



<u>Decision Ref:</u>	2020-0385
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Refusal to move existing tracker to a new mortgage product Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan was secured on the Complainants' principal private residence.

The loan amount was €420,000 and the term of the loan was 26 years. The Offer of Advance signed by the Complainants on **28 August 2014** outlined that the applicable interest rate was a discount variable rate of 4.1%.

The Complainants' Case

On **23 November 2005** the First Complainant signed and accepted an **Offer of Advance** from the Provider. The loan amount was €350,000 repayable over 30 years.

The Complainants submit that in **2012** they wanted to sell the property which secured the First Complainant's mortgage with the Provider in order to *"upscale to a bigger property to accommodate our growing family."* They outline *"When we made the decision to sell [the property] in late 2012 the house was in negative equity but the mortgage was not, hence being able to sell the property. Our aim was to sell at that time to be able to upscale during the recession at a cheaper cost."*

The Complainants detail that *“We went to [the Provider] and explained our situation as we were on a tracker mortgage and did not want to loose [sic] it. [The Provider] told us that we could bring the tracker mortgage over to the new property once we found a new property within 6 months of selling. [The Provider] also told us that we could borrow more money to upscale to a new property but it would be on a variable rate.”*

The Complainants submit that the property was sold and the First Complainant’s mortgage was redeemed in **October 2012**. They state that following this, *“it proved to be incredibly difficult to meet the demands of [the Provider] during the period of our application for mortgage approval ... The system employed by the bank in seeking additional information each time [the First Complainant] had a meeting arranged, became hugely time consuming especially as I was trying to complete my application within the 6 month period specified by the bank, to allow us to carry over the existing tracker mortgage. I feel I was grossly mistreated during the period of my application and feel [the Provider] took advantage of the situation knowing that if they took their time, the 6 months would expire and my tracker mortgage would be lost. This is what ultimately happened”*. The Complainants further submit that the Provider *“should by law have stated that [the Complainants] are allowed to, as owners of a tracker mortgage, be able to carry it through to our next mortgage over an unlimited timeframe and not the 6 months stated”*.

The Complainants further detail that *“even though [the Provider] did offer a loan to [the Complainants] in 2012, it did not meet the criteria we requested to be able to upscale to a property suitable for our family. With [the First Complainant’s] company accounts proving that we were able to afford a higher mortgage repayment, [the Provider] did not deem us fit to make the repayments in which case we could not find a suitable property to purchase. This is turn led to the tracker mortgage being lost”*. The Complainants further state that it was clear that they *“could afford a larger repayment than what was offered ... the mortgage was stress tested at 6% and even at that rate we were very comfortable with the repayments.”*

The Complainants further submit that *“Its complete rubbish that [the Provider] refused us in november 2012 and approved in december 2012 for a small bit less. This was done to clearly prolong the process and also knowing that the amount they approved was way below what we required to purchase a property suitable for us and our family. This was evident when we lost properties we were bidding on because we didnt have enough funds from the bank. We would have had enough funds if they had allowed the tracker mortgage be ported over and worked into the figures at the time.”*

The Complainants further submit that *“the bank have stated that they hold no records of communication in relation to the tracker. We believe this is untrue as we had discussions with an employee of the bank going by the name [Redacted] who dealt with mortgages*

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and has since left the bank we believe early 2013. I have some of his emails but unfortunately not all of them but proof that we had discussions with him”.

The Complainants refer to the Provider’s email to the Complainants on **5 February 2013** and state that *“You can clearly see the agreement we had was € 298870 at tracker rate which was the outstanding amount owed to the bank from our current mortgage.”*

The Complainants submit that in **2014** the Provider approved the Complainants’ new mortgage application for €420,000, but on a much higher variable interest rate. They state that *“due to the pressure and stress we were under we had no choice but to sign for this mortgage. We couldn’t rent any longer so the choice was limited - either move and pay higher rent or purchase a property where the repayments would be slightly cheaper. The offer from the bank was a variable rate which was way above the tracker rate we had.”* They submit that they find it *“strange”* that *“only after the 2 years [the Provider] then decided [the Complainants were] fit to draw down a mortgage of €420,000”.*

The Complainants detail that *“we purchased our previous property for 460k in 2005. We sold that particular property for 274k in 2012. We had approx 293k outstanding on that mortgage. We sold on the promise that we could carry our tracker mortgage over to the next mortgage. The agreement was we could maintain the 293k on tracker and the remaining loan would be on a variable rate which would mean our current mortgage when drawn down in 2014 should have been 293k on tracker and 127k on variable and not 420k on 4.1% so as you can see we have been massively overcharged.”*

The Complainants submit that the Provider has *“robbed us of our tracker mortgage, left us hugely out of pocket, lined their own pockets and actually believe that they are right to steel (sic) our tracker mortgage from us”.*

The Complainants are seeking that the Provider *“reinstate”* the tracker interest rate on their current mortgage loan account and reimburse them for the interest they have overpaid since **2014**.

The Provider’s Case

The Provider submits that prior to **October 2012**, the Complainants did not hold a mortgage in joint names on a tracker interest rate with the Provider. The First Complainant held a mortgage on a tracker interest rate in his sole name, secured by a property also registered in his sole name. The Provider states that there was no condition outlined in the First Complainant’s **Offer of Advance** which specified that a tracker interest rate would be available to carry to a subsequent mortgage borrowing for an unlimited time-frame.

The Provider details that a Tracker Mortgage Portability option was available from the Provider from **early 2012** until **late 2013**, at which point it was withdrawn by the Provider. It outlines that this option was available to existing customers whose current mortgage was availing of a tracker interest rate, and allowed these customers the choice to take the benefits of their current tracker interest rate with them when buying a new home.

Under this option, customers were able to keep their existing tracker interest rate on a *"like for like"* basis for an amount and term equivalent to their existing mortgage, with any additional borrowing being subject to the Provider's new business interest rates available at that time. The Provider states that it is important to note however that holding a mortgage on a tracker interest rate at the time of applying for the Tracker Portability Mortgage option *"did not guarantee or provide for automatic approval of a new mortgage"* as all new credit facility requests were subject to assessment in line with the Provider's credit criteria.

The Provider states that it considers that *"there may be an element of confusion with regard to the customers' understanding of the Tracker Portability option"* in that, the Provider did not stipulate that the Complainants could retain the First Complainant's mortgage on a tracker interest rate for a period of six months following the sale of the property secured by that mortgage as this would have resulted in the Provider retaining an unsecured mortgage for a period of six months. The Provider states that it allowed a period of six months from the time that the existing mortgage was redeemed for a customer to port the tracker interest rate to a new mortgage borrowing. It further states that there was no onus on the Complainants to redeem the First Complainant's existing mortgage prior to submitting their proposal for a new mortgage under the Tracker Mortgage Portability option. However in order to allow any new mortgage to be drawn down on a Tracker Mortgage Portability interest rate, the First Complainant's existing mortgage would have been required to be redeemed in full.

The Provider submits that it *"holds no records relating to any information which may have been provided to the customers prior to the redemption of the first named customer's [Redacted] sole named mortgage"*. It outlines that the First Complainant's mortgage was redeemed on **18 October 2012** and *"The circumstances surrounding the redemption of his mortgage were not disclosed to the Bank at that time."*

The Provider submits that in **November 2012** it received a joint mortgage proposal from the Complainants which provided for a joint mortgage of €359,870, over a term of 29 years based on the Tracker Mortgage Portability option, with any additional monies falling outside the allowable amount to be based on the applicable market interest rate.

The Provider states that in order for it to determine whether the Complainants met with its credit criteria, there was a requirement to assess the proposal in line with the Provider's applicable credit policy at that time, which included determining repayment capacity, financial status checks and an affordability assessment. The Provider states that this assessment was necessary to determine if the level of the Complainants' income was sufficient to meet all existing and proposed commitments.

The Provider details that the next step in the process was a full mortgage application where applicants were asked to submit relevant supporting documentation where appropriate. It states however that the Complainants' initial affordability assessment had "failed" and therefore the Provider would not have asked them to complete a full mortgage application as it may have given a "false expectation" that the mortgage application would be approved when it would not. It outlines that on completion of the affordability assessment which included the Complainants' income and outgoings, the Provider determined that the Complainants did not meet the Provider's criteria under income multiples, loan to value, debt service ratio and net disposal income, amongst other criteria, and the proposal was declined and did not progress to the full mortgage application stage.

The Provider submits it would not be appropriate to disclose full details of its credit assessment criteria as this information is "commercially sensitive". However it details that "Debt Service Ratio" and "Net Disposable Income" were two of the criteria it used for determining affordability and repayment capacity. It outlines that Debt Service Ratio (DSR) is "Total Financial Commitments expressed as a percentage of Net Monthly Income" and Net Disposable Income (NDI) "must be considered after the DSR calculation has been completed". It details that it also considered income multiples and loan to value, amongst other criteria. It submits that the Complainant's proposal in **November 2012** did not meet the criteria for DSR and NDI.

The Provider submits that the Complainants appealed this decision. The Provider received a further proposal from the Complainants in **December 2012** for a joint mortgage of €325,000 over a 26 year term, based on the Tracker Mortgage Portability option with any additional monies falling outside the allowable tracker portability amount to be based on a one year fixed interest rate. The Provider states that this proposal "passed" its affordability assessment and the Complainants' proposal was "agreed" on **07 December 2012**, however this agreement was subject to receipt of a full mortgage application and relevant supporting documentation and a further assessment by the Provider's Mortgage Underwriting Team.

The Provider submits however that on **15 January 2013** it was informed that the proposed purchase of the property by the Complainants had fallen through and in light of this the

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Complainants' mortgage proposal did not progress any further. It states that it *"holds no records relating to any formal discussions or information provided to the customers after being informed in January 2013 that the proposed purchase of their property had fallen through."*

The Provider states that it is important to note that there was no onus on it to offer additional or otherwise, credit facilities in relation to any proposal submitted and it is a matter for the Provider's own commercial discretion as to whether or not to do so. The Provider further states that it has no information or records which relate to any meetings referred to by the Complainants. It submits that it would not have sought completion of a full mortgage application and supporting documentation in circumstances whereby it was advised that the application was not proceeding.

The Provider states that the Complainants were not provided with formal mortgage approval in **2012** nor were they provided with a Letter of Loan Offer from the Provider in that regard.

The Provider states that following the assessment of the Complainants' mortgage application received in **July 2014**, it was satisfied that the Complainants met the Provider's criteria and their application was subsequently approved by the Provider's Mortgage Underwriting Team, and in line with this they were furnished with and accepted a formal Letter of Loan Offer in respect of their mortgage. It states that the Tracker Mortgage Portability option previously available to the Complainants was withdrawn by the Provider in **late 2013** and therefore was not available to the Complainants in **2014**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider deliberately prolonged the processing of the Complainants' mortgage loan application in **2012**, so that the 6-month period to port their existing tracker mortgage to a new property would expire.

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.

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

Following the issue of my Preliminary Decision, the Complainants made additional submissions on **31 August 2020**. The Complainants' submissions were exchanged with the Provider and the Provider indicated it had no further submissions to make.

Having considered the Complainants' additional submissions and all of the submissions and evidence furnished by both parties to this office, I set out below my final determination.

The issue to be determined is whether the Provider deliberately frustrated the mortgage application process to prevent the Complainants availing of the Tracker Portability Product in **2012**. In order to adjudicate on this complaint, it is necessary to review and set out relevant provisions of the Complainants' mortgage loan documentation and also to consider the interactions between the Complainants and the Provider during the period between **2012** and **2014**. It is also necessary to set out the relevant provisions of the First Complainant's mortgage loan which was taken out in **November 2005** and redeemed in **October 2012**.

At the outset, it is important to point out that this office will not interfere with the commercial discretion of a financial service provider with respect to a decision to accept or reject a consumer's application for credit, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of **Section 60 (2) of the Financial Services and Pensions Ombudsman Act 2017**.

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The Provider issued a **Revised Offer of Advance** to the First Complainant on **22 November 2005** which detailed as follows;

1. *"Amount of Credit Advanced: 350,000.00 Eur*
 2. *Period of Agreement: 30 Years 0 Months*
- ...
- Interest Rate: 3.2900%"*

The **Special Conditions** relating to the loan detailed as follows;

"The [Provider] Home Loan fixed rate of interest applicable at the date of this letter is 3.2900% per annum and this rate will apply until 31 October 2007. At the end of the fixed rate period the loan will automatically revert to the [Provider] Variable Home Loan Rate and [the Provider] may offer to continue the Advance at a fixed rate of interest for such a period and at such a rate as it may decide.

..."

The First Complainant signed the **Acceptance and Authority** on **23 November 2005** on the following terms;

"I/We the undersigned accept the within Offer of Advance on the terms and conditions set out above and overleaf and in the Bank's standard form of Mortgage."

It appears that the First Complainant's mortgage loan account was drawn down on an initial fixed interest rate of 3.29%. I have not been provided with any evidence which shows that this mortgage account was switched to a tracker interest rate at some point prior to **2012**, however, it does not appear to be disputed between the parties that this is what occurred.

I note that the Provider wrote to the First Complainant by letter dated **10 November 2012** which detailed as follows;

"Thank you for your payment of Euro 293,984.27, received on 18/10/12, to redeem this mortgage account.

...

We redeemed your account as of 18/10/12 and it is now closed."

As part of the investigation of this complaint, the Provider was asked to furnish a copy of the **mortgage proposals** which were submitted by the Complainants in **November 2012**

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and **December 2012**. The Provider has submitted that *“the Bank does not hold any copy of either proposal or file relating to the customers’ lending proposals”*.

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from 01 July 2007) and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows;

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

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

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

In circumstances where it is submitted that the lending proposals submitted by the Complainants in **November 2012** and **December 2012** respectively did not proceed to formal application stage, it does not appear that the Provider was required to retain these documents for a period longer than six years from the date the proposals were received.

A **Suitability Statement** signed by both the Provider and the Complainants on **6 November 2012** has been furnished in evidence and details as follows;

“Important Notice – Statement of Suitability

...

<i>Date of meeting</i>	<i>06/11/12</i>
<i>Time of meeting</i>	<i>15.09PM</i>

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Thank you for taking the time to meet with me. [The Provider] offers products and services on an information only basis and does not recommend or advise a particular product. Having discussed and gathered sufficient personal information from you the following products offered were discussed:

- *Fixed Rate Mortgage*

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

- *Fixed Rate Mortgage*

...

The customers looking to port their existing [Provider] tracker mortgage with a balance of €292870 with a term of 23 yrs 2 mths at a rate of 1.5% on a like for like basis.

You consider the Fixed Rate Mortgage suitable for you because:

- *You are an existing home owner looking to purchase a new home*
- **Fixed rate** – *you wish to fix your repayment over a fixed term to allow you to budget your monthly outgoings and to ensure your repayments remain unaffected by rate changes over the fixed term.*

You have chosen an introductory fixed rate of 3.95% for 1 years, at the end of this term you have the option of rolling onto the standard variable rate. An increase of 2% above the current standard variable rate 4.45% will mean that your scheduled repayment would be €426.00 based on a mortgage of €67,000 over a 29 year term.

Note: *The above is for illustration purposes only, based upon the information you have given and is neither an approval in principle nor an offer of credit. Your mortgage will be processed subject to normal lending criteria and relevant credit scoring approval, as appropriate."*

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The Provider has furnished in evidence a copy of a **Mortgage Application Form** which has not been signed by the Complainants, however, it does not appear to be disputed that this is the application form completed by the Complainants.

Page 3 of the application form details as follows;

"Are You: The Owner A Tenant Other

The Complainants have ticked the box next to *"The Owner"*. In response to the question *"If other, please give brief details"* the Complainants have written *"Tracker Porter Mortgage Case 292870 @ 1.5% for 23yr 2 mths."*

In **Section 1.5: Your mortgage requirements**, in response to the question *"Amount of loan"* the Complainants have written *"67,000"*. In response to the question *"Type of interest rate required"* the option *"Fixed interest rate (repayment will remain unchanged for the fixed rate period)"* is ticked.

An undated internal Provider document has been furnished which details as follows;

"Purpose of Borrowing

[The Complainants] are looking to port their existing tracker mortgage onto a new property being purchased for 455k. The couple are looking to port the redeemed mortgage balance of €292870 across onto a new property with a balance of €67000 to be provided at new lending rates.

...

The couple are currently living with their parents after selling their previously mortgaged property with [the Provider]. It was sold for 275K against a mortgage debt of 292K the bank had of a 106%LTV debt.

They are looking to replace this lending facility with a total loan just shy of 360K against a property worth at least 455K giving the bank an LTV debt of 79%.

...

Recommendation

If we are taking [the First Complainant's] income as an average over the last two years the mortgage will fall down on affordability as while his tracker rate of 1.5% is reasonable the term remaining is short at 22 years 2 months.

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If however we can be realistic and take his income at something closer to the actual profit this year the application will fall inside all parameters.

...

While the bank understands this case is borderline the customer sold his old property at a big loss compared to what they paid for it and are now looking for our help in purchasing their new family home and are putting 95K of their own funds into it reducing our risk. Please approve."

It appears that in **November 2012** the Complainants were seeking a mortgage for the loan amount of €359,870, comprising the tracker mortgage balance of €292,870 plus additional funds of €67,000.

The Provider has detailed that the Complainants' mortgage proposal submitted to the Provider in **November 2012** was declined by the Provider and the Complainants appealed the Provider's decision to decline their proposal.

Provision 4.24 of the **CPC 2012** provides;

"Where a personal consumer's formal application for credit is turned down by the regulated entity, it must clearly outline to the personal consumer the reasons why the credit was not approved. The regulated entity must offer to provide the reasons, on paper or on another durable medium, to the personal consumer. If requested by the personal consumer, the regulated entity must provide the reasons, on paper or on another durable medium, to the personal consumer."

It is disappointing that the Provider has not indicated to this office why it has not provided evidence of its declination of the proposal. Nonetheless, it does not appear to be in dispute between the parties that the Provider outlined to the Complainants that the mortgage proposal was declined in **November 2012** and did not proceed to formal application stage.

The Complainants, in their post Preliminary Decision submission dated **31 August 2020**, detail that the Provider "*never provided details of why [their] application failed even though [their] set of accounts proved [they] were able to repay all loans in a very comfortable manner*".

It is important for the Complainants to be aware that setting and applying the Provider's lending criteria is a matter that is within its own commercial discretion.

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The Provider was within its right to decline the application in circumstances where it was of the view that the Complainants' application carried an unacceptable credit risk for the Provider.

An email has been provided in evidence with the date and sender details redacted. However, it appears to be an internal email between two employees of the Provider and details as follows;

"I have completed a new mortgage application form that should be closer to what you require

I amended the address by stating the joint address but apart from that the address is correct. [Redacted] is the old tracker mortgage address but they have sold it and no longer live there

I checked policy and it is definitely 2 years audited accounts we require for salary confirmation and we use the gross figure. It's up to the underwriter to check the calculator against their income levels for net income

Can we get this passed to [redacted] or another underwriter and I'll chase up his accountant for his signature and tax clearance cert at this point as we are looking for a number of exceptions to this case?"

A **Mortgage Application Appeal Form** dated **27 November 2012** has been provided in evidence which appears to have been completed by the Provider. In **Section 4: Submissions** it details as follows;

"[The Complainants] are seeking to purchase a new PDH, having recently sold their old property.

It's a tracker porting case, the new PP is €455K and they were seeking to borrow €359,499 – €292,499 at tracker rate 1.5% and €67,000 of new lending.

We sought to use [the First Complainant's] self employed earnings for 2012 only [illegible] in our assessment as an exception rather than [Remainder illegible]"

In **Section 5: Branch Comments/Additional Submissions** it details as follows;

"[The Complainants] can still proceed with this house purchase if we agree to lend the revised amount of €325,499 as detailed above.

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The calculations based on average 2 years earnings and reduced amount give the following results:

NDI €2150

DSR 45.5%

IM 4.7 times salary

LTV 71%

The couple have evidenced savings of €100,000 with [the Provider] (10K spent on deposit, balance 90K). They also have 6K in [redacted] savings evidenced and had been gifted 15K from [redacted] to help with the purchase giving a total contribution of €121,000. [Redacted] is willing and able to gift them a further 10K to bridge the gap should we agree to lend the €325,499.

I ask for us to proceed with the case on the reduced amount their [sic] are a lot of positives points in this case. The customers have a good mortgage lending history with [the Provider], having previously borrowed 350K over 30 years. The couple have built up a significant savings balance while also servicing their [Provider] mortgage over the years. [The First Complainant] is having a good trading year and business is improving year on year. The couple show prudent spending habits and have no other loan commitments. The LTV on the security will be very favourable at 71%.

In closing, I would like to state that, the applicants have shown themselves to have a good understanding of their finances and are striving to buy a bigger home for a young family. [The First Complainant] is to be admired for running a profitable small business in [remainder illegible]"

A further internal email dated **2 December 2012** details as follows;

"Hi ...

Can you throw an eye over this case and support the appeal if so inclined?

I think it's a fair request. Underwriters want to approve 307K, I'd need 325K to progress. Under a bit of time pressure on it so I'm looking to get it to [redacted] this evening if possible."

A further internal email dated **3 December 2012** details as follows;

"I am happy to support here for the following reasons:

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- *Clients have carried a [Provider] mortgage in amount of €350k over the last 8 years without any arrears history, indeed they were able to pay a lump sum off same from accrued savings. This demonstrates affordability and repayment capacity with a high degree of certainty.*
- *It is fit and proper that a two year income average should be used, but the fact the income is trending upwards gives a measure of comfort for the bank. It is also positive that the accountant has confirmed that income will be in the €70,000's for 2012 which mirror's the 2011 performance*
- *The clients have no short term debt and costs associated with childcare have been factored in*
- *Clients are disciplined savers and have been able to build up accrued savings – this again, adds comfort for the bank in relation to this case.*
- *While the NDI is outside criteria at 45.5% the additional amount sought is not excessive at €18k.*
- *Existing long term customers with a proven tracker record”*

It appears that the Provider was willing to approve a loan amount of €325,499 for the Complainants in **December 2012**. This was €34,371 less than the loan amount of €359,870 originally sought by the Complainants in **November 2012**.

The Provider has detailed that *“the proposal met with the Bank’s lending criteria and the customers’ proposal was agreed on 7 December 2012”*. Again I have not been provided with evidence of any interactions between the parties that occurred on **7 December 2012**. Nonetheless, the evidence before me supports the Provider’s position that the Complainants’ appeal in **December 2012** was approved by the Provider, albeit on a reduced loan amount. Certainly the correspondence quoted above, show that the Provider’s representatives were supportive of the application on the part of the Complainants.

The Provider further submitted that *“However on 15 January 2013, the Bank was informed that the proposed purchase of the property by the customers had fallen through. In light of this, the customers’ mortgage proposal did not progress any further.”* Again, I have not been provided with evidence of any interaction that purportedly took place on **15 January 2013**. It is disappointing that in its response to this complaint the Provider has referred to communications which it has failed to provide in evidence to this office. I note that the Complainants have submitted that *“the proposed purchase of the property fell through as the bank would not lend enough finance for us to purchase the property even though my business accounts at the time showed we could afford a lot more.*

This was the banks way of prolonging our application so they could try to eliminate the tracker. We were to draw down on the discounted variable rate which was on top of the existing tracker we had which was to be ported over to the new mortgage."

Emails between the Complainants and the Provider's representative dated **04 February 2013** were furnished in evidence by the Complainants. The first email from the First Complainant to the Provider details as follows;

"How are you? I was expecting an email from you before or after christmas regarding the mortgage we were discussing previously but i never received anything. Not to worry. At present we are bidding on one particular house and I need you to clarify the amount of money we agreed on that I could borrow. Also you agreed with me that from the day I sold my previous house that I would be able to retain the tracker mortgage deal for one year from the date of sale. I need you to clarify this for me please as I need to know where I stand if we get outbid on this house we are bidding on at the moment. I need to know I have a period of up to October this year to buy a property and retain the tracker deal. October 2013 will be 1 year from when the previous property was sold."

The Provider's representative responded by email dated **05 February 2013** as follows;

"The agreed borrowing amount is 325K in total.

*292870 at tracker
32130 at SDV*

I'll refer back to you this afternoon with the tracker porting term remaining."

No evidence has been provided to this office by either party to show whether the Provider's representative reverted to the First Complainant with details of *"the tracker porting term remaining"*. I note that the Complainants have submitted that they were *"never replied to by [the Provider's representative] in relation to the tracker which is where our mortgage application died until 2014"*.

Having considered the submissions of both parties to this Office, it does not appear to be disputed between the parties that the Complainants were informed by the Provider from the outset that they had a six-month period from the date of sale of the property to avail of the Tracker Mortgage Portability option. It appears that the six-month period would have elapsed in **March/April 2013** in circumstances where the property was sold in **October 2012**.

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The Complainants, in their post Preliminary Decision submission dated **31 August 2020**, outline as follows:

“[The Provider] should have issued us the option of a tracker mortgage which they did not even though they stated it was still available until the end of 2013 in which case we would have been in a far superior position to purchase a property suitable to us and our family”

However no evidence has been provided by either party which shows that the Complainants were advised by the Provider at any stage that the “*porting term*” would be a period of one year.

In any event, having considered the evidence, it appears to me that the mortgage application did not proceed in **2013** because of the Complainants’ dissatisfaction with the reduced loan amount available from the Provider in **December 2012**. The Complainants themselves have submitted that “*the amount [the Provider] approved was way below what we required to purchase a property suitable for us and our family*”.

The evidence does not support the Complainants’ position that the Provider “*took advantage of the situation knowing that if they took their time, the 6 months would expire and my tracker mortgage would be lost*”. The evidence shows that the Provider engaged with the Complainants during the application process and the appeal process. Based on the evidence available to me it does not appear that there was any further contact between the Provider and the Complainants in relation to the mortgage application after **February 2013**.

There is no evidence that the Provider acted in a matter that was unreasonable, unjust, oppressive or improperly discriminatory in dealing with the Complainants’ mortgage application in **November/December 2012**. The Provider was entitled to decline the Complainants’ initial application in circumstances where it was of the view that the loan would pose a credit risk to the Provider. This is a matter of commercial discretion. It appears that the Provider was subsequently willing to move forward in **December 2012** with a mortgage application for a reduced loan amount, however, it does not appear from the evidence that this application was progressed.

I note that the Complainants completed and signed a further **Mortgage Application Form** on **28 July 2014**. In **Section 1.5: Your Mortgage Requirements**, in response to the question “*Type of interest rate required*” the Complainants have selected the option “*Variable interest rate (repayments may increase/decrease)*”. The other option was “*Fixed interest rate (repayment will remain unchanged for the fixed rate period)*”.

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The Complainants, in their post Preliminary Decision submission dated **31 August 2020**, outline as follows:

“the reason we signed the mortgage application in july 2014 on the rates provided was because we didnt have an option for the tracker when we should have initially from owning one on our previous mortgage. We should have been allowed to move the tracker to a new mortgage on the terms mentioned on the letter above by paying a variable rate on the excess borrowed. We were renting at the time and it was cheaper to purchase a property at the time hence signing but our repayments now should be far less then what they are.”

The evidence does not support the Complainants’ contention. The evidence shows there was no legal obligation on the Provider to allow the Complainants to carry a tracker interest rate from one mortgage loan to another mortgage loan over an unlimited timeframe up to July 2014 as the Complainants have suggested.

The Provider issued a **Loan Offer** dated **20 August 2014** to the Complainants.

The **Important Information** section of the Loan Offer details as follows;

1. *“Amount of credit advanced* : €420,000.00
2. *Period of agreement* : 26 Years

...

WARNING: VARIABLE RATE LOANS- THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.

WARNING: THE RATE QUOTED IN THIS LOAN OFFER MAY BE WITHDRAWN OR AMENDED BEFORE YOUR LOAN IS DRAWN DOWN. THIS CAN HAPPEN AS A RESULT OF FLUCTATION IN MARKET RATES OR THE BANK’S DECISION TO CHANGE RATES. IF THIS HAPPENS, YOUR INTEREST RATE WILL BE REPLACED BY THE AMENDED RATE. WE WILL TELL YOU OF ANY CHANGE BEFORE DRAW DOWN.”

Page 2 of the Loan Offer details as follows;

“Purpose of Loan : House Purchase

...

Loan Type : Dis Var SVR -0.40%
Capital and Interest

Loan Amount : €420,000.00

/Cont’d...

Interest Rate : 4.1%
Interest Type : Discount Variable
Loan Term : 26 Years"

The **Specific Loan Offer Conditions** detail as follows;

"The Discounted Variable rate quoted shall be subject to variation prior to drawdown in accordance with any variations in the Standard Variable rate offered by the lender."

The **Mortgage General Terms and Conditions** detail as follows;

"16. Interest Rate

(a) All loans are subject to the Bank's Mortgage Rate at the date the loan is drawn down. Subsequently, the interest rate may vary in accordance with the terms and conditions of the Loan Offer.

..."

The Complainants signed the **Loan Acceptance** on **28 August 2014** on the following terms and conditions;

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

The mortgage loan documentation issued to the Complainants on **20 August 2014** provided for a discounted variable interest rate of 4.1%. If the Complainants did not want to pursue this option as they were unhappy with the rate applicable to the mortgage, they could have declined to accept the Provider's offer. Instead the Complainants accepted the Provider's offer by signing the **Loan Acceptance** on **28 August 2014**. The choice to take out the mortgage loan on the terms and conditions offered by the Provider in **2014** was a choice that was freely made by the Complainants.

There was no legal obligation on the Provider to allow the Complainants to carry a tracker interest rate from one mortgage loan to another mortgage loan over an unlimited timeframe as the Complainants have suggested. When the First Complainant redeemed the mortgage loan that he held in his own name, the contractual entitlement to a tracker rate of interest on that mortgage loan ended.

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The Complainants were then eligible to apply to the Provider for a further mortgage loan and avail of the portability product. However the Provider was entitled and indeed obliged under the ***Consumer Protection Code 2012*** to assess the suitability and affordability of new lending to the Complainants. The Provider however was not willing to lend the Complainants the amount that they wanted to borrow, as it was outside of their lending criteria. This was a decision the Provider was entitled to make. The Tracker Portability option was no longer available by the time they proceeded with a further mortgage application in **July 2014**.

For the reasons set out in this Decision, I do not uphold the complaint.

Conclusion

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

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



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

30 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.

