



<u>Decision Ref:</u>	2020-0142
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to three mortgage loan accounts taken out by the Complainants between **2005** and **2012** (account ending **318**, account ending **621** and account ending **988**) with the Provider. All three mortgage loans that are the subject of this complaint ran consecutively and were secured on the Complainants' private dwelling house.

Mortgage loan account ending **318** was taken out in **October 2005**. The loan amount was €266,000 and the term was 30 years. The rate applicable to the mortgage loan was a tracker interest rate of ECB + 0.99%. This mortgage loan account was closed in **June 2006**.

Mortgage loan account ending **621** was taken out in **June 2006**. The loan amount was €256,212 and the term was 29 years and 5 months. The rate applicable to the mortgage loan was fixed at 4.18% until the roll-over date of 01 October 2009. This mortgage loan account was closed in **June 2012**.

Mortgage loan account ending **988** was taken out in **June 2012**. The loan amount was €223,300. A fixed interest rate of 3.75% applied to that mortgage loan from **June 2012** until **June 2014**.

The Provider has transferred its interest in the Complainant's mortgage loan ending **988** to another regulated entity since **15 December 2017**.

The Complainants' Case

The Complainants submit that they entered into a loan agreement for mortgage loan account ending **318** with the Provider in **September 2005**. The terms of the loan agreement provided for a tracker interest rate of ECB + 0.99%.

The Complainants state that they opted to apply a three year fixed rate of interest to the mortgage in **July 2006**. The Complainants say that they were misled and misadvised by the Provider when the three year fixed interest rate was applied to their mortgage loan in **July 2006**. They outline that their decision to fix the rate applying to their mortgage *"was based on meetings with bank officials where we were verbally advised that it would be the correct decision to make at the time."* They state that *"at no point were we informed that the tracker mortgage rate would no longer be available to us on conclusion of the fixed term"*.

The Complainants submit that both mortgage loans refer to a *"variable rate"* and the difference between the *"variable rate"* applicable to each of the mortgage loan accounts was never clearly explained to them by the Provider. They outline *"the bank drew up the papers which we signed to fix the mortgage for three years and, as we assumed, return to the tracker on completion of the fixed period."*

The Complainants further state that they were not informed by the Provider in **2006** that by applying a fixed rate to the mortgage loan they would be taking out *"a new account with different conditions."* They are of the view that there was *"no need"* to *"restructure"* their loan in **2006** as they were not in arrears and had never missed a mortgage repayment. They submit that it was *"wrong"* of the Provider to *"dupe"* them into taking out a new loan in **2006**, which led to the loss of their contractual entitlement to the tracker rate. They state *"we did not think we needed to employ a solicitor or a financial expert to examine the paperwork issued when all we wanted was to fix our interest rate for three years."*

The Complainants outline that they were not offered the option to revert to the tracker interest rate when the three year fixed interest rate period expired in **October 2009**. They say that when the fixed interest rate period was *"coming to an end"* they made contact with the Provider in relation to reverting to the tracker rate. They submit that the Provider informed them that the tracker rate was no longer available to them and the only options available were the standard variable rate or a new fixed rate.

The Complainants say that the Provider's withdrawal of its tracker rate product in **late 2008** is irrelevant to their complaint, as they drew down their original mortgage loan account ending **318** on the tracker interest rate in **2005**. They further outline that the Provider never informed them of the withdrawal of its tracker product to new or existing customers in **late 2008**.

The Complainants are seeking reimbursement of all overpayment on their mortgage loan account since **October 2009** and reinstatement of the tracker rate on their mortgage loan account, effective from **October 2009**.

The Provider's Case

The Provider submits that the Complainants drew down an ECB Tracker interest rate loan in the sum of €266,000 under mortgage loan account ending **318** on **21 October 2005** and that this loan facility was governed by the terms and conditions contained in a facility letter dated **22 August 2005**, which the Complainants signed and accepted on **13 September 2005**.

The Provider outlines that the Complainants completed a mortgage application for the new fixed interest rate loan in **June 2006**, which is evidenced by the signed and accepted **Final Financial Summary document** which issued to them on **28 June 2006**, prior to the new loan being drawn down. The Provider states that a Final Financial Summary document is a summary of the mortgage application which is completed during a face to face meeting with the customer. The relevant details are input to the Provider's mortgage application system during the customer meeting and the customer is then provided with a printout of the application in the form of a Final Financial Summary. It submits that the Final Financial Summary document is then signed and accepted by the customers to confirm the information as being correct. The Final Financial Summary document detailed the new proposed mortgage loan and confirmed "*amend rate to 3 year fixed*" and that the purpose of the loan application was "*Restructure of Lending*". The Provider outlines that a "*Restructure of Lending*" does not relate solely to loans that are in arrears and that whenever a customer wishes to change the fundamental terms of an existing loan, for example, requesting a change of product (such as in this case), or a request for additional monies, this necessitates the entering into of a new loan agreement. The loan is then restructured and replaced with the new loan agreement.

The Provider submits that a facility letter is the written contract made between the bank and a customer of the bank, and is the document which details the agreement made between the parties and it governs the terms and conditions of the loan. The **Consumer Credit Act 1995** and the **Consumer Protection Code** contain specific requirements which a

bank must adhere to when issuing a housing loan agreement to a customer, for example **section 129** of the Consumer Credit Act requires the first page of a housing loan agreement clearly to set out the amount of the loan, the period of the loan, the cost of credit etc. The Provider outlines that the facility letter for mortgage loan account ending **318** confirmed that the interest rate applicable to the loan was an ECB Tracker interest rate. Therefore, it states that only an ECB Tracker interest rate could be applied to that loan and the facility letter did not permit the Provider to apply a fixed interest rate to the ECB Tracker interest rate loan. It submits that if the Provider had commenced applying a fixed interest rate to mortgage loan account ending **318** without entering into a new loan agreement with the Complainants, the Provider would have been in clear breach of the terms of the facility letter and in clear breach of consumer credit legislation.

The Provider states that the branch where the application for mortgage loan account ending **621** was processed closed in **2012**, and the employee of the Provider who worked there and who met with the Complainants in **2006** is no longer employed with the Provider. It submits that it has checked all hard copy files and computerised records that it holds and it does not have a detailed record of the meeting that took place between any staff member in the branch and the Complainants in **2006** and therefore, it cannot comment on the specific discussions which took place at the meeting. The Provider outlines that ECB Tracker interest rate loans were still on sale from the Provider in **June 2006** and that the employee of the Provider who met with the Complainants in **June 2006** would not have been in a position to predict that the ECB Tracker interest rate loans would be withdrawn by the Provider as a loan product in **late 2008** and, accordingly, could not have so informed the Complainants.

The Provider says that on **3 July 2006**, pursuant to the terms and conditions of a facility letter dated **28 June 2006**, the Complainants drew down a new fixed interest rate loan under mortgage loan account ending **621**. The proceeds of the mortgage loan account ending **621** repaid the mortgage loan account ending **318** in full. The facility letter dated **28 June 2006** set out that the fixed interest rate loan was for a period of 29 years and 5 months from the date of drawdown and the fixed interest rate was for a period of three years.

The Provider contends that the Complainants were issued with, and accepted, documentation which confirmed that their loan would revert to the Provider's standard variable rate at the end of the 3 year fixed interest rate period. In this regard, the Provider relies on the **Schedule** in the **Fixed Rate Home Loan Agreement, Clause 11.4 of the Terms and Conditions**. The Provider says that **Clause 12.1** makes it clear that the Provider's "*variable home loan rate*" is subject to change in response to market conditions, which is different to a "*loan linked to the ECB Refinance Rate*" as specified in **Clause 12.2 of the Terms and Conditions**. The "*variable home loan rate*" clearly does not track the ECB

/Cont'd...

Refinance Rate and there is “*nothing else*” in the facility documentation that makes that link. The Provider indicates that it did not issue the Complainants with any documentation which confirmed that their loan would revert to an ECB Tracker interest rate. The Provider states that it believes that customers would generally understand the term standard variable rate and customers would not understand that it would refer to an ECB Tracker rate.

The Provider submits that the Complainants were issued with an account statement for their ECB Tracker loan under mortgage loan account ending **318** on **3 July 2006** which confirmed that €256,212 had been transferred “*to close ecb tracker*”. As and from **3 July 2006**, the Complainants were then issued with annual account statements for the new fixed interest rate loan under mortgage loan account ending **621**. The Provider is of the view that the Complainants were aware or ought to have reasonably been aware that they were entering into a new housing loan agreement as they accepted and signed the terms of the new facility letter on the **3 July 2006**.

The Provider outlines that it is satisfied that the content of the loan documentation for mortgage loan account ending **621** was sufficiently clear, transparent, comprehensible and unambiguous and that it is satisfied that the term “*variable rate*” is sufficiently clear and transparent in its meaning.

The Provider submits that it sent a rollover notification letter to the Complainants on **20 August 2009**, prior to the fixed interest rate period expiring, advising the Complainants that the fixed interest rate period was due to expire on **1 October 2009**. The letter stated that the Complainants had the possible options to choose between a variable rate or a new fixed rate. The Provider withdrew ECB Tracker interest rate loans as a product in **late 2008** and therefore it was not possible for the Provider to offer a new ECB Tracker interest rate loan to the Complainants in **October 2009**. The Provider says that on the expiry of the fixed interest rate period on **1 October 2009**, the Complainants did not opt to fix again, and the interest rate moved to the Provider’s variable interest rate as per the agreed contractual terms of the facility letter.

The Provider states that the Complainants’ mortgage loan account ending **621** was never on an ECB Tracker interest rate and there was no contractual or regulatory obligation on the Provider to apply an ECB Tracker interest rate to this loan on the expiry of the fixed interest rate in **October 2009**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to advise the Complainants appropriately or properly and/or misadvised the Complainants when the fixed interest rate was applied to their mortgage loan in **July 2006**.

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

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

1. By email from the Provider on **04 February 2020**.
2. By email from the Complainant on **07 February 2020**.
3. By email from the Provider on **14 February 2020**.

Copies of these additional submissions were exchanged between the parties. Following the consideration of the additional submissions from the parties, together with submissions and evidence furnished, my final determination is set out below.

/Cont'd...

The issue to be determined is whether the Provider failed to advise the Complainants appropriately or properly and/or misadvised the Complainants when the fixed interest rate was applied to their mortgage loan in **July 2006**. In order to determine this complaint it is necessary to review and set out the relevant provisions of the Complainants' loan documentation in relation to mortgage loan account ending **318**, the interactions with the Complainants in **2006** when the Complainants applied for and drew down mortgage loan account ending **621** and the relevant provisions of mortgage loan account ending **621**.

Mortgage loan account ending 318

The mortgage loan detailed that the Provider *"hereby offers a Tailored Home Loan to you linked to the refinance rate of the European Central Bank (ECB) as detailed hereunder"*.

The **"important information"** section on **page 1** of the **Tailored Home Loan** dated **22 August 2005** included the following;

<i>"Amount of credit advanced:</i>	<i>EUR 266,000.00</i>
<i>Period of Agreement:</i>	<i>30 years from drawdown</i>
...	
<i>APR*:</i>	<i>3.0% (VARIABLE)</i>
...	
<i>*Annual Percentage Rate of Charge"</i>	

The **"Schedule"** section of the **Tailored Home Loan** detailed as follows;

<i>"Property mortgaged:</i>	<i>[the Complainants' named primary residence]</i>
...	
<i>Rate of Interest:</i>	<i>The total of the ECB Refinance Rate plus 0.99% (the Added Percentage), currently 2.99% p.a"</i>

The **"Acceptance and Authority"** section of the **Tailored Home Loan** detailed as follows;

"I/We accept the within Offer of a loan on the Terms and Conditions set out including your Tailored Home Loan Terms and Conditions attached.

I/We irrevocably authorise my/ our solicitor to give the undertaking(s) referred to in clause 2 of the Terms and Conditions.

I/We irrevocably authorise you to pay the Loan through my/ our Solicitor (unless another mode of payment is agreed by the Solicitor)."

The "**Acceptance and Authority**" was signed by the Complainants on **13 September 2005**, and was witnessed by a solicitor.

The **Tailored Home Loan ECB Tracker – Terms and Conditions** details as follows;

"3 Rate of Interest

Until the loan is fully repaid, the Rate of Interest will be calculated by adding the Added Percentage specified in the Schedule to the current ECB Refinance Rate. Where the ECB Refinance Rate is changed by the European Central Bank, the new rate will be applied to your loan within three working days. If there ceases to be a rate of interest known as the ECB Refinance Rate, we will base your interest rate on the rate which is at that time the nearest equivalent to the ECB Refinance Rate.

Our Rate of Interest and APR are variable. Rates of Interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect. APR and other details quoted in the "Important Information" section assume that at drawdown of the Loan the Rates of Interest applicable will be those quoted at the date of this offer. If our Rates of Interest change prior to your acceptance of this Offer, any such change(s) will not be effective until we notify you in writing. Notice of such changes will be given by publication in the national press and will be exhibited in our Branches.

Interest will accrue on the balance of the Loan outstanding at the daily equivalent of the Rate of Interest specified in the Schedule. Interest is charged monthly in arrears and capitalised on our usual charging days (as well after as before any demand for repayment and / or after any judgement) and upon termination of this agreement. Arrears of instalments and other overdue payments will carry interest at the Rate of Interest compounded monthly."

Mortgage loan account ending **318** was stated to be a **Tailored Home Loan**. The terms and conditions of the Complainants' mortgage loan documentation outlined that an "**ECB Refinance Rate**" would apply to the mortgage loan. This was clearly set out in the **Schedule**

/Cont'd...

and **condition 3** of the Terms and Conditions. In accordance with **condition 3** the ECB Refinance Rate was one that “*is changed by the European Central Bank*”.

The Terms and Conditions of mortgage loan account ending **318** did not provide a contractual right for the Complainants to apply a fixed interest rate to that mortgage loan.

Mortgage loan account ending 621

There were discussions between the Complainants and the Provider with respect to the Complainants applying a fixed interest rate to their mortgage loan in **June/July 2006**. At that time the Complainants’ existing mortgage loan account ending **318** with the Provider was on the ECB tracker rate (ECB + 0.99%).

I note that the Provider has indicated that it has “*checked all hard copy files and computerised records that it holds and the Provider does not have a detailed record of the meeting that took place between any staff member in the [named] branch and the Complainants in 2006*”. It is disappointing that the Provider does not hold detailed records of the meeting with the Complainants, however it is nevertheless accepted between the parties that a meeting took place on or around **28 June 2006**.

A letter issued by the Provider to the Complainant on **28 June 2006**, which was **7 pages** in total and was headed “***Final Financial Summary***”. The **Final Financial Summary** was signed by the Complainants on **3 July 2006**. I note that the **Final Financial Summary** records the mortgage application discussion that took place during the meeting.

Page 3 of the **Final Financial Summary** details, as follows.

<i>Home Loan Questions and Answers</i>	
<i>Borrower type</i>	<i>Repackage</i>
<i>Type of Property</i>	<i>Main Residence</i>
<i>Loan purpose</i>	<i>Restructure of lending</i>
<i>What is the value of the property you wish to obtain the mortgage on?</i>	<i>EUR 365,000.00</i>
<i>What is the purchase price?</i>	<i>EUR 0.00</i>
<i>How much do you wish to borrow?</i>	<i>EUR 256,212.00</i>
<i>Please provide a detailed breakdown including figures on how this loan is made up amend rate to 3 year fixed</i>	
<i>What is your preferred loan repayment term?</i>	<i>29 years 4 months</i>

/Cont’d...

*Is there any other information which is relevant
to your application?
Capital & interest*

A **Credit Application** was submitted to the Provider for a “*Fixed Rate Home Loan*” on **28 June 2006**. The **Credit Application** details “*Application for EUR 256,212.00 Fixed Rate Home Loan*”.

The “*Comments*” section of the **Credit Application** outlines as follows;

“Amending existing mortgage to a 3 year fixed rate.”

A **Housing Loan Agreement** issued to the Complainants on **28 June 2006**. The Complainants’ mortgage loan documentation comprises of the **Housing Loan Agreement** headed **Fixed Rate Home Loan** and the **General Conditions for Annuity Home Loans**. The following are extracts from the mortgage loan documentation relevant to the Complainants’ complaint.

- **The Fixed Rate Home Loan**

The **Fixed Rate Home Loan** issued by the Provider to the Complainants dated **28 June 2006**. The “*important information*” section on **page 1** included the following;

*“Amount of credit advanced: EUR 256,212.00
Period of Agreement: 29 years 5 month(s) from drawdown***
Number of Repayment Instalments: 764 plus any final balance.
Amount of Each Instalment: 85 payment(s) of EUR 581.32
679 payment(s) of EUR 585.06
1 payment(s) of EUR 575.11
...
APR*: 4.31% fixed
...
Annual Percentage Rate of Charge”

The “**Schedule**” section on **page 2** of the **Fixed Rate Home Loan** detailed as follows;

*“Purpose of the Loan:
Restructure of Lending, as specified in your Loan Application

Property to be mortgaged (the “Property”):
[the Complainants’ named primary residence]*

/Cont’d...

Latest Drawdown Date: 28 September 2006

*Rate of Interest: 4.18% per annum, fixed
4.24% per annum, variable*

Fixed rate: Roll-over date: 1 October 2009. The Roll-over Date is the start date of the standard variable interest rate at that time. The fixed rate period expires on the date preceding this day.

...

Security: A first legal mortgage over the Property. (An existing 'all sums' first legal mortgage over the Property in our favour will satisfy this, but you must pay the stamp duty on it (if any) required to cover the increased sum lent)."

The "**Acceptance and Authority**" section on **page 3** of the **Fixed Rate Home Loan** detailed as follows;

"WARNING – THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE

*I/We have read and understand the nature and contents of this Loan Agreement
I/We agree to be bound by this Loan Agreement
Where applicable I/We irrevocably authorise my/our solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by my/our Solicitor)."*

The "**Acceptance and Authority**" was signed by a representative of the Provider on **28 June 2006** and by the Complainants on **03 July 2006**. The Complainants' signatures were not witnessed by a solicitor. The "*witnessed by*" section of the **Fixed Rate Home Loan** had been struck through as shown in the extract below.

Witnessed by:

Date

Signature

Address

The Complainants take issue with the conduct of the Provider in **June/July 2006** when they sought to apply a fixed interest rate to mortgage loan account ending **318**. The Complainants submit that they did not want to draw down a new loan, that there was no need to *“restructure anything”* and that *“all we wanted was to fix our interest rate for 3 years on our current loan which surely should be a standard procedure in every bank.”*

As outlined above, the terms and conditions of mortgage loan account ending **318** did not provide a contractual right for the Complainants to apply a fixed interest rate product to that mortgage loan. In these circumstances, I accept the Provider’s submission that in order for the Complainants to have a mortgage loan that was on a fixed interest rate, the mechanism that the Provider had available was for a new fixed interest rate mortgage loan to be applied for and drawn down by the Complainants.

The Complainants submit that *“at no stage”* did they sign any documents to say that they were taking out a different mortgage and that the Provider’s representatives did not give them *“any warning”* that they were being moved to a *“new account with different conditions”*. It appears to me that the process that was undertaken by the Provider in **late June / early July 2006** was a significantly truncated version of what would typically be understood to be the process of applying for, taking out and drawing down a new mortgage loan, in contrast to the process that had been undertaken by the Complainants some 10 months earlier.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines:

“...when a customer of a financial institution obtains a top up loan or switches from one product to another the drawdown processes for these transactions is more simplified than the drawdown process when a new customer (rather than an existing customer) of the Provider is drawing down a new loan. However, that is not to

/Cont’d...

suggest that a customer will not be aware of the “new mortgage loan” process. The Provider submits that the Ombudsman has erred [in my Preliminary Decision] in drawing a conclusion that due to the simplified process the Complainants were unaware that they were taking out a new mortgage loan.”

The Complainants in their post Preliminary Decision submission dated **04 February 2020**, outline:

“We can only stress the point that in any discussions with our local bank officials, whom we felt that we could trust, there was never any mention of a new loan. They discussed the duration it was best to fix our rate for i.e., 1 year, 3 years or 5 years, they provided us with the paperwork which we signed where they told us to sign and there was never any mention of a requirement for legal advice. This, as far as we were concerned, was a very straightforward process of fixing the interest rate on our existing loan and that is exactly the impression that we got from the bank officials that we dealt with.”

I have been provided with no evidence that the Provider specifically informed the Complainants that in order to apply a fixed rate to the mortgage loan, that the Complainants would have to redeem their existing mortgage loan and apply for and draw down a new mortgage loan on different conditions to the existing loan. For the avoidance of any doubt I do not accept that it was the Provider’s intention to “*dupe*” the Complainants. However, having regard to the manner in which the transaction was conducted and the documentation that has been submitted in evidence on the file, I accept the Complainants’ submission that they did not know that they were taking out a new mortgage loan which was subject to substantially different conditions at the time.

I note that the **Final Financial Summary** in the **Home Loan Questions and Answers** section, as extracted above, refers to a “*repackage*”, “*a restructure of lending*” and “*amend rate to 3 year fixed*”. The term “*restructure of lending*” was also contained in the **Schedule** to the **Fixed Rate Home Loan**. I am of the view that none of these phrases or terms were of such a nature that would inform the Complainants and put them on notice, that in order to apply a fixed interest rate to the mortgage loan, that what was going to occur was that mortgage loan account ending **318** would be redeemed and a new mortgage loan ending **621** would be drawn down on different terms and conditions to the original mortgage loan.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines that I failed in my Preliminary Decision to “*take or take adequately, into account a number of features of the “Final Financial Summary” document which issued to the Complainants following their meeting with a former employee of the Provider which took place in or*

/Cont’d...

around 28 June 2006". The Provider outlines that I have not referred to any of the following in the **Final Financial Summary**:

- "your product choice" (page 1);
- "This is your loan applica-tion [sic].." (page 2)
- "How much do you wish to borrow?" (page 3)
- "After you have taken out this mortgage.."(page 4)
- "your financial status will change..."
- "Application for Home Loan" (page 5)
- "prior to any loan being granted" (page 5, declaration a))
- "in connection with any loan being granted (page 5, declaration c))
- "this application for credit" (page 5, declaration d))
- "on approval of the loan" (page 5, declaration f))

The Provider submits that "these references are critical in that they made the Complainants aware that they were taking out another mortgage / home loan and this was clear to any reasonable person reviewing the document".

In reaching my decision on this matter, I have taken into account the **Final Financial Summary** document as a whole. I accept that there are certain references in the document, as have been highlighted by the Provider that might typically be understood to be references to new lending and I have had regard to these references in my consideration of this complaint and arriving at my decision. However, I also note that the references highlighted by the Provider are all contained in what appears to be standard text as part of the **Final Financial Summary**. I am of the view that the most pivotal section of the **Final Financial Summary** is the **Home Loan Questions and Answers** section, the text of which, it appears was typed into the document, in response to the questions discussed between the Complainants and the Provider at the meeting on or around **28 June 2006**. I am of the view that the phrases or terms contained in that section do not in any way disclose the real nature of the transaction that was proposed to be undertaken to the Complainants, that is, that the existing mortgage loan was being redeemed and a new mortgage loan subject to different terms and conditions was being taken out by the Complainants.

I also note that the **letter** enclosing the **Final Financial Summary** dated **28 June 2006** indicated that that the stated purpose of the letter was in relation to "restructure of lending". This letter outlined as follows:

/Cont'd...

“Dear [Complainants]

***Final Financial Summary
Re: Restructure of Lending”***

In these circumstances, I do not accept the Provider’s submission that it was clear to any reasonable person reviewing the document that a new mortgage was being taken out. Rather, I am of the view that the document specifically indicated to the Complainants that they were repackaging, restructuring their lending and amending the rate of interest applicable to their mortgage loan to a 3 year fixed rate at that time. Whilst these three terms in and of themselves can be construed to mean different things, none of them would properly be understood to describe the process of redeeming an existing loan and drawing down a new mortgage loan under entirely new terms and conditions.

I have also had regard to the circumstances under which the **Fixed Rate Home Loan** was signed by the Complainants. The **“Acceptance and Authority”** was signed by a representative of the Provider on **28 June 2006** and by the Complainants on **03 July 2006**. The Complainants’ signatures were not witnessed by a solicitor. The *“witnessed by”* section of the **Fixed Rate Home Loan** had been struck through as shown in the extract below. From examining the colour of the ink used by each of the three signatories (both of the Complainants and the Provider’s representative) and the weight of pen stroke, it appears to me that on the balance of probabilities this section was struck through by the Provider’s representative.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines that the *“finding [in my preliminary decision] that the Provider’s representative struck out the ‘witnessed by’ section is based on speculation and undermines the entire decision.”*

The Provider further submits:

“one of the Complainants signed the facility letter in blue ink as did the representative of the Provider. The Provider respectfully submits in the absence of a report from a forensic handwriting expert or other expert evidence disclosed to the Provider, with an opportunity to submit its own expert report and/or challenge any report or expert evidence provided to the Ombudsman, it is not open to the Ombudsman to conclude that the Provider was the party responsible for striking through the witness section of the facility letter or, if it was, that it was at its own instigation. In so doing the Ombudsman has acted in breach of fair procedures.”

/Cont’d...

The Provider also details that:

“A lot of emphasis appears to have been placed on this by the Ombudsman notwithstanding the unambiguous warnings in the Acceptance and Authority section that the Complainants should take legal advice.

I am of the view that the conclusion reached with respect to the strike through of the “*witnessed by*” section of the **Fixed Rate Home Loan** was one that I am entitled to make and was one that does not require any expert analysis as has been suggested by the Provider. The Provider has indicated that it did not have the opportunity to submit its own expert report. The Provider could, if it was of the view that expert evidence was required, have submitted its own expert report to this office as part of its submission in relation to the Preliminary Decision, however the Provider did not elect to do so. Even if it is the case that the Provider’s representative did not strike through this section of the form, the Provider has offered no explanation as to why it did not deem it necessary to have the Complainants’ signatures witnessed as would normally be required.

Furthermore, I am of the view that it is important to highlight that in arriving at my decision I have had regard to the totality of the evidence before me and have not “*placed emphasis*” on any singular issue as identified in my decision. Rather there are a series of issues with and variants to the standard process for applying for and drawing down a new mortgage loan that have led me to conclude that the evidence supports the Complainants’ position that they did not know that they were taking out a new mortgage loan which was subject to substantially different conditions at the time.

Whilst I note that the “**Acceptance and Authority**” section did contain a warning about seeking independent legal advice, the “*witnessed by*” section of the Acceptance and Authority that would typically be signed by a solicitor as part of the normal mortgage draw down process had been struck through as set out above. There is no evidence that the Complainants indicated to the Provider that they had decided not to seek independent legal advice with respect to this transaction.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines as follows:

*“With respect, whether or not the Complainants indicated to the Provider that they were seeking legal advice is irrelevant. It is well established, both in jurisprudence and in a previous legally binding decision of the Ombudsman that “there is no legal requirement or obligation on Financial Institutions to advise legal or otherwise, before a customer **amends his/her existing interest rate product.** [my emphasis]”*

/Cont’d...

The Provider further submits:

“Despite the fact that there was no legal requirement on a financial institution to advise customers to seek independent legal advice the facility letter for the fixed interest rate loan clearly stated “WARNING – THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE”. There is no legal or regulatory obligation on a financial institution to keep a record of whether a customer decided to obtain legal advice or not as this is a decision solely for a customer to make. In addition there is no legal or regulatory requirement that a customer’s signature is witnessed by a solicitor or other individual.”

With respect to this submission, I would firstly highlight to the Provider that each complaint before this office is considered on its own merits and based on the evidence and submissions made by the parties.

With regard to the transaction that took place it is clear to me that it was not an amendment to an existing interest rate product as has been described by the Provider in its post Preliminary Decision submission. Rather the transaction was for a new mortgage loan to be taken out with the Provider on a different interest rate product and subject to different terms and conditions to the existing mortgage loan. For the avoidance of any doubt, this decision does not seek to establish that there were obligations on the Provider to advise the Complainants to seek legal advice, to keep a record of whether the Complainants indicated that they were not going to seek legal advice or that the Complainants’ signature had to be witnessed by a solicitor or other individual. However, as outlined above, the circumstances under which the **Fixed Rate Home Loan** was signed by the Complainants are particularly relevant to this matter. The **witnessed by** section of the **“Acceptance and Authority”** was struck through and there is no indication why striking through, irrespective of who struck through what would appear to be a standard part of the Provider’s **Fixed Rate Home Loan**, was considered to be appropriate by the Provider. There was no evidence that the strike though was made at the Complainants’ request following an indication to the Provider that they did not want to seek independent legal advice. Conversely, the manner in which the initial **Tailored Home Loan** document was signed by the Complainants some 10 months earlier on **13 September 2005**, was significantly different. The Complainants’ signature was witnessed by the Complainants’ solicitor, with the Complainants’ solicitor confirming that she explained the *“nature and content”* of the Offer of the Loan and the terms and conditions to the Complainants.

The **“Acceptance and Authority”** section of the **Fixed Rate Home Loan** was irrevocably authorising a solicitor to give undertakings and in accordance with **General Condition 3**, to execute the mortgage, furnish certificates of title and stamp and register the mortgage. This is so in circumstances where a solicitor had not been engaged by the Complainants at

/Cont’d...

all. None of the steps which would typically be undertaken by a solicitor in the process of taking out a new mortgage loan were required by the Provider with respect to this transaction with the Complainants.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines:

“The Ombudsman has erred [in my Preliminary Decision] by omitting to include any reference to (or consideration of) the phrase “Where applicable”. The Provider submits that there are a number of instances (as more particularly detailed below) when a solicitor’s undertaking will not be applicable.

*When the Provider enters into a new loan agreement with a customer which is to be secured by a mortgage over a property and the said property has not previously been mortgaged to the Provider, a specific form of undertaking from a customer’s solicitor is required. The customer’s solicitor undertakes to put in place a mortgage over the property and also undertakes to return the title deeds to the Provider together with a solicitor’s certificate confirming the title is in order. However, in instances where a customer is obtaining a top up loan or in instances where a customer is **switching to a new loan product** with the Provider and a mortgage and solicitor’s certificate of title in relation to the property are already held by the Provider, there is no requirement for a customer to instruct a solicitor to furnish a new undertaking and certificate of title as the Provider will already hold the required documents.*

....

*As the new fixed interest rate loan was to be secured by the same property [in location] in 2006 the Provider did not require a new solicitor’s undertaking for this property. The security section of the July 2006 facility letter, quoted in the preliminary decision, specifically references that an existing all sums mortgage over the Property in question will satisfy these requirements. The Provider submits that the Ombudsman erred in not taking this into account. **[my emphasis]**”*

With respect to this submission, I would again highlight to the Provider that the transaction that took place was not a “switch” to a new loan product as has been described by the Provider. To describe the transaction as a “switch” to a new loan product is an oversimplification. The transaction undertaken was in fact the redemption of the existing mortgage loan and the inception of a new mortgage loan with the Provider on a different interest rate product and subject to new terms and conditions.

/Cont’d...

I acknowledge that the piece of the “**Acceptance and Authority**” in the **Fixed Rate Home Loan** that relates to solicitor undertakings is caveated with the words “*Where applicable*”. The full section is quoted earlier in my decision and has been taken into account. For the avoidance of any doubt, no issue has been raised with respect to the validity of the Provider’s security over the mortgaged property and I accept that the Provider is entitled to rely on an existing security where the terms of the Mortgage Deed permit the Provider to do so. Rather what I have pointed out is that none of the steps which would typically be undertaken by a solicitor in the process of taking out a new mortgage loan were required by the Provider with respect to this transaction with the Complainants. To me this is a further indicator that supports the Complainants’ submission that they did not know that they were taking out a new mortgage loan at the time.

I also note that **General Condition 2 of General Conditions for Annuity Home Loans** which was applicable to the **Fixed Rate Home Loan**, sets out the following;

“2. Preconditions

Before you may draw down the Loan we must receive in form and substance satisfactory to us:

- 2.1 the Agreement duly accepted by you;*
- 2.2 all identification materials required under all applicable anti-money laundering and similar regulations;*
- 2.3 evidence that you have good marketable title to the Property;*
- 2.4 the security specified in the Schedule or, in lieu of the mortgage over the Property, your solicitor’s undertaking referred to in clause 3;*
- 2.5 the survey/valuation of the Property referred to in clause 4;*
- 2.6 the insurance requirements referred to in clause 5 below have been satisfied;*
- 2.7 if applicable, an authority signed by you to open the current account referred to in clause 6 below;*
- 2.8 evidence that your solicitor has complied with our requirements as set out in our letter to your solicitor; and*
- 2.9 any other preconditions specified in the Special Conditions.”*

I note that of the nine preconditions set out above in the General Condition, the only precondition that appears to have been required of the Complainants was the first one, to sign the agreement. There is no evidence to suggest that any of the other preconditions were required by the Provider or adhered to by the Complainants to draw down the new mortgage loan ending **621**. Again supporting the Complainants’ understanding that they were not, in fact, taking out a new mortgage loan.

The value of the property is also outlined in the **Final Financial Summary** as €365,000. The requirement for a Survey/Valuation Report is outlined in **General Condition 4** of the

/Cont’d...

General Conditions for Annuity Home Loans. However I have not been provided with any evidence that any valuation of the property relating to the mortgage loan was required by the Provider to be undertaken by the Complainants at that time.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines:

“the Provider was already in receipt of all the documents listed at clauses 2.2 to 2.8 (inclusive) of the facility letter for the fixed interest rate loan. These documents had been obtained when the Complainant’s previous mortgage loan account [ending 318] was drawn down nine months earlier in October 2005. For example the Provider already held the property valuation (as required by clause 2.5) and also held confirmation of house insurance and life assurance (as required by clause 2.6). The Provider also already held the anti-money laundering documents (as required by clause 2.2). The aforementioned documents were all preconditions of drawdown of the Complainants’ previous loan in 2005.

The Complainants were not required to incur any unnecessary expense in obtaining new documents as these documents had previously been furnished to the Provider when the ECB Tracker loan was drawn down and the said documents are still valid. For example, the property valuation was less than 9 months old and the Provider did not require the Complainants to incur the cost of obtaining a new property valuation nor did the Provider require Complainants to obtain new life assurance policies or house insurance policies as these documents were already in existence and valid. Certain of these (valuation/security/life insurance) were specifically referred to in the Provider’s credit application provided in evidence to the Ombudsman...”

For the avoidance of any doubt, no issue has been raised with respect to whether the Provider was required to seek new documentation from the Complainants in order to deem that the Complainants had satisfied the pre-conditions for drawdown. Rather what I am pointing to is that the Provider’s own standard terms and conditions imposed nine preconditions that must be satisfied for a new mortgage loan to be drawn down. As has been indicated by the Provider these preconditions had been satisfied by the Complainants when their initial loan was drawn down in **October 2005**. There is no indication in the **Fixed Rate Home Loan** that was signed on **03 July 2006**, that as these preconditions had already been satisfied by the Complainants with respect to mortgage account ending **318**, these preconditions were not required to be satisfied by the Complainants with respect to the new loan under mortgage loan account ending **621**, such that would have put the Complainants on notice that they were in fact taking out a new mortgage loan in **July 2006**, in the same manner as they had done in **October 2005**. I note that the section of the **Credit Application** that the Provider has referred to is an outline of “proposed collateral” and “existing facilities and collateral” to assess the Provider’s

/Cont’d...

exposure on the mortgage loan. I do not see the relevance of this particular assessment which was undertaken by the Provider to the complaint under consideration.

After the **Fixed Rate Home Loan** was signed by the Complainants on **03 July 2006**, it appears that the mortgage loan account ending **318** was closed and mortgage loan account ending **621** was opened by the Provider. The **ECB Tracker Variable Rate Home Loan – Statement of Account** for mortgage loan account ending **318** dated **3 July 2006**, states as follows;

<i>“Entry Date</i>	<i>Value Date</i>		<i>Debited</i>	<i>Credited</i>
<i>03.07</i>	<i>03.07</i>	<i>Loan transfer</i>		<i>256,212.00</i>
<i>03.07</i>	<i>04.07</i>	<i>Interest</i>	<i>52.55</i>	
<i>04.07</i>	<i>03.07</i>	<i>to close ECB Tracker</i>		<i>280.19”</i>

The **Fixed Rate Home Loan – Statement of Account** for mortgage loan account ending **621** dated **3 July 2006**, states as follows;

<i>“Entry Date</i>	<i>Value Date</i>		<i>Debited</i>	<i>Credited</i>
<i>03.07</i>	<i>03.07</i>	<i>Loan transfer</i>	<i>256,212.00”</i>	

Again the language in the relevant statements of *“Loan Transfer”* does not appear to me to contain sufficient clarity as to the transaction that in fact took place, that is, that mortgage loan account ending **318** was redeemed and a new loan was taken out under account ending **612**.

I note that the statement with respect to account ending **318** also outlines *“to close ECB Tracker”*. The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines that the *“specific narrative wording used in the mortgage statement is clear and unambiguous and could leave the Complainants in no doubt that their ECB Tracker loan account was closed on 03 July 2006.”*

I am of the view that there is ambiguity with the term *“to close ECB Tracker”* which to me does not clearly illustrate to the Complainants that they were taking out a new mortgage loan which was subject to entirely different terms and conditions to the original loan that they had signed up to months earlier in **September 2005**.

The **Fixed Rate Home Loan** that was signed by the Complainants in **July 2006** did not contain a contractual entitlement to a tracker interest rate, rather it provided for a fixed rate until **01 October 2009** and thereafter a standard variable rate, which was not linked to an ECB Rate.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines:

“Fundamentally there appears to have been a failure [in my Preliminary Decision], both in law and in fact, to appreciate that the Complainants requested a fixed interest rate and the Complainants signed and accepted the terms of the fixed interest rate facility letter signed on 3 July 2006 which provided in express terms (clause 11.4 of the Terms and Conditions) that the loan would revert to a standard variable rate after three years. The relationship between the Complainants and the Provider is governed by these contractual terms. The failure to attach significance to the clear contractual terms is a serious and significant error. The Complainant had no contractual right to revert to the tracker mortgage. The Complainants acknowledge (see letters of 16 September 2015 and 18 February 2019) that they read the documentation but formed an “assumption” that the mortgage would revert to a tracker rate. This was an erroneous assumption which had no foundation in the documentation provided to the Complainants. It is not a presumption for which the Provider should be held liable.

As a matter of law, the 2006 facility letter superseded the 2005 facility letter pursuant to which the Complainants had a contractual right to a tracker mortgage. The Complainants cannot now seek to rescind the unambiguous terms of the 2006 facility letter based on the mistaken assumption by them.”

Having regard to the manner in which the transaction took place I am of the view that it was not clear to the Complainants in these circumstances that by signing the **Fixed Rate Home Loan in July 2006**, that the contractual entitlement to a tracker interest rate of ECB + 0.99% that had existed under the **Tailored Home Loan ECB Tracker** would no longer apply to the Complainants’ mortgage loan. I am of the view that the Provider failed to inform the Complainants appropriately that in order to accede to the Complainants’ request to apply a fixed interest rate to their mortgage loan, that the process to be undertaken was a redemption of their existing mortgage loan, which meant that the terms and conditions applicable to that loan would no longer have effect. The Provider did not make it clear that what was in fact happening was the application for and draw down of a new mortgage loan subject to different conditions. The **Fixed Rate Home Loan** which was signed on **03 July 2006** does not outline that it superseded the **Tailored Home Loan** which was signed on **13 September 2005 as has been suggested by the Provider**. Nor does it in any way refer to the redemption of the **Tailored Home Loan**. For the avoidance of any doubt I have not outlined in my decision that the Complainants were correct in their assumption that the **Fixed Rate Home Loan** would “revert” to the tracker interest rate at the end of the fixed interest rate period on **01 October 2009** or that there was any contractual entitlement to a tracker interest rate contained in the **Fixed Rate Home Loan**.

/Cont’d...

The Provider also submits that *“it is well established that a bank does not owe a duty of care to a customer to advise on the wisdom of a commercial decision”*. In this regard, the Provider refers to ***Delaney v AIB [2016] IECA 5*** and the text book Banking Litigation, Hewetson and Elliot 3rd edition para. 2-005. I accept that there was no obligation on the Provider to advise the Complainants on the merits of entering into the **Fixed Rate Home Loan**. The Complainants have made certain submissions that the Provider informed them that fixing the interest rate was *“the correct decision to make at the time”*. Firstly there is no evidence to support this submission and secondly, it was a matter for the Complainants to decide whether they wished to enter into the **Fixed Rate Home Loan**. The issue here arises because the Complainants did not know that they were entering into a new mortgage loan with the Provider and the process followed and documentation used by the Provider in the transaction were not of the clarity that would be expected of the Provider, such to put the Complainants on notice of the transaction that they were entering into with the Provider.

In light of all the foregoing, I uphold this complaint.

I note that the Complainants are seeking *“reinstatement to our original Tracker Mortgage Interest Rate together with reimbursement of overpayment since October 2009.”* However, it appears to me that the appropriate course of action to rectify the conduct complained of and its consequences is to direct that the **Tailored Home Loan ECB Tracker** mortgage loan be reinstated from **July 2006** as the failure on the part of the Provider occurred in **July 2006**. In this regard, I note the Complainants have also submitted that they would *“not have fixed the mortgage”* had the Provider explained to them that clearly that the *“option of returning to the tracker rate”* was being *“removed”* at the time.

The Provider in its post Preliminary Decision submission dated **04 February 2020**, outlines:

“The Provider submits that the Ombudsman has erred [in my Preliminary Decision] with regard to the aforementioned direction. The Complainants do not dispute that they sought and obtained a three year fixed interest rate loan which expired on 1 October 2009. The Complainants’ complaint relates to the interest rate which was applied on the expiry of the fixed interest rate period on 01 October 2009. Therefore, the Provider submits that if an ECB Tracker interest rate was to be applied from July 2006 this would be contrary to the agreed (and undisputed) contractual position between the Complainants and the Provider and an unlawful interference with the Provider’s legitimate contractual rights.”

As noted above, the Complainants have sought the application of the tracker interest rate on their mortgage loan account from the expiry of the fixed interest rate period on **01 October 2009**. However in circumstances where the failure on the Provider’s part occurred

/Cont’d...

in **July 2006**, I do not consider the direction that the Complainants are seeking to be appropriate. The Provider will be aware that in accordance with **s60(4) of the Financial Services and Pensions Ombudsman Act 2017**, where a complaint is found to be upheld by me then there are a number of directions available to me, one of which is that I can make a direction that the Provider rectify the conduct complained of or its consequences. It is a matter for me to decide what direction is appropriate in the circumstances of this complaint. The fact that the Complainants sought a particular remedy or direction that they considered appropriate in the context of this complaint does not bind me to that direction. In the circumstances of this particular matter, either it is the case that the Complainants would not have gone ahead with the **Fixed Rate Home Loan** in **July 2006** had they known that they were drawing down a new mortgage loan subject to different conditions, or they would have gone ahead with the **Fixed Rate Home Loan** had they had full information about the nature of the transaction. The Complainants have submitted that they would not have proceeded and I accept this.

Because of the truncated manner in which the transaction took place together with the lack of clarity in the documentation as to the nature of the transaction, I am referring this decision to the Central Bank of Ireland for any action it may deem necessary.

I requested that the Provider furnish this office with a table which compared the manner in which the Complainants' mortgage loan amortised on a monthly basis from **July 2006** and the manner in which it would have amortised if it had remained on the tracker interest rate of ECB + 0.99% from **July 2006**. The Provider furnished these calculations in evidence.

If the Complainants' mortgage loan account had remained on the tracker interest rate of ECB + 0.99%, the Complainants, for the most part, would have been paying a higher interest rate than the fixed interest rate of 4.18% which applied between **July 2006** and **September 2009**. The evidence shows that for 26 of the 39 months, the tracker interest rate ranged between 4.24% and 5.24% (both inclusive of the ECB base rate) which was higher than the fixed interest rate of 4.18% which applied. For 13 of the 39 months, the tracker interest rate ranged between 1.99% and 3.99% (both inclusive of the ECB base rate), which was lower than the fixed interest rate of 4.18% which applied.

After **October 2009**, a variable interest rate applied to the mortgage loan. The variable interest rate was 3.40% between **October 2009** and **November 2011** and 4.35% between **December 2011** and **June 2012**. The tracker interest rate that would have applied during the period between **October 2009** and **June 2012**, varied between 1.99% and 2.49%.

The difference in monthly repayments for the period (**October 2009** and **June 2012**) if the tracker interest rate had been applied, is represented in the table below:

/Cont'd...

Date Range (inclusive)	Actual monthly repayments (€)	Monthly repayments on tracker rate (€)	Difference per month (€)
October 2009	1,160.99	1,360.35	(199.36)
November 2009 – Mar 2010	1,160.00	906.90	253.10
April 2010	1,740.00	1,360.35	379.65
May 2010 – Aug 2010	1,160.00	906.90	253.10
September 2010	1,740.00	1,360.35	379.65
Oct 2010 – Feb 2011	1,160.00	906.90	253.10
Mar 2011	1,740.00	1,360.35	379.65
April 2011 – Jun 2011	1,160.00	932.78	227.22
July 2011	1,160.00	945.02	214.98
August 2011	1,160.00	957.26	202.74
September 2011	1,740.00	1,435.89	304.11
October 2011	1,160.00	957.26	202.74
November 2011	1,160.69	933.20	227.49
December 2011	1,163.03	919.68	243.35
Jan 2012 – Feb 2012	1,164.68	906.16	258.52
March 2012	1,747.02	1,359.24	387.78
April 2012 – May 2012	1,164.68	906.16	258.52
Jun 2012	707.76	906.16	(198.40)

It appears that in **June 2012**, a further fixed interest rate period was sought by the Complainants and mortgage loan account ending **621** was closed and mortgage account ending **988** was opened. A fixed interest rate of 3.75% applied to that mortgage loan from **June 2012** until **June 2014**.

A variable interest rate of 4.5% applied between **July 2014** and **January 2017** and 4.30% between **February** and **December 2017**. The tracker interest rate that would have applied during the period between **July 2012** and **December 2017**, varied between 0.99% and 1.99%. The difference in monthly repayments for the period (**July 2012** and **December 2017**) if the tracker interest rate had been applied, is represented in the table below:

/Cont'd...

Date Range (inclusive)	Actual monthly repayments (€)	Monthly repayments on tracker rate (€)	Difference per month (€)
July 2012	1,164.68	894.11	270.57
August 2012	1,747.02	1,323.09	423.93
Sept 2012 – December 2012	1,164.68	882.06	282.62
Jan 2013	1,747.02	1,323.09	423.93
Feb 2013 – April 2013	1,164.68	882.06	282.62
May 2013 – Jul 2013	1,164.68	860.58	304.10
August 2013	1,747.02	1,290.87	456.15
Sept 2013 - Oct 2013	1,164.68	860.58	304.10
November 2013	1,164.68	848.62	316.06
December 2013	1,164.68	836.66	328.02
January 2014	1,747.02	1,254.99	492.03
Feb 2014 – May 2014	1,164.68	836.66	328.02
June 2014	1,167.11	832.43	334.68
July 2014	1,754.31	1,242.30	512.01
August 2014	1,169.54	828.20	341.34
Sept 2014 – Dec 2014	1,169.54	819.98	349.56
January 2015	1,754.31	1,229.97	524.34
Feb – June 2015	1,169.54	819.98	349.56
July 2015	1,754.31	1,229.97	524.34
Aug – Nov 2015	1,169.54	819.98	349.56
December 2015	1,754.31	1,229.97	524.34
Jan – Feb 2016	1,169.54	819.98	349.56
March 2016	1,169.54	817.15	352.39
April 2016 – May 2016	1,169.54	814.32	355.22
June 2016	1,754.31	1,221.48	532.83
July 2016 – November 2016	1,169.54	814.32	355.22
December 2016	1,754.31	1,221.48	532.83
Jan 2017	1,169.54	814.32	355.22
Feb 2017 – May 2017	1,150.78	814.32	336.46
June 2017	1,726.17	1,221.48	504.69
July – Oct 2017	1,150.78	814.32	336.46
November 2017	1,726.17	1,221.48	504.69
December 2017	1,150.78	814.32	336.46

/Cont'd...

I note from the evidence provided that the capital balance on the mortgage loan when it was sold to another regulated entity in **December 2017** was €185,923.44, however, if the mortgage loan had remained on the tracker interest rate of ECB + 0.99% then the capital balance as of **December 2017** would have been €174,078.17, which is €11,845.27 less.

Having regard to the evidence, it appears to me that the repayments made on the mortgage loan account from **November 2009** to **December 2017** (when the mortgage loan was sold) were larger than the repayments that would have been required had the mortgage loan remained on the tracker rate of interest of ECB + 0.99% from **July 2006**. The total difference between the actual monthly repayments and the repayments that would have been required had the tracker rate of interest applied, during this period, appears to be approximately €31,600.

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

- (i) Apply a tracker interest rate of ECB + 0.99% to the Complainants' mortgage loan account from **July 2006** and repay to the Complainants any interest overpaid between **July 2006** and the date of sale of the mortgage loan in **December 2017**.
- (ii) Come to an arrangement with the purchaser of the loan or any future purchasers to the effect that the tracker interest rate of ECB + 0.99% be applied to the mortgage loan account from the date of sale to the maturity of the loan in accordance with the original terms and conditions and arrange for any consequent refund of overpaid interest due to be repaid to the Complainants.
- (iii) Pay a sum of €4,000 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered as a result of the Provider's conduct.

Conclusion

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

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;

- (i) Apply a tracker interest rate of ECB + 0.99% to the Complainants' mortgage loan account from **July 2006** and repay to the Complainants any interest

/Cont'd...

overpaid between **July 2006** and the date of sale of the mortgage loan in **December 2017**.

- (ii) Come to an arrangement with the purchaser of the loan or any future purchasers to the effect that the tracker interest rate of ECB + 0.99% be applied to the mortgage loan account from the date of sale to the maturity of the loan in accordance with the original terms and conditions and arrange for any consequent refund of overpaid interest due to be repaid to the Complainants.
- (iii) Pay a sum of €4,000 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered as a result of the Provider's conduct.

The Provider shall comply with these directions within a period of 35 days of the nomination of account details by the Complainants to the Provider.

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

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

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

7 April 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