



<b><u>Decision Ref:</u></b>	2020-0102
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer appropriate compensation or redress CBI Examination
<b><u>Outcome:</u></b>	Upheld

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

##### **Background**

This complaint relates to two mortgage loan accounts held by the Complainant with the Provider.

The Complainant's two mortgage loan accounts are held as follows:

- Mortgage loan ending **7036** was drawn down in **June 1999** in the amount of €43,679. This mortgage loan is secured on the Complainant's principal private residence.
- Mortgage loan ending **5463** was drawn down in **August 2005** in the amount of €216,000. This mortgage loan is secured on a Buy-to-Let property.

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

The Provider contacted the Complainant in **February 2018** advising him of the error that had occurred on his mortgage loan accounts.

The Provider detailed that the error that occurred on the accounts was as follows:

<p><b>Mortgage account ending 5463</b>  <i>“In our review, we found that when you moved from a tracker rate to the staff non-standard variable rate and then a fixed rate, we failed to provide you with sufficient clarity as to what would happen at the end of that fixed rate and the language used by us in communications to you may have been confusing and/or misleading.”</i></p>	<p><b>Mortgage account ending 7036</b>  <i>“In our review, we found that when you moved to a fixed rate from a tracker rate we failed to provide you with sufficient clarity as to what would happen at the end of that fixed rate. Because of this, you may have had an expectation that a tracker rate would be available to you at the end of the fixed rate period. The language used by us in your documentation may have been confusing as to whether it was a variable interest rate which varied upwards or downwards tracking the ECB Rate or a variable interest rate which varied upwards or downwards at our discretion.”</i></p>
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The period of overcharging on account ending **5463** was from **February 2009** until **November 2017**. The period of overcharging on account ending **7036** was from **November 2008** until **November 2017**.

The Provider restored the mortgage loan accounts to tracker interest rates of ECB + 1.1% on mortgage account ending **5463** and ECB + 0.85% on mortgage account ending **7036**.

The Provider made an offer of redress and compensation to the Complainant in relation to the mortgage loan accounts as follows;

	<b>Account ending 5463</b>	<b>Account ending 7036</b>
Redress covering; (a) Total Interest Overpaid. (b) Interest to reflect time value of money.	€45,770.26	€2,828.64
Compensation	€4,577.03	€650

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Independent Professional Advice Payment	€500	€750
<b>Total</b>	<b>€50,847.29</b>	<b>€4,228.64</b>

The Complainant signed the **Acceptance Forms** and the amount of €55,075.93 was paid into the Complainant's nominated bank account.

In **March 2018**, the Complainant appealed the redress and compensation offering to the Independent Appeals Panel. The basis of the Complainant's appeal was the inadequacy of the redress and compensation offering.

In **June 2018** the Appeals Panel decided to uphold the Complainant's appeal and awarded additional compensation of €5,000 to the Complainant. In determining the appeal the Panel outlined;

- *"The Panel was not satisfied that many of the losses claimed by the Customer could reasonably have been foreseen by the [Provider] or were effectively caused by the [Provider's] failure.*
- *The Panel had regard to the significant level of the overpayment and its impact on the Customer's specific financial, personal and family circumstances, as supported by the detailed evidence in the Customer's appeal".*

As the Complainant has been through the Provider's internal appeals process, this office was in a position to progress the investigation and adjudication of the complaint.

The conduct complained of that is being adjudicated on by this office is that the Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider's failure in relation to his mortgage loan accounts.

The Complainant submits that the offer made by the Provider does not adequately reflect the "loss" to him as a result of the interest overcharged by the Provider on his mortgage loan accounts.

The Complainant details that the Provider is "conflating" redress and compensation and that the amount of redress should not influence the level of compensation as they are separate matters. He outlines that restoring him to the original and correct position is redress. The Complainant states that he was paid the standard 10% and/or €650 compensation which did not adequately take into account his "specific circumstances" and did not compensate him for his "loss as a result of not having funds available when they should have been and my personal suffering and hardship." The Complainant

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outlines that with the additional compensation awarded by the Appeals Panel, his compensation is still “just 18%” of the total redress.

The Complainant is seeking €25,000 compensation in respect of “stress and anxiety” suffered by him. He outlines that his wife died in [date redacted] and that he had [number redacted] children from [ages redacted]. He details that this was a “very distressing and worrying” time as he had to manage his own “emotions, grief and loss” and that of his children. The Complainant details;

*“The refusal of [the Provider] to allow me Tracker rates just 10 days after her death ([date redacted]) and again 3 months later (04/02/2009) resulting in significantly higher rates and therefore higher repayments than [the Provider] should have been charging, was very distressing and stressful and further compounded my self-reproachment and self-blame over insufficient life cover, causing many sleepless nights worrying over financial and cash flow.”*

The Complainant is seeking further redress of €24,303, consisting of a balance adjustment of €23,146 and deposit interest of 5% i.e. €1,157. He details that this relates to two part redemptions made on mortgage account ending **5463** of €62,893.08 in **July 2014** and of €100,000 in **July 2016**. The Complainant states that he “would not have made these part redemptions” if his mortgage loan had been on a tracker rate. He outlines that he “made out of course capital repayments on the mortgage with the highest rate, as would be best practice to pay down your most expensive debt first.” He says that the first redemption payment made in **July 2014**, reduced his monthly mortgage repayments by €311 per month and was made from a “build-up of rental income” from his UK Investment property. He outlines that the second redemption payment made in **July 2016**, reduced his monthly outgoings by a further €869 per month and was made from the “forced voluntary sale” of his UK Investment property.

The Complainant is also seeking further compensation of €8,144.65 to “reflect the time value of money” on the total redemption amount paid of €162,893 on mortgage loan account ending **5463**. He says that the level of redress offered “does not reflect the opportunity cost nor time value of money of having to utilise this 168k in part redemption of my mortgage”. The Complainant details as follows;

*“I lost the opportunity to do AVCs, invest for my [relative redacted]’s education, go away on holidays with my family or spend money on my children and their education or even put funds on deposit to finish my [details redacted] education and cover contingencies/liquidity. I also lost opportunity to take the Voluntary Redundancy package on offer from [the Provider] at that time and thus missed out*

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*on a career change and/or set up my own business or buy franchise that I was thinking about."*

The Complainant outlines that the monthly repayments on account ending **5463** had gone from €720 per month in **January 2014** to €1,075 in **March 2014**, due to the expiry of the 3.99% fixed rate and the new variable rate of 5.95%. He says that at this time he asked the Provider for a BTL variable rate of 5.65%, as was advertised by the Provider at the time. He says he was denied this rate which was *"mean spirited"* of the Provider. He says that the move from interest only to capital and interest, since **September 2015** meant that the repayments on account ending **5463** were higher than they would have been if the tracker interest rate had applied. He details that this was *"compounded by having already paid (by March 2016) for 12 years of 3rd level education for my [number redacted] [children] ie [name] in [university name redacted] from [dates redacted], [name] in [university name redacted] from [dates redacted], [name] in [university name redacted] since [dates redacted], putting further strain on my cash flow."*

The Complainant is seeking additional compensation of €49,000 to reflect the lost opportunity for capital appreciation and rental income (£750 pm) from a UK investment property that was sold in **March 2016** as a result of the *"higher servicing cost of 5.95% rate vs 1.10% tracker rate on account number \*\*\*5463 and \*\*\*7063 in March 2016."* The Complainant submits that he purchased the property in **2007** for £114,000. He details that the purchase of the UK investment property was financed by way of mortgage loan which was secured on another property. This mortgage loan was for €280,000 with the initial 5 years interest only and then 15 years of capital and interest from **2012**. The mortgage loans which are the subject of this complaint were not used to finance the purchase of the UK investment property.

The Complainant details that the property was sold at a loss in **2016**. The Complainant submits that *"it did not make economic sense to hold onto property with the significantly higher monthly cash outflow with the higher interest rate charged"*. The Complainant submits that he had planned to keep this property until **2020** for ongoing rental income (£9,000 per annum) and expected capital appreciation but he was left with *"little option but to sell in March 2016 due to affordability and cash flow issues with higher C&I repayments on both \*\*\*5463 and \*\*\*4711."* The Complainant details that the UK Land Registry shows UK cumulative house prices increased by 10% between **March 2016** and **January 2018** and that *"Business Insider UK"* predicts 4.1% per annum or 14.2% from **2018** to **2022**. He outlines that based on his selling price of £98,500 that the property would have appreciated by £25,250 to £123,750 by **2022**.

The Complainant details that compensation offered is *"not adequate for my personal suffering and hardship and detriment caused from not having funds available when they*

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should have been over a nine year period and my claim for additional compensation is warranted, justified and reasonable.” The Complainant is seeking further compensation/redress of €106,447.65 from the Provider.

### The Provider’s Case

The Provider submits that the Complainant held the following mortgage loan accounts with the Provider, at the time of the complaint to this office (**November 2018**):

Account Number	Security Address	Drawdown Date	Original Amount	Balance
***5463	[BTL property]	04 August 2005	€216,000	€42,117.57
***7036	[The Complainant’s PPR]	10 June 1999	€43,679.00	€2,520.08
***7037	[The Complainant’s PPR]	09 June 1999	€68,585.86	€2,231.81
***4711	[BTL property 2]	11 January 2007	€280,000	€158,835.00

The Provider outlines that mortgage accounts ending **5463** and **7036** were deemed impacted as part of the Examination.

It details that account ending **4711** has been raised within the Complainant’s complaint but that account has not been deemed impacted as part of the Examination and that account is on an “undisputed” tracker rate of ECB + 0.75%. The Provider submits that mortgage account ending **4711** was used to purchase the UK investment property that is mentioned by the Complainant in his complaint, but is secured on another Buy-to-Let property held by the Complainant, which was unencumbered at the time the Complainant took out the mortgage loan in **January 2007**.

With respect to mortgage account ending **5463** the Provider outlines the following history of the mortgage loan;

- The mortgage loan drew down in **August 2005** on a 12 month fixed rate, reverting to standard variable.
- At the end of the fixed interest rate period the Provider issued the Complainant a **Mortgage Form of Authorisation (“MFA”)** which outlined the rates available

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and the Complainant selected the tracker interest rate of ECB + 1.25% in **July 2006**.

- The tracker interest rate of ECB + 1.25% was applied to the account for one month, when the Complainant amended the account to a Staff Non-Standard Variable Rate by MFA signed in **August 2006**. The Provider outlines that the Staff Non-Standard Variable Rate was not a tracker rate and was based on the higher of the Revenue's statutory BIK rate and the EURIBOR. The Provider outlines that the MFA "*definitively ended the former tracker rate and means that the Complainant has no claim in contract to a tracker rate on account [ending] 5463*"
- The Complainant moved to a Staff 2 year fixed rate of 3.95% by MFA signed in **January 2007**.
- The Provider wrote to the Complainant in **January 2009** outlining interest rate options available to the Complainant at the end of the fixed interest rate period. The options did not include a tracker rate. The Provider details that it acted correctly with what is stated in General Condition 7(b) of the mortgage loan offer. The Complainant did not reply to the MFA and the loan rolled onto the Provider's variable rate.
- The Complainant availed of a 3 year fixed rate by MFA in **February 2011** and the account moved to a variable rate in **February 2014**.
- The Complainant opted for a two year fixed rate in **June 2017**.
- The Complainant's mortgage loan account was moved to a tracker interest rate of ECB + 1.1% in **November 2017**.

With respect to mortgage account ending **7036** the Provider outlines the following history of the mortgage loan;

- The mortgage loan drew down in **June 1999** on a 2 year fixed rate.
- The Complainant applied a 5 fixed rate to the mortgage in **August 1999** and the account "*reverted*" to a standard variable rate in **September 2004**.
- The Complainant signed a MFA in **October 2004** to change the mortgage loan to a tracker interest rate of ECB + 1.1%.
- The Complainant availed of a fixed interest rate period from **December 2005** to **November 2008**.
- The Provider wrote to the Complainant in **October 2008** outlining interest rate options available to the Complainant at the end of the fixed interest rate period. The Provider submits that the options did not include a tracker interest rate and the Complainant used the MFA to apply the Staff Non Standard Variable Rate to the mortgage loan from **November 2008**.
- The Complainant applied to move the mortgage loan to a Staff LTV Variable Rate of 2.75% in **March 2009**.

- The Complainant's mortgage loan account was moved to a tracker interest rate of ECB + 0.85% in **November 2017**.

The Provider outlines that it included the Complainant's mortgage loan accounts (ending **5463** and **7036**) in the Examination because they were formerly on a tracker interest rate. The Provider details that it found as follows;

- When account ending **5463** moved from a tracker rate to the staff non-standard variable rate and then a fixed rate, the Provider failed to provide the Complainant with sufficient clarity as to what would happen at the end of the fixed rate period and the language used by the Provider may have been confusing and misleading.
- When account ending **7036** moved from a tracker rate to a fixed rate the Provider failed to provide the Complainant with sufficient clarity as to what would happen at the end of the fixed rate.

The Provider submits that it *"has not breached any contract"* with the Complainant and that there was no positive representation made by the Provider before the Complainant entered either fixed rate that the mortgage loans could move to a new tracker rate at the end of the fixed rate period.

The Provider outlines that regarding account ending **5463** there *"could not have been a natural expectation on the part of the Complainant that the account would revert to a tracker rate where he was not a tracker customer when he entered the fixed rate."* The Provider outlines that the failure on its part was to *"identify any type of variable rate that would apply at the end of the fixed rate period"* and the Provider submits that this *"is significantly less serious as a shortcoming in terms of conduct than a breach of contract or miss-selling a fixed rate through positive misrepresentation that a new tracker rate would be provided when it ended."*

The Provider submits that the Complainant's accounts were *"moved"* to tracker rates of ECB + 0.85% and ECB + 1.1% in **November 2017**. The Provider asserts that the redress payment with respect to each account *"refunds"* the Complainants in a lump sum *"equivalent to the overpayments"* made as a result of being on a higher interest rate. The Provider states that redress payment includes a payment in respect of the *"time value of money"* which represents a payment to reflect *"additional financial loss"* suffered for not having access to the money that was used to pay interest at the incorrect rate. The Provider submits that the Appeals Panel awarded an additional sum of €5,000 in compensation and this *"strengthens the argument that compensation paid was at least adequate"*.

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With respect to the Complainant's claim for compensation for "stress and anxiety suffered", the Provider outlines that it "understands completely that the Complainant suffered stress and anxiety as a result of the passing of his wife and sympathises entirely with him on this loss." The Provider submits that it stands over the Independent Appeals Panel's decision to increase the Complainant's compensation award by €5,000.

The Provider further submits that this office does not have the power under **s60(4)(d)** of the **Financial Services and Pensions Ombudsman Act 2017** (the "**FSPO Act**") to make an award for stress, as it is not a loss or expense and the Provider does not believe that the Complainant has demonstrated any inconvenience. The Provider outlines that for a claim for stress to succeed "*even in a court action for tort, there must be personal (psychiatric) injury*" and that a court will not make an award for stress arising from a breach of contract or professional negligence.

With respect to the Complainant's claim for redress and compensation for the redemption payments made on mortgage account ending **5463**, the Provider outlines that the Complainant "*elected of his own volition*" to make additional payments in **2014** and **2016** and the terms of the mortgage loan allowed him to do this whilst on a variable interest rate. The Provider details that there is "*no record*" of the Complainant making contact with the Provider to discuss his options for repayment. The Provider details that it could not "*refuse*" the repayments and the Provider has provided fair value for the overpayments. The Provider details that "*it cannot be fairly and reasonably said that the Complainant's choice to make additional payments results from the conduct complained of*". The Provider submits that the "*consequences are too remote from the question of tracker and dependent on any number of factors someone may consider when making the financial decision to overpay the mortgage.*"

The Provider submits that "*at first sight*" it may have been more natural for the Complainant to use the proceeds of the UK property to repay mortgage account ending **4711**, as that mortgage loan had been the source of the funds to purchase the property. The Provider outlines that the Complainant elected to "*apply*" €100,000 from the proceeds to reduce the balance on account ending **5463** "*presumably because it had a higher interest rate*" than account ending **4711**. The Provider outlines that the net effect meant that the Complainant retained €100,000 at a tracker rate of ECB + 0.75%, which was "*cheaper*" than the tracker rate entitlement on account ending **5463**.

The Provider submits that it does not accept that the Complainant is entitled to an additional capital adjustment or the Complainant's estimate of what that is. It outlines that the redress payment already made "*includes a payment in respect of the time value of money*".

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With respect to the UK Investment Property, the Provider submits that the Complainant did not purchase the property on the premise that tracker rates were available to him on account ending **5463** or **7036**, as both mortgage loans were on other rates in **January 2007**. The Provider outlines that the Complainant made the decision to sell the property in **2016** “without consulting” the Provider as “he was free to do as the Provider had no mortgage on the UK property.” The Provider submits that there is no record to indicate that the Complainant expressed any unhappiness about selling the property. The Provider is of the view that it is “not fair or reasonable” for the Complainant to link his decision to sell with any complaint about the interest rates on accounts ending **5463** or **7036** “ex post facto”.

The Provider details that it has “no record” of the Complainant having any financial difficulty and that it was always open to the Complainant to seek an alternative repayment arrangement to alleviate any financial strain, if he was suffering from that. It states that the Complainant at no point sought forbearance or an arrangement which could have facilitated retention of the property. The Provider submits that the Complainant mentions a number of factors that may have been considered when considering the future of the UK investment property, “Brexit, fear of depreciation of sterling, costs of educating children.” The Provider outlines that the “consequent loss” against capital appreciation on the UK investment property are “too remote” from the question of insufficient clarity within the Mortgage Form of Authorisation in mortgage accounts ending **5463** and **7036**, that do not directly concern the UK property (only account ending **4711** has a connection to it).

The Provider submits that it remains satisfied that the compensation and redress was adequate and that the Complainant has not introduced a reason to revisit that previously awarded under the scheme.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider has not offered adequate redress and compensation to the Complainant by consequence of the Provider’s failure in relation to his mortgage loan 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 Complainant was given the opportunity to see the Provider’s

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

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

At the outset, I note that the Provider has made submissions about its view that there was no breach of contract and no misrepresentation in this matter. As the Provider has already conceded that the Complainant was entitled to have tracker interest rates restored to the Complainant's accounts, I fail to understand why the Provider seeks to advance arguments as to why it believes the Complainant was not contractually entitled to a tracker interest rate. I believe this approach is not helpful to resolving the matter at issue which is the amount of redress and compensation offered by the Provider. I will not be making any comment or determination as to the nature of the Provider's failures as it is neither necessary nor appropriate to do so. The issue for decision is whether the Provider has offered adequate compensation to the Complainant by consequence of the Provider's failures in relation to his mortgage loan accounts. These failures have been admitted by the Provider in its letters to the Complainant in **February 2018**.

The Provider has detailed that the redress and compensation offered and paid to the Complainant is in line with the Provider's Redress and Compensation Framework which is based on the Central Bank's Principles for Redress. The redress payment of €48,598.90 reflects the amount of interest overpaid on the mortgage loan accounts and includes a payment of €2,314.24 to reflect the time value of money. The Provider also

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paid the Complainant €1,250 for the purposes of seeking legal advice and compensation of €5,227.03. The Provider submits that the Appeals Panel added a further sum of €5,000 which the Provider is bound by. The Provider submits that the Complainant has not made out a reasonable claim for additional compensation beyond what the Provider and the Appeals Panel has already provided for and was paid by the Provider to the Complainant.

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

This complaint concerns two of the Complainant's mortgage loan accounts, details as follows;

- Mortgage loan account ending **7036** which was drawn down in **1999** in the amount of £34,400 (€43,679) for a term of 20 years, commencing on a two year fixed rate of 7.5%. The fixed interest rate applying to the mortgage loan was amended in **August 1999** to a 5 year fixed rate of 5.15%.
- Mortgage loan account ending **5463** which was drawn down in **2005** in the amount of €216,000 for a term of 25 years, commencing on a one year fixed interest rate of 2.77%. The Special Conditions of the mortgage loan provided for a 10 year interest only period and thereafter capital and interest.

On **20 October 2004**, the Complainant signed a **Mortgage Form Authorisation ("MFA")** to apply an interest rate of 1.1% "*above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate")*" to mortgage loan account ending **7036**. The Complainant subsequently signed a MFA to apply a fixed interest rate of 3.490% to mortgage account ending **7036** from **December 2005** to **November 2008**.

On **31 July 2006**, the Complainant signed a MFA to apply a "*Tracker Var ECB + 1.25% INV>25K*" of 4.00% to mortgage account ending **5463**. The Complainant subsequently signed a MFA to apply a "*Staff Non Standard Variable Rate*" to the mortgage loan from **August 2006** and then a "*Staff 2 Year Fixed Rate*" to the mortgage from **January 2007** to **February 2009**.

It was at this time that the failures that were subsequently identified in **February 2018** as part of the Examination occurred on the Complainant's mortgage loan accounts ending **7036** and **5463**.

I will first consider the mortgage loan accounts in the period between **November 2008** and **July 2014**.

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In **November 2008** mortgage account ending **7036** was moved by the Complainant onto the Staff Non Standard Variable Rate of 5.5% at the time, and was then moved in **March 2009** to a Staff LTV Variable Mortgage rate which at the time was 2.75%. Between **March 2009** and **July 2014** the Staff LTV Variable rate fluctuated between 2.25% and 3.9%. The tracker interest rate that should have been applied from **November 2008** was ECB + 0.85%. Between **November 2008** and **July 2014**, the overall tracker (ECB + margin) rate fluctuated between a rate of 1% and 4.1%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 0.85%) had been applied to mortgage account ending **7036** between **November 2008** and **July 2014**, is also represented in the table below:

<b>Mortgage Account ending 7036</b>				
<b>Date Range (inclusive)</b>	<b>Difference in Interest rate charged vs the tracker interest rate</b>	<b>Actual Monthly Repayments</b>	<b>Monthly repayments if the mortgage was on the Tracker Rate</b>	<b>Overpayment per month</b>
Nov 2008 – Feb 2009	Between 1.4% and 2.15%	Between €283.09 and €290.13	Between €254.50 and €270.70	Between €19.43 and €28.58
Mar 2009 – Mar 2010	0.4%	Between €247.69 and €254.06	Between €242.54 and €248.60	Between €5.15 and €5.46
Apr 2010 – Aug 2011	Between 0.65% and 1.15%	Between €253.31 and €255.95	Between €242.54 and €247.38	Between €8.57 and €10.77
Sep 2011 - Sep 2012	Between 1.15% and 1.80%	Between €259.99 and €260.94	Between €240.65 and €247.38	Between €13.56 and €19.34

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Oct 2012 – Jul 2014	Between 2.30% and 2.90%	€264.65	Between €236.48 and €240.65	Between €24.00 and €28.17
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With respect to mortgage account ending **5463** in the period between **February 2009** and **July 2014**, account ending **5463** was moved to a standard variable rate in **February 2009** of 4.35%. Between **May 2009** and **February 2011** the standard variable rate fluctuated between 4.1% and 4.25%. A 3-year fixed rate of 3.99% was then applied to the mortgage loan in **February 2011**. On the expiry of the fixed interest rate period in **February 2014**, a variable interest rate of 5.95% was applied to the loan. The tracker interest rate that should have been applied from **February 2009** was ECB + 1.1%. Between **February 2009** and **July 2014**, the overall tracker rate (ECB + margin) fluctuated between a rate of 1.6% and 3.1%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 1.1%) had been applied to mortgage account ending **5463** between **February 2009** and **July 2014**, is also represented in the table below:

<b>Mortgage Account ending 5463</b>				
<b>Date Range (inclusive)</b>	<b>Difference in Interest rate charged vs the tracker interest rate</b>	<b>Actual Monthly Repayments</b>	<b>Monthly repayments if the mortgage was on the Tracker Rate</b>	<b>Overpayment per month</b>
Feb 2009 – Apr 2009	Between 1.25% and 1.75%	Between €714.50 and €785.21	Between €469.51 and €559.58	Between €225.63 and €244.99
May 2009 – Aug 2010	2.00%	€740.77	Between €379.26 and €424.29	Between €316.48 and €361.51
Sep 2010 – Feb 2011	2.15%	€767.62	€379.26	€388.36

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Mar 2011 – Jul 2012	Between 1.39% and 1.89%	€720.52	Between €379.29 and €469.55	Between €250.97 and €341.23
Aug 2012 – May 2013	2.14%	€720.52	€334.08	€386.44
Jun 2013 – Nov 2013	2.39%	€720.52	€288.90	€431.62
Dec 2013 – Feb 2014	2.64%	€720.52	€243.82	€476.70
Mar 2014 – Jul 2014	4.60%	€1,074.69	Between €225.73 and €243.82	Between €830.87 and €848.96

The Complainant submits that he made a redemption payment of €62,893.08 off mortgage account ending **5463** in **July 2014**. He states that this redemption was made up from a “*build-up of rental income*” from his UK property which he decided to “*convert back to euro*”. I note that the Complainant has also indicated that the rental income from the UK property was £9,000 per annum (£750 per month). In these circumstances, it would appear that the Complainant had been “*building*” up the rental income from the UK property for some 5 and a half years up to **July 2014**.

I note that by this time the Complainant had been making significant overpayments because of the incorrect interest rate being applied to mortgage account ending **5463**. Mortgage loan account ending **5463** was an interest only loan at the time. As is evidenced in the table above, these overpayments were between €225.63 and €244.99 on a monthly basis in **2009**, they continued to grow to between €250.97 and €341.23 in **2011/2012**, rising to between €830.87 and €848.96 in **2014**. The overpayments on mortgage account ending **7036** were significantly lower, ranging between €5.15 and €28.58 per month. In circumstances where the overpayments on a monthly basis on mortgage account ending **5463** were so great, it appears to me that the evidence supports the Complainant’s submission that he made this redemption payment because of the rising repayments on this account.

In this regard, I also note that as of **February 2014**, the interest rate being applied to the mortgage loan had increased by 1.96% from 3.99% to 5.95%. The Complainant makes reference to having sought a reduced interest rate of 5.65% at this time. The

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Complainant submits that the Provider refused this as his mortgage was not eligible for that rate. I have not been provided with any evidence of these communications between the Complainant and the Provider, however I have no reason to doubt that this took place. That being said, it was a matter that was in the Provider's commercial discretion whether it wished to accede to the request for the reduced variable rate type. The Complainant submits that the Provider followed the "*letter rather than the spirit of the law*" in refusing him the reduced rate. It is important for the Complainant to be aware that there was no obligation on the Provider to give the reduced rate.

Nonetheless, this series of interactions demonstrates to me that the Complainant was conscious of the interest rate applicable to mortgage account ending **5463** and having regard to all of the above it appears to me that the Complainant did make the redemption payment of €62,893.08 off mortgage account ending **5463** in **July 2014** as a result of the higher interest rate being applied to this account. I note that the evidence shows that the redemption payment made at the time reduced the overall balance outstanding on the mortgage loan at the time that it was made. The Provider has also taken into account the redemption payment when recalculating account ending **5463** on the basis of the application of the tracker interest rate from **February 2009**.

I will now consider the mortgage loan accounts in the period between **August 2014** and **July 2016**.

Between **August 2014** and **July 2016** the Staff LTV Variable rate that applied to mortgage account ending **7036** was 3.9%. The tracker interest rate that should have been applied was ECB + 0.85%. Between **August 2014** and **July 2016**, the overall tracker (ECB + margin) rate fluctuated between a rate of 0.85% and 1%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below. The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 0.85%) had been applied to mortgage account ending **7036** between **August 2014** and **July 2016**, is also represented in the table below:

<b>Mortgage Account ending 7036</b>				
<b>Date Range (inclusive)</b>	<b>Difference in Interest rate charged vs the tracker</b>	<b>Actual Monthly Repayments</b>	<b>Monthly repayments if the mortgage was on the Tracker Rate</b>	<b>Overpayment per month</b>

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	<b>interest rate</b>			
Aug 14	2.90%	€264.65	€236.48	€28.17
Sept 14 – Feb 16	3.00%	€264.65	€235.90	€28.75
Mar 16 – July 16	3.05%	€264.65	Between €235.71 and €235.90	Between €28.94 and €28.75

With respect to mortgage account ending **5463** in the period between **August 2014** and **July 2016**, the mortgage account remained on the variable interest rate of 5.95%. The tracker interest rate that should have been applied was ECB + 1.1%. Between **August 2014** and **July 2016**, the overall tracker rate (ECB + margin) fluctuated between a rate of 1.1% and 1.25%. The difference in the interest rate actually charged to the mortgage loan and the interest rate that should have been charged is demonstrated in column 2 of the table below.

The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 1.1%) had been applied to mortgage account ending **5463** between **August 2014** and **July 2016**, is also represented in the table below:

<b>Mortgage Account ending 5463</b>				
<b>Date Range (inclusive)</b>	<b>Difference in Interest rate charged vs the tracker interest rate</b>	<b>Actual Monthly Repayments</b>	<b>Monthly repayments if the mortgage was on the Tracker Rate</b>	<b>Overpayment per month</b>
Aug 2014 – Sept 2014	4.70%	€763.79	€160.26	€603.53
Oct 2014 – Aug 2015	4.80%	€763.79	€147.41	€616.38
Sept 2015 – Feb 2015	4.80%	€1,287.61	€925.78	€361.83

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Mar 2016 – Jul 2016	4.85%	€1,287.61	Between €922.95 and €925.78	Between €364.66 and €361.83
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The Complainant made a redemption payment of €100,000 against mortgage loan account ending **5463** on **14 July 2016**. The Complainant submits that this redemption payment was from part of the proceeds of the sale of an Investment Property he had in the UK. The Complainant submits that he was “forced” to sell the property because of the higher interest rates being applied to his mortgage loan accounts ending **5463** and **7036**.

From the documentation submitted, in the form of a **Completion Statement** with respect to the sale of the property, it appears that the property sold for £98,500.00 and after fees the Complainant received £96,789.10 from the sale. I have not been provided with the rate of conversion applied when the proceeds of the sale were converted into Euro by the Complainant, but I estimate that that the sum available to the Complainant from the sale of the property was in the region of €125,000.

I note that the Complainant has also submitted in evidence, emails between himself and his solicitors in the UK in relation to the sale of the property and in one of them on **26 April 2016** he outlines, “I’m very worried that GBP will weaken leading up to Brexit poll day”. The Complainant in his submissions also outlines as follows;

*“The higher mortgage rate of 5.95% vs Tracker 1.10% made the case for holding onto a UK BTL much less attractive. Also the threat of Brexit was around the corner, as I believed the upcoming referendum in June 2016 was 50/50 and therefore high risk of sterling depreciation, thus adding further risk to holding onto my UK property.”*

In the circumstances of this particular matter, I do not accept that the Complainant sold the UK Investment Property solely because of the higher interest repayments being charged on mortgage accounts ending **5463** and **7036**. In this regard, I note that the sum that the Complainant was overpaying on a monthly basis on account ending **7036**, was less than €30 per month. Which, although I accept the Complainant should not have been overcharged by any amount, is a relatively small figure. With respect to mortgage account ending **5463**, I note that the difference in monthly repayments was significant between when the last redemption payment took place in **July 2014** and **August 2015**. The overpayments on account ending **5463** were in the region of €600 monthly. I note that these monthly overpayments had reduced to approximately €360 per month from **September 2015**, when the interest only period on mortgage account ending **5463** ended and capital and interest repayments were required under the

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mortgage loan contract. Whilst I accept that these overpayments were still significant on mortgage account ending **5463** leading up to the period when the Complainant sold his UK Investment property. I am of the view that the evidence shows there were other factors outside of the interest rate applying to mortgage account ending **7036** and **5463** that influenced the sale of the UK Investment Property. To me, the evidence shows that the Brexit referendum was the main motivating factor and the uncertainty that existed in the market as to the potential consequences on property holdings in the UK and value of sterling at that time. I also note that the evidence shows that the UK property was an unencumbered property, such that it was a matter entirely within the Complainant's discretion to sell the property and the Complainant was not required to engage with the Provider with respect to the sale. The mortgage loan (account ending **4711**) which had been taken out to purchase the UK Investment property was secured on another Buy to Let property held by the Complainant.

In these circumstances, I do not accept that the Provider can reasonably be said to be responsible for the loss of capital appreciation and loss of rental income up to **2022** of €49,000, which the Complainant has claimed the Provider is responsible for. It may have been the case that the Complainant had initially intended when he purchased the property in **2007**, to hold this property *"for ongoing rental income and expected capital appreciation"* post his retirement, but the evidence shows that the external factor of *"Brexit"* had a significant impact on Complainant's decision not to continue to hold the property. The fact that house prices in the UK may have subsequently increased is not a matter that the Complainant would have known at the time of making the decision to sell in **2016**. Any fluctuation in the value of property is not something that can be accurately predicted.

With respect to the sale of the UK property, the Provider has raised the argument that the Complainant at no point sought forbearance or an arrangement which could have facilitated retention of the property. Whilst it is true that the Complainant did not do so, I am of the view that the Provider in its presentation of this argument has sought to over-simplify the detailed and lengthy documentary process that must be undertaken in order to seek out and be approved by the Provider for a forbearance arrangement on a mortgage loan account.

In circumstances where the overpayments on a monthly basis on mortgage account ending **5463** were so significant, it appears to me that the evidence supports the Complainant's submission that he made the redemption payment of €100,000 because of the high repayments on mortgage account ending **5463**. I accept that this redemption repayment may not have been made. I note that the Provider in its submissions to this office outlines as follows:

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*“the Complainant elected to apply €100,000 from the proceeds from the sale of the UK investment property to reduce the balance on mortgage account [ending 5463] presumably because it had a higher interest rate, rather than mortgage account [ending 4711]...The net effect meant that the Complainant retained €100,000 at a tracker rate of ECB + 0.75 which in effect was cheaper than the tracker rate entitlement on mortgage account [ending 5463] has still turned out well for him even in light of the payment of redress and compensation and restoration of the tracker rate on mortgage account [ending 5463].”*

It appears that the Provider accepts that the reason that the Complainant elected to apply a redemption payment against account ending **5463** was because it had a higher interest rate being applied than the mortgage loan that was used to fund the purchase of the UK investment property and that this has *“turned out well”* for the Complainant, given that account ending **5463** would have been on a higher tracker rate of ECB + 1.1%, had it been on the tracker interest rate at the time of the redemption payment in **July 2016**. I accept that it appears, in hindsight, having applied a tracker rate to mortgage account ending **5463**, that this was the better of the two loans (account ending **5463** and **4711**) to make the redemption payment off. However the Provider in making this argument appears to have entirely ignored the fact that at the time of the redemption payment of €100,000 in **July 2016** mortgage loan account ending **5463** was the subject of a variable rate of 5.95%, which was 4.85% higher than the tracker interest rate of 1.1% (ECB + 1.1%) that should have applied to the mortgage loan at the time. I note that the evidence shows that the redemption payment made at the time reduced the overall balance outstanding on the mortgage loan at the time that it was made. The Provider has also taken into account the redemption payment when recalculating account ending **5463** on the basis of the application of the tracker interest rate from **February 2009**.

With respect to the redemption payments totalling €162,893.08 (€62,893.08 made in **July 2014** and €100,000 made in **July 2016**) on mortgage account ending **5463**, the Complainant has claimed that he is entitled to redress of €24,303, which comprises of a loan balance adjustment of €23,146 and interest of 5% on that figure of €1,157. The Complainant has submitted a calculation document to support his claim which appears to add back the redemption repayments to the initial capital borrowed, so as to adjust the capital balance outstanding on the mortgage loan at **November 2017**. The Complainant’s methodology which arrived at a downward balance adjustment is unclear to me.

Either it is the case that the Complainant is seeking to have the redemption repayments made reversed or not. It does not seem to me that the Complainant wants to have these reversed, as of course this would give rise to interest arising on these capital sums, which in turn would be due and owing to the Provider. In any event there does

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not seem to me to be any basis for the capital adjustment and interest that the Complainant has claimed.

In reviewing mortgage loan account ending **5463** in **February 2018**, the Provider assessed the interest paid on the Complainant's mortgage loan account during the impacted period (**February 2009** to **November 2017**), as against the interest that would have been paid had the tracker interest rate of ECB + 1.1% been applied to the account. It was determined that the Complainant had overpaid interest of €43,590.72 with respect to mortgage account ending **5463**. This assessment and calculation took into account the fact that the Complainant had made the redemption payments of €162,893.08, during the impacted period and the capital balance at the relevant times was reduced accordingly. The Complainant was repaid the overpaid interest in the amount of €43,590.72. It is important for the Complainant to be aware that he does not have an entitlement to both a repayment of the total sum of overpaid interest and a reduction in capital of the total sum of overpaid interest off the mortgage loan. The application of both would not restore the Complainant to the position he would have been in and would instead result in the Complainant receiving a sum of money over and above what is calculated as the sum owed by the Provider to the Complainant.

With respect to the redemption payments totalling €162,893.08, the Complainant has also sought further interest of 5% (€8,144.65) to reflect the "*time value of money*" on that sum. Either it is the case that if the Complainant had the money available to him he would have reduced the capital sum owing on mortgage account ending **5463** at the times that he did, or he would not have made those capital redemption repayments and further interest would have accrued on that capital amount. In circumstances where the Complainant does not appear to want to unwind the redemption payments, I do not see a basis for this claim. I note that an interest payment to "*reflect the time value of money*" on the interest overpaid of €2,179.54, was afforded to the Complainant as part of the redress and compensation payment in **February 2018**.

The Complainant is seeking an additional sum of €25,000 in respect of the "stress and anxiety" he suffered. The Complainant refers to the loss of his wife in [dates redacted], which he states was a "very distressing and worrying time" and a period of "grief" for him and his family. I sympathise with the Complainant for the loss of his wife and I have no doubt that this was a very difficult time for the Complainant and his family.

The Complainant has indicated that during the period of overcharging that he was under "*financial pressure*". I have not been provided with any evidence to that effect. It would appear to me that there is in fact evidence to the contrary, in that, the Complainant had "*built up*" rental income from the UK investment property to the amount of at least €62,893.08 by **July 2014**.

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That being said, taking into consideration all of the evidence before me in terms of the significant level of overcharging that occurred on mortgage account ending **5463**, which at its least was in the region of €200 per month in **early 2009** and at its peak was over €800 per month, in **early 2014** and the time period of almost nine years (**2009 – 2017**) over which the overcharging occurred, I am of the view that the level of compensation offered is not sufficient or reasonable to compensate the Complainant in the particular circumstances of this complaint. I have also had regard to the overcharging on mortgage account ending **7063**, which was less but when taken in the round adds to the sums that the Complainant was overpaying to the Provider on a monthly basis.

Throughout the nine year period, the Complainant was denied the opportunity of making informed decisions about his finances as he did not know the true position with respect to the repayments that were actually due and owing on the mortgage loan accounts ending **5463 and 7036**. During the impacted period the Complainant made two out of course redemption payments that the evidence shows were made as a result of the high interest rate being charged on mortgage account ending **5463**. The Complainant may not have made the redemption payments totalling €162,893.08 had he known the true position on his mortgage loan at the time.

During this nine year period, the Complainant's personal circumstances had changed, in that, his wife had passed away. For a parent of [number redacted] children, who were all going through various stages of their education throughout this period, it cannot but be the case that the unavailability of sums rising from €200 up to €800 on a monthly basis over a near nine year period, was a source of great inconvenience to the Complainant and his family

The Complainant has outlined that the monthly outgoings to provide for his family included "*tuition/grinds/school uniforms and fees, medical, child care and home help*" and other outgoings in the form of "*school trips*" and "*family holidays*". I have no doubt that the Complainant and his family suffered inconvenience as a result of the Provider's overcharging. In this regard, I find it extraordinary that the Provider has stated that it does not believe that the Complainant has demonstrated any inconvenience. I am at a loss to know how the Provider arrived at this view in the particular circumstances of this complaint.

I note that the Complainant has received a total of €10,227.03 in respect of both mortgage loan accounts. He originally received €4,577.03 for the failures on mortgage loan account ending **5463** and €650 for the failures associated with account ending **7036**. The Independent Appeals Panel subsequently increased the compensation award

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by €5,000. In my view the total amount of compensation awarded to the Complainant is at a level I would not consider satisfactory.

Therefore I uphold this complaint and direct that pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, the Provider pay a sum of €22,000 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered. For the avoidance of doubt the total sum of compensation of €22,000 is inclusive of the €10,227.03 compensation already paid to the Complainant for the Provider's failure.

### **Conclusion**

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

I direct, pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017** that the Provider pay the Complainant a sum of €22,000 for the loss, expense and inconvenience suffered, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider. For the avoidance of doubt the total sum of compensation of €22,000 is inclusive of the €10,227.03 compensation already paid to the Complainant for the Provider's failure.

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**

20 March 2020

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

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

