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| <u>Decision Ref:</u> | 2020-0369 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Tracker Mortgage |
| <u>Conduct(s) complained of:</u> | Failure to apply the correct tracker rate as part of the Examination |
| <u>Outcome:</u> | Partially upheld |

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The loan amount was €218,000 and the term of the loan was 25 years. The Letter of Approval which was signed on **19 May 2008** outlined the Loan Type as "2 Year Fixed New Business Home Loan".

A complaint was received by the then Financial Services Ombudsman's office in **July 2011**. It detailed that the conduct complained of was that the Provider failed to fully advise the Complainants of the consequences of breaking the fixed interest rate period that applied to their mortgage loan account in **February 2009** and refused to return the Complainants to a tracker interest rate.

This complaint file was placed on hold between **May 2012** and **February 2015** as a result of High Court and Supreme Court litigation that was ongoing at that time. The litigation was not in relation to this complaint but dealt with similar issues to those arising in relation to this complaint. The Supreme Court appeals were ultimately withdrawn.

On conclusion of the litigation, engagements took place between the Central Bank of Ireland (the “Central Bank”) and the Provider with respect to a scheme of redress for tracker mortgage account holders who were affected by particular conduct of the Provider.

The Complainants’ mortgage loan account was considered by the Provider under the Provider’s redress programme. The Complainants’ complaint remained on hold within this office throughout the process.

An offer was made to the Complainants by the Provider on **4 August 2015** as part of the redress programme in relation to admitted failures of the Provider regarding the Complainants’ mortgage loan account, as follows;

“Explaining our failure:

On 01/02/2009 you broke from the fixed interest rate period which applied to your mortgage account at that time. This break took place before the scheduled maturity date of the fixed interest rate period.

*In breaking from your fixed interest rate period early, you lost a contractual right to avail of a tracker mortgage at the scheduled maturity date of the fixed interest rate period. **However at the time that you broke from your fixed interest rate period, we did not inform you that you would be unable to avail of a tracker rate mortgage at the scheduled maturity date of the fixed interest rate period.**”*

In the offer made to the Complainants in **August 2015**, the Provider proposed to provide redress to the Complainants by returning their mortgage loan to a tracker rate and compensate the Complainants as follows;

(1) ***Tracker Rate Mortgage Option***

“We are offering you the opportunity to move to the tracker rate mortgage you would have been entitled to move to at the maturity of your fixed interest rate period if you had chosen to do so. That rate will reflect the loan conditions of your mortgage with [the Provider]. The rate of interest charged on this product is based on the ECB Refinancing Rate (the “ECB Rate”) plus a margin of 3.25% (in practice this equals a tracker rate today of 3.30%).”

(2) ***Redress and Compensation***

Part One – Balance adjustment and possible net refund to you

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- *“We have established that your current loan balance would have been €187,771.77, which is €4,391.28 less than your loan balance at present. (Kindly note that for Interest Only loans there may be no adjustment to the loan balance).*
- *We have calculated a net refund of overpayments due to you of €4,434.87.*
- *The above figures are calculated up to 31/07/15. In the event that you have some arrears on your mortgage account, then any overpayments made on the account and identified in this redress programme will first be applied to those arrears on the account, thereby reducing the adjusted arrears balance before a net refund (if there is any left over) is paid to you.”*

Part Two - Compensation

“This payment will include two elements:

Firstly, it will include a payment of €3,000.00 in recognition of our failure in this matter.

Secondly, it will include €400.00 (including VAT) which you may use to pay for independent advice if you chose to seek advice in respect of this letter. You have full discretion as to the use of this money.”

The Mortgage Rate Instruction Form and Payment Authorisation and Account Adjustment Form were signed by the Complainants on **6 September 2015**.

The Complainants commenced an appeal to the Provider’s Appeal Panel in relation to the Provider’s offer of redress and compensation in **July 2016**. The Appeals Panel decided in **September 2016** that the appeal was unsuccessful for the following reasons;

- *“It had not been shown that the financial and non-financial damages by [the Complainants] were caused by the Bank’s failure(s) and/or would not have occurred but for the Bank’s failure(s); and*
- *It had not been shown that it was foreseeable or could be anticipated that [the Complainants] would suffer the non-financial losses claimed as a result of the Bank’s failures.”*

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As the Complainants have been through the Provider's appeals process, this office was in a position to progress the investigation and adjudication of the complaint.

The conduct complained of that is now being adjudicated on by this office and that is the subject of this Decision, is as follows;

- (a) The Provider withdrew the Complainants' initial Letter of Loan Approval which provided for a tracker interest rate of ECB + 0.75%; and
- (b) The Complainants are dissatisfied with the tracker interest rate of ECB + 3.25% that the Provider has offered them.

The Complainants' Case

The Complainants submit that they only became aware in **2016** that at the time they applied for the mortgage loan in **2008**, the Provider *"initially were going to give us a tracker mortgage where the rate wouldn't have exceeded 0.75% over the ECB for the term of the loan."*

The Complainants detail that *"[We] had taken out a car loan in 2006 with [the Provider], which had a balance remaining of approx. €6,000 ... [the Provider] told us at the last minute we would have to clear off the €6,000 and any other borrowings before they would issue the loan cheque"*. They outline that following receipt of the initial loan offer dated **17 April 2008**, *"a few weeks later in May 2008 [the First Complainant] got a phone call from our broker who informed me that [the Provider] wanted us to increase our mortgage to clear off a car loan that we had with them. So we went in to him and signed a letter to increase our mortgage to €218,000. The repayments on both mortgages were similar but the 0.75% condition had been removed on the new loan offer."*

The Complainants further submit that the Provider has stated that the request to amend the loan amount from €210,000 to €218,000 was instigated by the Complainants. They assert that *"this was NEVER EVER the case, I remember this very clearly and it was at [the Provider's] insistence that we borrowed more money to clear off our other borrowings."* They submit: *"as it was **their** idea for us to clear our other borrowings and not ours, the original letter of approval with the 0.75% rate should have stood."*

The Complainants refer to the **Amendment Request Form** timestamped **09.16** on **28 April 2008** which states that the Complainants *"wish to redeem our car loan and incorporate it as part of our new loan"*. The Complainants submit however that *"one of the conditions of the first loan offer is that we had to clear off borrowing account no. [ending] 0346 for an*

amount of €8,510.00. This WAS a car loan, although it doesn't state that on the document."

The Complainants further submit that *"...at this point we had the original loan offer on the table and we were going to accept it. I doubt if [the Broker] took it upon himself to tell us that we needed to increase our mortgage and clear our car loan. No, he got the call from [the Provider] and what I would say initially happened is that someone at [the Provider] contacted [the Broker], mistakenly told them that we needed to increase our mortgage to clear our car loan, [the Broker] probably didn't know that our car loan was already included in the list of borrowings that had to be cleared as it didn't state that the borrowing was for a car. Then, when the letter to increase the loan was received by [the Provider], [the Provider], **must have then** realized that we didn't need to borrow more money, as our car loan was already included in the items to be cleared."*

The Complainants state *"What happened then is anyone's guess but I would guess that [the Provider] then contacted [the Broker] and asked what the extra money was for, and that, I would say, is what the other letter of the same date, sent to them a few hours later at 12.12 hrs, stating that we wanted to increase our mortgage to €218,000 for home improvements was for."*

The Complainants refer to the **Amendment Request Form** timestamped **12:12** on **29 April 2008** which states that the Complainants required additional funds *"to purchase home furnishings"*. The Complainants assert that *"under no circumstances did [we], go and ask for extra money for home improvements, this never happened, someone somewhere must have assumed that we needed more money for something and that's how that letter came to be"*.

The Complainants refer to the **Amendment Request Form** timestamped **09:01** on **7 May 2008**. They outline that *"There is then a third letter, (albeit a copy of the second one) dated 07/05/2008 (copy attached) sent a week later, AGAIN TO INCREASE OUR MORTGAGE and I have to add, NONE of these letters have been signed by either my wife or myself. These letters are the reason for a new loan offer been [sic] sent to us without the tracker rate option on it. I certainly think there are questions to be answered here, a big mistake has been made somewhere and as a result of that, at the moment, we are paying over 4 times the interest that we would have been"*.

The Complainants feel they were *"cheated out of the first offer of loan approval"* by the Provider. They further submit that the Provider deliberately delayed in sending them the amended Letter of Loan Approval and *"It then took them another three weeks to send us out another letter of loan offer, and in those three weeks, the terms had changed, i.e., the 0.75% rate was no longer on offer, I never knew this until now as I say, and never knew*

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*what a tracker mortgage was back then, but I think the [Provider] stalled on this because, in those three weeks they had stopped offering the 0.75% rate **BUT** they had already offered it to us and this was their way of getting out of it."*

The Complainants submit that the tracker interest rate of ECB + 3.25% that was restored to their mortgage loan account by the Provider is "excessive". They state that *"The rate of 3.25% above the ECB rate that we have been given is ridiculous, tracker mortgages were always in or around 1% above the ECB rate and for [the Provider] to state that this rate would have been the rate at the end of our fixed term is crazy when as far as I can remember they stopped offering tracker mortgages at the end of 2008."*

The Complainants wish to be put on a more "realistic rate". They have queried the basis on which the margin of ECB + 3.25% has been calculated as the Provider was no longer offering tracker rates in **March 2010**. They assert that they have been given "a lower variable rate mortgage and only slightly lower at that. It is not a tracker rate."

The Provider's Case

The Provider submits that the Complainants engaged the services of a Broker in relation to the handling of their mortgage with the Provider and any discussions in relation to the mortgage product requested or required by the Complainants were between the Complainants and their broker, and the Provider states that it was not privy to those discussions. It states that on **17 April 2008**, it issued a **Letter of Loan Approval** to the Complainants' appointed Broker and solicitor which offered the Complainants a Tracker Home Loan for the amount of €210,000.00 at a tracker interest rate of 4.75% (ECB + 0.75%). The Provider states that this mortgage offer was not accepted by the Complainants and "therefore its terms are not relevant for the purpose of the Complainants' mortgage".

The Provider submits that subsequently on **29 April 2008** it received an **Amendment Request Form** from the Complainants' Broker in which the Broker advised that the Complainants wished to increase the loan amount of €218,000 in order to redeem their car loan and incorporate the sum into their mortgage borrowing. It states that a further **Amendment Request Form** was submitted later that day, stating that the purpose of the increased loan amount was to purchase home furnishings. The Provider submits that it acceded to the Complainants' request and issued an amended letter of Loan Approval on **8 May 2008** which outlined that the loan was for the amount of €218,000, on a two year fixed interest rate of 4.99%. The Provider submits that pursuant to **Special Condition 6**, on the expiry of the fixed rate period the Complainants would be entitled to "the then current [Provider] Tracker Mortgage rate".

The Provider submits that the Complainants accepted the mortgage product offered to them and confirmed their understanding when they signed the **Letter of Acceptance on 19 May 2008** in the presence of their solicitor.

It states that therefore *“it is the terms and conditions of this mortgage which are relevant for the purposes of the Complainants’ redress and compensation”*.

The Provider details that subsequently the Complainants sought to break the two year fixed interest rate period early in favour of moving to a variable interest rate in **February 2009**. It outlines that it acceded to that request, and accordingly moved the mortgage loan account to a variable interest rate of 4.55% with effect from **1 February 2009**.

The Provider submits that as a result of an investigation by the Central Bank the Provider identified a failure in connection with the management of certain mortgage accounts, including the Complainants’ mortgage loan account. It details that the failure that occurred with regard to the Complainants’ mortgage loan account was the Provider’s failure to inform the Complainants that, by breaking early from the fixed interest rate period in **February 2009**, they would lose their entitlement to a tracker interest rate in the future.

The Provider submits that the purpose of the Provider’s redress and compensation offer pursuant to their redress programme was to return the Complainants’ mortgage account to the position that it would have been in had the failure not occurred and to compensate the Complainants for the failure. The Provider submits that in its letter of **04 August 2015**, that the Provider’s failure was explained and that details of the redress and compensation proposal were given to the Complainants.

The Provider states that an appeal was submitted by the Complainants to Provider’s Independent Appeals Panel and it replied to the Complainants’ appeal. A decision was reached by the Panel not to uphold the Complainants’ appeal and the Complainants rejected the Panel’s decision.

The Provider submits that the offer of the mortgage account balance adjustment of €4,391.28, plus a refund of overpayments in the amount of €4,434.87 would return the Complainants’ mortgage loan account to the position it would have been in had the mortgage loan account been placed on a tracker interest rate of ECB + 3.25% in **March 2010** (the maturity date of the Complainants’ initial two year fixed interest rate period).

The Provider submits that as part of the redress programme, the Complainants were offered the opportunity to switch to a tracker interest rate, which they would have been entitled to move to at the maturity of their two year fixed rate period, if they had chosen to do so. The Provider submits that under the redress programme, the tracker interest rate

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to be applied to a customer's mortgage loan account is "determined by the loan conditions of the mortgage entered into".

It details that "The applicable rate of interest which would have applied to the Complainants' mortgage on the expiry of the fixed term, if they had chosen to move to the tracker rate in accordance with Special Condition 6, was ECB + 3.25%. Therefore, this is the tracker rate which has been offered to the Complainants under the [redress programme]."

The Provider states that the Loan Offer, which was signed by the Complainants did not contain a specific promise as to a particular tracker rate margin to be offered to them on expiry of the fixed rate period:

"Based on the term and conditions of the mortgage entered into by the Complainants, on the expiry of their fixed term, they did not have an entitlement to be offered any specific margin over the ECB rate, but rather the appropriate tracker margin rate being charged by the Bank at the time of the expiry of the 2 Year fixed rate term."

The Provider details that the calculation of the appropriate tracker rate margin is based on a commercial decision made by the Provider, and is dependent on market conditions taking into account a number of factors such as wholesale lending and borrowing rates, interest rates paid on deposits and the Provider's competitive position. It states that therefore the appropriate tracker rate margin which would have been applied to the Complainants' mortgage in **May 2010** was ECB + 3.25%. It submits that it is not correct to say that tracker rates were always at around 1% and that this is the tracker rate which ought to have applied to the Complainants' mortgage.

The Complaints for Adjudication

The complaints for adjudication are:

- (a) The Provider incorrectly withdrew the tracker interest rate offering of ECB + 0.75% from the Complainants between the first Letter of Offer and the second Letter of Offer in **2008**; and
- (b) The Provider has incorrectly offered the Complainants a tracker interest rate of ECB + 3.25% which is excessive.

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

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

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

"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be

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investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”

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

An **application form** signed by the Complainants on **11 March 2008** has been provided in evidence.

The “*case summary*” section details as follows;

“Existing customers of [the Provider] who wish to re-finance their existing mortgage and their Credit Union loans.

Excellent repayment record on all loans.”

In the “*mortgage details*” section, in response to the question “*loan amount*” the figure “*€210,000*” has been written. In response to the question “*rate type*” the “*fixed*” option is ticked and “*1 year – 4.89%*” has been written next to it. The other options available were tracker, variable, discount, split or other.

An **Approval in Principle** document dated **27 March 2008** has been provided in evidence and details as follows;

| | | |
|-------------------------------------|---|------------------------|
| <i>“Loan Purpose:</i> | <i>Purchase Price / Estimated Value</i> | <i>Loan Amount</i> |
| <i><u>Refinance/Restructure</u></i> | <i><u>€450,000</u></i> | <i><u>€218,000</u></i> |

| | | |
|-------------------------|-----------------------|--------------------------|
| <i>Loan Type:</i> | <i>Interest Rate:</i> | <i>Term:</i> |
| <i><u>Home Loan</u></i> | <i><u>4.75%</u></i> | <i><u>25 Year(s)</u></i> |

LTV: 48% ...

Product Name: Tracker (LTV <=60%/>=200K) HomeLoan”

A further **Approval in Principle** document, also dated **27 March 2008**, has been provided in evidence and details as follows;

| | | |
|-------------------------------------|---|------------------------|
| <i>“Loan Purpose:</i> | <i>Purchase Price / Estimated Value</i> | <i>Loan Amount</i> |
| <i><u>Refinance/Restructure</u></i> | <i><u>€450,000</u></i> | <i><u>€210,000</u></i> |

| | | |
|-------------------------|-----------------------|--------------------------|
| <i>Loan Type:</i> | <i>Interest Rate:</i> | <i>Term:</i> |
| <i><u>Home Loan</u></i> | <i><u>5.44%</u></i> | <i><u>25 Year(s)</u></i> |

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LTV: 47% ...

Product Name: Standard Variable Rate Home Loan

I note that tracker interest rates were on offer generally by the Provider when the Complainants applied for the mortgage loan in **March 2008**. The Complainants availed of the services of a third party Broker during the application stage of the mortgage loan application.

I note that the application form outlined the types of interest rate options available generally on mortgage loans, including the tracker rate. In circumstances where the Complainants were engaging with a Broker with respect to the mortgage loan application it appears that all of the Complainant's communications were with the Broker at this time.

I note from the evidence that a **Letter of Approval** dated **17 April 2008** was issued to the Complainants and details as follows;

| | |
|-------------|-------------------------------------|
| "Loan Type: | Tracker (LTV <=60%/>=200K) HomeLoan |
|-------------|-------------------------------------|

| | |
|-----------------------------------|----------------|
| Purchase Price / Estimated Value: | EUR 450,000.00 |
| Loan Amount: | EUR 210,000.00 |
| Interest Rate: | 4.75% |
| Term: | 25 year(s)" |

Special Condition 9 details as follows;

"The interest rate applicable to this tracker mortgage loan may be varied from time to time by [the Provider] provided the interest rate will not exceed 0.75% over the European Central Bank refinancing rate (the "ECB Rate"). The ECB rate may be varied from time to time by the European Central Bank (the "ECB"). In the event of any variation of the ECB rate, the interest rate applicable to this loan will not be more than 0.75% over the ECB rate as varied by the ECB and the revised interest rate for the loan will apply not later than one calendar month from the date provided by the ECB as the date on which the variation to the ECB rate will take effect. [The Provider] reserves the right to alter the said percentage over the ECB rate at any time prior to drawdown of the loan."

It is clear that the Loan Offer provided for a tracker interest rate that *"will not exceed 0.75% over the European Central Bank refinancing rate (the "ECB Rate")"*. However it is not disputed between the parties that the Complainants did not accept or sign the Loan Offer dated **17 April 2008**.

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I note that an **Amendment Request Form** timestamped **09:18** on **29 April 2008** has been furnished in evidence and details as follows;

"Please increase the loan amount to €218,000

...

"We wish to redeem our car loan and incorporate it as part of our new loan."

A further **Amendment Request Form** timestamped **12:12** on **29 April 2008** details as follows;

"Please increase the loan amount to €218,000.

...

Clients wish to purchase home furnishings."

A further **Amendment Request Form** timestamped **09:01** at **7 May 2008** details as follows;

"Please increase the loan amount to €218,000.

...

Clients wish to purchase home furnishings."

The **Letter of Approval** dated **8 May 2008** details as follows;

| | |
|--------------------|--|
| <i>"Loan Type:</i> | <i>2 Year Fixed New Business Home Loan</i> |
|--------------------|--|

| | |
|--|-----------------------|
| <i>Purchase Price / Estimated Value:</i> | <i>EUR 450,000.00</i> |
| <i>Loan Amount:</i> | <i>EUR 218,000.00</i> |
| <i>Interest Rate:</i> | <i>4.99%</i> |
| <i>Term:</i> | <i>25 year(s)"</i> |

Special Condition 6 details as follows;

"On expiry of the fixed rate period and without affecting the entitlement of the applicant to apply at any time to fix the rate for a further period (if available), the interest rate applicable to the loan will be the then current [Provider] Tracker Mortgage rate (comprising of a certain percentage over the European Central Bank refinancing rate ("the ECB rate")) appropriate to the loan as may be varied from time to time in accordance with variations to the ECB rate. In the event of any variation of the ECB rate, the revised interest rate for the loan will apply not later

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than 1 calendar month from the date provided by the ECB as the date on which the variation to the ECB rate will take effect.”

The Complainants signed the **Acceptance of Loan Offer** on **19 May 2008** on the following conditions;

“I/we the undersigned accept the within offer on the terms and conditions set out in

- i. Letter of Approval*
- ii. The General Mortgage Loan Approval conditions*
- iii. The [Provider] Mortgage Conditions”*

The Complainants accepted the Letter of Approval having confirmed that it had been explained to them by their solicitor in **May 2008**. It is clear to me that the **Letter of Approval** which was ultimately accepted by the Complainants envisaged a two year fixed rate and **special condition 6** of the Letter of Approval sets out the interest rate that would be applicable at the end of the fixed interest rate period was *“the then current [Provider] Tracker Mortgage rate (comprising of a certain percentage over the European Central Bank refinancing rate (“the ECB rate”)) appropriate to the loan”*. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate of ECB + 0.75% on the expiry of the two year fixed interest rate period.

The Provider was free to exercise its commercial discretion in making a loan offer to the Complainants providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainants to decline that offer if they were dissatisfied that the terms and conditions did not specifically contain a guaranteed tracker interest rate margin at the end of the fixed interest rate period, or indeed if they required clarification as to why the loan amount was increased from €210,000 to €218,000. Instead the Complainants signed the mortgage loan having confirmed that their solicitor had explained the terms and conditions of the mortgage loan to them.

The Complainants have submitted that they believe they are entitled to a tracker interest rate of ECB + 0.75% on the basis that the original **Loan Offer** dated **17 April 2008** provided for that. It is important for the Complainants to understand that in order for them to have a contractual right to a particular tracker interest rate and margin on their mortgage loan at the end of the fixed interest rate period in **2009**, that right would need to have been specifically outlined in the mortgage loan documentation that was signed by the parties. However no such right was set out in writing in the **Letter of Approval** dated **8 May 2008** which was signed by the Complainants on **18 May 2008**. The fact that the Provider had offered the tracker interest rate of ECB + 0.75% in the initial **Loan Offer** in **April 2008**, after

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the Complainants submitted their application for a mortgage loan, did not oblige the Provider to offer that tracker interest rate in the amended Letter of Approval in **May 2008**.

The evidence in the form of the **Amendment Request Forms** shows that the Complainants, through their Broker, requested an increased loan amount after the initial Loan Offer issued.

I note that the Complainants have submitted that they *“doubt if [the Broker] took it upon himself to tell us that we needed to increase our mortgage and clear our car loan. No, he got the call from [the Provider] and what I would say initially happened is that someone at [the Provider] contacted [the Broker], mistakenly told them that we needed to increase our mortgage to clear our car loan, [the Broker] probably didn’t know that our car loan was already included in the list of borrowings that had to be cleared as it didn’t state that the borrowing was for a car.”*

I reiterate that this complaint is maintained against the Provider and in these circumstances this office cannot consider any conduct of the third party broker. Furthermore the Complainants have not submitted any evidence to this office to substantiate their claims about these communications between the Provider and the broker at the time.

The fixed interest rate period did not expire in real time in **May 2010** in this matter, as the Complainants broke out of the fixed interest rate period in **February 2009**. The Provider subsequently became aware of failures in relation to information given to the Complainants as part of their redress programme and offered the Complainants redress on the basis of the application of a tracker interest rate of ECB + 3.25% from **August 2015**.

The Provider has furnished in evidence a copy of its **Lending Interest Rates** document effective from *“the start of business”* on **1 April 2010**. I note that it details as follows;

“Home Loans Rates for Existing Business

[...]

| | RATE | APR |
|---------------------------------|-------------|------------|
| <i>Tracker Rate LTV <80%</i> | 4.25% | 4.3% |
| <i>Tracker Rate LTV >80%</i> | 4.25%” | 4.3% |

...

*“Residential Investment Property Loans & Commercial Mortgages
Rates available on request. The rate applicable to individual customers is determined in accordance with loan documentation.”*

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The Provider has submitted evidence to the effect that the margin of ECB + 3.25%, was available in **May 2010** to all customers who had a Home Loan, which is the mortgage loan product that the Complainants held. The outstanding balance on the Complainants' mortgage loan on **21 May 2010** when the fixed interest rate period would have expired was €208,730.86. It appears to me that had the fixed interest rate period on the Complainants' mortgage loan expired in real time in **May 2010**, the tracker interest rate that the Provider had available at that time and that would have been offered to the Complainants for their mortgage loan was ECB + 3.25%. As such I believe that the Provider has applied the correct tracker interest rate margin (ECB + 3.25%) to the Complainants' mortgage loan account from **July 2015** to redress the Complainants' mortgage loan account.

I note that an **Alternative Repayment Request Form** was completed and signed by the Complainants on **27 October 2010**. The **Branch Recommendation** section of the form detailed as follows;

"[First Complainant] HAS BEEN CUT DOWN TO A 3 DAY WEEK AT €300 A WEEK & HE CAN CLAIM DOLE OF €112 A WEEK THIS IS SHOWN IN OTHER INCOME. LAST YEAR THIS ALSO HAPPENED TO [FIRST COMPLAINANT] & IN JAN & FEB HE WAS ONLY IN WORK 2 DAY A FORTHNIGHT [SIC] & IN MAR & APRIL IN 1 DAY A WEEK & COME JUNE BACK TO 5 DAYS A WEEK. (THIS COULD HAPPEN AGAIN THIS YEAR & IS WHAT THE COUPLE FEAR) THEY HAVE A RENTAL PROPERTY IN [REDACTED] WHICH HAS HAD NO TENNANTS [SIC] SINCE LAST MAY, SO THEY ARE DOWN €700 A MONTH IN THEIR INCOME FROM THIS AS WELL. [SECOND COMPLAINANT] USED TO WORK IN [REDACTED] 2-3 DAYS A WEEK, SHE HAS NOT WORKED FOR THEM SINCE BEGINNING OF SEPTEMBER THEY SAY THEY HAVE NO WORK FOR HER ... THEY ARE ON INTEREST ONLY ON THE RENTAL PROPERTY [ENDING] 7183. HOWEVER, THEY NEED HELP WITH THEIR [SIC] FAMILY HOME MORTGAGE [ENDING] 4380 AS THEY HAVE USED UP ANY SAVING THEY HAVE. THEY WOULD APPRECIATE IF THEY COULD HAVE A 3 MONTHS MORATORIUM".

I note that the Provider wrote to the Complainants by letter dated **25 January 2011** to confirm that the monthly repayments had been reduced to €758.81 for a period of 6 months from **21 February 2011** to **21 July 2011**.

It appears from the evidence that the Complainants contacted the Provider by telephone on **11 May 2011** to query the position regarding the tracker rate. The Provider has submitted that on that date *"[The First Complainant] rang the Bank to complain that he was not advised in 2009 that if he remained in a fixed rate he would automatically go onto a tracker rate in 2010"*.

/Cont'd...

It is most disappointing that a recording of this telephone call has not been provided in evidence.

The Provider issued a Final Response letter to the Complainants on **11 May 2011** which detailed that *“as you opted to break from your Fixed Rate contract in February 2009, the tracker rate is no longer an option for you.”*

The Complainants wrote to the Provider by letter dated **17 May 2011** as follows;

“This sort of information should have been given to me at the time and before I came off[f] the fixed rate, if this information had been given, it would have been clear to me that it would be sheer madness to break from the fixed rate.”

The Provider sent a further Final Response letter to the Complainants on **27 June 2011** which detailed;

“as you opted to break from your Fixed Rate contact [sic] in February 2009, the Tracker Rate was no longer an option available to you ... The original agreement in relation to the interest rate applicable to your loan and as set out in your Letter of Approval thus no longer applies once you departed from its terms.”

A **Payment Holiday Options Application Form** was signed by the Complainants on **17 November 2011**. The Complainants have ticked the option stating *“If you have previously made overpayments and would like to fund your underpayment with these overpayments, please tick here.”* A typed annotation on the form states *“use remaining cr for jan 12”*.

The Provider wrote to the Complainants by letter dated **23 December 2011** as follows;

“Details of your preferred repayment arrangement are shown below:

| | |
|---------------------------|--------------------------|
| <i>Start Date</i> | <i>December 22, 2011</i> |
| <i>End Date</i> | <i>January 21, 2012</i> |
| <i>PAYMENT ADJUSTMENT</i> | <i>€624.33”</i> |

The Complainants completed a **Standard Financial Statement** on **3 February 2012** which detailed as follows;

| | |
|---------------------------------------|-----------------------|
| <i>“Total Net Monthly Income</i> | <i>2308.66</i> |
| <i>Less Total Monthly Expenditure</i> | <i><u>1866.74</u></i> |
| <i>Sub-Total</i> | <i>441.92</i> |

/Cont’d...

| | |
|--|--------------------------|
| <i>Less Mortgage Repayments Being Paid</i> | <i>1253.12</i> |
| <i>Less Other Monthly Debt Being Paid</i> | <i><u>1015.35</u></i> |
| <i>Total (Surplus/Deficit)</i> | <i>-1826.55 DEFICIT"</i> |

The "Reason(s) for Review/Arrears" was "TEMPORARY LAY OFF UNTIL APRIL".

In the "Other relevant Information" section the Provider has detailed as follows;

"[Second Complainant] has not been working for the last 2 years & unfortunately has been unable to get employment at present. [First Complainant] works in the Local [business] but the last 2 years plus this year (starting dec 2009) his boss lays off his workers for the months of Dec, Jan Feb & March.

Therefore they are living on social welfare benefits. Ideally they would appreciate a 3 month moratorium, however as they took one last year this is not possible. They have a rental property with [the Provider] which they get in total form [sic] sw payment & tenant a total of €600 therefore they have to make up the remainder of €155.00. They where [sic] forced to borrow €3k to put new windows in this property hence [Second Complainant's] Credit Union Loan. I have completed nets leaving the rental income & rental property mortgage out of to give a more accurate [sic] reading. Nets indicate a capacity to pay €461.00 a month and customers are happy with this on top of the difference they have to give to the rental property. Therefore we are applying for a CPH (interest only) Minus set at €461 a month for 3 months."

The Complainants signed a **Restructure Agreement: Capital Payment Holiday** on **15 February 2012** for a period of six months during which the monthly repayments were approximately €870.53 effective from **21 March 2012**.

The Complainants completed a **Standard Financial Statement** on **29 August 2012** which detailed as follows;

| | |
|--|---------------------------|
| <i>"Total Net Monthly Income</i> | <i>2340.00</i> |
| <i>Less Total Monthly Expenditure</i> | <i><u>1926.74</u></i> |
| <i>Sub-Total</i> | <i>413.26</i> |
| <i>Less Mortgage Repayments Being Paid</i> | <i>718.38</i> |
| <i>Less Other Monthly Debt Being Paid</i> | <i><u>1015.35</u></i> |
| <i>Total (Surplus/Deficit)</i> | <i>-1,320.47 DEFICIT"</i> |

/Cont'd...

In the “Other relevant Information” section the Provider has detailed as follows;

“[First Complainant is looking to continue on his current arrangement on both a/c for a further 6 month period if possible ... [First Complainant] mentioned that hes back working but is only on a 3 day week and sometimes only gets 2 days per week ... [First Complainant] mentioned that as of the last 2 weeks he is not receiving rental income from his other property but is hoping to have somebody else in as soon as possible.”

I note that the Complainant’s direct debt of €1,231.86 was returned unpaid on **21 September 2012** and he made a lodgement of €750.00 on **4 October 2012**.

The Complainants signed a **Restructure Agreement: Capital Payment Holiday** on **6 November 2012** for a period of six months during which the monthly repayments were approximately €715.01 effective until **21 April 2013**.

The Complainants completed a further **Standard Financial Statement** on **19 January 2013** which detailed as follows;

| | |
|-------------------------------------|------------------|
| “Total Net Monthly Income | 2,422.33 |
| Less Total Monthly Expenditure | <u>1,926.74</u> |
| Sub-Total | 495.59 |
| Less Mortgage Repayments Being Paid | 227.39 |
| Less Other Monthly Debt Being Paid | <u>1,015.34</u> |
| Total (Surplus/Deficit) | -747.15 DEFICIT” |

The “Reason(s) for Review/Arrears” was “unemployed between december march”.

The Complainants completed a further **Standard Financial Statement** on **30 April 2013** which detailed as follows;

| | |
|-------------------------------------|------------------|
| “Total Net Monthly Income | 2,233.66 |
| Less Total Monthly Expenditure | <u>1,978.67</u> |
| Sub-Total | 254.99 |
| Less Mortgage Repayments Being Paid | 716.71 |
| Less Other Monthly Debt Being Paid | <u>485.70</u> |
| Total (Surplus/Deficit) | -947.42 DEFICIT” |

The “Reason(s) for Review/Arrears” was “unemplo[y]ed between at mo – going back in May for 3mnths”.

/Cont’d...

In the "Other relevant Information" section the Provider has detailed as follows;

"Customer is looking to cont paying 716.71 on account [ending] 4380. Has an IO RIP [ending] 7183 happy with that. [First Complainant] mentioned that he does not get work from the end of November until mid May. When he does go back in May he will only be working 3 days per week and then gradually if it gets busier he will get more days if it gets busier. [Second Complainant] is currently on a [named] scheme."

The Provider wrote to the Complainants on **24 May 2013** as follows;

"Following our recent assessment of your account, we believe that the best option for your financial circumstances is for you to sell your property. This will enable you to use the proceeds of the sale to clear the arrears outstanding and repay or significantly reduce, your mortgage balance."

I note that the Complainants signed a further **Restructure Agreement: Capital Payment Holiday** on **30 May 2013** for a period of six months during which the monthly repayments were approximately €717.88 commencing from **21 June 2013** until **21 November 2013**.

The Complainants wrote to the Provider on **11 June 2013**, detailing as follows;

"I am writing to you to say that I WILL NOT even consider selling my home at the moment. Things have been very tough financially for my family and I for the past four years but in that time I have always managed to pay you what was agreed. I fully understand that ideally I should be paying an amount off the capital as well as paying the interest but up until now that has just not been possible.

...

As I am back working I am in a position to pay you more money than I have been of late, however I am going to ask you to allow me to continue on the interest only restructure for the next six months as agreed, this will allow me to get rid of the arrears on my account.

...

*Instead of the normal monthly repayment of €717.88, I intend to pay you **at least** an extra €300.00 per month for the next six months."*

/Cont'd...

I note from the **mortgage loan statements** that the Complainants made the following payments to the mortgage loan account during the interest only period;

- Cash lodgement of €350 on **18 June 2013**
- Direct debit of €717.88 on **21 June 2013**
- Cash lodgement of €350 on **17 July 2013**
- Direct debit of €717.88 on **19 July 2013**
- Direct debit of €717.88 on **21 August 2013**
- Cash lodgement of €400 on **23 August 2013**
- Direct debit of €716.88 on **20 September 2013**
- Cash lodgement of €250 on **27 September 2013**
- Direct debit of €717.88 on **21 October 2013**
- Direct debit of €717.88 on **21 November 2013**

Following the expiry of the interest only period in **November 2013** the repayments on the mortgage loan reverted to capital and interest repayments monthly from **December 2013** onwards. I note that the net refund amount of overpaid interest of €4,478.38 was refunded to the mortgage loan account on **9 September 2015** and reduced the arrears balance from €4,536.49 to €58.11.

I note that the Complainants have submitted that they *“NEVER EVER EVER sought additional compensation/financial damages ... the only issue [they] raised was the severity of the tracker rate.”*

Having regard to all of the evidence before me I do not accept that the Provider has failed to apply the correct tracker interest rate margin to the Complainant's mortgage loan account. There is no evidence to demonstrate an entitlement to a tracker interest rate of ECB + 0.75%. I accept that the Provider has applied the correct tracker interest rate margin (ECB + 3.25%) to the Complainants' mortgage loan account from **July 2015** to redress the Complainants' mortgage loan account.

I note that at each point when the Complainants requested forbearance on their mortgage loan account, the First Complainant's unemployment and the absence of a tenant in their Buy to Let property were the main motivating factors which caused the Complainants to seek forbearance. While I accept that the Complainants were overpaying significant amounts on their mortgage loan account on a monthly basis at the time forbearance was sought in **February 2011, December 2011, March 2012, November 2012** and **June 2013**, respectively. The evidence shows these forbearance periods were requested primarily due to the First Complainant's lack of employment.

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However I am of the view that the Provider's response when the Complainants raised the tracker issue with the Provider in **May 2011** was most disappointing. Had the Provider investigated this issue correctly at the time the Complainants made their complaint in **2011** and restored the tracker interest rate at that time as it should have, the retrospective application of the tracker interest rate in **2015** would not have been necessary. I have no doubt that this failure on the Provider's part caused inconvenience to the Complainants.

The Provider has paid compensation of €3,000 to the Complainants, together with redress of €4,434.87 and an independent professional advice payment of €400. Having regard to all of the evidence before me in terms of the particular circumstances of the Complainants, the level of overcharging and the period over which the overcharging occurred, and the Provider's failure to correct the matter when it was brought to its attention by the Complainants, I do not accept that the amount of compensation paid by the Provider is reasonable in the circumstances of this particular matter.

For the reasons set out above, I partially uphold the complaint and direct that pursuant to **Section 60(4)** of the *Financial Services and Pensions Ombudsman Act 2017*, the Provider pay a sum of €5,000 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered.

For the avoidance of doubt, the total sum of compensation of €5,000 is inclusive of the €3,000 compensation already offered to the Complainants by the Provider for its failure.

Conclusion


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

Pursuant to **Section 60(4) and Section 60 (6)** of the *Financial Services and Pensions Ombudsman Act 2017*, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €5,000 (which is inclusive of the €3,000 compensation already offered to the Complainants by the Provider for its failure), to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

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

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

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

21 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.