An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0503
Sector:	Banking
Product / Service:	Repayment Mortgage
Conduct(s) complained of:	Application of interest rate
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint relates to the Complainants' 'Residential Mortgage Loan Account', which was incepted on **12 September 2008**.

The Complainants' Case

The Complainants incepted a 'Residential Mortgage Loan Account' on **12 September 2008**. The agreed term of the mortgage loan account was 20 years and the Complainants state it was facilitated through a Mortgage Broker at that time. The Complainants also submit that the mortgage loan agreement was interest only repayments for the whole 20-year mortgage term. Documents submitted show the interest rate at inception was an *"ECB Tracker-Interest Only Start"* product.

The Complainants, through their intermediary, state that at inception *"*[their] *Accountants were required to provide* [the Provider] *with information and certification that* [they] *were in a position to cover the interest only payments for the entire duration of the mortgage, based upon rental income elsewhere*". They also submit that they were given assurances in **September 2008,** that their mortgage loan account was 'interest only' for the full term. They submit correspondence issued by the Provider stating this. These letters, issued on **1 October 2014, 2015** and **2016**, state an *"interest only basis for the full term of your mortgage on all of your mortgage account over the term of the mortgage".*

The Complainants go on to say that *"the reference to capital plus interest payments after ten years,* [they] *were told, that this was a paperwork exercise for* [the Provider] *and that this was the way that* [the Provider] *did it".* The Complainants submit that they *"always relied upon what was communicated and promised to* [them] *at the time".* The Complainants now feel that at this juncture, having *"relied upon their promises and warranties,* [they] *have now lost the opportunity to refinance the facility".* The mortgage loan account was not adjusted in **September 2018**. The Provider, through its mortgage service agent, stated that it would switch to capital and interest repayments in **February 2019.**

The Complainants were also unhappy that the mortgage loan account was transferred to a loan service company on **28 September 2018**. Following the loan service company writing to the Complainants "*in July 2018*" to inform them of the change to their mortgage repayment structure and monthly repayment increase, the Complainants raised a complaint to the Provider. The Complainants were unsure of correspondence received from a different named entity and questioned the change of their mortgage loan account ownership and the suggested change of repayment terms

The complaint is that the Provider:

1. Has allegedly failed to adhere to the Complainants' mortgage account terms and conditions of '*interest only*' repayments for the entire 20-year mortgage loan term;

2. Failed to clarify the business relationship between it and the loan service company, causing confusion and doubt in its investigation into the Complainants' complaint.

The Complainants want the Provider to *"honour the interest only mortgage agreement for its duration, until **2028**".*

The Provider's Case

The Provider disputes the Complainants position, stating that the interest only period was for the first 10 years, reverting to capital and interest payments for the remaining 10-year period.

The Provider states that the Complainants' repayments were due to change to both capital and interest, after 10 years/120 monthly instalments, which was due to begin in or around **September 2018.** The Provider states that *"in accordance with the terms of* [their] *loan agreement, the mortgage repayments were due to switch to Capital & Interest repayments effective from **20 October 2018**".*

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The Provider also *"apologise for any confusion caused"* by the correspondence which was issued to the Complainants' on the **1 October 2014, 2015** and **2016.** It goes on to say this was *"due to an administration oversight and did not correctly reflect* [their] *mortgage terms as outlined in* [their] *loan agreement dated **12 September 2008**".*

The Provider submits in its Final Response Letter, that the mortgage loan account was transferred to a service agent company on **28 September 2018.** It also explained that the mortgage loan account transfer to a servicing company was permitted under the terms of the mortgage and did not require consent from the Complainants.

The Provider also acknowledged its delay in not switching the mortgage account to capital and interest in **September 2018**. In recognition of this, it applied **€4,546.60** to the mortgage loan account. The Provider states that it also issued a cheque to the Complainants totalling **€550.00**, wherein "*€400.00 was to cover the cost of any independent professional advice*" they may seek regarding the matter. The *"remaining €150.00 was to cover any distress or inconvenience this oversight may have caused".* The Provider's letter then once again stated that the mortgage would switch to capital & interest repayments in **February 2019.**

Preliminary Decision

A Preliminary Decision was issued to the parties on 20 October 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Complainants' solicitors made the following submissions:

1. E-mail, together with attachment, to this Office dated 22 November 2020.

2. E-mail to this Office dated 25 November 2020.

Copies of these submissions were transmitted to the Provider for its consideration.

The Provider has not made any further submission.

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I have now had the opportunity to consider the Complainants' solicitors' additional submissions and all submissions and evidence furnished by both parties to this Office, and I set out below my final determination.

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.

The Complainants' solicitor in post Preliminary Decision correspondence to this Office stated:

> *"…my clients remain very anxious that Mr Deering would actually hear from them and allow them to test and challenge matters put forward by the service provided."*

I have considered this request made by the Complainants for an Oral Hearing. I remain of the view that an Oral Hearing is not necessary. Insofar as this request does not relate to the 'understanding' of the Complainants or their financial advisers as to what was agreed in 2008, I do not consider that an Oral Hearing is necessary or would be of any assistance in determining this complaint. The submissions furnished on behalf of the Complainants refer at pages 21 and 22, to "*factual disputes as between the parties*". The 12 matters identified, to my mind, are incorrectly described as disputes as to fact; none of the matters identified represent issues in respect of which the Provider has contradicted any view expressed by the Complainants. Furthermore, given that some of these matters took place as far back as approximately 15 years ago, I do not believe that an Oral Hearing would be of any assistance in determining 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.

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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.

Prior to embarking on an analysis of the complaint it will be useful to reproduce certain relevant terms and conditions of the mortgage account and to set out the relevant passages of the correspondence relied upon by the Complainants.

Mortgage Account Terms and Conditions

The Provider relies upon Section 3 of the Additional Conditions of the Loan Agreement which provides as follows:

> *You have an elected to pay interest only on your mortgage for a period of 120 months (the "Interest Only Period") at the rate set out in the Particulars of Offer.*
>
> *On expiry of this period, your repayments will increase to reflect the repayment of capital and interest. You should make provision in your financial planning for this increased payment.*

Correspondence Relied Upon by the Complainants

The Provider sent a letter to the Complainants dated 1 October 2014 regarding their mortgage loan. This letter includes the following sentence set out in bold and underlined on the first page of the letter immediately above the substantive part of the letter (that is, immediately above the greeting '*Dear* [Complainants]'):

> ***Important Information about repaying your Interest Only Full Term mortgage***

In the body of the letter, the following is stated:

> *In line with the terms and conditions on your account, you agreed to make repayments on an interest only basis for the full term of your mortgage.*
>
> *Interest only mortgage repayments means that you are only repaying the interest on your account over the term of the mortgage, No capital balance is being repaid by you and once the terms expires, the Outstanding Balance will become due and owing.*

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> *We recommend that you review your financial arrangements regularly with your broker or an independent financial adviser in order to ensure that you will be in a position to repay the Outstanding Balance owing at the end of your mortgage term.*

Thereafter advice is provided as to how the 'Outstanding Balance' might be paid and a number of options are listed including the following:

> *Changing your interest only mortgage to capital and interest repayments.*

A letter sent on 1 October 2015, one year after this first letter of October 2014, contains identical passages. A further letter sent a year later again on 1 October 2016 contains largely similar wording.

Analysis

The Complainants in this case incepted a 20-year term mortgage account with the Provider in September 2008. The terms of the 'Offer of Mortgage Loan' document (which was signed by the Complainants on 18 September 2008 in the presence of their solicitor) clearly stipulate an agreement to make interest-only payments for a period of 10 years (in the stated initial amount of €3,025.00) following which the repayments would increase to interest and capital payments (in the stated estimated amount of €6,676.31) for the remaining 10 years.

The Second Complainant, in her letter of 19 July 2018 to the Provider, does not concede this point insofar as she states:

> *Notwithstanding what was agreed with* [the Provider] *in 2008, namely that our home mortgage would be interest only for its duration, that there is now some suggestion that this was not the case and, in fact that it was to be interest only for the first 10-year period only. To be clear, this is not what was represented to us at the time and indeed subsequently confirmed to us,*

In written submissions provided to this office on the Complainants' behalf, the following is stated:

> *The loan offer itself provided that the loan from* [the Provider] *was a 20 year loan on an interest-only basis for 10 years and on an interest and capital basis for the remaining 10 years.*

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> *Notwithstanding the said loan offer, it was the complainants' understanding that the loan they were offered would be on an interest-only basis for the full duration of the mortgage - this understanding arose from the documentation they advanced to the bank prior to the bank's approval of the loan on different terms, and theirs and their financial adviser's interactions with* [the Provider] *at the time. Please see the attached from* [the Complainants' financial adviser] *dated 16 July 2019 which confirms the position.*

The letter of 16 July 2019 from the Complainants' financial adviser to the Complainants states as follows:

> *Further to our recent conversation I write to advise that at the time of taking out this mortgage facility with* [the Provider] *although the loan offer stated the interest only period was for an initial period of ten years the impression given at that time was that the interest only would be for the duration of the mortgage.*

I have been provided with no evidence to support the Second Complainant's characterisation of 'what was agreed' with the Provider in 2008 as set out in the first passage quoted above. Contrary to the Complainants' claim, the loan documentation (in particular Section 3 of the Additional Conditions of the Loan Agreement) clearly evidences an agreement to make interest-only payments for 10 years followed by 10 years of capital and interest payments. The fact that the 'Offer of Mortgage Loan' document specifies the precise amount of the respective payments, the fact that the offer does not refer to a residual capital balance that will remain to be cleared at the termination of the term of the loan, and the fact that the Complainants clearly had the benefit of legal advice at the time that they signed the loan offer document, reinforces this position.

The Complainants rely on their '*understanding'* as to what was in fact agreed or understood by reference to the documentation submitted by the Complainants in the course of their application, and by reference to "*theirs and their financial adviser's interactions"* with the Provider. The documentation submitted by the Complainants in the course of their application for the loan does not determine the terms of the loan that was drawn down.

What matters is not what was requested, but what was offered and accepted by the parties. With regard to the Complainants' 'interactions' with the Provider, the Complainants have offered no specific example(s) other than the three letters which I will address below.

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In terms of the understanding of their financial adviser, it is abundantly clear that the individual quoted above was entirely aware of the content of the loan offer. In the event that any interactions served to imbue the financial advisor with the 'impression' that that which was intended to be offered, or intended to be implemented, differed from, and was more favourable (from the Complainants' point of view) than, that which was offered in writing, it seems to me that it would be incumbent on the financial advisor to have sought to rectify any such issue at the time.

There is no dispute that the Complainants signed the Offer of Mortgage Loan document in September 2008. There is no dispute as to the content of this contract and the fact that it provided for a switch to interest and capital payments after 10 years. It also appears to be accepted that the Complainants and their financial advisors were aware of the precise content of the document which was signed by the Complainants. In the circumstances, the signed document is clearly the document governing the relationship between the parties and, in absence of any legally binding variation of that agreement (addressed below), its terms are valid and enforceable.

Insofar as any suggestion has been advanced that this issue represents a factual dispute that might require ventilation by way of an Oral Hearing or "*at the trial of this action*" (it is unclear how a 'trial' might ensue), I do not accept this. The material facts, as set out in the preceding paragraph, are all accepted. In any event, it is apparent that this issue does not feature in the list of 12 "*factual differences*" or "*points of difference*" advanced by the Complainants (on pages 21 and 22 of the 'Written Submissions' submitted on their behalf) in an effort to subtend a request for an Oral Hearing.

The real thrust of the Complainants' complaint, in my view, relates to the letters subsequently received by the Complainants. Some six years after the commencement of the mortgage account, the Complainants received a letter on 1 October 2014 which stated that interest-only payments were applicable in respect of the "*full term of the mortgage*". Letters sent by the Provider in October 2015 and October 2016 repeated this position. The Provider accepts that these letters were sent but states that they were sent "*in error*". Furthermore, the Provider, whilst acknowledging these mistakes, and having offered certain compensation in respect of them, maintains that it is entitled to insist on compliance with the terms of the mortgage as agreed by the Complainants in September 2008.

Prior to embarking on the substantive analysis, it will be useful to document the Provider's response to the letters of October 2014, October 2015 and October 2016 (hereinafter the 'three letters') which it states were sent in error. The Provider's initial response was set out in a letter of 10 July 2018 following the Complainants having brought the three letters to the Provider's attention.

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The Provider's letter of 10 July 2018 explained that the three letters had been sent arising from an "*administrative error*" and offered "*sincere apologies for this error*". The letter indicated that the account would switch to interest and capital payments on 20 October 2018, as provided for in the original loan agreement.

In my Preliminary Decision I had stated that "*following further correspondence from the Complainants dated 19 July 2019",* this was a typographical error and should have read following further correspondence from the Complainants dated 19 July 2018 arising from which a complaint was logged. I also stated that the Provider decided to suspend the switching of the account to interest and capital payments pending the outcome of an internal review. I note the Complainants' solicitor in his post Preliminary Decision submission disputes this stating:

> *"My clients were not switched to interest plus capital because of an error on behalf of [third party] which is why they initially offered my clients two cheques and the credit to their account. To be fair this fact was disclosed by [third party] and therefore I am somewhat lost as to Mr Deerings statement in this regard I respectfully suggest that it goes against the evidence provided by the Service Provider."*

A substantive response was issued to the Complainants on 12 December 2018. This letter noted that the account would switch to interest and capital payments as and from February 2019. The letter also stated that €4,546.60 had been credited to the mortgage account "*in recognition of the delay switching your Mortgage Account to Capital & Interest repayments*".

This figure equated to the amount of interest charged on the account between the date the account had been scheduled to switch to interest and capital payments (20 October 2018), and 31 January 2019. The letter also provided an additional amount in compensation for the three letters sent in error, explained in the following terms:

> *We are also aware that over the lifetime of your Mortgage Account, you may have received correspondence from* [the Provider] *which wrongly indicated that your Mortgage Account would remain Interest Only for the full term of your Mortgage Account.*
>
> [The Provider] *understand that customers make financial decisions based on the information they provide and this information may have impacted decisions you have made. As a result* [the Provider] *recognises that you may wish to seek independent professional advice in relation to this matter and are providing a payment of €400 to cover the cost of any advice you may seek, but you are under no obligation to use the funds for this purpose.*

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A further €150 is included as a payment to cover any distress and inconvenience this error may have caused you.

The payment for €550 has been split equally between parties on the account, and your share of €275 enclosed.

The Complainants' representative subsequently issued a letter dated 8 January 2019 disputing the Provider's entitlement to switch the account to interest and capital payments. This letter was deemed by the Provider to be a rejection by the Complainants of the offer of compensation set out in the letter of 12 December 2018. In rejecting the offer, my understanding is that the amount of €550 offered to the Complainants (in the form of separate cheques made out to each of them in the amount of €275) was not lodged and credited to any account belonging to the Complainants. My understanding is, however, that the amount of €4,546.60 *was* credited to the Complainants' account and has never been reversed.

The first and most important question which I must address is whether the Complainants should be entitled to have their mortgage account maintained as an interest only account for the full term of the mortgage on the basis of the three letters. I am not satisfied that this is the case.

The Complainants executed the mortgage agreement in September 2008 in the full knowledge, I am satisfied, that the mortgage documentation provided for the commencement of capital and interest payments after an initial 10-year period of interest only payments. The September 2008 mortgage agreement is the document governing the relationship between the parties and it is this agreement that regulates the respective rights and entitlements of the parties. Insofar as various letters from the Complainants or their representative refer to a 'contractual right' to maintain the account on interest only payments for the full 20-year term, this argument is misconceived.

The 'contract' is the 'Offer of Mortgage Loan' document signed by the Complainants on 18 September 2008 and this contract clearly provides for the switch to capital and interest payments. The Complainants have not advanced any evidence supporting any legal binding variation to that contract.

Beginning in October 2014, and repeated both one year and two years later, the Provider sent correspondence to the Complainants which contained information entirely inconsistent with the September 2008 mortgage agreement.

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However, much in the same way that a letter from the Provider could not unilaterally alter the executed agreement in a manner that would disadvantage the Complainants, nor can the Provider unilaterally alter the agreement in a manner that favours the Complainants. There is an executed agreement between the parties and changes could be made to that agreement only with the consent of all parties.

I might at this point address one further matter regarding the first of the three letters- the letter of 1 October 2014. In a written submission provided to this office, the Complainants characterise this letter as a response to a phone call had between the Provider and the Second Complainant "*at some point in early Summer 2014*". I have been provided with no evidence to support this assertion. The Provider has stated that this letter (and indeed the two that followed in October 2015 and October 2016 respectively) were automatically generated letters. I accept this and I do not accept the suggestion that the letter was a response to any phone call thereby communicating an admission or acknowledgment of some nature. The letter clearly makes no reference to any prior telephone call and is in the format of a *pro forma* letter.

It will thus be apparent that I do not view the three letters as giving rise to a right in favour of the Complainants to vary the terms of their agreement and thereby to extend the interest only period to cover the entire term of the loan. That is not the end of the matter however as, in certain instances, conduct on the part of one party can serve to prevent, or to 'estop', that party from relying on the strict terms of an agreement. However, I am not satisfied that such circumstances exist in this case. The Complainants received the three letters.

The Complainants, at the point that they received the three letters, were aware that their mortgage agreement provided for capital and interest payments following the initial 10-year interest only period. Notwithstanding the fact that the Complainants had this knowledge, and notwithstanding that the Complainants recognised that the content of the three letters was inconsistent with their executed mortgage agreement, the Complainants took no steps that I have been advised of to seek to clarify the matter.

The Complainants, instead, appear to have operated on the basis that the account was now to be considered a full-term interest only account. I am not satisfied that this was a reasonable course of action to adopt. I am of the view that, having identified the inconsistency, the reasonable approach would have been to contact the Provider seeking clarity. Had that been done, and had the Provider clarified that the account was to be considered a full-term interest only account, a different decision may have ensued here.

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It will be apparent from the foregoing that I do not consider the Complainants to be entitled to have their mortgage account maintained as an interest only account for the full term of the mortgage. That is not to say that I do not consider them to be entitled to compensation. The sending of the three letters in the terms as drafted was undoubtedly most regrettable and clearly caused confusion and inconvenience to the Complainants. Furthermore, the repetition of the mistake on two occasions clearly compounded matters. The fact that I have suggested that the Complainants should have sought clarity from the Provider does not detract from the fact that the Provider caused this problem as a result of its own "*administrative error*". It is appropriate that the Provider offered its "*sincere apologies"* and it is further appropriate that the Provider offered compensation for its error. I will now turn to an analysis of the compensation offered.

The Provider offered money to the Complainants under three headings. In the first part, it credited the Complainants' account with an amount equivalent to the interest charged on the account in the period when it was conducting its internal review. The Provider characterises this payment as "*in recognition of the delay switching your Mortgage Account to Capital & Interest repayments*". I make no comment on this payment which the Provider has clearly deemed appropriate and which is connected to the somewhat long period during which the matter was under review by the Provider.

The second element of the money offered to the Complainants was a figure of €400 to facilitate the securing of legal advice (albeit there was no requirement for the money to be put to that purpose). This seems to me to have been a reasonable allowance for the Provider to make and, again, I do not propose to interfere with this offer.

The final element of the money offered to the Complainants was a cumulative figure of €150 offered *"as a payment to cover any distress and inconvenience this error may have caused you".* In essence, in light of the manner in which the Provider constructed its offer to the Complainants, this seems to me to be the sole component of the offer that can properly be characterised as compensation for the sending of the three letters. I am not satisfied that this amount is adequate in the circumstances.

The Provider made a serious error which it repeated on two occasions over the course of a two-year period. The Complainants have advanced no submissions as to any particular loss or prejudice suffered by them other than a lost opportunity to "*refinance* [the] *facility*" and a reference to a lost opportunity to sell a property to reduce the debt instead of offering it as collateral on other lending. These claimed repercussions are not adequately particularised and they are too vague and too remote to lend themselves to quantification. I am thus compelled to address the matter in a general manner.

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In the circumstances, in recognition of the gravity of the error, and in reflection of the fact that the error was repeated on two occasions, I direct compensation to the Complainants in the amount of €2,000. To this figure should be added the amount of €400 for legal advice which the Provider deemed appropriate and of which the Complainants are not yet in receipt.

With regard to the involvement of a third party, the Provider explains that it appointed a loan service company to provide customer support and administrative services in April 2016.

Subsequently, the Provider sold the Complainants' mortgage to this third party in September 2018. The transfer of the account was notified in advance to the Complainants and was confirmed once completed. I accept that the terms of the mortgagee account authorised the Provider to take the action described above and I am equally satisfied that no aspect of the Complainants' complaint which criticises the action has been substantiated. It is appropriate that the Provider has continued to provide "*support and assistance in relation to any unresolved or outstanding matters relevant to the period that the mortgage was owned by"* the Provider.

Furthermore, the submission states as follows:

> (i) The Complainants disagree that "once we became aware that letters had been incorrectly issued" to the couple, "we completed a full review". The couple do not know whether the provider is answering only on behalf of the current owners of the loan, or the previous owners i.e. [the Provider]. The couple have already set forth herein their justified scepticism of the bank's position as to the timing, context and veracity of its knowledge of the error and the systemic nature of same over a period of c. 11 years and, in particular, why an automatic letter did not issue in 2017 just as it had in previous years.

I do not view the matter listed at (i) as meeting the threshold noting, in any event, that this matter is entirely immaterial. Many of the matters are issues peculiarly within the knowledge of the Complainants. Some of the issues are posed as mere questions. In addition, it seems to me that many of the matters speak largely to the question of quantification of damage suffered, rather than to the issue of whether the Complainants are entitled to have their complaint upheld. The facts on which the substantive part of this decision is grounded are not in dispute and the resolution of the matters identified, insofar as disputes may exist, would not have a bearing on the substantive part of this decision.

For the reasons outlined in this Decision, I partially uphold this complaint and direct that the Provider pay a sum of €2,400 in compensation to the Complainants.

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Conclusion

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

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Provider to make a compensatory payment to the Complainants in the sum of €2,400, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

10 December 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—

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(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.