An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0419
Sector:	Banking
Product / Service:	Tracker Mortgage
Conduct(s) complained of:	Failure to offer appropriate compensation or redress CBI Examination
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns the overcharging of interest on a mortgage account and the adequacy of the redress and compensation offered by the Provider.

The Complainants' Case

In their Complaint Form made to this Office, the Complainants describe their complaint, as follows:

> *"The FSO made a ruling in 2013* [complaint reference number redacted] *prior to the then Tracker Mortgage Examination which we did not accept. Since this Ruling* [the Provider] *deemed account* [388] *to be impacted and in scope contrary to the FSO Ruling in 2013.* [The Provider] *has issued a Redress & Compensation letter in relation to* [account ending 150] *also and given us the option to appeal to the FSPO. In 2013 the FSO ruled that "the Bank did act wrongfully, and in breach of duty" in relation to account* [151]*. The Bank issued a Redress & Compensation letter to us on 04/05/2018 but stated following the FSO Ruling no further monies were due."*

In response to the question contained on the Complaint Form inquiring as to whether any other person might be adversely affected by the decision of this Office regarding the complaint, the Complainants stated that:

> *"*[The Complainants' First Child] – *age 10yrs, psychologically impacted*
> [The Complainants' Second Child] – *age 6yrs, physical & psychological impact to the extreme following a birth injury in 2013."*

In resolution of this complaint, the Complainants stated, as follows:

> *"*[The Provider] *awarded us a "gesture of Goodwill" based on direct causation of the loss of our home. However they did not return our tracker rate or award us any compensation for the detriment they caused our family. They referred back to the FSO Ruling of 2013 and also claimed the Tracker Mortgage Examination did not allow for the Tracker to be returned. We want the (1) Tracker Rate or value of the Tracker Rate returned (2) Appropriate compensation for the detriment they have caused to our family."*

In a letter dated **4 October 2019**, which accompanied the Complainants' Complaint Form, the Complainants state, beginning at page 3, that:

> *"The FSO ruling on our accounts that issued on the 9th September 2014 has now been absolutely altered by virtue of the fact than* [sic] [the Provider] *has now even admitted than* [sic] *Mortgage account* [388] *is deemed impacted, something that the FSO did not correctly identify in 2013-2014. The Bank and the Appeals Board have however utilised the FSO observations and findings to exclude our family from appropriate Redress and Compensation in a situation where there is obvious and serious detriment. As you can imagine this has a significant and unjust impact on our family.*
>
> *To be clear the level of significant overcharge across our accounts in December 2012 has been confirmed by* [the Provider] *at €1,355 per month. The accumulated overpayment at that date was circa €39,612 (across 3 accounts;* [150]*,* [151]*,* [388]*). As we have previously outlined this level of detriment set off a sequence of events that has severely impacted every single one of our family. The FSO had a clear opportunity in 2013 to deal with this serious issue quickly and appropriately which the FSO failed in its duty and mandate.*

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The harm originating with the Bank's "wrongdoing" but the level of harm that has continued for our family due to the FSO's incorrect ruling is also enormous.

Our argument is and always has been that [the Provider] *did not come clean about their wrongdoing at any point from 2008 to allow us to make informed financial decisions. We had repeatedly requested the return of our Tracker rates on 3 accounts and the Bank repeatedly and officially incorrectly declared that we were not entitled to the reinstatement of our Tracker rates.*

The Bank's blatant "misinformation" resulted in us making huge financial decisions based on incorrect information provided by [the Provider]. *We fully believe that* [the Provider] *were aware of our entitlement to the Tracker rates over the full period. This "misinformation" is an absolute and direct causation of our financial and personal/familial issues.*

The Bank awarded a "gesture of goodwill" based on direct causation; "the bank is anxious to ensure you are paid the sum you would be due if it was such a case".

On 30th January [the Provider] *informed the Finance Committee that in the case of Property lost their customers would be entitled to the;*

- *Uplift Value of the lost home*
- *Value of the Tracker on the related home*
- *Compensation*

We have been awarded the "uplift value of our lost home" based on direct causation but we have not been compensated for the value of the €480,000 lost Tracker rate nor have we been compensated for the loss of the Tracker, our home or for the financial, and most importantly the medical/physical e.g. our daughter's birth injury and psychological impact on our family.

The Bank has made numerous errors and inconsistencies throughout the FSO and Appeals process in a calculated manner. They have not followed either the Framework as outlined by the Central Bank, or their own publically [sic] *announced guidelines for redress of Tracker cases. They have provided inaccurate and misleading information at a number of points to us and also to the FSPO.*

This latest "Appeal" process, which took over 12 months, was greatly protracted by [the Provider] *who consciously delayed the process by not providing information in any reasonable timeframe.*

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As I anticipated, and as stated to you in our last meeting in early 2018, there has been significant delays caused by [the Provider]*. This in turn has delayed us in being able to reengage with the FSPO. Unfortunately* [the Provider] *has been allowed to consistently operate within its own rules and timeframe, without being held to account.*

We are now requesting that the FSPO review re-open our case immediately and address the harm to our family without further delay.

We would like a clear response to the following:

- *Why has the FSO ruling been utilised and referenced throughout the Bank and Appeals processes of "The Tracker Mortgage Examination"*
- *We would like you to confirm that the FSO's previous finding on account* [388] *has been formally over turned*
- *We would like you to clarify if the Panel's assertion is correct that "under the Tracker Mortgage Examination, where a property was sold in or about 2012 and the account closed, there is no mechanism for reinstating the tracker rate"*
- *We request that FSPO assess and award a fair compensation for the detriment caused by the Bank's wrongdoing to our family*
- *We demand that* [the Provider] *be forced to adhere to their commitments of Tracker impacted accounts by "returning us to the position we would have been in should the error not have occurred" per the guidelines of the Tracker Mortgage Examination Review. We want the return of our Tracker rate, or the value of same."*

Clarification of the conduct complained of

By letter dated **30 January 2020**, this Office wrote to the Complainants to clarify the jurisdiction of this Office in respect of the complaint articulated by them in their Complaint Form and accompanying correspondence. In this respect, the Complainants were informed that the Finding of the Financial Services Ombudsman issued on **9 September 2014**, under reference number [redacted], remained legally binding ("the Legally Binding Decision").

Noting that the Complainants did not accept the Legally Binding Decision, this Office informed the Complainants that the appropriate means by which to appeal that decision was by way of an appeal to the High Court and, as no such appeal had been maintained, the decision remained legally binding.

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The letter further informed the Complainants that this Office did not have a role under the Central Bank of Ireland directed Tracker Mortgage Examination. As a result, the Complainants were informed that it was not for this Office to determine what the Tracker Mortgage Examination did or did not allow for. In these circumstances, the Complainants were advised that the complaint outlined by them was not a complaint that was eligible for investigation by this Office.

However, the Complainants were advised that this Office may investigate a complaint that the Provider failed to offer adequate redress or compensation for the failures identified by the Tracker Mortgage Examination as regards the relevant loan accounts. In making a complaint of this nature, the Complainants were reminded that this Office would not investigate any conduct that had already been the subject of the Legally Binding Decision.

By letter dated **1 February 2020**, the Complainants advised that:

> *"We wish to pursue our complaint that* [the Provider] *has failed to offer our family adequate redress and compensation for their failures."*

The Complainants also explained, amongst other matters, that the Legally Binding Decision was referenced because the Provider and the Independent Secretariat of the Tracker Mortgage Examination *"utilised and referred to the FSO finding* […] *to avoid offering fair redress and compensation in our case."*

This Office responded to the Complainants on **12 February 2020**, requesting that the Complainants set out the precise extent of the redress and compensation offered by the Provider and the basis for the Complainants' position that this redress and compensation was inadequate.

In a letter to this Office dated **February 2020**, the Complainants explained, as follows:

> *"The correspondence you requested previously and we provided included all of the redress and compensation offered by* [the Provider]*;*
>
> - [Provider] *Redress & Compensation Letter + Pack dated 04/05/2018 – Loan Accounts* [650, [sic] 388, 151, 342]. *Total: €348,697.12.*
> - [Provider] *further Redress Letter dated 23/11/2018 – Loan Account* [151]*. Total €2,218.00*
> - [Provider] *Redress & Compensation Letter dated 12/12/2017 – Loan Account* [388] *(including* [Provider] *recalculation table) Total: €38,894.45*

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On 30th January [the Provider] *informed the Oireachtas Finance Committee that in cases of Property lost their Customers would be entitled to the;*

- *Uplift Value of the lost home*
- *Value of the Tracker on the related income*
- *Compensation*

We have been awarded the "uplift value of our lost home" calculated by [the Provider] *as €348,697.12 on the 04/05/2018 in line with their Tracker redress & compensation policy. The Bank however has not redressed the loss of our €480k Tracker rate. Equally, we have also not been compensated for the loss of the Tracker, our home or for the financial, medical and psychological impact on our family.*

We also continue to pay off loan account [150]*, which was drawn down to pay for stamp duty and fees on* [property] *(the home we lost). The Bank's calculation of value on our lost home excluded the negative equity of €73,000 that remained on the sale of* [the property]*.*

The Bank has failed to comply with the Tracker Mortgage Examination Framework and even their own publicly stated redress & compensation packages. The Bank and the wrongful removal of our Tracker rate and continuous denial of our contractual rights was a direct cause of us losing our previous family home and our valuable Tracker rate. We are currently repaying a home loan on standard variable rates. The financial strain of the Bank's over-charging since 2008 caused enormous detriment to our family and impacted every financial decision we have had to make since. You are aware we were unable to afford private health care for our [Second Child's] *birth in 2013 and she suffered a catastrophic birth injury at the hands of junior doctors, whilst* [the Provider] *withheld our refund. We have had enormous medical bills to fund since* [our Second Child's] *birth for her rehabilitation and ongoing care. This ongoing financial pressure has resulted in huge psychological health issues for our family.*

[The Provider] *has failed to "put us back in the position we would have been in should the error not have occurred". They can never reverse* [our Second Child's] *injury and give her a normal life without disability and they will not give us back the last decade of our financially strained family life. They should however by their own policy redress our Tracker rate and award compensation to our family for the detriment they have caused.*

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> [The Financial Services and Pensions Ombudsman] *previously agreed that the fundamentals of our case had been completely altered given all of our accounts are now deemed impacted and the overall levels of overcharging and overpayments increased substantially. It was agreed if our case re-presented to the FSPO again that this would be dealt with as a new case and handled in a timely manner. We believe that the FSPO has sufficient information and a mandate to instruct* [the Provider] *to address to their own Tracker redress policies without further delay."*

By letter dated **23 April 2020**, this Office wrote to the Complainants in respect of their previous correspondence. In the first instance, this letter addressed the contents of the final paragraph of the Complainants' letter of **14 February 2020** and a meeting which took place between the Complainants and the Financial Services and Pensions Ombudsman on **23 February 2018**. In particular, the Complainants were informed that no agreement had been entered into at that time nor had any assurances been given. The Complainants were further reminded that they had been advised on a number of occasions during this meeting, that the Financial Services and Pensions Ombudsman could not discuss any matters relating to any new complaint the Complainants might seek to make to this Office.

Addressing the conduct complained of, this letter of **23 April 2020**, again informed the Complainants that any complaint regarding their entitlement to a tracker interest rate on mortgage loan account 342 was not a complaint eligible for this Office to consider. The letter informed the Complainants that the reason for this was that these matters were already considered as part of the Legally Binding Decision which would not be re-visited by this Office. Arising from this, the Complainants were asked to confirm, in writing, the following:

> *"1. That you accept the parameters of the complaint that this office has jurisdiction to consider, is that:*
>
> *'The Provider failed to offer you adequate compensation for the failures identified as part of the Examination with respect to your mortgage loan accounts.'*
>
> *2. That you accept that the matters considered as part of Legally Binding Finding that issued by the Financial Services Ombudsman on 09 September 2014 under reference* [complaint reference number redacted] *will not form any part of the investigation of the complaint you are now seeking to progress."*

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The Complainants responded to this letter on **27 April 2020**, as follows:

> *"I acknowledge that during our meeting in February 2018* [the Financial Services and Pensions Ombudsman] *outlined that the finding of previous case could not be reviewed as it was subject to a Legal Binding. It must also be noted that the FSPO acknowledged that we never accepted or agreed with the Finding. The finding has since been discovered under the Terms of the Tracker Mortgage Examination, to be incorrect.*
>
> *I accept that the previous case reference* [complaint reference number redacted] *conducted by the FSO was considered as part of Legally Binding Finding that will not form part of any investigation of the complaint with the FSPO case reference* [current complaint reference redacted].
>
> *Importantly my clear understanding was that given the change in circumstances, i.e.* [the Provider] *correctly confirmed during the course of the Mortgage Tracker Examination that all of our accounts were deemed impacted, that any new case, i.e. case* [current complaint reference redacted]*, would be **fully** assessed by the FSPO in a timely manner. This has not occurred.*
>
> *I note that* [the Financial Services and Pensions Ombudsman] *and the FSPO agrees that any redress or compensation which case* [current complaint reference redacted] *refers to should be reviewed by the FSPO.* […]*."*

The Complainants' letter then proceeded to repeat most of the matters referred to in their letter of **14 February 2020**. In terms of compensation, the Complainants stated, as follows:

> *"We therefore want to be correctly compensated for;*
>
> - *Value of our lost Tracker*
> - *Compensation for the detriment caused to our family"*

In this letter, the Complainants also referenced *"delays by the FSPO in dealing with this matter …"* and that *"*[i]*t feels at this point that the FSPO are not engaging with us and the continuous requests for additional information are causing huge distress to us all."*

By letter dated **15 May 2020**, this Office wrote to the Complainants seeking to address their concerns regarding any delay in the progression of their complaint and the level of engagement from this Office.

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Further to this, in light of the Complainants' reference to the loss of the tracker interest rate in their letter, this Office again requested that the Complainants confirm, in writing, their acceptance of paragraphs (1) and (2) of the letter of **23 April 2020**, quoted above. The Complainants responded to this letter on **15 May 2020**, indicating their acceptance of the parameters of the complaint but emphasising that they did not accept the findings of the Legally Binding Finding of **September 2014**.

The Provider's Case

Mortgage Loan Account 151

The Provider says that the Complainants drew down a mortgage loan of €562,500 on **4 July 2005** repayable over a term of 30 years under a Mortgage Loan Offer Letter dated **18 May 2005** which was signed and accepted on **19 May 2005**. The Provider says this Offer Letter provided for a tracker interest rate at ECB+1.00% and the loan account drew down on this rate on **4 July 2005**. The Provider says the Complainants signed and accepted a Mortgage Form of Authorisation ("MFA") on **9 November 2005** to switch the loan to a 3 year fixed rate of 3.49%. Upon expiry of the 3 year fixed rate period, the Provider says the loan rolled to a standard variable rate at 4.79% on **14 November 2008**. By MFA signed on **6 September 2010**, the Provider says the loan account switched to a 3 year fixed rated at 3.6% and remained on this rate until it was redeemed on **14 December 2012**.

Tracker Mortgage Examination

The Provider says it included the Complainants' mortgage loan in the Tracker Mortgage Examination because it had been formerly on a tracker rate. The Provider says that in its review, it found that when the Complainants moved to a fixed rate from a tracker rate, it failed to provide the Complainants with sufficient clarity as to what would happen at the end of that fixed rate. Because of this, the Provider says the Complainants may have had an expectation that a tracker rate would be available to them at the end of the fixed period. The Provider says the language used in its 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 rate which varied upwards or downwards at the Provider's discretion.

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The Provider says it made an offer of redress and compensation in the amount of €29,625.42 by letter dated **4 May 2018** which was made up of:

(1) Redress for the difference between the interest paid from 14 November 2008 to 17 December 2012 in the amount of €26,704.93;

(2) Compensation for the Provider's failure in the amount of €2,670.49; and

(3) Payment of €250.00 for independent legal or financial advice.

The Provider says it clarified that the above payment had been reduced by previous redress and compensation, namely a direction made for redress and compensation of €30,182.57 to be paid by the Provider to the Complainants in accordance with the Legally Binding Decision of the Financial Services Ombudsman of **9 September 2014**, which included a payment of €2,218.00 referred to in a letter dated **23 November 2018**, being a refund of a fixed rate breakage fee applied to the loan account during the redemption of the loan in **December 2012**.

Mortgage Loan Account 150

The Provider says the Complainants drew down a mortgage loan of €60,000 on **14 June 2005** repayable over a term of 25 years under a Mortgage Loan Offer Letter dated **18 May 2005** which was signed and accepted on **23 May 2005**. The Provider says the Offer Letter provided for a tracker interest rate at ECB+1.30% and the loan account drew down on this rate on **14 June 2005**. The Provider says that the Complainants signed and accepted a MFA on **5 December 2005** to switch the loan to a 3 year fixed rate at 3.49% and the loan rolled to a standard variable rate at 4.79% on the expiry of the fixed rate in late 2008. By MFA dated **22 February 2011**, signed on **1 March 2011**, the Provider says the loan account switched to a 5 year fixed rate at 5.3%. The Provider says a further MFA dated **20 January 2014** was signed on **28 January 2014** where the loan account reverted to a tracker rate of ECB+1.3% on **30 January 2014**.

2014 Offer

By letter dated **21 January 2014**, the Provider says it offered the Complainants an arrangement in the following terms, by way of settlement of a complaint made in respect of the loan accounts:

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"Mortgage Loan Account [150]

Return to a Tracker Variable ECB+1.3% from 14 November 2008
Difference in interest rates @ 20 January 2014 €5109.17"

The Provider says the Complainants accepted this offer of settlement on this account only, and the (increased) sum of €5,151.53 was credited to the account on **31 January 2014**.

2019 Review

By letter dated **15 August 2019**, the Provider says it wrote to the Complainants concerning a review conducted by it (entirely separate from the Tracker Mortgage Examination) in respect of mortgage loan accounts which had previously been on a tracker rate of interest. The Provider says it noted that the 2014 settlement was directly concerned with the removal of the tracker rate of interest from the Complainants' loan account, and therefore included loan account 150 in the review. The Provider says it stated that:

"We want to ensure that our service continues to be transparent for customers. With this in mind, we have recently completed another review of a number of mortgages, including yours.

Following our previous review, we offered you a refund of €5151.53 in 2014 for the interest we overcharged. However, we did not include a compensation payment as part of this refund.

[…]

To put this right, we want to offer you a compensation payment of €515.15."

The Provider says that payment was subsequently credited to an account of the Complainants' choosing.

Mortgage Loan Account 388

The Provider says that the Complainants drew down a mortgage loan of €180,000 on **28 January 2004** repayable over a term of 25 years under a Mortgage Loan Offer Letter dated **25 September 2003** which was signed and accepted by the Complainants on **28 September 2003**.

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The Provider says the Offer Letter provided that the loan would draw down on a 1 year fixed rate at 2.58%, after which the loan account would move to a standard variable rate.

The Provider says the Complainants signed an MFA on **26 January 2005** to switch the loan to a 3 year fixed rate at 3.49%. The Provider says the loan moved to a standard variable rate at 4.79% after the expiry of the fixed rate. The Provider says the Complainants signed a MFA on **5 December 2005** to switch the loan account to a [particular type of rate redacted] tracker interest rate at ECB+1.1%. By MFA dated **22 February 2011**, signed by the Complainants on **1 March 2011**, the Provider says the loan account switched to a 5 year fixed interest rate at 5.3%. The Provider says the loan account moved to a standard variable rate at 4.5% at the expiry of the fixed rate period in **2016.**

Tracker Mortgage Examination

The Provider says it included the Complainants' loan in the Tracker Mortgage Examination because it was formerly on a tracker rate. In its view, the Provider says it found that when the Complainants moved in **2011**, to a fixed rate from a tracker rate, it failed to provide the Complainants with sufficient clarity as to what would happen at the end of that fixed rate. Because of this, the Provider says, the Complainants may have had an expectation that a tracker rate would be available to them at the end of the fixed rate period in **2016**. The Provider says that the language used by it in 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 rate which varied upwards or downwards at the Provider's discretion.

The Provider says the Complainants' loan account moved to a tracker rate of ECB+1.1% on **24 November 2017** through the Central Bank directed Tracker Mortgage Examination. The Provider says it made an offer of redress and compensation in the amount of €38,894.45 to the Complainants by letter dated **12 December 2017** which was made up of:

(1) Redress for the difference between the interest paid from 1 December 2008 to 23 December 2017 in the amount of €34,449.50;

(2) Compensation for the Provider's failure in the amount of €3,444.95; and

(3) Payment of €1,000.00 for independent legal or financial advice.

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Offer of 4 May 2018

By letter dated **4 May 2018** (attaching the redress and compensation letter for loan account 151), the Provider says, noting that the Complainants' case was *"unusual and is outside the normal scope of the Tracker Mortgage Examination"*, offered further compensation in the amount of €348,697.12, *"as a gesture of goodwill and an expression of the sincerity of its apology for not addressing the issues* [the Complainants] *raised on the account in a timely and holistic fashion.* [The Provider] *repeats its apologies for this and the sum offered is intended to reflect the time and energy you have invested over an extensive period of time to put things right."*

Independent Appeals Panel

The Provider says that the Complainants were not satisfied with the redress and compensation offered on the loan accounts and they appealed the matter to the Independent Appeals Panel. The Provider says the Independent Appeal Panel issued its decision on **11 September 2019** and rejected the Complainants' appeal, holding:

> *"The Panel carefully considered the information provided by the Customers and the Bank. In doing so, the Panel noted the compensation paid to the Customers under the Tracker Mortgage Examination, as well as the separate payment in May 2018 of €348,657.12 made outside the Tracker Mortgage Examination. The Panel notes this latter sum was paid as a gesture of goodwill and in expression of the sincerity of the Bank's apology for "not addressing the issues* [the Complainants] *raised on the account in a timely and holistic fashion". The Panel also notes that the Bank did not categorise the sale of the* [property] *as "direct causation" of loss of property, within the meaning of the Tracker Mortgage Examination and the Panel's Terms of Reference*
>
> […]
>
> *Whilst recognising that this is a very difficult case, the Panel is not satisfied that compensation over and above that already awarded by* [the Provider] *within the Tracker Mortgage Examination* […] *and on a good will basis outside the Tracker Mortgage Examination is warranted."*

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Compensation Criteria

Mortgage Loan Account 151 and 388

The Provider says that as part of the 'Framework for Conducting the Tracker Mortgage Examination' as set out by the Central Bank of Ireland, the Provider was obliged to develop a plan to conduct the Examination incorporating the Framework and within the timelines prescribed. The Provider says a redress and compensation scheme was implemented in respect of impacted customers in line with the 'Principles for Lenders when Tracker Mortgage Related Issues Identified for Redress (Principles for Redress)'.

By way of synopsis, the Provider says its scheme for redress and compensation includes the following core elements:

(a) Tracker Rate

The Provider will reinstate or offer to reinstate the mortgage loan account to the appropriate tracker rate.

(b) Redress

The Provider will refund the customer a lump sum payment ("the Adjusted Amount") equivalent to the interest overcharged as a result of being on a higher rate of interest. The Adjusted Amount refers to the difference between the monthly amounts that the customer was charged in respect of the impacted account and the monthly amounts that they should have been charged had the relevant issue identified not occurred.

The Provider says that the redress includes a payment in respect of the time value of money, which represents a payment to reflect the additional financial loss suffered by customers for not having access to the money that was used to pay interest at the incorrect rate.

(c) Compensation

The compensation amount provided to customers was calculated with respect to a number of characteristics of each impacted account. The Provider says the methods used to work out the redress and compensation calculation have been reviewed and approved by an independent third party.

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(d) Independent Advice

Each impacted customer was offered the opportunity to obtain independent legal or financial advice and the Provider would make an additional monetary payment towards the cost.

(e) Appeals Panel

The Provider says it established an independent appeals process to adjudicate all elements of offers made under the scheme. In line with the principles of the Examination and the specific requirements of the Central Bank of Ireland, the Provider says it appointed a Consultancy Firm to provide Independent Secretarial Services to the Appeals Panel, which in turn was comprised of entirely external independent experts. The Provider says this body is entirely separate from it and was set up to oversee the appeals process. The Provider says the Independent Secretariat acted as a facilitator between the Appeals Panel and impacted customers to ensure a fair and effective operation of the Appeals Process.

The Provider says that the Complainants did not fit into the category of special loss such as repossession and the Appeals Panel did not alter their categorisation within the Examination.

Mortgage Loan Account 150

By letter dated **21 January 2014**, the Provider says it advised the Complainants that further to previous correspondence, the Provider had considered the Complainants' mortgage loan accounts in relation to issues raised in prior correspondence and, further to a review of their loan account, a decision was made to seek to resolve the matter amicably by offering to restore the Complainants' tracker rate and refund overpaid interest in the sum of €5,109.17.

The Provider says the sum of €5,109.17 offered was equivalent to the interest overcharge as a result of being on a higher rate of interest during the impacted period. The Provider says the impacted period was identified as **14 November 2008**, the date the Complainants should have been offered a tracker rate, to date, being **21 January 2014**.

The Provider says there was no requirement for it to offer compensation and the offer was made in respect of the individual case as presented by the Complainants, and not further to a formal scheme. The Provider says the offer was made in full and final settlement of the Complainants' complaint, and was accepted by the Complainants in **2014**.

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In respect of the payment offered to the Complainants on **15 August 2019**, the Provider says that in the interests of fairness and equality between customers, it offered a compensatory payment representing 10% of the redress offered in **2014**. The Provider says this offer was made in circumstances where the Provider has conducted reviews in **2011** and **2018** in respect of mortgage loan accounts which had previously been on tracker rates, and potential errors made due to the removal of those tracker rates.

In short, the Provider says the **2011** review identified mortgage loan accounts that moved from a tracker rate of interest in circumstances such as the Complainants' case, namely that there was a contractual right to a tracker rate of interest, but no tracker rate was offered to the customer upon the expiry of a fixed rate period, which had the potential to confuse a customer as to the interest rates available to them at the expiry of the fixed rate. The Provider says that those impacted by the 2011 review were provided with redress equivalent to the interest overcharge as a result of being on a higher rate of interest, and had the tracker rate reinstated on the mortgage loan account.

The Provider says the 2018 review identified mortgage loan accounts that had been deemed impacted (and redressed) by the **2011** review but had not had a compensatory offer made. The Provider says the amount under the **2018** review was calculated with respect to the same magnitude as that provided to customers by way of Operational Errors identified in the Tracker Mortgage Examination – that is, 5% to 10% compensation depending on the refund amount.

The Provider says that accounts which received a difference of interest refund of less than €5,000 were offered a compensation payment of 5% of this figure, while accounts which received a difference of interest refund equal to or greater than €5,000 were offered compensation payments of 10% of this amount.

The Provider says it would like to clarify that mortgage loan account 150 was not treated as part of the **2011** and **2018** reviews. However, as was made clear in the letter of **15 August 2019**, the Provider wished to make the compensatory offer such that, were it to have been included with the **January 2014** settlement, the account would be in line with the criteria set out by the **2011** and **2018** reviews. Whilst the offer was not made within the framework of the schemes, the Provider says that when offering the sum in **August 2019,** it had cognisance of the schemes' frameworks.

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Redress and Compensation Offered Between December 2017 and August 2019

Mortgage Loan Accounts 151 and 388

The Provider says that from the outset it has evidenced that redress and compensation was offered to the Complainants on **12 December 2017** in line with its Redress and Compensation Scheme. The Provider says it has been fully compliant with the Examination and that redress and compensation has been paid to the Complainants.

The Provider says it has also restored loan account 388 to the tracker rate of interest it had previously been on. The Provider says it is satisfied that the correct ECB rate and margins were correctly applied for the correct period of time within the redress and compensation calculation. The Provider says that loan account 151 had been redeemed by **December 2017** and therefore, a tracker rate could not be reinstated on that account.

The Provider submits that the redress and compensation offered to and accepted by the Complainants was adequate and in line with its Redress and Compensation Scheme Framework. The Provider says that it outlines below its reasons why the Complainants' further claim for additional compensation is neither fair nor reasonable, taking into account that the Complainants appealed the matter to the Appeal Panel, which rejected the appeal. The Provider says that the Complainants had the full extent of the Framework applied to them and that they have exhausted all avenues within the Framework. The Provider says it had been fully compliant with the Framework and that it is bound by the decision of the Appeals Panel.

The Provider says that the calculation of redress took into account an interest payment to reflect the time value of money of the redress offered and that the mechanisms for the calculation of redress for the time value of money were in line with those submitted to the Central Bank of Ireland.

The Provider says that the calculation of compensation was based on its understanding of the detriment suffered, including but not limited to inconvenience, harm, loss as a result of not having funds available to the Complainants when they should have been, personal suffering and hardship, caused by the relevant issues. The Provider says the compensation amount has been calculated with respect to a number of characteristics of each impacted account which have been reviewed and approved by an independent third party. The Provider submits that the compensation payment was reasonable and fair taking into account the Complainants' circumstances.

/Cont'd…

The Provider says that the Appeals Panel considered and rejected the Complainants' claim for further compensation and that this complaint to this Office has advanced no new grounds which undermine the determination of the Independent Appeals Panel.

Mortgage Loan Account 150

Referring to its offer of **21 January 2014**, the Provider says the payment of €5,109.17 comprised a refund of overcharged interest from **14 November 2008** to **21 January 2014**. Whilst not offered as part of any particular scheme, the Provider says that the offer was made in like manner as an offer under the 2011 Mortgage Review would have been, that is, redress of the overcharged interest and reinstatement of the tracker rate on the account.

By letter dated **15 August 2019**, the Provider says it offered the Complainants a further sum of €515.15. The Provider says this sum was offered in recognition of its failure to include a compensatory element to the sum offered to the Complainants in **January 2014**. The Provider says that this sum was not offered further to the **2018** Mortgage Review Framework but was made with reference to the **2018** Framework.

The Provider says that while no compensatory element was in the initial offer of **January 2014**, it is satisfied that this position has been rectified and that it has offered adequate redress and compensation to the Complainants, which has been offered with reference to its independently review Framework for Redress and Compensation for **2011** and **2018** Mortgage Reviews.

The Provider says that the Complainants, not being satisfied with the offer of redress and compensation, appealed the offer to the Independent Appeals Panel, which rejected the Complainants' claim for further compensation.

Adequacy of Redress and Compensation

Mortgage Loan Accounts 151 and 388

The Provider says that the redress and compensation offered to the Complainants was adequate. The Provider says the payments include a lump sum back payment equal to the difference between the tracker rates at the relevant margins and the higher interest rates charged for the relevant period, that is, what is called "redress" in the Tracker Mortgage Examination.

/Cont'd…

The Provider says interest was paid on that redress (sometimes called the time value of money in the Examination) at 5%. The Provider says the redress paid seems to it to equate to the contractual measure of damages, and the interest paid is reasonable.

The Provider says the back payments (of redress) have the effect of reversing the MFAs in the relevant period on foot of which rates higher than the tracker rate were charged. In the Provider's view, it says that means that the back payments accurately redress the Complainants for the differences in rates and thus restores them to the position they would have been in, if the tracker interest at the appropriate margins had been charged instead during the relevant periods. The Provider says this is the normal method of redress for overpayments. The Provider says it believes that this is the only feasible and fair method.

In respect of the powers of this Office to direct redress pursuant to ***section 60(4)(d)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Provider says it appears to it that the back payments by way of redress equate to the idea of compensation for *"loss … sustained by the complainant as a result of the conduct complained of"*.

In addition, the Provider says that payments were made for compensation and sums for professional advice which (in the Provider's view) exceed the normal contractual measure of damages, and which a court would not have awarded in an action, for breach of contact.

The Provider says the amount of interest refunded is calculated by using the actual balance which existed on the impacted mortgage accounts for each day during the impacted period and applying the daily interest rate differential to the daily balance to determine the amounts overcharged during the impacted period, with fair value interest and compensation applied to the full redress amount.

The Provider explains that the interest rate differential is the difference between the incorrect interest rate that was charged during each impacted day and the interest rate that should have been charged during each impacted day (the correct interest rate).

The Provider says it is satisfied that the redress outlined above (Redress and Compensation letter dated **12 December 2017**) represents the extent to which interest was overcharged and includes interest charged on a capital balance that was higher than it would have been but for the tracker issues, that is, the incorrect interest rate.

/Cont'd…

Mortgage Account 150

The Provider says that the redress and compensation offered to the Complainants was adequate. The Provider says the offer of **21 January 2014** of €5,109.17 was identified as being the *"*[d]*ifference in interest rates @ 20 January 2014"* (the difference between **14 November 2008** and **20 January 2014**). The Provider says this payment was equal to the difference between the tracker rates at the relevant margins and the higher interest rates charged for the relevant period. This back payment (of redress) the Provider says, had the effect of reversing the MFA for the relevant period during which rates higher than the tracker rates were charged. In the Provider's view, it says this means that the back payment accurately redresses the Complainants for the differences in rates and thus restores them to the position they would have been in, if tracker interest at the appropriate margin had been charged instead during the relevant period. The Provider says this is the normal method of redress for overpayments. The Provider says it believes this is the only feasible and fair method.

In addition, the Provider says a payment was made for compensation in **August 2019** which (in the Provider's view) exceeds the normal contractual measure of damages, and which a court would not have awarded in an action for damages, for breach of contract.

Compensation Offered in May 2018

The Provider refers to the following passage from its letter of **4 May 2018**:

> *"Attached you will find a standard pack under the Tracker Mortgage Examination. This pack concludes that you were entitled to redress and compensation of a total of €29,625.42. However, under the standard set by the Tracker Mortgage Examination, the Bank reduces that award by any amount awarded to you by the Financial Services Ombudsman (FSO).*
>
> *As you are aware, the FSO awarded you a total of €30,182.57. Once we deduct the redress and compensation by this figure there is no remaining amount payable."*

The Provider says it was not satisfied with this redress (the benefit of which has been paid in **2014**) accurately reflected its desire to apologise sincerely to the Complainants for its failure to deal with the issues raised by the Complainants in respect of all three mortgage loan accounts since **2013**.

/Cont'd…

As noted in this letter, the Provider says that the sum of €348,697.12 was offered *"as a gesture of goodwill and an expression of the sincerity of its apology for not addressing the issues* [the Complainants] *raised on the accounts in a timely and holistic fashion … the sum offered is intended to reflect the time and energy* [the Complainants] *have invested over an extensive period of time to put things right."*

The Provider says that the offer of €348,697.12 was not made further to the criteria outlined by the Tracker Mortgage Examination Framework documentation. As noted in this letter, the Provider says the offer was instead being made outside of the normal scope of the Examination. The Provider says its identification of the Complainants' case as *"unusual"* arose from the nature of the submissions of the Complainants throughout the course of the complaint investigation process, including the submission that but for the issue of the tracker rate, the Complainants would not have sold their original primary dwelling house when moving to their new property. The Provider says it was this submission in particular that drove the criteria/calculation of the offer made on **4 May 2018**.

In respect of the Complainants' submission concerning the sale or otherwise of the original primary dwelling house, the Provider says its letter noted the following:

> *"The Bank acknowledges that the cumulative impact of denial of a tracker rate across your 3 mortgage accounts was a significant factor that you have raised with the Bank in your decision to sell the property at* [location]*. However, the Bank also notes that you did not originally claim that you would have retained both the property at* [location] *and* [location] *in 2013-14. You asserted something rather different as I explain below.*
>
> *From a review of your file, it is clear that you decided to sell your prior home at* [location] *for a number of reasons not solely connected to the tracker issue; and the Financial Services Ombudsman found that was so as a matter of fact in 2014. You did not assert in your original complaint that you wished to retain both houses ….*
>
> *Instead you made very clear in your complaint that you would not have moved to your present home at* [location] *if you realised that entailed losing the tracker rate for your mortgage loan that was secured on* [original primary dwelling house] *(account* [151]*). The FSO did not up-hold that point (see page 9 of the copy adjudication enclosed).*

/Cont'd…

Notwithstanding this, the Bank has sought to quantify its offer of compensation in a tangible manner, being the assumption, that you would have retained the house at [location] *(on its tracker rate) and purchased your present family home at* [location]*, or indeed an alternative property, if the Bank had sooner put you on a tracker rate on accounts* [388] *and* [159] […]*."*

On balance, the Provider says, it concluded and remains satisfied that there was no direct causation between the tracker rate issue and the Complainants' decision to sell the original primary dwelling house. Notwithstanding this, the Provider says by way of apology, that it wished to offer a sum that equalled the increase in value of this property between the date it was sold in **December 2012** and **May 2018**.

The Provider says it calculated the sum of €348,697.12 in the following manner, on the basis that the property's value was €808,697.12 as at **4 May 2018**:

A)	Date of Sale	[date redacted] 2012
B)	Selling Price of Property	€460,000
C)	Central Statistics Office Residential Property Price Index at time of sale	59.1%
D)	Central Statistics Office Residential Property Price Index as at February 2018	103.9%
E)	Increase in CSO Index: $\underline{E=(D-C)*100)}$ C	75.80%
	Increase in property price based on increase in CSO Index (B*E)	€348,697.12

The Provider says it is satisfied that the bespoke criteria utilised in calculating a fair and reasonable expression of its sincerity in apology, was appropriate, having regard specifically to the unusual features of the Complainants' case.

By 'instruction letter' dated **4 May 2018**, the Provider says the Complainants instructed the Provider to remit the sum of €348,697.12 to an account of their choosing. The Provider says this letter was received on **9 May 2018** and the payment was subsequently transferred to the nominated account.

/Cont'd…

The Provider refers to the Complainants' letter of **27 April 2020** that the offer of €348,697.12 did not take into account the negative equity of €73,000 that remained following the sale of the original primary dwelling house. The Provider submits that that figure of €348,697.12 takes into account the depreciated value of the property at the time of sale in **December 2012**. The Provider also says that it rejects that the sale of the property left a negative equity of €73,000 or anywhere close to that region of negative equity.

First, the Provider says the intended purpose of the calculation made in arriving at €348,697.12 calculated the estimated value of the property in the 'present day', based on the Central Statistics Office Residential Property Price Index as at **February 2018**. The sale price on **2012** was then subtracted from this calculation which would reflect the increase (or decrease) in the value of the property between **December 2012** and **February 2018**. The resulting conclusion, the Provider says, was that there was an increase of €348,697.12 in the value of the property during that time i.e. there was positive equity in the property in the amount of €348,697.12.

In order for the property to move from a negative equity position to a positive equity position, the Provider says the increase in the value of the property must have been at least more than the negative equity in that property, that is, the value of the property increases to a 'zero sum' position, and thereafter any increase in value is treated as positive equity. Therefore, the Provider says it is satisfied that, in its calculation, the increase in value took into account the purported negative equity and increased to such a point as the positive equity in the property would be valued at €348,697.12.

The Provider refers to internal 'MMails' connected to the Complainants' application for mortgage loan account 342, being the loan sought in respect of the Complainants' new primary dwelling house.

By MMail dated **27 June 2012**, it was noted that:

> *"The customer here have not been successful in selling their existing property at the price on this application of E500k – the offer on their house is E430k. So Apps have now reverted with a negative equity proposition as follows …*
>
> *Negative equity carried forward from existing* [Provider] *mortgage E48,000* [Provider] *number* [151]*."*

/Cont'd…

By further MMail dated **17 August 2012**, it was advised that:

> *"*[Complainants'] *property sale agreed at E430,000 – this leaves negative equity with* [Provider] *mortgage of c50k 0 (fixed rate funding fee incl + selling fees) …*
>
> *Negative equity of C E48/E50k – apps wish to put as much of this as possible on this new mortgage – so mortgage requested E549,000 –*
> *Negative eq carry forward E45k."*

By further MMail dated **15 October 2012**, the following was noted:

> *"Change in proposition here, the sale price of their own house has increased since the last proposal – so now this will not be a negative equity proposal – straightforward purchase …*
>
> *Sale agree on own house = €460,000 – will clear* [Provider] *mortgage with own funds now. Balance c E473k + breakage fee – input from own savings to this E20k"*

The Provider says that the above MMails clearly outline the proposed negative equity figures considered by both the Provider and the Complainants during the application by the Complainants for their new primary dwelling house. At no stage, the Provider says, is there any suggestion that the negative equity attracted by the previous mortgage loan would be any higher than €48,000, plus breakage fee (which was refunded to the Complainants by letter dated **23 November 2018**), and the seller's fees which are an essential cost borne by a customer in any sale of property. Further, the Provider says that as can be seen from the MMail of **15 October 2012**, the Complainants were able to obtain an increase in the sale price of €30,000 from the previous offer, which left a negative equity in the region of €20,000 (inclusive of breakage fee and selling fees).

Bearing in mind the refund of €2,218.00 on **23 November 2018**, being the breakage fee paid by the Complainants, the Provider says this left a negative equity on the property of around €18,000, being €55,000 short of the negative equity left in the property as contended by the Complainants. The Provider says it cannot locate any evidence to corroborate the Complainants' claim that such an amount of negative equity was left on the original primary dwelling house.

The Provider says it is satisfied that the payment offered on **4 May 2018** was calculated taking account of any negative equity in the sale of the property in **December 2012**.

/Cont'd…

Further, the Provider says it would like to clarify that whilst the amount offered was calculated with reference to the increase in the value of the original primary dwelling house, it remains of the firm view (as confirmed by the Financial Services Ombudsman in its adjudication in 2014) that the tracker issue on the Complainants' mortgage loan accounts were not the direct cause of the decision to sell this property. In that regard, whilst the offer was linked to the calculation, the Provider submits that the nature of the payment was as an apology for the effort expended by the Complainants through the complaint process, and not an acceptance by the Provider in respect of the sale of the property in **2012**, such that the consideration of negative equity is merited. As noted above, the Provider says it cannot locate any evidence to corroborate the figure of €73,000 as being the amount of negative equity in the property following the sale. Instead, the Provider says it notes evidence to the contrary, namely that negative equity in the property was significantly less, especially following an increase in the sale in **October 2012**.

Affordability of Health Care and Birth Injury

The Provider says it acknowledges the extremely difficult experience suffered by the Complainants and their family arising as a result of the birth injury of the Complainants' second child in **September 2013**. However, the Provider says that a causal link between its error in respect of overcharging of interest and the birth injury cannot reasonably be made. The Provider submits that the allegedly negligent actions of a third party in the context of a medical procedure, is a matter that is entirely remote from the issue of overcharging of interest on the Complainants' mortgage loan accounts. The Provider says that decisions including the choice of medical personnel and the manner of procedure are matters that are within the sole decision making power of the Complainants and that the Provider's error would not reasonably have affected those choices.

The Provider says, in its respectful view, the most appropriate avenue of recourse in this situation would be by way of bringing an action in medical negligence. The Provider says it understands from contemporaneous media reports that the Complainants did indeed pursue litigation on behalf of their daughter arising from the incident. The Provider says it further understands that this matter was settled in or around [date redacted].

Psychological Impact

The Provider says that it sympathises with the Complainants in respect of any psychological health issues that arose for their family due to perceived ongoing financial pressure during the impacted period.

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The Provider says it has sought to compensate for the stress and inconvenience felt by the Complainants through the offers of compensation made by it through the Tracker Mortgage Examination Framework in the total sum of €6,630.59, and in the additional offer of compensation outside of the Examination in the sum of €348,697.12.

The Provider says that it is of the view that this significant total sum of compensation alone (without the inclusion of redress offered) is both fair and reasonable compensation for the difficulties experienced by the Complainants through the course of their complaints with the Provider concerning their loan accounts.

The Provider notes that the total compensation offered (€355,327.71) represented more than 5 times (535%) the total redress offered (€66,305.96). The Provider says this far exceeds the compensation offered under the Tracker Mortgage Examination, which is calculated at 10% of the redress offered on each mortgage loan account. In this regard, the Provider says it is satisfied that it made a significant offer to the Complainants, which took full account of multiple aspects of the loss suffered by the Complainants, including the stress and inconvenience suffered as a result of the overcharging of interest on the mortgage loan accounts.

Notwithstanding this, the Provider says it has no record of the Complainants advising it of financial difficulties to the extent described by the Complainants in their Complaint Form. The Provider notes that none of the mortgage loan accounts (including mortgage loan account 342) entered arrears during their lifetimes. The Provider says that it notes a request made by the Complainants in a letter dated **12 March 2015** for an extension to the term of mortgage loan 388, which was accepted by the Provider.

However, apart from this extension, the Provider says it has no record of any request for forbearance, nor any forbearance offered to the Complainants at any stage, either within the impacted period, or outside of the impacted period. If the Complainants perceived themselves to be under financial pressure and advised the Provider of this, the Provider says it would have been in a position to assist by way of organising periods of forbearance where necessary, either short term or long term. The Provider says it has no such record and it is satisfied that the operation of the mortgage loan accounts was such that it would not have been reasonable to assume that the Complainants were under such financial pressure that the Provider ought to have made contact with the Complainants in this regard.

/Cont'd…

The Complainants' Ability to Make Informed Financial Decisions

The Provider notes that in the Complainants' letter of **4 October 2019**, it is stated that:

> *"*[the Provider] *did not come clean about their wrongdoing at any point from 2008 to allow us to make informed financial decisions."*

In the first instance, the Provider says it would direct this Office to the comments it has made above. The Provider says it acknowledges that the overcharging of interest on the Complainants' account would have had a financial effect the Complainants, in that they were not able to utilise the overcharged funds during the period before the redress and compensation in **January 2014**, **December 2017**, **May 2018**, **November 2018** and **August 2019**. However, the Provider says it would like to make a number of observations in respect of the redress and compensation payments made to the Complainants at these times.

First, the Provider says as noted in its Framework for Redress and Compensation, the redress includes a payment in respect of the time value of money. The time value of money amount represents a payment to reflect additional financial loss suffered by the Complainants for not having access to the money that was used to pay interest at the incorrect rate.

Second, the Provider says the compensation payment made as part of the redress and compensation scheme was designed to compensate the Complainants for loss such as loss of access to funds in a manner that was fair and reasonable for all customers.

Finally, the Provider says it notes the significant compensation offered outside of the Tracker Mortgage Examination Framework to the Complainants on **4 May 2018**. The Provider says this was designed to reflect and compensate the Complainants' efforts in dealing with their complaint in respect of the mortgage loan accounts. The Provider says that to include all redress and compensation offers and the FSPO compensation directed in the Legally Binding Decision in **2014**, to date, it has in total offered the sum of €424,658.82 to the Complainants, which has been accepted by them.

The Provider says that although it accepts that the overcharging on the mortgage loan accounts would have naturally removed a degree of the Complainants' ability to make financial decisions, based solely on the fact they would not have had access to those funds during the relevant period, the Provider says it is satisfied that when taking into account the redress and compensation offered, both within and separate from the Tracker Mortgage Examination, this is sufficient compensation for this loss.

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The Provider states that it is of the view that this level of compensation would not have been awarded to the Complainants if they were to have successfully made a claim for damages for breach of contract such as this, in a litigation context.

The Provider says it understands that the Complainants' contention that its conduct did not allow them to make informed financial decisions, may also be in specific reference to the allegation that the Complainants intended to keep the original primary dwelling house as an investment property. The Provider says that while it does not wish to comment on the outcome of the Independent Appeals Panel and accepts the outcome of that Panel, it notes the following comments made by the Panel in respect of the original primary dwelling house:

> *"The* [Complainants] *in their appeal state they have not been "compensated for loss of home" at* [location] *which they sold in December 2012. The Appeals Panel has carefully considered this aspect of the* [Complainants'] *appeal, and has engaged with both* [the Provider and the Complainants]*. Having done so, the Panel has determined, on the balance of probabilities, that the* [Complainants] *did not lose their former family home as a consequence of the* [Provider's] *overcharging.*
>
> *In reaching this conclusion, the Panel took account of the following facts:*
>
> - *The mortgage drawn under account* [342] *to fund the acquisition of* [the new primary dwelling house] *was for €550,000.00 and the purchase price of the property was €630,000.00;*
> - *The loan offer included a Condition Precedent which required the* [Complainants] *to provide evidence of savings of €120,000.00, prior to the drawdown of that loan;*
> - *The* [Complainants] *had to cover a shortfall in order to redeem the mortgage on* [the original primary dwelling house]*, so there was no equity available from the sale of this property; and*
> - *In their appeal, the* [Complainants] *state that the* [new primary dwelling house] *"required substantial modernisation"*
>
> *Against these facts, the Panel considered the* [Complainants'] *contention that they could have retained* [the original primary dwelling house] *and proceeded with the purchase of* [the new primary dwelling house]*, had the overcharging not occurred.*

/Cont'd…

The [Complainants] *provided a number of Affordability Indicators, which the Panel has carefully assessed. The* [Provider] *also, at the Panel's request, undertook an affordability assessment assuming the overpaid cash was available and tracker rates applied. The outcome of the* [Provider's] *assessment is that "the* [Provider] *would not have had the appetite at the time to approve a trade up mortgage that did not involve redemption of the then existing home loan debt given the high debt level (>€1.2m representing an income multiple of 7.2) and this retrospective view remains unchanged when factoring in the tracker rate failure.*

The Panel observes that the [Complainants'] *Affordability Indicators assume a purchase price of €510,000.00 (as opposed to an actual purchase price of €630,000) and borrowings of €355,000 (as opposed to actual borrowings of €550,000). In selecting these figures, the* [Complainants] *state they took account of savings of €120,000 and the tracker overpayment refund totalling €39,612.88.*

The Panel notes however that this approach does not take into account the requirements to fund the differential between the mortgage and the purchase price of [the new primary dwelling house]*; the transaction costs including stamp duty; the funding of the shortfall on the* [original primary dwelling house]*; the Condition Precedent in the mortgage loan offer letter for* [the new primary dwelling house]*; or any refurbishment costs for* [the new primary dwelling house].

The Panel applied the actual purchase price and the actual mortgage loan amount for [the new primary dwelling house] *to the* [Complainants'] *Affordability Indicators and having done so, accepts the* [Provider's] *assessment that a loan to purchase* [the new primary dwelling house]*, without sale of* [the original primary dwelling house]*, would likely not have been approved or forthcoming.*

This would be the case within any plausible range of rental income for the [original primary dwelling house] *property."*

The Provider submits that the Independent Appeals Panel has given careful consideration to the issues raised by the Complainants and decided to reject their contention that but for the overcharging, the Complainants would have sought to retain the original primary dwelling house in **2012**. The Provider says it accepts the outcome of the Independent Appeals Panel.

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The Complaint for Adjudication

The complaint is that the Provider has failed to offer the Complainants adequate compensation for its failures identified by the Tracker Mortgage Examination regarding their mortgage loan accounts.

Decision

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

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

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

A Preliminary Decision was issued to the parties on **7 September 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of **15 working days**, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of the Preliminary Decision, the Complainants made a submission under cover of their letter to this office dated **15 October 2021**, a copy of which was transmitted to the Provider for its consideration.

The Provider has advised this office under cover of its email dated **26 October 2021** that it has no further submission to make.

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The Complainants, in their submission dated **15 October 2021**, set out, among other things, as follows:

1) *The FSPO does not hold the provider to account in terms of adhering to the provider's own Tracker redress and compensation policy nor does it adhere to Central Bank guidelines;*
2) *The FSPO have failed in its mandate to hold the provider responsible for 'undoing the harm' caused to customers;*
3) *The general tone of the FSPO response is that our family could afford the significant levels of overcharging by the provider and that we should be satisfied with the refund returned to us.*
   We take umbridge to the implication that essentially we are financially comfortable and therefore the bank is not obliged to adhere to agreed policies. It begs the question that if we in fact had defaulted our [sic] mortgage payments as many other during this Financial depression did, would we in fact be treated more justly by the FSPO;
4) *The deep personal impact that the overcharging has had our on family and in particular on our daughter has been ignored and any compensation to somewhat address this has incorrectly not been enforced by the FSPO;*
5) *The fact that we continue to pay for a top-up loan raised for a home that we don't own because of* [the Provider] *financial mis-information. The account should have been cleared by* [the Provider] *when we lost ownership due to the Bank's litany of errors.*

When the Preliminary Decision issued to the Complainants on **7 September 2021**, they were afforded an opportunity to make certain limited submissions in relation to the Preliminary Decision,

> *"… if the said submission falls within one or more of the following categories*:-
>
> *"**1. An Additional Point of Fact**"*
> *….*
>
> *"**2. An Error of Fact…."***

Having reviewed the Complainants' submission, I consider that the points raised in their post Preliminary Decision submission do not fall within the 2 categories set out above.

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I also note that in their submission the Complainants, at point 2, refer to the Financial Services and Pensions Ombudsman (the "FSPO") failing

> "*in its mandate to hold the provider responsible for 'undoing the harm' caused to customers;*

The Complainants also set out, at point 4 of their submission, that

> "*and any compensation to somewhat address this has incorrectly not been enforced by the FSPO;*

Further, the Complainants say

> "[i]*n our opinion overall the FSPO has consistently failed in its mandate to protect consumers".*

It is important to note that the Financial Services and Pensions Ombudsman is an impartial adjudicator of complaints. He is not an advocate for either providers or complainants. He is not a regulator, nor an enforcer. The Financial Services and Pensions Ombudsman does not impose sanctions and it is important not to confuse his role with that of the Regulator, the Central Bank of Ireland.

I also note that the Complainants, at point 5 of their submission, contend that

> "[t]*he fact that we continue to pay for a top-up loan raised for a home that we don't own because of* [the Provider's] *financial mis-information. The account should have been cleared by* [the Provider] *when we lost ownership due to* [the Provider's] *litany of errors.*

The Complainants by letter dated **15 May 2020**, "*while noting that they did not accept the investigation and previous finding of the then Financial Services Ombudsman in **2014**, accepted that this Decision would <u>not</u> re-examine any elements of Complaint which were already the subject matter of that previous Decision of the FSO which investigated their complaint*". The complaint previously investigated was:

> "that upon expiry of the fixed rate terms in place on the Complainants' mortgage accounts [151], [150] and [388], the Bank wrongfully and/or unfairly failed to offer the Complainants the option of switching/reverting said accounts to a tracker rate of interest.

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The Complainants are also disgruntled over the Bank's failure to offer them a Negative Equity Trade Up mortgage following redemption of their loan (account [151]) in 2012. They insist that they were eligible for this type of mortgage as they were in negative equity at the time.

They submit that had they taken out a Negative Equity Trade Up facility in 2012, their existing account [151] would have remained active and they would not have closed off their tracker mortgage.

The Complainants also accepted, in their letter dated **15 May 2020,** that

"the parameters of the complaint that this office has jurisdiction to consider, is that:

'The Provider failed to offer you adequate compensation for the failures identified as part of the Examination with respect to your mortgage loan accounts.'"

Therefore, the matter of any contended "*misinformation*" furnished by the Provider in relation to a "*top-up loan*" leading to the asserted continued loss by the Complainants is not the subject of this Decision.

I have examined the adequacy of the compensation offered by the Provider for the failures identified as part of the Examination in respect of the three mortgage loan accounts the subject of this complaint.

Having considered the Complainants' additional submission and all submissions and evidence furnished by both parties to this office, I set out below the final determination of this office.

Evidence

Redress and Compensation Offered

Account 388

The Provider wrote to the Complainants on **29 November 2017** to inform them that account 388 was charged an incorrect rate of interest for a period and that the Provider was in the process of conducting a review of the account.

/Cont'd…

The letter further advised that the loan account would be moved to a tracker interest rate set out in the relevant loan documentation. Following this, the Provider wrote to the Complainants on **12 December 2017** to advise that an incorrect interest rate had been applied to account 388 between **14 November 2008** and **28 November 2017**.

In terms of the redress and compensation being offered to the Complainants arising from this, I note that page 8 of the letter states, as follows:

> *"**2. Redress for the interest that you overpaid:***
>
> *This applies for the period: 14 Nov 2008 – 28 Nov 2017.*
>
> | | | |
> |---|---|---|
> | *A)* | *How much you paid:* | *€54,005.34* |
> | *B)* | *What your total repayment should have been if correct tracker rate has been applied* | *€21,196.29* |
> | *C)* | *Total interest that you overpaid* | |
> | | *(A – B)* | *€32,809.05* |
> | *D)* | *Interest we will pay to you to reflect the time value of money* | *€1,640.45* |
> | | ***Total Redress (C + D)*** | ***€34,449.50*** |
>
> ***3. Compensation:***
>
> | | |
> |---|---|
> | *Compensation for the Bank's failure**:* | *€3,444.95* |
>
> […]
>
> ***4. Independent Professional Advice:***
>
> | | |
> |---|---|
> | *Payment towards the cost of getting Independent professional advice if you want to get it* […]*."* | *€1,000.00* |

/Cont'd…

The amount of redress and compensation offered in respect of account 388 totalled €38,894.45. This letter also provided a breakdown and reconciliation in respect of the interest actually charged to account 388 and that which should have been charged.

Account 150

By letter dated **21 January 2014**, the Provider made the following offer to the Complainants in respect of the interest charged to loan account 150:

> *"Mortgage Loan Account* [150]
> *Return to a Tracker Variable ECB +1.3% from 14 November 2008*
> *Difference in interest rates @ 20 January 2014 €5,109.17"*

On **31 January 2014**, the Provider wrote to the Complainants to advise that a refund of €5,151.53 would be made in respect of account 150. This letter also enclosed a breakdown and reconciliation in respect of the interest actually charged to account 150 and that which should have been charged by reference to the applicable ECB rate.

I note that in a letter to the Complainants dated **29 May 2018**, the Provider sought to explain why this loan account was not deemed 'impacted' under the Tracker Mortgage Examination, as follows:

> *"You have correctly pointed out that the tracker rate failure in relation to account* [151] *was identified at the same time as that on account* [150]*. However, account* [150] *was restored to a tracker rate on the 30th January 2014 and a redress payment was made at that time following the Financial Services and Pensions Ombudsman's ruling.*
>
> *For this reason no further detriment occurred on the account and as a result it is not deemed as impacted. This differs to account* [151] *which closed in December 2012 on an incorrect rate.* […]*."*

Account 151

The Provider wrote to the Complainants on **4 May 2018** to advise that an incorrect interest rate had been applied to account 151 between **14 November 2008** and **17 December 2012**.

/Cont'd…

In terms of the redress and compensation being offered to the Complainants arising from this, I note that page 7 of the letter states, as follows:

> *"**2. Redress for the interest that you overpaid:***
>
> *This applies for the period: 14 Nov 2008 – 17 Dec 2012.*
>
> | | | |
> |---|---|---|
> | *A)* | *How much you paid:* | *€69,673.01* |
> | *B)* | *What your total repayment should have been if correct tracker rate has been applied* | *€44,239.74* |
> | *C)* | *Total interest that you overpaid (A – B)* | *€25,433.27* |
> | ***D)*** | *Interest we will pay to you to reflect the time value of money* | *€1,271.66* |
> | | ***Total Redress (C + D)*** | ***€26,704.93*** |
>
> ***3. Compensation:***
>
> | | |
> |---|---|
> | *Compensation for the Bank's failure:* | *€2,670.49* |
>
> […]
>
> ***4. Independent Professional Advice:***
>
> | | |
> |---|---|
> | *Payment towards the cost of getting Independent professional advice if you want to get it* […]*."* | *€250.00* |

The total amount of redress and compensation offered in respect of account 151 totalled €29,625.42. This letter also provided a breakdown and reconciliation in respect of the interest actually charged to account 151 and that which should have been charged. The Complainants were also advised (at page 6) that, in light of the direction for redress and compensation of €30,126.13 made by the Financial Services Ombudsman in the Legally Binding Finding in 2014, no further payment in respect of the Examination would be made.

/Cont'd…

Accounts 388, 150 and 151

By letter dated **4 May 2018**, the Provider wrote to the Complainants in respect of accounts 650, 388, 151 and 342, as follows:

> *"I refer to phone call with* [the Second Complainant] *on 20th February 2018. I apologise for not being able to revert until now.*
>
> *The Bank had hoped to revert sooner but it has taken longer to formulate the offer to you than expected as the nature of your case is unusual and is outside the normal scope of the Tracker Mortgage Examination.*
>
> *Attached you will find a standard pack under the Tracker Mortgage Examination. This pack concludes that you were entitled to redress and compensation of a total of €29,625.42. However, under the standard set by the Tracker Mortgage Examination, the Bank reduces that award by any amount awarded to you by the Financial Services Ombudsman (FSO). As you are aware, the FSO awarded you a total of €30,182.57. Once we reduce the redress and compensation by this figure there is no remaining amount payable.*
>
> *That outcome of the Tracker Mortgage Examination will not be satisfactory to you. Nor will it satisfy the Bank as it wishes to make you a substantial offer of compensation. For the reason above, the Bank must make this offer outside of the Tracker Mortgage Examination. This letter outlines the offer the Bank is making to you.*
>
> *The Bank is willing to offer you the substantial sum of €348,697.12 as a gesture of goodwill and an expression of sincerity of its apology for not addressing the issues you have raised on the accounts in a timely and holistic fashion. The Bank repeats its apologies for this and the sum offered is intended to reflect the time and energy you have invested over an extensive period of time to put things right.*
>
> *The Bank acknowledges that the cumulative impact of denial of a tracker rate across your 3 mortgage accounts was a significant factor that you have raised with the Bank in your decision to sell the* [original primary dwelling house]. *However, the Bank also notes that you did not originally claim that you would have retained both the property at* [the original primary dwelling house] *and* [the new primary dwelling house] *in 2013-14. You asserted something rather different as I explain below.*

/Cont'd…

From a review of your file, it is clear that you decided to sell your prior home at [original primary dwelling house] *for a number of reasons not solely connected to the tracker issue; and the Financial Services Ombudsman found that was so as a matter of fact in 2014. You did not assert in your original complaint that you wished to retain both houses* […]. *Instead you made very clear in your complaint that you would not have moved to your present home at* [location] *if you realised that entailed losing the tracker rate for your mortgage loan that was secured on* [the original primary dwelling house] *(account* [151]*). The FSO did not up-hold that point* […].

Notwithstanding this, the Bank has sought to quantify its offer of compensation in a tangible manner, being the assumption, that you would have retained the [original primary dwelling house] *(on its tracker rate) and purchased your present family home at* [location]*, or indeed an alternative property, if the Bank had sooner put you on a tracker rate on accounts* [388] *and* [159] […].

On balance the Bank has not categorised your sale of the property […] *as "direct causation" of loss of property in the language of the Tracker Mortgage Examination. Examples of direct causation are cases where arrears result in repossession or voluntary sale by the borrower but where it is considered likely that an appropriate forbearance treatment could have been offered if the lender had charged the correct tracker rate.*

Notwithstanding that there was not direct causation, the Bank is anxious to ensure you are paid the sum you would be due if it was such a case. The sum of €348,697.12 offered is intended to equal the increase in value of [the original primary dwelling house] *between the date you sold it and today. I set out more detail on how we have calculated this below.*

Capital Appreciation Amount: €348,697.12

If you hadn't elected to sell the property, you would have benefited from an increase in value. Your property was sold on 14th December 2012 for €460,000. We estimate that its current value is €808,697.12, a capital appreciation of €348,697.12.

/Cont'd…

A breakdown as to how this figure has been calculated can be seen below.

A)	*Date of Sale*	*[Date redacted] 2012*
B)	*Selling Price of Property*	*€460,000*
C)	*Central Statistics Office Residential Property Price Index at time of sale*	*59.1%*
D)	*Central Statistics Office Residential Property Price Index as at Feb 2018*	*103.9%*
E)	*Increase in CSO Index:* $\underline{E=(D-C)*100)}$ C	*75.80%*
	*Increase in property price based on increase in CSO Index (B*E)*	*€348,697.12*

[…].*"*

Appeal to the Independent Appeals Panel

I note that the Complainants completed a 'Redress and compensation appeal form' dated **3 September 2018**, in respect of accounts 388, 150 and 151, appealing the redress and compensation offered by the Provider under three categories.

The Complainants set out their position under each of the following three categories:

"1. […]

[150] *- No redress & compensation paid – no dates accounted for*

[151] *- Redress only paid to Dec 2012. Successor account not redeemed (*[342]*) No compensation paid.* […]

5. […]

[151] *- not compensated under CBI Framework*
- home not classified as lost

/Cont'd…

- no tracker reinstated
- not compensated for loss of home
- not compensated for impact on our family, especially [the Complainants' children]

6. […]

[151] *- no compensation paid*
no tracker returned
house not deemed "lost"
not rectified within CB Framework

[150] *No Redress & Compensation paid* […]

Section C: Oral hearing […]

The whole issue has been so distressing to our family. We find it difficult to discuss but we will make ourselves available to the Panel if required, and if anyone needs clarification. The issues and impact on [the Complainants' children] *are particularly difficult."*

The Complainants also enclosed a 13 page letter dated **5 August 2018,** in support of their appeal.

At the second and third pages of this letter, the Complainants state:

*"**Redress***

Account [151]*:*

[The Provider] *admitted they had failed to reinstate the Tracker to our account in 2014 (just months after the accounts closed and our home was sold). The amount of overcharge up until account closure was €25,433.27. The Tracker rate (ECB + 1%) was not returned to us. We had been requesting the return of this tracker on our home since 2008 when the account rolled off a fixed rate. The Bank continued to deny we had an entitlement to a Tracker rate on this account until 2014 just after our account closed* […].

The Financial Services Ombudsman (FSO) in their findings that issued on 09/09/2014 awarded compensation of only €2,500 in 2014 "to compensate for the Bank's failure to offer to reinstate account [150] *to the original tracker rate whilst said account remained active".*

/Cont'd…

The Bank has decided not to deem account [151] *impacted under the current Central Bank Framework per their letter dated 04/05/2018. The Bank state that once the FSO compensation of €2,500 is taken into account the Bank believes nothing further is due. No redress, rate rectification or compensation has been paid for the loss of our home. The Bank claims "on balance" that there is no "direct causation" from the Banks actions for the loss of our home.*

The Bank has instead attempted to circumvent the Central Bank Framework and has paid us a "goodwill" gesture.

By ignoring the Central Bank Framework the Bank are trying to avoid returning our Tracker and over 10 years later we have not been returned to the position we would have been in had the "error" not occurred. The Bank has decided not to deem the property "lost".

The Bank's "goodwill gesture" has been calculated based on the "capital appreciation" value of our former home since it's sale in 2012 of €348,697. The calculation excludes the negative equity of €73,000 that remained on the sale of the home.

Account [150]*:*

The Tracker rate was reinstated to this account in February 2014 (ECB + 1.3%) when we complained to the Bank and requested a review. The amount of overcharge was €5,150.74. No compensation has been paid. The Bank has decided that this account is not deemed impacted under the Tracker review and is not due any compensation.

Account [388]*:*

In the face of significant pressure emanating from the Tracker scandal, Account [388] *was redressed in December 2017. A Tracker rate (ECB + 1.1%) was reinstated on the account. The amount of overcharge was €32,809.05. Refund issued of €32,809.05. A minimal amount of compensation was paid of €3,444.95, which does not in any way reflect the harm and stress caused.* […]*."*

/Cont'd…

Beginning at the tenth page, the letter states:

> *"**Family Impact of Bank's overcharging***
>
> ***Impact on* [the Complainants' Second Child]**
>
> *1. Birth Injury caused due to lack of funds to pay for Private Consultant*
>
> [The Complainants' Second Child] *was born on* [date redacted] *2013, following an extremely stressful pregnancy exaggerated by the discovery of the loss of the Tracker on our home, the extent of the overcharging and the defensive stance by the Bank. We were unable to afford to pay for a Private Consultant for* [the Complainants' Second Child's] *birth due to the actions of* [the Provider] *and the level of overcharging; €1,355 per month. Again to reiterate in December 2012 the Bank owed us €39,612.88 in overpayments. We had been forced to apply all our savings to the purchase of* [the new primary dwelling house]*. €25,000 paid in clearance of negative equity on loan account* [151] *and we were continuing to pay off the remaining negative equity on loan account* [150]*.*
>
> *We could not afford to pay for a private obstetrician.*
>
> [The Complainants' Second Child's] *Legal Team* […] *have received Medical Reports from independent medical experts that confirm a lack of duty of care by inexperienced Medical Staff at* […] *birth.*
>
> *The birth injuries sustained* […] *were completely avoidable if her birth had been carried out by an experienced Consultant.* [The Complainants' Second Child] *suffered paralysis, neurological damage and psychological damage.*
>
> [The Complainants' Second Child] *is currently in receipt of services from* [details redacted]*.* [The Second Complainant] *returned to work after her birth to continue to earn enough for* [the Complainants' Second Child's] *countless additional Private Interventions and to ensure the household income was sufficient to support the* [Provider] *mortgage payments (the Bank continued to overcharge us on Acc* [388] *until December 2017, we continue to pay off negative equity loan account* [150] *and we now pay out new Home Loan at standard Variable rates).* [The Second Complainant] *did however have to take a step back from her Career and reduce her working week to 4 days to accommodate* [the Complainants' Second Child's] *ongoing medical appointments. Please find spreadsheet attached detailing some of those costs.*

/Cont'd…

2. Renovations to house

The [new primary dwelling house] *required substantial modernisation. In 2014 the* [Provider] *withdrew their Offer of a Top Up mortgage of €60,000 and proactively attempted to dissolve any relationship. To be clear the Top Up Mortgage which was applied for and approved originally in 2013 was to enable basic remedial works to be carried out* […]. *These works included upgrading of heating. Subsequent to the approval and subsequent to* [the Complainants' Second Child's] *birth injury the funds were also required to allow a reconfiguration of layout to benefit* [the Complainants' Second Child] *and her additional needs due to her disability. Planning was granted and works were due to commence but* [the Provider]*, further to the Finding issued from the FSO dated 09/09/2014, refused to issue an updated Offer and allow drawdown.* [The Provider] *were fully aware that the Top Up Loan was critical to our situation to ensure essential works were carried out. To date* [the Provider] *has stated that this was merely an error on their behalf.*

Their "error" forced us to move our Home Loan to [another financial service provider] *to ensure we could pay the builder who had already commenced works and was threatening to close the site due to non payment.* [The financial service provider] *approved the loan plus top up within 24hrs. The new loan was of course at their standard variable rate.*

We lodged a complaint with [the Provider] *about the withdrawal of our top up and treatment which was progressed to the FSO. The FSO recommended that the Complaint be put on hold pending the outcome of the Tracker Review.*

However in December 2017 the [Provider] *issued an FRL in relation to this complaint. On one hand the* [Provider] *was supposedly in communication with us over the Tracker Issue and a Senior Manager had been appointed to our case but then in a threatening and defensive manner an FRL issued defending their position. At one point the Bank even highlighted our marital breakdown when* [the First Complainant] *vacated the family home over the familial distress associated with Finances and* [the Complainants' Second Child's] *Birth Injury.*

***Impact on* [the Second Complainant]**

[The Second Complainant] *suffered several physical medical complications as a result of the birth of* [the Complainants' Second Child].

/Cont'd…

However the overwhelming and enduring damage has been psychological, exacerbated over the last number of years with the discovery of the level of [the Provider's] *overcharging when we as a family believed we could not even afford a private consultant, and since by the continued treatment and retention of monies owed to us over the critical early intervention years for* [the Complainants' Second Child]*. Our financial outlay in costs are detailed in the attached spreadsheets.*

[The Second Complainant] *was diagnosed by* [Professor] *with PTSD and depression on 22/05/2015. She has continued to receive counselling, psychiatric help and medication* […]*. She suffers ongoing anxiety, panic attacks and depression and is on ongoing medication for same. In addition she has had the added burden of continuing her job, albeit on a reduced week to facilitate* [the Complainants' Second Child's] *appointments and working outside of hours in an unpaid capacity, to ensure ongoing repayments are met to a home loan at a grossly inflated rate of interest.*

***Impact on* [the Complainants' First Child]**

[The Complainants' First Child] *has been psychologically scarred and has changed from a happy child into one consumed with fear and anxiety since the birth of her dearly longed for sister. She has been subjected to the impact of the financial and psychological distress (including marital breakdown) that her parents have been consumed by over the last few years, due to the* [Provider's] *actions. She is currently attending a child psychiatrist with the HSE primary care unit* […]*.*

In summary, [the Provider] *has through their actions caused immeasurable damage and detriment to our family. The strategy that they pursued with us just to cover up the Bank's Tracker Issues was cruel and sustained relentlessly over the past 10 years despite numerous opportunities to stop the harm.*

We note that the Bank has now changed its position and is now allowing all their Customers to move home and retain their Tracker and not just in negative equity situations like ours was. [The Provider] *instead chose to act with complete contempt for our family and that has led to an enormous and detrimental impact on our lives and the lives of our* [child] […].

We want [the Provider] *to correctly assess our case within the Tracker Mortgage Review Process as outlined by the Central Bank and we want to be redressed appropriately for the loss of our home and the loss of our Tracker rates.* […]*."*

/Cont'd…

I note that in an information request dated **5 October 2018**, the Appeals Panel requested that the Provider *"elaborate on the Bank's rationale for the "gesture of goodwill" payment"*.

In a response dated **13 May 2019**, the Provider stated, as follows:

> *"The Bank made a compensation payment in the amount of €348,697.12 and did so outside of the Tracker Mortgage Examination Framework. The primary motivation for making this payment was the significant time delay in resolving the customers' complaint noting that the customers originally raised their concerns regarding the interest rate on account* [151] *in November 2008.*
>
> *The compensatory payment was intended to reflect and compensate the customers for the energy they expended in attempting to resolve matters with the Bank noting that despite the fact that their complaint was referred to the FSPO in 2014 further investigation and remediation was subsequently required to address the Bank's failure in relation to the tracker rate across their 3 mortgage accounts.*
>
> *This additional compensation has been provided outside the TME due to the customers' unique circumstances and in recognition of an accumulation of errors and issued across a number of the customers' account allied to the very unfortunate personal circumstances whilst not a cause factor, had an outsized impact on the customers themselves.*
>
> *While the methodology employed by the Bank in arriving at the compensation value was based on a precedent established under the TME that commonality does not constitute and should not be construed as a further impact under the Tracker Mortgage Examination.*
>
> *The Bank determined that the customers decided to sell their original PDH* […] *for a number of reasons not connected to the tracker issue; and in 2014 the Financial Services Ombudsman also found that to be the case."*

Further Redress and Compensation

I note that by letter dated **23 November 2018**, the Provider wrote to the Complainants in respect of account 151, advising that it had found a further error in its calculations regarding a number of accounts, including account 151.

/Cont'd…

In this respect, the letter explained:

> *"In short, we charged you a fee for ending a fixed mortgage rate period early. Had you been on a tracker rather than a fixed rate, this fee would not have featured. Please accept our apologies for this.* […]
>
> | | |
> |---|---|
> | *Refunded fixed rate breakage fee* | *€2,218.00* |
>
> […]"

The Provider wrote to the Complainants again on **15 August 2019** in respect of account 150, offering a compensation payment in the amount of €515.15, as follows:

> *"In 2014 we reviewed a number of* [Provider] *Mortgage Accounts, unrelated to the later Tracker Mortgage Examination. We did this to ensure that our customers' contractual and regulatory rights were being fully honoured. Your* [Provider] *Mortgage Account* [150] *was part of this review.* […]
>
> *Following our previous review, we offered you a refund of €**5,151.53** in 2014 for the interest we overcharged. However, we did not include a compensation payment as part of this refund.* […]
>
> *To put this right, we want to offer you a compensation payment of €**515.15**."*

Outcome of Appeal

I note that the Appeals Panel issued a decision dated **11 September 2019** in respect of loan accounts 388 and 151. However, as a letter of offer of redress and compensation had not been provided in respect of loan account 150, the Appeals Panel stated that it could not hold an appeal in relation to that loan account. The Appeals Panel did not uphold the appeal. In the context of the present complaint, the Appeals Panel stated, as follows:

> *"Health and Family Wellbeing*
>
> *The Appeals Panel acknowledges the difficult health and family wellbeing issues which have been experienced by the Customers and their two children,* [names redacted].

/Cont'd…

The Panel cannot reasonably attribute these issues to the overcharging either directly or indirectly, but does acknowledge that the overcharging, particularly in the period between 2008 and 2012 must inevitably have compounded the stress being suffered by the Customers. As the Panel cannot attribute any causation to the Bank for these issues, it follows that the Customers' claim for detriment and for expenses listed in the Customers' appeal are not upheld.
[…]

Compensation

While recognising that this is a very difficult case, the Panel is not satisfied that compensation over and above that already awarded by [the Provider] *within the Tracker Mortgage Examination (€6,115.44), and on a goodwill basis outside the Tracker Mortgage Examination (€348,697.12) is warranted."*

Analysis

It is clear that the Complainants believe that the Provider has failed to offer adequate redress and compensation to them in respect of the overcharging of interest on their loan accounts. In this respect, the Complainants have identified a number of matters for which they believe that either no compensation, or inadequate compensation, has been received.

I have noted that in their letter of **February 2020**, the Complainants state that they were unable to afford private health care for the birth of their second child, who they say suffered injury during her birth at the hands of junior doctors.

In the letter dated **5 August 2018** accompanying their appeal to the Appeals Panel, the Complainants state that they were unable to afford to pay for a private consultant due to the Provider's overcharging of interest of €1,355.00 per month.

While the Complainants attribute their inability to pay for private medical care for the birth of their second child in **September 2013** to the Provider's conduct, they have not provided any evidence to demonstrate a lack of affordability. The Complainants have simply pointed to the fact that their loan accounts were being overcharged. However, I do not accept that this fact alone shows that the Complainants could not afford private medical care. In this respect, I note that the extent of the overcharging in the year **2013** does not appear to align with the Complainants' comments that they were being overcharged €1,355 per month.

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For instance, loan account 151 was redeemed in **December 2012** and overcharging ceased at this point. From **January 2013** to **September 2013**, loan account 388 appears, on average, to have been overcharged by around €400.00 per month and loan account 150 appears, on average, to have been overcharged by €130.00 per month. As a result, in the months leading up to the birth of the Complainants' second child, they were being overcharged by approximately €530.00 per month which, whilst significant, is much less than suggested by the Complainants.

I note that none of the Complainants' loan accounts appear to have fallen into arrears or that any form of forbearance was requested by the Complainants prior to the birth of their second child. If the Complainants were experiencing affordability issues, it is reasonable to expect them to have engaged with the Provider, or any of their other creditors for that matter, to seek some form of arrangement regarding their loans in order to assist with any affordability issues they were experiencing.

I also note that in a 'MMail' dated **15 October 2012**, that both Complainants had very good salaries: the First Complainant is recorded as having a gross basic salary of €93,380.00 and the Second Complainant is recorded as having a gross basic salary of €67,500.00 – giving a combined income of €160,880.00.

Further to this, the Complainants have not provided any evidence of their monthly expenditure during the periods of overcharging or in the months leading up the birth of their second child or any evidence that they were experiencing difficulty meeting their monthly expenses to an amount equal to or greater than the amount by which they were being overcharged in interest payments, such that they were unable to afford private medical care.

Accordingly, I do not accept that the Complainants were unable to afford private medical care as a result of the overcharging which occurred on their loan accounts.

Leading on from this, I do not accept that the unfortunate injury sustained by the Complainants' second child can be attributed to the Provider's conduct and in my opinion, such a link is simply something which is too remote. In any event, it would appear from the evidence that the medical staff who delivered the Complainants' child were directly responsible for the injury sustained. I also note from the Provider's evidence that the Complainants sought to recover and may have received financial compensation arising from this injury. Consequently, it would be unreasonable and unfair to seek further compensation from the Provider for the same injury in circumstances where compensation may already have been paid, even if the injury could be attributed to the conduct of the Provider, which I am of the opinion, it cannot.

/Cont'd…

In respect of the psychological issues experienced by the Complainants' first child, the Complainants appear to attribute this to the circumstance of the birth of their second child and *"the financial and psychological distress (including marital breakdown) that her parents have been consumed by"*. Having considered the matter at length, I do not accept that the Provider is responsible for any psychological impact that its failure to apply the correct interest rates to the Complainants' loan accounts, had on the Complainants' first child.

It is my opinion that this type of adverse impact is too remote to foresee, and I do not accept that this is something that the Provider can reasonably be expected to provide compensation for.

In their letter of **4 October 2019**, the Complainants say that the Provider *"did not come clean about their wrongdoing at any point from 2008 to allow us to make informed financial decisions"* and the *"blatant "misinformation" resulted in us making huge financial decisions based on incorrect information"*.

In respect of the sale of the original primary dwelling house, the Appeals Panel stated that:

> *"The Customers in their appeal state they have not been "compensated for loss of home"* […] *which they sold in December 2012. The Appeals Panel has carefully considered this aspect of the Customer's appeal, and has engaged with both the* [Provider] *and the Customers. Having done so, the Panel has determined, on the balance of probabilities, that the Customers did not lose their former family home as a consequence of the Bank's overcharging."*

Further to this, the previous Legally Binding Finding of **2014** of the Financial Services Ombudsman ("the FSO") stated that:

> *"Although the Complainants insist that they would not have moved house and redeemed account* [151] *had they been permitted to re-avail of their original tracker rate with effect from 2008, there is no real evidence before me to suggest that the Bank's failure to offer them a tracker rate was indeed the real or pivotal motivation behind the Complainants' decision to purchase a new family home."*

In light of the foregoing findings, I do not accept that the Provider was, or indeed is, obliged to compensate the Complainants for any matters concerning the sale of the original primary dwelling house.

/Cont'd…

I note that in the letter accompanying their appeal to the Appeals Panel, the Complainants also refer to issues surrounding a top-up loan. However, that issue is the subject of a separate investigation by this Office and having considered the evidence, I am not satisfied that any difficulty experienced in respect of this top-up loan, arose from the overcharging which occurred on the Complainants' loan accounts.

In this respect, I note the following passage from the Complainants' letter:

> *"… but* [the Provider]*, further to the Finding issued from the FSO dated 09/09/2014, refused to issue an updated Offer and allow drawdown.* [The Provider] *were fully aware that the Top Up Loan was critical to our situation to ensure essential works were carried out. To date* [the Provider] *has stated that this was merely an error on their behalf."*

Outside of the matters discussed above, the Complainants have not identified specific instances where they were unable to make informed financial decisions nor have they identified the *huge financial decisions* that were made based on incorrect information.

However, I am satisfied that the amounts overpaid by the Complainants in interest payments on their loans deprived them of access to a certain amount of money from month to month during the periods of overcharging and thereby is likely to have influenced their spending habits, to some extent, during this time. Accordingly, this warrants compensation.

Further to this, as noted above, I am not convinced that the overcharging had a significant impact on the Complainants' ability to maintain their loan repayments and, by extension, their monthly expenditure requirements. Accordingly, while there may have been some stress and inconvenience arising from the overcharging, this has not necessarily been established from the evidence. The stress and other psychological effects experienced by the Complainants appear to have arisen once they became aware of the overcharging and also from the unfortunate injury sustained by their daughter during her birth, but not necessarily because of, or during the period of, the overcharging. However, it is my opinion that the stress and inconvenience caused by, and arising from, the Provider's conduct nonetheless warrants compensation.

With this in mind, I consider it appropriate to examine the redress and compensation offered by the Provider in respect of each of the loan accounts.

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Account 388

Account 388 was subject to overcharging of interest for the period **November 2008** to **November 2017**. Arising from this, the Provider sought in late 2017 to re-instate the correct interest rate to this loan account, being the ECB tracker rate, and to provide redress and compensation to the Complainants.

In respect of the redress and compensation, in its letter of **12 December 2017**, the Provider calculated this overcharge to amount to €32,809.05, being the difference between the interest actually charged to the loan account and the interest which should have been charged to the loan account.

When overcharging occurs, it is my opinion that a financial services provider is obliged to refund to the customer the amount of interest that has been overcharged. In this complaint, the Provider has sought to do this and, in its correspondence to the Complainants, has provided details of how the overcharging occurred, when it occurred, and the amount overcharged. However, I note that the Complainants have not identified any error or shortcoming on the part of the Provider in its calculation of the amounts by which loan account 388 was overcharged or the period during which the overcharging occurred. In such circumstances, I am satisfied that the amount of €32,809.05 reasonably reflects the amount by which loan account 388 was overcharged during the period **November 2008** to **November 2017**.

In addition to this, the Provider offered further redress in the amount of €1,640.45 representing the time value of money, to recompense the Complainants for the financial loss associated with not having access to the excess money paid to the Provider by way of overcharged interest. The Provider advises that the basis of calculation for this amount is 5% of the interest overcharged to loan account 388 (that is, €32,809.05 x 5%).

Following on from my comments above, when overcharging occurs, a financial service provider is reasonably expected to compensate a customer for being deprived of the money they would otherwise have had at their disposal, if the overcharging had not occurred. In the present complaint, the Complainants have not set out any basis which would suggest that manner in which the Provider has offered redress for the time value of money is wrong or unreasonable or could not be considered an appropriate means of redress for the overcharging. In the circumstances, I consider that redress for the time value of money, calculated at 5% of the total amount overcharged represents a reasonable amount of compensation for financial loss arising from being deprived of access to and use of these overcharged amounts.

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The Provider also offered a compensation payment to the Complainants for its failures associated with the overcharging. In the context of loan account 388, the Provider offered compensation in the amount of €3,444.95. The amount of compensation is calculated at 10% of the total redress offered [(€32,809.05 + €1,640.45 = €34,449.50) x 10%]. In its Complaint Response, the Provider says compensation is based on its understanding of the detriment suffered which includes inconvenience, harm, unavailability of funds, personal suffering and hardship for instance.

Having considered the matter in detail, I am satisfied that compensation in the amount of €3,444.95 is a reasonable amount of compensation in respect of the overcharging which occurred on this loan account.

A final payment offered as part of the redress and compensation in respect of loan account 388 was €1,000 for the purpose of obtaining independent profession advice. The Complainants have not provided any evidence to show that they sought professional advice arising from this redress and compensation letter, the details of any such advice or the cost incurred in obtaining that advice. Further to this, the Complainants do not appear to have challenged the adequacy of this payment and neither have they offered any evidence to show it was insufficient for the purpose of obtaining professional advice. In the circumstances, I am satisfied that a payment of €1,000 is a reasonable amount to offer the Complainants for the purpose of obtaining professional advice arising from the overcharging which arose on their loan account.

Accordingly, having regard to the fact that loan account 388 was restored to the appropriate tracker interest rate and the redress and compensation offered by the Provider on **12 December 2017**, I am satisfied that adequate compensation was offered by the Provider in respect of this loan account arising from the failure to apply the correct rates of interest to the loan account for the 9 year period between **November 2008** and **November 2017**.

Account 150

By letter dated **21 January 2014**, the Provider offered to return loan account 150 to a "*Tracker Variable ECB +1.3%"* from **14 November 2008** and to refund the difference between the interest charged to this loan account and the interest that would have been charged by reference to the relevant tracker rate, for the period of five years plus, between **November 2008** and **January 2014**. On **31 January 2014**, the Provider advised the Complainants that this refund would amount to €5,151.53. A number of years later, the Provider wrote to the Complainants on **15 August 2019** noting that while a refund of overcharged interest was made, an amount in respect of compensation was not offered.

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In this letter, the Provider proceeded to offer €515.15 by way of compensation for the overcharging of interest.

The evidence is that loan account 150 did not form part of the Provider's Tracker Mortgage Examination and that the Provider did not seek to compensate the Complainants for any overcharging which occurred on this loan account as part of the Tracker Mortgage Examination.

However, the Provider's evidence is that it sought to maintain a similar approach and therefore to compensate the Complainants by reference to the redress schemes in place in respect of its **2011** and **2018** Mortgage Reviews.

I note that loan account 150 was ultimately returned to a tracker interest rate. In this respect, I note that in the Provider's letter of **7 October 2013**, it offered to allow the Complainants to break out of their current fixed rate arrangement and return to the relevant tracker rate with effect from **14 November 2008**. In addition, the Provider offered to waive the 'broken funding compensation fee'.

In its letter of **31 January 2014**, the Provider advised the Complainants of a refund of €5,151.15 in respect of overcharged interest. Also enclosed with this letter was a detailed breakdown, on a daily basis, of the difference between the interest charged to this loan account and the interest that would have been charged if the appropriate tracker rate was applied. However, I note that the Complainants have not identified any error or shortcoming on the part of the Provider in its calculation of the amounts by which this loan account was overcharged or the period during which the overcharging occurred. In such circumstances, I am satisfied that the amount of €5,151.15 reasonably reflects the amount by which loan account 150 was overcharged during the period of a little more than five years, between **November 2008** and **January 2014**.

Following this, the Provider offered compensation in respect of the overcharging in the amount of €515.15. In contrast to loan accounts 388 and 151, the Provider did not offer redress in the form of a time value of money payment or an amount for the purpose of obtaining independent professional advice. As can be seen, these payments were made on foot of the schemes in place in respect of the Tracker Mortgage Examination. However, in my opinion, it has not been established that the Provider was required to offer redress and compensation in respect of loan account 150 as part of the Tracker Mortgage Examination or strictly by reference to the framework in place for redress and compensation under the Tracker Mortgage Examination.

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As I have stated above, when overcharging occurs, it is my opinion that a financial services provider is expected to pay a reasonable amount to compensate for this conduct in addition to refunding the amount overcharged. However, I do not accept that compensation has to be offered specifically by reference to a time value of money payment with a separate compensation amount, together with a further amount for professional advice. It is my opinion that the amount of compensation offered must be reasonable. In this instance, the Provider offered an amount of compensation that was 10% of the amount by which the account was overcharged (i.e. €5,151.15 x 10%).

Having considered the matter in detail, I am satisfied that compensation in the amount of €515.15 is a reasonable amount of compensation in respect of the overcharging which occurred on this loan account.

Accordingly, having regard to the fact that loan account 150 was restored to the appropriate tracker interest rate and noting the refund and compensation offered by the Provider, I am satisfied that adequate redress and compensation was offered by the Provider in respect of this loan account arising from the failure to apply the correct rates of interest to the loan account for the period **November 2008** to **January 2014**.

Account 151

Account 151 was subject to overcharging of interest during a four year period from **November 2008** to **December 2012**, when it was redeemed. As a result of this, the Provider sought to offer redress and compensation in its letter of **4 May 2018**. This comprised a refund of overcharged interest of €25,433.27; a time value of money payment of €1,271.66; a compensation payment of €2,670.49; and €250 for the purpose of obtaining independent professional advice – all of which totalled €29,625.42. However, this letter also referenced the Legally Binding Finding from the FSO in **2014**, arising from which, the Provider had been directed to pay the amounts stipulated in its letter of **4 July 2013** together with an amount of compensation.

In the Legally Binding Finding of the FSO, he considered a complaint in respect of the Provider's conduct regarding the application of the appropriate interest rates to the Complainants' loan accounts, including loan account 151. Following the investigation, the FSO formed the view that there were certain failings on the part of the Provider as to its conduct in respect of the interest rates to be applied to loan account 151. In these circumstances, the FSO then considered whether the settlement offer proposed by the Provider was sufficient.

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In this respect, the Provider's settlement proposal was noted, and considered, as follows:

> *"By letter dated 4 July 2013 the Bank offered to provide the Complainants with an interest refund of €25,464.57 to cover the difference in interest charged to account* [151] *when an interest rate other than the contractual tracker rate was applied (after the 14 November 2008) and in addition, to reimburse them for the breakage fee (€2,218) they were required to pay to exit the second fixed rate agreement in 2012.*
>
> *Given that the combined amount of €27,682.27 will serve to restore (the now closed) account* [151] *to the position it would have been in, had a tracker rate been applied with effect from the expiry of the first fixed rate term, I am of the view that the sum of €27,682.57 will go some way to redressing the Complainants for the error perpetrated on their account.* […] *I believe that an additional monetary amount must also be provided to the Complainants to compensate them for the Bank's failure to offer them the opportunity of reverting to their original tracker rate, while account* [151] *was extant."*

Later in the Legally Binding Finding, the then FSO stated that:

> *"To mark my Finding in respect of account number* [151]*, I direct the Bank to pay to the Complainants the amounts stipulated in its letter to the Complainants dated the 4 July 2013 (i.e. an interest refund of* ***€25,464.57****, together with breakage fee reimbursement in the amount of* ***€2,218****). I further direct the Bank to pay to the Complainants an additional amount of* ***€2,500*** *to compensate them for the Bank's failure to offer to reinstate account* [151] *to the original tracker rate whilst said account remained active."*

The total amount the Provider was therefore directed to pay in **2014**, was €30,182.57.

I note that in its letter of **4 May 2018**, the Provider cited the amount it was directed by the FSO to pay as €30,126.31. Although this is not at correct figure, the evidence does not suggest that the Provider paid an incorrect amount to the Complainants arising from the Legally Binding Finding. It appears that this may have simply been a typographical error; particularly as the correct amount was cited by the Provider in the second letter of **4 May 2018** and in its Complaint Response.

While the interest refund amount cited in the Legally Binding Decision is €25,464.57, I note that the amount stated by the Provider as being overpaid in its letter of **4 May 2018** is €25,433.27, a difference of €31.30. However, it is not clear why there is a difference between the two amounts and I would have expected both amounts to be the same.

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In any event, it is my view that as part of the Legally Binding Decision, the FSO engaged in an assessment of the appropriate amount of compensation payable to the Complainants arising from the failures associated with the charging of interest on loan account 151. As can be seen, the adjudication of the FSO directed that an amount of €30,182.57 was to be paid by the Provider to the Complainants.

Given that a legally binding determination has already been made by the FSO as to the appropriate amount payable to the Complainants arising from the Provider's conduct, this Office will not now seek to engage in an assessment of the redress and compensation offered by the Provider in its letter of **4 May 2018** in respect of loan account 151, though the Provider should ensure that it has accurately implemented this direction.

However, following the Legally Binding Decision, it appears that on **23 November 2018**, the Provider offered to refund the fixed rate breakage fee of €2,218.00 incurred by the Complainants for prematurely ending the fixed rate arrangement in place on loan account 151. It appears that this refund was offered in addition to the compensation directed in the Legally Binding Decision, which also directed the refund of a breakage fee.

Accordingly, having regard to the limited assessment that can be conducted in respect of loan account 151, I am satisfied that no further comment is warranted in respect of the Provider's failure to apply the correct rates to the loan account for the period **November 2008** to **December 2012**.

Goodwill Gesture

As is clear from the foregoing analysis, I am satisfied that the Complainants were adequately compensated in respect of the each of their loan accounts as a result of the overcharging which occurred. In such circumstances, it is important to recognise that the Provider was not obliged to make any further offers of compensation to the Complainants outside of the amounts discussed above.

I note however, that by letter dated **4 May 2018**, the Provider offered the Complainants a goodwill gesture of almost €349,000.00, as follows:

> *"The Bank is willing to offer you the substantial sum of €348,697.12 as a gesture of goodwill and an expression of sincerity of its apology for not addressing the issues you have raised on the accounts in a timely and holistic fashion. The Bank repeats its apologies for this and the sum offered is intended to reflect the time and energy you have invested over an extensive period of time to put things right."*

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The Provider derived this amount by reference to the capital appreciation that accumulated on the value of the Complainants' original primary dwelling house between the date of sale in **2012** and **February 2018** in reliance on residential property price index information available from the Central Statistics Office.

For the purpose of ascertaining the capital appreciation value of the original dwelling house, I consider this to be a reasonable means of doing so.

It is not disputed by the Provider that there was negative equity associated with the sale of this property. The Provider considers the negative equity to have amounted to €18,000/€20,000, while the Complainants consider the negative equity to have been in the region of €73,000.

However, in the Legally Binding Finding in **2014**, the FSO noted there was negative equity of approximately €25,000. In any event, while there was negative equity attaching to the original primary dwelling house, I do not accept that the Provider was required, as part of its goodwill gesture (which was a voluntary payment that it was not required to offer), to take this into consideration when calculating capital appreciation nor was the Provider required to do so as part of the goodwill gesture.

Considering the context in which the goodwill gesture was offered and the means by which the Provider calculated the amount of this gesture, I am satisfied that a goodwill gesture in the amount of €348,697.12 was both reasonable and adequate.

Therefore, taking the totality of the compensation offered by the Provider into consideration, I am satisfied that the Complainants were more that adequately compensated for the failings on the part of the Provider arising from the incorrect application of interest to their loan accounts during the relevant periods.

Accordingly, I do not consider there to be any reasonable basis upon which this complaint should be upheld.

Conclusion

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

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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.

UNA GATELY
DIRECTOR OF INVESTIGATION SERVICES

11 November 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

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