



<u>Decision Ref:</u>	2020-0332
<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>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The Complainant previously held an investment housing loan with the Provider under mortgage loan account ending **8913** which was drawn down by way of Facility Letter dated **5 May 2005** for an amount of €300,000 for a term of 25 years on the Provider's "Prime Rate". The purpose of the loan was to purchase an investment property.

The Complainant then chose to enter into a new loan agreement with the Provider in order for a fixed interest rate to apply to her loan. At this stage, it came to light that the Complainant was residing in the mortgaged property as her principal private residence. The original mortgage loan account ending **8913** was closed and a new mortgage loan account ending **8928** was set up by way of Facility Letter dated **24 April 2009**. The loan amount was €229,500 and the term of the loan was 21 years and 3 months. The Facility Letter dated **24 April 2009** detailed that the mortgage would commence on a fixed interest rate of 2.98% until **1 May 2011** at which point the loan would "roll-over" to a standard variable interest rate.

It is Mortgage loan account ending **8928** that is the subject of this complaint.

The Complainant's Case

The Complainant submits that in "early 2011" she spoke with a representative of the Provider who advised her that she "was eligible to change [her] mortgage to an ECB tracker mortgage". The Complainant states that she contacted the Provider's representative by e-mail on **20 April 2011** "formally requesting to change [her] mortgage from the variable rate to an ECB tracker mortgage".

The Complainant submits that following this exchange the Provider's representative sent her the forms which "needed to be filled". The Complainant explains that she completed these forms and returned them to the Provider. The Complainant submits that the Provider's representative contacted her on **9 May 2011** to confirm that the forms had been received by a mortgage advisor of the Provider and that the Provider would contact her to "confirm that the mortgage had been amended".

The Complainant submits that she received no further communication from the Provider's representative or confirmation that her mortgage loan account had been amended to a tracker interest rate despite having been advised by the Provider's representative that she would receive same. The Complainant states that she sent a number of e-mails to the Provider's representative to which she received no response. She subsequently attempted to contact the Provider by telephone on a number of occasions but again she "received no response".

The Complainant submits that she contacted the Provider on **22 May 2014** noting her previous interactions with the Provider in **2011** and her dissatisfaction with the "lack of customer service" received by the Provider. The Complainant noted in her letter that the lack of customer service "would have a material impact to [her] mortgage payments over the last 3 years". The Complainant requested that a credit be applied to her mortgage account of the "difference of interest payments in the last 3 years and for [her] mortgage to be amended to an ECB tracker".

The Complainant states that she received a response from the Provider on **16 June 2014** detailing that she had no entitlement to a tracker interest rate. The Complainant submits that she was "not satisfied" with the Provider's response as she had received confirmation "both verbally and written" from the Provider's representative that she "was eligible" for a tracker mortgage and "that the mortgage was in the process of being amended". The Complainant takes issue with the fact that the Provider did not complete the agreed changes.

/Cont'd...

The Complainant contends that at no point in her interactions with the Provider's representative was she made aware that the Provider would not be able to make any changes to her mortgage loan account because she was based in a different continent at the time. The Complainant notes that the Provider's representative was aware of where she was on an extended holiday at the time of dealing with him over the telephone. The Complainant further submits that she "*was never made aware of any Company Policy or rules*" that she had to "*go into a branch and that it was not possible to deal with employees over the phone*".

The Complainant re-iterates that she was "*never made aware that [she] was not eligible for a tracker mortgage*" and she states that she had "*trusted that the employee knew what he was doing and wouldn't be providing incorrect information to [her] or misleading [her]*". The Complainant also contends that at no point in her dealings with the Provider was she told that she was required to apply for a new mortgage application.

The Complainant disagrees with the Provider's comments that the Provider was at all times clear on the charges applicable to her mortgage. In this regard, the Complainant contends that she was led to believe by the Provider's representative that the tracker mortgage interest would be applied to her mortgage "*going forward*" and as a result at no point "*was it clear what charges were going to be applied to [her] account*".

The Complainant is seeking that a tracker interest rate be applied to her mortgage loan account and the difference in interest payments between the tracker interest rate that should have been applied in **April 2011** and the interest rate that was applied to her account be credited to her mortgage loan account.

The Provider's Case

The Provider submits that it issued a Facility Letter dated **5 May 2005** to the Complainant for the sum of €300,000 under mortgage loan account ending **8913**. The Provider notes that the initial interest rate applicable to the Complainant's mortgage loan account was the Provider's "*Prime Rate*". In this regard, the Provider refers to **section 5** of the Provider's "**Clear and Simple-Personal Fees and Charges Explained**" brochure which details how the "*Prime Rate*" is calculated. The Provider explains that the "*Prime Rate*" was used on its "*Variable Rate Business Loans with an agreed margin charged above this rate, in this case the margin was 0.875%*". The Provider also notes that the "*Prime Rate*" is an entirely separate interest rate to that of "*ECB Rate*" whereby the "*Prime Rate*" is calculated with reference to the three month EURIBOR rate plus a margin set at the discretion of the Provider.

The Provider submits that the Complainant's mortgage loan account ending **8913** was changed from a variable rate business loan to a home loan product which attracted a fixed interest on **24 April 2009** at the Complainant's request. The Provider explains that as the *"loan was originally processed as a business loan, it was not possible to register the loan for TRS"*. The Provider submits that this was the first time it became aware that the Complainant was living in the property as the mortgage was drawn down as a business loan. The Provider further explains it was *"necessary"* to close the previous mortgage loan account ending **8913** and open a new mortgage loan account ending **8928** on the Provider's home loan product.

The Provider issued a Facility Letter dated **24 April 2009** to the Complainant confirming the new loan under mortgage account ending **8928** was for a period of 21 years and 3 months and provided for a two year fixed rate period with a roll-over date of **1 May 2011**. The Provider explains that **clause 11.4** of the terms and conditions of the Facility Letter dated **24 April 2009** stated that if the Complainant did not opt to apply a further fixed interest rate at the end of a fixed rate period then the interest rate would revert to the Provider's *"then applicable"* variable home loan rate. The Provider submits that the Complainant signed and accepted the Facility Letter dated **24 April 2009** *"which confirmed the interest rate would revert to a standard variable interest rate"*.

The Provider states that a *"Rollover notification"* letter issued to the Complainant on **16 March 2011** prior to the expiry of the two year fixed interest rate period in **May 2011**. The Provider submits that this letter advised the Complainant of the possibility to choose between a standard variable rate and a new fixed interest rate product or to *"revert to an ECB Tracker interest rate (with the margin which had applied before your fixed rate period) subject to certain qualification criteria"*. The Provider explains that in circumstances where the Complainant's mortgage loan account ending **8928** was not previously on an ECB tracker interest rate *"it was not possible for the Complainant to revert to an ECB Tracker rate and the Complainant did not meet the qualification criteria to revert to an ECB Tracker"*.

In relation to the Complainant's submissions regarding the e-mail exchange between the Complainant and a representative of the Provider from **20 April 2011** to **9 May 2011**, the Provider states that it no longer has access to that employee's e-mail, who is no longer employed by the Provider. However, the Provider submits that it does not *"dispute the content of the emails but does dispute the meaning inferred"* by the Complainant.

In this regard, the Provider submits that *"[a]ny request to change an interest rate with [Provider] involves the drawing down of a new facility"*. The Provider contends that it was not possible to process a new loan application for the Complainant as the *"Complainant was not living in Ireland and as ECB Tracker interest rate loans were not on sale in 2011"*.

/Cont'd...

The Provider explains that any new loan application process would have involved an employee of the Provider “*meeting with the customer, the preparation and agreement of a Final Financial Summary documents with the customer, a formal internal credit application and approval process and subsequent issuance and acceptance of new facility letters by the customer*”. The Provider notes that the form which was completed by the Complainant in **April 2011** was a **Customer Information Form** which is used to update a customer’s information prior to processing a new loan application. The Provider submits that the Customer Information Form was not an offer for any product or services

The Provider further states that it did not have a “*distance marketing policy*” for customers in **2011** and so it was not permitted for an employee of the Provider to sell a new product to a customer over the telephone in **2011**. In any event, the Provider explains that in circumstances where it withdrew ECB tracker interest rate loans as a new product from the market in **late 2008**, even if the Complainant had been living in Ireland in **2011** and was able to attend a branch of the Provider in person, she would still not have been able to draw down a new ECB tracker interest rate loan as “*she had no pre-existing contractual entitlement to an ECB tracker interest rate loan*”.

In response to the Complainant’s submissions that she was never contacted following her request to have a tracker interest rate applied to her mortgage loan in **April 2011**, the Provider submits that it did not have a direct personal contact number for the Complainant during this period and had made a number of attempts to contact the Complainant’s home telephone number in Ireland. The Provider submits that it eventually made contact with the Complainant’s father on **10 June 2011**, the Complainant’s mother on **2 August 2011** and the Complainant’s father again on **25 November 2011** at which time he confirmed where the Complainant was.

The Provider is satisfied that it has complied with the relevant provisions of the **Consumer Protection Code** as applies to the provision of information in relation to products offered.

The Provider submits that the Complainant’s mortgage loan account was sold to a third party Provider in **December 2017** and the Complainant was made aware of this by written correspondence in **October 2018**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to apply a tracker interest rate to the Complainant’s mortgage loan account in **April 2011**.

Decision

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

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

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 **14 September 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.

In order to determine this complaint, it is necessary to review the relevant provisions of the Complainant's loan documentation and to consider certain interactions between the Complainant and the Provider in **2011**.

In order to review the Complainant's loan documentation, I am of the view that that it is firstly helpful to set out the Complainant's mortgage loan trajectory from **2005** when she took out a "*Business Variable Rate Loan*" under mortgage loan account ending **8913** to **2009** when the Complainant's mortgage loan switched to a "*Fixed Rate Mortgage*" under mortgage loan account ending **8928**.

I note from the evidence provided that an **Investment Housing Loan Application Form** was completed by the Complainant on **19 May 2005**, indicating that she was seeking €300,000 to purchase an investment property. An internal **Credit Memorandum** dated **4 May 2005** reads as follows;

“The purpose of this application is to request a term loan of €300,000 to enable applicant purchase a residential investment property at [property address].

[...]

Any other relevant Background information. Applicant, aged 22 is currently studying [college course].

This is an opportunity to get into the property market and her father will fully support her in this venture. This property is a 2 bed apartment, was initially booked by [Complainant’s father] approx 18 months ago at a price of €280K. In view of the increase in property prices since then it is now valued at c €350K. The property will be rented at c €1,200 PM which will be sufficient to cover interest repayments in the first 5 years (€875 PM). [Complainant’s father] will fully back the loan by way of guarantee.

[...]

*Term= 35 years
Interest only – first 5 years
Interest rate+ PR + 0.875%*

[..]

Applicant wish to avail of 5-year interest only for tax planning purposes in order to maximise the amount of interest relief available.”

A **Facility Letter** dated **5 May 2005** was issued to the Complainant which was signed by the Complainant on **19 May 2005**. The **Important Information** section details as follows:

“Important Information as at [05/05/05]

- 1. Amount of Credit advanced: [EUR300,000]*
- 2. Period of agreement: [25 years from initial date of drawdown]*
- 3. Number of repayment instalments: [300]*

/Cont’d...

[...]

1. AMOUNT OF FACILITY:

*EUR300,000 (Three hundred thousand Euro)
(in this Facility Letter, the "Housing Loan" means the amount of principal outstanding from time to time under this Facility Letter).*

2. Purpose of Facility

To enable you to purchase a residential investment property at [address].

[...]

4. AVAILABILITY & REPAYMENT:

Interest only to be covered on a monthly basis for 5 years commencing one month from date of initial drawdown of the loan. The Housing Loan will then be repaid by 240 consecutive monthly instalments to include capital and interest commencing 5 years from date of initial drawdown of the Loan. Subject to the Bank's right to review and adjust if necessary the amount of such instalments as hereinafter provided the monthly instalments will, in so far as possible, be of equal amounts. The amount of each monthly instalment will be EUR875.64 for the first 5 years and then EUR1,740.37 for the 20 years thereafter provided that such monthly instalment will be reviewed periodically at the discretion of the Bank and adjusted as necessary in the light of prevailing interest rates to ensure that the Housing Loan together with all interest payable thereon is repaid in full within the agreed term. Interest which is not paid on the date on which it is due for payment shall be capitalised in accordance with the provisions of Clause 5 the Third Schedule hereto. The Bank shall be entitled to vary the amount of the monthly instalment referred to in the Standing Order to reflect the interest adjustments referred to above.

[...]

5. INTEREST:

The interest payable by you on the Housing Loan shall be the Bank's Prime Rate (presently 2.625%) but subject to variation at the discretion of the Bank in response to market conditions as notified in the Bank's branches from time to time plus 0.875%.

/Cont'd...

[...]

8. *SPECIAL CONDITIONS:*

- a) *During the period for which this facility is being made available, the Bank requires to be provided with: -*
- (i) Any additional information on your activities or financial condition which the Bank may reasonably request.*
- b) *Acceptance by you of this Facility Letter signifies acknowledgement and acceptance of: -*
- (i) General Terms and Conditions Attaching to Housing Loan Facilities set out in the First Schedule to this Facility Letter;*
 - (ii) Default Schedule (Second Schedule to this Facility Letter); and*
- c) *The Bank reserves the right, from time to time, to obtain professional valuations of all property secured in our favour. Such valuations shall be prepared by a valuer approved by the Bank and conducted at the Borrowers expense."*

The **Facility Letter** was signed by the Complainant on **19 May 2005**, whereby the Complainant confirmed as follows;

"I, [Complainant] hereby confirm my agreement with the terms and conditions of the foregoing and undertake to carry out all the obligations set out therein."

The Complainant's father also signed this acceptance as guarantor on **19 May 2005**.

The Facility Letter dated **5 May 2005** confirmed that the interest rate applicable to the Complainant's investment loan under mortgage account ending **8913** was the Provider's "*Prime Rate*" which at the time was 2.625% and was subject to variation at the discretion of the Provider to an agreed margin of 0.875% charged above that rate. The terms of the Facility Letter provided for an initial five year interest only repayment period and thereafter capital and interest repayments for the remaining twenty years. There is no reference whatsoever in the Facility Letter as regards the mortgage loan switching or rolling over from the Provider's "*Prime Rate*" to another interest after a certain period.

/Cont'd...

The Provider's "Prime Rate" is not specifically defined in the Facility Letter. The Provider submits that historically the Provider's Fees and Charges brochures detailed how the "Prime Rate" was calculated and "this information was also historically available in all branches of the Provider and published on the Provider's website". The Provider has submitted a copy of its "current" brochure titled "**Clear & Simple- personal Fees & Charges Explained**". **Section 5- Interest Rates** describes the "Prime Rate" as follows and notes that this is "effective from 01/11/09";

"[The Provider's] Prime Rate (IRL): is set with reference to the three-month EURIBOR 365 day rate available at www.euribor.org; it is reset on a weekly basis as follows:

- (i) The average of the three-month, 365-day EURIBOR rate for each of the days in the preceding week is calculated;*
- (ii) The average at (i) above is rounded up to the nearest 1/10th using normal rounding; and*
- (iii) 130 basis points are added to the rounded average at (ii) above to give the [Provider's] Prime Rate (IRL) for the following seven days. Bank holidays are treated as rate change dates, (saving Christmas period close). When a rate is not published, the rate from the previous day is included in the average.*

Our Prime Rate is not a tracker rate and the basis of its calculation may change at the discretion of the Bank. If the basis of the calculation of the [Provider's] Prime Rate (IRL) changes in a manner that disadvantages you, we will always give you notice in writing in accordance with all applicable laws and regulations."

It is unclear as to whether the Complainant was furnished with a copy of the above brochure or a similar type brochure in **2005**, however I accept that such information regarding the Provider's "Prime Rate" was available to customers.

The Complainant accepted the terms and conditions of the Facility Letter to include the applicable interest rate therefore it is reasonable to conclude that the Complainant was satisfied that the Provider's "Prime Rate" would apply to mortgage loan account ending **8913** for the term of the loan.

The Provider's "Prime Rate" applied to the Complainants' investment housing loan until **May 2009** at which point the Complainant applied to switch her mortgage loan to a home loan product. The Provider submits that this request to switch mortgage product came about as the Complainant wished to apply for Tax Relief at Source (TRS) in relation to the mortgaged property.

/Cont'd...

It is understood that in circumstances where the loan was originally processed as a business loan, it was not possible to register the loan for TRS. In order to facilitate this switch, the Complainant was required to close the original mortgage loan account ending **8913** and draw down a new facility.

The Provider has submitted a copy of its internal notes in evidence dated **21 April 2009** which detail as follows in relation to the reason for the switch in mortgage product;

"[Complainant's] mortgage was drawn down under Business Customer Number [number] in error in July 2005 for 25 years. Her father [name of Complainant's father] organised this mortgage and is guarantor to cover full mortgage. It was set up as an investment loan and [Complainant's father] intention was that [Complainant] would continue to live at home and she would rent this apartment. This did not (sic.) happen and [Complainant] lived in it from the start."

Given that the Complainant was seeking for classification of the property which was the subject of the mortgage loan to be amended from an investment property to a principal private residence, I accept that the terms of the loan were being altered.

A document submitted in evidence titled **Final Financial Summary** dated **20 April 2009** indicates that a meeting took place between the Complainant and the Provider to discuss the Complainant's requirements regarding a home loan. The **Final Financial Summary** details as follows;

*"In my discussion with you, I have focused on a LTV 2 year fixed rate mortgage, then to revert to standard variable rate- LTV 66%-
If interest rates rise by 2% monthly repayment will increase by additional Eur244.53 per month"*

A section of this document contains the heading '**Key Items of Information about a Mortgage**' and the following is detailed thereunder;

"[...]"

If we offer you an ECB Tracker Mortgage, this has a variable interest rate which will move up or down following the rate set by the European Central Bank.

If we offer you an LTV Mortgage (a Loan To Value Mortgage) this means that we compare the value of your house to the amount of your loan. The rate of interest we charge you depends upon how high the house's value is compared to your loan.

/Cont'd...

[...]

We charge you interest on your loan, and you will pay this as part of your monthly instalment. The interest rate may be fixed or variable. When the interest rate is fixed, it means that the amount of your repayment will not change until the end of the fixed period of time which you may have agreed with us. When the interest rate is a variable then it may go up or down from time to time (usually in response to market conditions) and that means that your repayment amount will change too."

The **Final Financial Summary** document also contains the following warning;

"IMPORTANT NOTE

This is not a legal description of mortgage loans that we may provide to you. It is meant to help you understand the general nature of our mortgage products.

Before making any agreement with us, be sure that you understand the full details of what is involved, which will be more substantial than what we set out here. In particular, carefully examine the agreement and our terms and conditions and be sure that you understand them. If you have any doubt about what you are agreeing, feel free to ask us questions or seek advice from your professional advisors, such as your solicitor"

The **Final Financial Summary** was signed by the Complainant and dated **20 April 2009**.

Following this meeting, a **Facility Letter** dated **24 April 2009** was prepared for the Complainant in respect of new mortgage loan account ending **8928**. The **Important Information** section details as follows:

"Important Information as at 24 April 2009

1. *Amount of Credit advanced: EUR 229,500.00*
2. *Period of agreement: 21 years and 3 month(s) from drawdown*
3. *Number of Repayment Instalments: 253 plus any final balance."*

The **Schedule** section of the **Facility Letter** dated **24 April 2009** reads as follows;

"Purpose of the Loan:

Internal Transfer, as specified in your Loan Application

Property to be mortgaged (the "Property"): [address]

/Cont'd...

Latest Drawdown Date: 24 July 2009

*Rate of Interest: 2.98% per annum
4.15% per annum, variable.*

Fixed rate: Roll-over date: 1 May 2011. 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.”

Under the **Statutory Notices and Other Warnings** section it is detailed as follows;

“WARNING: THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (this will not apply during any period of fixed interest rate.)”

The **General Conditions for Annuity Home Loans** attaching to the **Facility Letter** dated **24 April 2009** detail as follows under the **Interest- Fixed Rate Loans** section;

[...]

11.3 You may, prior to the expiration of a Fixed Period, request us to fix the rate of interest on the Loan for such further period as you may specify (so long as it is a period for which we offer fixed rates on home loans). If we agree to such request (and we have no obligation to do so) the rate of interest applicable to the Loan for the requested Fixed Period shall be our applicable fixed home loan rate on the first date of the requested Fixed Period or, if a margin is specified in the Schedule, the aggregate from time to time of that margin and such fixed home loan rate.

11.4 Unless a further Fixed Period is agreed in accordance with clause 11.3, at the end of a Fixed Period the rate of interest applicable to the Loan will revert to our then applicable variable home loan rate.

11.5 You may at any time the rate of interest applicable to the Loan is variable request us to fix the rate of interest on the Loan for such period as you may specify (so long as it is a period for which we offer fixed rates on home loans). If we agree to such request (and we have no obligation to do so) the rate of interest applicable to the Loan for the requested Fixed Period shall be our applicable fixed home loan rate on the first date of the requested Fixed Period or, if a margin is specified in the Schedule, the aggregate from time to time of that margin and such fixed home loan

/Cont'd...

rate. You may not make such a request where you are in breach of any provision of the Agreement.

11.6 You may at any time during a Fixed Period opt to convert to our variable home loan rate (plus or minus any margin specified in the Schedule) by notifying us in writing. Upon conversion, a redemption fee shall be payable by you calculated in accordance with clause 9.3 above. You may not exercise this option where you are in breach of any provision of the Agreement.

The **General Conditions for Annuity Home Loans** attaching to the **Facility Letter** dated **24 April 2009** detail as follows under the **Interest- Variable Rate Loans** section;

12.1 If the Loan is a variable rate loan which is not linked to the ECB Refinance rate, the rate of interest applicable to the Loan will be our applicable variable home loan rate or if a margin over or under that rate is specified in the Schedule the aggregate from time to time of that margin and the applicable variable home loan rate.

Our variable home loan rate is subject to variation from time to time in response to market conditions and such rate at the date specified in the Important Information Notice is the rate quoted in the Schedule.

12.2 If the Loan is an ECB Tracker Variable Rate Home Loan, then the interest rate is linked to the ECB Refinance Rate. The rate of interest specified in the Schedule is the rate applicable to the Loan at the date of the facility letter, and it represents the sum of the ECB Refinance Rate on that date and an agreed margin ("the ECB rate margin"). The ECB Refinance Rate is subject to variation, and the rate of interest applicable to the Loan shall be the ECB rate margin added to the ECB Refinance Rate from time to time, and shall vary accordingly."

The **Acceptance and Authority** section of the **Facility Letter** dated **24 April 2009** was signed and accepted by the Complainant on **24 April 2009** and details 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.

/Cont'd...

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)."

It clear to me that the Facility Letter dated **24 April 2009** offered the Complainant a fixed interest rate of 2.98% for a two year period until **1 May 2011** at which point the mortgage loan would "roll-over" or switch to the Provider's standard variable rate. The Provider's "standard variable interest rate" provided for in the Facility Letter dated **24 April 2009** did not have any reference to being linked to the ECB rate but rather was described as a variable home loan rate "subject to variation from time to time in response to market conditions". I am of the view the **section 11.4** of the **Interest-Fixed Rate Loans** section of the Facility Letter, outlined above, is clear as to what is to occur at the end of the fixed period that is the loan will revert to the Provider's then applicable variable home loan rate. Equally **section 12.1** of the **Interest-Fixed Rate Loans** section of the Facility Letter is clear that if the loan is a variable rate loan which is not linked to the ECB refinance rate then the rate applicable to the loan will be the Provider's variable home loan rate.

In the circumstances, I accept that at no stage did the Complainant have a contractual entitlement to a tracker interest rate based on the terms of the Facility Letters dated **5 May 2005** and **24 April 2009**.

Prior to the expiry of the two year fixed interest rate period, the Provider issued an **End of Fixed Period Maturity Letter** dated **16 March 2011** to the Complainant which details as follows;

"The agreed fixed rate period on your Fixed Rate Home Loan ends on 03.05.2011, so you now have the opportunity to review and agree the interest terms for the remaining term of your loan.

Variable interest rate or a new fixed interest period?

You have the option to choose between one of the following:

- *To move to a variable rate*
- *To agree a new fixed rate period*
- *To revert to an ECB tracker rate (with the margin which had applied before your fixed rate period)**

If you wish to revert to an ECB tracker rate or avail of a new fixed interest rate period, please contact the Bank on the above telephone number to arrange a meeting to discuss your options.

/Cont'd...

If you do not respond to this letter by 27.04.2011 the interest rate on your Fixed Rate Home Loan will revert to the bank's applicable variable home loan rate, as agreed in the original Terms and Conditions of your mortgage.

[...]

if you were on an ECB tracker rate immediately before the fixed rate period

The **End of Fixed Period Maturity Letter** dated **16 March 2011** invited the Complainant to contact the Provider if she was interested in choosing a new fixed interest rate period after the initial fixed interest rate period ended. The **End of Fixed Period Maturity Letter** also appears to invite the Complainant to contact the Provider if she wished to *"revert to an ECB tracker (with the margin which had applied before your fixed rate period)"*. However this suggests that the mortgage loan account had to already have been on an ECB tracker interest rate immediately before the fixed interest period, which was not the case in respect of the Complainant's mortgage loan account which had been on a fixed interest rate for a period of two years since inception in **2009**.

I am of the view that the mention of a tracker interest rate could have been confusing to the Complainant. It would have been better if the Provider's communication to the Complainant in March 2011, only contained the options actually available to the Complainant. That said, I do not believe that the wording of the template letter gave the Complainant an entitlement to a tracker interest rate on the mortgage loan.

The Provider's internal notes dated **1 April 2011** indicate that there was some form of contact with respect to the Complainant's mortgage loan account as there is a note which states *"fixed rate query referred to [initials]"*.

A further internal note on **18 April 2011** reads as follows;

"I have placed lending file in the internal name for [name of relationship manager at Provider's branch] as requested"

This suggests that the query was referred to the Provider's branch.

The Complainant contacted the relationship manager of the Provider by e-mail on **20 April 2011** noting the following;

"I am writing in relation to my mortgage. I need to change my mortgage account to an ECB tracker mortgage. Would you be able to send the forms to me as soon as possible as I think I need to change it as soon as possible."

/Cont'd...

It appears that the Complainant contacted the Provider using her work e-mail address and the signature at the end of the e-mail contains the Complainant's e-mail address and a contact telephone number.

The Provider responded to the Complainant by e-mail on **21 April 2011** as follows;

"I have already got the ball rolling in regards to the mortgage switcher since I spoke to your dad, Can you please complete the attached form and e mail or fax it back to me at the details below.

Also in regards to location are you on a 1 year holiday in [location] and in regards to employment are you guaranteed your position when you return to Ireland."

The Complainant replied to this e-mail on **9 May 2011** with the following;

"Did you get my email with the attachment?"

I understand from both parties' submissions that the "attachment" that the Complainant is referring to in the above e-mail is the Provider's **Customer Information Form**. The form which was signed and dated by the Complainant on **27 April 2011** contains personal details, employment details, and current employer's details in respect of the Complainant. The sections titled "Net Monthly Expenditure for Primary Residence", "Net Monthly Expenditure for Additional Property" and "Net Monthly General Expenditure" were not completed by the Complainant. The Provider's **Customer Information Form** included a cover sheet noting the following;

"We are delighted that you are interested in our products and services and we wish to progress your enquiry as efficiently as possible.

By completing and returning this form it will greatly assist us in preparing in advance for your interview in the branch. If you require any assistance in completing this form, please contact any of our branch staff who will be pleased to assist you.

Please complete all sections of the Customer Mortgage Information Form where possible, using a ballpoint pen.

[...]

This is not an application for or an offer of any of our products or services.

/Cont'd...

All credit facilities are subject to age and status. All products and services are subject to terms and conditions.

Certain credit facilities are subject to security.” (My emphasis)

The cover sheet also listed a number of documents which the Complainant was required to bring with her when she called to the Provider branch for an interview to include proof of identification and address, bank statements, salary slips and copy of latest P60. The **Customer Information Form** makes no reference whatsoever to the selection of a particular interest rate, let alone an ECB tracker interest rate.

The Provider’s representative responded to the Complainant’s e-mail on **9 May 2011** as follows;

“I received your e mail and have passed it on to the mortgage advisor to amend your mortgage. They should be onto you in the coming days to confirm that the mortgage has been amended”.

Following a review of the **Customer Information Form** completed and signed by the Complainant on **27 April 2011** (which I note was not completed in full by the Complainant) and the e-mail exchange between the relationship manager of the Provider and the Complainant, I do not accept that these interactions were sufficient to allow the Provider alter the interest rate on the Complainant’s mortgage loan account. I acknowledge that the Provider’s representative indicated that the Complainant’s request to apply for a tracker interest rate had been passed *“on to the mortgage advisor to amend”* who *“should be onto”* the Complainant to *“confirm the mortgage has been amended”*. While I do not consider this communication to amount to an entitlement to a tracker interest rate on mortgage loan account ending **8928** from that point in time, I do consider it to be inappropriate careless and confusing. It appears to me that the Complainant’s request was of the nature of an *“enquiry”* for an amended rate and on receipt, the relationship manager referred the request to a mortgage advisor. The **Customer Information Form** clearly states that it is *“not an application for or an offer of any of the Provider’s products or services”*. The Complainant’s request was clearly for a change in the Provider’s mortgage product, that is, for her mortgage loan account to switch from a fixed interest rate to an ECB tracker interest rate.

That said, I am of the view that in circumstances where the e-mail of **9 May 2011** appears to be the last e-mail sent from the relationship manager to the Complainant on foot of her request, it is understandable that such communications could reasonably cause the Complainant to form an expectation that she could apply a tracker interest rate to her mortgage loan account at that point in time.

/Cont’d...

A question arises as to why the Provider did not follow up with the Complainant to explain the reason why a tracker interest rate could not be applied to her mortgage loan account at the end of the fixed interest rate period to ensure that that the Complainant was left with no uncertainty in this regard. I acknowledge that the Complainant was abroad at the time however the Complainant had furnished the Provider with her contact details (e-mail address and telephone number) through which it could have followed up with her.

The Provider's internal notes show that the Provider left a message with the Complainant's father on **9 June 2011**. The internal note details as follows;

"message left with [name of Complainant's father] to return call re some issues on the Itv switcher case on the expired mortgage"

This entry appears to suggest that the Provider perhaps wanted to explain why the Complainant's mortgage loan account could not be moved to a tracker interest rate. Again, a question arises as to why the Provider did not e-mail or contact the Complainant directly in this regard.

The Provider's internal notes suggest that the Provider returned a telephone call from the Complainant's father on **10 June 2011** and left a message. The internal note details the following;

"returned [name of Complainant's father] call from earlier today and left a message"

On **2 August 2011**, the Provider's internal notes detail as follows;

"spoke to [Complainant's] mother and left a message for [Complainant's father] to return my call re the fixed rate transfer"

The Provider states that it made contact with the Complainant's father on **25 November 2011** who indicated that the Complainant was abroad on a working holiday.

In light of the above, I do not accept that the Provider made reasonable attempts to contact the Complainant to explain any issues that arose in relation to her switching or being unable to switch to an ECB tracker interest rate. Whilst I am of the view that the Complainant's loan documentation is clear that there was no contractual entitlement to a tracker interest rate at the end of the two year fixed interest rate period, I am also of the view that the information provided to the Complainant by the Provider in the e-mail exchange set out above was somewhat confusing and misleading in this regard.

/Cont'd...

It follows that I am of the view that the Provider failed in its obligations under the **Consumer Protection Code 2006** which was in force during the period of this communication in **2011. Chapter 1** of the **Consumer Protection Code 2006**, provides that;

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

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainant. Whilst I accept that errors in communication can occur and in this circumstance an error did occur which affected the Complainant’s understanding of her rights and entitlements under the mortgage loan agreement, I am of the view that the Provider should have been proactive in bringing this error to the Complainant’s attention and highlighted how the error occurred, in advance of the Complainant making her complaint to this office.

For the reasons set out above, I am of the view that this complaint is partially upheld. To mark the Provider’s shortcomings under the **Consumer Protection Code 2006**, I direct that the Provider pay to the Complainant a sum of €1,000 in compensation.

For the reasons set out above, I partially uphold the complaint and direct that the Provider pay to the Complainant a sum of €1,000 in compensation.

Conclusion

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

I direct, pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, that the Respondent Provider pay to the Complainant a sum of €1,000 in compensation to an account of the Complainant’s choosing, within a period of 35 days of the nomination of account details by the Complainant 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**.

/Cont’d...

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

6 October 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.