



<u>Decision Ref:</u>	2020-0245
<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>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The loan amount was €300,000 and the term of the loan is 38 years. The particulars of the Loan Offer dated **8 February 2006** detail that the loan type is a "STANDARD ANNUITY". The Complainants' mortgage loan account ending **4571 (01)** was drawn down on a one year fixed interest rate of 3.25% in **February 2006**.

The Complainants' Case

The Complainants submit that prior to the expiry of the one year fixed interest rate period in **February 2007**, they received an interest rate options form from the Provider. The Complainants submit that they were offered standard variable and fixed rates, however, they explain that "*a tracker rate was not offered... even though tracker rates were an option at the time*". The Complainants confirm that they opted to fix the interest rate on their mortgage loan account at a rate of 3.25% for three years by signing a **Letter of Authority/Acknowledgement** on **23 February 2007**.

The Complainants state that they never received the **Product Expiry Letter** accompanying the **Letter of Authority/Acknowledgement** in **February 2007**, which the Provider maintains was issued to them. The Complainants assert that they *“were entitled to consider a tracker rate in 2007”* but they were *“not offered a tracker rate in 2007 as the bank did not send [them] the product expiry letter and therefore neither [they] nor the bank have a copy of it”*. In respect of the template sample **Product Expiry Letter** that the Provider has submitted in evidence and says was issued to customers in **February 2007**, the Complainants submit that if they *“were offered the option to inquire about tracker rates in 2007 as is stated in the sample copy[they] would have rang the number and inquired about tracker rates available in 2007”*. The Complainants contend that in circumstances where they did not receive this letter, they were unable to make an *“informed decision”* as they were *“lacking the necessary information”*. As a result, the Complainants submit that they made the decision to opt for a fixed rate on the sole basis of the **Letter of Authority/Acknowledgement** *“which outlined the rates available to [them] (fixed or SVR) and does not mention a tracker rate.”* The Complainants believe that the sample **Product Expiry Letter** furnished by the Provider *“is evidence that [they] should have been offered tracker rates in 2007”*.

The Complainants submit that they find it *“totally unacceptable that tracker rates were not mentioned on the letter [they] did receive (Letter of Authority/ Acknowledgement) and totally unacceptable that [they] did not receive the Product Expiry Letter where tracker rates would have been offered.”* The Complainants further state that if tracker interest rates were listed as an option on the **Letter of Authority/Acknowledgement**, they *“could have selected it then or at the very least enquired about it”*.

On expiry of the three year fixed interest rate period in **February 2010**, the Complainants received an interest rate options form. Again, they submit that they were only offered fixed and variable interest rates for their mortgage loan account *“even though tracker rates were an option at the time”*.

The Complainants submit that they believe that the Provider *“intentionally omitted”* tracker interest rates to *“mislead”* them.

The Complainants are seeking the following:

- (a) That mortgage account ending **4571 (01)** is placed on a tracker rate with immediate effect;
- (b) A refund of the difference in interest rates between the standard rate that was applied and the tracker rate during the applicable periods;
- (c) Compensation for *“years of stress and financial worry”*; and

- (d) Any amount awarded to be refunded or taken off the outstanding mortgage principal.

The Provider's Case

The Provider states at the outset that the Complainants' mortgage loan was arranged through a third party broker and the Provider was "*prohibited*" from contacting the Complainants "*until such time as the [Complainants'] mortgage funds were drawn down.*" As such, the Provider submits that it "*is not in a position to confirm or comment on any information given to the [Complainants] by their broker during the application stage of their mortgage*".

The Provider submits that a **Loan Offer** dated **8 February 2006** was signed and accepted by the Complainants on **17 February 2006** who confirmed that the terms and conditions attaching to the **Loan Offer** had been explained to them by their Solicitor.

The Provider explains that the Complainants were not offered a tracker interest rate on the expiry of the initial fixed interest rate period in **February 2007** because the their loan account "*drew down on 24 February 2006 on a fixed rate of 3.25% for a period of one year and was due to default to a Standard Variable Rate (SVR) on 28 February 2007 as stated in the Loan Offer*".

The Provider states that the variable rate, as described in the **Loan Offer**, was one "*which could be increased or reduced by [the Provider] at any time.*" The Provider submits that the **Loan Offer** does not contain any reference to a tracker interest rate and this would be necessary for a tracker interest rate to apply.

In advance of the expiry of the initial fixed interest rate period in **February 2007**, the Provider states that it issued a **Product Expiry Letter** to the Complainants which confirmed the expiry date of the fixed interest rate period and that the Complainants' mortgage loan account "*would automatically roll to the Bank's Standard Variable Rate (SVR) unless they chose one of the interest rate options available to them*". The Provider states that the **Product Expiry Letter** outlined the alternative interest rates which were available for selection at that time and enclosed a **Rate Change Letter of Authority/Acknowledgment** should the Complainants decide to opt to select an interest rate option outlined. The Provider submits that the **Product Expiry Letter** also invited the Complainants to contact the Provider with any specific enquiries in relation to the availability of tracker variable rate options. The Provider states that it has no record of the Complainants contacting the Provider to request a tracker rate of interest during this period in **2007**. The Provider submits that it did not retain a copy of the **Product Expiry Letter** that issued to the Complainants in **February 2007**. The Provider explains that this may be due to the

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expiration of the Provider's agreed period for retention of documents and consequently the Provider may have securely disposed of the document in line with its obligations under data protection and other legislation. The Provider rejects the Complainants' submission that they did not receive the **Product Expiry Letter** accompanying the **Letter of Authority/Acknowledgement** in **February 2007** and submits that they "*were one document and were not issued separately*". Given the Complainants acknowledged that they received the **Letter of Authority/Acknowledgement**, the Provider states that it is satisfied that the Complainants were provided with the **Product Expiry Letter** also.

The Provider states that the Complainants completed, signed and returned the **Letter of Authority/Acknowledgement** on **23 February 2007** opting for a further fixed interest rate of 4.85% for a period of three years.

The Provider submits that prior to the expiration of the three year fixed interest rate period, a **Product Expiry Letter** enclosing a **Rate Change Letter of Authority** issued to the Complainants on **18 February 2010**. The Provider submits that the Complainants were not offered a tracker interest rate on the expiry of the three year fixed interest rate period in **February 2010** as the Provider had withdrawn tracker interest rates from the market in **late 2008**, therefore tracker rates were not available to the Complainants as a product for selection in **2010**.

In circumstances where the Provider has no record of having received a response from the Complainants or a selection of one of the interest rate options outlined in the **Product Expiry Letter** of **18 February 2010**, the Provider explains that the Complainants' mortgage loan account defaulted to the Provider's standard variable rate in accordance with the **Letter of Authority/Acknowledgement** signed by the Complainants on **23 February 2007**.

The Provider does not accept the Complainants' submission that it "*intentionally omitted*" the option of a tracker interest rate on the options forms in **2007** and **2010** in order to "*mislead*" the Complainants.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate on their mortgage loan account on the expiry of fixed interest periods in **February 2007** and **February 2010**.

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

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Before dealing with the substance of the complaint, I note that the evidence indicates that the application for the mortgage loan was submitted by the Complainants to the Provider through a third party broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this Office, which outlined as follows;

"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint."

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Therefore, the conduct of the third party broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also necessary to set out the interactions between the Complainants and the Provider in **2007** and **2010** prior to the expiry of the fixed interest rate periods.

The documentary evidence at the time of the application supports the Provider's submission that the Provider did not have any direct communication with the Complainants, and that all communications pertaining to the mortgage application were between the Complainants and their broker. I have been provided with a copy of the broker's cover letter to the Complainants dated **8 February 2006** enclosing the Loan Offer, which contains a brief statement, from the broker, regarding the Provider's valuation report requirements and ends with;

"If you have any questions, please do not hesitate to contact me."

The **Loan Offer** dated **8 February 2006**, details as follows;

“...
Loan Type: STANDARD ANNUITY
Loan Amount: €300,000.00
Interest Rate: 3.25%
Interest Type: FIXED FOR 12 MONTHS and variable thereafter
Term: 38 years
Monthly Loan Repayment €1146.50 for the following 12 months
*€1238.76 for the following 444 months**

“...
...

**Based on a calculation using the current [Provider's] variable rate”*

Condition (3) of the **Specific Loan Offer Conditions** attaching to the Loan Offer is entitled **“What requires no further action”** and reads as follows;

“The rate of interest applicable to this loan will be fixed [for] the fixed rate term specified in the loan offer letter.

The fixed rate quoted shall be subject to variation prior to drawdown in accordance with any variations in the fixed rate offered by the Company to new applicants for similar loans...”

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I note that the following warning is contained in the document entitled **Loan Offer – Consumer Credit Act 1995**;

“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.”

Condition 14 of the **Standard Mortgage General Terms and Conditions (effective from 18/02/2004)** attaching to the **Loan Offer** reads as follows;

“Interest Rate

(a) Subject to subsection (b), all loans are subject to the prevailing interest rate at the date the loan is drawn down. Subsequently, the interest rate may vary in accordance with the terms and conditions of the Loan Offer.

(b) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

- (i) The rate of interest applicable to the loan will be fixed at the rate and for the period specified in the Loan Offer;*
- (ii) The Borrower on expiry of the Fixed Rate Period may, by prior notice in writing to [the Provider], opt to choose a further fixed rate of interest for a certain period if such an option is made available by [the Provider] and on terms and conditions as may be specified by [the Provider].*

Where such an option is not made available by [the Provider] or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower.”

Page 1 of the **European Standardised Information Sheet** which was furnished to the Complainants with the **Loan Offer** details as follows;

“This document does not constitute a legally binding offer.

The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.

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...

3. Interest Rate

...

Interest rate: 3.25%

Interest Type: FIXED FOR 12 MONTHS and variable thereafter

(a) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

....

The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to [the Provider], opt to choose a further fixed rate of interest for a certain period if such an option is made available by [the Provider] and on terms and conditions as may be specified by [the Provider]. Where such an option is not made available by [the Provider] or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower."

The Complainants signed the **Loan Acceptance** on **17 February 2006** on the following terms;

"I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

I/We fully understand and accept the specific nature of this Standard Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Standard Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released."

It is clear that the **Loan Offer** dated **8 February 2006** envisaged that a fixed interest rate of 3.25% would apply to the Complainants' mortgage loan account for the first 12 months and thereafter a variable interest rate would apply, or the Complainants could opt to choose a further fixed rate of interest for a certain period, if such an option was made available by the Provider. The variable rate of interest referred to in **Condition 14(b)** of the

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Standard Mortgage General Terms and Conditions was clearly one *“which may be increased or decreased by [the Provider] at any time.”* **Condition 14** of the **Standard Mortgage General Terms and Conditions** does not mention the application of a tracker interest rate to the Complainants’ mortgage loan.

I note that the Provider has sought to rely on the **European Standardised Information Sheet** (the *“ESIS”*) that accompanied the **Loan Offer**, in support of its submission as to why the Complainants were not offered a tracker interest rate at the end of the initial fixed interest rate period in **2007**. I accept that the ESIS outlined that once the fixed interest rate period ended, the repayments would thereafter be based on either a further fixed rate of interest, if available by the Provider, or a variable rate of interest which may be increased or decreased by the Provider at any time. This is consistent with **Condition 14** of the **Standard Mortgage General Terms and Conditions**. However, as the Provider is no doubt aware that the ESIS does not form part of the Complainants’ mortgage loan contract and is for illustration purposes only. In this regard, I note that the ESIS clearly states that *“[t]his document does not constitute a legally binding offer”*.

The Complainants accepted the **Loan Offer** by signing and accepting the **Loan Acceptance**, having confirmed that the **Loan Offer** had been explained to them by their solicitor and they understood the contents of the **Loan Offer** and the terms and conditions attaching to it. If the Complainants were not happy with the terms of the **Loan Offer**, including the terms with respect to the applicable interest rate, the Complainants could have decided not to accept the offer made by the Provider.

Prior to the expiry of the initial fixed term, I understand that the Provider issued a **Product Expiry Letter** together with a **Letter of Authority/Acknowledgement** to the Complainants in or around **February 2007**. The **Letter of Authority/Acknowledgement** was signed by the Complainants on **23 February 2007** and returned to the Provider. However the Complainants maintain that they did not receive a copy of the **Product Expiry Letter** with the **Letter of Authority/Acknowledgement**.

The Provider has stated that it did not retain a copy of the **Product Expiry Letter** and no such document has been submitted in evidence. It is most disappointing that the Provider has failed to retain a copy of this letter in its records.

In this regard, **provision 49 of the Consumer Protection Code 2006** and **Provision 11.5 and 11.6 of the Consumer Protection Code 2012**, outline as follows;

“A regulated entity must maintain up-to-date consumer records containing at least the following

a) a copy of all documents required for consumer identification and profile;

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- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."

The Complainants' mortgage loan account was incepted for a term of **38 years** commencing from **February 2006** and the **Product Expiry Letter** purportedly issued to the Complainants in **February 2007**. There is no indication that the mortgage loan has been redeemed or disposed of in any way, therefore the Provider is obliged to retain that documentation on file for six years from the date on which the relationship with the mortgage holder ends.

The Provider has indicated that the reason it did not retain the letter "*may*" be due to the expiration of the Provider's agreed period for retention of documents and consequently the Provider may have securely disposed of the document in line with its obligations under data protection and other legislation. I recognise the importance of complying with data protection and other legislation and it is a matter for the Provider to set its retention periods, having regard to that legislative regime. However, it appears to me that when instruction letters issue by the Provider to a mortgage holder during the term of a loan and that loan remains active with the Provider, the Provider should retain that documentation on file for six years from the date the relationship with the mortgage holder ends in order to comply with the **Consumer Protection Code 2006** and **2012**. It appears to me that the Provider's document retention policy is not in compliance with the **Consumer Protection Code 2006** and **2012** and I suggest that the Provider should review this policy to ensure compliance.

The template **Product Expiry Letter** that has been submitted in evidence details as follows;

"On the [] the current fixed rate of []% on your mortgage will expire and you may at that time choose to transfer your mortgage to either a variable rate or a new fixed rate term. The choice is yours.

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The fixed rate options available at present are as follows;

...

If you decide that a fixed rate option is best for you, simply complete the enclosed Letter of Authority and return it to us.

We will then transfer your existing Mortgage to the option chosen. Should you have any specific queries in relation to refixing your mortgage, or the availability of tracker variable rate options please contact us at...

If you choose a variable rate you do not need to contact us as your loan will automatically revert to a variable rate. The current rate is []% and the total monthly repayment(s) is outlined in the payment plan below..."

The **Letter of Authority/Acknowledgement**, which was signed by the Complainants on **23 February 2007**, details the following as regards the Complainants' selection of a fixed interest rate option;

"Dear Sirs,

Please transfer my/our existing mortgage to a fixed rate mortgage with immediate effect. I/We wish to apply for the fixed interest rate of:

- 1 Year Fixed N/A % ()*
- 2 Year Fixed 4.85 % ()*
- 3 Year Fixed 4.85 % ()*
- 4 Year Fixed N/A ()*
- 5 Year Fixed 4.89 % ()*
- 10 Year Fixed N/A % ()*

Please tick appropriate."

The **Letter of Authority/Acknowledgement** also details as follows;

"TRANSFER FROM FIXED RATE TO VARIABLE RATE AT THE END OF FIXED NOTICE

On the expiry of the fixed term I/we may, by prior notice in writing to the Company, opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the Company. Where such an option is not available or I/We fail to exercise the option if available, the interest rate applicable will be a rate of

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interest which may be increased or reduced by the Company from time to time at any time in line with market interest rates (the variable rate)."

The Complainants selected the three year fixed interest rate of 4.85%.

There is a dispute between the parties as to whether the **Product Expiry Letter** issued to or was received by the Complainants in or around **February 2007** with the **Letter of Authority/Acknowledgement**. In the circumstances of this particular complaint, I do not think it is necessary to determine the dispute as to whether the **Product Expiry Letter** was issued and received or not. The reason for this is that the **Letter of Authority/Acknowledgement** has been provided in evidence and that document is the document that set out the interest rate options that the Provider was making available to the Complainants at the time. The **Letter of Authority/Acknowledgement** did not contain an offer of a tracker interest rate as the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account.

I do not accept that the Complainants "*did not receive the necessary information needed to make an informed decision*" in relation to the interest rate options to choose. In accordance with the terms and conditions of the Complainants' mortgage loan, the Complainants were only entitled to a variable interest rate option. The Provider had the discretion to make available a further fixed interest rate period and it did so. The Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan. It is important for the Complainants to understand that while tracker rate options may have been available as a product option from the Provider at the time, the Complainants were not contractually entitled to be offered a tracker interest rate.

It may be the case at this remove that the Complainants believe that if they received the **Product Expiry Letter** then they "*would have rang the number and inquired about tracker rates available in 2007*". However, this is not evidence that the Complainants "*should*" have been offered a tracker rate on their mortgage loan at that time as they have submitted. The Complainants could have contacted the Provider at any time if they had a query in relation to the applicable interest rate on their mortgage loan account, outside of those which they were contractually entitled to, however that does not mean that the Provider was obliged to offer them any particular rate. Had the Complainants contacted the Provider in **2007**, it would then have been a matter for the Provider to decide within its commercial discretion to accede to a request for a particular interest rate product outside of those that the Complainants were entitled to.

Prior to the expiry of the three year fixed interest rate period in **March 2010**, the Provider issued a **Product Expiry Letter** dated **18 February 2010** to the Complainants enclosing a **Rate Change Letter of Authority** offering the Complainants a number of fixed interest rate

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options and a range of variable interest rate options. The **Product Expiry Letter** accompanying the **Rate Change Letter of Authority** details as follows;

“The fixed rate period on your mortgage is coming to an end on 07/03/2010, so now it’s time to start thinking about your next mortgage deal. Any borrowings you have on this fixed rate will automatically roll to the Standard Variable Rate Default Option (APR 3.9%) of 3.85%.

You might choose a new variable rate or alternatively you could select a new fixed rate. With a fixed rate you will continue to have the security of knowing what your monthly repayments will be.”

The Complainants did not have an entitlement to a tracker interest rate on their mortgage loan on the expiry of the three year fixed interest rate period in **March 2010**. In accordance with **Condition 14(b)** of the **Standard Mortgage General Terms and Conditions** and the terms of the **Letter of Authority/Acknowledgement** which was signed by the Complainants on **23 February 2007**, the Provider offered the Complainants fixed and variable rate types. In circumstances where the Provider did not receive a response to this correspondence, the Complainants’ mortgage loan account defaulted to the Provider’s standard variable rate on **7 March 2010**.

A **Rate Change Letter of Authority** was issued to the Complainants on **9 March 2011** which was signed by the Complainants on **20 March 2011**. This letter listed options for a two or three year fixed interest rate and a range of variable interest rate options. The Complainants opted for a two year fixed interest rate option.

As outlined above, the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account at the end of the initial fixed interest rate period in **February 2007** or on expiry of the three year fixed interest rate in **February 2010**.

For the reasons set out above, I do not uphold the complaint.

Conclusion

My Decision is that this complaint is rejected, pursuant to **Section 60(1)** 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.

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FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

23 July 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.