



<u>Decision Ref:</u>	2020-0461
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The loan amount was €450,000 and the term of the loan is 35 years. The particulars of the Loan Offer Letter dated **27 April 2007** detailed that the loan type was "Discount 0.55% until 31/03/08 92% Capital and Interest" and that the interest type was "Discount Variable".

The Complainants' Case

The Complainants submit that when they applied for mortgage loan ending **4796 (01)**, they requested that a tracker interest rate apply to the mortgage loan account as per the Provider's **Executive Summary** document that they have submitted in evidence. The Second Complainant was an employee of the Provider at this time. The Complainants state that they were issued with a **Loan Offer Letter** dated **27 April 2007**. The Complainants assert that the 'Loan Acceptance' section of the Loan Offer Letter "*clearly stated that [they] were signing for a tracker mortgage*". The Complainants state that they signed and accepted the Loan Offer Letter on **3 May 2007** for a tracker mortgage and in doing so

confirmed that the *“Specific Loan Offer Terms and Conditions explained to [them] by [their] Solicitor referred to that Tracker Mortgage”*.

The Complainants refer to **Condition 14** of the Standard Terms and Conditions which refers to the applicable interest rate. The Complainants are of the view that given that they *“signed for a tracker mortgage, Condition sub-clause 14 (b) applies to [their] Mortgage”*. The Complainants state that it is not *“unreasonable”* for them to consider that the *“variable rate referred to in the offer letter was in fact a Tracker Variable and not a Standard Variable rate”*.

The Complainants explain that shortly after mortgage loan account ending **4796 (01)** was drawn down on **19 June 2007**, they *“realised that the loan was not on a tracker rate and was in fact on a variable rate”*. The Complainants submit that they sent a request to the Provider on **28 June 2007** to amend a portion of their mortgage loan account to a tracker interest rate and to place the other portion on a staff fixed interest rate, however they state that they received no response from the Provider in relation to their request.

The Complainants state that they sent a further request to the Provider on **12 November 2007** to place a portion of their mortgage loan account on a tracker interest rate and to place the other portion on a staff fixed interest rate, but again they did not receive a response from the Provider. The Complainants submit that the Second Complainant has no record of discussing this request to amend the interest rate with the Provider’s mortgage department despite the Provider’s assertions that it was *“highly likely”* that this matter was discussed directly with the Second Complainant as she was a mortgage advisor with the Provider at the time.

In **January 2008**, the Complainants explain that they opted for a fixed interest rate to apply to mortgage loan account ending **4796 (01)** as *“rates were on the rise”* and in **February 2008** a portion of the mortgage loan account was moved to a staff fixed interest rate under sub-account ending **4796 (02)**. The Complainants submit that at no point did the Provider advise them or make them aware that if they opted to apply a fixed interest rate to their mortgage loan account, a tracker variable rate would no longer be available to them. The Complainants contend that if they had *“been aware that by fixing the rate [they] would lose all entitlements to a tracker rate [they] would never have fixed the rate”*.

The Complainants question why a Change Agreement Form was issued to them in **January 2008** on foot of their request to amend the interest rate on their mortgage loan account to a fixed interest rate however a Change Agreement Form was not sent to them on foot of their request to amend the interest rate to a tracker interest rate in **November 2007**.

The Complainants state that they requested a tracker interest rate from the Provider by way of telephone call in **2011** on expiry of the fixed interest rate period in respect of mortgage loan account ending **4796 (01)**.

The Complainants submit that they were advised that a tracker interest rate was not available and a letter was issued to them outlining the suite of interest rates available for selection at the time, which did not include a tracker interest rate.

The Complainants reject the Provider's statement that the mention of a "*Tracker Mortgage*" on the Loan Acceptance document attached to the Loan Offer Letter was a "*typographical error*". The Complainants submit that this explanation by the Provider is "*astonishing, laughable and dismissive*". The Complainants state that this "*typographical error*" has had "*grave and serious consequences*" on their mortgage as they believed that they were agreeing to a tracker mortgage.

In addition, the Complainants submit that the Provider has failed to comply with the spirit of the **Consumer Protection Code** by being "*dishonest and not acting in the best interest of its customer*".

The Complainants are seeking the following:

- (a) That mortgage loan account ending **4796(01)** is recalculated as if it had been placed on a tracker interest rate from **June 2007** until **January 2008**, and from the expiry of the requested fixed interest rate period in **March 2011**;
- (b) A refund of the difference in interest rates between the standard variable rate that was applied and the tracker interest rate during the applicable periods; and
- (c) Compensation for the actions of the Provider in relation to its behaviour relating to this complaint which has caused "*a great deal of stress*" to the Complainants.

The Provider's Case

The Provider submits that the Complainants completed a standard application form on **2 April 2007** for a mortgage loan which did not specify a specific interest rate product.

The Provider states that it issued a **Loan Offer Letter** to the Complainants on **27 April 2007** which "*clearly confirmed that the mortgage loan was to draw down on a discounted variable rate*". The Provider further states that the Loan Offer Letter did not contain any specific condition specifying that a tracker interest rate would be made available to the Complainants when the initial discounted variable rate period ended, or any stage during the term of the loan. The Provider explains that "*[s]uch a reference would have been necessary for a tracker interest rate to apply*".

/Cont'd...

The Provider refers to the **Executive Summary** submitted by the Complainants and notes that this is an “*internal document*” which was not provided to the Complainants during the mortgage application stage and is not a “*formal mortgage offer*”. The Provider explains that the Complainants’ mortgage application was assessed by the Provider’s underwriting team in line with the Provider’s credit policy, which was applicable at the time, and “*the Executive Summary had no bearing or implications on this process*”. The Provider asserts that the terms and conditions to include the interest rate that the Complainants’ mortgage loan was agreed upon were outlined in the Loan Offer Letter dated **27 April 2007**, which is the Complainants’ loan agreement with the Provider.

The Provider submits that the Loan Acceptance in the Complainants’ Letter of Offer “*erroneously*” refers to the term “*Tracker Mortgage*” and that this was a “*typographical error*”. The Provider states that this is apparent when read in conjunction with the Loan Offer Letter and the relevant terms and conditions and that the “*incorrect reference*” does not create “*a right or expectation to a tracker interest rate*”. The Provider further asserts that the “*typographical error 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 the documents evidencing the agreement*”. The Provider rejects the Complainants’ submission that **General Condition 14(b)** applied to their mortgage loan account as this condition is only applicable in the case of a tracker mortgage.

The Provider refers to an “*internal memo*” dated **28 June 2007** from the Complainants to the Provider requesting that “*the maximum allowable portion*” of the Complainants’ mortgage loan be placed on the Provider’s “*lifetime fixed staff interest rate of 3% and for the remaining mortgage loan portion to be placed onto a tracker interest rate of ECB+ 0.75%*”. The Provider explains that the Complainants’ instruction was not in a format acceptable to the Provider in line with **Condition 21** of the **Standard Mortgage General Terms and Conditions**. The Provider states that its “*required form*” in order to make a change to a mortgage loan is a “*Change Agreement/Product Switch form*”. The Provider further explains that at the time of this request in **June 2007**, the Complainants’ mortgage loan funds had not been fully drawn down. The Provider states that “*€99,480 was still to be drawn down, meaning that the account was not complete*”. The Provider states that it was therefore unable to change the interest rate on the mortgage loan “*until such time as all approved loan funds had been drawn down and the mortgage loan was complete*”. The Provider states that it has no record of having formally replied to the Complainants’ internal memorandum of **28 June 2007** however given the Second Complainant was a mortgage advisor in the Provider’s branch, the Provider is of the view that it is “*highly likely*” that this matter was discussed directly with the Second Complainant.

The Provider states that the Second Complainant submitted a second “*internal memo*” on **12 November 2007** requesting that “*the maximum allowable portion*” of the

/Cont’d...

Complainants' mortgage loan be placed on the Provider's *"lifetime fixed staff interest rate, and the remaining portion of the loan to be placed onto a tracker interest rate of ECB+ 0.75%"*. While the Provider acknowledges that the Complainants' mortgage loan had been completely drawn down on **7 November 2007**, the Provider explains that the Complainants' request could not be actioned as it was not in the correct form acceptable by the Provider and was not signed by the First Complainant. Again, the Provider submits that it is unable to locate a formal response the Second Complainant's memo.

The Provider submits that its records indicate that the Complainants requested information/paperwork in relation to an interest rate product switch on their mortgage loan account on **14 January 2008**. In response to this request, the Provider states that it issued a **Change Agreement/Product Switch form** to the Complainants on **21 January 2008** which was the correct form required for the Provider to make the changes to the interest rate on the Complainants' mortgage loan account. The Provider explains that pursuant to the Complainants' instructions, the Change Agreement/Product Switch form included the transfer of a €190,000 portion of the Complainants' mortgage loan account to the Provider's fixed rate of 3% and the remaining mortgage balance to transfer to a fixed interest rate of 5.05%, fixed until **31 March 2011**.

The Provider submits that the Complainants accepted and signed the Change Agreement/Product Switch form on **24 January 2008** and the Complainants' mortgage loan was consequently split into two separate mortgage loan sub-accounts whereby mortgage loan account ending **4796(01)** was placed on a fixed interest rate of 5.05% until **30 March 2011** and mortgage loan account ending **4796(02)** was placed on a lifetime fixed rate of 3%.

The Provider asserts that this Change Agreement/Product Switch form did not contain any entitlement to a tracker rate of interest on the expiry of the fixed rate period. The Provider explains that the Change Agreement/Product Switch form did not *"supersede the general terms and conditions outlined in the customers' Loan Offer"*. The Provider maintains that **Condition 14 (c) (ii)** attaching to the Loan Offer Letter continued to apply to both of the Complainants' mortgage loan sub-accounts. The Provider states that therefore, upon the expiry of the fixed interest rate period on mortgage loan account ending **4796(01)**, the Provider's variable interest rate would apply in the event that the Complainants chose not to opt for a further fixed interest rate. The Provider submits that there was *"no expiry date applicable"* to the staff lifetime fixed rate of 3% on mortgage loan account ending **4796(02)**. The Provider explains that the variable interest rate as described in the standard mortgage general terms and conditions is *"the Bank's Standard Variable Rate which is a variable rate which can be increased or reduced by the Bank (the Lender) at any time"*.

By comparison, the Provider explains that a *“a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will only rise and fall in line with movements in the ECB base rate, which base cannot be changed by [the Provider]”*.

The Provider submits that the Change Agreement/Product Switch form signed by the Complainants on **24 January 2008** was *“clear”* and there is no evidence to suggest that the Complainants *“raised any concerns in relation to this document”*. The Provider further asserts that at no point did it *“offer a fixed interest rate which defaulted to a tracker interest rate at the end of the fixed interest rate period”*.

The Provider explains that mortgage loan account ending **4796(02)** remained on the staff fixed interest rate until **March 2009**, at which time the Complainants chose to remove their mortgage from the staff fixed rate and place this second mortgage loan sub-account onto a variable interest rate. The Provider states that the Complainants signed and accepted a Change Agreement/product Switch Form on **3 March 2009** to facilitate this amendment to their mortgage loan account. The Provider notes that mortgage loan account ending **4796(02)** remained on the variable interest rate until **August 2009**, at which point the Complainants requested to place the maximum allowable mortgage portion on the Provider’s 3% staff lifetime fixed interest rate. The Provider explains that the staff fixed interest rate was applied to mortgage loan account ending **4796(02)** however the outstanding balance on the mortgage loan sub-account was less than the maximum allowable amount (€190,000) therefore funds were removed from the Complainants’ third mortgage loan sub-account ending **4796(03)** which created a fourth mortgage loan sub-account, as follows;

*“Loan a/c 1 – Fixed 5.05% until 31/03/11 (SVR)
Loan a/c 2- Lifetime Fixed 3%
Loan a/c 3- Lifetime SVR
Loan a/c 4- Lifetime Fixed 3%”*

The Provider notes that the Complainants signed and accepted a further Change Agreement/Product switch form on **28 August 2009**. The Provider explains that there was no expiry date applicable to the lifetime fixed rate of 3% as the *“expectation on a lifetime product is that it will run to the maturity date of the mortgage loan”* unless the Complainants chose to switch to another interest rate, or leave employment before the end of the scheduled mortgage term.

The Provider submits that on **14 March 2011**, prior to the end of the fixed interest rate period in respect of mortgage loan sub- account ending **4796(01)**, it issued a letter to the Complainants outlining the alternative interest rate products available to them at the time.

/Cont’d...

The Provider explains that as “*tracker interest rate products were withdrawn by the Bank [in late 2008], this product type was not included in this letter*”. The Provider states that the default position following the expiry of the fixed interest rate period on mortgage loan sub- account ending **4796(01)** in **March 2011** was the Provider’s “*Standard Variable Rate and therefore there was no entitlement to default to a tracker interest rate*”.

The Provider further submits that it does not accept the Complainants’ submissions that the Provider failed to comply with the “*spirit*” of the **Consumer Protection Code** and asserts that the Complainants were provided with all the relevant required information in order to make informed decisions throughout the mortgage journey.

The Complaints for Adjudication

The complaints for adjudication are that;

- (a) The Provider incorrectly failed to apply a tracker interest rate to the Complainants’ mortgage loan account from inception in **June 2007**;
- (b) The Provider incorrectly failed to apply a tracker interest rate to the Complainants’ mortgage loan account when requested to do so by the Complainants after drawdown of mortgage loan account ending **4796 (01)** in **June 2007** and in **November 2007**; and
- (c) The Provider incorrectly failed to offer the Complainants the option of a tracker interest rate at the end of the fixed interest period in respect of mortgage loan account ending **4796 (01)** in **March 2011**.

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.

/Cont’d...

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

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

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also necessary to set out the interactions between the Complainants and the Provider from **2007 to 2011**.

The Complainants completed a **General Mortgage Application Form** on **2 April 2007** seeking a mortgage loan in the amount of €460,000 over a 35 year repayment period. Under the "*Type of mortgage*" section of the application form, the Complainants chose "*Capital and Interest (Repayment)*". I note that there is no reference to a specific interest rate type or interest rate product in the application form.

An **Executive Summary** document was prepared by the Provider for internal use in support of the Complainants' intended mortgage application. I understand that the purpose of this document was to summarise the Complainants' mortgage application and was not provided to the Complainants during the mortgage application stage. I note that this document refers to the "*Loan Type*" as "*disc tracker .55 over ecb*". I understand that the Complainants' received a copy of the Executive Summary through a data access request and this did not form part of the documentation furnished to the Complainants at application stage. In any event this document did not form part of the loan offer documentation that ultimately issued to the Complainants.

Following an assessment of the Complainants' mortgage loan application, the Provider issued a **Loan Offer Letter** dated **27 April 2007** in respect of mortgage loan account ending **4796**.

/Cont'd...

The **Loan Offer Letter** details as follows;

“...
Loan Type : *Discount 0.55% until 31/03/08 92%
Capital and Interest*
Loan Amount : *€450,000.00*
Interest Rate : *4.69%*
Interest Type : *Discount Variable*
Term : *35 years”*

The “*Loan Offer – Consumer Credit Act 1995*” section of the **Loan Offer Letter** reads as follows;

“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME”

The **Specific Loan Offer Conditions** attaching to the **Loan Offer** include the following;

“...Drawdown 350,520 to purchase house costing 381,000. Balance required to purchase to emanate from sale of existing family home- written confirmation prior to drawdown that there is an irrevocable signed contract in place for sale of existing family home.

Drawdown 85k to assist cost of upgrading new family home against architect certs- if required if appropriate.

Drawdown against invoices if planning is not required. Drawdown balance on application for home improvement....”

The Specific Loan Offer Conditions clearly envisaged that only €350,520 of the total loan amount of €450,000 would be drawn down initially to purchase the mortgaged property with the balance of the monies to be drawn down at a later date for home improvements.

Two sets of Terms and Conditions were attached to the Loan Offer Letter: The **General Terms and Conditions** and the **Standard Mortgage General Terms and Conditions**.

The **Standard Mortgage General Terms and Conditions** are stated to be effective from “01/06/2006”.

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

“1. Introduction

/Cont’d...

(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."

Therefore 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 Letter dated **27 April 2007**.

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

"14. Interest Rate

(a) Subject to Sub-Clause 14(b), all Loans are subject to the Bank'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 movement.*
- (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 the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender.*

Where such an option is not made available by the Lender, or if available, where the Borrower fails to exercise the option, the interest

/Cont'd...

rate applicable will be a variable interest rate which may be increased or decreased by the Lender at any time, and in this respect, the decision of the Lender will be final and conclusively binding on the Borrower”.

Page 1 of the **European Standardised Information Sheet** attaching to the **Loan Offer Letter** details as follows;

“This document does not constitute a legally binding offer.

The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.

[...]

3. Interest Rate

...

Interest rate: 4.69%

Interest Type: DISCOUNT VARIABLE”

The Complainants signed the **Loan Acceptance** on **3 May 2007** on the following terms;

“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.”

It is clear to me that the **Loan Offer** envisaged that a discounted variable interest rate of 4.69% would apply to the mortgage loan until **27 April 2008**.

While I accept that the **Executive Summary** refers specifically to a discount tracker variable interest rate, the interest rate type that was ultimately offered to the Complainants by the

/Cont'd...

Provider in the Loan Offer was a discounted variable interest rate. The nature of this variable interest rate was one that could be adjusted by the Provider from time to time as opposed to a tracker variable interest rate which fluctuates in line with European Central Bank (ECB) rates.

The Provider states that the following tracker interest rates were available in **June 2007**;

“[Provider’s] Tracker Interest Rates available June 2007

ECB Base Rate June 2007: 4.00%

Loan to Value: <80%

ECB + 0.95% (interest rate 4.95%)

Loan to Value: >80%

ECB + 1.15% (interest rate 5.15%)

First Time Buyer Tracker Rate:

ECB + 0.75% (interest rate 4.75%)

Provider’s Tracker Interest Rates (with [Product] Discount) available June 2007

Loan to Value: <80%

ECB + 0.75% (interest rate 4.75%)

Loan to Value: >80%

ECB + 1.15% (interest rate 5.15%)”

I note that the Complainants were not first time buyers when they applied for their mortgage loan in **June 2007** therefore the above first time buyer rate was not available. Nevertheless, the above shows that the non-tracker variable interest rate of 4.69% that was offered to the Complainants in the Loan Offer was in fact lower than the lowest tracker interest rate product on offer by the Provider at the time which was 4.75%.

The Complainants accepted the Loan Offer by signing the **Loan Acceptance**, having confirmed that the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions had been explained to them by their solicitor and they understood them. If it was the case that the Complainants were not satisfied with the type of variable interest rate offered by the Provider in the **Loan Offer**, the Complainants could have chosen not to accept the Loan Offer of **27 April 2007**.

However the Complainants signed their acceptance of the Loan Offer and the first stage of the Complainants’ mortgage loan drew down in the amount of €350,520 on **19 June 2007**

/Cont’d...

in line with the Specific Loan Conditions outlined above. The Complainants' mortgage loan account drew down on a discounted variable interest rate of 4.69%.

The Complainants contend that the **Loan Acceptance** form "*clearly stated that [they] were signing for a tracker mortgage*". I note that there is a reference to "*Tracker Mortgage*" in the second paragraph of the **Loan Acceptance**, as quoted above. This appears to be an error on the part of the Provider as the sentence that contains this erroneous reference to "*Tracker Mortgage*" is 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. I do not consider that the single use of the word "*Tracker*" in this sentence which was not related to the interest rate applicable to the Complainants' mortgage loan could have led the Complainants to reasonably form the understanding that the interest rate applicable to the loan was a tracker interest rate.

I note that there is no other mention of "*Tracker Mortgage*" in the Complainants' loan documentation apart from **Condition 14 (b)** of the **Standard Mortgage General Term and Conditions**, as outlined above. However I am of the view that **Condition 14(b)** did not apply to the Complainants' mortgage loan given the interest rate applicable was a variable interest rate as opposed to a tracker interest rate. If the Complainants' mortgage loan was a tracker mortgage then I would expect the particulars of the Loan Offer Letter and Specific Loan Offer Conditions to contain details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14(b)**, however, there is no reference to a fixed rate margin or an ECB rate in the Complainants' loan documentation.

Whilst this error on the part of the Provider is entirely unsatisfactory, I am satisfied that the particulars of the **Loan Offer** are sufficiently clear as to the type of mortgage offered to the Complainants and confirm that the Complainants were offered a discounted variable interest rate mortgage loan that could be adjusted by the Provider from time to time as opposed to a tracker interest rate.

Whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainants' mortgage loan account, I am also of the view that the information provided to the Complainants in the **Loan Acceptance** was somewhat confusing. The standards expected of the Provider in all its dealings with the Complainants are set out in the **Consumer Protection Code 2006** (the "**CPC 2006**"). The **CPC 2006** came into force on **1 August 2006**.

The **General Principles** contained in **Chapter 1** came into effect immediately on **01 August 2006** which includes the following provision;

/Cont'd...

“Chapter 1 – General Principles

A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

...

(2) 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 Complainants. Whilst I accept that errors can occur and in this instance, that error did not affect the Complainants’ underlying contractual entitlements, I am of the view that the Provider should have been more proactive in bringing this “*typographical error*” to the Complainants’ attention and highlighted how the error occurred, in advance of the Complainants making a complaint to the Provider. I note that the error was not addressed by the Provider until it issued its **Final Response Letter** to the Complainants on **12 July 2018**.

The Complainants submit that when they noticed that they were being charged a non-tracker variable interest rate shortly after the first stage of their mortgage loan was drawn down in **June 2007**, they “*immediately requested*” that their mortgage loan account be placed on a tracker interest rate. The Second Complainant, who was employed as a mortgage advisor with the Provider at the time, sent an **internal memorandum** to her colleague dated **28 June 2007** detailing as follows;

“...

Please amend my mortgage ref [account ending 4769] to staff rates.

...

51526 X 4 + 32000 = 238104

Please can you put this amount or the max allowable on 3%.

Please place the balance on [Product] Rate Ecb plus .75 i.e tracker rate of 4.75%

If you have any queries you might give me a buzz on [number].

Thanks a mil

[Second Complainant]

Mortgage Advisor”

Upon a review of the submissions furnished by the Provider and the Complainants, I note that both parties agree that this internal memorandum requested that the maximum

/Cont’d...

allowable portion of the Complainants' mortgage loan be placed onto the Provider's lifetime fixed staff interest rate of 3% and for the remaining mortgage loan portion to be placed on a tracker interest rate of ECB + 0.75%.

There is a stamp on the internal memorandum indicating that it was received by the Provider's mortgage operations department. However, I note from the evidence provided that no action whatsoever was taken by the Provider on foot of receipt of the internal memorandum and therefore the Complainants' mortgage loan account remained on the discounted variable interest rate. This office requested the Provider to explain why no action was taken on foot of the Complainants' request. The Provider has provided the following explanations;

- The internal memorandum was not in a format acceptable by the Provider in line with **Condition 21** of the Standard Mortgage General Terms and Conditions applicable to the Complainants' mortgage loan;
- At the time of the request, the Complainants' mortgage loan funds had not been fully drawn down. The Provider states that it was unable to change the interest rate of a mortgage loan until such time as all approved funds has been drawn down and "*the mortgage account was complete*"; and
- Given the Second Complainant worked closely with the Provider's mortgage department, the Provider maintains that it is "*highly likely*" that the Second Complainant discussed this matter directly with the Provider's mortgage operations department.

Condition 21 of the **Standard Mortgage General Terms and Conditions** attaching to the **Loan Offer Letter** dated **27 April 2007** states as follows;

"The Borrower's instructions

(a) The Lender will accept written instructions bearing the original signature of the Borrower. This does not include instructions sent by facsimile or instructions with a facsimile of the Borrower's signature. The Lender will be entitled to act on any such written instructions which appear to the Lender to be genuine. The Lender may require the Borrower's instructions to be in a particular form which the Lender may specify."

While I acknowledge that this condition allows the Provider to require the Complainants to submit any instructions to the Provider in a particular format, the "*particular form*" required is not specified in the Complainants' loan documentation. The Provider submits that it required instructions to be in the form of a "*Change Agreement/Product Switch*" form, which I accept it was entitled to require in line with **Condition 21**. However, there is no evidence to demonstrate that the Provider actually informed or otherwise specified to

/Cont'd...

the Complainants that this was the “*particular form*” required. A question therefore arises as to why the Provider did not issue the Complainants with the appropriate “*Change Agreement/Product Switch*” for completion on foot of receiving the internal memorandum.

The Provider also states that it was not in a position to act on the Second Complainant’s instruction to amend the interest rate because the mortgage loan amount had not been drawn down in full at that stage (€99,480 was still to be drawn down). While I accept that it may have been within the Provider’s commercial discretion to not permit any changes to the mortgage product until the loan amount was fully drawn down, there is no evidence to suggest that the Provider explained its reasoning to the Complainants in this regard. Rather, the Provider concedes that it has no record of having “*formally replied*” to the Complainants on foot of receipt of the internal memorandum dated **28 June 2007**. While I appreciate that the Second Complainant was employed as a mortgage advisor with the Provider at the time, in the absence of any internal meeting notes or any other supporting evidence, I do not accept the Provider’s submission that it is “*highly likely*” that the Second Complainant discussed the matter directly with the Provider.

It is important for the Provider to be aware that the mortgage loan the subject of this complaint is jointly held by the First Complainant and Second Complainant and so any communication in relation to the interest rate should have been addressed to both Complainants. It is most disappointing that the Provider failed to take any action whatsoever on foot of receipt of the Second Complainant’s instructions or indeed offer any written explanation to the Complainants as to why it was not in a position to action the Complainants’ request to amend the interest rate on their mortgage loan account.

The Second Complainant submitted a further **internal memorandum** to the Provider dated **12 November 2007** detailing as follows;

“Please amend my mortgage ref [ending 4796] to staff rates.

.....

[First Complainant’s] Total salary 58178 incl bonuses.

[Second Complainant’s] salary is E32k.

Please can you put this amount or the max allowable on 3%.

Please place the balance on [Product] Rate Ecb plus .75 i.e tracker rate of 4.75%

If you have any queries you might give me a buzz on [number].

Thanks a mil

/Cont’d...

*[Second Complainant]
Mortgage Advisor"*

I note that this internal memorandum was addressed to the same colleague to which the previous request was made to in **June 2007** as well as another colleague. Upon a review of the submissions furnished by the Provider and the Complainants, I note that both parties agree that this internal memorandum requested that the maximum allowable portion of the Complainants' mortgage loan be placed onto the Provider's lifetime fixed staff interest rate of 3% and for the remaining mortgage loan portion to be placed on a tracker interest rate of ECB + 0.75%.

There is a stamp on the internal memorandum indicating that it was received by the Provider's mortgage operations department. However, I note from the evidence provided, that, once again, no action whatsoever was taken by the Provider on foot of receipt of the internal memorandum and therefore the Complainants' mortgage loan account remained on the discounted variable interest rate.

The Provider states that the balance of the loan monies had been drawn down on **7 November 2007** when the Second Complainant submitted the internal memorandum on **12 November 2007** therefore the mortgage loan account was "*complete*". However, the Provider states that the internal memorandum was not in the "*correct form*" and was not signed by the First Complainant therefore the Provider was unable to action the Complainants' request. Again, the Provider concedes that it is unable to locate a response to the Second Complainant's internal memorandum. The Provider is of the view that it is "*highly likely*" that the Second Complainant discussed this matter directly with the Provider however in the absence of any internal meeting notes or any other supporting evidence, I do not accept the Provider's submission in this regard. It is most disappointing that the Provider did not issue the Complainants with a "*Change Agreement/Product Switch*" form and explain to the Complainants that this was the required form to be completed in order to amend the interest rate on the mortgage loan account. Instead, the evidence indicates that the Provider simply ignored the Complainants' request and took no action whatsoever.

The Provider states that the following tracker interest rates were available in **November 2007**;

"[Provider's] Tracker Interest Rates available November 2007

ECB Base Rate November 2007: 4.00%

Loan to Value: <80%

ECB + 0.95% (interest rate 4.95%)

/Cont'd...

Loan to Value: >80%
ECB + 1.15% (interest rate 5.15%)

First Time Buyer Tracker Rate:
ECB + 0.75% (interest rate 4.75%)

Provider's Tracker Interest Rates (with [Product] Discount) available November 2007

Loan to Value: <80%
ECB + 0.75% (interest rate 4.75%)

Loan to Value: >80%
ECB + 1.15% (interest rate 5.15%)”

The above shows that the variable interest rate of 4.69% applicable to the Complainants' loan in **November 2007** was in fact lower than the lowest tracker interest rate product on offer at the time which was 4.75%.

While the Complainants may not have lost out on any real financial benefit by the Provider's failure to respond to the Complainants' request to apply a tracker interest rate in **November 2007**, at the time, the fact remains that when the Complainants specifically requested a change to their mortgage loan account, no action whatsoever was taken by the Provider and there was no communication with the Complainants in response to their request.

While I accept that the Complainants ultimately had no contractual entitlement to a tracker interest rate and any amendment to this effect was within the Provider's commercial discretion, the Provider should have responded to the Complainants' written request explaining why no such action could be taken, if that was its position, or outline the steps required to be taken by the Complainants in order to enable the Provider to facilitate their request to amend the interest rate on their mortgage loan account.

As previously mentioned, the standards expected of the Provider in all its dealings with the Complainants are set out in the **CPC 2006**, in particular the **General Principles** contained in **Chapter 1** which came into effect on **01 August 2006**. I am of the view that the Provider did not act with "*due skill, care and diligence*" in its dealings with the Complainants in accordance with **Chapter 1** of the **CPC 2006** when it failed to respond to the First Complainant's internal memorandums of **28 June 2007** and **12 November 2007**.

/Cont'd...

The Provider issued a letter dated **21 January 2008** to the Complainants enclosing a "Change Agreement" form on foot of what appears to be further request by the Complainants to amend the terms of their mortgage loan. The letter dated **21 January 2008** details as follows;

"I refer to your recent request to alter the terms of your mortgage account.

To proceed, please complete and return the enclosed Change Agreement form to the above address.

Should you have any queries regarding this, or any other matter, please do not hesitate to contact me on the above telephone number"

The **Change Agreement/Product Switch Form** contained the following in relation to the interest rates requested by the Complainants;

"THIS IS AN IMPORTANT DOCUMENT. YOU SHOULD TAKE INDEPENDENT LEGAL ADVICE BEFORE SIGNING AND SIGN ONLY IF YOU WANT TO BE LEGALLY BOUND

....

1.	<i>Amount of credit advanced</i>	€446,980.83
2.	<i>Period of Agreement</i>	34 years 4 months
3.	<i>Number of Repayment instalments</i>	412
4.	<i>Amount of each instalment from: 19/02/2008</i>	€2,050.71
	<i>Amount of each instalment from: 19/04/2011</i>	€2,134.72
	<i>Amount of each instalment from: 19/06/2042</i>	€1,395.46

.....

"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"

Mortgage Products(s):

Loan A/c	Product Name	Interest Rate %	Repayment Method	Mortgage Loan Term	Loan Amount	Effective Date
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR	5.05%	Capital & Interest	34 Yrs 4 Mths	€256,980.83	[21/1/08]

/Cont'd...

Loan A/c 2 Lifetime Fixed 3% 3.00 Capital & 34 Yrs 4 €190,000.00 [21/1/08]
Interest Mths ”

The following Special Conditions apply to the account(s) detailed above:

....

This Change Agreement, the Offer of Loan dated 27-APR-2007 in respect of the Property and the Standard Mortgage Conditions shall, as from the effective date of this Agreement, be read and construed together as constituting your Agreement with the Bank. All terms and conditions contained in previous Offers of Loan, Change Agreement(s) and/or Repayment Method Change Agreement(s) relating to Products(s), Interest Rate(s), repayment, early repayment (if any) partial repayment (if any), repayment method and Loan Term shall no longer apply. All other terms and conditions of the Loan(s) as set out in the Offer of Loan dated and the Standard Mortgage Conditions will remain unaltered.`

IMPORTANT INFORMATION ABOUT YOUR MORTGAGE

1. The amount outstanding on your Mortgage at 21-JAN-2008 was €446,980.83
2. The new Monthly Payment will change to €2,050.71 on a date to be confirmed
3. The type of interest rate applying to your Mortgage Account is:

Loan A/c	Product Name	Interest Rate Type
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR	FIXED
Loan A/c 2	Lifetime Fixed 3%	

4. The Interest Rate shown on the first page of this Agreement will change to :-

Loan A/c	Product Name	New Interest Rate %	Effective Date
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR		
Loan A/c 2	Lifetime Fixed 3%		

The Complainants signed this **Change Agreement/Product Switch form** on **24 January 2008** on the following terms;

“I/We acknowledge receipt of this Change Agreement and confirm acceptance of the terms and conditions as set out herein.

...

/Cont'd...

Please refer to the Special Conditions which detail the relevant provisions applicable to the product(s) you have selected. If you are in any doubt as to the effect of these provisions, please seek advice from your solicitor before signing the Acceptance of this Change Agreement.”

The **Change Agreement/Product Switch form** details that Complainants’ mortgage loan was effectively split into two mortgage loan sub-accounts whereby a fixed interest rate of 5.05% applied to the first mortgage loan sub-account until **31 March 2011** and a fixed interest rate of 3% applied to the second mortgage loan sub-account for the lifetime of that loan account.

The Provider acknowledged receipt of the signed Change Agreement/Product Switch form from the Complainants by letter dated **4 February 2008** which details as follows;

“Further to recent correspondence, I can confirm that €190,000 of your mortgage has been transferred to the staff rate of 3 %. The remaining balance has been put on the 5.05% fixed rate until 31/03/11....”

The Provider submits that the Change Agreement/Product Switch form contained information as to what would transpire at the end of the fixed rate period.

The Provider states that “a standard variable rate (“SVR”)” would apply to the first mortgage loan sub-account upon expiry of the fixed interest rate period on **31 March 2011**. I do not agree with the Provider’s submissions that the terms of the Change Agreement/Product Switch form were clear as to what would happen at the end of the fixed rate period in respect of the first mortgage loan sub-account. The Change Agreement/Product Switch form merely states that the interest rate is “Fixed 5.05% Until 31/03/11 SVR”. The term “SVR” is not defined in the Change Agreement/Product Switch form or the Loan Offer Letter and the associated conditions. It is disappointing the Change Agreement/Product Switch form did not specifically set out what the acronym “SVR” meant.

I am of the view that the use of an undefined acronym in a contractual document is wholly unacceptable on the part of the Provider and does not conform to the standards expected of a diligent and prudent financial service provider. The absence of a definition of “SVR” raises the potential for ambiguity as to the applicable interest rate at the end of the fixed interest rate period when the Change Agreement/Product Switch form is considered in and of itself.

/Cont’d...

As outlined above, the Change Agreement/Product Switch form specifically states that the Loan Offer letter dated **27 April 2007** and the Standard Mortgage Conditions together with the contents of the signed Change Agreement/Product Switch form are to be read and construed together as constituting the Complainants' updated agreement with the Provider. The Change Agreement/Product Switch form also states that all terms and conditions contained in any previous Loan Offer Letters or Change Agreements no longer apply. In this particular case, there are no previous Loan Offer Letters (other than the original Loan Offer Letter dated **27 April 2007**) or Change Agreements. Therefore, I am satisfied that Loan Offer Letter dated **27 April 2007** and the Standard Mortgage General Terms and Conditions, effective from **1 June 2006** and attaching to the Loan Offer Letter dated **27 April 2007** remain unchanged.

In circumstances where the Change Agreement/Product Switch form is unclear as to what is to occur upon the expiry of the fixed interest rate on **31 March 2011**, one must look to the Loan Offer Letter and the Standard Mortgage General Terms and Conditions to provide clarity in this regard. It has already been established that the Loan Offer Letter dated **27 April 2007** does not contain a specific contractual entitlement to a tracker interest rate. In terms of the Standard Mortgage General Terms and Conditions, **Condition 14 (c) (ii)** details what is to occur on the expiry of a fixed interest rate period. As outlined above, **Condition 14 (c) (ii)** explains that on expiry of the fixed interest rate period, the Complainants can choose a fixed interest rate for a further fixed rate period or in the event that no further fixed interest rate option is made available by the Provider or if the Complainants fail to exercise the option, the interest rate that will apply will be "*a variable interest rate which may be increased or decreased by the Lender at any time*".

It is clear that the nature of the variable interest rate that is to apply upon the expiry of the fixed interest rate is one that could be adjusted by the Provider from time to time as opposed to a tracker variable interest rate which fluctuates in line with ECB rates. I note that there is no reference whatsoever to a tracker interest rate in the Change Agreement/Product Switch form.

It is also important to note that the **Change Agreement/Product Switch form** which was signed by the Complainants on **24 January 2008** details that the Complainants confirmed acceptance of the terms and conditions as set out in the form and outlined that if the Complainants had any doubt as to the effect of the provisions, the Complainants should seek advice from their solicitor before signing the agreement. It is unclear whether the Complainants sought advice at the time. If the Complainants were unsure about the terms of the **Change Agreement/Product Switch form** it was a matter for them to decide whether to seek advice. In any event they signed the **Change Agreement/Product Switch form** agreeing to the terms and conditions of that form.

Given the above, I do not accept that it was reasonable for the Complainants to assume or form an expectation that the first mortgage loan sub-account ending **4796(01)** would automatically default to a tracker interest rate at the end of the fixed interest rate period on **31 March 2011**.

I note that the Complainants' second mortgage loan sub-account remained on a staff fixed rate until **March 2009**, at which time the Complainants' chose to remove this mortgage from the staff fixed interest rate and place in on a variable interest rate. In order to facilitate this request, the Provider issued a **Change Agreement/Product Switch form** to the Complainants dated **27 February 2009** which details as follows;

"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"

Mortgage Products(s):

Loan A/c	Product Name	Interest Rate %	Repayment Method	Mortgage Loan Term	Loan Amount	Effective Date
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR	5.05	Capital & Interest	33 Yrs 3 Mths	€254,347.11	27 February 2009
Loan A/c 2	Lifetime SVR +0.10	4.20	Capital & Interest	33 Yrs 3 Mths	€186,452.75	27 February 2009
Loan A/c 3	Lifetime SVR +0.39	4.49	Capital & Interest	24 Yrs 8 Mths	€43,390.66	27 February 2009

The following Special Conditions apply to the account(s) detailed above:

....

This Change Agreement, the Offer of Loan dated 27-APR-2007 in respect of the Property and the Standard Mortgage Conditions shall, as from the effective date of this Agreement, be read and construed together as constituting your Agreement with the Bank. All terms and conditions contained in previous Offers of Loan, Change Agreement(s) and/or Repayment Method Change Agreement(s) relating to Products(s), Interest Rate(s), repayment, early repayment (if any) partial repayment (if any), repayment method and Loan Term shall no longer apply. All other terms and conditions of the Loan(s) as set out in the Offer of Loan dated and the Standard Mortgage Conditions will remain unaltered.`

/Cont'd...

IMPORTANT INFORMATION ABOUT YOUR MORTGAGE

1. The amount outstanding on your Mortgage at 27-FEB-2009 was €484,190.52
2. The new Monthly Payment will change to €2,206.27 on a date to be confirmed
3. The type of interest rate applying to your Mortgage Account is:

Loan A/c	Product Name	Interest Rate Type
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR	FIXED
Loan A/c 2	Lifetime SVR + 0.10	
Loan A/c 3	Lifetime SVR +0. 39	

4. The Interest Rate shown on the first page of this Agreement will change to :-

Loan A/c	Product Name	New Interest Rate %	Effective Date
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR		
Loan A/c 2	Lifetime SVR + 0.10		
Loan A/c 3	Lifetime SVR +0. 39		

The Complainants signed this **Change Agreement/Product Switch form** on **3 March 2009** on the following terms;

"I/We acknowledge receipt of this Change Agreement and confirm acceptance of the terms and conditions as set out herein.

...

Please refer to the Special Conditions which detail the relevant provisions applicable to the product(s) you have selected. If you are in any doubt as to the effect of these provisions, please seek advice from your solicitor before signing the Acceptance of this Change Agreement."

The **Change Agreement/Product Switch form** details that the Complainants' mortgage loan was effectively further split into a third mortgage loan sub-account and a lifetime variable rate was applied to both that sub-account and the second mortgage loan sub-account.

The Provider acknowledged receipt of the signed Change Agreement/Product Switch form from the Complainants by letter dated **20 March 2009** which details as follows;

"Thank you for your recent request to change the product(s) on your mortgage account. The following table details your repayment amount(s) and the date(s) it will be effective from based upon the product(s) you have requested.

/Cont'd...

<i>Loan Account No.</i>	<i>New Payment</i>	<i>Payment Date</i>	<i>Product</i>	<i>Repayment Type</i>
<i>Loan A/c 1</i>	<i>€1,099.70</i>	<i>19/04/2009</i>	<i>Fixed 5.05% Until 31/03/11 SVR</i>	<i>Capital and Interest</i>
<i>Loan A/c 2</i>	<i>€730.18</i>	<i>19/04/2009</i>	<i>Lifetime SVR +0.10</i>	<i>Capital and Interest</i>
<i>Loan A/c 3</i>	<i>€237.01</i>	<i>19/04/2009</i>	<i>Lifetime SVR +0.39</i>	<i>Capital and Interest</i>
<i>Total Repayment</i>	<i>€2,066.89</i>			

Thank you for choosing us as your mortgage provider and if we can be of any further assistance please do not hesitate to call us on the number given above."

The Complainants sent a signed letter to the Provider dated **5 August 2009** requesting the following;

"Please amend the maximum allowable to the staff rate@3%. Payslips enclosed".

On foot of this request, the Provider issued a **Change Agreement/Variation of Contract** dated **27 August 2009** to the Complainants which details as follows;

"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"

Mortgage Products(s):

<i>Loan A/c</i>	<i>Product Name</i>	<i>Interest Rate %</i>	<i>Repayment Method</i>	<i>Mortgage Loan Term</i>	<i>Loan Amount</i>	<i>Effective Date</i>
<i>Loan A/c 1</i>	<i>Fixed 5.05% Until 31/03/11 SVR</i>	<i>5.05</i>	<i>Capital & Interest</i>	<i>32 Yrs 9 Mths</i>	<i>€252,262.12</i>	<i>27 August 2009</i>
<i>Loan A/c 2</i>	<i>Fixed 3.00 for Life</i>	<i>3.00</i>	<i>Capital &</i>	<i>32 Yrs 9</i>	<i>€184,724.02</i>	<i>27 August 2009</i>

/Cont'd...

	%	Interest	Mths	
Loan A/c 3	Lifetime SVR +0.39	4.24	Capital & Interest	24 Yrs 2 Mths €37,475.83 27 August 2009
Loan A/c 4	Fixed 3.00 for Life	3.00	Capital & Interest	24 Yrs 2 Mths €5,275.98 27 August 2009

The following Special Conditions apply to the account(s) detailed above:

....

This Change Agreement, the Offer of Loan dated 27-APR-2007 in respect of the Property and the Standard Mortgage Conditions shall, as from the effective date of this Agreement, be read and construed together as constituting your Agreement with the Bank. All terms and conditions contained in previous Offers of Loan, Change Agreement(s) and/or Repayment Method Change Agreement(s) relating to Products(s), Interest Rate(s), repayment, early repayment (if any) partial repayment (if any), repayment method and Loan Term shall no longer apply. All other terms and conditions of the Loan(s) as set out in the Offer of Loan dated and the Standard Mortgage Conditions will remain unaltered.

IMPORTANT INFORMATION ABOUT YOUR MORTGAGE

1. The amount outstanding on your Mortgage at 27 August 2009 was €479,737.95
2. The new Monthly Payment will change to €2,010.86 on a date to be confirmed
3. The type of interest rate applying to your Mortgage Account is:

Loan A/c	Product Name	Interest Rate Type
Loan A/c 1	Fixed 5.05% Until 31/03/11 SVR	FIXED
Loan A/c 2	Fixed 3.00 for Life %	FIXED
Loan A/c 3	Lifetime SVR + 0.39	
Loan A/c 4	Fixed 3.00 for Life %	FIXED

The Complainants signed this **Change Agreement/Product Switch form** on **28 August 2009** on the following terms;

/Cont'd...

"I/We acknowledge receipt of this Change Agreement and confirm acceptance of the terms and conditions as set out herein.

...

Please refer to the Special Conditions which detail the relevant provisions applicable to the product(s) you have selected. If you are in any doubt as to the effect of these provisions, please seek advice from your solicitor before signing the Acceptance of this Change Agreement."

The **Change Agreement/Product Switch form** details that the Complainants' mortgage loan was effectively further split into a fourth mortgage loan sub-account and lifetime fixed interest rate was applied to both that sub-account and the second sub-account while the third sub-account remained on a lifetime variable rate and the first sub-account remained on a fixed interest rate of 5.05% until **31 March 2011**.

I note that the Change Agreements of **27 February 2009** and **27 August 2009** did not supersede the Loan Offer Letter dated **27 April 2007** and the Standard Mortgage Conditions.

Prior to the expiry of the fixed interest rate on the first mortgage loan sub-account ending **4796(01)**, the Provider issued a letter enclosing a **Rate Change Letter of Authority** to the Complainants dated **15 March 2011**. The cover letter dated **15 March 2011** details as follows;

**"RE: Mortgage Account No.: [ending 4796]
Sub Account No.: 1**

THE FIXED RATE PERIOD ON YOUR MORTGAGE IS ABOUT TO END

Dear Customer(s)

The fixed rate period on your mortgage is coming to an end on 31/03/2011, so now it's time to start thinking about your next mortgage deal. Any borrowings you have on this fixed rate will automatically roll to the Standard Variable Rate (APR 4.4%). Your monthly repayment on this rate is included in the table overleaf.

Alternatively you might choose a new variable or fixed rate. To help you make an informed decision the table below outlines the advantages and disadvantages of the default Standard Variable Rate compared to other variable and fixed rate mortgages.

/Cont'd...

[.....]"

The **Rate Change Letter of Authority** dated **15 March 2011** details the range of interest rate options available to the Complainants to choose from. This list of interest rate options was also included in the **Rate Change Letter of Authority** which details as follows;

**"RE: Loan Account No.: [ending 4796]
Sub Account No.: 1**

Dear Sirs,

Please transfer my/our existing mortgage to the interest rate selected below with immediate effect. I/We wish to apply for the interest rate of:

Rate Options	Rate%	Please tick selected rate
<i>Fixed until 31/3/2013 <90% LTV (APR 4.5%) reverting to Standard Variable Rate</i> This rate is only available if your LTV is less than 90%	4.80	
<i>Fixed until 31/3/2013 <90% LTV (APR 4.7%) reverting to Standard Variable Rate</i> This rate is only available if your LTV is less than 90%	5.10	
<i>Discounted Variable with [Product] discount SVR -0.40% <80% LTV (APR 4.0%)</i> This rate is only available if your LTV is less than 80% and you are a [Product] account holder. An up to date valuation is required.	3.95	
<i>Discounted Variable with [Product] discount SVR -0.30% >80% LTV (APR 4.1%)</i> This rate is only available to [Product] account holders.	4.05	

/Cont'd...

<i>Discounted Variable SVR -0.20% <80% LTV (APR 4.2%) This rate is only available if your LTV is less than 80%. An up to date valuation is required.</i>	4.15	
<i>Discounted Variable SVR -0.10% >80% LTV (APR 4.3%)</i>	4.25	
<i>Standard Variable Rate (APR 4.4%)</i>	4.35	If you wish to default your mortgage to this rate, you do not need to contact us, we will automatically transfer your mortgage to this rate unless you instruct us otherwise.

[...]

Conditions applying to fixed rate mortgages

- 1. Transfer from fixed rate to standard variable rate at the end of the fixed term:**
On the expiry of the fixed rate term I/we may, by prior notice in writing to the Company, opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the Company. Where such an option is not available or I/we fail to exercise the option if available, the interest rate applicable will be a rate of interest which may be increased or reduced by the company from time to time

[...]”

I note that the Complainants selected the first option listed above, that is, a fixed interest rate until **31 March 2013** of 4.80% reverting to the Provider’s standard variable interest rate thereafter.

The Complainants signed the **Rate Change Letter of Authority** on **1 April 2011** on the following terms;

/Cont’d...

“Transfer of Authority:

I/We acknowledge that my/our mortgage will be transferred to the rate I/we have selected and that the conditions outlined will apply where I/we have selected a fixed rate. “

The Complainants submit that that they requested that a tracker interest rate be applied to their first mortgage loan sub-account ending **4769(01)** at the end of the fixed interest rate period in **March 2011** however they state that they were advised that they were not entitled to a tracker interest rate as it was no longer available. While I acknowledge that the Provider had withdrawn tracker interest rates from the market in **late 2008**, it is important to note that in circumstances where a fixed interest rate applied to the first mortgage loan sub-account ending **4769(01)**, **condition 14 (c) (ii)** was the governing condition that applied to this particular mortgage loan sub-account. As outlined above, pursuant to **condition 14 (c) (ii)**, at the end of a fixed interest rate period, the Provider could offer the Complainants a further fixed interest rate and if no such rate was made available, or if the Complainants chose not to make a selection from the rates offered by the Provider, a variable interest rate which may be increased or decreased by the Provider at any time would apply. The **Rate Change Letter of Authority** dated **15 March 2011** offered the Complainants a range of fixed interest rate options as well as discounted variable rate options and highlighted that the Provider’s standard variable interest rate would apply if the Complainants did not make a selection from the interest rates offered. Therefore, I am of the view that the Provider acted in accordance with **condition 14 (c) (ii)** when it issued the **Rate Change Letter of Authority** dated **15 March 2011**.

I have considered the Complainants’ mortgage loan documentation in its entirety and it appears to me that the Provider was under no obligation to offer the Complainants a tracker interest rate when they applied for a mortgage loan in **April 2007**. If the Complainants were of the view that the nature of the discounted variable interest rate offered was not suitable to them, the Complainants could have decided not to accept the offer made by the Provider on **27 April 2007**. Instead, the Complainants signed the **Loan Acceptance** on **3 May 2007** in the presence of their solicitor and confirmed that they accepted the Loan Offer on the terms and conditions set out therein and the mortgage loan was drawn down in **June 2007**. By way of **Change Agreement/Product Switch form** dated **24 January 2008**, the Complainants chose to place a portion of their mortgage loan on a fixed interest rate **until 31 March 2011**.

I accept that the Complainants had no contractual or other entitlement to a tracker interest rate on the expiry of a fixed interest rate in **March 2011** but rather were entitled to a further fixed interest rate and if no such rate was available they were entitled to the

/Cont’d...

Provider's standard variable interest rate, in line with the Standard Mortgage Conditions attaching to the Loan Offer Letter of **27 April 2007**.

I have already noted my disappointment with respect to the Provider's dealings with the Complainants on foot of requests by the Second Complainant to amend the interest rate on the Complainants' mortgage loan account in **June 2007** (after drawdown of the loan) and again in **November 2007**. Equally, I have highlighted my disappointment with the Provider's reference to "*Tracker Mortgage*" in the second paragraph of the **Loan Acceptance** and the Provider's use of an undefined acronym in the **Change Agreement/Product Switch form** dated **24 January 2008** which I could have led to some confusion on the part of the Complainants as to their contractual entitlements.

For the reasons set out above, I am of the view that this complaint is partially upheld. To mark the Provider's shortcomings under the **Consumer Protection Code 2006**, I direct that the Provider pay to the Complainants a sum of €2,500 compensation.

For the reasons set out in this Decision, I partially 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 partially upheld, on the grounds prescribed in **Section 60(2)(a) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €2,500, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

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

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

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

/Cont'd...



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

16 December 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.