



<u>Decision Ref:</u>	2020-0260
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Refusal to move existing tracker to a new mortgage product
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to two mortgage loans which the Complainants' held/hold with the Provider as follows:

- Mortgage loan account ending **4235**, was secured on the Complainants' then private dwelling house and was drawn down in **February 2007** on a tracker interest rate. The Complainants sold the mortgaged property the subject of mortgage loan account ending **4235** and the mortgage was redeemed in **August 2014**.
- The Complainants purchased a new property in **July 2014** by availing of the Provider's Home Mover Mortgage product. In doing so, the Complainants drew down mortgage loan account ending **2971**, in the amount of €270,000 in **July 2014**. Mortgage loan account ending **2971** was split into two sub accounts as follows:
 - (a) mortgage loan account ending **2971(1)** which was drawn down on a 5 year tracker interest rate of ECB + 2% in the amount of €169,402 (which represented the level of borrowing outstanding on account ending **4235**) for a term of 18 years.

- (b) The remainder of the Complainants' borrowing in the amount of €100,598 was drawn down under mortgage loan account ending **2971(2)** on the Provider's variable interest rate of 4.5% for a term of 25 years.

This complaint relates to mortgage account ending **2971(1)** and **2971(2)**.

The Complainants' Case

The Complainants submit that they held a tracker interest rate on mortgage account ending **4235** in respect of their private dwelling house (the "**first property**"). The Complainants submit that in **spring/summer 2014**, they decided to sell the first property in order to purchase a larger family home. However, they did not want to lose their existing tracker mortgage rate by moving house. The Complainants state that they enquired with the Provider "*about porting [their] tracker rate to a new property, as was mentioned in the [m]edia at the time*".

The Complainants detail that they were informed by the Provider that they would have to add 2% to their existing tracker interest rate for a period of 5 years and thereafter the interest rate would revert to the Provider's standard variable rate. The Complainants are of the view that this was "*very unreasonable as the bank was clearly going to benefit from the arrangement*" however they were "*not in a position to argue*" as they would lose their tracker rate if they went to an alternative Provider for credit. The Complainants submit that they accepted the Provider's "*modified version of [their] tracker rate*" and decided to "*port [their] mortgage, with the extra percentages and the five year time limit*".

The Complainants outline that they sold the first property subject to mortgage loan account ending **4235** which resulted in a loss of approximately €5,155, this being the difference between the sale price and the outstanding loan. The Complainants state that they contacted the Provider in **April 2014** to seek advice in relation to the negative equity aspect of the sale of the first property. Following subsequent conversations between the Complainants and the Provider by telephone and in person, the Complainants submit that it was their understanding that the negative equity would carry over as part of the borrowings for their new house (the "**second property**"). The Complainants contend that there is no mention in the loan documentation "*of paying the negative equity outright*". The Complainants submit that they based their borrowing calculations "*on the existing loan and the new top up loan at a variable rate for the remaining amount*" and there was "*only mention of the total sale proceeds being remitted to the bank*".

The Complainants state that they proceeded with the sale of the first property and the purchase of the second property however, at the time of closing, it became apparent that their solicitor was "*short money*" to complete the transactions. The Complainants submit that they felt the "*only solution was to pay out a lump sum which seemed to be required to*

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clear the negative equity". The Complainants contend that they paid the negative equity in a lump sum and borrowed it as part of their new mortgage.

The Complainants believe that they were misled about the Home Mover Mortgage product and were not sold the product that they had requested/expected from the Provider. The Complainants submit that they *"had wanted to port [their] tracker plus two percent"* however they *"had completely ended [their] old mortgage and took on a new split mortgage"*.

The Complainants also submit that the actions of the Provider during the sale of the first property led to delays. The Complainants explain that the representative of the Provider who they were dealing with *"had to go on a special training course with regard to [their] particular circumstances"* and *"[i]t could be inferred that the bank were stalling"* so as to find the best way to approach the situation to the Provider's benefit. The Complainants submit that they went sale agreed on the first property in **March 2014** and viewed the second property at the same time however they only received a loan offer in late **May 2014**. The Complainants state that they were *"fortunate that the sale of [their] home house did not fall through"*.

The Complainants are seeking:

- (a) Refund of the sum of €5,155 representing the negative equity that the Complainants submit they paid in full;
- (b) Reversion to the original tracker rate of interest as it applied to their previous mortgage loan account (ending **4235**);
- (c) Refund of all interest overpaid by them since the beginning of their current mortgage (original tracker rate versus ECB + 2% as applies to the new mortgage loan account); and
- (d) Time limit of 5 years in relation to expiry of the tracker interest rate removed.

The Provider's Case

The Provider submits that the Complainants were on a tracker interest rate of ECB base rate + 0.75% margin on mortgage loan account ending **4235** in respect of the first property up until that mortgage was redeemed in **August 2014**. The Provider states that the Complainants redeemed their original mortgage and purchased the second property for which they required further borrowings as part of the Provider's Home Mover Mortgage scheme.

The Provider states that it is satisfied that the terms and conditions of the Home Mover Mortgage scheme were clearly outlined to the Complainants and confirmed as understood by them. The Provider asserts that there is no evidence to support that its Tracker Porting

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product was ever available to the Complainants with regard to their **2014** mortgage application as it was no longer available at that time. The Provider explains that the Tracker Portability option allowed existing customers, who were on a tracker rate, to retain their existing tracker interest rate on a *"like for like"* basis for an amount equivalent to their existing mortgage balance and term, with any additional borrowings being subject to the Provider's then new business interest rates. The Provider states that this product was withdrawn in **late 2013**. The Provider submits that its records indicate that the First Complainant was advised by telephone on **16 January 2014** (before the new mortgage application was made) that Tracker Porting was no longer available. During the telephone call on **16 January 2014**, the Provider states that the First Complainant was informed of the Home Mover Mortgage product and it was recommended that she contact a local branch of the Provider to discuss this option in more detail. Further, the Provider submits that *"the Suitability Letters, Mortgage Application and Letter of Loan Offer, which were provided to the Complainants and accepted by them, all refer to the fact that the product they had chosen was the Home Mover Mortgage"*.

In response to the Complainants' assertion that the Provider *"was stalling so as to find the best [way] to approach the situation to their benefit"*, the Provider *"rejects"* this assertion and states that the options available to the Complainants under the Home Mover Mortgage scheme were recorded in Suitability Statements dated **30 April 2014** and again on **21 May 2014**. The Provider submits that it is unaware of any *"special training course"* which the branch mortgage adviser had to attend in relation to the Home Mover Mortgage product. The Provider states that its *"branch network and intranet site is updated with details of new product offerings and services prior to inception so that staff can be familiar with new products and services in a timely manner and be in a position to address customers' queries accordingly"*.

The Provider rejects the Complainants' assertion that its actions led to a protracted sale of the first property. The Provider states that it received a letter from the Complainants' solicitor on **26 March 2014** requesting title deeds and redemption figures. On **9 April 2014**, the Provider issued a letter to the Complainants' solicitors noting that the title deeds would be made available for collection. The Provider states that a redemption statement issued on **17 April 2014** and they received a letter from the Complainants' solicitors dated **20 May 2014** advising of the sale price for the first property. The Provider submits that there is no evidence to suggest that it disputed the sale offer and so the sale of the first property proceeded and the mortgage balance on account ending **4235** was subsequently redeemed.

In respect of the negative equity issue, the Provider states that the figure of €5,155 quoted by the Complainants is the difference between the sale price of €163,000 which the Complainants refer to and the amount forwarded by their solicitor to redeem their original

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mortgage (account ending **4235**) which had an outstanding balance of €168,154.82, being €5,154.82 (rounded to €5,155). The Provider contends that it was a matter for the Complainants whether or not to accept a particular offer regarding the sale of the first Property, noting the fact that they were aware of the outstanding mortgage balance on mortgage account ending **4235** which was confirmed to their solicitor by way of redemption statement dated **17 April 2014**.

The Provider submits that the Complainants were offered a loan in the amount of €270,000 by way of Loan Offer dated **12 June 2014** however the loan was approved for a house purchase of approximately €300,000 with the balance of funds required to emanate from the Complainants' savings and from a gift. The Provider states that this means that the negative equity amount incurred by the Complainants was paid directly by them and was not part of the mortgage funds. The Provider agrees that it is likely that the Complainants needed to fund approximately €5,155 of their own funds to complete the property transactions but disagrees that this amount was added to their mortgage account as a negative equity amount. The Provider states that the Complainants did not seek or apply for a negative equity Home Mover Mortgage "*as it appears they had the mechanism to pay this shortfall when redeeming their first mortgage (ending 4235)*". The Provider explains that for customers who wished to apply for a negative equity Home Mover Mortgage, the amount of their negative equity would be added to the amount of the borrowings required to purchase the new dwelling, thus increasing the overall borrowings on their new mortgage to include the level of negative equity on their existing mortgage. The Provider submits however that the Complainants applied for a positive equity Home Mover Mortgage as it appeared that the Complainants "*had the mechanism to pay off the shortfall of €5,155 themselves, via their solicitors, in order for the solicitor to forward redemption funds of €168,154.82 to the Bank to redeem the mortgage*" on mortgage loan account **4235**.

The Complaints for Adjudication

The complaints for adjudication are;

- (a) The Provider incorrectly misled the Complainants as to the details of its 'Home Mover' mortgage product and as a result they were not sold the product that they thought they were getting;
- (b) The Provider incorrectly failed to detail or document the negative equity in the Complainants' property appropriately despite requests from the Complainants; and
- (c) The Provider incorrectly forced the Complainants to pay the negative equity of €5,155 in addition to having this amount added to their mortgage loan.

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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 **08 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, the final determination of this office is set out below.

The first issue to be determined is whether the Provider incorrectly misled the Complainants as to the details of its 'Home Mover' mortgage product and as a result they were not sold the product that they thought they were getting.

The Provider issued a Loan Offer dated **16 February 2007** to the Complainants in respect of mortgage loan account ending **4235** over the first property. The particulars of the Loan Offer dated **16 February 2007** are set out below;

<i>"Mortgage Account Number</i>	<i>: [ending 4235]</i>
<i>Loan Type</i>	<i>: [...] Tracker ECB +0.75% 80% Capital and Interest</i>
<i>Loan Amount</i>	<i>: €240,034.00</i>

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<i>Interest Rate</i>	<i>: 4.25%</i>
<i>Interest Type</i>	<i>: Variable</i>
<i>Term</i>	<i>: 25 years"</i>

The Complainants accepted the Loan Offer dated **16 February 2007** together with the terms and conditions attaching to the Loan Offer by signing the **Loan Acceptance on 20 February 2007** which details as follows;

"I/We fully understand and accept the specific nature of this Remortgage Mortgage. I/We further understand that any outstanding debt (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 Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released."

The Loan Offer dated **16 February 2007** envisaged that the tracker interest rate applied to the Complainants' mortgage loan account ending **4235** would reflect any amendments (increases or decreases) to the applicable tracker rate as set out by the European Central Bank until the term of the mortgage ended.

The Provider was requested by this Office to submit a copy of recordings and/or transcripts of all telephone recordings of conversations between the Provider and the Complainants in relation to the sale of the first property and the application and drawdown of mortgage loan account ending **2971**. The Provider indicated in its submissions that it furnished this Office with a copy of *"transcripts of telephone conversations held with the First Named Complainant on 12 July 2013 and 16 January 2014"*.

However, the evidence submitted by the Provider does not include transcripts of the telephone calls concerned. They are simply copies of notes from the Provider's system in respect of the two telephone calls that took place between the First Complainant and the Provider. It is most disappointing that the Provider does not have recordings of these calls. It is also most unacceptable that the Provider would seek to characterise notes of telephone calls as *"transcripts"* when they clearly are not.

The notes submitted record that the First Complainant contacted the Provider on **12 July 2013** to query the possibility of moving house and keeping the tracker interest rate which applied to mortgage loan account ending **4235**.

The Provider's note of the telephone call on **12 July 2013** details as follows;

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"..Ms called enquiring about possibly moving house and keeping tracker rate. Advise all tracker rates are portable but she should speak to local branch regarding this".

The Provider submits that the **Tracker Portability option** was available to customers from **early 2012** until **late 2013** who were availing of a tracker interest rate on their current mortgage, as was the case with the Complainants. I understand that the Tracker Portability option allowed customers to maintain their existing tracker interest rate when buying a new home for an amount equivalent to their existing mortgage balance and the remaining term, with any additional borrowings being the subject of the Provider's then new business interest rates. When the First Complainant contacted the Provider in **July 2013**, the Tracker Portability option was an available product option that the Complainants could have applied for with the Provider. However it does not appear that the Complainants pursued an application for this product with the Provider at that time.

I understand from the notes recorded by the Provider and submitted in evidence to this Office, that the First Complainant contacted the Provider again on **16 January 2014**. The Provider's note of the telephone call on **16 January 2014** details as follows;

"..ms[...] called, i advised cannot port tracker rates but there is a process in place for home movers. Advised need to speak with the loans advisor in branch. Transferred to [Location] branch service centre advised if no one avail[able] need to arrange a call back".

It would appear from the above that when the First Complainant contacted the Provider on **16 January 2014**, she was informed that the Tracker Portability option was no longer available to the Complainants as the Provider had already withdrawn this product in **late 2013**.

Whilst I note that I have not received the recordings or the transcripts of the telephone calls referred to above, I accept that the contents of the Provider's notes of the telephone calls submitted in evidence are not in dispute between the parties. I accept that the First Complainant was provided with up to date and correct information from the Provider during the telephone call on **16 January 2014**.

The Provider issued an Annual Mortgage Statement dated **25 February 2014** to the Complainants in relation to mortgage loan account ending **4235**. The Annual Statement showed an outstanding balance of €171,709.93 and noted that the remaining term of the loan was 18 years and 1 month.

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The next substantive communication recorded is between **March 2014** and **April 2014**, when the Complainants' solicitor sought redemption figures in respect of loan account ending **4235** and to take up the title deeds of the first property on accountable trust receipt so that the sale could proceed. A redemption statement issued to the Complainants' solicitor quoting the total amount due and owing as of **16 April 2014** to be €170,259.88.

The Complainants applied for additional borrowings from the Provider in **April 2014** in order to purchase the second property. The interactions which followed between the Complainants and the Provider show that the Complainants applied for a **Home Mover Mortgage** in **2014**, however the Complainants submit that they wished to avail of the Provider's Tracker Portability option. The Provider submits that the Tracker Portability option was no longer available to the Complainants in respect of their mortgage application in **April 2014** as the Provider had already withdrawn this option from the market in **late 2013**. It would appear from the note of the telephone call on **16 February 2014**, that it was explained to the First Complainant, during her telephone call with the Provider, that the Tracker Portability option was no longer available however a new product was being offered to home movers in similar circumstances to the Complainants.

From a review of the loan documentation, I understand that the Provider's Home Mover mortgage, offering a tracker interest rate of ECB + 2% for a 5 year period, was available from the Provider to existing tracker mortgage customers. As part of the Home Mover mortgage product, I understand that the Complainants were required to redeem their original mortgage account ending **4235** on the first property as the underlying security property would change when the Complainants purchased the second property. The Provider explains that this option allowed the Complainants to set up a new mortgage loan account and avail of a new tracker interest rate on borrowings up to the existing level of their previous tracker mortgage balance on account ending **4235** for a period of 5 years and any additional borrowings over the tracker mortgage balance were priced at a rate from the Provider's new business rates and subject to loan to value criteria.

The Complainants completed and signed a **General Mortgage Application Form** on **30 April 2014**. **Section 1.5** of the **General Mortgage Application Form** refers to "*Your mortgage requirements*" wherein it is noted that €270,000 is the amount of the loan and the following is handwritten next to the section "*Repayment period*";

*"Home mover tracker -> 170,119 over 18 years plus
-> 99,881 over 25 years variable rate"*

As regards the details of the property to be mortgaged, a purchase price and estimated value of €300,000 is included in the application form. The application form also refers to

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the requirement to complete a **Statement of Suitability** and explains that this is “a separate document which will set out the reasons why the product(s) you have chosen is/are considered suitable or the most suitable for your particular needs, objectives and circumstances”. The Complainants ticked the box in this section of the application form to confirm that they read and understood this requirement.

A **Statement of Suitability** issued to the Complainants during the application process on **30 April 2014**. The important notice section of the Statement of Suitability states as follows;

“This is an important document which sets out the reasons why the product(s) or service(s) offered or recommended is/are considered suitable, or the most suitable, for your particular needs, objectives and circumstances.”

It is important to consider the contents of the Statement of Suitability which was signed by both Complainants on **30 April 2014** and details as follows;

“Thank you for taking the time to meet with me. [The Provider] offers products and services on an information only basis and does not recommend or advise a particular product. The questions below were asked to help you decide on the most appropriate product type and you answered the following:

- *Do you currently have negative equity which you wish to port to a new property?* **Yes**
- *Do you currently have a Tracker mortgage with [the Provider]? Note that you are eligible to move home and avail of a new 5 year tracker product for borrowings up to your existing level of tracker borrowings* **Yes**

Having answered these questions and discussed and gathered sufficient personal information from you the following products offered were discussed:

- **Home Mover Mortgage- new 5yr tracker & additional borrowing at Variable Rate/Discounted Variable Rate**

I have recorded on the fact finding document details about your financial needs and objectives, your financial situation, your personal circumstances and the importance of capital security to you. You have considered the facts and, after taking into account the product information I have provided you with, you have determined that the following products are suitable to you.

- **Home Mover Mortgage- new 5yr tracker & additional borrowing at Variable Rate/Discounted Variable Rate**

I explained the Features and Benefits of the above by referring to the relevant product brochure ware and Terms and Conditions.

*You consider the **Home Mover Mortgage –new 5yr tracker & additional borrowing at Variable Rate/Discounted Variable Rate** suitable for you because:*

- **New 5year Tracker Rate-** *You have an existing [Provider] Tracker Mortgage and you wish to give this up in return for a new 5 year Tracker interest rate on some of the borrowing for your new home.*
- **Variable Rate-** *You wish to have flexibility of making additional repayments to your mortgage and to be able to take repayment breaks without any penalties on the additional borrowing.*

You have chosen to replace your existing tracker mortgage rate of 0.75% over ECB on borrowings of €170,119 with a new 5 year tracker rate of ECB+2.00% on the same level of borrowings. An increase of 2% above this rate will mean that your scheduled repayment would be €1,106.11 based on a mortgage of €170,119 over a 18 year term

ADDITIONAL BORROWING (VARIABLE RATE)

The product you have chosen has a rate of 4.50%, an increase of 2% above this rate will mean that your scheduled repayment would be €674.40 based on a mortgage of €99,881 over a 25 year term.

The above **Statement of Suitability** documents a total borrowing of €270,000 which involved replacing the Provider's tracker interest rate of ECB + 0.75% on the Complainants' then existing borrowings in the amount of €170,119 with a Home Mover mortgage product with an initial 5 year tracker interest rate of ECB + 2% over a term of 18 years and additional borrowings of €99,881 at a variable interest rate of 4.5% over a term of 25 years.

A further **Statement of Suitability** was completed by the Complainants with the Provider on **21 May 2014** and was signed by the Complainants on the same day. The **Statement of Suitability** signed on **21 May 2014** takes the same format as the **Statement of Suitability** of **30 April 2014**, as detailed above, except the details in relation to the borrowings state as follows;

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“You have chosen to replace your existing tracker mortgage rate of 0.75% over ECB on borrowings of €169,402 with a new 5 year tracker rate of ECB+2.00% on the same level of borrowings. An increase of 2% above this rate will mean that your scheduled repayment would be €1,101.45 based on a mortgage of €169,402 over a 18 year term

ADDITIONAL BORROWING (VARIABLE RATE)

The product you have chosen has a rate of 4.50%, an increase of 2% above this rate will mean that your scheduled repayment would be €577.98 based on a mortgage of €85,598 over a 25 year term.

The above **Statement of Suitability** documents a total borrowing of €255,000 which involves replacing the Provider’s tracker interest rate of ECB + 0.75% on the Complainants’ then existing borrowings in the amount of €169,402 with a Home Mover Mortgage product with an initial 5 year tracker interest rate of ECB + 2% over a term of 18 years and additional borrowings of €85,598 at a variable interest rate of 4.5%, initially, over a term of 25 years.

The **Customer Declarations** sections in both **Statements of Suitability** which the Complainants signed on **30 April 2014** and **21 May 2014** state the following;

“Home Mover Mortgage- new 5yr tracker & additional borrowing at Variable Rate/Discounted Variable Rate

- *I confirm that there are no changes to my personal details held by [the Provider]*
- *I confirm that I have given consideration to any future known or potential changes in my circumstances when deciding to proceed with this mortgage*
- **Home Mover Mortgage:** *I confirm that I understand that the rate on this housing Loan may vary from time to time in line with changes to the European Central Bank (ECB) base rate.*
- **Variable Rate Mortgage:** *I confirm that I understand that the rates on this housing loan may be adjusted by the Lender from time to time.*
- *I confirm that the Mortgage outlined above is suitable to my needs and circumstances.*
- *I have received the relevant product brochures, including terms and conditions, along with [the Provider’s] Terms of Business and the Provider’s Personal Banking Terms and Conditions brochures. I have been informed of how [the Provider] and others will use my information and how to give my consent.*
- *I confirm that I did not receive advice or a recommendation during the course of this process....”*

The Complainants signed their agreement to the above on both **Statements of Suitability** and ticked the box stating;

"I AM PROCEEDING WITH THIS APPLICATION"

The Complainants appear to be of the view that they were misled in terms of the operation of the Home Mover mortgage product and further state that they were "*not given a booklet*" explaining the Home Mover mortgage. I am of the view that the main purpose of the Statements of Suitability was to allow the Provider set out the reasons why the Home Mover mortgage product was suitable, or the most suitable, for the Complainants' particular needs, objectives and circumstances. It is clear from the evidence submitted that the Complainants signed both Statements of Suitability confirming that the Home Mover mortgage product which included a new 5 year tracker interest rate and additional borrowings at a variable rate were suitable to their needs and circumstances. The Statements of Suitability also indicate that the Provider explained the features and benefits of the Home Mover mortgage product by referring to the relevant product brochures and terms and conditions. The Complainants in turn signed the Statements of Suitability confirming that this was the case and confirmed that they were satisfied to proceed with the application. As such, I have no reason to believe that the operation of the Home Mover mortgage product was not explained to the Complainants by the Provider.

The Provider issued a Loan Offer Letter dated **12 June 2014** to the Complainants based on borrowings in the amount of €270,000 (as referred to in the Statement of Suitability dated **30 April 2014**). The Loan Offer Letter dated **12 June 2014** referred to a new mortgage loan account ending **2971** and was split into two sub accounts ending **2971(1)** and **2971(2)**.

The repayment details as set out in the Loan Offer Letter dated **12 June 2014** in relation to account ending **2971(1)** are as follows;

<i>"Loan Type</i>	<i>: 5Yr Tracker ECB + 2.00% until 310819 Capital and Interest</i>
<i>Loan Amount</i>	<i>: €169,402.00</i>
<i>Interest Rate</i>	<i>: 2.25%</i>
<i>Interest Type</i>	<i>: Variable</i>
<i>Loan Term</i>	<i>: 18 years"</i>

The repayment details as set out in the Loan Offer Letter dated **12 June 2014** in relation to account ending **2971(2)** are as follows;

<i>"Loan Type</i>	<i>: Flex Var SVR +0.00% Capital and Interest</i>
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Loan Amount : €100,598.00
Interest Rate : 4.5%
Interest Type : Variable
Loan Term : 25 years”

The Special Conditions attached to the Loan Offer dated **12 June 2014** include the following;

“The loan has been sanctioned for house purchase €300,000 with balance of funds to emanate from savings and gift.

The Borrower’s solicitor is required to confirm that the borrower has entered into an unconditional contract fo[r] the sale of the property situated at [the first property] fro €163,000 prior to drawdown.

Solicitor to undertake prior to funds release that loan account [ending 4235] which is secured on [the first property] will be redeemed immediately after drawdown.

The Tracker rate offered in this loan offer (which tracks ECB rate) replaces your current Tracker rate, which will no longer be available after this drawdown, and is for a period of 5 years until 31/08/2019. The Borrower, on the expiry of the 5 year period, may opt to choose another product if such an option is made available by the Bank and on terms and conditions as may be specified by the Bank. Where such an option is not made available by the Bank or, if available, where the Borrower fails to exercise any option, the interest rate applicable will be the Standard Variable Rate of interest which may be increased or decreased by the Bank at any time, and in this respect, the decision of the Bank will be final and conclusively binding on the borrower.

Prior to drawdown, your solicitor is to provide us with a copy of the execution page of the contract for sale of your existing property. This contract must be fully executed by all parties.

We will not allow the net proceeds of sale from your existing property to be lodged and require full purchase price to be remitted to the Bank by your solicitor. On or prior to requesting the loan funds, your solicitor is to confirm that the total sale proceeds will be remitted to the Bank...”

I accept that the Special Conditions set out above clearly inform the Complainants that the new 5 year tracker interest rate of ECB + 2% replaced what was their then tracker interest

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rate of ECB +0.75% and it was not the case that they were able to keep their existing tracker interest rate on a like for like basis.

The Complainants signed and accepted the Loan Offer dated **12 June 2014** and the terms and conditions attaching thereto by signing the **Loan Acceptance** on **30 June 2014** in the presence of their solicitor which details as follows;

“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...”

The Complainants confirmed by signing the **Loan Acceptance** on **30 June 2014** that the Loan Offer letter and the conditions attaching to the Loan Offer were explained to them by their solicitor and they fully understood them. As such, I accept that the Complainants had the benefit of independent legal advice when entering into the new mortgage loan agreement and that the terms and conditions attaching to the Loan Offer were, or ought to have been, explained to them by their solicitor.

The Complainants' new mortgage account ending **2971(1)** drew down on **25 July 2014** on a Home Mover mortgage interest rate of ECB + 2% and mortgage account ending **2971(2)** drew down on the same date on a standard variable rate. The Provider issued a letter dated **29 July 2014** to the Complainants to confirm that mortgage accounts ending **2971(1)** and **2971(2)** were opened and the letter also included details about the type of mortgage taken out by the Complainants. The following product description was included in the Provider's correspondence to the Complainants:

Product Description	Initial Interest Rate
<i>5Yr Tracker ECB until 31/08/19 < 90%- A variable rate which is 2.00% above [the Provider's] European Central Bank Rate, currently 0.15%, until 31/8/2019, to give a current rate payable of 2.15%.</i>	2.15%
<i>Flex Var SVR +0.00% <90%- The Bank's Standard Variable Rate, currently 4.50% for the term of this mortgage</i>	4.50%

The product description set out above outlines the split between the two mortgage types as outlined in the Loan Offer Letter dated **12 June 2014**.

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The Complainants contend that that Provider did not “sell” them the product that they had requested/expected as they wanted to “port [their] tracker plus two percent” however they state that they “had completely ended [their] old mortgage and took on a new split mortgage”. It is important for the Complainants to understand that in circumstances where they were applying for borrowings in respect of the second property, the Provider required that this application be treated as a new mortgage application in accordance with the Provider’s prevailing lending criteria as the underlying secured property was changing. After the Complainants’ new mortgage application was approved, the Complainants were offered the Provider’s then prevailing business rates and products in respect of the new mortgage loan account ending **2971**. Having considered the loan documentation in relation to the Provider’s Home Mover scheme, I understand that only the existing tracker mortgage balance of €169,402.00, that is the outstanding balance on mortgage loan account ending **4235**, attracted the new tracker interest rate offering of ECB + 2% for a period of 5 years under mortgage loan account ending **2971(1)**. After the expiry of the 5 year tracker interest rate period, the Complainants could choose another mortgage rate from the Provider’s available range of interest rates or alternatively the mortgage account would revert to the Provider’s standard variable rate for the remainder of the term of the mortgage as outlined above. Meanwhile, the new borrowings in the amount of €100,598 attracted the Provider’s standard variable rate for a 25 year term under mortgage loan account ending **2971(2)**. It is clear that in order to avail of the new tracker rate, the Complainants’ new mortgage loan account had to be split in this manner as each mortgage product attracted differing interest rates.

It is important to note that if the Complainants believed that the Provider’s Home Mover product was not suitable for them, they were under no obligation to accept the terms of the Loan Offer dated **12 June 2014**. I accept that while product offerings were explained to the Complainants by the Provider, it was the responsibility of the Complainants to consider which particular mortgage product offering and interest rate to choose based on their particular needs and circumstances.

The second issue to be determined is whether the Provider incorrectly failed to detail or document the negative equity in the Complainants’ property appropriately.

In order to determine this issue, it is necessary to consider the interactions between the Provider and the Complainants in relation to the sale of the first property and the redemption of mortgage loan account ending **4235** and the purchase of the second property.

As part of the assessment of the Complainants’ needs, objectives and circumstances to allow the Provider offer them the most suitable mortgage product(s), the Complainants were asked in the Suitability Statements signed **30 April 2014** and **21 May 2014** whether

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they “currently have negative equity which [they] would like to port to a new property” to which they responded “Yes”. I believe that this meant that the Complainants were aware that they had negative equity and wished to transfer any negative equity over to the second property following the sale of the first property and the redemption of mortgage loan account ending **4235**.

The Provider submits however that the Complainants did not seek or apply for “a negative equity Home Mover Mortgage” but rather applied for a “positive equity Home Mover Mortgage”. I accept that when the Complainants completed the **Statement of Suitability of 30 April 2014** that neither party would have been aware of the specific shortfall, however the evidence shows the parties were certainly aware of a potential shortfall when the Statement of Suitability of **21 May 2014** was completed. The Provider further submits that the interest rate applicable to a negative equity Home Mover mortgage product at the time was a tracker rate of ECB + 2.5% whereas the rate for a positive equity Home Mover mortgage, as chosen by the Complainants was a 5 year tracker interest rate of ECB + 2%.

It is unclear from the evidence submitted whether the Provider explained the differences between the negative equity and positive equity Home Mover mortgage products to the Complainants. I note that neither the General Mortgage Application Form nor the Statements of Suitability specifically describe the Home Mover mortgage product as being a “negative equity” or “positive equity” one. Nevertheless, it is difficult to see why the Complainants would opt for a negative equity Home Mover product in circumstances where the interest rate applicable to a negative equity Home Mover mortgage product was higher. Therefore, it would appear that it was more beneficial to the Complainants to avail of the positive equity rate. It is clear from both Statements of Suitability signed and accepted by the Complainants that the Complainants chose a 5 year tracker interest rate of ECB + 2% which I understand represented a positive equity Home Mover mortgage.

It appears from the Loan Offer dated **12 June 2014** that the Complainants were in a position to deal with the negative equity aspect of the property transaction with their solicitor as the solicitor undertook to redeem mortgage account ending **4235** before drawing down the new borrowings. Moreover, I do not believe that the Provider was obliged to advise the Complainants as to the negative equity aspect in circumstances where the role of the Provider was to offer and provide a suitable product to the Complainants as opposed to recommend or advise on a particular product. The Complainants could have obtained independent advice from their solicitor in relation to the negative equity should they have so wished.

The third issue to be determined is whether the Provider incorrectly forced the Complainants to pay the negative equity of €5,155 in addition to having this amount added to their mortgage loan.

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In order to determine this issue, it is necessary to consider the interactions between the Provider and the Complainants in relation to the redemption of mortgage account ending **4235** and the drawdown of the new mortgage account ending **2971**.

It is clear from the Loan Offer dated **12 June 2014** that the Provider offered to advance to the Complainants the sum of €270,000. The loan was approved for a house purchase of approximately €300,000. The Special Conditions attached to the Loan Offer Letter dated **12 June 2014**, as outlined above, which the Complainants agreed to by signing the Loan Acceptance, state that the *“loan has been sanctioned for house purchase €300,000 with balance of funds to emanate from savings and gift”*. I understand that this meant that the balance of funds required for the purchase of the second property was to be paid directly by the Complainants and was not part of the mortgage funds drawn down in **July 2014**. I understand that if the Complainants chose a negative equity Home Mover mortgage, the amount of their negative equity would have been added to the amount of the borrowings required to purchase the second property, thus increasing the overall borrowings on their new mortgage to include the level of negative equity on their existing mortgage. This would also have resulted in a higher interest rate of ECB + 2.5% (an additional .5%) being applied to their mortgage loan.

However this is not what happened in this case as the Complainants' negative equity amount was not applied to the new borrowings under mortgage account ending **2971**.

The Special Conditions attaching to the Loan Offer dated **12 June 2014** also required the Complainants' solicitor to confirm that the Complainants had entered into an unconditional contract for the sale of the first property for €163,000 prior to the drawdown of the new mortgage account ending **2971** and the Complainants' solicitor was to undertake that loan account ending **4235**, which was secured on the first property, would be redeemed immediately after drawdown. In circumstances where the Complainants were required to fully redeem the outstanding balance on mortgage loan account ending **4235**, the Complainants' solicitors requested the Provider to issue redemption figures on the Complainants' mortgage loan account ending **4235** by way of letter dated **15 July 2014**. The letter dated **15 July 2014** states as follows;

“...We note that the funds are being provided under mortgage account [ending 2971] and are to be used in connection with the release of mortgage on the above account [ending 4235]. Accordingly we should be obliged if you would furnish us with redemption figured for amount required to redeem said mortgage on this coming Friday, Friday the 18th of July next...”

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I have not been provided with a copy of the redemption statement that issued from the Provider however I understand from the letter dated **31 July 2014**, from the Complainants' solicitor to the Provider, that the Provider received a cheque in the sum of €168,154.82 in full redemption of all sums due on mortgage account ending **4235**. The Provider issued a letter to the Complainants on **7 August 2014** in relation to mortgage account ending **4235** noting the following;

"Thank you for your payment of €168,154.82, received on 01 August 2014, to redeem this mortgage account. Your payment includes the Security Release fee of €38.

We redeemed your account as of 01 August 2014 and it is now closed...."

On foot of mortgage loan account ending **4235** having been redeemed, the Complainants were then in a position to draw down their new mortgage loan account ending **2971**. I note from the Mortgage Transaction Summary dated **14 August 2019** that monies in the amount of €270,000 were advanced to Complainants on mortgage loan account ending **2971**. As outlined above, mortgage loan account ending **2971** was split into two sub accounts whereby mortgage loan account ending **2971(1)** was drawn down on a 5 year tracker interest rate of ECB+ 2% in the amount of €169,402 for a term of 18 years. The remainder of the Complainants' borrowing in the amount of €100,598 was drawn down under mortgage loan account ending **2971(2)** on the Provider's variable interest rate of 4.5% for a term of 25 years.

Although the Provider's letter dated **7 August 2014** suggests that mortgage loan account ending **4235** was fully redeemed on **1 August 2014**, it appears from the Provider's submissions that the redemption monies did not reach the mortgage account until **6 August 2014**. On that date, the Provider submits that the redemption balance on mortgage account ending **4235** was €167,305.48 as opposed to €168,154.82 which was the amount paid by the Complainants to redeem that mortgage loan account. Consequently, the Provider issued a refund of the difference being €849.34 to the Complainants by electronic transfer and that amount was credited to the Complainants' bank account. The Complainants were notified of the refund of the overpayment by way of letter dated **14 August 2014**. In this regard, I have also reviewed an extract of a mortgage statement in respect of mortgage loan account ending **4235** which shows the redemption balance as of **6 August 2014** as €167,404.45. However an amount of €98.97 was credited to the mortgage account on the same day which left the redemption balance as of **6 August 2014** at €167,305.48. The mortgage statement also shows that an electronic fund transfer of €849.34 was processed by the Provider on **14 August 2014** which left a closing balance of €0.00 on mortgage loan account ending **4235**.

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Given the redemption balance of mortgage loan account ending **4235** was €167,305.48 and the sale price of the first property was €163,000, there was negative equity in the amount of €4,305.48. I believe that the amount of €5,154.82 (rounded to €5,155) referenced by the Complainants stems from the difference between the sale price of €163,000 and the amount forwarded by the Complainants' solicitor to the Provider to redeem mortgage account ending **4235** being €168,154.82, prior to the Provider having issued the refund of €849.34. It is clear that the negative equity was paid by the Complainants through their solicitor as mortgage account ending **4235** was ultimately fully redeemed however there is no evidence to suggest that any negative equity amount was added to the Complainants' new mortgage account ending **2971**.

In light of all the foregoing, I do not uphold the complaint.

Conclusion

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

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



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

31 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.