



<u>Decision Ref:</u>	2023-0009
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' principal private residence.

The loan amount was for €182,000.00 and the term of the loan was 30 years. The **Mortgage Loan Offer** dated **25 September 2007** provided for a staff preferential variable interest rate of 4 % which would apply for the term of the loan.

The Complainants' Case

The Complainants state that in **November 2007**, they approached the Provider for the purposes of transferring their mortgage from another financial services provider to the Provider in order to avail of the Provider's "*Fixed Rate mortgage*". The Second Complainant was a staff member of the Provider at this time and Complainants detail that they were advised by the Provider to "*avail of a Preferential Staff Rate of 4% (0.89% lower than the tracker).*" The Complainants maintain that their advisor recommended that they could "*do this up to a certain value*". The Complainants outline that this resulted in 50% of their mortgage, i.e., mortgage loan account ending **4582**, "*availing of a 3yr fixed rate that then reverted to a tracker rate when the fixed term ended, and the other 50% [account ending 3467] on a staff preferential variable.*"

The Complainants submit that there has been a *“lack of transparency”* on the part of the Provider regarding mortgage rates and options. The Complainants maintain that the Provider recommended that they avail of a staff preferential rate which was *“withdrawn after 11 months resulting in a transfer to a variable rate”*. The Complainants assert that there was no option to avail of a tracker interest rate when the preferential rate was removed which would *“align with other 50% of mortgage”*. The Complainants submit that if the Second Complainant had not been an employee of the Provider, *“100% of [their] mortgage would have been on a tracker mortgage for the term of the loan.”*

The Complainants state that they are *“delighted”* that the Provider agreed to move their mortgage loan account ending **3467** to a tracker interest rate in **2020**. The Complainants note that they feel that the Provider should offer *“a level of redress to mitigate the negative financial impact of the poor financial support, advice and service [they] received in relation to [their] mortgage.”*

The Complainants are of the view that they have not been dealt with *“fairly”* by the Provider regarding the interest rates offered. The Complainants maintain that they have been *“negatively impacted financially”*. The Complainants submit that they are satisfied with the Provider’s offer of transferring part of their mortgage to a tracker interest rate but are concerned that this does *“not address the fact that [their] monthly repayments have been substantially higher over the years”*. The Complainants are of the view that the Provider should refund them the excess *“in monthly repayments that [they] have been repaying over the last 10 years.”* The Complainants *“strongly believe”* that they *“should have been offered the tracker rate years ago when from a very early stage the “Staff Preferential” rate was no longer competitive.”*

The Complainants are seeking the following:

- (a) Mortgage loan account ending **3467** to be transferred to a tracker rate of interest and;
- (b) A refund of overpaid interest from **April 2009**, when the mortgage loan account was switched to a standard variable rate instead of a tracker rate of interest.

The Provider’s Case

The Provider states that the **Mortgage Loan Offer** dated **25 September 2007** for mortgage loan account ending **3467** provided for a loan amount in the sum of €182,000.00 repayable over a period of 30 years. The Provider notes that the interest rate was a *“staff preferential rate”* of 4.00% as detailed in **Special Condition (v)** of the **Mortgage Loan Offer**. The Provider submits that **Special Condition (v)** also makes it clear that if the Second

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Complainant ceased to be employed by the Provider *“the mortgage loan account will move to the prevailing Homeloan Variable Rate.”*

The Provider submits that the **Mortgage Loan Offer** for mortgage loan account ending **4582** was also dated **25 September 2007** and provided for a loan in the amount of €168,000.00 repayable over a term of 30 years. The Provider notes that this mortgage loan account was drawn down on a on a two-year fixed interest rate and thereafter moved to a tracker interest rate.

The Provider maintains that the Complainants *“had the full benefit of legal advice”* at the time they signed and accepted each of the **Mortgage Loan Offers**. The Provider submits that each of the **Mortgage Loan Offers** are *“subject to its own terms and conditions to include interest rates.”*

The Provider notes that the *“nature and mechanism of the staff preferential rate is that it is a variable rate of interest which is fixed at 4% for the term of the loan.”* The Provider details that the Complainants could elect to move from this interest rate and that the staff preferential rate was not one which would *“default”* at any point in time.

The Provider is of the view that the Complainants *“did not convert mortgage loan account ****3467 to a Staff Preferential Rate”*. The Provider submits that the Complainants *“requested two different interest rates on each mortgage loan account.”* The Provider asserts that the ultimate decision as to the interest rates to be applied to each mortgage loan account rested with the Complainants. The Provider states that *“it is the customer who chooses the interest rate.”*

The Provider submits that the terms and conditions of the **Mortgage Loan Offer** in respect of mortgage loan account ending **3467** were sufficiently clear in that a staff preferential rate would be applied to the mortgage loan account at inception. The Provider states that there was no contractual entitlement to a tracker rate of interest in relation to that mortgage loan.

The Provider submits that the Complainants elected to change the applicable interest rate on mortgage loan account ending **3467** in **March 2009** by completing a **Mortgage Form of Authorisation** in which they chose to apply a staff LTV variable interest rate of 2.75%. The Provider explains that there was no *“expiry date”* on the staff preferential rate or staff LTV variable rate.

The Provider states that the Complainants did not request to move to a tracker interest rate in **April 2009** but *“expressly requested to move to the Staff LTV Variable Rate*

Mortgage.” The Provider details that no rate options were offered and, instead, “a *specific rate option was requested by the Complainants.*”

The Provider notes that if the Complainants had not executed the **2009 Mortgage Form of Authorisation**, “*the mortgage loan account would have remained on a staff preferential interest rate for the term of the mortgage loan.*”

The Provider notes that it issued a further **Mortgage Form of Authorisation** to the Complainants on **09 May 2019**. The Provider explains that the Complainants signed and accepted this **Mortgage Form of Authorisation** on **14 May 2019** and by doing so, chose to apply a two-year fixed interest rate of 2.9% to their mortgage loan account ending **3467**. The Provider submits that at the end of the fixed interest rate period “*the Provider will have the sole discretion to offer any further fixed rate periods and in the absence of choice, the applicable interest rate will be a variable interest rate.*”

The Provider maintains that the Complainants could have requested alternative interest rate options at any point in time and that it was open to them to choose an interest rate that best suited their financial needs.

The Provider states that it acknowledges that the **Mortgage Loan Offer** in respect of mortgage loan account ending **3467** was not sufficiently clear “*regarding the workings and application of the staff preferential rate.*” The Provider states on that basis, together with “*any ambiguity which could be perceived from Special Condition Part 4 (a) (iv) of each of the Offer Letters*”, it is prepared to offer the Complainants a tracker rate of interest on the same margin as set out in the **Mortgage Loan Offer** in relation to mortgage loan account ending **4582**. The Provider submits however that the Complainants “*have no contractual entitlement to a tracker rate of interest*” in respect of mortgage loan account ending **3467** and, as a result, “*the Provider does not believe the Complainants are entitled to redress or compensation on the mortgage loan account.*”

The Provider is of the view that the Complainants’ solicitor had a “*clear duty*” to explain the full implications of the mortgage loan documents and if any doubts were raised about the **Mortgage Loan Offer** letters “*this should have been raised with their solicitor at that time.*”

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly transferred mortgage loan account ending **3467** to a standard variable interest rate instead of a tracker interest rate in **April 2009**, following the withdrawal of the Provider’s staff preferential rate.

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 **19 December 2022** 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.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also necessary to set out the details of certain interactions between the Provider and the Complainants in **2007** and **2009**.

The Provider has furnished a copy of screenshots from its internal system which record the **mortgage loan application notes** as follows:

“ ...

*Staff/Split ****4582*

...

Decision: Offer Sanctioned Amount: 182,000

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Added By: [Redacted] 15/09/2007 at 12:26:05

Decision: Release for Completion

Added By: [Redacted] 19/10/2007 at 11:59:26

..."

The Provider issued a **Mortgage Loan Offer Letter** dated **25 September 2007** in relation to mortgage loan account ending **3467** to the Complainants, which details as follows:

"...

**"PART 1 – THE STATUTORY LOAN DETAILS
IMPORTANT INFORMATION AS AT 25 September 2007**

1. Amount of Credit advanced:	€182,000
2. Period of Agreement:	30 Years
3. Number of Repayment Instalment <u>Instalments</u> <u>Type</u>	4. Amount of each <u>Instalment</u>
360 Variable at 4.000%	€867.50

...

PART 2 - THE ADDITIONAL LOAN DETAILS

11. Type of Loan:	Repayment
12. Interest Rate:	4.000% Variable

..."

Page 2 of the **Mortgage Loan Offer Letter** also provides:

"This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter."

Part 4 – The Special Conditions details as follows:

"The Loan is subject to the following special conditions (the "Special Conditions") which, unless stated to the contrary, must be complied with in full to the Lender's satisfaction before the Loan, or any part of it, can be drawn down:

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(a) *The following Special Conditions apply to the Loan:*

...

(iv) *This Offer Letter is in addition to the Lender's Offer Letter reference ****4582 issued to the Borrower in respect of the Property and is subject to all Conditions Precedent and Special Conditions quoted therein.*

(v) *The interest rate applied to the Loan is a staff preferential rate. In the event of the Borrower (or both Borrowers where both are members of the permanent staff of the Lender) ceasing to be employed by the Lender for any reason, the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the Lender may, at its absolute discretion, offer to the Borrower.*

..."

General Condition 1 of Part 5 – The General Conditions details as follows:

"1. Interpretation and General

(a) *In this Offer Letter the term "Conditions" means all the terms, conditions and provisions set out in Part 1 to 5 inclusive..... "Loan" means the mortgage loan described in this mortgage Loan Offer Letter ("Offer Letter") the details of which are set out in Parts 1 to 5 inclusive. [..]"*

General Condition 6 of Part 5 – The General Conditions details as follows:

"6. Variable Interest Rates

(a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*

(b) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*

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- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR)."*

General Condition 7 of Part 5 – The General Conditions details as follows:

"7. Fixed Interest Rates

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

The Complainants signed the **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer Letter** on **25 September 2007** on the following terms:

"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."

The Complainants accepted the **Mortgage Loan Offer Letter**, having confirmed that they had read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer Letter** dated **25 September 2007**.

The mortgage account statements provided in evidence show that mortgage loan account ending **3467** was drawn down on **26 November 2007** on an interest rate of 4% in line with the **Mortgage Loan Offer Letter**.

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It is clear to me that **Special Condition (a) (v)** of the **Mortgage Loan Offer Letter** provided for a staff preferential interest rate of 4% to apply for the term of the loan under mortgage loan account ending **3467**. The particulars of the **Mortgage Loan Offer Letter** describe the staff preferential interest rate of 4% as a “*variable*” interest rate. **General Condition 6** describes the nature of the applicable variable interest rate to be one which may be varied at the discretion of the Provider.

Special Condition (a) (v) of the **Mortgage Loan Offer Letter** also provided that in the event of the Second Complainant ceasing to be employed by the Provider, the staff preferential interest rate would cease and the interest rate on the mortgage loan would “*immediately revert*” to the Provider’s prevailing Homeloan Variable Rate or “*such other rate which the Lender may, at its absolute discretion, offer to the Borrower*”.

Although variable in nature, it appears to me that the staff preferential interest rate would remain static or fixed at a variable interest rate of 4% for the term of the loan, while the Second Complainant remained in the employment of the Provider. There is no reference to any default interest rate such as a tracker interest rate applying to mortgage loan account ending **3467**, other than the Provider’s prevailing variable interest rate applying if the Second Complainant ceased employment with the Provider.

The **Special Conditions** of the **Mortgage Loan Offer Letter** in relation to mortgage loan account ending **3467** also refer to a second mortgage loan account held by the Complainants with the Provider. The wording of **Special Condition (a) (iv)**, as detailed above, suggests that the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467** is to be read “*in addition to*” the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of the Complainants’ second mortgage loan account ending **4582**. **Special Condition (a) (iv)** also provides that the **Mortgage Loan Offer Letter** dated **25 September 2007** is subject to “*all Conditions Precedent and Special Conditions quoted therein*”. The language of **Special Condition (a) (iv)** is somewhat unclear in this regard as it is unclear whether the word “*therein*” refers to the Conditions Precedent and Special Conditions quoted in the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467**, or to the Conditions Precedent and Special Conditions quoted in the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **4582**. The former interpretation would suggest that the mortgage loan under mortgage loan account ending **3467** is governed by its own distinct terms and conditions, as detailed above. The latter interpretation would suggest that both mortgage loan account ending **3467** and mortgage loan account ending **4582** are more interlinked.

I have been furnished with the **Mortgage Loan Offer Letter** dated **25 September 2007** concerning mortgage loan account ending **4582**. While mortgage loan account ending

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3467 is the subject of this complaint, I consider it appropriate to also set out the relevant details of the **Mortgage Loan Offer Letter** in respect of the mortgage loan account **4582** in circumstances where **Special Condition (a) (iv)** of the **Mortgage Loan Offer Letter** in relation to mortgage loan account ending **3467** refers to the **Mortgage Loan Offer Letter** in relation to mortgage loan account ending **4582** and vice versa.

The **Mortgage Loan Offer** dated **25 September 2007** in relation to mortgage loan account ending **4582** details as follows:

“ ...

**“PART 1 – THE STATUTORY LOAN DETAILS
IMPORTANT INFORMATION AS AT 25 September 2007**

1. Amount of Credit advanced:	€168,000
2. Period of Agreement:	30 Years
3. Number of Repayment <u>Instalments</u>	<u>Instalment Type</u>
24	Fixed at 4.790%
336	Variable at 5.100%

... ”

PART 2 - THE ADDITIONAL LOAN DETAILS

11. Type of Loan:	Repayment
12. Interest Rate:	4.790% Fixed

... ”

Part 4 - The Special Conditions outlines as follows:

- “ ...
- (a) *The following Special Conditions apply to the Loan:*
- (i) *The interest rate applicable to the loan is a fixed rate and is fixed for the period set out in Part 1 of this Offer Letter. At the end of the fixed rate period the Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, in accordance with general condition 7(b) of the Offer Letter, the interest rate applicable to the Loan will be a variable interest rate. This variable interest rate may vary upwards or downwards. The interest rate shall be no more than*

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1.10% above the European Central Bank Main Refinancing Operations Minimum Rate ("Repo Rate") for the term of the Loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank.

Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.

...

- (iv) *This Offer Letter is in addition to the Lender's Offer Letter reference ****3467 issued to the Borrower in respect of the Property and is subject to all Conditions Precedent and Special Conditions quoted therein.*

..."

Part 5 – The General Conditions provides as follows:

" ...

7. Fixed Interest Rates

...

- (b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of the fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*

..."

It is clear to me that **Special Condition (a) (i)** of the **Mortgage Loan Offer Letter** provided for a two-year fixed interest rate of 4.790% to apply to mortgage loan account ending **4582**. **General Condition 7 (b)** and **Special Condition (a) (i)** detail what is to transpire at the end of the fixed interest rate period. **General Condition 7(b)** provides that at the end of the fixed interest rate period, the Provider will have sole discretion to offer the Complainants a further fixed interest rate period, or if the Provider does offer the Complainants a choice of interest rate and the Complainants fail to select an interest rate, a variable interest rate will apply to the mortgage loan account. **Special Condition (a) (i)** specifically describes the variable interest rate that will apply on the expiry of a fixed interest rate period as tracker interest rate comprising the ECB main refinancing rate and a margin not exceeding 1.10% over the ECB main refinancing rate.

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From a review of both **Mortgage Loan Offer Letters**, it is clear that the applicable interest rate in respect of mortgage loan account ending **3467** was a staff preferential rate of 4% to apply for the term of the mortgage loan unless the Provider and the Complainants mutually agreed to amend the mortgage loan to an alternative interest rate or unless the Second Complainant ceased employment with the Provider, in which case the Provider's prevailing variable interest rate would apply.

The applicable interest rate at inception in respect of mortgage loan account ending **4582** was a two-year fixed interest rate with the entitlement to a tracker interest rate of ECB +1.10% on the expiry of the fixed interest rate period if an alternative interest rate was not available, or if an alternative available interest rate was not selected by the Complainants. A **compliment slip** in relation to mortgage loan account ending **3467** with a date stamp of **31 March 2009** has been furnished in evidence which details as follows:

"...
a/c:****3467

Hi [Redacted]

Enclosed is an application form for a change to staff LTV variable mortgage.

Thanks again for your help.

If there are any problems please give me a shout

Mob: [redacted]..."

The evidence shows that the Complainants completed and signed a **Mortgage Form of Authorisation** on **30 March 2009** to amend the applicable interest rate on mortgage loan account ending **3467** to a staff LTV variable interest rate of 2.75%. The **Mortgage Form of Authorisation** details as follows:

"

**APPLICATION FOR CHANGE TO STAFF LTV VARIABLE
MORTGAGE FORM OF AUTHORISATION**

...

VARIABLE RATE

2.75%

APPLICATION FOR CHANGE OF INTEREST RATE:

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

Please select when you wish to change your interest rate:

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- I/We wish to change to the rate selected above immediately*
- I/We wish to change to the rate selected above at the expiry of my/our current fixed rate period (if applicable)....”

The **Consumer Credit Act Notices** section on **page 2** of the **Mortgage Form of Authorisation** details as follows:

*“If your mortgage is at any time at a variable rate, please note: **THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.**”*

The Complainants signed the **Acknowledgement and Agreement** section of the **Mortgage Form of Authorisation** on **30 March 2009** on the following terms:

“ACKNOWLEDGEMENT AND AGREEMENT

...

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

I acknowledge and agree that:-

- 1. In converting the Loan from a fixed rate, I understand that I will be liable to pay a funding sum to [the Provider] calculated in accordance with the condition contained in the Offer Letter applicable to the Loan or in as set out below (whichever is lesser):**

In the case of a fixed rate loan, in the event of early repayment of the loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or further or subsequent fixed rate period, the Borrower will be liable to pay a sum to be calculated in according with the following formula: (Amount x (R-R1) x Time) divided by 36500 and for the purposes of this formula, the variables are defined as follows: - “Amount” means average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments; in the case of an endowment loan, this will equal

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the full amount of the early repayment or conversion. "R" means the cost of funds for the Bank for the fixed rate period as incorporated in the existing interest rate applying to the loan. "R1" means the interest rate available to the Bank for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period. "Time" means the number of the days from the date of early repayment to the end of the relevant fixed rate period.

2. Variable Interest Rates

- i. Subject to clause 2(iii), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Bank's discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.
- ii. The Bank shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) of the Offer Letter, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.
- iii. Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).

3. In the event of the Borrower (or both Borrowers where both are members of the permanent staff of [Provider] ceasing to be employed by the [Provider], the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the [Provider] may, at its absolute discretion, offer to the Borrower.
4. **Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged."**

By signing the **Mortgage Form of Authorisation** on **30 March 2009**, the parties agreed to convert mortgage loan account ending **3467** from a staff preferential rate mortgage to a staff LTV variable interest rate mortgage. There is no reference in the **Mortgage Form of Authorisation** to a tracker interest rate applying to mortgage loan account ending **3467**, other than the Provider's prevailing variable interest rate applying if the Second

Complainant ceased employment with the Provider, or such other rate that may be offered at the discretion of the Provider.

The **mortgage account statements** for mortgage loan account ending **3467** show that the interest rate changed to 2.75% on **08 April 2009** and subsequently decreased to 2.5% on **09 April 2009**.

The Complainants appear to be of the view that in circumstances where the Provider purportedly withdrew the staff preferential rate of 4%, the Provider transferred their mortgage loan account ending **3467** to a standard variable interest rate instead of a tracker interest rate in **April 2009**. However, I have not been provided with any evidence to suggest that the Provider decided to withdraw the staff preferential rate from its suite of mortgage products in **2009**. In circumstances where it was intended that the staff preferential rate of 4% would apply to mortgage loan account ending **3467** for the term of the loan, unless the Second Complainant ceased employment with the Provider, it was a matter for the parties to mutually agree to change the applicable interest rate if they so wished. The evidence shows that it was Complainants applied to the Provider in **March 2009** to move to a staff LTV variable rate mortgage. There is no evidence to suggest that the Complainants requested to move to a tracker interest rate at this time and there was no obligation on the part of the Provider to offer the Complainants a tracker interest rate at this time, in circumstances where, the mortgage loan agreement only provided for a staff preferential rate of 4%.

The **mortgage account statements** show that mortgage loan account ending **3467** remained on the staff LTV variable rate until **2019** when the Complainants chose to apply a fixed interest rate to their mortgage loan account.

The Provider submits that the Complainants made a request to apply a fixed interest rate to their mortgage loan account ending **3467** in **April 2019**. The **General Conditions of Mortgage Loan Offer** dated **25 September 2007** provides that the Provider may at its absolute discretion allow the Complainants to avail of a fixed interest rate. The Provider appears to have allowed the Complainants avail of a fixed interest rate as the Provider explains that it issued a **Mortgage Form of Authorisation** to the Complainants on **09 May 2019** with a choice of LTV 61%-80% interest rates including variable and fixed rate options (1-year, 2-year, 3-year, 5-year and 10-year). The Provider states that the Complainants signed and accepted this **Mortgage Form of Authorisation** on **14 May 2019** choosing a two-year fixed interest rate of 2.9%.

I have not been furnished with a copy of the **Mortgage Form of Authorisation** dated **14 May 2019** in evidence which is most disappointing, and the Provider has not provided a reason for its failure to submit this document in evidence. However, the **mortgage account**

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statements show that a fixed interest rate of 2.9% was applied to mortgage loan account ending **3467** on **21 May 2019**.

In circumstances where a fixed interest rate applied to mortgage loan account ending **3467** in **May 2019**, **General Condition 7** of **Part 5 – The General Conditions of Mortgage Loan Offer** dated **25 September 2007** became applicable. **General Condition 7(b)** provides that at the end of the fixed interest rate period, the Provider will have sole discretion to offer the Complainants a further fixed interest rate period, or if the Provider does offer the Complainants a choice of interest rate and the Complainants fail to select an interest rate, a variable interest rate will apply to the mortgage loan account. **General Condition 6** of **Part 5 – The General Conditions of the Mortgage Loan Offer** dated **25 September 2007** in relation to mortgage loan account ending **3467** describes the nature of the variable to be one that could be adjusted at the discretion of the Provider. However, the wording of **Special Condition (a) (iv)** suggests that the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467** is to be read “*in addition to*” the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of the Complainants’ second mortgage loan account ending **4582** and to the Conditions Precedent and Special Conditions quoted in the **Mortgage Loan Offer Letter** dated **25 September 2007** respect of mortgage loan account ending **4582**. **Special Condition (a) (i)** of the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of the Complainants’ second mortgage loan account ending **4582** describes the variable interest rate that will apply on the expiry of a fixed interest rate period as tracker interest rate comprising of ECB + 1.10%.

The Provider’s **Final Response Letter** to the Complainants dated **08 January 2018** in response to the Complainants’ complaint to the Provider dated **14 November 2017**, states as follows:

“ ...

There is no provision in your Mortgage Loan Offer for a tracker rate of interest.

...”

However, the Provider subsequently reviewed the Complainants’ mortgage loan account ending **3467** as part of the Central Bank of Ireland directed Tracker Mortgage Examination. The Provider wrote to the Complainants on **18 February 2020**, prior to the expiry of the two-year fixed interest rate period, for the purposes of offering the Complainants a tracker interest rate in respect of mortgage loan account ending **3467**. The letter dated **18 February 2020** details as follows:

“We recently reviewed your mortgage loan as part of the Tracker Mortgage Examination. We can confirm that your account was “not impacted”.

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The phrase “not impacted” in this context means that we did not find a mistake was made with a “tracker rate” of interest that entitles you to be paid redress and compensation. When we refer to a “tracker rate” we mean a rate of interest that is an agreed percentage above the European Central Bank (ECB) Repo Rate.

However, in our review we found that the Offer Letter for your mortgage loan has a clause that gives you the right to a tracker rate of interest at the end of a fixed rate period if you choose a fixed rate during the life of the mortgage loan. We enclose a copy of this Mortgage Offer Letter. You asked us to fix the interest rate on your mortgage loan in April 2019, which we did and as a result you have triggered your right to move to a tracker rate at the end of the fixed rate period.

Notwithstanding, the Bank indicated to the office of the Financial Services and Pensions Ombudsman (“FSPO”) that we would offer you the opportunity to avail of a Tracker now and in that context we are offering you the right to switch to a tracker rate now. If you wish to avail of a tracker rate now there will be no cost to you in breaking out of your fixed rate early.

We have set out our offer of a tracker rate in the Mortgage Form of Authorisation (“MFA”) we enclose with this letter. The MFA sets out the details of the tracker interest rate we are offering: it is 1.10% above the ECB Repo Rate. That percentage is the same as the one set out in the Offer Letter for your mortgage loan dated 25 September 2007; 1.10%. For reference, your current mortgage is on a fixed rate of 2.90%.

You have until 10 March 2020 to accept this offer of a tracker rate. If you would like to take up the offer, please make sure you sign the MFA and get it back to us by 10 March 2020. If you do, we can the move you straight to a tracker rate.

If you do move to a tracker rate using the MFA you can stay on it for as long aa you wish. If you decide to move to a tracker rate now that option will remain open to you at the end of your fixed rate period....”

I note that the Complainants accepted the offer from the Provider to break away early from the fixed interest rate period and apply a tracker interest rate of ECB + 1.10% to mortgage loan account ending **3467**. Mortgage loan account ending **3467** was moved to a tracker interest rate of ECB +1.10% in or around **March 2020**.

However, the Complainants maintain that the Provider should have offered them a tracker interest rate in **April 2009** when they moved from the staff preferential interest rate.

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Consequently, the Complainants submit that the Provider “*should offer a level of redress to mitigate the negative financial impact of the poor financial support, advice and service [they] received in relation to [their] mortgage.*”

From a review of the mortgage loan documentation in relation to both mortgage loan accounts held by the Complainants with the Provider, it appears that the entitlement to a tracker interest rate arises at the end of a fixed interest rate period should the Complainants decide to apply a fixed interest rate during the life of the mortgage loan. **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467** stipulates that at the end of a fixed interest rate period, the Provider has the discretion to offer the Complainants a further fixed interest rate period. However, if the Provider does not offer a further fixed interest rate period or if the Provider offers the Complainants a choice of interest rate at the end of any fixed rate period and the Complainants fail to exercise that choice, then in either case the interest rate applicable to the loan will be a variable interest rate. Therefore, while there is no specific entitlement to a tracker interest rate on the face of **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467**, the Provider has a discretion to offer a choice of interest rates to the Complainants. In addition, if **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467** is to be read “*in addition to*” the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **4582** and is subject to the **Special Conditions** contained in the **Mortgage Loan Offer Letter** in respect of mortgage loan account ending **4582**, then the nature of the variable interest rate to apply at the end of the fixed interest rate period is a tracker interest rate of ECB +1.10%.

While the Complainants are of the view that they should have been offered a tracker interest rate from the Provider in **April 2009**, it is important to highlight that the Complainants were not availing of a fixed interest rate in **2009** to trigger any entitlement to a tracker interest rate.

The evidence shows that the Complainants were availing of the staff preferential rate of 4% from the inception of mortgage loan account ending **3467** in **November 2007** until **April 2009**. While it was intended that the staff preferential rate of 4% would apply for the term of the mortgage loan, the Complainants completed a **Mortgage Form of Authorisation** on **30 March 2009** to amend the applicable interest rate on mortgage loan account ending **3467** to a staff LTV variable interest rate of 2.75%. The nature of the staff LTV variable interest rate was one that could be adjusted by the Provider as opposed to a tracker interest rate that fluctuated in line with variations in the ECB rate. While tracker interest rates were available generally from the Provider in **2009**, subject to certain eligibility criteria, there was no contractual or other obligation on the part of the Provider

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to offer the Complainants a tracker interest rate on mortgage loan account ending **3467** in **April 2009** when they decided to move from the staff preferential rate of 4%.

The Complainants' mortgage loan account remained on the staff LTV variable interest rate until **May 2019** when the Complainants chose to apply a two-year fixed interest rate of 2.9% to mortgage loan account ending **3467**. By doing so, the Complainants triggered their entitlement to be offered a tracker interest rate at the end of the two-year fixed interest rate period in **May 2021**. However, in circumstances where the Provider has acknowledged that the **Mortgage Loan Offer Letter** dated **25 September 2007** in respect of mortgage loan account ending **3467** *"is not sufficiently clear regarding the workings and application of the staff preferential rate, together with any ambiguity which could be perceived from Special Condition Part 4 (a) (iv) of each of the Offer Letters"*, the Provider decided to offer the Complainants the opportunity to break away early from the fixed interest rate period with no cost to the Complainants and apply a tracker interest rate of ECB + 1.10% to mortgage loan account ending **3467** in **March 2020**. This was a decision that the Provider made of its own commercial discretion in light of any confusion which could be perceived from the wording contained in the **Mortgage Loan Offer Letter** dated **25 September 2007** regarding the Complainants' interest rate entitlements in relation to mortgage loan account ending **3467**.

The standards expected of the Provider in all of its dealings with the Complainants are set out in **Chapter 1** of the **Consumer Protection Code 2006**, which came into force on **01 August 2006**, and provides that:

"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers"

I accept that the mortgage loan documentation in relation to mortgage loan account ending **3467** is sufficiently clear as to the nature and workings of the staff preferential rate of 4% interest rate that applied to the mortgage loan at inception in **November 2007**. The Complainants could have remained on this interest rate for the lifetime of the loan, unless the Second Complainant ceased employment with the Provider. The Complainants chose to move to a staff LTV variable interest rate of 2.75% in **April 2009**. I am satisfied that the mortgage loan documentation, in particular the **Mortgage Form of Authorisation** that was signed by the Complainants on **30 March 2009** is sufficiently clear as to the nature and workings of the staff LTV variable rate.

Nonetheless, some confusion arises in the mortgage loan documentation as to what might transpire at the end of a fixed interest rate period should the Complainants decide to switch to a fixed interest rate with the agreement of the Provider during the lifetime of the

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loan, which is what occurred in **May 2019** when the Complainants chose to apply a two-year fixed interest rate to mortgage loan account ending **3467**. The Provider acknowledges that some confusion or ambiguity could be perceived from **Special Condition Part 4 (a) (iv)** of the **Mortgage Loan Offer Letters** dated **25 September 2007** in relation to each mortgage loan account. In light of any confusion in this regard, the Provider afforded the Complainants the opportunity to apply a tracker interest rate of ECB +1.10% to mortgage loan account ending **3467** in **March 2020**, before the expiry of the two-year fixed interest rate period in **May 2021**. The Complainants duly accepted this offer made by the Provider and they were not charged any penalties for breaking away early from the fixed interest rate period. I consider the Provider's offer to apply a tracker interest rate to the mortgage loan account in **March 2020** to be a reasonable attempt to address any confusion arising from **Special Condition Part 4 (a) (iv)** of the **Mortgage Loan Offer Letters** dated **25 September 2007**.

In light of all the foregoing, I do not consider that the Provider incorrectly transferred mortgage loan account ending **3467** to a standard variable interest rate instead of a tracker interest rate in **April 2009**. The Provider transferred mortgage loan account ending **3467** from a staff preferential interest rate to a staff LTV variable rate in **April 2009** on foot of the Complainants' express instructions.

For the reasons set out in this Decision, I do not uphold this complaint.

Conclusion

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

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



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

23 January 2023

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.