Provider's failure) to the Complainant for the inconvenience he has suffered.

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

18 May 2021

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

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(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

