



<u>Decision Ref:</u>	2020-0408
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The complaint relates to two 'Buy-to-Let' mortgage loan accounts held by the Complainants with the Provider, as follows:

- **Mortgage loan account ending 0482**
The loan amount advanced on mortgage loan account **0482** was in the sum of €132,000.00 and the term of the loan was 25 years. The mortgage loan was drawn down in **February 2004**. A tracker interest rate of ECB + 0.75% was applied to the loan on **29 February 2008**. An Agreement to Amend Mortgage Loan Offer Letter was signed in **September 2013**, moving the mortgage loan account from a tracker interest rate (1.250% per annum) to a BTL variable interest rate (2.250% per annum).
- **Mortgage loan account ending 5818**
The loan amount advanced on mortgage loan account **5818** was in the sum of €57,800.00 and the term of the loan was 25 years. The mortgage loan was drawn down in **May 2007**. The Offer Letter provided for a fixed interest rate of 4.99% for the first 3 years, thereafter moving to a tracker interest rate of ECB + 1.5%. An Agreement to Amend Mortgage Loan Offer Letter was signed in **June 2014**, moving

the mortgage loan account from a tracker interest rate (1.750% per annum) to a BTL variable rate (2.750% per annum).

The Complainants' Case

The Complainants submit that they accepted and signed two mortgage loan offers with the Provider in **December 2002** and **April 2007**, secured on a Buy to Let property.

The Complainants submit that due to the economic downturn in **2013**, they began to experience financial difficulties. They outline that the First Complainant's employment was terminated due to the economic crisis and they "*were unable to make full repayments*".

The Complainants detail that "*we strongly feel that we were coerced by [the Provider] to revoke our tracker mortgage rate for interest only payments for a few years while we were under extreme financial pressure*". The Complainants outline that the documentation was "*signed under tremendous stress when we felt we had no other option but to comply with the lender*".

The Complainants detail that they strongly believe that they were "*unfairly treated*" by the Provider and they would like the tracker interest rates restored to the mortgage loan accounts.

The Provider's Case

The Provider outlines as follows with respect to each mortgage loan account:

Mortgage Loan Account ending 0482

The Provider submits that the Complainants entered into an agreement with the Provider by Mortgage Loan Offer dated **18 December 2002** for the loan facility of €132,000 for a term of 25 years, to assist the Complainants with the purchase of an investment property. The Provider details that the offer letter was signed and accepted by the Complainants on **18 December 2002** and the mortgage loan was drawn down on **9 February 2004**. The Provider outlines that the offer letter provided for a fixed rate of interest of 3.89% for a term of 12 months and thereafter reverting to a standard variable rate of interest. The Provider outlines that the Complainants signed a Mortgage Form Authorisation ("MFA") to apply a tracker interest rate to the mortgage loan on **29 February 2008**.

The Provider details that the Complainants entered into the following agreements amending the terms of the mortgage loan account ending **0482**:

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- a. MFA signed and accepted **23 May 2007** - interest only for 3 years;
- b. MFA signed and accepted **12 May 2010** - interest only for 6 months;
- c. MFA signed and accepted **1 November 2010** - interest only for 6 months;
- d. MFA dated **11 June 2011**, signed and accepted **17 June 2011** - interest only for 6 months;
- e. MFA dated **26 January 2012**, signed and accepted **2 February 2012** - interest only for 6 months;
- f. MFA dated **3 September 2012**, signed and accepted **9 September 2012** - interest only for 12 months;
- g. MFA dated **19 September 2013**, signed and accepted **25 September 2013** – interest rate amended from a tracker interest rate to a BTL variable rate and a further 12 months interest only;
- h. MFA dated **10 March 2015**, signed and accepted on **11 March 2015** – interest only for 4 months;
- i. MFA issued on **19 June 2015**, signed and accepted on **02 July 2015** – term extension by 244 months.

Mortgage Loan Account ending 5818

The Provider submits that it agreed to advance a further loan facility to the Complainants in the sum of €57,800 for a term of 25 years by way of Mortgage Loan Offer dated **04 April 2007**. The Provider outlines that the mortgage was secured by way of charge on the BTL property. The Offer Letter was signed and accepted by the Complainants on **9 April 2007** and the mortgage loan was drawn down on **14 May 2007**. The Second Offer Letter provided for a fixed interest rate at 4.99% for the first 3 years, thereafter reverting to a tracker interest rate of ECB + 1.5%.

The Provider details that the Complainants entered into the following agreements amending the terms of the mortgage loan account ending **5818**:

- a. MFA signed and accepted **12 May 2010** - interest only for 6 months;
- b. MFA signed and accepted **1 November 2010** - interest only for 6 months;
- c. MFA dated 11 June 2011 signed and accepted **17 June 2011**- interest only for 6 months;
- d. MFA dated **30 January 2012** signed and accepted **2 February 2012** - interest only for 6 months;
- e. MFA dated **3 September 2012**, signed and accepted **9 September 2012** - interest only for 12 months;
- f. MFA dated **26 May 2014** signed and dated **25 June 2014** - amended from tracker to a BTL variable rate and a further interest only period for 12 months;

- g. MFA issued on **19 June 2015**, signed and accepted on **2 July 2015** – term extension by 205 months.

The Provider submits that the Complainants had 6 years forbearance on mortgage loan account ending **0482** during **2007-2013** and 3 years forbearance on mortgage loan account ending **5818** during **2010-2013**.

The Provider details that both of the Complainants' mortgage loan accounts were due to commence capital and interest repayments in **September 2013**, in accordance with the terms and conditions of the Offer Letters and subsequent MFAs and it contacted the Complainants both by telephone and by letter. The Provider outlines that the Complainants advised the Provider they were not in a position to meet the increased repayments and a **Standard Financial Statement (SFS)** was issued to the Complainants in **July 2013**. The Provider submits that it received the completed SFS in **August 2013**, along with an authority to deal with the Complainants' third party representative.

The Provider submits that it advised the Complainants and their third party representative on **27 August 2013** that both mortgage accounts were on a tracker interest rate and if forbearance was offered and accepted that it would be subject to the Provider's Buy-to-Let Pricing Policy.

The Provider details that the Buy-to-Let Pricing Policy was introduced by the Provider in **November 2012**, following engagement with the Central Bank of Ireland. The Provider details that as part of a financial review, if a change of terms and conditions was deemed appropriate (for example, Interest Only) the Buy-To-Let tracker customer would be offered a new standard variable rate mortgage for the life of the loan, which is initially priced at 1% above what they were then paying on the tracker mortgage.

The Provider submits that the offer made to the Complainants in respect of a further interest only period was assessed by reference to the criteria in the Provider's Buy-to-Let pricing policy. The Provider details that the Complainants were offered the 12 month interest only periods on both mortgage loans with the requirement that the loans would convert from the tracker interest rates to the BTL variable interest by way of Agreements to Amend the Mortgage Loan Offer Letters that issued in **September 2013**. The Provider outlines that the Complainants' circumstances were carefully considered when offering them the alternative repayment arrangements.

The Provider submits that **Condition 4(d)** of the terms and conditions of the original loan offer letters dated **18 December 2002** and **4 April 2007** detail that the Provider "*may in its*

absolute discretion and with the consent of the Borrower, vary any payment of principle, interest or any other amount payable in respect of the loan”.

The Provider submits that it can exercise commercial discretion when amending loan terms in response to requests for renegotiation of terms, where mortgages are outside the scope of the **Code of Conduct on Mortgage Arrears (“CCMA”)**. The Provider details that as the mortgage was secured on a BTL investment property, the Complainants are not afforded the protections of CCMA.

The Provider submits that the effects of the interest rate change were explained to the Complainants and it disclosed the relevant information, making no effort to conceal the interest rate adjustment or the implications for the Complainants. The Provider refers to **provisions 6.9 and 6.10 of the Consumer Protection Code 2012 (“CPC 2012”)** and submits that it complied with the provisions of the **CPC 2012**.

The Provider submits that the Complainants were not happy with the offer they received in **September 2013** and stated they would not agree to the forbearance on the mortgage loan accounts. The Provider details that this option was respected and acknowledged by the Provider, who explained the effect of the decision to them. The Provider outlines that there is no evidence that the Provider exerted any pressure, duress or “*coercion*” on the Complainants to accept the offer. The Provider details that, at the time, the Complainants decided to take up an offer of assistance from family and thereafter return to capital and interest repayments. The Provider submits that it is entirely a matter for the borrower whether to accept the amended terms offered. The Provider notes that the Complainants chose not to accept the offers in **September 2013** and remained on tracker interest rates for both mortgage loan accounts until they approached the Provider in **January 2014**, requesting that the Provider re-issue the Agreements.

The Provider submits that in **January 2014** the Complainants and their representative advised the Provider that they could no longer meet the capital and interest payments on the mortgage loan accounts and requested the Provider to re-issue the Agreements from **September 2013**. The Provider outlines that it then re-issued the Agreements to Amend the Mortgage Loan Offer Letters, as requested by the Complainants, which were accepted by the Complainants and were duly implemented.

The Provider submits that the Complainants were advised at all times that they could, and should, seek legal and financial advice regarding the Agreements or any forbearance arrangement, and the Complainants were free to refuse the offer of forbearance if they

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wished. The Provider highlights that the Complainants employed the services of a third party representative.

The Provider details that it acted fairly with respect to the offer of the alternative repayment arrangement and details that it issued all letters to the Complainants pursuant to its obligations under provision 8.4, 8.6, 8.8 and 8.9 of the **CPC 2012**. The Provider submits that it was complied with the **CPC 2012**. The Provider also makes reference to Chapter 2 of the **CPC 2012**. The Provider states that it is satisfied that it has acted honestly, fairly and professionally in the best interests of the Complainants. The Provider submits that it put forward the best solution for both parties.

The Provider believes that the Complainants have not evidenced any elements of coercion or malpractice by the Provider. It asserts that the evidence supports and outlines that the Complainants clearly understood the amended terms which were duly signed and returned by them to the Provider.

The Complaint for Adjudication

The complaint for adjudication is that the Provider inappropriately removed the tracker interest rate from the Complainants' mortgage loan account ending **0482** in **September 2013** and from the Complainants' mortgage loan account ending **5818** in **June 2014**.

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

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

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

At the outset, it is important to point out the jurisdiction of this Office in complaints regarding arrears handling. This Office can investigate the procedures undertaken by the Provider regarding the arrears, in this matter under the **Consumer Protection Code 2012**, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainant, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, 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**.

In order to adjudicate on this complaint it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation (accounts ending **0482** and **5818**) and to consider the interactions between the Complainants and the Provider in **2013** and **2014**.

Mortgage loan account ending 0482

The Loan Offer Letter dated **18 December 2002** with respect to mortgage loan account ending **0482**, outlines as follows;

<i>“Amount of Credit Advanced:</i>	<i>Eur 132,000</i>
<i>Period of Agreement:</i>	<i>300 months</i>
...	
<i>Type of Loan (e.g. Annuity or Endowment):</i>	<i>Annuity</i>
<i>Interest Rate and whether Fixed or Variable:</i>	<i>3.89% Fixed</i>
<i>Fixed Rate Period (if interest rate is fixed)</i>	<i>12 months.</i>

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Normal Review Date (if applicable)

30.12.2003”

Part 3 – The General and Special Conditions details as follows;

“4. Repayment

- (a) *Unless otherwise stated herein or agreed by the Bank in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower’s bank or other financial institution. For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and any other amounts payable and for an endowment loan shall comprise of interest and such other amounts only. The due dates for repayment of the Loan are those dates that are from time to time set by the Bank. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender at its absolute discretion.*
- (b) *In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Bank may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.*
- (c) *If so agreed in writing by the Bank, the Loan may be repaid in 10 or 11 payments in any year of the term and such payments (unless the Bank at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during the year for that Loan.*
- (d) *The Lender may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amount payable in respect of the Loan.*

...

6. Variable Interest Rates

- (a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Bank’s discretion upwards or downwards. If at any time a variable rate of interest applies,*

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repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.

- (b) The Bank shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.5% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

7. Fixed Interest Rates

- (a) The Bank may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed.*

In the case of a fixed rate loan, the increase shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Bank's fixed rate available for the fixed period selected by the Borrower at the date of draw down.

- (b) The Bank shall have sole discretion to provide any further or subsequent fixed rate period. If the Bank does not provide such a further or subsequent fixed rate period or if the Bank offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*

....”

The **Acceptance of the Loan Offer** details as follows;

“I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions”.

The Complainants signed and accepted the **Loan Offer Letter** on **18 December 2002**. It is clear that the mortgage loan offer envisaged a fixed interest rate for 12 months and

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thereafter in accordance with **General Condition 7(b)** the Provider had the discretion to offer a further fixed interest rate period. If the Provider did not offer a further fixed period or if the Provider offered a choice of interest rates and the Complainants failed to exercise a choice, then the interest rate applicable to the loan would be a variable interest rate. The variable interest rate contained within the Complainants' mortgage loan documentation was not a tracker interest rate that was linked to the European Central Bank (ECB) rates.

The Complainants signed a **Staff Application for Change to Tracker Mortgage – Mortgage Form of Authorisation** on **29 February 2008** that applied a tracker interest rate to the Complainants' mortgage loan on the following terms;

“The interest rate shall be no more than 0.75% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan.”

Mortgage loan account ending 5818

The Loan Offer Letter dated **04 April 2007** with respect to mortgage loan account ending **5818**, outlines as follows;

<i>“Amount of Credit Advanced:</i>	<i>€57,800</i>
<i>Period of Agreement</i>	<i>25 Years</i>
<i>...</i>	
<i>Type of Loan:</i>	<i>Interest Combo</i>
<i>Interest Rate:</i>	<i>4.990% Fixed”</i>

Part 4 – The Special Conditions of the **Mortgage Loan Offer Letter** details as follows;

...

(iii) *The interest rate applicable to the Loan is a fixed rate and is fixed for the period set out in Part 1 of this Offer Letter. At the end of the fixed rate period the Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, in accordance with general condition 7(b) of the Offer letter, the interest rate applicable to the Loan will be a variable interest rate. This variable interest rate may vary upwards or downwards. The interest rate shall be no more than 1.50% above the European Central bank Main Refinancing Operations Minimum Rate (“Repo Rate”) for the term of the Loan. Variation in interest rates shall be implemented by the*

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lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.

Part 5 – The General Conditions contains the same terms for **General Condition 4, 6 and 7** as extracted above with respect to mortgage loan account ending **0482**, except with respect to **General Condition 6(c)** where the rate above EURIBOR is 0.1% with respect to mortgage loan account ending **5818**.

The **Acceptance of the Loan Offer** details as follows;

“1. I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions.”

The Mortgage Loan Offer Letter of **04 April 2007** that has been furnished in evidence is not signed by the Complainants. However it is not in dispute between the parties that this Mortgage Loan Offer Letter was accepted by the Complainants and the funds were drawn down by them.

It is clear from the mortgage loan documentation that a three year fixed interest rate would apply to the mortgage loan account and on the expiry of the fixed rate, a tracker interest rate of ECB + 1.50% would apply. The mortgage loan notes show that the mortgage loan was drawn down on **31 May 2007** and a tracker interest rate of ECB + 1.5% was applied to the loan on **31 May 2010**.

It is not in dispute between the parties that the Complainants entered into a number of alternative repayment arrangements for interest only repayments with respect to both mortgage loans (accounts ending **0482** and **5818**) between **2007** and **2014**. The Provider has furnished in evidence copies of the **Mortgage Form of Authorisations** signed by the Complainants to apply those interest only periods to the mortgage loans.

The Provider submits that it issued Interest Only Review letters to the Complainants with respect to their mortgage loans on **19 June 2013** and **20 June 2013**. I have not been furnished in evidence with these letters.

The Provider's notes from its internal system record that outgoing calls were made to the Complainants on **26 June 2013** and **08 July 2013**. The Complainants contacted the Provider by telephone on **09 July 2013**. I have not been provided in evidence with an audio recording of the telephone call, however, the Provider has furnished the note from its internal system of the call, which outlines as follows;

*"Both BTL accs on I/O and due to revert on 17 and 18/09 to full C*I repayments of approx. [a/c ending 5818] e299.97 and [a/c ending 0482] e699.82 Corresp issued to inform cust of same on 20.06.13, Both accs on tracker and no arrears, Advised cust of meaning of call, cust advised will need to discuss with husband re mortgage and if can afford full repayments, advised customer if needs forbearance will need to complete new SFS for assessment."*

The content of the call is not in dispute between the parties. It appears from the Provider's notes that further calls took place throughout **July 2013** and **early August 2013** with respect to the end of the alternative repayment arrangements in **September 2013** and the requirement to complete a **Standard Financial Statement (SFS)** if the Complainants were not in a position to meet the capital and interest repayments on the mortgage loans.

The Complainant completed and signed a **SFS** on **20 July 2013**. The SFS and supporting documents were submitted to the Provider under cover of letter dated **20 August 2013**.

The SFS recorded the "*Reason(s) for Review/Arrears*" as "*Int Only Term coming to an end. Renewal required pending establishment of career changes (both)*"

The SFS recorded the Complainants' monthly income, monthly expenditure, monthly debt payments, property assets and non-property assets. The documents supporting the SFS included a document entitled "Provider submission" which recorded projected annual income of €38,708 and annual expenses of €47,664, with a shortfall of €8,956. The submission also recorded as follows;

Conclusion

Identified shortfall of €8,956 is worrying, however [the Complainants] have the where with all to cover payments at present levels for the coming 12 months, with the comfort that things ought to improve in terms of establishing both [the Complainants'] career paths.

Indeed it could be pointed out that they have taken strategic decisions to reposition themselves and that they are now about to benefit from these decisions although in terms of income growth etc it could be another year before this will be

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a reality and at that stage they could be well placed to consider moving on to annuity type payments.

Position as set out gives great comfort going forward however it must be tempered with the fact that incomes will only grow incrementally especially for [Second Complainant] if she attains a regular/permanent position – all the indications are good she has put herself in the shop window – got a 6 month contract and also has [details of position]

Proposed

1. *Interest only structure to continue for another 12 months on all 4 mortgages on both PDH and RIP*
2. *6 month reviews to be implemented”*

The Provider’s notes from its internal system record the following telephone calls. I have not been provided in evidence with an audio recording of those telephone calls, however, it is not in dispute between the parties that these calls took place and that the notes are a record of those calls. The Provider has furnished the notes from its internal system, which outline as follows;

• **Telephone Call between the Provider and the Complainants on 27 August 2013**

“OC to Cust mobile [number] who advises there should be LOA to deal with [name of third party representative] in the pack received and on further review there is a LOA to deal with [name of third party representative]. Enquired if Cust available to meet with me to go through the SFS & Cust [Second Complainant] advised that with [job] & [number redacted] kids it might be difficult initially and Cust confirmed that I should first contact [name of third party representative] and explain to him the different options as I explained to the Cust that both RIP’s on Tracker rates so if alternative repayment arrangement accepted, may lose tracker rate.”

• **Telephone Call between the Provider and the Complainants’ representative on 02 September 2013**

“IC from [Complainants’ representative] with whom we have LOA to deal with. [Complainants’ representative] advised that he was speaking to the Customers who are reluctant to lose tracker rate on BTL Property, however, [Complainants’

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representative] agreed that they want to proceed with original proposal of 12 months i/o on all accounts subject to 6 months review.”

The Provider’s internal notes of the assessment of the SFS record as follows;

“Customers have stated on SFS that they have savings of [€]11k, livestock worth [€]25k and [redacted] machinery worth [€]440k. It is also noted that family assistance is available from [Second Complainant’s] father who is the owner of [business]. This would be further evidence of ability to return to C&I in the future.

Figures as per SFS showing very small surplus when Interest Only repayments are calculated. Customers have however been meeting this level of repayments without income from [Second Complainant salary].

This would show that repayment capacity is evident for this level of repayment. Long term sustainability of these mortgages is dependent on [Second Complainant’s] employment being made permanent and success of [First Complainant’s named] business. Customers seeking additional time for business expansion and [Second Complainant] contract will cease in April ’14. Based on this I would look to approve 12 months Interest Only on all 4 accounts. Both BTL mortgages subject to 1% loading and loss of tracker rate. Repayment capacity is evident for this.”

Two agreements issued to the Complainants on **19 September 2013** with respect to mortgage accounts ending **0482** and **5818**. Both letters detailed as follows:

“If you accept the accompanying offer, it will mean moving you from your present tracker rate of interest to a new rate of interest and we explain what this will mean for you in the enclosed form of Agreement.

.....

Accepting the form of Agreement will have long term implications for you. For example:

.....

- *You will lose the present tracker variable rate for the remaining term of the mortgage.”*

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I note that **Section A** of the relevant forms details as follows;

Mortgage Account ending 0482	Mortgage Account ending 5818
<p><u>“SECTION A: WHAT THIS FORM DOES Conversion from Tracker Rate to New Interest Rate Type</u></p> <p><i>Tracker to BTL Variable</i></p> <p><i>This form converts the interest we charge on the Loan from a tracker rate which is 1.250% per annum at present to a BTL Variable rate. The BTL Variable Rate will apply for the remaining term of the Loan (except for periods in which you and we agree in writing to fix the interest rate for the Loan). At present this BTL Variable rate is 2.250% per annum.</i></p>	<p><u>“SECTION A: WHAT THIS FORM DOES Conversion from Tracker Rate to New Interest Rate Type</u></p> <p><i>Tracker to BTL Variable</i></p> <p><i>This form converts the interest we charge on the Loan from a tracker rate which is 2.000% per annum at present to a BTL Variable rate. The BTL Variable Rate will apply for the remaining term of the Loan (except for periods in which you and we agree in writing to fix the interest rate for the Loan). At present this BTL Variable rate is 3.00% per annum.</i></p>

Section B of both of the forms with respect to mortgage loan accounts ending **0482** and **5818** details as follows;

“SECTION B: FURTHER TERMS AND CONDITIONS OF THIS FORM

B.1 ANY COMMITMENT TO A TRACKER RATE ENDS

Any commitment or obligation in your Mortgage Loan Offer Letter or otherwise to provide you with a tracker variable rate for the Loan, now or in the future, will end once you complete and return this form. This Clause takes precedence over any condition of your Mortgage Loan Offer Letter, this form or elsewhere concerning interest in general or tracker variable rates in particular including any Special Condition. The phrases “tracker rate”, “tracker interest rate” or “tracker variable rate” are popular expressions to describe an interest rate that is an agreed margin above the European Central Bank (“ECB”) Main Refinancing Operations Rate (including where it is described in your Mortgage Loan Offer Letter or elsewhere as the ECB Main Refinancing Operations Minimum Bid Rate). A tracker rate follows or “tracks” movements in this ECB rate. The word “tracker” and phrases containing that word are used with that meaning in this form.

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B.7 This Form will amend the Mortgage Loan Offer Letter

- 7.1 *This form will amend the terms and conditions that apply to the Loan, including the Mortgage Loan Offer Letter.*
- 7.2 *This form does not change the maturity date of the Loan which will remain as provided for in the Mortgage Loan Offer Letter unless Section A says so (if it does say so, the term of the Loan is extended by the maturity date shown in Section A).*
- 7.3 *Unless amended or replaced by this form, each of the terms and conditions of the Mortgage Loan Offer Letter will remain in full force and effect. (For example, the General Terms and Conditions contain clauses dealing with interest in general, additional interest charges on overdue payments, variable interest rates and fixed interest rates.*
- 7.4 *If there is a conflict between a term or condition in the Mortgage Loan Offer Letter and a term or condition in this form, the term and condition in this form will take priority.*

B.10 About Your Acceptance of this Form

- 10.1 *You have five weeks from the date of this form shown on page 1 (the "Acceptance Period") to consider it and to return it to us properly completed.*
..."

Section C of the forms contained indicative comparisons of the cost of the tracker interest rate and the variable interest rate and details of the advantages and disadvantages of the tracker rate and other rates.

The Provider's notes from its internal system record that outgoing calls were made to the Complainants on **23, 26 and 28 September 2013**. The Provider contacted the Complainants by telephone on **02 October 2013** with respect to the mortgage loans on their principal private residence, which are not the subject of the complaint to this office and the mortgage loans on the buy to let property, which are the subject of this complaint to this office. I have not been provided in evidence with an audio recording of the telephone call, however the content of the notes is not in dispute. The Provider's note from its internal system of the call, outlines as follows with respect to the mortgage loans which are the subject of this complaint;

"....Advised [a/c ending 5818] has called for full payment but has missed so also missed a payment on this.....Advised [0482] hasn't called yet, will suspend DD and cust can call to reinstate and manually pay i/o.

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Advised will call Wed morning to bring all payments utd. Cust happy with this .Making personal note and suspending DD.....cust advised is sending back MFAs for NON CCMA properties today.”

The Complainants’ representative issued a letter to the Provider dated **11 October 2013**, an extract of which appears below;

“Given the special circumstances of the case, it is pleasing that they are receiving the bounce of the ball, however in relation to their RIP Mortgages which are at Tracker Rates there are indeed some issues that require confirmation or teasing out. I note that it is proposed to move them on to a special Variable rate of 1% over the respective Tracker rates and that this would apply for a 1 year period.

Accordingly I should be obliged if you would clarify

- 1. That this 1% differential will remain for the remaining term*
- 2. Or that rate applicable will then revert to a matrix type variable rate*
- 3. Or that some other type of Variable hybrid rate will apply after 12m*

First observations would suggest that Tracker Rate is to go, replaced by an initial 12m Variable rate and after that Standard Variable rate to apply.

As previously said initial reactions to what was being proposed was positive however when the differential in losing Tracker rate and retaining same was fleshed out and when the sums were done up, it appears that by opting for this “concession” a considerable loss throughout the remaining term of the RIPs loans would be incurred and that economically it would be quite silly to commit to this.

In the circumstances and with the benefit of significant reflection, I have suggested to [the Complainants] that they make every effort possible to retain these Tracker rates and judging from your correspondence it would appear that your bank is now anxious that they resume full annuity payments on these loans if these tracker rates are to be retained.

Clearly these levels of payments are currently beyond them, as set out in recently submitted SFS, however having discussed the situation with both of them and having set out the additional proposed costs throughout the life time of these loans. [The Complainants] have decided to take up [the Second Complainant’s] family offer of assistance and to this end her father has indicated that he will fund them the difference in payments over the next 12 months, between Interest Only on RIPs and Full Annuity Payments @ current tracker rates on these RIPs.

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.....

Again I thank you and commend you for your efforts to date and assure you of [the Complainants'] ongoing commitments to fully honour their obligations."

It appears that between **October 2013** and **January 2014**, the Provider contacted the Complainants on a number of occasions with respect to missed repayments and arrears arising on the mortgage loan accounts.

It appears from the Provider's notes that it received an email from the Complainants' representative on **23 January 2014**, which detailed as follows;

"I refer to a raft of correspondence re the above and related home loans.....Recently, [the Complainants] indicated through me, that they wished to try and retain tracker rates which would have subjected them to immediate annuity payments which commenced for the last 2 months. They hoped that they could lean on external sources to help them in this quest, but having received [sic] the situation they now go their own way and to this end request that your bank reissue, i.e. IO for 12 month at new tracker linked rate with the rate then migrating to a new variable rate – effect of which is that the tracker will be lost forever. The [Complainants] are fully aware of the consequences of this request but have tried to go at it to preserve tracker rates and sadly cannot do it. Indeed, they are to be recommended [sic] for the honesty in their efforts and the frankness of their conclusions notwithstanding the fact they fully realise the value they are forsaking. I assume that Offer letters will issue and that interest only payments will apply in early course."

The Provider submits that it issued two Agreements to Amend Mortgage Loan Offer Letter to the Complainants on **29 January 2014**, with respect to mortgage loan account ending **5818** and **30 January 2014**, with respect to mortgage loan account ending **0482**. I have not been furnished in evidence with either of these documents. It is not in dispute that these documents issued and in any event the content of the agreements is not central to the adjudication.

It appears that with respect to mortgage loan account ending **5818**, Agreements to Amend Mortgage Loan Offer Letters were re-issued on **13 March 2014**, **26 May 2014** and **11 June 2014** as the forms were not completed by the Complainants correctly.

It appears that with respect to mortgage account ending **0482**, the Provider accepted the Agreement to Amend Mortgage Loan Offer Letter dated **19 September 2013**, signed on **25 September 2013** to effect the change to mortgage loan account ending **0482**.

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The Agreement to Amend Mortgage Loan Offer Letters which were accepted by the Complainants contain the same text in Section A and Section B, as the forms that issued in **September 2013**, as quoted above, save for with respect to mortgage loan account ending **5818**, Section A, noted the tracker rate was then 1.75% and the BTL variable was 2.75%.

Section C of the forms provide as follows;

“SECTION C: LEGAL NOTICES

(PLEASE READ THESE CAREFULLY)

Warning: if you switch to an alternative interest rate, you will not be contractually entitled to go back onto a tracker interest rate in the future.

INDICATIVE COMPARISON OF THE COST OF YOUR LOAN AT ITS TRACKER INTEREST RATE TO THE COST OF YOUR LOAN AT THE RATE & ON THE TERMS OFFERED IN THIS FORM (Consumer Protection Code, Provision 6.9)”

Mortgage Account ending 0482	Mortgage Account ending 5818
<p><i>(a) We estimate you are now obliged to pay us monthly instalments of €707.37 each and that the total cost to you of the Loan would be €11,880.77. This estimate (i) is based on the tracker interest rate and the terms and conditions that apply to the Loan before you accept this form; but (ii) assumes you pay instalments of principal and interest on a normal annuity basis (for example, this estimate takes no account of any alternative repayment arrangement we may have entered into with you before we sent you this form.)</i></p>	<p><i>a) We estimate you are now obliged to pay us monthly instalments of €303.94 each and that the total cost to you of the Loan would be €9,439.77. This estimate (i) is based on the tracker interest rate and the terms and conditions that apply to the Loan before you accept this form; but (ii) assumes you pay instalments of principal and interest on a normal annuity basis (for example, this estimate takes no account of any alternative repayment arrangement we may have entered into with you before we sent you this form.)</i></p>

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<p><i>(b) If you accept this form, we estimate you will be obliged to pay monthly instalments of €222.68 each during the Agreed Period and of €805.73 thereafter. The total cost of the Loan would be €23,080.77. These estimates are based on the rate of interest and other terms (for example, your reduced payment obligations during the Agreed Period) provided for in this form. The increase in the cost of the Loan is because (i) the interest rate offered in this form is higher than your present tracker interest rate; and (ii) the Loan principal will not be repaid as quickly as set out in the initial version of your Mortgage Loan Offer Letter.</i></p> <p><i>(c) Each estimate (i) assumes you met your payment obligations to us in full and in time; (ii) is indicative only, for example, the amounts you pay in regular instalments may differ because of future changes in interest rates; (iii) assumes you make 12 monthly payments each year even if you have another arrangement with us; and (iv) includes arrears, even if arrears are not being capitalised as part of this agreement.</i></p>	<p><i>b) If you accept this form, we estimate you will be obliged to pay monthly instalments of €129.22 each during the Agreed Period and of €345.63 each thereafter. The total cost of the Loan would be €15,889.58. These estimates are based on the rate of interest and other terms (for example, your reduced payment obligations during the Agreed Period) provided for in this form. The increase in the cost of the Loan is because (i) the interest rate offered in this form is higher than your present tracker interest rate; and (ii) the Loan principal will not be repaid as quickly as set out in the initial version of your Mortgage Loan Offer Letter.</i></p> <p><i>c) Each estimate (i) assumes you met your payment obligations to us in full and in time; (ii) is indicative only, for example, the amounts you pay in regular instalments may differ because of future changes in interest rates; (iii) assumes you make 12 monthly payments each year even if you have another arrangement with us; and (iv) includes arrears, even if arrears are not being capitalised as part of this agreement.</i></p>
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The **Agreement to Amend Mortgage Loan Offer Letters** also contained a section entitled

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“Advantages and disadvantages of tracker and other rates (Consumer Protection Code, Provision 6.9)” which outlined the advantages and disadvantages of a Tracker Variable Rate, a BTL Variable Rate and a Fixed Rate.

The Complainants signed the **Acceptance of the Agreement to Amend Mortgage Loan Offer Letter** with respect to mortgage account ending **5818** on **25 June 2014** and with respect to mortgage loan account ending **0482** on **25 September 2013** on the following terms:

“By signing this form:-

- (1) I confirm I understand both the form and the information given to me in the letter that the Lender sent me with this form;*
- (2) I accept and agree to be bound by the terms and conditions of the form;*
- (3) I understand I am moving from a tracker rate of interest using this form. I have read and understood each part of the form concerning that, including Section C.*

(4) PLEASE TICK AT LEAST ONE OF THE FOLLOWING BOXES:

- I have received independent legal advice on this form.*
- I have received independent financial advice on this form.*
- I did not get independent legal or financial advice on this form because I have sufficient appreciation of financial and legal matters and of the meaning of this form to understand this form completely. I am satisfied to sign it without such advice; I will never raise the lack of advice as a reason to question this form.”*

The Complainants signed and accepted the **Agreement to Amend Mortgage Loan Offer Letter**, with respect to mortgage account ending **5818** having ticked each of the relevant boxes to confirm that they had received independent legal advice and independent financial advice on the agreement. The Complainants signed and accepted the **Agreement to Amend Mortgage Loan Offer Letter**, with respect to mortgage account ending **0482** having confirmed that they had received independent financial advice on the agreement.

The Complainants submit that they were *“coerced”* into switching from the tracker interest rate to a variable interest rate on both mortgage loans. There is no evidence that the Provider *“coerced”* the Complainant to enter into the arrangements in **2014**.

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The Complainants were seeking an alternative repayment arrangement. It was within the Provider's discretion to decide whether to grant the Complainants an arrangement and in doing so, whether the Provider wished to introduce any different terms to the agreement. The Provider, in accordance with its Buy-to-let pricing policy offered a standard variable rate which was to start at 1% above the current tracker interest rate on the Complainants' mortgage loans.

It is important for the Complainants to be aware that at all times they remained obliged to comply with the terms and conditions of the original **Mortgage Loan Offer Letters**, which were signed and accepted by them, that is, to make the capital and interest repayments on the mortgage loan.

I accept that the Complainants did not want to give up the entitlement to the tracker interest rates of ECB + 0.75% and ECB + 1.5% on the mortgage loans. This is very understandable. However the reality of the situation at that time from **September 2013** leading into **early 2014**, was that the Complainants could not service the repayments required within the original terms of the loans. The Complainants were seeking to agree an alternative arrangement and it was a matter for them to decide whether to accept the alternative arrangements on offer by the Provider. If the Complainants were not happy with the terms of the **Agreements to Amend Mortgage Loan Offer Letters**, including the amendment to the interest rate, the Complainants could have decided not to accept the offer made by the Provider. Indeed this is what happened in **October 2013**, when the Complainants' representative rejected the offers on the basis that the Complainants did not want to give up the entitlement to a tracker interest rate. However the Complainants' representative subsequently re-approached the Provider seeking that the arrangements be re-offered. It was expressly recognised by the Complainants' representative that the Complainants were aware that the tracker interest rates were being given up.

Provision 6.9 of the **CPC 2012**, outlines as follows;

"a regulated entity offers a personal consumer the option to move from a tracker interest rate to an alternative rate on their existing loan; the lender must provide the personal consumer with the following information on paper or on another durable medium:

- i. Indicative comparisons of the cost of the monthly repayments at the personal consumer's current tracker interest rate and each of the alternative rate(s) being offered;*
- ii. An indicative comparison of the total cost of the loan if the personal consumer continue with the existing tracker interest rate and the total cost of the loan for each of the alternative rate(s) and terms being offered. Any*

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assumptions used must be reasonable and justifiable and must be clearly stated; and

- iii. *Details of the advantages and disadvantages for the personal consumer of the tracker interest rate compared to each of the other rate(s) being offered.*

The following warning statement should also appear with the information above, in circumstances where a personal consumer will not be able to revert to a tracker interest rate if they move to an alternative rate:

Warning: If you switch to an alternative interest rate, you will not be contractually entitled to go back onto a tracker interest rate in the future.

This provision does not apply to a mortgage on a primary residence covered by the Code of Conduct for Mortgage Arrears which is in "arrears" or "pre-arrears" as defined in the Code of Conduct for Mortgage Arrears."

Neither of the Complainants' mortgage loans were secured on a primary residence. The appropriate information and warnings under **provision 6.9** of the **CPC 2012** were contained in the **Agreements to Amend Mortgage Loan Offer Letters**. Albeit that the **Agreement to Amend Mortgage Loan Offer Letter** signed with respect to mortgage account ending **0482** did not contain updated comparisons as of **January 2014**.

Therefore I cannot accept that the Provider incorrectly removed the tracker interest rates from both of the Complainants' mortgage loan accounts. The Complainants were seeking a forbearance arrangement from the Provider. The Provider was willing to accede to the request for a further 12 month interest only term but on the condition that the Complainants agreed to change the interest rate applicable to the mortgage loans from a tracker interest rate to a variable interest rate. The Provider issued the offers to the Complainants to this effect in the form of the **Agreements to Amend Mortgage Loan Offer Letters**, which contained the appropriate warnings under the **CPC 2012** in respect of moving from a tracker interest rate to a variable interest rate. The Complainants accepted the **Agreements to Amend Mortgage Loan Offer Letters** having confirmed that they had taken independent advice with respect to each mortgage loan.

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

Conclusion

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

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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**

13 November 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.