



<u>Decision Ref:</u>	2020-0414
<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 Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan account which is the subject of the complaint was secured on the Complainants' private dwelling house.

The loan amount was €380,000 and the term was 23 years. The particulars of the Mortgage Loan Offer Letter dated **24 May 2007** detailed that the loan type was *Fixed Rate 4.65% until 31/08/09 100% Interest Only*".

The Complainants' Case

The Complainants submit that they applied for a mortgage loan with the Provider in **March 2007**. The Complainants detail that the property was a *"build project"* and that the sole reason that they placed their mortgage with the Provider was the significantly competitive fixed margin of 0.75% above ECB on the Provider's tracker interest rate loans.

The Complainants detail that in order to secure the fixed tracker margin of 0.75% they opened a particular type of current account with the Provider, which they have maintained. The Complainants outline that this type of account was not required for a

fixed rate loan and they only maintained this account *“as it was understood and accepted as a requirement to get and keep the margin agreed at the outset of the loan.”*

The Complainants detail that the requirement to maintain the account to avail of the tracker interest rate margin of ECB + 0.75% is a *“collateral contract to the main loan.”*

The Complainants submit that they were issued with a Loan Offer dated **02 May 2007** which was clear that the tracker margin of 0.75% was for the life of the loan. They detail that interest rates were in a *“rising period”* and they were *“informed”* of a special 2 year fixed rate of 4.65%. The Complainants outline that the *“discussions surrounding the tracker margin were in far greater detail with more substantial discussion when compared to the request to then fix the interest rate for the first [2] years.”*

The Complainants outline that the subsequent Loan Offer dated **24 May 2007** which they accepted is *“clear about one element”*, the fixed rate of 4.65% until **31 August 2009**. The Complainants detail that the *“only time”* they were informed that the account could not *“revert”* to the tracker margin *“agreed”* was when the fixed interest rate period expired in **August 2009**.

The Complainants outline that when they received the options letter dated **24 August 2009**, they contacted the Provider to query the absence of a tracker rate option. The Complainants submit that they were then informed that they would not be able to avail of the tracker rate option.

The Complainants state that the reference to a *“Tracker Mortgage”* in their **Loan Acceptance** is evidence of the assurances made by the employee of the Provider at the time they took out their mortgage loan. The Complainants detail that they have sought and received a legal opinion on the merits and importance of the Loan Acceptance page and submit that they have been advised as follows;

“..it is viewed as the most important page in the document as it is the only page that the customer signs. It contains a number of important declarations and the legal opinion sought has confirmed that there has never been an error contained in this page of acceptance”

The Complainants detail that the Provider’s position that the reference to a *“Tracker Mortgage”* was a *“clerical error”* is *“flawed”* and the acceptance was changed to *“reflect the purpose of the loan”*. The Complainants submit that this is supported by the sample loan acceptance they have furnished in evidence which has been amended to reflect the purpose of that *“Remortgage Mortgage”*. The Complainants further outline that there was a *“clerical error in the omission of the inclusion of the tracker margin which was negotiated*

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and agreed at some length as part of the application process and was set at ECB [plus] 0.75%.”

The Complainants outline that the Provider’s argument that the variable rate “cannot possibly mean” a tracker variable rate is tenuous. The Complainants detail that “when the Repo (ECB Rate) changes there is no automatic system in place that magically alters the rates on the [Provider’s] mortgage system”. The Complainants submit that “A Tracker Variable rate for the avoidance of doubt is a variable rate: and is a variable rate adjustable by the [Provider] from time to time.”

The Complainants’ representative details that the Loan Offer showed the nominal rate of interest applying for the fixed rate period but they submit;

*“[The Provider] did not disclose the nominal rate for the “second and third periods of the loan. What was quoted was a single combined APR which mixed a nominal fixed rate of 4.65% and two **undisclosed** variable rates. Had the nominal variable rate of 4.5% been shown, and had been other than **4.5%** (Tracker Variable rate representing the agreed fixed margin of 0.75% plus then ECB Rate of 4.00%) then it would be arguable that despite clear statement in the loan offer “...is secured on the Property the subject of the **Tracker Mortgage...**”, it was then clear the nominal rate (had it been shown) was a Standard Variable Rate it could have put my clients on red alert. Combine the mistake and then the omission and there is clear misrepresentation, no matter how innocent.”*

The Complainants also outline that **Article 6** (“Misleading Actions”) and **Article 7** (“Misleading Omissions”), of **EU Directive 2005/29/EC**, which was transposed into Irish law by the **Section 43** and **Section 46** of the **Consumer Protection Act 2007** “could have been breached”. The Complainants also rely on **EC (Unfair Terms in Consumer Contracts) Regulations 1995** and the *contra proferentem* rule. The Complainants state that the failure to offer the tracker rate of ECB + 0.75% at the end of the fixed period is “against a background of both previous dealings where the Tracker Variable Rate was offered and also there was no warning that [the Provider] were to remove the Tracker option for a relatively short period as against a much longer period”.

The Complainants state that they were required to pay a lump sum of €190,000 in **January 2012** off their mortgage loan “to reduce the cost of this loan account when the account did not revert to its tracker margin following the fixed rate period.” They detail that this would not have been required if the proper interest rate was applied to the mortgage loan account since **September 2009**.

The Complainants are seeking the following;

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- a) The tracker rate of ECB margin + 0.75% to apply to their mortgage loan account backdated to the expiry of the fixed rate in **01 September 2009**.
- b) A refund of all overpaid capital and interest.

The Provider's Case

The Provider submits that the Complainants' mortgage application was received through the Complainants' mortgage broker and in accordance with the Provider's agreement with brokers, it was prohibited from contacting broker customers directly until the mortgage loan funds were drawn down.

The Provider outlines that a Loan Offer dated **02 May 2007** issued to the Complainants' broker and that this offered the Complainants a tracker interest rate of ECB + 0.75%. The Provider details that this Loan Offer was never accepted by the Complainants and therefore it is *"incorrect for the [Complainants] to assert that a tracker margin had been initially agreed"*.

The Provider details that it subsequently issued a revised Loan Offer dated **24 May 2007** which was on the basis of a *"Fixed Rate 4.65% until 31/08/09"*. The Provider submits that this was in line with the request made by the Complainants' broker. The Provider outlines that it does not accept that the Complainants were told that it was possible for them to later convert the fixed interest rate loan to the tracker interest rate of ECB + 0.75% as long as they agreed to operate a specific Provider account. The Provider submits that there is no evidence of this.

The Provider submits that it had a type of current account available to customers which entitled them to a range of benefits, including periodic mortgage offers. The Provider states that customers could avail of a special discount off its tracker mortgage loan product when they held the current account. The Provider details that the Complainants opened an account of this type in **March 2007** and while the Complainants initially sought a tracker interest rate loan and availed of the discount, they did not draw down on this rate and instead opted for a mortgage loan on a fixed interest rate. The Provider outlines that the Complainants availed of a discounted variable rate associated with their current account at a later stage in their mortgage journey.

The Provider submits that the Complainants entered into an agreement with the Provider by **Mortgage Loan Offer Letter** dated **24 May 2007**, whereby the Provider agreed to advance a mortgage loan facility to the Complainants in the sum of €380,000 for a term of 23 years. It states that the Complainants signed and accepted the Loan Offer dated **24 May 2007** and the mortgage loan account was drawn down in **June 2007**.

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The Provider submits that the Complainants never had a contractual entitlement to a tracker rate. The Provider details that it never offered a fixed rate product with a default tracker rate option and the “*default*” position applicable to the Complainants’ mortgage was a standard variable rate. The Provider relies on **Section 14 (c)** of its **Standard Mortgage Terms and Conditions**. The Provider submits that the standard variable rate is a “*variable interest rate which may be increased or decreased by the Lender at any time*” whereas a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will rise and fall in line with movements in the ECB base rate only. The ECB base rate cannot be changed by the Provider. The Provider outlines that the term “*variable rate*” in the Complainants’ mortgage loan documentation was “*sufficiently clear and transparent in its meaning*”. The Provider outlines that the Complainants confirmed that they had the mortgage details explained to them by their solicitor and that they understood them.

The Provider acknowledges that the **Loan Offer Acceptance** contains an “*erroneous*” reference to “*Tracker Mortgage*”. The Provider submits that the purpose of the paragraph containing this error was for the Complainants to acknowledge that they fully understood the specific nature of the mortgage, that the debt owed to the Provider was secured on the mortgaged property and must be repaid in full before the title deeds will be returned or the security released. The Provider outlines that the reference to “*Tracker Mortgage*” was a typographical error which “*was not capable of transforming the entire basis of the loan to a tracker facility, when there was no other reference to a tracker rate*” in other documentation evidencing the agreement.

The Provider submits that the **Loan Offer Acceptance** was only part of the mortgage documentation provided and should be read in conjunction with the Loan Offer and the relevant Terms and Conditions and “*to view the Loan Offer Acceptance in isolation would not be reflective of the customer experience andincorrectly disregard other substantive and clear information that was provided*” to the Complainants as to what would happen at the end of the fixed rate period.

The Provider states that there was no breach of **Article 6** and **Article 7** of the **EU Directive 2005/29/EC**. The Provider submits that the mortgage loan terms and conditions were clear.

The Provider submits that the Complainants were sent a **Product Expiry Letter** dated **20 August 2009** which set out the interest rate options available to the Complainants on the expiry of the fixed rate term. The Provider outlines that the Complainants’ were not offered a tracker interest rate at this time. The Provider submits that the Complainants chose the variable rate mortgage on **20 August 2009**.

The Provider submits that the Complainants wrote to the Provider on **05 January 2012** enclosing a cheque for €190,000 being the amount by which they wished to reduce their mortgage loan by. The Provider details that the Complainants also requested that the account would avail of a discounted variable interest rate and that the mortgage loan account would move to capital and interest repayments when the transaction was complete.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate of ECB + 0.75% on the expiry of the fixed rate period on **31 August 2009**.

Decision

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

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

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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

Following the issue of my Preliminary Decision, the following submissions were received from the parties;

1. Letter from the Complainants' representative to this Office dated **09 September 2020**
2. Letter from the Complainants' representative to this Office dated **10 September 2020**
3. Letter from the Provider to this Office dated **24 September 2020**
4. Letter from the Complainants' representative to this Office dated **08 October 2020**

Copies of these additional submissions were exchanged between the parties.

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

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

"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint."

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

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2007** and **2009**.

The Complainants applied for a mortgage loan through a third party Broker. An **Application Form** which is broker branded has been submitted in evidence.

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In the **“Mortgage Required”** section, in response to the question *“Type of loan required”*, the Tracker Rate option was selected by the Complainants. The other options available were fixed, variable, split, discount variable and other.

The **“Additional Information”** section of the Application Form details that the Complainants were purchasing the site and building a property on the site which would cost €372,000 and that a further €95,000 would be spent on completing the property. The application also detailed that it was the Complainants’ intention, on completion of the build, to rent their then existing property to yield a rent of €750 per month.

The **“Declarations and Signatures”** section of the **Application Form** details as follows:

“I/We declare and agree that:

1. This form must not be construed as an offer on behalf of the lender and any advances offered may be revised or cancelled before the advance is paid.

...

5. The rate of interest will be that which the lender is charging on the date on which the loan cheque is drawn down and subsequently the rate and repayment may vary within the terms of the mortgage.

...

12. I/We are aware and agree that this application form may be presented to more than one lender for underwriting.

13. I/We understand that I am/ we are not guaranteed access to the lowest cost mortgage available on the market.

....”

The Complainants signed the **Application Form** in the **“Declarations and Signatures”** section on **16 March 2007**. The text beneath their signatures outlines as follows:

“In signing the above I declare that the details mentioned above have been brought to my attention which are agreeable and acceptable to me.”

The evidence shows that the Complainants had a preference for a tracker interest rate when applying for their mortgage loan by way of **Application Form** dated **16 March 2007**.

However the Complainants acknowledged in the “**Declarations and Signatures**” section of the Application Form that the form was not an offer on behalf of the lender and that the rate of interest would be that which the lender was charging on the date on which the loan cheque is drawn down and subsequently the rate and repayment may vary within the terms of the mortgage. The Complainants make note of the level of discussion they had surrounding the tracker interest rate at the outset of the application process. There is no evidence of discussions that took place at the time of the application. However, in any event it appears that any discussions were with the Broker, and not the Provider.

As already stated, the conduct of the Broker does not form part of this complaint.

It is important for the Complainants to be aware that in completing the Broker Application Form and discussing interest rate options with the Broker, they had not at that time, received any offer of a mortgage loan on a tracker interest rate from the Provider.

A **Loan Offer** dated **02 May 2007** issued from the Provider to the Complainants which details as follows;

<i>“Loan Type</i>	<i>: [Named Product] Tracker ECB + 0.75% 80% Interest Only</i>
<i>Loan Amount</i>	<i>: €380,000.00</i>
<i>Interest Rate</i>	<i>: 4.5%</i>
<i>Interest Type</i>	<i>: Variable</i>
<i>Term</i>	<i>: 23 Years</i>
<i>Monthly Loan Repayment *</i>	<i>: €1,425.00 from 02/06/2007</i> <i>: €2,570.10 from 02/06/2012</i>
<i>Retention Amount</i>	<i>: €37,000</i>

** Based on a calculation using the current [Provider] variable rate*

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

“Interest Only repayments will be collected for this mortgage for the first 60 months, after that the mortgage will revert to Capital and Interest.”

The **Loan Offer** also included **General Terms and Conditions**. The Loan Offer dated **02 May 2007** was not accepted or signed by the Complainants.

The Provider has submitted a number of emails between **16 May 2007** and **23 May 2007** into evidence, as follows:

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- On **16 May 2007**, an email which appears to be from the Complainants' Broker to the Provider, outlines as follows:

*"This customer wants to be on the 4.65% fixed rate for 2 years.
Please issue a revised offer. He still wants to be on interest only for 5 years."*

- On **23 May 2007** an email was sent by the Provider to the Broker, as follows:

*"Our loan offers teams have confirmed that this is keyed at 2 yr interest only.
If 5 yrs is required we would need to issue a revised offer."*

- On **23 May 2007** an email was sent by the Broker to the Provider, as follows:

"Why though, the first one was int only for 5 years – why would they just change it??? Why? Why?"

- On **23 May 2007** an email was sent by the Provider to the Broker, as follows:

*"From our system this revised (sic) was requested through our telephony team.
They received a request over the phone to change to a 2 year fixed rate on Interest only.*

This is why it was changed to 2 yrs interest only.

Not sure who rang through the telephony seen as [Broker] have our direct numbers – was it the agent??"

- On **23 May 2007** an email was sent by the Broker to the Provider, as follows:

"I think it was a bit of misinterpretation here, [name] from here requested an amended loan offer for 2 year fixed rate and loan to stay on int only and there was obviously a little confusion.

We need a new offer urgently."

The second **Loan Offer Letter** dated **24 May 2007** details as follows;

<i>"Loan Type</i>	<i>:Fixed Rate 4.65% until 31/08/09 100% Interest Only</i>
<i>Loan Amount</i>	<i>:€380,000.00</i>

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<i>Interest Rate</i>	: 4.65%
<i>Interest Type</i>	: Fixed
<i>Term</i>	: 23 years
<i>Monthly Loan Repayment</i>	: €1,472.50 from 21/06/2007
	: €1,659.51 from 21/06/2009
	: €2,721.11 from 21/06/2012
<i>Retention Amount</i>	: €37,000"

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

"This offer supersedes any previous offer

...

Interest Only repayments will be collected for this mortgage for the first 60 months, after that the mortgage will revert to Capital and Interest. [my emphasis]"

Two sets of Terms and Conditions have been furnished in evidence by the Provider: The **General Terms and Conditions** and the **Standard Mortgage General Terms and Conditions**.

The terms and conditions titled **Standard Mortgage General Terms and Conditions** are stated to be effective from "01/06/2006" and detail as follows;

"1. Introduction

(a) These General Mortgage Terms and Conditions apply in all circumstances to the Lender's Standard Mortgage/Tracker Mortgage. These General Terms and Conditions are supplemental to and form part of the Loan Offer which comprises Specific Loan Offer Conditions and General Terms and Conditions. In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply."

I accept that the Standard Mortgage General Terms and Conditions are supplemental to the **Specific Loan Offer Conditions** and the **General Terms and Conditions** comprised in the Complainants' Loan Offer.

Condition 14 of the **Standard Mortgage General Terms and Conditions** details as follows;

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“14. Interest Rate

(a) Subject to Sub- Clause 14(b), all Loans are subject to the [Provider’s] Mortgage rate at the date the Loan is drawdown [sic].

(b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:-

- (i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank (“ECB”) rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movements;*
- (ii) There will be no reduction in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.*

(c) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

- (i) The rate of interest applicable to the loan will be fixed at the rate and for the period specified in the Loan Offer.*
- (ii) The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by [the Provider]. Where such option is not made available by the [Provider] or if available, where the Borrower fails to exercise the option, the **interest rate applicable will be a variable interest rate which may be increased or reduced by the Lender at any time** and in this respect, the decision of Lender will be final and conclusively binding on the Borrower.” **[My emphasis]***

The **Loan Acceptance** which was signed by the Complainants and is undated outlines as follows;

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

*I/We fully understand and accept the specific nature of this Purchase Mortgage.
I/We further understand that any outstanding debt owing (whether owing now or
in the future) to [the Provider] by me/us at any given time is secured on the
Property the subject of the Tracker Mortgage and must be repaid in full before the
relevant title deeds can be returned or the relevant mortgage deed released.”*

The Complainants’ representative in his post Preliminary Decision submission dated **08 October 2020** details as follows in relation to the Complainants’ mortgage loan application;

“Given the importance placed on the applicable margin at the outset, [the Complainants] were not intent on setting that margin aside, but more importantly there was no indication whatsoever given by [the Provider] or any warning at any loss or change to the variable basis of the loan agreed and negotiated at the outset.

The loan was not re-applied for was not re-assessed or underwritten”.

The Complainants were offered a tracker interest rate in the Letter of Offer dated **02 May 2007**. However the evidence shows that the Complainants did not accept that offer of a mortgage loan on a tracker interest rate of ECB + 0.75%. Rather the Complainants’ Broker issued an instruction to the Provider that the Complainants wanted to be on *“the 4.65% fixed rate for 2 years”* and specifically requested that a revised Letter of Offer be issued on this basis. The Provider duly complied with the request and issued a new **Loan Offer Letter** dated **24 May 2007**. It is important for the Complainants to be aware that this loan offer offering a fixed interest rate superseded the previous loan offer that offered a tracker interest rate of ECB + 0.75%, the terms of which were never agreed or accepted by the Complainants. Therefore, I cannot accept the Complainants’ submissions that no warning was given as to a loss or change to the *“variable basis of the loan”* as the mortgage loan accepted by the Complainants was a fixed rate mortgage loan and was not of a variable nature.

The Complainants’ representative in his post Preliminary Decision submissions dated **08 October 2020** states as follows;

“Condition 14 when viewed in its entirety confirms the loan type.

.....

Condition 14 states in full

“In the case of a Tracker Mortgage the conditions of this sub clause shall apply”

The Declaration page titled

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*“All parties to sign page states
.....The property the subject of the Tracker Mortgage”*

It is an entirely acceptable link here given the points made at the beginning of this submission of the lengths [the Complainants] went to ensure they got the most competitive Tracker Margin on offer by [the Provider].”

This argument seems to ignore the words “**in the case of a Tracker Mortgage**”. This was clearly intended to apply to a tracker mortgage. However, as set out above, the Complainants’ mortgage was not a tracker mortgage.

The Complainants ultimately signed their acceptance of the Loan Offer Letter dated **24 May 2007** offering a fixed interest rate mortgage loan. In circumstances where the Complainants’ mortgage loan was drawn down on a fixed interest rate as opposed to a tracker interest rate, it is clear that **Condition 14 (c)** relating to fixed rate mortgages applied, rather than **Condition 14 (b)** relating to tracker mortgages which appears to be the condition referred to by the Complainants’ representative in his post Preliminary Decision submissions.

I have considered the Complainants’ **Loan Offer Letter** dated **24 May 2007**, together with the Special Conditions and General Conditions and it appears to me that there was no reasonable basis for the Complainants to form the understanding that the mortgage loan would move to a tracker interest rate of ECB + 0.75% at the end of the initial fixed interest rate period. It is clear from **Condition 14 (c)** that, on the expiry of the fixed interest rate period on the mortgage loan account, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainants. The variable interest rate set out in **Condition 14(c)** was clearly one which may be increased or decreased by the Provider at any time. **Condition 14 (c)** does not mention the application of a tracker interest rate to the Complainants’ mortgage loan.

The Complainants argue that a tracker rate is a variable type rate that is also “*increased or reduced*” by the Provider, as where a change occurs in the ECB base rate the Provider must alter the rate applicable to the mortgage on its system to effect the increase or decrease. It is generally the case that for amendments to interest rates to take effect on customers’ mortgage accounts some form of manual intervention is required by the Provider to effect that change. The fact that a member of staff has to input data so as to effect some form of change cannot be taken to mean that the interest rate type in question is *de facto* a variable interest rate that has been “*increased or reduced*” by the Provider. There is no reasonable basis for this argument.

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If it was intended that the loan would be a tracker mortgage then the Loan Offer conditions applicable to the loan would have contained details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14(b)**. However, there was no reference to a fixed margin or an ECB rate in the Complainants' Loan Offer Letter. Further there is no reference to a fixed interest rate period or the end of a fixed interest rate period, in **Condition 14(b)**, rather the condition relates to the "*date of payment of the Loan*".

The Complainants have sought to rely on the **Loan Offer Letter** dated **02 May 2007** and discussions that they assert they had at the time the loan was applied for, to support their claim for an entitlement to a tracker interest rate of ECB + 0.75% at the end of the fixed interest rate period on **31 August 2009**. However as outlined above the Complainants did not accept that Loan Offer Letter and therefore did not draw down their mortgage loan under the term of the **02 May 2007** Loan Offer Letter. Rather the evidence shows that their third party Broker was in contact with the Provider after that Loan Offer Letter issued to change the mortgage loan to a loan commencing on a two year fixed interest rate. The emails that issued from the Broker to the Provider are clear, the Complainants were seeking a two year fixed interest rate mortgage loan. As a consequence, a revised **Loan Offer Letter** issued on **24 May 2007**. This provided for a fixed interest rate. The Complainants themselves acknowledge that interest rates were in a "*rising period*" and that is why they decided to seek a mortgage loan commencing on a fixed interest rate. There was no instruction or request from the Complainants' Broker as to the type of interest rate that should apply to the Complainants' mortgage loan after the two year fixed interest rate period ended.

The Loan Offer Letter dated **24 May 2007** specifically notes that it "*supersedes*" any previous offer. Therefore, the previous offers were no longer valid and had no application.

There is also no evidence to support the Complainants' submission that there was an agreement with the Provider that the "*default position*" with respect to the mortgage loan was that a tracker interest rate of ECB + 0.75% would be applied to the mortgage loan account at the end of the fixed interest rate period.

Furthermore it is important to note that the Complainants had engaged the services of a third party Broker at the time and there is no evidence that the Complainants had any direct communications with the Provider at the time the mortgage loan application was made in **March 2007** or at the time, either of the Loan Offer Letters issued on **02 May 2007** and **24 May 2007**. The evidence, as set out above, shows that the communications that took place with respect to the new Loan Offer Letter between **16 May** and **23 May 2007** were between the Provider and the Broker and not between the Complainants and the Provider directly.

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I note that there is a reference to “*Tracker Mortgage*” in the **Loan Acceptance**, as quoted above. The Complainants have submitted a significant amount of post Preliminary Decision submissions concerning this reference. In my Preliminary Decision, I accept that the reference to “*Tracker Mortgage*” in the **Loan Acceptance** was a “*typographical error*” on the part of the Provider. Notwithstanding the post Preliminary Decision submissions made by the Complainants, I remain clearly of the view that whilst this error on the part of the Provider is entirely unsatisfactory, it would neither be reasonable nor logical to conclude that this one erroneous use of the words “*Tracker Mortgage*” in the **Loan Acceptance** section of the Complainants’ mortgage loan documentation could have led the Complainants or anyone to reasonably form the understanding that the loan would move to a tracker interest rate at the end of the fixed interest rate period. The sentence that contains this erroneous reference to “*Tracker Mortgage*” is specifically in relation to potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainants understood this had to be repaid before the deeds of the property could be released and returned. This sentence was clearly not in relation to the interest rate applicable at the end of the initial fixed interest rate period or any other time.

The Complainants’ representative, in his post Preliminary Decision submission dated **09 September 2020**, states as follows;

“...the investigation has failed in any way to seek to find out what should or was to be the correct wording or phrase/ sentence of this “typographical error”.

A “typographical error” as claimed by [the Provider] and accepted by the FSPO would have been a critical point at the time [the Complainants] were signing the declaration.

If the words described and accepted as a “typographical error” were removed this immediately would have alerted [the Complainants] to the hidden penalty that existed in selecting a short fixed period.

I also note that the Conditions for the Loan Offer signed have been set aside as page 1 states

1. *Introduction*

- a) *These general Terms and Conditions apply in all circumstances to the Lenders Standard/ Tracker Mortgage.*

1(m) *(states)*

/Cont’d...

“Fixed Rate Period” means the period during which the Lender has agreed to fix the rate.”

[The Provider] also confirms in Condition 14 (b)

In the case of a Tracker Mortgage the Conditions of this sub cause shall apply

- 1) The loan is subject to the Tracker Mortgage variable (emphasis added) interest rate at the date of payment of the Loan.*

The reasons I quote the above and the resultant (remarkable) acceptance of the office of the inclusion of “Tracker Mortgage” as a “typographical error”, causes a myriad of subsequent issues which have now been raised, with the acceptance by your office of these key and critical words as a “typographical error”.

While I do not accept that this is indeed a “typo” of the nature understood and meant by the Oxford definition of a typo, what is clear from [the Provider] is that it is now firmly in the position and stance of the inclusion of “Tracker Mortgage” is what it terms a “typographical error” and I must insist, that the provider cannot now resile from that position.

I now request the office of the FSPO to clarify what should have been written in the declaration.

...

...because of the acceptance by your office of a “typo” in the declaration page, the decision errs in a number of ways.

- 1) [The Complainants] would have been alerted to the change in their declaration and it would have allowed them to revert with questions and queries at the very least.*
- 2) If the conditions outlined above were no longer relevant to their loan considering the “typo” issue, this would have also brought their concerns to the fore.*
- 3) When the office states “specifically notes that it “supersedes” any previous offer”, there is a large level of assumption on its part that all of the matters above were superseded.*

/Cont’d...

...

What should it have read?

While awaiting the answer to that key and critical question it is now clearly obvious given the importance of the Declaration page of the Loan Offer, that whatever would have been included by [the Provider] (remembering that I do not accept that this is a "Typo") and Tracker Mortgage did in fact confirm to the client their intention. "

The Complainants' representative, in his post Preliminary Decision submission dated **09 September 2020**, states as follows;

"I entirely challenge the view formed as the purpose of the Declaration, not in what it says, but in that it reference "the subject of the Tracker Mortgage". The sentence is as written but references the product the loans was assumed by [the Complainants] to be.

...

Why would it be unreasonable for [the Complainants] to believe it would roll to the agreed Tracker. [The Provider] adopted the [Provider not relating to this complaint] loan offer documents and all [Provider not relating to this complaint] Fixed rate mortgage rolled to Tracker rate, after all [the Complainants] ensured in securing a 0.75% rate why would he be unreasonable in thinking this was what was intended and signed for."

The Complainants' representative, in his post Preliminary Decision submission dated **10 September 2020**, states as follows;

"...

We have asked [the Complainants] to have faith in the Ombudsman's process but given what [the Complainants] understood they were signing up, as evidenced by the Letter of Offer Declaration, along with their intentions, and then the "typographical error" by the bank in the declaration, this process has in fact failed [the Complainants].

...

A customer's level of knowledge when compared to the provider is always weighted against them but when the basic function of what a Tracker Mortgage is gets altered, and that alteration is claimed to be an error and "is accepted as confusing"

/Cont'd...

than this process has failed them and the customers don't stand a chance with their complaints.

...

The definition of a Tracker Mortgage still stands despite this lender trying to rewrite the history of what it meant."

The Provider, in its post Preliminary Decision submission dated **25 September 2020**, submits as follows;

"The Bank is satisfied that the reference to "Tracker Mortgage" in the Loan Acceptance document was a typographical error. Notwithstanding the inclusion of the reference to a "Tracker Mortgage" in the document it did not confer any entitlement to have a tracker interest rate period applied to the customers' mortgage account on the expiry of the fixed interest rate period. There was no other reference to either a 'Tracker Mortgage' or indeed a tracker interest rate in any of the customers' other loan documentation that constituted their loan agreement with the Bank.

We do not agree with the customers' representative assertion that "the weight of the decision falls so heavily against the customers". The Bank is satisfied that when the customers' entire loan documentation is assessed and considered as a whole it would be unfair to rely on a single reference to a "Tracker Mortgage" as constituting an entitlement to have a tracker interest rate applied to the mortgage account at any point.

The customers' complaint was also considered in the context of the Tracker Mortgage Examination and assessed as not impacted."

The Provider, in its post Preliminary Decision submission dated **25 September 2020**, further states as follows;

"We do not agree with the assertion that "[the Provider] adopted [name of Provider not relating to this complaint] loan offer documents and all [name of Provider not relating to this complaint] Fixed rate mortgages rolled to Tracker rate...". [The Provider] and [name of Provider not relating to this complaint] operated as a separate brands and legal entities prior to their merger.... [Name of Provider not relating to this complaint] offered both fixed interest rate to standard variable rate as well as fixed interest rate to tracker interest rate products. [The Provider] on the other hand never marketed or sold fixed interest rates that defaulted to tracker interest rate products at any time. "

/Cont'd...

The Complainants' representative, in his post Preliminary Decision submission dated **08 October 2020**, states as follows;

“...

- *The execution document does not contain a “Typographical error”.*
- *The [Provider not relating to this complaint] Loan Offer system is used in this case and was adopted by [the Provider] at the time of its takeover [Provider not relating to this complaint].*

The Provider is 100% incorrect in its response to this point but worryingly it is fully aware of the difficulties the adoption of the [Provider not relating to this complaint] Mortgage system, for the issuing of loan offer letters, has subsequently caused.

If the Office of the Ombudsman is to accept, as it appears to, that the inclusion of “Tracker Mortgage” in the declaration is a typographical error, then the following must be investigated fully, prior to any formal decision being issued on this account.

I remain concerned that in an investigation of this importance for [the Complainants] and the financial consequences of that decision that none of the following has ever been raised by your Office, of the lender given the position of acceptance by the Office of the Bank's position.

- 1. If “Tracker Mortgage” is a ‘typo’ what should the ‘correct’ declaration state.*
- 2. If there was no ‘typographical error’ made and the reference to Tracker Mortgage was not included, I believe given the points above that [the Complainants] and their solicitor would have been alerted to a change in the variable basis of the loan for the term of the loan.*

...

On a personal note, I wish to make you aware of the upset the Preliminary Decision has caused to the family who feel they did nothing wrong and feel the Office in its Preliminary Decision is taking an enormous leap of acceptance of the lenders claim regarding a “Typographical error”.

To take this leap then I feel it was also beholding of the Office to ask what should have been included.

...

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I feel it is also worth mentioning that if [the Complainants] closed and 1 week later fixed the rate on the account, their loan would now be on the margin agreed at the outset, but only after the CBI investigation. As this Bank would not have automatically reverted the loan to its Tracker Rate in that instance either, until forced to do so by the CBI.

Considering who held the bank of knowledge and information at the outset of this loan, I see no grounds for the acceptance by this Office of what I can only describe as an 'excuse' when it comes to describing the most important page of a loan offer as having an "Typographical error" and we still do not know what should be written in its place."

The Complainants' representative, in his post preliminary decision submissions raises the question as what term would have been utilised in the Loan Acceptance section of the Loan Offer Letter if the "Typographical error" had not occurred. It is not a matter for this office to rewrite the Complainants' mortgage loan documentation and while I appreciate that the Complainants are unhappy with the decision reached, as it does not accord with the submissions made by them during the complaint and their desire to now have a tracker mortgage. I have to have regard to the entirety of the evidence before me, in considering this complaint. I also cannot operate on the basis of hypothetical scenarios as have been posited on behalf of the Complainants. I can only reach my decision based on the evidence before me relating to this particular complaint.

I am satisfied that the mortgage loan agreement in its entirety was clear that there was no contractual entitlement to a tracker interest rate, and that the inclusion of the word "Tracker" in that section of the Loan Acceptance when taken in context did not provide for a tracker rate, let alone an entitlement to a specific tracker interest rate of ECB + 0.75% on the expiry of the fixed interest rate period.

The Complainants submit that the **Loan Offer Letter** dated **24 May 2007** is unclear as to the interest rate applicable at the end of the fixed interest rate period. In this regard the Complainants refer to **sections 43 and 46** of the **Consumer Protection Act 2007, the EC (Unfair Terms in Consumer Contracts) Regulations 1995** and the *contra proferentem* rule. There is no evidence that the Complainants were given false, misleading or deceptive information or that information was concealed by the Provider from the Complainants under **sections 43 and 46** of the **Consumer Protection Act 2007, as amended**.

With respect to the **EC (Unfair Terms in Consumer Contracts) Regulations 1995** and the Complainants' submission that the Provider has acted contrary to the good faith requirement in **regulation 3(2)**. The Complainants outline that **regulation 3(2)** has been

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breached by “*the lack of any warning of the loss of a lifetime Tracker Variable Rate by accepting a Fixed Rate period....*” I do not accept this to be the case, the **Loan Offer Letter** dated **24 May 2007** superseded the previous **Loan Offer Letter** dated **02 May 2007**, which contained the entitlement to the tracker interest rate. The **Loan Offer Letter** dated **24 May 2007** was issued on the Complainants’ instruction that they wanted a mortgage loan commencing on the 2 year fixed interest rate. The **Loan Offer Letter** dated **24 May 2007** was clear that that on the expiry of the 2 year fixed interest rate period, the variable interest rate would apply. The Complainants’ were relying on an incorrect assumption that they could somehow apply the tracker interest rate to their mortgage loan on the basis of a Loan Offer Letter that had not been accepted by them and therefore, no longer had any validity or relevance to their mortgage. There was no link between these two Loan Offers and neither the Complainants nor the Provider have any entitlements under the **Loan Offer Letter** dated **02 May 2007**. In the same way that the Complainants cannot seek to rely on that Loan Offer Letter, the Provider could not seek to enforce terms associated with the **Loan Offer Letter** dated **02 May 2007**, against the Complainants as that is not the Loan Offer Letter that was accepted and agreed by both parties as evidenced by the fact that it is signed by both parties.

The Complainants’ representative, in his post Preliminary Decision submission dated **09 September 2020**, details as follows;

“I must also challenge your office in its lack of reference to Article 5 of the Council Directive 93/13/EEC 5/4/93 on Unfair Terms in Consumer Contracts...

...Given the arguments that were put forward by [the Complainants] and lack of the above Directive being implemented in this case I believe this is a further error in the decision.”

Article 5 of the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts details as follows;

“In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).”

I have reviewed the Letter of Loan Offer dated **24 May 2007** together with the terms and conditions attaching thereto and I accept that the mortgage loan documentation is drafted in “*plain, intelligible language*”. The incorrect reference to a tracker mortgage occurred in

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the **Acceptance of Loan Offer** page, where the Complainants confirmed their acceptance and understanding of the terms and conditions attaching to the Loan Offer Letter. I accept that this reference may have been confusing to the Complainants however when reviewed along with the particulars of the Letter of Loan Offer itself and the terms and conditions, in particular **Condition 14**, I am of the view that it is clear that the word “Tracker” was included in error by the Provider.

If the Complainants were of the view that the **Loan Offer Letter** dated **24 May 2007** was ambiguous as to the type of interest rate that the loan would roll over to at the end of the fixed interest rate period, the Complainants could have decided not to accept the offer made by the Provider or sought to clarify the type of interest rate that would apply at the end of the fixed interest rate period. Instead the Complainants signed the **Loan Acceptance** and confirmed that the mortgage conditions had been explained to them by their solicitor and they fully understood them. As outlined above, it is clear from **Condition 14 (c)** that, on the expiry of the fixed interest rate period on the mortgage loan account, either, a variable interest rate would apply, or a further fixed rate if a fixed rate was made available by the Provider and selected by the Complainants. The variable interest rate set out in **Condition 14(c)** was clearly one which may be increased or decreased by the Provider at any time. It makes no reference to the ECB rate. There was no ambiguity as to the rate applicable at the end of the fixed interest rate period in the **Loan Offer Letter** dated **24 May 2007**.

With respect to the Complainants’ submission that the operation and maintenance of the Provider’s current account was a “*collateral contract to the main loan*” which entitled them to a tracker interest rate at the end of the fixed rate period. The evidence shows that the Complainants’ opened the current account with the Provider in **March 2007**. This coincides with when the Complainants applied for their mortgage loan. The **[Product] Current Account Brochure** details that “*[all account] members are entitled to apply for an [the Provider] Flexible Tracker Mortgage with [product] discount. This offers all the features and benefits of our Flexible Tracker Mortgage, with the added benefit of a special discount off our Flexible Tracker Mortgage Rate.*”

It is understood that the Complainants opened a current account with the Provider in **March 2007** which entitled them to a range of benefits to include a special discount off the Provider’s tracker mortgage loan product.

The Complainants’ representative, in post Preliminary Decision submissions dated **08 October 2020**, details as follows;

“The [name of Provider’s current account] account was only opened for the discount on the margin applicable to this Tracker Mortgage. All of the other benefits held no

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relevance to [the Complainants] when opening the account. It was only opened solely for the discount in the Tracker Margin it gave.

The **Brochure** details how the Complainants can obtain the tracker mortgage, and sets out as follows;

“How it works

When you apply for a Flexible Tracker Mortgage with [product] discount we’ll discuss all your options with you. When your application is being processed, if you wish to take the Flexible Tracker Mortgage with [product] discount, full details of this will be written on your application form.

Once your application is agreed, an Offer of Advance will be forwarded to you. From the moment you drawdown the mortgage funds, you’ll start receiving the benefit of your Flexible Tracker Mortgage with [product] discount.”

The Complainants were offered this discounted tracker mortgage product in the **Loan Offer Letter** dated **02 May 2007**, however they chose not to accept it and did not draw down the mortgage loan under this product.

The fact that the Complainants chose to continue with the current account after rejecting the tracker mortgage and accepting the **Loan Offer Letter** dated **24 May 2007**, which did not have a discount associated with the current account did not in my view create any obligation on the Provider to offer the Complainants a tracker rate at the end of the fixed interest rate period on **31 August 2009**.

The Complainants’ representative, in his post Preliminary Decision submission dated **09 September 2020**, details as follows;

“...The “mortgage discount benefit” entitled to them, by taking a [PRODUCT] account would have also been highlighted as being set aside and would have raised sufficient concerns, to change nothing with how the loan is agreed namely ECB plus 0.75% and decide to allow the mortgage proceed as was agreed and understood as application stage.

... Why would [the Complainants] continue with their [PRODUCT] account (see attached). The sole reason was to continue to avail of the discount it gave on their Tracker margin rate. The discount was worth €26.66 per month and was a valuable discount for the couple”.

/Cont’d...

The Provider, in its post Preliminary Decision submission dated **25 September 2020**, details as follows;

“There was no obligation or requirement on the customers to take out a [PRODUCT] current account. In relation to the customers’ representative’s assertion that the customers would not have continued with their [PRODUCT] current account if it was their understanding they had no entitlement to a tracker interest rate at a future date and consequently would not have been able to avail of a discount on a tracker interest rate; we would clarify that [PRODUCT] current account holder benefits were not confined to mortgage discount benefits. Holders were entitled to a range of benefits under four separate categories: Financial, Travel, Lifestyle and Protection. One of these financial benefits was that customers could apply for an [Provider] Flexible Tracker Mortgage with a [PRODUCT] discount. This offered all the features and benefits of the Flexible Tracker Mortgage, with the added benefit of a special discount off the Flexible Tracker Mortgage rate. In addition, [PRODUCT] members could avail of a free valuation when applying for their mortgage (including non tracker mortgages). The customers in this instance received the benefit of a free valuation by virtue of the fact they were [PRODUCT] current account holders. While the customers initially applied for a mortgage loan on a tracker interest rate they actually drew their mortgage loan down on a fixed interest rate.

At a later point in their mortgage journey (2009) the customers availed of a discounted variable rate (non tracker interest rate) which had the [PRODUCT] discount applied. This demonstrates that the customers did enjoy benefits holding onto the [PRODUCT] current account, and that these benefits are product neutral. In addition, the [PRODUCT] Terms & Conditions clearly articulate that mortgage offers will be made periodically to holders of these accounts.”

I accept that the tracker rate discount offered on foot of holding a particular current account with the Provider may have been a factor considered by the Complainants when applying for a particular mortgage loan product. The Complainants were indeed offered this discount when they initially chose the option of tracker mortgage in their mortgage application form. However, in circumstances where the Complainants did not accept the tracker rate mortgage and subsequently requested a fixed rate mortgage, the terms of which they ultimately agreed to, they were no longer eligible to apply a tracker rate discount to their mortgage loan. Nevertheless, the Complainants subsequently availed of a discounted variable rate in **2009** on foot of holding this particular current account with the Provider. It appears to me that there were other reasons to maintain this current account and the Complainants benefitted from discounts, other than the discounted tracker rate.

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In any event the holding of a particular current account could not possibly of itself alter the terms and conditions relating to a separate mortgage account.

While I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainants' mortgage loan account at the end of the fixed interest rate period on **31 August 2009**, I am also of the view that the information provided to the Complainants in the **Loan Acceptance** contained an error. The **Consumer Protection Code 2006**, outlines that;

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

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainant. While I accept that *"typographical"* errors can occur and in this circumstance that error did not affect the Complainants' underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought this *"typographical"* error to the Complainants' attention and highlighted how the error occurred, in advance of the Complainants making a complaint to the Provider.

The Complainants' representative, in his post Preliminary Decision submission dated **09 September 2020**, states as follows;

"When considering this paragraph, it is interesting as a practitioner to strongly disagree and agree with the same paragraph.

I know this decision is wrong.

The Office has made an error of fact.

In a failure to give any consideration to the customer's journey to ensuring he received the most competitive Tracker margin available from [the Provider], including but not exclusively the opening of a [PRODUCT] account.

The points raised above are being entirely set aside by the office. I see this as wrong given the appropriate consideration to the customers v providers and who knew more.

.....

I believe if one is to be fair and reasoned to the customer...then I do not think there can be any doubt whatsoever that [the Complainants] assumed that the very

/Cont'd...

competitive Tracker they had agreed to was not being set aside and we raised many of the reasons for this view. ”

I have not been furnished in evidence with the legal opinion mentioned by the Complainants in their submission. In any event, I do not agree that the Loan Acceptance is “viewed as the most important page in the document as it is the only page that the customer signs”. The mortgage loan in this instance comprised of the Loan Offer, the Specific Loan Offer Conditions, the General Terms and Conditions, the Standard Mortgage General Terms and Conditions and the Loan Acceptance. The fact that the Complainants’ signature was only attached to the Loan Acceptance does not give that specific page any more relevance in the mortgage loan contract than any other page. The Complainants’ contractual entitlements were set out in the entirety of the mortgage loan, as opposed to any individual page. As outlined above, the “*typographical*” error did not affect the Complainants’ underlying contractual entitlements. The sample Loan Acceptance with the “*Remortgage*” reference does not have any relevance to the Complainants’ mortgage loan. The Complainants’ representative submitted two anonymised documents relating to the outcome of the Tracker Mortgage Examination on other mortgage holders mortgage loan accounts, where those accounts are held with another third party provider, with the post Preliminary Decision submissions dated **09 September 2020** and **10 September 2020** and made submissions in respect of those documents.

These documents have absolutely no relevance to the Complainants’ mortgage loan or their entitlements.

It would be completely inappropriate for me to apply the terms of a contract between other parties or the application of a process involving other parties to my decision in relation to this complaint.

I note that the Provider acknowledged its error in its **Final Response** Letter to the Complainants dated **24 April 2015**, and made a goodwill offer of €2,500 for any “*confusion the erroneous reference to a “Tracker Mortgage”*” may have caused. The Complainants rejected this offer and submit that it “*only served to further anger them*”.

The Complainants’ representative in his post Preliminary Decision submission dated **09 September 2020** submits as follows;

“The consequences of this typo are far greater than the attempted recognition of €2,500 from the Provider given the financial loss to [the Complainants] and the substantial benefit to the provider.

...

/Cont’d...

The intentions of [the Complainants] were clear and did not get altered by asking to fix the rate for the first 2 years.

The correction of the “typo” would have alerted [the Complainants] to more occurring than their simple request.

It would certainly have raised the following

“Should we wait to fix the rate until after drawing down the loan”.

...

I see this as an error, the acceptance of the office of the retrospective positioning of the lender with no questioning of what should have been in the declaration as this would have put my clients on alert to the hidden and silent removal of what was agreed CPC 2006 prevents in a clear way this occurring.”

The Provider, in its post Preliminary Decision submission dated **25 September 2020**, states as follows;

“We would clarify that the Bank is, in this instance, agreeable to honouring the offer of €2,500 that had been made to the customers in the Final Response Letter of 24 April 2015. However, we would clarify that the offer was made to the customers in April 2015, which was prior to the inception of the Tracker Mortgage Examination in late December 2015. Having now had the benefit of considering the customer’s complaint in the context of the Tracker Mortgage Examination an offer of €2,500 would not have been made to the customers in the current circumstances.”

I am of the view that the comment made by the Provider with respect to the offer and the Tracker Mortgage Examination and current circumstances is somewhat futile and irrelevant. The Provider assessed the Complainants’ complaint in **April 2015** and made an offer to the Complainants as recompense for the Provider’s error. It remains that the error happened. To this end, it is difficult to understand the Provider’s rationale for submitting that the offer would not be made in current circumstances. In any event, I note that the Provider is agreeable to honouring the offer made in **April 2015**.

In relation to the Complainants’ representative’s comment in relation to retrospective positioning, it would appear to me that the Complainants perhaps understanding with the benefit of hindsight might wish to retrospectively accept the tracker mortgage that they rejected in 2007. That is very understandable. However it does not provide a basis on which I should or could uphold their complaint.

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The Complainants did not have a contractual or other entitlement to a tracker interest rate of ECB + 0.75% at the end of the fixed interest rate period on **31 August 2009**. The Complainants had been offered a tracker interest rate of ECB + 0.75% in the initial Loan Offer Letter that issued to them dated **02 May 2007**, however, they rejected that offer and asked for a mortgage loan commencing on a 2 year fixed interest rate. The Loan Offer Letter dated **24 May 2007** did not contain an entitlement to either a tracker interest rate or tracker interest rate with a margin of 0.75% at the end of the initial fixed interest rate period on **31 August 2009**. The Loan Offer Letter dated **24 May 2007** did contain a typographical error but that error did not affect the Complainants' underlying contractual entitlements.

Furthermore, I do not accept that the Complainants are at any financial loss as a result of the error. Therefore, I accept the sum of €2,500 which has been made by the Provider to be reasonable in the circumstances.

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

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(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**

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

