



<b><u>Decision Ref:</u></b>	2020-0412
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

##### **Background**

This complaint relates to a mortgage loan account ending **7404** held by the Complainants with the Provider. The mortgage loan account that is the subject of this complaint is secured on the Complainants' private dwelling house.

The Complainants signed a loan offer letter for loan account ending **4907** in **March 2005**, in the amount of €250,000 over a term of 25 years. The interest rate applicable to the mortgage loan was a tracker interest rate of ECB + 0.79%.

In **April 2005**, the Complainants redeemed mortgage loan account ending **4907** and drew down mortgage loan account ending **5024**, in the amount of €250,000 over a term of 25 years. The interest rate applicable to the mortgage loan ending **5024** was an "Offset" variable interest rate of 3.00%.

The Complainants signed a loan offer letter dated on **29 September 2006** for mortgage loan account ending **7404**, the mortgage loan account the subject of this complaint, in the amount of €320,000 over a term of 23 years and 9 months. Mortgage loan account ending **7404** was drawn down on **07 November 2006** and the interest rate applicable to the mortgage loan was a 5 year fixed interest rate of 4.65%. Mortgage loan account ending **5024** was redeemed once mortgage loan account ending **7404** was drawn down.

### The Complainants' Case

The Complainants contend that on **23 March 2005**, they entered a mortgage agreement for mortgage loan account ending **4907** in the amount of €250,000 over a term of 25 years on a tracker interest rate of ECB +0.79%.

The Complainants submit that the purpose of mortgage loan account was to discharge their loan liabilities on their family home, and to also fund the purchase of a foreign holiday home. The Complainants outline the schedule of repayments for the holiday home were as follows:

- "a. October 2004: €3,000.00 (paid)*
- b. November 2005: €58,000.00 (to be paid)*
- c. October 2006: €134,340.00 (to be final payment)"*

The Complainants contend that they sought advice from the Provider as to how it could be facilitated that they could earn interest on the monies borrowed as they did not require €134,340.00 of the borrowings until **October 2006**. The Complainants submit that the Provider advised them of, and recommended the *"Offset Arrangement"*. The Complainants submit that they did not understand, or at any time they were not advised that the Offset Arrangement was a mortgage product itself and this would end mortgage loan account ending **4907**, which was on a tracker interest rate.

The Complainants contend that *"contrary to the file note provided by the Provider"* dated **26 April 2005**, the Complainants *"at no stage sought to dispose of their ECB Tracker loan in favour of an 'Offset Mortgage'"* and submit that up until receipt of the Provider's formal response to this office dated **29 January 2019**, understood that they held an ECB tracker interest rate mortgage with the Provider.

The Complainants outline that in **June 2006**, due to an upgrade to the holiday home being purchased, they required an additional €80,000 and outline that in or around **September 2006**, they requested a *"top up"* loan of €80,000 with the Provider.

The Complainants submit that they met with a member of the Provider's staff on **27 and 28 September 2006** to discuss the *"top up"* loan and she advised the Complainants that they should fix the interest rate on their mortgage loan account as she *"fully expected interest rates to increase"*.

The Complainants contend that it is “*materially misleading*” for the Provider to submit that these meetings were to discuss the possible interest rate options available for the proposed loan of €320,000.

The Complainants contend that this meeting was to organise the sum of €80,000 to facilitate the upgrade to the holiday home. The Complainants assert that contrary to the “*implicit assertion*” by the Provider, they did not seek advice on interest repayments and the Provider “*positively advised the Complainants to fix their interest repayments*”.

The Complainants outline that on foot of this “*specific advice which had been proffered*” by an employee of the Provider, they opted to apply a 5 year fixed rate to the entire sum repayable (both the original amount and the “*top up*” amount). The Complainants submit that the employee never explained to them that “*fixing the rate was fixing it to a standard variable rate and that upon expiry of the said fixed rate term, the fixed rate would accordingly revert to a standard rate rather than the ECB variable rate*”.

The Complainants contend that under the **Consumer Protection Code 2006** (the “**2006 Code**”), the Provider has a duty to advise customers of the consequences of an action if the Provider takes the initiative with a particular action. The Complainants submit that during the meetings held on **27 and 28 September 2006**, the Provider voluntarily proffered financial advice to the Complainants to “*fix their repayments*”. The Complainants contend that under **Section 1.6 of the 2006 Code**, the Provider was under a positive obligation to inform the Complainants that if they fixed their interest rates, upon the expiry of the fixed rate period their mortgage loan account would revert to a standard variable rate, and not their existing ECB tracker rate. The Complainants submit that this material information was never communicated to them.

The Complainants further outline that under section **1.2 and 1.3 of the 2006 Code**, the Provider was under a positive obligation to “*act with due, skill care and diligence in the best interest of*” the Complainants and not “*recklessly, negligently or deliberately mislead*” the Complainants as to the advantages or disadvantages of a particular product. The Complainants contend the member of staff having advised them to apply a fixed interest rate to their mortgage loan account without advising them it would deprive them of their tracker interest rate acted “*recklessly, or in the alternative and without prejudice to the forgoing, negligently mislead the Complainants as to the real or perceived advantages of the fixed interest rate*”.

The Complainants further contend that even if they took the Provider's submissions "*at face value*" as they are disputed by the Complainants, when advising the Complainants in **September 2006**, the Provider's staff failed to inform the Complainants that applying a fixed interest rate would result in them losing their Offset mortgage facility which held a "*more favourable interest rate than that subsequently provided*". The Complainants further contend that the Provider was under a positive obligation under **Section 1.6** of the **2006 Code** to do so.

The Complainants submit that the Provider acceded to this request and by way of loan agreement dated **29 September 2006** drew down a further €80,000. The Complainants contend that at all times they understood this to be a "top up" on their existing mortgage loan account ending **4907**, which was drawn down in **March 2005**.

The Complainants contend that "*contrary to*" their understanding and "*wholly without the properly informed agreement*" of the Complainants, the Provider "*unilaterally disposed*" of mortgage loan account ending **4907** and created a new 23 year 9 month mortgage. The Complainants outline that it was never explained to them that a "*complete disposal of their existing mortgage had occurred*". The Complainants submit that they understood that all of the entitlements and obligations of mortgage loan account ending **4907** were still in place, and if the tracker interest rate had been withdrawn from them it was "*without their informed knowledge or consent*".

The Complainants submit that the Provider issued them a rate options letter dated **22 August 2011**, which contained the option of a tracker rate but this was shaded over. The Complainants outline that upon enquiry with the Provider, they were informed that the option of an ECB tracker rate was not available to them.

The Complainants outline that on the expiry of the fixed rate period in or around **03 October 2011**, the mortgage loan account ending **7404** reverted to the standard variable rate instead of the ECB variable rate, as per the mortgage loan agreement dated **23 March 2005**.

The Complainants outline that in or around **31 January 2012**, the First Complainant contacted an agent of the Provider (the "**Member of Staff**") by telephone "*regarding the actions of [the Provider]*" and indicated that they were going to make a formal complaint to the Financial Services Ombudsman [now Financial Services and Pensions Ombudsman] regarding all of the matters which they felt were failings by the Provider. The Complainants submit that they have sought a recording of this telephone call, but the Provider has informed them that no such recording exists.

The Complainants submit that they wrote a letter dated **04 February 2012** to the Member of Staff, and the Member of Staff responded by way of letter dated **06 February 2012**, acknowledging receipt of their letter and also acknowledged the telephone call which took place on **31 January 2012**.

The Complainants outline that in a letter from the Provider dated **20 February 2012**, it invited the Complainants to attend a meeting with a representative of the Provider to carry out a full financial review of their situation.

The Complainants submit that they subsequently spoke to the Member of Staff on the telephone to arrange the meeting. The Complainants contend that on foot of this call, the Member of Staff should have known that the Complainants perceived and understood that the upcoming meeting was for the specific purpose of discussing the Complainants' complaint against the Provider. The Complainants submit that a meeting was arranged for **07 March 2012**, which was then postponed to **14 March 2012**.

The Complainants take issue with and dispute the content of "*purported notes taken from a meeting dated 7 March 2012*". The Complainants say "*emphatically, that the discussions of the said meeting... did not reflect, and could not reasonably be construed as having reflected, such an interaction between the parties*". The Complainants go on to submit that during the meeting with the Provider on **07 March 2012**, they made reference to the way they were treated by the Provider in **2005** and **2006** and repeated that they were unhappy with the poor advice and lack of fairness with which they were treated. The Complainants outline that they were then asked a series of questions regarding their finances and the First Complainant was asked if he required a loan or other financial products.

The Complainants submit that they are "*concerned at the degree of inaccuracy*" within the Provider's note of the meeting of **07 March 2012**, given the Provider's inconsistency "*...with the Complainants' clear recollection of the meeting*", the manifest favourability towards the Provider and the Provider's attempted reliance on the note.

The Complainants outline that on **14 March 2012**, they attended the meeting at a branch of the Provider. The Complainants submit that they emphasised their dissatisfaction to the Member of Staff regarding:

- a. The manner the Provider "*unilaterally and without the informed agreement*" of the Complainants removed their existing 25 year mortgage, and replaced it with a new mortgage repayable over a term of 23 years 8 months without any or any adequate explanation to the Complainants; and

- b. The manner in which the Provider purported to provide a 'top up' loan of €80,000 and "*positively*" advised the Complainants to apply a fixed interest rate to the entire mortgage loan account on the basis the Provider's agent expected interest rates to increase, in circumstances where the Provider did not "*provide any explanation whatsoever to the Complainants as to the effect of fixing their interest rates*" and particularly on the expiry of the fixed rate period, that the mortgage loan account would revert to the standard variable rate in circumstances where the Complainants understood it would be the tracker variable rate.

The Complainants outline that during this meeting, they made it clear to the member of staff that "*in the absence of [the Provider] providing an adequate remedy*", they would be making a formal complaint to the Financial Services Ombudsman (now the Financial Services and Pensions Ombudsman). The Complainants submit that the member of staff provided them with prepared papers dated **07 March 2012** and **13 March 2012** respectively outlining the benefits of a particular product the Provider offered at the time, and informed the Complainants that it would reduce their monthly interest rate from 4.44% to 3.97%.

The Complainants contend that the member of staff outlined to the Complainants that their monthly repayments would then be broadly in line with the ECB rates and this "*...drop should accordingly remedy any concerns they may have in respect of their change from the ECB variable rate to the standard variable rate*". The Complainants submit that this was a "*premeditated and calculated action on behalf of [the Provider]*". The Complainants contend that as lay people they consented to this solution and submit that the member of staff represented this change of product as permanent in nature.

The Complainants submit that the Provider knew or ought to have known that the representations made in the meeting on **14 March 2012** would not only be relied on but would be "*pivotal*" to the Complainants issuing a formal complaint to this office. The Complainants contend under **Section 2.6** of the **Consumer Protection Code 2012 (the "2012 Code")** that the Provider was under a mandatory obligation to disclose all material information in a way that seeks to inform the customer. The Complainants outline that by expressly representing the change to the new product as a remedy to the Complainants' complaint about having their tracker interest rate removed from their mortgage loan account, the Provider was under a positive obligation under **Section 2.6** to inform the Complainants that the change to this new product was only temporary in nature and could be unilaterally revoked by the Provider in the future. The Complainants' contend that the failure of the Provider to disclose this is a manifest breach of its mandatory obligations under **Section 2.6** of the **2012 Code**.

The Complainants outline that their mortgage loan account moved to this product on a lower interest rate on **13 April 2012**, and so they did not raise a complaint with this office. The Complainants submit that 6 months later, in **September 2012**, the 6 year limitation period came into effect in which the Provider could not be "*prosecuted*" for their actions in **September 2006**.

The Complainants outline that in **June 2013**, the Provider "*unilaterally revoked*" the Complainants' access to the product that had applied from **April 2012**, without any or adequate explanation and the Complainants interest rate reverted from 3.90% to 4.50%.

The Complainants submit that by representing to the Complainants in **April 2012** that the new product should remedy the matters complained of and then unilaterally revoking the product in **June 2013**, constitutes a "*deliberate and purposeful attempt to deprive the Complainants of relief by way of*" a complaint to this office. The Complainants contend that alternatively, it constitutes a "*negligent misrepresentation*" by the Provider that matters had been permanently resolved.

The Complainants submit that from **July 2013**, they sought copies of the minutes of the meeting held in March 2012 from the Provider, and submit that they received a letter from the Provider dated **22 January 2014** stating on "*...review of the minutes of the customers meeting held on 14<sup>th</sup> March 2012, it is noted that both [Complainants] agreed that [Member of Staff] had given them options and that they chose the 5 year fixed rate mortgage but regret that the ECB Tracker was now no longer available*". The Complainants submit that this is at odds with the Provider's formal response to this office, wherein the Provider submits that it "*...does not have a detailed note of the meeting which took place on 14 March 2012*". The Complainants contend that the manner in which the Provider has treated its meetings with the Complainants, and records of same, has been less than transparent.

The Complainants further outline that in a telephone call on **20 July 2015** with a member of staff of the Provider, he confirmed no minutes of the meeting exist. The Complainants contend that the express reference to minutes in the letter from the Provider dated **22 January 2014** "*...appears to constitute a calculated and deliberate attempt to mislead*". The Complainants contend that this is it at odds with the Provider's "*mandatory obligation*" to act honestly, fairly and professionally, in addition to correcting errors and handling complaints speedily, efficiently and fairly **under Sections 2.1 and 2.8 of the 2012 Code**.

The Complainants outline that they have “*suffered loss, damage, inconvenience and expense*” as a result of the Provider’s actions and are seeking the following:

- a. The Complainants’ mortgage loan account ending **7404** “*reverts*” to a tracker interest of ECB + 0.79% as per the loan offer letter for mortgage loan account ending **4907**, dated **23 March 2005**;
- b. The Provider pay the Complainants “*all monetary losses, charges and costs which the Complainants have incurred as a direct result of the Complainants having fixed their mortgage interest rate on 29 September 2006 pursuant to the advice of [the Provider]*”;
- c. An “*inquiry*” into the monetary losses specified at (b) above, and an account of same assessed by an independent actuary that the Provider fully discharges the costs of;
- d. The Provider pay the Complainants “*damages*” for loss, inconvenience and expense incurred as a result of the actions of the Provider in **September 2006**;
- e. The Provider pay the Complainants “*damages*” for loss, inconvenience and expense incurred as a result of the actions of the Provider in **September 2012**; and
- f. Any further order that this office sees fit.

### **The Provider’s Case**

The Provider submits that on **30 March 2005**, the Complainants signed and accepted a facility letter dated **23 March 2005** for an ECB Tracker interest rate loan of ECB + 0.79% in the sum of €250,000 under mortgage loan account ending **4907**. The Provider outlines that mortgage loan account ending **4907** was “*only drawn down for one night*” on **24 April 2005**.

The Provider goes on to outline that on **25 April 2005**, it appears the Complainants attended at a branch of the Provider and informed the Provider that they did not want a tracker interest rate loan and instead wished to draw down an “Offset Mortgage”. The Provider submits that the Complainants confirmed that they would lodge €50,000 into their current account with the Provider in order to avail of the “Offset” interest rate.



The Provider outlines that the Complainants “executed” a new facility letter dated **26 April 2005** for an Offset Mortgage in respect of mortgage loan account ending **5024**. The Provider submits that when mortgage loan account ending **5024** was drawn down in **April 2005**, mortgage loan account ending **4907** was “repaid and replaced” in full.

The Provider submits that the Complainants did not reference in their submissions that the Complainants’ tracker mortgage, mortgage loan account ending **4907**, was only drawn down for one day in **April 2005**. The Provider goes on to submit that the Complainants also did not reference the fact that they did not wish to avail of a tracker interest rate in **April 2005** and wished to avail of an “Offset” mortgage loan account therefore the Complainants subsequently lodged €50,000 into their current account in order to avail of the “Offset” mortgage. The Provider contends that the complainants were fully aware that an “Offset Mortgage” was a completely different loan product.

The Provider submits that in **September 2006**, the Complainants sought new loan monies to assist with the purchase of a holiday home. The Provider outlines that the Complainants met with the Provider to discuss possible interest rates and the options included availing of an ECB tracker interest rate, a 2 year fixed rate, a 3 year fixed rate and a 5 year fixed rate. The Provider submits that the employee who met with the Complainants no longer works with the Provider and it does not hold a detailed record of the meetings which took place in **September 2006** but does hold a handwritten note outlining the interest rates the Complainants were offered at these meetings.

The Provider submits that following the “customer advisory meeting”, the Complainants opted to take the 5 year fixed interest rate product.

The Provider submits that as the Complainants were seeking additional borrowings, a new mortgage was required. The Provider outlines that it approved a new loan in the amount of €320,000 which comprised of approximately €240,000 to repay mortgage loan account ending **5024**, and additional funds of approximately €80,000 to fund the purchase of the holiday home.

The Provider further outlines that the Complainants were issued a new facility letter dated **29 September 2006** for mortgage loan account ending **7407** and the terms and conditions confirmed that it was for a period of 23 years 9 months on a 5 year fixed interest rate, which was to revert to the Provider’s standard variable rate. The Provider submits that the Complainants signed and accepted the facility letter which confirmed that they were entering into a new loan facility for the entire sum of €320,000 on a 5 year fixed rate.

The Provider submits that it fully complied with its obligations under the **2006 Code**, and in particular **Section 1.6**, and indicates that in **September 2006**, it issued the Complainants

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with a ***“Final Financial Summary”*** which set out in detail the proposed terms and a summary of the new loan. The Provider outlines that, in addition to this, it issued the Complainants with a ***“Home Loan Quotation”*** document dated **29 September 2006** which stated on page 1 under the heading ***“Type of Interest Rate”*** that the loan was ***“Fixed to 3 October 2011 then Standard Variable Rate for the remainder of the term”***.

The Provider outlines that page 1 of the **facility letter dated 29 September 2006** for mortgage loan account ending **7407** confirms that it was a ***“Fixed Rate Home Loan for a period of 23 years and 9 months from drawdown”*** and page 2 confirms that the ***“Rollover date”*** was **01 October 2011** and this date is ***“...the start date of the standard variable interest rate at that time”***. The Provider outlines that **Clause 11.4** of the Terms and Conditions also states that ***“[u]nless a further Fixed Period is agreed in accordance with clause 11.3, at the end of a Fixed Period the rate of interest applicable to the Loan will revert to our then applicable variable home loan”***.

The Provider goes on to outline that **clause 12.1** of the facility letter dated **29 September 2006** makes it clear that that the Provider’s ***“variable home loan rate”*** is subject to change in response to market conditions contrary to a loan linked with the ECB Refinance Rate, as specified in **clause 12.2**. The Provider contends that the variable home loan rate ***“...clearly does not track the ECB Refinance Rate and there is nothing else in the facility documentation that makes that link”***.

The Provider submits that this facility letter was signed and accepted by the Complainants ***“...in the presence of their own solicitor”***.

The Provider submits that it wrote to the Complainants on **17 October 2006** to confirm that it had drawn down their ***“new 5 year fixed rate mortgage for EU320,000”*** and that it had issued €81,513.28 to the Complainants’ solicitors which represented the ***“...net proceeds from new loan once the existing mortgage was cleared (closing balance EUR238,486.72)”***.

The Provider outlines that the Complainants drew down mortgage loan account ending **7407** on **07 November 2006** in the amount of €320,000. The Provider contends that from the date of drawdown, the Complainants received annual statements which confirmed that the mortgage loan account was on a fixed interest rate. The Provider submits that the Complainants were aware or ought to have been reasonably aware that a new mortgage was required and at all times, the Complainants were furnished with new loan documentation which they applied for, accepted and signed.

The Provider submits that it issued the Complainants a ***“Rollover notification”*** letter dated **22 August 2011** as the fixed rate period on mortgage loan account ending **7407** was due to

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expire on **03 October 2011**. The Provider outlines that this letter offered the choice between a variable rate, a new fixed rate period or to *“revert to an ECB tracker rate with the margin which had applied before the fixed rate period”*. The Provider contends that as mortgage loan account ending **7407** had not previously been on a tracker interest rate, the ECB tracker rate option was not available to the Complainants and there was no contractual or regulatory obligation on the Provider to apply a tracker interest rate to mortgage loan account ending **7407** on the expiry of the fixed rate period in **October 2011**.

The Provider outlines that as the Complainants did not elect to apply a fixed interest rate, as per the terms of the facility letter dated **29 September 2006**, mortgage loan account ending **7407** reverted to the Provider’s *“home loan variable interest rate”*.

The Provider submits that it issued a letter to the Complainants dated **06 February 2012** confirming that if the Complainants were unhappy with how the Provider was dealing with their complaint, they could refer the matter to the Financial Services Ombudsman (now the Financial Services and Pensions Ombudsman). The Provider submits that **clause 26** of the loan facility letter for mortgage loan account ending **7407** also sets out the process whereby a customer can bring a complaint to this office.

The Provider submits that a meeting took place between the Complainants and the Provider on **07 March 2012**. The Provider outlines that a discussion took place at this meeting regarding the meeting which took place in **2006** and submits that a meeting note of the **March 2012** meeting states *“... [The Complainants] realised that the Manager had given them the options and they themselves chose the 5 Fixed rate but were annoyed that the ECB Tracker mortgage was no longer available to them after they came off the 5 year Fixed rate”*.

The Provider further outlines that there was discussion at this meeting about upgrading to a different product and contends that the benefits of upgrading were explained in detail to the Complainants. The Provider submits that a note of the meeting confirms that the Complainants were due to return on 14 March 2012 to sign the documentation for the *“discounted mortgage”* and a new credit card.

The Provider submits the Complainants attended at a branch of the Provider on **14 March 2012**, however it does not hold a detailed note of the meeting. The Provider states that the Complainants executed the documents for the *“discounted mortgage”* and the new credit card on this date.

The Provider outlines that the *“discounted mortgage”* product the Complainants opted for in **March 2012**, did not in any way preclude them from making a complaint to this office at that time or any point prior.

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### The Complaints for Adjudication

The complaints for adjudication are as follows;

- a. The Provider failed to inform the Complainants that when the 'top-up loan' was taken out in **September 2006**, their original mortgage loan account ending **4907** was disposed of and mortgage loan account ending **7404** was created;
- b. The Provider failed to advise the Complainants that by applying a fixed interest rate to mortgage loan account ending **7404** in **September 2006**, a tracker interest rate would not be available to them in the future;
- c. The Provider denied the Complainants their entitlement to apply a tracker interest rate to mortgage loan account ending **7404** in or around **October 2011**; and
- d. The Provider deliberately delayed in dealing with the Complainants' complaint in an effort to frustrate a complaint being made to the Financial Services Ombudsman's office. In this regard, the Complainants assert that the Provider proffered solutions to remedy the matters complained of in **March 2012** which were revoked a year later in **June 2013**.

### Decision

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

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

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict.

I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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

Following the issue of my Preliminary Decision, the following submission was received from the parties:

1. Email from the Complainants' representative received on **06 October 2020**.

This additional submission was exchanged between the parties.

Having considered the additional submission and all of the submissions and evidence furnished by both parties to this Office, I set out below my final determination in respect of this complaint.

In order to determine this complaint it is necessary to review and set out the relevant provisions of the Complainants' loan documentation in relation to all three mortgage loan accounts, as well as the interactions between the Complainants and the Provider when the Complainants applied for and drew down each of the mortgage loan accounts over the period between **2005** and **2012**.

- **Mortgage Loan Account ending 4907**

A Housing Loan Agreement issued to the Complainants on **23 March 2005** in respect of mortgage loan account ending **4907**.

The following are extracts from the mortgage loan documentation in respect of mortgage loan account ending **4907** relevant to the Complainants' complaint.

The **"important information"** section on **page 1** of the **facility letter** included the following;

<i>"Amount of credit advanced:</i>	<i>EUR 250,000.00 ("the loan")</i>
<i>Period of Agreement:</i>	<i>25 years from drawdown</i>
<i>Number of Repayment Instalments:</i>	<i>300 monthly, plus any final balance</i>
...	
<i>APR*:</i>	<i>2.80% variable</i>

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*\*Annual Percentage Rate of Charge"*

The "**Schedule**" section on **page 1** detailed as follows;

*"Rate of Interest: The total if the ECB Refinance Rate plus .79% (the Added Percentage), currently 2.79% p.a."*

This was signed and accepted by the Complainants on **30 March 2005**, and was witnessed by a solicitor.

The Provider has submitted into evidence a handwritten document entitled "File Note" which is dated **26 April 2005**. It details as follows:

*"ECB Tracker facility letters were signed & returned to branch. Customers called to branch yesterday re drawdown of mortgage & said it was an "Offset Mtg" they wanted. I explained that the ECB Tracker Rate did not apply but the customers were adamant that they were not made aware of same and were unwilling to accept a rate of 3.09% on the offset and also of going back through their solicitor at this stage.*

*Rang [Named Employee] in Bus. Development re sanctioning a rate of 2.99% on the offset on a once off basis. She agreed to same.*

*Also rang the District Manager regarding covering the full legal fees of EUR1000 – on a once off basis in a good will gesture towards customers as they were very annoyed at inconvenience caused to them and at the costs they incurred.*

*Customers are lodging EUR50,000.00 to their new current account to offset against Mtg. They will be buying a holiday home with same in about 18 months but wanted to offset in the meantime.*

*ECB Tracker was opened for 1 night & then closed and Internal switcher done*

*EUR250,000 To offset mtg. New facility letters signed by customers.*

*Customers were happy with this solution."*

The Complainants dispute that they expressed dissatisfaction with the tracker rate, but rather they sought advice from the Provider as to how they could earn interest on the monies borrowed, in circumstances where a substantial sum of the monies borrowed was

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not required to be transferred for the purchase until **October 2006** and the Provider recommended the Offset Arrangement.

The contemporaneous evidence does not support the Complainants' position. It appears from the above file note that mortgage loan account ending **4907** was drawn down on **25 April 2005** and the Complainants attended at a branch of the Provider on **26 April 2005** because they were unhappy with the mortgage loan being on a tracker rate of interest. It appears from the above that the Complainants were aware of the Offset mortgage product and negotiated a better rate than the rate on offer by the Provider for the Offset mortgage product.

It appears that the Complainants signed a second Housing Loan Agreement on **26 April 2005** with respect to mortgage loan account ending **5024**.

- **Mortgage Loan Account ending 5024**

A letter dated **26 April 2005** issued to the Complainants which details as follows:

*"We are pleased that you have chosen our Offset product which links your Offset Mortgage (with TRS if applicable) to your nominated Offset Account(s) thus creating your Offset Portfolio.*

***This Side-Letter together with the attached Offset Mortgage Facility Letter, the Terms and Conditions of the Offset Account(s) in your Offset Portfolio and the signed "How we use Personal Information" form, constitutes your Agreement with the Bank and we have advised that you should discuss fully the terms and effect of all these documents with your legal advisers.***

...

**TERMINATION**

*We will ensure when removing an Account from an Offset Portfolio that Validation will take place to ensure that the account is not the last Mortgage Account or linked Account causing an unwanted termination of the Offset Portfolio.*

*In the event that an Offset Portfolio is closed, then the remaining Offset Account(s) must be converted to an appropriate Current/ Savings Account. At the month end following the closure a final Statement will be sent to you and your offset Portfolio codification records will be removed from our database."*

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A **Housing Loan Agreement** also issued to the Complainants on **26 April 2005** in respect of mortgage loan account ending **5024**. The following are extracts from the mortgage loan documentation in respect of mortgage loan account ending **5024** relevant to the Complainants' complaint.

The **"important information"** section on **page 1** of the **facility letter** included the following;

<i>"Amount of credit advanced:</i>	<i>EUR 250,000.00 ("the loan")</i>
<i>Period of Agreement:</i>	<i>25 years from drawdown</i>
<i>Number of Repayment Instalments:</i>	<i>300 monthly, plus any final balance</i>
...	
<i>APR*:</i>	<i>3.00% variable</i>
...	
<i>*Annual Percentage Rate of Charge"</i>	

The **"Schedule"** section on **page 1** detailed as follows;

<i>"Purpose of the Loan:</i>	<i>As specified in your Loan Application Form dated 8<sup>th</sup> day of March 2005.</i>
....	
<i>Latest Drawdown Date:</i>	<i>25<sup>th</sup> April 2006</i>
<i>Rate of Interest:</i>	<i>Our Variable Offset Mortgage Rate Tier 3 Rate. Currently 2.99% p.a."</i>

The **Terms and Conditions** attached to mortgage loan account ending **5024**, detail as follows:

**"(3) Rate of Interest**

.....

*Interest will accrue on the balance of the Loan outstanding at the daily equivalent at our Offset Mortgage Rate at the Tier Rate indicated in the SCHEDULE of this Facility Letter ("Offset Mortgage Rate").*

*The balance outstanding will be calculated by allowing for Offset as set out in our Offset Current Account and Offset Savings Account Terms and Conditions. Interest is charged monthly in arrears and capitalised on our usual charging days (as well as after as before any demand for repayment*

/Cont'd...



*and/ or after any judgement) and upon termination of this Agreement.  
Arrears of Instalments and other overdue payments will carry interest at  
the Rate of Interest compounded monthly.*

This Housing Loan Agreement was signed and accepted by the Complainants, however the section marked "Signature of Solicitor" is crossed out and marked "N/A".

I note that the **bank statement** dated **17 October 2006** appears to indicate that the funds were debited into the mortgage account for account ending **5024** on **14 April 2005**, which appears to predate the drawdown of funds on either mortgage loan account.

In this regard, the **bank statement** dated **17 October 2006** details as follows:

*Account: [Redact] 5024  
Account Currency EUR*

*Offset Mortgage Group – Statement of Account No. 1  
IBAN [Redacted] – [The Complainants]*

---

<i>Entry</i>	<i>Value</i>	<i>Debited</i>	<i>Credited</i>
<i>Credit Balance+</i>			
<i>Date</i>	<i>Date</i>		<i>Debit Balance –</i>
		<i>Balance as at 27.04.2005</i>	
0.00+			
14.04	18.04	<i>Balance transfer</i>	242,423.45
242,423.45-			
25.04	25.04	<i>Transf. [Redacted] [Second Complainant]</i>	1,214.52
241,181.93-			
28.04	01.05	<i>Interest</i>	519.46
241,701.39"			

I note that the conditions of the **Housing Loan Agreement** dated **26 April 2005**, do not stipulate that mortgage loan account ending **4907** would be redeemed in full or that the Housing Loan Agreement dated **26 April 2005** superseded the Housing Loan Agreement dated **23 March 2005** in respect of mortgage loan account ending **4907**. In these circumstances, I accept that there was room for some uncertainty as to the status of mortgage account ending **4907** at that time mortgage account ending **5024** was signed and drawn down.

/Cont'd...

However that being said, the letter dated **26 April 2005** is clear that the Offset product was linked to the Offset Mortgage and the Complainants signed a new **Housing Loan Agreement** at the time, for a mortgage in the same amount of €250,000 and for the same term of 25 years. The terms and conditions applicable to mortgage loan account ending **5024** were clear that it was an Offset Mortgage Loan. In these circumstances it appears to me that the Complainants' contractual entitlement to a tracker interest rate on mortgage account ending **4907** ended at the time mortgage loan account ending **5024** was accepted and drawn down.

I appreciate that with hindsight the Complainants might now prefer for the terms of mortgage account ending **4907** to have remained in being, given that a tracker interest rate of ECB + 0.79% would later transpire to be a very advantageous rate. However, the contemporaneous evidence clearly shows that within a day of drawing down the mortgage loan account ending **4907**, the Complainants indicated a preference to the Provider for the mortgage loan to be an Offset Mortgage Loan so that the Complainants could benefit from the off-set of interest earned on the €50,000 they transferred into their current account, as against the interest accruing on the Offset Mortgage. The Complainants' new mortgage loan under account ending **5024** was drawn down on that basis.

- **Mortgage Loan Account ending 7407**

There were discussions between the Complainants and the Provider with respect to the Complainants applying a fixed interest rate to their mortgage loan in **September 2006**. At that time the Complainants' existing mortgage loan account ending **5024** with the Provider was on the Provider's "Offset" variable interest rate of 3.00%.

I note that the Provider has indicated that it has "*checked all hard copy files and computerised records that it holds and the Provider does not have a detailed record of the meetings that took place between the staff members in the [named] branch and the Complainants in 2006*".

It is disappointing that the Provider does not hold detailed records of the meeting with the Complainants, however it is nevertheless accepted between the parties that meetings took place on or around **27 and 28 September 2006**.

The Provider has submitted into evidence a handwritten note, which it contends contains details of the interest rates offered to the Complainants during the meetings in **September 2006**, which details the following:

*"E320k over 23 years & 8 months  
& 25 years*

/Cont'd...

ECB Rate	3.79% currently 23 yrs 8 mths	E1709.86
Change to	<u>25 year term</u> →	E1653.72
2 year Fixed	4.35% 23 yrs 8 mths	E1808.31 (1808.31
	Over 25 years	E1753.37
3 year fixed	4.55% 23 yrs 8 mths	E1844.19
	Over 25 years	E1789.71
5 year Fixed	4.65% 23 yrs 8 mths	E1808.03 (25 yrs)
	Over 25 years	E1862.27 (23 yrs 8 mths)
E320k Life cover over 25 years		E93.36 per month"

A letter issued by the Provider to the Complainant on **29 September 2006**, which was **7 pages** in total and was headed "**Final Financial Summary**". I note that the Final Financial Summary records the mortgage application discussion that took place during the meeting.

**Page 2** of the **Final Financial Summary** details, as follows:

*"You require Home Loan facility of E320K on a 5 year fixed facility. You are releasing equity of E80K in order to complete the purchase of a holiday home in Spain. You wish to include all of the Lending in One Home Loan over a term of 23 yrs 8 months and you have asked us to arrange Life Cover on your behalf."*

**Page 3** of the **Final Financial Summary** details, as follows.

<b>Home Loan Questions and Answers</b>	
Borrower type	Re-mortgage/switcher
Type of Property	Main Residence
Loan purpose	House purchase
What is the value of the property you wish to obtain the mortgage on?	EUR 550,000.00
What is the purchase price?	EUR 0.00
How much do you wish to borrow?	EUR 320,000.00
Please provide a detailed breakdown including figures on how this loan is made up	

<i>E80K to assist with purchase of new holiday home E240K to re-structure existing [Provider] Mtg on main residence</i>	
<i>What is your preferred loan repayment term?</i>	<i>23years 8 months</i>
<i>Is there any other information which is relevant to your application?</i>	
<i>Past normal retirement age at end of proposed Mortgage term [Second Complainant] is a [Profession] and will benefit from an attractive [Profession] pension and we would [sic] envisage that this mortgage liability will be cleared prior to retirement.</i>	

The **Final Financial Summary** was signed by the Complainants on **2 October 2006**.

A **Credit Application** was submitted to the Provider for a “Fixed Rate Home Loan” on **27 September 2006**. The **Credit Application** details “Application for EUR 320,000.00 Fixed Rate Home Loan. The “Comments” section of the Credit Application outlines as follows;

*“1/. Brief summary of application (Include comment on any connected borrowing). [The Complainants] are existing clients who switched to us last year to avail of our Offset Mortgage. They now wish to release further equity on their home to secure the purchase of a holiday home in [Country]. They originally released equity last year for such a purchase but in the meantime they have changed the property they are purchasing as this one is in a better location and is a larger property and should get more rental income. Total cost of new property is approx. E233,581 they have already paid E65,490 and owe approx. another E174k incl Solicitors fees to secure the purchase, this is made up of the following*

- 1. C/A balance E60,000*
- 2. Loan to sister E14,000 (to be repaid in December 2006)*
- 3. SSIA maturity E20,000 approx*
- 4. Equity release E80,000 approx*

*Total E174K*

*....”*

The Complainants take issue with the conduct of the Provider in **September 2006**, contending that they were not aware that their original mortgage loan account ending **4907** was disposed of and mortgage loan account ending **7404** was created. They assert that the Provider failed to advise them that by applying a fixed interest rate to mortgage loan account ending **7404** in **September 2006** a tracker interest rate would not be available to them in the future. They also state that they were not aware that they were taking out a new mortgage loan at the time, rather that they were applying for a “top up” in the sum of €80,000.

/Cont’d...

As outlined above from the evidence, the Complainants redeemed mortgage loan account ending **4907** over one year previously, in **April 2005**, and drew down mortgage loan account ending **5024**, which was on the Provider's Offset variable rate, and not a tracker interest rate. The contractual entitlement to the tracker interest rate of ECB + 0.79% ended one day after that loan was drawn down, when the Offset Mortgage Loan under mortgage account ending **5024** was taken out.

I note that the **Final Financial Summary** outlines "You wish to include all of the Lending in One Home Loan over a term of 23 yrs 8 months" and in the **Home Loan Questions and Answers** section, as extracted above, the borrower type is outlined to be a "Re-mortgage/switcher" and "E80K to assist with purchase of new holiday home E240K to re-structure existing [Provider] Mtg on main residence". I note that the Complainants signed this form on **2 October 2006**. These circumstances do not support the Complainants' position that they were unaware that they were taking out a new mortgage loan for the increased sum of €320,000 at the time. The **Final Financial Summary** is clear that all of the lending would be in one home loan and that the Complainants were proceeding with a re-mortgage.

Further, the evidence in the form of the handwritten note shows that the Provider's representative outlined the available interest rates to the Complainants at the time, to include the Tracker interest rate of 3.79% and 2, 3 and 5 year fixed interest rates. The Complainants submit that they were positively advised to take a fixed interest rate on the loan by the Provider's representative. There is no evidence to support this submission. In any event if the Complainants were unhappy with the fixed interest rate option on the new mortgage loan, they were not obliged to take this option.

A **Housing Loan Agreement** issued to the Complainants on **29 September 2006**. The Complainants' mortgage loan documentation comprises of the **Housing Loan Agreement** headed **Fixed Rate Home Loan** and the **General Conditions for Annuity Home Loans**. The following are extracts from the mortgage loan documentation relevant to the Complainants' complaint.

The mortgage loan agreement for mortgage loan account ending **7407** dated **29 September 2006** on **page 1** details that it is a "Fixed Rate Home Loan".

The "**important information**" section on **page 1** of the **Fixed Rate Home Loan** included the following;

"Amount of credit advanced: EUR 320,000.00  
Period of Agreement: 23 years 9 month(s) from drawdown\*\*\*

/Cont'd...

*Number of Repayment Instalments:* 283 plus any final balance.  
*Amount of Each Instalment:* 60 payment(s) of EUR 1,861.19  
223 payment(s) of EUR 1,837.42  
1 payment(s) of EUR 1,834.15  
...  
*APR\*:* 4.66% fixed  
...  
*\*Annual Percentage Rate of Charge*

The "**Schedule**" section on **page 2** of the **Fixed Rate Home Loan** detailed as follows;

*"Purpose of the Loan:*  
*Home Purchase, as specified in your Loan Application*  
*Property mortgaged (the "Property"):*  
[the Complainants' named primary residence]

*Latest Drawdown Date: 29 December 2006*

*Rate of Interest: 4.65% per annum, fixed.*  
*4.49% per annum, variable.*

*Fixed rate: Roll-over date: 1 October 2011. The Roll-over Date is the start date of the standard variable interest rate at that time. The fixed rate period expires on the date preceding this day.*

...  
*Security: A first legal mortgage over the Property. (An existing 'all sums' first legal mortgage over the Property in our favour will satisfy this, but you must pay the stamp duty on it (if any) required to cover the increased sum lent)."*

The "**Acceptance and Authority**" section on **page 3** of the **Fixed Rate Home Loan** detailed as follows;

**"WARNING – THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE**

*I/We have read and understand the nature and contents of this Loan Agreement.*  
*I/We agree to be bound by this Loan Agreement.*

/Cont'd...

*Where applicable I/We irrevocably authorise my/ our Solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/ our Solicitor (unless another mode of payment is agreed by my/our Solicitor)."*

The "**Acceptance and Authority**" was signed by the Complainants on **12 October 2006**. The Complainants' signatures were witnessed on the same date, although the witnesses' signature is illegible. The Provider has indicated that it was witnessed in the presence of the Complainants' own solicitor. The Complainants have not disputed this.

The **Fixed Rate Home Loan – Terms and Conditions** details as follows;

**"11 Interest – Fixed Rate Loans**

11.1 *If the Loan is a fixed rate loan the rate of interest applicable to the Loan for the Fixed Period specified in the Schedule will be our applicable fixed home loan rate on the date of drawdown of the Loan or, if a margin over or under the rate is specified in the Schedule, the aggregate from time to time of that margin and the applicable fixed home loan rate. The applicable fixed home loan rate at the date specified in the Important Information Notice is the rate specified in the Schedule.*

...

11.3 *You may, prior to the expiration of a Fixed Period, request us to fix the rate of interest on the Loan for such further period as you may specify (so long as it is a period for which we offer fixed rates on home loans).*

*If we agree to such request (and we have no obligation to do so) the rate of interest applicable to the Loan for the requested Fixed Period shall be our applicable fixed home loan rate on the first date of the requested Fixed Period or, if a margin is specified in the Schedule, the aggregate from time to time of that margin and such fixed home loan rate.*

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

....."

**Condition 12** of the **Fixed Rate Home Loan – Terms and Conditions** details as follows;

/Cont'd...

**“12 Interest – Variable Rate Loans**

- 12.1 *If the Loan is a variable rate loan which is not linked to the ECB Refinance rate, the rate of interest applicable to the Loan will be our applicable variable home loan rate or if a margin over or under that rate is specified in the Schedule the aggregate from time to time of that margin and the applicable variable home loan rate. Our variable home loan rate is subject to variation from time to time in response to market conditions and such rate at the date specified in the Important Information Notice is the rate quoted in the Schedule.*
- 12.2 *If the Loan is an ECB Tracker Variable Rate Home Loan, then the interest rate is linked to the ECB Refinance Rate. The rate of interest specified in the Schedule is the rate applicable to the Loan at the date of the facility letter, and it represents the sum of the ECB Refinance Rate on that date and an agreed margin (“the ECB rate margin”). The ECB Refinance Rate is subject to variation, and the rate of interest applicable to the Loan shall be the ECB rate margin added to the ECB Refinance Rate from time to time, and shall vary accordingly.”*

Mortgage loan account ending **7407** was stated to be a **Fixed Rate Home Loan**. The Complainants’ mortgage loan documentation outlined that a fixed interest rate would apply to the mortgage loan until **30 September 2011** and on **01 October 2011** the loan would roll-over to the a variable rate of interest.

This was clearly set out in the **Schedule** and **condition 11.4** of the Terms and Conditions. **Condition 11.3** provided an option for the Complainants to request a further fixed interest rate and the Provider could agree to that, but the Provider was under no obligation to do so. **Condition 12.1** outlined that the variable interest rate was “*not linked*” to the ECB rate, but rather was “*subject to variation from time to time and in response to market conditions*”. The Schedule to the Fixed Rate Home Loan did not contain any reference to an ECB rate, such as would have been required for the application of a tracker interest rate to the Complainants’ mortgage loan under **condition 12.2**.

The Complainants contend that they were not aware that mortgage loan account ending **7404** was to roll over onto the standard variable rate and that the Provider never explained to them that “*fixing the rate was fixing it to a standard variable rate and that upon expiry of the said fixed rate term, the fixed rate would accordingly revert to a standard rate rather than the ECB variable rate*”.



The Terms and Conditions of mortgage loan account ending **7407** are clear that the mortgage loan would roll over to a standard variable rate at the end of the fixed interest rate period on **01 October 2011**. The Terms and Conditions of mortgage loan account ending **7407** did not provide a contractual right for the Complainants to apply a tracker interest rate to that mortgage loan. For the Complainants to have a contractual right to apply a tracker interest rate to mortgage loan account ending **7404** at the end of the fixed interest rate period, that right would have to have been specifically outlined in the mortgage loan documentation that was signed by the parties. However no such right was set out in the **Fixed Rate Home Loan** signed by the Complainants in **September 2006**. The Complainants signed the mortgage loan documentation, with respect to mortgage loan account ending **7404**, with a clear written warning to seek independent legal advice. They also confirmed that they had read and understood the nature and content of the loan agreement. In these circumstances, I do not accept the Complainants' submission that they were unaware that they were taking out a new mortgage loan in **September 2006** which was subject to substantially different conditions at the time.

The evidence in the form of the **bank statements** show the transfer of the balance of €242,423.45 from mortgage account ending **5024** to mortgage account ending **7404**.

The bank statement with respect to mortgage loan account ending **5024** dated **17 October 2006** details as follows:

“

**Account: [Redact] 5024**  
**Account Currency EUR**

**Offset Mortgage Group – Statement of Account No. 1**  
**IBAN [Redacted] – [The Complainants]**

---

<b>Entry</b>	<b>Value</b>	<b>Debited</b>	<b>Credited</b>
<b>Date</b>	<b>Date</b>		<b>Debit Balance –</b>
		<i>Balance as at 27.04.2005</i>	
			0.00+
14.04	18.04	Balance transfer	242,423.45
			242,423.45-
.....			
17.10	17.10	TO FIXED RATE MTG	238,486.72
			0.00+”]

/Cont'd...

The bank statement with respect to mortgage account ending **5024** dated **29 December 2006** details as follows:

“

**Account: [Redact] 7404**  
**Account Currency EUR**

<b>Fixed Rate Home Loan – Statement of Account No. 1</b>			
<b>IBAN [Redacted] – [</b>			
<b>Entry</b>	<b>Value</b>	<b>Debited</b>	<b>Credited</b>
<b>Date</b>	<b>Date</b>		<b>Debit Balance –</b>
		<i>Balance as at 17.10.2006</i>	
0.00+			
17.10	17.10	Loan transfer	320,000
320,000-			

Again I note that the conditions of the **Fixed Rate Home Loan** do not stipulate that mortgage loan account ending **5024** would be redeemed in full. In these circumstances, I accept that there was room for some uncertainty as to the status of mortgage loan account ending **5024** at that time mortgage loan account ending **7404** was signed and drawn down. However in order for mortgage loan account ending **7404** to be taken out as a single loan on the higher sum of €320,000, it is evident that mortgage loan account ending **5024** would be cleared at the time the funds were drawn down.

A “**Roll-over letter**” dated **22 August 2011** issued to the Complainants and detailed as follows:

*“The agreed fixed rate period on your Fixed Rate Home Loan ends on 03.10.2011, so you now have the opportunity to review and agree the interest terms for the remaining term of your loan.*

**Variable interest rate or a new fixed interest period?**

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

- *To move to a variable rate*
- *To agree a new fixed rate period*

/Cont’d...

- *To revert to an ECB tracker rate (with the margin which had applied before your fixed rate period)\**

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

*If you do not respond to this letter by 28.09.2011 the interest rate on your Fixed Rate Home Loan will revert to the bank's applicable variable home loan rate, as agreed in the original Terms and Conditions of your mortgage.*

...

*\*if you were on an ECB tracker rate immediately before the fixed rate period."*

The Complainants' mortgage loan account ending **7404** had not been on a tracker interest rate immediately prior to the fixed rate so they could not avail of the tracker rate. I am of the view that the mention of a tracker interest rate could have been confusing to the Complainants in these circumstances. It would have been better if the Provider's communication to the Complainants in **August 2011**, had only contained the actual options available to the Complainants at that time. That said I do not believe that the wording of the template letters gave the Complainants an entitlement to a tracker interest rate on the mortgage loan.

It is clear based on the above, that there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account ending **7404** on the expiry of the fixed rate period in **October 2011**.

As the Complainants did not elect for a further fixed rate, a standard variable rate was applied to mortgage loan account ending **7404** on **03 October 2011**.

I note the Complainants are also of the view that the Provider deliberately delayed in dealing with the Complainants' complaint in an effort to frustrate a complaint being made to the office of the Financial Services Ombudsman. In this regard, the Complainants assert that the Provider proffered solutions to remedy the matters complained of in **March 2012** which were revoked a year later in **June 2013**.

It appears from the evidence that the Complainants contacted the Provider by way of a telephone call on **31 January 2012** to make a complaint about the "*lack of advice and information [the Complainants were] given when taking out a mortgage in 2006*". It is

/Cont'd...

disappointing that the Provider has not submitted a copy of a recording or transcript of this call, however it is nevertheless accepted between the parties that this call occurred.

The Provider has submitted into evidence a letter from the Complainants to the Provider dated **04 February 2012**, which details the following;

*"I am writing to you to make a complaint concerning the lack of advice and information I was given when taking out a mortgage in 2006.*

*I phoned the [Provider] support line on 31/01/2012 and spoke with a member of staff. I made my complaint to this staff member who assured me that my complaint would be dealt with.*

....

*The bank manager at the time ([Named Employee]) advised us to fix on a variable rate but at no stage did she guide or advise us that a tracker mortgage may have been a better option for us".*

The Provider has submitted into evidence a letter to the Complainants dated **20 February 2012**, which details the following:

*"Your present Mortgage is on a Standard Variable Rate of 4.35%. There are other choices available which would help to reduce the repayment on your Mortgage, over the remaining term. We would like to meet with you to discuss these options and we would like to invite you to a meeting with our Personal advisor by contacting [Telephone Number] and making an appointment with [Member of Staff] at a time that it is convenient to both parties."*

The Provider has submitted into evidence a document entitled "**Confirmation & Agenda**" which details the following:

<i>"Name</i>	<i>[Second Complainant]</i>
<i>...</i>	
<i>Date</i>	<i>7 March 2012</i>
<i>Time</i>	<i>15:00 – 16:00</i>
<i>Branch</i>	<i>[Location]</i>
<i>Subject</i>	<i>UPGRADE TO PRESTIGE</i>

...

/Cont'd...

*Follow-up actions and responsibility:*

*Originally [Second Complainant] had made a written complaint as she thought that there was an ECB Tracker fixed rate at the time of obtaining mortgage and she wrote advising that Manager at the time had not advised her about the ECB in full.*

...

*After discussion [Complainants] realised that Manager had given them the options and they chose themselves the 5 Fixed rate but were annoyed that the ECB Tracker mortgage was no longer available to them after they came off the 5 year Fixed rate but agreed that neither them or the advisor could see what the future held and that it could also have gone against them in that ECB rates could have risen instead of*

*dropping and for a time they were higher than 3.79% also the advisor would not have known that the Bank were to remove the ECB Tracker Variable Product off sale some years later.*

*Customers have now decided after receiving copy of Package Calculator to upgrade their [Account Type] to “[Different Product]” and opt for the [Different Product] Discount on Variable rate presently 3.90%. The benefits of upgrading was explained to both in detail...”*

I note that in their initial complaint to this office dated **09 September 2015**, the Complainants outlined the following;

*“16. The said [Member of Staff] then, by telephone, arranged a meeting with the Complainants which was due to take place on 7 March 2012.*

...

*17. The said [Member of Staff] then contacted the first named complainant by way of telephone and stated that the meeting for 7 March 2012 would have to be postponed for a week to 14 March 2012*

....

*On or about 14 March 2012 both Complainants met with the said [Member of Staff].....”*

/Cont’d...

I further note that on receipt of the Provider's formal response, which contained the document entitled **Confirmation and Agenda**, as referred to above, the Complainants, in their submission dated **16 April 2019**, detailed the following:

*"Furthermore, the Complainants take issue with the content of purported notes taken from a meeting dated 7 March 2012 which have been provided by the bank insofar as they state that:*

*"[a]fter discussions with [the Complainants] they realised that Manager has given them the options and they chose themselves the 5 Fixed rate but were annoyed that the ECB Tracker Mortgage was no longer available to them after they came off five year Fixed rate but agreed that neither them or the advisor could see what the future held.....*

*The Complainants say, emphatically, that the discussions of said meeting (which occurred at the behest of the lender – on the purported basis of a 'full financial review') did not reflect, and could not reasonably be construed as having reflected, such an interaction between the parties".*

The Complainants go on to outline the following:

*"The meeting of 7 March 2012 began with a casual conversation in which the bank official referred to the Complainants' personal finances. The Complainants made reference to the substance of their complaint and repeated that they continued to be very unhappy and annoyed at the poor service and the lack of fairness in the manner they were treated in both 2005 and 2006.*

...

*The Complainants submit that the purported notes produced by the Provider do not in any way properly record or reflect the contents of the meeting. The Complainants are concerned at the degree of inaccuracy therein particularly given (a) their inconsistency with the Complainants' clear recollection of the meeting, (b) the manifest favourability of same towards the bank and (c) the bank's attempted reliance upon same herein".*

I note that the Complainants originally submitted that a meeting with the Provider did not take place on **07 March 2012**, and subsequently contend a meeting did take place on **07 March 2012**, and that they do not agree with the content contained in the document the Provider holds setting out what was discussed at the meeting, due to their "clear

/Cont'd...

*recollection of the meeting*". In any event it is not material to the complaint at hand when the meeting took place, save to say that a meeting took place in **March 2012**.

The Provider has submitted into evidence a letter entitled **Final Financial Summary** issued to the Complainants dated **13 March 2012**, detailing the following on page 1:

*"Thank you for meeting with me to discuss your requirements regarding*

- *Day to Day Finance*

*If anything has changed since our meeting, please let me know as soon as possible as this may affect your product choice.*

*Please note that the summary must be read in conjunction with any product literature and your personalised illustration(s), if applicable.*

*Please check the information provided is correct, and if you have any questions do not hesitate to contact me."*

Page 8 of the Financial Summary document is headed "*Application and Declaration*", and this is signed by the Complainants on **14 March 2012**, accepting the New Product.

The Provider has also submitted into evidence a document entitled "CONDITIONS FOR [PROVIDER'S PRODUCT] MORTGAGE DISCOUNT". The document goes on to detail:

*"These terms and conditions govern the [Product] Mortgage Discount applied to your Housing Loan Agreement Number [ending 7404] Housing Loan Agreement" with [the Provider] and apply in addition to the applicable terms and conditions set out in your Housing Loan Agreement.*

1. *[Product] Discount: The [Product] Discount will be applied to your Housing Loan Agreement provided that all the applicable terms and conditions are met.*
2. *Your [ Product] Discount:*

*As of 14<sup>th</sup> March 2012 The [Product] Discount that will be applied to your Housing Loan Agreement is 0.45%. This means that the rate of interest applicable to your Housing Loan Agreement will be:..."*

This agreement was signed and accepted by the Complainants on **14 March 2012**, and witnessed by two bank officials. A warning was contained above the signature section detailing:

*“PLEASE NOTE THIS IS AN IMPORTANT DOCUMENT AND SHOULD BE RETAINED CAREFULLY. YOU MAY WISH TO CONSULT WITH YOUR SOLICITOR BEFORE SIGNING”*

The Complainants signed and accepted the terms and conditions of the different product on **14 March 2012**, which appears to have applied a discount of 0.45% to the variable interest rate applicable to mortgage loan account ending **7404**.

I note that the Complainants have contended that the Provider offered this discounted rate in **March 2012** as a *“premeditated and calculated action”* and the Provider knew or ought to have known that the representations made in the meeting in **March 2012** would not only be relied on but would be *“pivotal”* to the Complainants issuing a formal complaint to this office.

I find it difficult to understand how the Complainants have arrived at this conclusion. There is nothing contained in the documentation to suggest that this discounted rate was offered as a solution to the Complainant’s issue regarding the advice given by the Provider in **2005** and **2006**, neither is there anything in the documentation that could in any way prevent the Complainants making a complaint to the then Financial Services Ombudsman or subsequently to this office.

The Complainants met with the Provider and signed up to a different product, which allowed for a 0.45% discount on their mortgage loan account. There was nothing stopping the Complainants from lodging a complaint with the office of the Financial Services Ombudsman at that juncture or at any point in time up to six years (and longer in certain circumstances) from the date of the conduct complained of. I have been provided with no evidence that the Provider deliberately delayed in dealing with the Complainants’ complaint in an effort to frustrate a complaint being made to the office of the Financial Services Ombudsman. The Complainants were free to make a complaint to the Financial Services Ombudsman at any time. When the complaint was made it was fully investigated by this office.

The Complainants, in their post Preliminary Decision submission sent to this office through their representative and received on **06 October 2020**, detail as follows;

*“Clearly the issues raised in your findings are both detailed and well-grounded however having discussed same with my clients and having reviewed all of the papers in this matter it is equally clear that the time line between when the initial*

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*discussions were entered into between the respective parties and the subsequent actions that were taken were not wholly representative and further were by accident or design in direct conflict to my clients understanding.*

*It is important to note that any agreement my client purportedly entered into with her lending Institution was done in good faith only to discover at a later date that they were induced to enter same initially only to discover later that their unilateral mistake was as a consequence of their clear misrepresentation to her of the lending Institution which they intended and knowingly acted upon.*

*Again on its face it appears that the lending institution while appearing to act as an honest broker to my Clients only served to exploit my clients good faith belief that at all times they were acting in her best interests while the consequence of such an agreement placed them in a position where they somehow acquiesced to a ridiculous repayment plan.*

*The cornerstone to their argument is based on laches and it is in this respect that the lending Institution should not be allowed to profit from the referred to misrepresentation.*

*The foregoing is my clients initial reaction and should not be taken as a detailed reply and as such they reserve their right to revert with a more detailed response based on the timeline to these unfortunate events.”*

It appears that the Complainants continue to maintain the view that they are entitled to a tracker interest rate on mortgage loan account ending **7404**. As already outlined, it is important for the Complainants to be aware that there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account ending **7404** on the expiry of the fixed interest rate period in **October 2011**.

Having regard to all the evidence before me, I have been provided with no evidence that the Provider “*induced*” the Complainants in any way to sign mortgage loan documentation nor do I accept that that there was a “*clear misrepresentation*” on the part of the Provider in its dealings with the Complainants. As set out above, the Complainants signed the mortgage loan documentation with respect to mortgage loan account ending **7404** with a clear written warning to seek independent legal advice. The Complainants also confirmed that they had read and understood the nature and content of the loan agreement.

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On foot of the final paragraph of the Complainants' submission dated **6 October 2020**, the Complainants' representative was informed by this office by way of e-mail dated **29 October 2020** that in the absence of receipt of any further detailed submissions on behalf of the Complainants within a period of a further five working days from that date, this office would take it that the Complainants have nothing further to add and a Legally Binding Decision would issue. I note that no further submissions have been received by this office from the Complainants or their representative within the time allowed.

The Complainants drew down mortgage account ending **4907** on a tracker interest rate of ECB + 0.79% in **April 2005**. Mortgage loan account ending **4907** was redeemed the day after it was drawn down as the Complainants decided to pursue the option of an offset mortgage. In these circumstances the mortgage account ending **4907** was redeemed and the Complainants signed a new Housing Loan Agreement and mortgage loan account ending **5024** was drawn down. The Complainants sought additional funds of €80,000 from the Provider in **September 2006** and elected for the option of one home loan for a total of €320,000.

The Provider outlined the option of a tracker interest rate on the new mortgage loan (account ending **7404**) and the Complainants elected for a mortgage loan on a 5 year fixed rate.

The terms and conditions of mortgage account ending **7404** provided for the application of a variable interest rate at the end of the fixed interest rate period in **October 2011**. The Complainants did not have an entitlement, contractual or otherwise to a tracker interest rate on mortgage account ending **7404** when the fixed interest rate period ended in **October 2011**.

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

### Conclusion

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

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



**GER DEERING**

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**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

17 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.**