Decision Ref: 2020-0103

Sector: Banking

Product / Service: Tracker Mortgage

Conduct(s) complained of: Failure to apply the correct tracker rate
Failure to offer appropriate compensation or redress

Outcome: Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan which was signed by the Complainant on **27 March 2007**, outlined the mortgage loan amount as €330,000 and the term as 35 years. The mortgage loan that is the subject of this complaint is secured on the Complainant's private dwelling house.

A complaint was received by the then Financial Services Ombudsman Bureau in **April 2016**. The complaint transferred to the office of the Financial Services and Pensions Ombudsman (FSPO) on its establishment on **01 January 2018**. The complaint detailed that the conduct complained of was that the Provider had failed to offer the Complainant a tracker interest rate at the Provider's "*prevailing rate*" on the expiry of fixed interest rate periods in **April 2010** and **April 2014**. The complaint was placed on hold pending the outcome of the Tracker Mortgage Examination which was directed by the Central Bank of Ireland.

The Provider considered the Complainant's mortgage loan account under the Tracker Mortgage Examination. The Provider identified that a failure had occurred on the mortgage

loan account and as such that account was deemed to be *"impacted"* as part of the Examination.

The Provider in its letter to the Complainant dated **16 March 2018** detailed the circumstances that caused this failure to happen as follows;

> *"The terms and conditions of your mortgage account state that at the end of a fixed rate period you had the option to choose from the then prevailing fixed, variable or tracker interest rates. The interest rate on your account was fixed for a period and when this expired (between October 2008 and December 2013), we had withdrawn tracker rates. Because of this, you did not have the option of choosing the then prevailing tracker rate at that time."*

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

> *"The reason we withdrew tracker interest rates from October 2008 until December 2013 was because this rate type would have been prohibitively expensive. As such, any prevailing tracker rate that would have existed at the end of your fixed rate period would have been more expensive than the variable rates that were available during that time. Based on best available information, it is estimated that the prevailing Private Dwelling House (PDH) tracker rate would have averaged circa 7.9% (9.0% for Buy to Let (BTL)). Whereas, the PDH standard variable rate averaged 3.3% (4.4% for BTL). As such, you did not suffer any financial detriment as a result of the prevailing tracker not being available during that period. However, we recognise that this option should have been available to you and we apologise for our failure."*

A compensation offer was made to the Complainant by the Provider on **16 March 2018**, as follows;

> *"To compensate you for this failure we are making a payment of €1,615. This payment is made up of €1,000 in compensation and €615 towards independent professional advice. Where there are multiple parties to an account, the payment will be split equally between all parties.*
>
> *As we did not offer you a prevailing tracker interest rate at the end of your fixed rate period, we are giving you the option of our prevailing tracker interest rate now. That is, the prevailing European Central Bank interest rate on the main refinancing operations as set by the ECB (currently 0%) plus the prevailing margin as set by [the Provider] (currently 3.32% for a PDH or 4.32% for a BTL property)."*

/Cont'd…

The Complainant submitted an appeal to the Independent Appeals Panel, established by the Provider as part of the Examination on **31 July 2018**. The Appeals Panel decided on **07 February 2019** that the appeal was unsuccessful.

As the Complainant had completed the Provider's internal appeals process, the complaint was taken off hold and progressed by this Office.

The conduct complained of that I am now adjudicating on is that the Provider has not offered the Complainant adequate redress or compensation for its failure on her mortgage loan account.

The Complainant's Case

The mortgage product the Complainant accepted and signed in **March 2007** was for an initial 3 year fixed rate of interest.

The Complainant submits that under **Clause 3.2** of the **General Terms and Conditions of Offer of Mortgage Loan** the Provider was contractually obliged to offer her *"the then prevailing tracker rate in April 2010 when [the] fixed rate period expired. But they did not do so"*.

The Complainant states that the Provider introduced tracker mortgages in **2003** and that from time to time the Provider changed the prevailing tracker margins that it offered to customers rolling off fixed rates. The Complainant outlines that the Provider increased the margin on tracker mortgages with LTVs in excess of 80% to 1.5% in **June 2008** and next changed the margin in **December 2013**.

The Complainant says that when the fixed interest rate period applicable to her mortgage loan ended in **April 2010,** she had a LTV in excess of 80% and that the then prevailing rate, which had continued to prevail since June 2008, was ECB + 1.5%.

The Complainant disagrees with the Provider's statement that:

> *"In the context of Clause 3.2 the term "prevailing rates" means the interest rates then current and available at the date that a customer's fixed Rate period expires."*

The Complainant outlines that although the Provider was entitled to change the prevailing tracker interest rate, it was not entitled to withdraw it. The Complainant says that just because the Provider stopped offering tracker interest rates to customers between **October 2008** and **December 2013** that the prevailing tracker interest rate "*did not vanish into thin*

/Cont'd…

air". The Complainant describes the failure of the Provider to offer her a tracker rate upon expiry of the fixed rate period in **April 2010** as "*a breach of an inherent and fundamental element of the contract*" as opposed to the Provider's description of the conduct as a "*service failure*".

The Complainant further highlights a press release issued by the Provider from **10 October 2008** and submits that as she was an existing customer of the Provider on the date of withdrawal of tracker interest rates she should not have been affected by the Provider's decision to stop offering tracker rates to new customers. The Complainant outlines as follows;

> *"I signed my mortgage contract (dated 21st March 2007) on 27th March 2007. This is the only mortgage contract that I signed with [the Provider] in relation to my property. As I was an existing customer on 10th October 2008 I should not have been affected by the withdrawal of the tracker rate. [The Provider's] refusal to offer me a tracker rate on 26th April 2010 was, and remains, a clear breach of contract"*

The Complainant outlines that the Provider had not actually set a new prevailing tracker rate since **June 2008** so the "*last prevailing margin is the best estimate of what the margin probably would have been*". The Complainant states that the term "*prevailing rates*" is not defined in the mortgage loan contract and it certainly didn't define it as the rate on offer to new customers.

The Complainant submits that the Provider was entitled to change the prevailing rate in **April 2010**, but it chose not to do so. She asserts that it was not entitled to withdraw the rate and in doing so was "*in breach of an inherent and fundamental element*" of her mortgage loan contract.

The Complainant submits that *"if the Ombudsman does not accept that the prevailing rate was 1.5%, then the Ombudsman needs to establish what the prevailing rate would probably have been in April 2010*". The Complainant says, that "*no one can say for sure what would have happened in 2010. The best we can do is work out what would probably have happened"*. In this respect the Complainant labels the Provider's submission that if it did have a tracker rate between **October 2008** and **December 2013** it would have been "*prohibitively expensive*" and it "*would have averaged circa 7.9%*" as "*a very poor attempt at a post hoc rationalisation*".

The Complainant further states that the Provider developed a model in **September 2017** which concluded that the prevailing margin *"should have been higher than 1.5%".* In this regard the Complainant says;

/Cont'd…

"If [the Provider] had used this model back in April 2010 to set the prevailing margin at 4.013% and had offered this tracker rate to [the Complainant] at the time, then she would have had no grounds to challenge it either at the time or at any time since. But they did not set the rate at the time. They developed it over 7 years after [the Complainants] fixed rate expired.

If a customer were complaining about an unexpected or unexplained rise in their interest rate today it would be entirely appropriate for [the Provider] to submit the model it was using to calculate this rate today. And it would be entirely appropriate for the customers to argue that this model does not comply with the contract or the legislation. But this would be a complaint about actual figures and calculations that were used to get to a live rating. By comparison, in [the Complainant's] case, [the Provider] is using a hypothetical model developed seven years after the event, to work out what the pricing should have been, when we already know what it was, 1.5%.

It is entirely inappropriate for [the Provider] to seek to revise a rate already set based on a model developed seven years later."

The Complainant further details that the Provider has not "*provided any evidence to support its assertion that the Tracker interest rate would have been more expensive than their Variable or Fixed rates which were available during that time*." The Complainant says that a tracker interest rate has the exact same costs as a standard variable rate mortgage. *"They are funded from the same sources. The costs of risk is the same. The cost of capital is the same."* The Complainant says that the pricing model used by the Provider in **April 2010** determined that the appropriate standard variable rate as 2.75%, so the tracker rate would probably have been 2.75% (ECB + 1.75%).

The Complainant outlines that where there is ambiguity in a contract it should be interpreted in favour of the customer and that there was a prevailing rate of ECB + 1.5% which was effective from **June 2008**.

The conduct complained of is that the Provider has not offered the Complainant adequate redress and compensation for its failure on her mortgage loan account.

The Complainant is seeking the following;

(a) The interest charged on her mortgage loan account to be recalculated at the rate of ECB + 1.5%, backdated to April 2010;
(b) A refund of the interest overcharged; and

/Cont'd…

(c) Compensation at the rate of 15% of the overcharged amount on her mortgage loan account.

The Provider's Case

The Provider submits that the Complainant's mortgage loan account was drawn down in **March 2007** on an initial 3 year fixed rate.

The Provider's position is that a tracker interest rate never applied to this mortgage loan account and the terms and conditions clearly outlined that at the end of the fixed rate period, the Complainant may choose between a number of "*prevailing*" rates. In the absence of a choice by the customer, the loan would convert to a variable interest rate.

The Provider states that in **October 2008** it withdrew tracker interest rates for new mortgage customers and existing mortgage customers who wished to change from their then current contractual interest rate to a tracker rate. In its response to this complaint the Provider outlines that the reason it withdrew tracker interest rates in October 2008 was because this rate type would have been *"prohibitively expensive*" for customers had the Provider continued to offer this rate type.

The Provider outlines that because it withdrew tracker interest rates, it was unable to offer the Complainant a tracker interest rate when her fixed interest rate period ended on **29 April 2010** and that any prevailing tracker interest rate that would have existed in **April 2010**, would have been much more expensive than the variable rates that were available during that time. The Complainant chose a four year fixed interest rate of 3.95% in **April 2010**. The Provider states the Complainant has always chosen fixed interest rates and has never selected a variable interest rate option on her mortgage loan.

The Provider submits that the Complainant was not contractually entitled to a tracker interest rate on her mortgage loan account and that the General Conditions do not "*expressly state"* that the Provider was "*required to offer a tracker interest rate at any particular rate on the expiry of a Fixed Interest rate period*". The Provider outlines that **General Condition 3.2** refers to the customer "*choosing*" between the Provider's rates which are *"then prevailing*" "*at the end of any fixed interest rate period*". The Provider argues that use of the term "*then prevailing*" by reference to the end of any fixed interest period when a customer choice arises does not contemplate that the Complainant ought to have been offered a rate that was in place at a point in the past.

/Cont'd…

The Provider's view is that **General Condition 3.2** is "*permissive in nature and is conditional"* on there actually being a tracker interest rate available at the time the Complainant's fixed interest rate period came to an end. The Provider outlines that this is supported by the use of similar language in **Condition 3.6.4**. The Provider submits that "*even if this is not the case, the Complainant could not, in any event, obtain a Tracker rate other than a Tracker rate which would have been "then prevailing" (albeit for a tracker hypothetical) rate*" at the expiry of the Complainant's fixed rate. The Provider defines prevailing rates as:

> *"In the context of Condition 3.2, the term "then prevailing rates" means the interest rates then current and available on the day that the Fixed interest rate period ends. The phrase "then prevailing " clearly relates to all three rates listed above ("a fixed interest rate", "a variable interest rate" or a "tracker interest rate") and can therefore be interpreted as being the rates available on the day that the Fixed interest rate period ends.*"

The Provider outlines that since there was no prevailing tracker interest rate available generally by the Provider, by not having one to offer *"there was a service failure on the [Provider's] part, but there was no breach of contract".*

The Provider states that "*following feedback from its customers*" it made a "*commercial decision*" to "*reintroduce a prevailing tracker rate*" in **December 2013**. The Provider submits that this rate was only made available to customers "*whose terms and conditions entitled them to the option*". The Provider outlines that the tracker interest rate of 5.61% (ECB + 4.91%) was set in the normal way, following a review of various mortgage costs and, in particular, funding costs.

The Provider submits that it recognises that the Complainant may have had an expectation that the choice of the Provider's then prevailing tracker rate would have been available when the fixed rate period on her mortgage loan account expired. The Provider outlines that it wrote to the Complainant on **16 March 2018** to apologise for its service failure. The Provider is of the view that the compensation offered of €1,615 to the Complainant is "*adequate*" and "*fair*" as it contends that she did not suffer any financial detriment by not having a choice of the then prevailing tracker rate at that time. The Provider outlines that its approach to compensating customers who were affected by this service failure was shared with the Central Bank of Ireland. The Provider also outlines that the Complainant's appeal to the Independent Appeal Panel set up as part of the Tracker Mortgage Examination was unsuccessful.

/Cont'd…

The Provider outlines as follows;

> *"In order to estimate the hypothetical Tracker rates for the period October 2008 to December 2013, (during which time Tracker rates were not available), the [Provider] used an international standard mortgage pricing model and the best available objective information to estimate what the prevailing margin and rate would reasonably have been at the time, had the [Provider] maintained the rate. In calculating the estimated Tracker Mortgage margin the [Provider] considered components such as;*
>
> 1) *Funding costs;*
> 2) *Credit risk costs;*
> 3) *Capital costs; and*
> 4) *Operating costs"*

The Provider submits further that its calculations were independently reviewed by an international firm of financial market experts and by the External Independent Party for the Tracker Mortgage Examination. The Provider states that the "*setting of the [Provider's] prevailing Tracker margin is and was at all times expressed to be, at the sole discretion*" of the Provider. The Provider outlines that its workings to calculate the estimated tracker rates for the period **October 2008** to **December 2012** do not include the "*reasonable incremental cost to cover the financial risk of providing the lifetime guarantee margin over the European Central Bank rate (ECB) for the life of the mortgage loan"*. The Provider says these "*reasonable incremental costs*" were estimated by the international firm of financial markets.

The Provider states;

> *"By way of further background, the period in which the [Provider] did not have a prevailing Tracker rate was at the peak of the banking liquidity and sovereign crisis. Given this economic backdrop, the vast majority of the total cost of the estimated prevailing Tracker rate is made up of the Bank's funding costs during this period. By way of context, the average cost of five year Irish Government debt, on the secondary markets, for the same period was, 5.2%. This peaked at an average of 14.5% for the month of July 2011.*
>
> *The [Provider] refutes the Complainant's suggestion that a Tracker mortgage has the exact same costs as a standard variable rate mortgage. This is not the case as the standard variable rate can be adjusted at the discretion of the [Provider] whereas the Tracker margin is locked in for the life of the loan. Given the different financial risk profile, the standard variable rate is not a relevant benchmark of Tracker pricing."*

/Cont'd…

The Provider outlines that the *"international firm of financial market experts"* who considered the Provider's approach and calculations concluded that they were *"reasonable and appropriate for the purpose for which it was developed, i.e setting the minimum prevailing mortgage tracker margin"*.

The Provider submits that the Complainant has been appropriately compensated for the "*service/operational failure*" in the sum of €1,615.00 and there is no basis for a recalculation of interest charged since April 2010 based on ECB + 1.5% margin, as such a margin (including the then prevailing ECB rate) was not and would not have been offered by the Provider.

The Complaint for Adjudication

The complaint for adjudication is whether the Provider has offered adequate redress and/or compensation for its failure on the Complainant's mortgage loan account.

Decision

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

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

A Preliminary Decision was issued to the parties on **17 January 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.

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

1. By email from the Complainant on **24 January 2020**;
2. By email from the Complainant on **25 January 2020**;
3. By email from the Complainant on **25 January 2020**;

/Cont'd…

4. By email from the Complainant on **30 January 2020**;
5. By letter from the Provider dated **07 February 2020**;
6. By email from the Complainant on **10 February 2020**;
7. By letter from the Provider dated **21 February 2020**;
8. By letter from the Provider dated **21 February 2020**;
9. By letter from the Provider dated **04 March 2020**;
10. By email from the Complainant dated **04 March 2020**.

Copies of these additional submissions were exchanged between the parties.

Having reviewed and considered the post Preliminary Decision submissions together with all the submissions and evidence furnished 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.

The Provider has made submissions in response to my Preliminary Decision that if I had concerns about the evidence then I ought to have convened an Oral Hearing for the purposes of exploring those concerns "*instead of simply rejecting the evidence* entirely *without giving the Bank an opportunity to address these concerns."* The Provider in its post Preliminary Decision submissions has further submitted that it believes that it should have been given the opportunity by way of Oral Hearing;

> *"to discuss with the Ombudsman the intricacies of the market at the time the Complainant's fixed rate expired in April 2010 and also the opportunity to address any queries the Ombudsman may have regarding the context of the work conducted that was reviewed and analysed by [named third party] in preparing its report."*

The parties have both been given the opportunity in the investigation of this complaint and more recently since the Preliminary Decision issued to make any written submissions they considered relevant to the investigation and adjudication of this complaint. In particular with respect to the specific issues raised by the Provider above, I wrote to the Provider on **21 February 2020** informing the Provider that I was giving it a further opportunity to submit any details or evidence to me in writing, if there were details or evidence relevant to the dispute at issue which were not yet made available. The Provider detailed in its letter of **04 March 2020** that it had nothing further to submit.

I am satisfied that the submissions and evidence furnished were sufficient to enable me to make my Legally Binding Decision in this complaint without the necessity for holding an Oral Hearing. I remain of the view that a conflict of fact has not arisen in this matter, such as would require the holding of an Oral Hearing. Therefore I do not believe that an Oral Hearing would advance matters or assist in my adjudication of this complaint.

/Cont'd…

In order to adjudicate on this complaint it is necessary that I review and set out the relevant provisions of the Complainant's loan documentation. I will also set out interactions between the Complainant and the Provider since **March 2007**.

The Complainant was issued with a **Letter of Offer of Mortgage Loan** dated **21 March 2007**. The "**Important Information**" set out in that letter, details as follows;

1.	*"Amount of Credit Advanced*	*€330,000*
2.	*Type of Loan*	*Interest Only reverting to Annuity*
3.	*Period of Agreement*	*35 years/420 months"*

Part 1 – Particulars of Offer of Mortgage Loan sets out the following as the "*Repayment Details as at date of Offer":*

	Term	***Loan Type***	***Interest Rate Description***	***Rate***	***Margin***	***Net Rate***	***Amount of Each Instalment***
1	*2 years*	*Fixed Interest Only*	*Int. Only – 3 Year Fixed Rate*	*5.05%*	*0%*	*5.05%*	*€1,390.05*
2	*1 Year*	*Fixed Annuity*	*3 year fixed new*	*5.05%*	*0%*	*5.05%*	*€1,710.31*
3	*32 Years*	*Variable Annuity*	*Variable Rate*	*4.6%*	*0%*	*4.6%*	*€1,620.67*

Part 4 of the **General Terms and Conditions of Offer of Mortgage Loan** outline as follows;

> ***"3.1 RATE NOT GUARANTEED TO DRAWDOWN***
>
> *Due to fluctuations in interest rates, the [Provider] does not warrant or guarantee that the rate specified in the Particulars will apply on drawdown:*
>
> *(a) In the case of an offer at a variable rate or tracker rate, the initial rate which will apply to the Mortgage Loan will be the rate prevailing at date of drawdown.*
>
> *(b) In the case of an offer at a fixed interest rate, the appropriate fixed rate which prevails at date of drawdown will apply to the Mortgage Loan if this is different from the rate specified in the Particulars. The Customer may accept this rate or, within 21 days of drawdown, opt to switch to the variable or tracker rates prevailing at the time without incurring any early breakage cost under Clause 3.3.*

/Cont'd…

3.2 FURTHER FIXED INTEREST RATE OPTIONS/CHOICE

At the end of any fixed interest rate period, the Customer may choose between:

(a) a further fixed interest rate period, or

(b) conversion to a variable interest rate Mortgage Loan, or

(c) conversion to a tracker interest rate Mortgage Loan,

at the [Provider's] then prevailing rates appropriate to the Mortgage Loan. If the Customer does not exercise this choice, then the Mortgage Loan will automatically convert to a variable interest rate Mortgage Loan.

…

3.4 FIXED INTEREST RATE MORTGAGE LOAN

In the case of a fixed interest rate Mortgage loan, the interest rate is the appropriate rate which prevails at the date of drawdown, and will be fixed for the period of time stated in the Particulars, subject to these conditions.

3.5 VARIABLE INTEREST RATE MORTGAGE LOAN

In the case of a variable interest rate Mortgage Loan the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the [Provider], from time to time, subject to these conditions.

3.6 TRACKER INTEREST RATE MORTGAGE LOAN

3.6.1 The tracker interest rate is made up of two parts:

(a) the European Central Bank's main refinancing operations minimum bid rate (the "ECB Rate") which is variable, and

(b) the Tracker Margin as stated in Part 1 of the Particulars of Offer of Mortgage Loan, subject to 3.6.3 below.

3.6.2 The tracker interest rate applicable at any time will change within 5 working days of a change in the ECB Rate.

3.6.3 The [Provider] may adjust the Tracker Margin upwards if the Valuation Report values the property at less than the Property Price/Estimate Value shown in the Particulars of Offer of Mortgage Loan. The [Provider] will notify the Customer in writing of the new Tracker Margin.

3.6.4 The Customer may at any time convert a tracker interest rate Mortgage Loan to a fixed interest rate Mortgage Loan or a variable interest rate Mortgage Loan at the [Provider's] then prevailing rates appropriate to the Mortgage Loan. However, the Customer may not convert the tracker interest rate

/Cont'd…

Mortgage Loan directly or indirectly from one tracker interest rate to another tracker interest rate in order to avail of a lower prevailing Tracker Margin."

The **Acceptance and Consent** in **Part 7** of the **General Terms and Conditions of Offer of Mortgage Loan** was signed by the Complainant and witnessed by a solicitor on **27 March 2007**. The Acceptance and Consent states as follows:

> *I/We hereby confirm, that I/we have read the within Terms and Conditions attaching to this Offer, and acknowledge that I/we have received a copy thereof."*

The Provider wrote to the Complainant on **22 April 2009** enclosing a copy "*of our current rates . . . as requested*". The rates cited included a standard variable rate (2.9%) and fixed rates of one, two, three, four, five and ten years (between 2.85% and 4.41%), but no tracker interest rate was included. It appears from the Provider's **Customer Accounting Special Notes** from **29 April 2009** that "*Int only expired reverting to annuity for 33 yrs fixed for one more year*". It appears from the Complainant's account statements that an interest rate of 5.18% applied between April 2009 and April 2010, and that no action was taken by the Complainant on foot of the rate letter of 22 April 2009.

The Provider wrote to the Complainant on **31 March 2010** and outlined as follows;

> *"With reference to the above quoted Fixed Rate Mortgage Account, we wish to advise that the Fixed Rate Term is due to expire on the 29th April 2010.*
>
> *We shall be grateful, therefore, if you will contact this office at your earliest convenience in order to discuss the various Products which are now available to you. In the event that we do not hear from you prior to 26th March 2010 your account will transfer automatically to the [Provider's] prevailing Standard Variable Rate for mortgages at this time."*

It appears from the Provider's **Customer Accounting Special Notes** that the Complainant contacted the Provider by telephone on **06 April 2010 and 13 April 2010**. The notes outline as follows;

06Apr10 *[The Complainant] called adv fixed rate exp and adv need req to amend rate…[Provider representative name]*

13Apr10 *advised [The Complainant] of repayments on fixed rates as per summary illustrator…[Provider representative name]*

/Cont'd…

The Complainant wrote to the Provider by letter dated **14 April 2010** and outlined as follows;

> *"I would like to transfer to a 4 year fixed rate which I understand from my recent conversations with your team is currently 3.95%.*
>
> *I understand from one of these conversations that my minimum monthly repayment is estimated around €1,456."*

The Statement of Account with respect to the Complainant's mortgage loan shows that the capital balance on the mortgage loan as at **26 April 2010** was €314,501.83.

I note that the letter that issued to the Complainant on **31 March 2010** prior to these two telephone conversations did not contain any information about the interest rate options available to the Complainant, rather the letter operates as a prompt to the Complainant to contact the Provider to discuss the products available. Having considered the evidence before me, I note that at the end of later fixed interest rate periods in March 2014, March 2016 and March 2018, the Provider set out in writing the various rate options available to the Complainant as well as the repayments applicable to each rate option. It is unclear to me why the Provider did not set out the various options in writing to the Complainant in March 2010, in the same manner in which the Provider did at the end of the later fixed interest rate periods.

The **Consumer Protection Code 2006** (the "***CPC 2006***") was in effect at the time of the expiry of the fixed interest rate period in April 2010. It outlines in Chapter 2 that:

> *"A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."*

I am of the view that the Provider did not act in a manner that was consistent with the CPC 2006, by simply prompting the Complainant to contact the Provider to discuss interest rate options, as opposed to setting out those options in a clear and comprehensible durable medium to the Complainant. This would have afforded the Complainant the opportunity to consider the options before her and thereafter contact the Provider to discuss those options, if it was necessary.

It is disappointing to note that the Provider does not hold a recording of the telephone calls on **06 April 2010** or **13 April 2010**. This is particularly so given that the Complainant's options were not outlined in the correspondence she had received on 31 March 2010 that prompted those calls. I understand that the Provider, when asked for a recording of these telephone

/Cont'd…

calls by the Complainant as part of a Data Access Request, outlined to the Complainant that the Provider "*did not record their phone calls in 2010*". In any event it is accepted by the parties that the Provider did not give the Complainant the option of a tracker interest rate on her mortgage loan in **April 2010**.

A fixed rate expiry letter was sent to the Complainant on **18 March 2014** providing the Complainant rate options of a standard variable (4.4%) or various fixed rate options (between 4.55% and 5.35%). No tracker rate option was made available to her. On **28 April 2014** a new 2 year fixed interest rate of 4.75% was applied to the Complainant's account upon the Complainant's written request of **7 April 2014**.

In **April 2016** the Complainant was given the option of the prevailing tracker rate of 3.72% (ECB rate of 0.05% plus a margin of 3.67%), in addition to a standard variable rate (3.65%) and various fixed rate options (3.5% to 3.8%). The Complainant chose the option of a 2 year fixed rate (3.6%).

Application of General Condition 3.2

Both the Complainant and the Provider have put forward arguments as to whether or not a breach of contract occurred when the Provider did not make the option of a tracker interest rate available to the Complainant on her mortgage loan in **April 2010.** The Provider submits that this was a "*service failure*" on the part of the Provider and not a breach of contract, while the Complainant argues that it was a fundamental breach of the contract between the parties.

In order to determine this question, it is necessary to consider the meaning of **General Condition 3.2**. The Supreme Court has recently confirmed that the proper approach to the construction of contractual documents is one of 'text in context'; *Jackie Greene Construction Ltd v IBRC* [2019] IESC 2. This requires a court (or other adjudicative body) to consider the text used in the context of the circumstances in which the document concerned was produced, including the nature of the document itself.

In *Law Society v MIBI* [2017] IESC 31, para 5.3, the Supreme Court explained that:

> "*the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context*."

/Cont'd…

Further, it has been held that in considering complaints, I am entitled to lean against a sophisticated construction of a key and significant term in a bank's contract with its customer where the term is not expressed in plain language; *Irish Life and Permanent plc v Financial Services Ombudsman* [2012] IEHC 367 at para 43.

In *Jackie Greene Construction*, Clarke CJ indicated at para 8.1 that "*a first, and particularly important, aspect of the proper construction of*" the disputed part of an agreement is to identify the purpose behind that part. The purpose behind **General Condition 3.2** is to provide for the rate of interest that will apply to the loan agreement at the end of a fixed rate period. The clause provides for a choice of options to be made available to the borrower in this regard between a further fixed rate, a variable rate, or a tracker rate. The clause also seeks to identify how those rates will be set by reference to the Provider's "*then prevailing rates*". To my mind, the real dispute on the construction of **General Condition 3.2** is whether the term "*then prevailing rates*" is meant to: (a) clarify that the interest rate to be offered will be the one 'prevailing' at the time that the fixed rate period ends rather than at some other time; or (b) to impose a condition that a particular product will only be offered if there is a prevailing rate available for that product at the given time.

The principle basis on which the Provider argues that no breach of contract occurred in this complaint is that the phrase "*then prevailing rates*" is to be read as to render the clause "*permissive*" in nature and *"conditional"* on there actually being a tracker interest rate available *"generally"* by the Provider at the time the Complainant's fixed interest rate came to an end. It is my view that there is a central flaw in this argument of a limiting or restricting provision as this construction fails to give proper recognition to the meaning and force of the words used elsewhere in the clause, which clearly convey that when "*any*" fixed interest rate period ends the customer "*may choose between*" the three specified options. If anything, there is equal or more reason to interpret the word "*then*" as constituting an assurance that the rate options will be available, that is, that the Provider will continue to have "*then prevailing rates*" so that the "*rates appropriate to the Mortgage Loan*" on one of the options being selected can be identified. In circumstances where **General Condition 3.2** permits the Complainant to "*choose between*" a fixed, variable or tracker rate, it appears to me that the corollary is that the Provider is contractually obliged to make those options available to the Complainant in order for her to make that choice. Even the heading of **General Condition 3.2** highlights the 'options/choice' purpose of the clause.

Further, and considering the text of **General Condition 3.2** 'in context', **General Conditions 3.1, 3.2, 3.3, 3.4, 3.5, and 3.6** all seem to me to be premised on an assumption that there would be prevailing fixed interest, variable interest, and tracker interest rates available at different times over the course of the mortgage loan. These are at the time of drawdown

/Cont'd…

(**Clauses 3.1, 3.4, 3.5 and 3.6**), on expiry of fixed interest rate periods (**Clause 3.2**), in the event of a decrease in the value of a property and/or at any time during the currency of the mortgage (**Clause 3.6.4**).

I believe that the most important operative words used in **General Condition 3.2** are those which state that "*at the end of any fixed interest rate period the Complainant may choose between…*". These describe the circumstances in which the condition will be triggered (that is, the ending of a fixed interest rate period) and what will happen when those circumstances are present (that is, the Complainant will be given a choice between certain specified options). The condition then goes on to describe the three different mortgage products which are stated to make up the three options. The balance of the condition, in my view, simply makes clear that once the product has been selected, the interest rate will be the one "*prevailing*" at the time at which the fixed interest rate period ends, and not at some other time (such as at the date the mortgage agreement was entered into). To me, the term *"then prevailing rates*" is in effect a clarifying clause, and not one which restricts or imposes a *"condition*" upon whether a specified product will be available as a choice. I am satisfied that this is how the condition would have been interpreted by a reasonable and informed member of the public in the context of the loan agreement.

It is my view that **General Condition 3.2** obliges the Provider to provide the Complainant with the choice between a fixed interest rate, a tracker interest rate, or a variable interest rate at the end of "*any fixed interest rate period*".

In the alternative, I am of the view that **General Condition 3.2** suffers from a degree of ambiguity, such that the doctrine *contra proferentem* means that those ambiguities are to be resolved against the party who structured the ambiguous clause (that is, against the Provider).

In its Final Response Letter to the Complainant dated **07 July 2016** and in its response to this complaint to this Office, the Provider has sought to define the term *"prevailing rates*" as meaning *"the interest rates then current and available at the date that a customer's fixed rate period expires"*. I believe that if this definition was intended then it should have been contained in the mortgage loan itself. It certainly should have been made clearer to the Complainant that each of the three stated options would only be offered at the end of the fixed rate period if the Provider was offering such a rate type at the time, if this was the meaning that the Provider intended.

I am mindful that in *McMullan Brothers Ltd v McDonagh* [2015] IESC 19, the Supreme Court held that the mere fact that the parties to a contract did not provide for a particular issue does not necessarily mean that the contract is ambiguous. I am not determining that the **General Condition 3.2** is ambiguous simply because there is no clause specifically

/Cont'd…

dealing with the question of what would happen if there was no prevailing rate on offer when the fixed rate period ended. Rather, it is my view that there is a degree of ambiguity with two possible interpretations of **General Condition 3.2.** As I have already stated, I am of the view that one of those interpretations is more compelling, (that is, that the Provider was obliged to provide the Complainant with the choice between a fixed interest rate, a tracker interest rate, or a variable interest rate at the end of "*any fixed interest rate period*"), but in the alternative I believe that the clause should be construed against the Provider due to the ambiguity.

The argument put forward by the Provider is that **General Condition 3.2** was "*conditional"* on there being tracker interest rates available "*generally*" by the Provider and because the Provider had *"withdrawn"* tracker interest rates from the market in **October 2008**, it was not under an obligation to offer the Complainant a tracker mortgage option. This contention could be understood as being an argument that the obligation to offer a tracker interest rate option was no longer capable of being complied with, which can be somewhat likened to an articulation of the doctrine of frustration. Whereas a party in some limited and narrowly defined circumstances can be released from contractual obligations which have become incapable of being performed, it is an essential component of that doctrine that the circumstances which give rise to impossibility of performance have occurred without default by the party seeking to be discharged from the obligation. Given that the Provider took the conscious decision to "*withdraw*" tracker interest rates from the market generally, then any argument that the contract was impossible to perform and the Provider was released from its contractual obligations, without consequence, is not sustainable.

There is also in my view a further inconsistency in the Provider's argument that that **General Condition 3.2** was "*conditional"* on there being tracker interest rates available "*generally*" by the Provider. The Provider argues that because it had withdrawn tracker interest rates from the market in **October 2008**, it was not under an obligation to offer the Complainant a tracker interest rate option. The Provider, by its own submission "*reintroduced"* a *"prevailing tracker rate*" in **December 2013** which according to the Provider was only made available to customers "*whose terms and conditions entitled them to the option*". If it is the case that **General Condition 3.2** was "*conditional"* on there being tracker interest rates available "*generally*", then the tracker interest rate offering that was "*reintroduced*" in **December 2013** would have had to have been offered "*generally*" (that is, to all customers) by the Provider to be a "*prevailing*" tracker interest rate within the meaning of General Condition 3.2 as advanced by the Provider. I note that this was not the case in December 2013.

/Cont'd…

It is my opinion that the correct construction of **General Condition 3.2** is that it created a contractual obligation binding on the Provider to offer the three choices at the end of the fixed interest rate period to the Complainant, one of which was a tracker interest rate *"at the then prevailing rate appropriate to the mortgage loan".* Therefore I believe the Provider failed to comply with its contractual obligations towards the Complainant in **April 2010** and again in **April 2014**.

Prevailing Rate

The term "*then prevailing rates"* by reference to its natural and ordinary meaning within **General Condition 3.2** appears to me to mean the prevailing rates of interest at the point in time when the agreed period of interest has expired. In the Complainant's case this was **29 April 2010.** I accept that the Provider was entitled to set the tracker interest rate margin at the "*then prevailing rate appropriate to the Mortgage Loan*" on **29 April 2010**. The setting of the tracker interest rate margin was a matter that was within the Provider's commercial discretion. I will not interfere with the Provider's commercial discretion, unless the Provider has acted in a way that is unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant. The issue here arises because the Provider did not make the option of a tracker interest rate available for the Complainant to choose when the first fixed interest rate period ended in **April 2010**. Rather the Provider only made that option available to the Complainant some six years later in **March 2016**.

The Provider, in response to my question requesting details of the factors relevant to the Complainant's particular mortgage loan that were taken into account by it in setting the prevailing tracker rate, including the margin, outlined that there were *"no factors specific"* to the Complainant's mortgage loan that would have been taken into account in setting the tracker margin. In these circumstances, it appears that there are no factors specific to the Complainant's mortgage loan account that the Provider would have considered in setting the "*tracker rate*" at the *"then prevailing rate*" in **April 2010**.

The Provider submits that when the Complainant's fixed interest rate period was due to expire on **29 April 2010**, the Provider did not have a tracker interest rate option available. The Provider outlines that the reason for this is that tracker interest rates were "*withdrawn*" from the market by the Provider in October 2008. In this regard, I understand that the Provider issued a press release in **October 2008**, which outlined as follows;

/Cont'd…

"[The Provider] announces withdrawal of Tracker Rates for new business […] October 2008

[The Provider] today announces that it will no longer offer Tracker Mortgages to new mortgage applicants, effective from close of business today, […] October 2008.

For some time now the Tracker Mortgage product has been under review because of the continuing high cost of funds in the market. Tracker Mortgages are priced off the ECB rate, but funded at money market rates, which given current market conditions is unsustainable. Existing customers with Tracker Mortgages are not affected. Customers who currently have an offer of a Tracker Mortgage, but which is not yet drawn, will still be able to avail of the Tracker Mortgage within the terms of their loan agreement. [The Provider] continues to offer a very attractive Standard Variable Rate Mortgage, in addition to a range of very competitive Fixed Rate options."

Having regard to the Provider's press release above, I note that the rationale given by the Provider at the time for "*withdrawing*" tracker rates from the market "*for new business*" was because the way that tracker interest rates were priced became "*unsustainable*" for the Provider. The Provider has submitted in response to this complaint that the reason it withdrew tracker interest rates in **October 2008** was "*because this rate type would have been prohibitively expensive for customers had the Provider continued to offer this rate type."* I have not been provided with any evidence of any assessment that was undertaken by the Provider in **October 2008** to substantiate the Provider's position that the rate type would have been prohibitively expensive for existing customers at the time.

Neither have I been provided with any evidence of any assessment that was undertaken by the Provider in **April 2010** to substantiate that the tracker interest rate that would have been offered to the Complainant at that time would have been prohibitively expensive for her. In any event, by the Provider's own admission the Complainant should have had the option of a "*prevailing*" tracker interest rate to choose at end of the fixed interest rate period in April 2010. If the "*prevailing*" tracker interest rate had been given as an option by the Provider as it should have been, it would have been a matter for the Complainant to decide whether or not she considered the "*prevailing*" tracker interest rate to be "*prohibitively expensive*" or acceptable.

The Provider in its post Preliminary Decision submission dated **07 February 2020** refers to its withdrawal of tracker rates in October 2008 and "*the evidence*" that if the Provider had set a tracker mortgage interest rate in April 2010, it would have been "*prohibitively expensive"* . I again re-iterate that I have not been provided with any evidence of an assessment conducted by the Provider in October 2008 or in April 2010 to support this submission made by the Provider.

/Cont'd…

The Provider has supplied a report entitled **Tracker Mortgages – Assessment of Appropriate Pricing 2008 – 2012** in evidence. This report was prepared in 2017. The purpose of this report is expressed as follows;

> *"This paper aims to assess the factors prevailing between October 2008 and December 2012 that would have informed the setting of a tracker rate during that period, had the product been offered*".

The report goes through the various steps that the Provider used and elements taken into account to set a tracker margin during that period had it been offered. Considerations such as EURIBOR conversion rates, term liquidity premium, expected loss, return on capital and operating costs are outlined.

This report, prepared by the Provider, concludes as follows;

> ***"Conclusion***
> *Based on this methodology, a point in time minimum spread of 2.42% above the ECB REFI rate would have been the starting point for a discussion on an appropriate prevailing tracker rate in October 2008, increasing to over 4% 9 months later.*
>
> *It must be emphasised that this calculation approach is a benign one from a customer point of view and very optimistic from an issuance point of view. The bank would not have been able to close out its funding price risk at these prices. Judgement would be required to estimate the additional reward required to compensate for the funding cost risk beyond the next 5 years.*
> ……
> *This comparison draws attention to the fact that the look-back methodology should not just be considered on a point-in-time basis. Specifically, [the Provider] (and all other Irish lenders) withdrew trackers because [the Provider] knew that it could no longer manage the funding cost risk arising from the tracker mortgages guaranteed margin. Given the long term nature of the mortgage product, pricing decisions are made periodically based on future expectations and any pricing decision needed to consider the unquantifiable long term funding cost and not just a point-in-time price."*

Appendix 1 of the Report purportedly shows the "*minimum tracker margin*" that the Provider could have offered between **September 2008** and **December 2012**, as follows;

/Cont'd…

	A	B	C	D = A + B + C	E	F	G	H = D + E + F + G
Date	**ECB to EONIA**	**EONIA to 3 Month Euribor**	**Implied TLP**	**Funding Costs over ECB**	**Expected Loss**	**Return on Capital**	**Cost**	**Min Margin over ECB**
30/09/2008	0.125	0.651	0.911	1.688	0.147	0.123	0.460	2.417
31/10/2008	0.125	0.482	1.145	1.752	0.152	0.124	0.460	2.487
30/11/2008	0.125	0.518	1.166	1.809	0.159	0.128	0.460	2.555
31/12/2008	0.125	0.507	1.281	1.913	0.162	0.129	0.460	2.663
30/01/2009	0.125	0.445	1.760	2.330	0.168	0.131	0.460	3.088
27/02/2009	0.125	0.470	1.865	2.460	0.174	0.132	0.460	3.225
31/03/2009	0.125	0.427	1.766	2.318	0.180	0.133	0.460	3.090
30/04/2009	0.125	0.413	1.747	2.285	0.192	0.137	0.460	3.074
29/05/2009	0.125	0.312	1.618	2.055	0.186	0.137	0.460	2.838
30/06/2009	0.125	0.289	3.078	3.492	0.198	0.138	0.460	4.288
31/07/2009	0.125	0.268	2.888	3.281	0.213	0.143	0.460	4.097
31/08/2009	0.125	0.276	2.030	2.431	0.275	0.160	0.460	3.326
30/09/2009	0.125	0.283	1.543	1.951	0.272	0.155	0.460	2.837
30/10/2009	0.125	0.339	1.838	2.302	0.256	0.148	0.460	3.165
30/11/2009	0.125	0.352	1.844	2.321	0.262	0.150	0.460	3.193
31/12/2009	0.125	0.355	1.858	2.338	0.274	0.154	0.460	3.225
29/01/2010	0.125	0.337	1.912	2.374	0.288	0.157	0.460	3.279
26/02/2010	0.125	0.352	1.901	2.378	0.295	0.158	0.460	3.291
31/03/2010	0.125	0.296	1.793	2.214	0.307	0.162	0.460	3.143
30/04/2010	0.125	0.313	2.489	2.927	0.323	0.159	0.460	3.870
31/05/2010	0.125	0.372	2.826	3.323	0.347	0.167	0.460	4.297
30/06/2010	0.125	0.337	2.965	3.427	0.362	0.169	0.460	4.417
30/07/2010	0.125	0.299	2.911	3.335	0.377	0.172	0.460	4.344
31/08/2010	0.125	0.306	3.020	3.451	0.402	0.179	0.460	4.493
30/09/2010	0.125	0.286	4.758	5.169	0.404	0.178	0.460	6.211
29/10/2010	0.125	0.275	4.656	5.056	0.412	0.179	0.460	6.107
30/11/2010	0.125	0.341	8.422	8.888	0.428	0.183	0.460	9.960
31/12/2010	0.125	0.338	8.720	9.183	0.339	0.178	0.460	10.160
31/01/2011	0.125	0.308	8.109	8.542	0.344	0.179	0.460	9.525
28/02/2011	0.125	0.310	7.777	8.212	0.350	0.177	0.460	9.199
31/03/2011	0.125	0.289	7.799	8.213	0.343	0.176	0.460	9.192
29/04/2011	0.125	0.273	6.794	7.192	0.358	0.180	0.460	8.190
31/05/2011	0.125	0.282	7.396	7.803	0.388	0.181	0.460	8.832
30/06/2011	0.125	0.285	9.329	9.739	0.358	0.181	0.460	10.738
29/07/2011	0.125	0.330	8.512	8.967	0.374	0.187	0.460	9.988
31/08/2011	0.125	0.364	8.726	9.215	0.548	0.268	0.460	10.490
30/09/2011	0.125	0.409	8.774	9.308	0.578	0.285	0.460	10.631
28/10/2011	0.125	0.416	8.522	9.063	0.546	0.271	0.460	10.340
30/11/2011	0.125	0.485	8.559	9.169	0.548	0.275	0.460	10.452
30/12/2011	0.125	0.449	8.851	9.425	0.523	0.271	0.460	10.678
31/01/2012	0.125	0.385	8.323	8.833	0.514	0.273	0.460	10.080
29/02/2012	0.125	0.360	7.192	7.677	0.518	0.276	0.460	8.930
30/03/2012	0.125	0.324	6.498	6.947	0.481	0.259	0.460	8.147
30/04/2012	0.125	0.328	6.858	7.311	0.483	0.262	0.460	8.516
31/05/2012	0.125	0.342	7.770	8.237	0.467	0.259	0.460	9.423
29/06/2012	0.125	0.296	7.788	8.209	0.464	0.259	0.460	9.391
31/07/2012	0.125	0.269	7.432	7.826	0.461	0.256	0.460	9.004
31/08/2012	0.125	0.206	6.600	6.931	0.455	0.256	0.460	8.102
28/09/2012	0.125	0.163	4.959	5.247	0.446	0.254	0.460	6.406
31/10/2012	0.125	0.174	3.965	4.264	0.443	0.253	0.460	5.420
30/11/2012	0.125	0.179	3.206	3.510	0.437	0.250	0.460	4.656
31/12/2012	0.125	0.155	2.914	3.194	0.421	0.246	0.460	4.321

The Complainant's fixed interest rate period expired on **29 April 2010**. On the basis of the above the Provider argues that the minimum tracker margin over ECB that the Provider could have offered to the Complainant as at 30 April 2010 was 3.87%.

The Provider has also submitted a report called **Project Dawn – Mortgage Tracker Margin Validation** in evidence. This report was prepared in 2017 by an international financial firm and the scope of the engagement was noted as follows;

> *"1. Review of the [Provider's] methodology that retrospectively determines the minimum prevailing tracker margin the [Provider] would have offered customers in the period October 2008 to December 2012. Document any rationale for determining reasonableness of methodology."*

The Report states that the firm "*did not assess and does not provide any opinion on the Minimum Tracker Margin calculated by the [Provider] under its methodology*."

Both of these reports were prepared in **2017**, more than 7 years following the expiry of the fixed interest rate period on the Complainant's mortgage loan account and almost 4 years after the Provider "*reintroduced*" a tracker interest rate option in **December 2013** to customers who had an entitlement to that option under **General Condition 3.2.**

In its response to questions raised by this Office regarding the basis upon which the "*prevailing*" tracker rate was calculated, the Provider submits that it "*used an international standard mortgage pricing model and the best available objective information to estimate what the prevailing margin and rate would have been at the time, had the Bank maintained the rate*." The Provider submits that components such as: (a) funding costs; (b) capital risk costs; (c) capital costs; and (d) operating costs, were used in calculating the estimate. The Provider then gives examples of how these factors changed over time and impacted on how the Provider believes its then prevailing tracker margin rate would reasonably have been set. In relation to debt market conditions and credit ratings downgrades, the Provider compares its own credit rating from an A1 in 2007 to sub-Investment grade in 2010 to Ba3 in 2013. It also gives the example of the price of 5 year Irish government debt in July 2011. In respect of loan default risk, the Provider references loan default rates in 2012 and 2013. In respect of the cost of capital, the Provider indicates that regulators now require higher proportions of assets to be held in equity capital. It also gives the example of its own cost of secured, medium term funding on the wholesale markets from 2011.

Although I take no issue with the components considered as part of this estimate which appear to represent appropriate international practice, it does not seem reasonable to me for the Provider to seek to establish the rate it would have set on or before **April 2010** based

/Cont'd…

on events and factors that took place in 2011, 2012, 2013 and beyond that simply would not have been known to it in 2010.

I further note that in calculating its estimated prevailing tracker rate from 2008 to 2013, the Provider appears to have included a reasonable incremental cost to cover the financial risk of providing the lifetime guarantee margin over the ECB rate for the life of the mortgage loan, as estimated by the firm of financial markets experts engaged by the Provider in 2017. There is no evidence that such a cost was included by the Provider in setting its tracker margin until the involvement of this firm. Once again, I have concerns about the use of such a costing component which results from advice from 2017 when there is no evidence this would have been used by the Provider in 2010 if it had set a prevailing rate/margin at that point.

The main concern that I have with the Provider's estimates and reports are that they appear to be premised on a calculation of what the Provider *should* have charged by way of tracker margin in light of all of the factors that are now known in relation to the cost of funding, credit risk costs, and so forth. I do not accept that this evidence establishes the tracker margin that the Provider *would* have set on or before **April 2010**. I am entitled and, I believe, obliged to test the relevance of the evidence and submissions of the Provider in response to the present complaint in relation to what it says would have been the prevailing rate in 2010. In that regard, I have serious concerns that the use of post-April 2010 events and factors – the use of which is clear from the Provider's own submissions – has undermined the value of the Provider's evidence and submissions in relation to establishing what the tracker interest rate would have been, if it had been set in 2010.

I note that the Provider has outlined that the "*prevailing tracker margin*" of 4.91% was approved by the Provider's Pricing Committee in **January 2013**, and that the rate was available from that date, but that this was not advised to customers rolling off a fixed rate until **December 2013** "*due to system limitations*". It is somewhat surprising to me that the Provider set the prevailing tracker margin of 4.91% some 11 months before it was reintroduced to customers in December 2013. I say this in light of the fact that the tracker margins that have retrospectively been calculated by the Provider in its report fluctuated on a monthly basis and on occasion by a full percentage point. In these circumstances, I find it somewhat surprising that the tracker margin could be set by the Provider in January 2013 and then remain static until its reintroduction to customers some 11 months later in December 2013. The fact that the Provider did not appear to see a need to adjust this rate during this time, in my view, further undermines the relevance of the 2017 reports as evidence of tracker rates that would have been set by the Provider between 2008 and 2012.

In the preparation of the reports, the authors and the Provider have the benefit of hindsight; the pricing models in the reports reflect a tracker rate that would have protected the

/Cont'd…

Provider from exposure to the financial instability prevalent from the period the Provider *"withdrew"* tracker rates for new customers in **October 2008** to when it offered the re-set tracker interest rate margin for existing customers in **December 2013**. I believe it is not reasonable of the Provider to seek to establish the *"prevailing"* tracker interest rate applicable to the Complainant's mortgage loan retrospectively having regard to factors that could not have been known on **29 April 2010**. The Provider would not have had all of the information it used in compiling its reports if it were setting a live prospective "*prevailing tracker rate*" when the Complainant's fixed interest rate period ended on **29 April 2010**. I accept that the Provider was entitled to withdraw tracker interest rates from its product offering to new customers at any stage; however it was not entitled to *"withdraw"* the option of a tracker interest rate from the Complainant who had a contractual entitlement to choose that option. I believe this is borne out by the Provider's decision to *"reintroduce*" a prevailing tracker rate and make it available to customers in respect of which it stated *"whose terms and conditions entitled them to the option"* in **December 2013**.

The Complainant had a four year fixed interest rate period applied to her mortgage loan account between April 2010 and April 2014. At the time that fixed interest rate period ended on **26 April 2014**, the Provider also did not give the Complainant the option of the "*prevailing tracker margin*" that it had reintroduced in December 2013. It was not until the expiry of a further two year fixed interest rate period that applied between **April 2014** and **April 2016**, that the Provider offered a tracker interest rate of 3.72% (ECB (0.05%) + 3.67%).

The ***Consumer Protection Code 2006 (effective since 01 July 2007)***, outlines as follows;

> *"***General Principles**
> *A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:*
> 1. *acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;*
> 2. *acts with due skill, care and diligence in the best interests of its customers."*

In the circumstances of this complaint, I am of the view that the Provider did not act in accordance with these provisions of the Consumer Protection Code. The Complainant had a contractual entitlement within the General Terms and Conditions of her mortgage loan to choose a *"tracker interest rate*" at the "*then prevailing rate*" when the fixed interest rate period applicable to the mortgage loan ended on **29 April 2010**. The Provider did not act fairly, reasonably or in the best interests of the Complainant when it decided that it was not going to give her the option of choosing a *"tracker interest rate*" at the *"prevailing rate*" in April 2010. As I have set out above, I do not accept that the Provider can retrospectively create a tracker interest rate that it now claims it would have offered the Complainant in April 2010, having the benefit of hindsight and knowledge of what actually happened in the

/Cont'd…

intervening period. The Provider's attempt to do so is not reasonable and not in the best interests of the Complainant.

The Provider in its post Preliminary Decision submission dated **07 February 2020** details that I was required to assess the evidence submitted and that I was not entitled to "*wholly reject undisputed evidence, particularly when the evidence was supported by external sources*".

Firstly I would point out that the Provider's evidence was not "*undisputed*" and was in fact disputed by the Complainant. Further, in the investigation of complaints I am entitled and obliged to test the evidence and submissions made by either party to a complaint. I am entitled to reject evidence when, having considered that evidence, I conclude its probative value has been undermined or is of little value. Therefore, I do not accept that the Provider's evidence is "*undisputed".*

The Provider further detailed:

> *"The Ombudsman's decision to simply reject these reports on the basis that they were retrospective in nature was an error in light of the Ombudsman's conclusion that the Bank was obliged to offer the Borrower a tracker rate option in April 2010 but did not in fact do so. There was no alternative but for the Bank to retrospectively calculate that rate, when it had not been offered at the relevant time."*

In the interests of clarity and for the avoidance of any doubt, in reaching my determination on this matter I have considered, in detail, both reports **Tracker Mortgages – Assessment of Appropriate Pricing 2008 – 2012** and **Project Dawn – Mortgage Tracker Margin Validation**, which were submitted in evidence by the Provider. I am of the view that the classification of my consideration of those reports as a "*decision to simply reject*" those reports is an over simplification by the Provider of the detailed analysis and documented consideration of those reports which I have outlined in this decision. Further, and as should be apparent from the above, my concern with the reports in question is not simply the Provider's attempt "*to retrospectively calculate that rate*" as the Provider has argued. Rather, my concern is with the methodology adopted by the Provider in its calculation which expressly relies on events and factors that post-date April 2010 and which would not have been known to it if it had set a prevailing rate in April 2010. If the Provider had instead submitted evidence of the relevant factors known to it at the relevant time, and calculations of the most likely rate it would have offered in April 2010 on the basis of then-available information and its methodologies of tracker rate setting on or before April 2010, my assessment of the probative value of such evidence would have been very different.

/Cont'd…

I am also somewhat concerned about the following submission made by the Provider:

> *Furthermore, it was open to the Ombudsman to request the Bank to provide a calculation of the likely tracker mortgage interest rate as at April 2010, without taking into account factors known thereafter."*

In circumstances where the Provider had recognised that a failure had occurred on its part and had engaged in an exercise in **2017** to ascertain the impact of its failure on the Complainant from **April 2010**, I would have expected that as a starting point, the scope of any analysis would have been to attempt to look prospectively from the point in time that the failure occurred in April 2010 "*without taking into account factors known thereafter*". On the basis of this submission made by the Provider, it is apparent that this was certainly not the exercise conducted by the Provider at the time. It is most disappointing that the Provider seems to be indicating at this late stage – almost ten years after its initial breach – that it could have done so but for some undisclosed reason it chose not to, and continues to choose not to. This further solidifies my view that the conduct of the Provider was and indeed remains unreasonable.

I propose to uphold this complaint because I believe that Provider's offer of redress of €1,615 to the Complainant for its failure on the Complainant's mortgage loan account is totally inadequate. The Provider has simply classified its failure as a service failure, whereas I am of the view that the Provider failed to comply with an important contractual provision of the Complainant's mortgage loan in **April 2010** by not giving the Complainant the option of conversion to a *"tracker interest rate Mortgage Loan"* at the "*then prevailing rate*". Further, and following from its breach, the Provider has, sought to rely on a sophisticated and unmerited construction of the phrase "*then prevailing rates"* in order to deny the Complainant her contractual rights. Giving the Complainant the option of a tracker interest rate on her mortgage loan account in **April 2010** at the "*then prevailing rates"* was a matter solely within the Provider's control. It was the Provider alone which decided to deny the Complainant the options set out in her mortgage loan contract. The Provider initially denied there was any issue with its conduct in April 2010 and has subsequently sought to downplay the severity of the breach of contract by classifying it as a "*service failure*" in **March 2018**. I am of the view that this conduct since its initial breach of contract has been unreasonable.

I believe that it was also unreasonable for the Provider to attempt to retrospectively create the tracker interest rate margin that it argues it would have offered the Complainant when the fixed interest rate period on the mortgage loan account expired in **April 2010** by using post-breach factors that could not have been known to it in April 2010. As set out above, I am also of the view that the Provider was in breach of a number of provisions of the Consumer Protection Code 2006 with regard to its actions towards the Complainant.

/Cont'd…

Having reached this conclusion, I must now decide the appropriate direction to make in order to redress the Provider's breach of contract, regulatory breaches, and unreasonable conduct.

Direction

The Provider has furnished this Office with a **Table of Tracker rates with Margins**. When the Complainant's mortgage loan was drawn down in **2007** the Loan to Value Ratio was 100%. I have not been provided with any valuation or other evidence that the Loan to Value on the Complainant's mortgage loan was less than 80% in **April 2010**.

With respect to Existing Private Dwelling House Customers whose borrowings were less than €500,000 and the Loan to Value Ratio was greater than 80%, the Provider has outlined the following tracker interest rates/margins that were set by the Provider.

The Provider submits that the tracker interest rate product was *"discontinued for new business effective 10/10/08 – continues as maturity product only"*.

Established/Set Date	ECB Base Rate	Rate
17 December 2007	4.00%	5.10% – Includes Margin 1.1%
22 April 2008	4.00%	5.10% - Includes Margin 1.1%
16 June 2008	4.00%	5.5% - Includes Margin 1.5%
15 July 2008	4.25%	5.75% - Includes Margin 1.5%
01 December 2013 * LTV does not appear to apply to this rate	0.25%	5.61% - Includes Margin 4.91%

As I have outlined above, I do not accept the Provider's contention that the prevailing rate was "*conditional"* on there being tracker interest rates available "*generally*" by the Provider to the market. Indeed, by its own action in setting a new "*prevailing*" rate in **December 2013** that has not been made available to the market generally or new customers, the Provider has demonstrated that a "*prevailing"* rate does not have to be made available to new customers or the market generally.

The Oxford English Dictionary defines *"prevailing*" as "*existing or most common at a particular time*". The term "*then prevailing rates"* by reference to its natural and ordinary meaning within **General Condition 3.2** appears to me to mean the prevailing rates of

/Cont'd…

interest that had been set by the Provider and that existed or were most common at that time. It is clear from the evidence before me that there were a number of existing tracker rates applicable to customers of the Provider in 2010. These ranged from a margin of 1.1% to 1.5% above ECB, and were set by the Provider and applied to existing borrowers who had tracker interest rates applied to their mortgage loans with the Provider at that time.

I accept that the Provider set a new tracker mortgage margin of 4.91% in **January 2013**. This margin may well have been the appropriate margin above ECB to be offered to mortgage holders coming off fixed interest rate periods after January 2013, but this rate or margin cannot be said to have "*existed*" or to have been "*the most common*" in 2010 or between April 2010 and January 2013.

It is clear that while the Provider withdrew tracker interest rates for new customers, other customers whose mortgage loan accounts were on a tracker interest rate at the *"then prevailing rate*" in **October 2008** continued to avail of tracker interest rate margins of between 1.1% and 1.5% above ECB after October 2008. There is an argument that the appropriate rate to be offered to the Complainant, effective from **30 April 2010**, is a margin that had been set by the Provider and that existed for other mortgage holders of the Provider whose mortgage loans were on a tracker interest rate at the point in time when the Complainant's fixed rate expired. The rate that had been set by the Provider closest in time to when the Complainant's fixed rate period expired in 2010 was the rate of ECB + 1.5%.

Given the difficult economic climate that had prevailed after the economic crash and continued to prevail in **2010**, I accept that had the Provider set a tracker interest margin at the time (as it ought to have done for customers including the Complainant who were rolling off a fixed rate with an entitlement to a tracker rate option), I accept it would in all probability have been higher than the ECB + 1.5% margin that had last been set by the Provider in **July 2008**. In these circumstances, I do not believe that it would be equitable, reasonable or proportionate to direct the Provider to apply the rate of ECB + 1.5% to the Complainant's mortgage loan account from April 2010 for a period of over 30 years to the projected maturity of the mortgage loan in 2042.

As set out above, I do not believe it is appropriate for the Provider to set a "*prevailing rate*" with the benefit of hindsight by taking into account post-breach factors. The Complainant has submitted that I need to establish what the prevailing rate probably would have been in **April 2010**, when the fixed interest rate period expired. Having carefully considered the matter, I do not believe it would be appropriate for me to set a prevailing tracker rate due to limitations in the available evidence before me. Setting the prevailing tracker rate in April 2010 was a matter that was within the Provider's commercial discretion and, even in these circumstances where it failed to exercise its discretion to set the prevailing tracker rate, on

/Cont'd…

balance I do not believe that is reasonable or appropriate for me to do so. Furthermore, even if I were to attempt to set a prevailing tracker rate, I do not believe it would be easy to remove facts that are now known about the economic fallout resulting from the financial crash from consideration when attempting to estimate the most likely rate that the Provider would have set, with the knowledge it ought to have had at the time. The Provider has not submitted any evidence of the relevant factors known to it at the relevant time, or calculations of the most likely rate it would have offered in April 2010 on the basis of then-available information and its methodologies of tracker rate setting on or before April 2010. Further, there are commercial factors within the knowledge of the Provider that would have influenced the rate it would have set and which are not available to me. In those circumstances, I do not believe that I am in a position to "*ascertain what the then prevailing tracker rate would likely have been, had it been offered by the Bank in April 2010*" as the Provider's post Preliminary Decision submissions dated **07 February 2020** argue that I should do.

The Provider has outlined in its post Preliminary Decision submissions dated **07 February 2020** as follows;

> *"As appears from these cases, it is not necessary for a decision maker in the position of the Ombudsman to reach a conclusion of absolute or even near certainty when assessing what might have occurred. Nor is it a question of the Ombudsman himself setting what he considers might have been a reasonable prevailing rate in April 2010. Rather, the Ombudsman is obliged on the basis of the evidence to make an assessment of what the rate would most likely have been if it had been offered. This involves a proper and fair assessment of the evidence, including the expert materials provided by the Bank (and not disputed by the Complainants)."*

The Complainant in her post Preliminary Decision submission detailed:

> *"We are naturally disappointed that the Ombudsman did not follow through with this and direct [the Provider] to apply the 1.5% margin to [the Complainant's] mortgage from the date the fixed term expired until the maturity of the mortgage……However we recognise the wide scope of the Ombudsman's powers"*

I have set out my reasons as to why I believe it is not appropriate for me to set a prevailing tracker rate and I do not believe that I am obliged to set a prevailing rate.

In determining the appropriate redress, I am conscious that there are several relevant factors that cannot be determined with any certainty at this point. I do not know what "*prevailing rate*" the Provider would have offered to the Complainant in **April 2010**, though I am prepared to accept that it would have been higher than a margin of 1.5% over the ECB

/Cont'd…

rate. Without knowing this rate, I cannot determine the most likely option that would have been chosen by the Complainant in **April 2010** if she has been offered a choice of variable, fixed, and tracker rates. I appreciate that the Complainant seems to believe that she would have chosen the tracker rate if it had been offered to her (which is the only real basis upon which she can claim to have suffered financial loss from the Provider's breach). But this belief also results from a degree of hindsight; of knowing the movements in the ECB base rate since April 2010. Further, I note that each time a rate choice has been presented to the Complainant, she has opted for a fixed rate of interest even when the variable rates on offer have been lower. If a prevailing tracker rate of 1.5% above ECB (which was 1% at the time) was offered to her in **April 2010**, it is understandable that the Complainant now believes she would have opted for such a rate as it would have been significantly cheaper over the past nine years than the other options available to her. But, as I have outlined above, I do not accept that the margin of 1.5% above ECB would have been offered to the Complainant if the Provider had set a prevailing rate in 2010. Without knowing the unknown but higher rate that would have been offered to her in **April 2010**, I do not accept that it can be established that the Complainant would (or would not) have accepted the tracker rate that should have been offered to her.

In these particular circumstances, I am also of the view that a direction of a monetary lump sum compensation payment is not an appropriate remedy. I believe that the breach of **General Condition 3.2** of the Complainant's mortgage loan contract (which relates to the application of an interest rate to the mortgage loan), has a pivotal and ongoing impact on the cost of the Complainant's mortgage loan from the date the contract was breached in **April 2010**, and until the loan is repaid in full. A one-off compensatory payment does not, therefore, seem to me to adequately redress such a breach.

It should also be emphasised that the question of appropriate redress in the present case is to remedy the Provider's breach of contract, its breaches of the Consumer Protection Code 2006, and its unreasonable conduct towards the Complainant.

I am mindful that ***section 12(11)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, requires me to act *"according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form"* and that ***s60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** affords me a flexibility and choice in fashioning an appropriate remedy.

Arriving at an appropriate remedy to this complaint has been challenging. I have been guided by what I believe is equitable, reasonable and proportionate, and what I believe will do justice between both parties. In the circumstances of this particular matter, and bearing in mind the ongoing effects of the breach in terms of the cost of credit over the lifetime of the Complainant's mortgage loan, I believe that a fair and proportionate remedy is to direct

/Cont'd…

that the Provider write down the capital sum outstanding on the Complainant's mortgage loan (which I understand to have been in the region of €314,500)
from the date that the breach of contract occurred in **April 2010** by 12%.

I have reached this decision because I am of the view that a write down at this level is proportionate to the breaches that occurred in this complaint. This direction will reduce the funding and sustainability risks from the Provider's prospective that might have accrued if a fixed margin above the ECB were instead directed to be applied to the mortgage loan for the remaining 32 years from **April 2010**. It will also have the effect of reducing the capital sum owed by the Complainant, thereby reducing the interest she will pay on the remaining 32 years of that mortgage from April 2010, which addresses the continuing impact of the Provider's breaches on the Complainant's mortgage loan account.

In light of all the foregoing, I uphold this complaint and direct that pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Provider do the following;

a) apply a once off reduction (write down) of 12% off the capital balance on the mortgage loan account as it stood at the end of the fixed interest rate period which expired on **29 April 2010**; and
b) repay the Complainant, to an account of her choosing, the difference between (1) the amount of interest she actually paid from **30 April 2010** to **date**, and (2) the amount of interest that she would have paid on the reduced (written down) capital balance from **30 April 2010** to **date**.

I note that the Provider has submitted that the issue raised by the Complainant *"relates to a wider*" number of customers of the Provider. Therefore, it appears that the issue considered in this decision has a wider impact on other customers of the Provider. Therefore, I am referring this decision to the Central Bank of Ireland for any action it may deem necessary.

/Cont'd…

Conclusion

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

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to do the following;

(a) apply a once off reduction (write down) of 12% off the capital balance on the mortgage loan account as it stood at the end of the fixed interest rate period which expired on **29 April 2010**; and

(b) repay the Complainant, to an account of her choosing, the difference between (1) the amount of interest she actually paid from **30 April 2010** to **date**, and (2) the amount of interest that she would have paid on the reduced (written down) capital balance from **30 April 2010** to **date**.

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

12 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.