



<b><u>Decision Ref:</u></b>	2021-0037
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Refusal to move existing tracker to a new mortgage product
<b><u>Outcome:</u></b>	Rejected

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

##### **Background**

This complaint relates to the Complainants' mortgage loan accounts ending **7062** and **0333** held with the Provider. Both mortgages are secured on the Complainants' private dwelling house (PDH).

The First Complainant previously held the following mortgage loans with the Provider;

- Mortgage loan account ending **4139** was secured on the First Complainant's former private dwelling house (PDH). The loan amount was €290,000 and the term was 30 years. The mortgage loan was redeemed on **11 October 2017**.
- Mortgage loan account ending **9839** was also secured on the First Complainant's former private dwelling house. The loan amount was €106,000 and the term was 30 years. The mortgage loan was redeemed on **11 October 2017**.
- Mortgage loan account ending **9898** was secured on the First Complainant's Buy-to-Let property. The mortgage loan was redeemed when the property was sold in **2014**.

In **2014** the Complainants drew down two joint mortgage loans to fund the purchase of their current primary dwelling house, as follows;

- A Mortgage Loan Offer Letter dated **23 September 2014** for mortgage loan account ending **7062** was signed by the Complainants on **7 November 2014**.

The loan amount was €225,000 and the term was 19 years. The interest rate applicable to the loan as *"4.250% Fixed"* for a period of 2 years.

- A Mortgage Loan Offer Letter dated **17 June 2015** for mortgage loan account ending **0333** was signed by the Complainants on **24 June 2015**. The loan amount was €180,000 and the term was 19 years. The interest rate applicable to the loan as *"3.750% Fixed"* for a period of 2 years.

### **The Complainants' Case**

The First Complainant submits that she previously had two mortgage loan accounts ending **9839** and **4139** with the Provider which were both operating on a tracker rate and were secured on her former Private Dwelling Home (PDH). She outlines that she resided in this property between **2002** and **2012**. She details that she subsequently relocated to another county in **2013** and rented out her former PDH *"for a short period"*.

The First Complainant submits that she also had a third mortgage account ending **9898** which also operated on a tracker interest rate and was secured on a Buy-to-Let (BTL) property.

The Complainants submit that in **2014**, they decided to jointly purchase a family home (their current Private Dwelling Home). They applied for and drew down two mortgage loan accounts ending **7062** and **0333** to fund the purchase.

The First Complainant submits that during the application process in **2014** the Provider advised her to sell her BTL property and clear the outstanding mortgage account ending **9898**. She states that *"I duly complied and sold this property. I sold it at an approximate loss of 100K from the original purchase price. At the time I asked [the Provider] if there was anything that [the Provider] could do as I felt I took the entire brunt of the loss and [the Provider was] now gaining by forcing me off the tracker rate and on to a much higher yielding variable rate for [the Provider]. [The Provider] confirmed there was absolutely nothing [it] could do."*

The Complainants submit that they have since learned that they could have availed of the Provider's Tracker Mover product in **2014** if they had instead sold the First Complainant's former PDH which secured her mortgage accounts ending **9389** and **4139**. They outline that *"At no time did [the Provider] suggest that there was the possibility of obtaining the 'Tracker Mover' rate which would have allowed [the Complainants] to avail of the existing tracker rate + 1% for 5 years, or indeed the possibility of any other tracker rate."* Consequently the Complainants state that their mortgage accounts ending **7062** and **0333** were drawn down on a *"much higher"* variable rate in **2014**.

In **2017** the Complainants asked the Provider if they could avail of the Tracker Mover product for the new mortgage accounts ending **7062** and **0333**, if they sold the First Complainant's former PDH which secured mortgage accounts ending **9839** and **4139**. They submit that the Provider informed them that this property was not eligible for the Tracker Mover product because it had since been rented out by the First Complainant. The First Complainant submits that the Provider *"has treated me very harshly in declaring that the property [securing accounts ending 9839 and 4139] was not my private principle residence"*.

### **The Provider's Case**

The Provider submits that the Tracker Mover product was not available to the Complainants in **2014** as they *"did not satisfy the criteria for the Tracker Mover product."* It details that the Tracker Mover product allowed customers who were eligible for the product to retain their tracker product on the balance of their existing mortgage for a period of 5 years with an additional 1.00% over the margin of their current tracker. It states that any sums above the existing mortgage balance would be subject to a standard variable rate or a fixed interest rate.

The Provider details that the First Complainant held three mortgage loans secured on two properties with the Provider when the Complainants submitted their mortgage applications in **2014**.

The Provider submits that there were two mortgage loans secured on the First Complainant's former primary residence.

### **Mortgage loan account ending 4139**

The Provider details that the mortgaged property was purchased by the First Complainant *"in or around 2003"* and was mortgaged under account ending **4139** for €290,000.

The Provider states that at the time of drawdown the property was described as *“being the property in which the First Named Complainant would reside.”*

#### **Mortgage loan account ending 9839**

The Provider submits that in **2005** the First Complainant was approved an equity release on her PDH property in the amount of €106,000 for the purpose of assisting the First Complainant in purchasing an investment property.

The Provider states that it accepts that the property securing mortgage accounts ending **4139** and **9839** was the First Complainant’s primary residence from **2002** to **2012**. However it outlines that the First Complainant was renting out this property when the Complainants applied for the mortgage loans in **2014** and the Complainants were residing in another county at that time. The Provider asserts that the First Complainant’s property was *“at all material times, operating as a buy-to-let/residential investment property and was not the private dwelling house of the Complainants, either jointly or separately.”*

#### **Mortgage loan account ending 9898**

The Provider submits that another property was purchased by the First Complainant in **2006** under mortgage loan account ending **9898**. It states that the *“purpose of the mortgage loan was to purchase this property as an investment property.”*

#### **Mortgage applications in 2014**

The Provider submits that the Complainants submitted two mortgage loan applications in **2014**. The Provider outlines that the Complainants first applied for a mortgage loan of €430,000 in **January 2014** to fund the purchase of a property. It submits that this application was *“initially declined and further declined on appeal by the Complainants”* due to concerns over the Complainants’ *“repayment capacity.”*

The Provider states that it *“did not instruct the Complainants to sell”* the First Complainant’s BTL which secured mortgage loan account ending **9898**. It notes that the Complainants had placed this property on the market for sale prior to the Complainants submitting their first mortgage loan application in **January 2014**. It states that the Complainants advised the Provider in that application that the sale had fallen through the previous year and their intention was to *“keep the [BTL] Property on the market but sought approval on the basis they were retaining it.”* The Provider submits that the Complainants *“embarked on this course of action without any input or direction from the Provider.”*

The Provider outlines that if the mortgage loan application in **January 2014** had been approved, the Complainants would have had an overall indebtedness to the Provider of approximately €917,000. The Provider states that it *“had concerns about the Complainants’ level of spending at the time”* and advised the Complainants to *“save at stressed levels for a period of 6 months to evidence satisfactory repayment capacity.”*

The Provider states that this application did not progress to approval stage, therefore interest rate options were not discussed between the parties and no offer letter was issued to the Complainants.

The Provider details that in or around **27 January 2014**, the Complainants informed the Provider that they wished to appeal the Provider’s decision to decline their mortgage loan application. The Provider submits that its credit department stated that the application had been declined at the *“highest possible level”* and that there were no new circumstances which warranted bringing the matter to another unit of the Provider. It submits that the Complainants’ appeal was declined on **28 January 2014** as all available avenues had been exhausted *“following careful consideration of the Complainants circumstances and such appropriate lending risks”*.

The Provider reiterates that its recommendation following the decline of the Complainants’ initial mortgage loan application was that the Complainants *“demonstrate repayment capacity by saving at the level of stressed mortgage repayments for 6 months.”* It states that the Provider’s Credit Department noted that the issue was with the Complainants’ *“lifestyle”* and that *“Even if both properties were sold, it only proves additional 500pm.”* The Provider states that in discussion with the Complainants *“it was suggested that the best course of action would be to sell the [BTL] property and to “re-establish a savings record to support stressed mortgage repayments.””* The Provider outlines that the Complainants could demonstrate that they had the ability to meet the repayments by saving for a period of 6 months, or they could have reduced their overall indebtedness. Therefore the Provider is of the view that there was *“always a choice on how to approach this and this choice lay entirely with the Complainants.”*

The Provider submits that it received a further mortgage loan application from the Complainants in **August 2014** to fund the purchase of a different property which is now the Complainants’ Private Dwelling Home. It outlines that in their second application, the Complainants advised the Provider that the First Complainant’s BTL property which secured mortgage account ending **9898** was then currently at sale agreed at €235,000, which would be used to clear the mortgage balance, with a surplus of approximately €50,000 which would be used to assist with the purchase and renovations of the new proposed property.

The Provider submits that it does not have any evidence that the Tracker Mover product was discussed as an option with the Complainants in **2014**. It states that when the Complainants submitted their mortgage loan applications in **January 2014** and **August 2014**, *“the Provider’s branch manager did raise the option of the Tracker Mover product with the Provider’s Credit Department, which was rejected as the Complainants did not meet the criteria”* because *“neither of their properties with tracker rates of interest were ‘owner occupied’ properties and the application was to proceed on the basis that both properties were to be retained.”*

The Provider outlines that in circumstances where the Complainants did not meet the prerequisites for the Tracker Mover product, there was *“no obligation on the Provider to extend or discuss products which would be inapplicable to the customer’s circumstances and the Provider believes that there is no failure by it in not doing so.”*

The Provider states that it issued a **Mortgage Loan Offer Letter** to the Complainants on **23 September 2014** for mortgage account ending **7062** which offered a mortgage loan amount of €225,000 on an initial fixed interest rate of 4.250% for a period of two years, rolling to a standard variable rate thereafter. The Provider states that the Complainants wanted the initial two year fixed rate period on mortgage loan account ending **7062** and the Provider was satisfied to offer that rate with a standard variable rate applying thereafter. It details that the Complainants indicated their acceptance of this offer by signing the Offer Letter on **7 November 2014** and the mortgage loan account was drawn down in full on **18 December 2014**.

On **17 June 2015** the Provider issued a **Mortgage Loan Offer Letter** to the Complainants for mortgage loan account ending **0333** which offered a mortgage loan amount of €180,000 on an initial fixed interest rate of 3.750% for a period of two years with a standard variable rate applying thereafter. The Complainants accepted the offer by signing the Offer Letter on **24 June 2015**.

The Provider submits that it is not under any obligation to offer any particular product or interest rate to a customer except where contractually obliged to, which it states is *“not the case in this instance”*. The Provider outlines that *“Interest rate offerings are made at the discretion of the Provider and based on many factors including its commercial discretion.”* The Provider states that it is clear that mortgage loan accounts ending **7062** and **0333** are *“not ‘Tracker Mover’ products and this is what the Complainants were satisfied to accept.”*



## **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Tracker Mover product to the Complainants in **2014**.

## **Decision**

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

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

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also 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 26 January 2021, 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.

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

/Cont'd...

In order to determine this complaint, it is necessary to consider the interactions between the Complainants and the Provider in relation to the Complainants' mortgage applications between **January** and **August 2014**. At the outset I will also set out the details of the First Complainant's mortgage loan accounts that were held with the Provider.

**A Mortgage Loan Offer Letter** dated **16 June 2003** issued to the First Complainant in relation to mortgage loan account ending **4139**.

**Part 1 – The Statutory Loan Details** outline as follows;

1. Amount of Credit Advanced	€290,000
2. Period of Agreement	30 years
3. Number of <u>Repayment Instalments</u>	<u>Instalment Type</u>
12	Variable at 2.750%
348	Variable at 3.600%
..."	

**Part 4 – The Special Conditions** outline;

"...

*The interest rate applicable to the loan has been discounted by 0.85% per annum on the amount of the Loan for a period of 12 months from the date of drawdown of the Loan. At the end of the said discount period the reduction shall cease and the interest rate applicable to the Loan shall revert to the then prevailing Home Loan variable rate. The discount set out in this special condition is the discount which would apply if the Loan were drawn down today. There is no guarantee that this discount will be available when the loan is in fact drawn down. The actual discount that will apply shall be the discount then offered by the Lender at the date of drawdown."*

The First Complainant signed the **Acceptance and Consent** on **26 June 2003** on the following terms;

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

/Cont'd...



**A Mortgage Loan Offer Letter** dated **7 April 2005** issued to the First Complainant in relation to mortgage loan account ending **9839**.

**Part 1 – The Statutory Loan Details** outline as follows;

<b>4. Amount of Credit Advanced</b>	<b>€106,000</b>
<b>5. Period of Agreement</b>	<b>30 years</b>
<b>6. Number of</b>	<b>Instalment</b>
<b><u>Repayment Instalments</u></b>	<b><u>Type</u></b>
12	Fixed at 2.750%
348	Variable at 3.600%
..."	

**Part 4 – The Special Conditions** detail;

- (i) *"This advance is issued in addition to your existing homeloan reference [ending] 4139."*

The First Complainant signed the **Acceptance and Consent on 27 April 2005** on the following terms;

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

I have not been provided with any evidence which shows that the First Complainant's mortgage loan accounts ending **4139** and **9839** were switched to a tracker interest rate at some point prior to **2014**, however it does not appear to be disputed between the parties that this is what occurred.

I have not been furnished with details of the **Mortgage Loan Offer Letter** issued to the First Complainant in relation to the mortgage loan account ending **9898**. Nonetheless I note that it is not disputed that the security for this mortgage loan was the First Complainant's BTL property purchased in **2006**.

The Provider has furnished in evidence a copy of its **[Tracker Mover product] Customer Factsheet** which is marked **03/13**.

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Relevant excerpts from the brochure are as follows:

***“What is the [Tracker Mover product]***

*Now [the Provider] may be able to provide the following option to existing tracker mortgage customers who wish to move home:*

- *A tracker product **for five years** at just 1.00% over your current margin over ECB rate – that is ECB (European Central Bank) rate plus a margin of 1% more than your current margin over ECB (meaning the new tracker rate will be 1% per annum higher than your present tracker rate).*
- *The tracker product will be available for the outstanding amount of your existing homeloan tracker mortgage.*
- *Even if you are in negative equity we may be able to offer you a solution (see further detail below)*
- *You can choose a new business variable or fixed rate on any additional mortgage funds required for the move to your new home.*

...

***What if you existing property is in Negative Equity?***

*Even if your current property is in negative equity, we may be able to provide a mortgage for a new home where you bring the negative equity portion of your current mortgage across to your new mortgage.*

*Applicants must meet certain conditions to qualify, including the following:*

- *Your new mortgage Loan to Value (LTV) can be no more than 175% including the negative equity portion, or 125% for self-builds.*
- *Maximum term 30 years or up to age 70.*
- ***Available on owner occupied mortgages only.** Applicants must be existing [Provider] mortgage customers with a satisfactory repayment record of at least 2 years. [Emphasis added]*
- *If you are trading up, you must be able to fund at least 10% on the purchase price of the new property, plus stamp duty and any associated buying and selling costs such as estate agent, legal fees, etc.*
- *The existing property must be sold and the proceeds paid off the original mortgage before the new mortgage can be drawn down.”*

/Cont’d...

It is clear from this document that the Provider's Tracker Mover product was available on "owner occupied mortgages only". This lending criteria falls within the Provider's commercial discretion.

I understand that the Complainants submitted a joint mortgage loan application in **January 2014** for the loan amount of €430,000, to fund the purchase and renovation of a new home.

The Provider has indicated that it "does not retain supporting documents submitted alongside applications which are subsequently declined for longer than 6 months after the decline." However the Provider has furnished a copy of its internal **mortgage loan application notes** which record as follows:

*"Mortgage Loan Application [redacted]*

*...*

*Existing Mortgage Accounts*

*[Ending] 4139*

*[Ending] 9839*

*[Ending] 9898*

*...*

*Proposal*

*Currently living rent free with [Redacted family member] they wish to Purchase property currently derelict on 11acre site*

*...*

***Mover Retainer***

***[First Complainant] has [BTL] property in [Location] on market offer last year 240k fell through***

***Keeping prop on mrkt looking for approval based on keeping property RIP in [Location] also to be retained – M/R calculator shows shortfall stress test at 1736***

***[First Complainant] will be increasing rent on prop in [Location] to 1400pm from 1100 also savings 500pm [my emphasis]***

*Repayment Capacity:*

*...*

/Cont'd...

No short term debt - Rental income evident at 1900pm  
LTV on assumption that works adds min val 190k LTV 88%  
within guideline

...

#### Pros

[First Complainant] ... good stable employment est p60 for 2013 200k  
Track Record [the Provider]

Own input is good – savings built up

Good asset quality

#### Cons

Exception required on income multiple

2<sup>nd</sup> Applicant salary low

Shortfall on Mover/Retainer Calculator

#### Recommendation

Repay Capacity is evident – LTV within guideline and NDI

...

- Overall not happy that applicants have demonstrated repayment capacity at this level based on savings of 500pm.
  - Note meeting h/l repts totalling 2412pm and rental income coming in for [Location] property @ 1100pm. Property in [Location] is currently rented, proposed 800pm. Recent offer fell through 240k.
  - Noting that both properties are in positive equity and recommendation would be to support app[lication] subject to contract for sale on [BTL] property, which brings proven capacity to 2400pm based on previous level of savings 1000pm.
  - Spoke with [Redacted], asked if customers indicated selling the existing properties is an option and he said that they would, worst case scenario but would loose (sic) this property as would be waiting too long.
- ..."

A further internal entry was made on the Provider's **mortgage application notes** on **21 January 2014** which outlines as follows:

*"Established customers with good track record.*

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*Seek €430k to fund purchase and renovation of derelict property on 11 acres. 88% optimistic end value based on € for € return on costs. Surplus of €52k providing comfort on overruns. However also have significant other debt via two BTLs whihc (sic) are both likely in Neg Equity (based on mtm).*

*Key issue is lack of proven repayment capacity for incremental debt noting €3.1k stressed repayment vs. €500 savings, €500 support to BTL shortfall. Noting new child imminent and no rent being paid at the moment the lack of repayment capacity is concerning and is likely to deteriorate further upon new arrival.*

*Unable to support at a meaningful level at tthis (sic) time, requires evidence of repayment capacity being proven.”*

An email from the Provider’s underwriter dated **22 January 2014** has been provided in evidence. The recipient details have been redacted. The email details as follows;

*“Subject: Application Declined*

*Date: 22/01/2014*

*...*

*Reason: Repayment capacity not evident.*

*Thank you for this application:*

*Unfortunately, following assessment and referral to Manager level, as presented the application is deemed to carry an unacceptable credit risk and has been declined for the following reason(s):*

- Customers have not demonstrated repayment capacity at the proposed level of finance.*
  - No alternative offered at this time, customers need to save at the level of stressed repayments for a minimum of 6 months in order to review.*
- ...”*

The Provider’s internal note dated **23 January 2014** details as follows;

- “Spoke with [Redacted] and confirmed decline. No revised offer available as issue here is lifestyle. Even if both properties were sold, it only proves additional 500pm.*
- Advised customers need to save at level sought for 6 [months].”*

/Cont’d...

An undated email from the Provider's Branch Manager has been furnished in evidence. The recipient details have been redacted, however the email appears to be in response to the underwriter's email of **22 January 2014**. The email details as follows;

*"Appealing credit decision here.*

...

*Can you advise if any counter offer will be made at lower amount? As I don't feel customer having to wait 6 mths is a counter offer to go back with."*

The underwriter responded on an unspecified date as follows;

*"I acknowledge your comments however there is no new information to warrant an appeal here.*

*This has been declined at the highest possible level and there would not appear to be a basis for representing the case to [Provider unit], as the information has not materially changed."*

A further internal note of the Provider's dated **23 January 2014** details as follows;

*"Telephone appeal from [Redacted] Br[anch] Manager. I explained again the rationale for the decline i.e. repayment capacity not fully proven and the overall debt level.*

*Advised him the best course of action was for the customers to actively pursue sale of the [investment] property and also to re-establish a savings record to support stressed mortgage repayments."*

It is evident that the mortgage loan application was declined in **January 2014** as the Provider was of the view that the Complainants had not demonstrated sufficient repayment capacity at the proposed level of finance. It is important for the Complainants to be aware that setting and applying the Provider's lending criteria is a matter that is within its own commercial discretion. The Provider was within its right to decline the application in circumstances where it was of the view that the Complainants' application carried an unacceptable credit risk for the Provider.

In this regard I would also highlight to the Complainants that **Chapter 5 of the Consumer Protection Code 2012 (the "CPC 2012")**, places certain obligations on the Provider in assessing suitability and affordability of credit.

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In this regard the Provider is obliged to have regard to an applicant's personal circumstances and financial situation prior to providing or arranging a product or service under **provision 5.16** of the **CPC 2012**.

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

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

On the basis of the evidence before me I accept that the Provider outlined the reasons why the credit application was not approved to the Complainants.

In **August 2014** the Complainants submitted a second **mortgage application** for the lower loan amount of €400,000 to fund the purchase of a different property.

The Provider has submitted that a *"Mortgage Application Form was not completed by the Complainants"* in **August 2014**. However the Provider has furnished a copy of its internal **mortgage loan application notes** in evidence.

The **mortgage loan application notes** detail as follows:

*"...*

*[First Complainant] owns 2 RIL's. She has a 2 bed apartment in [Location]. The mortgage held with [Provider] ref [ending] 9839 + [ending] 4139*

*Balance outstanding totals e291k with repays of e1385p/m Value of property is e280k+ approx.*

*Rental income e1300p/m rented to longterm tenants*

*She also owns a second property in [Location]*

*This is a 4 bed house and is currently sale agreed at e235k*

/Cont'd...

*Mortgage held with [Provider] ref [ending] 9898 to clear from sale with a surplus of e50k approx. and these funds will be used to assist in the purchase and renovations of the new proposed property. Loan to clear on this property is e180k.*

***\*\*\*This application fails the stress test on the payment on the Mover/retainer calculator [emphasis added]***

*Exception requested given the good steady income on existing property in [Location]*

...

***\*\*\* please also note that an application ref no [ending 1621] was declined by [the Provider] in January 2014 due to lack of build up of savings***

*This has now been rectified and is evident from savings a/c held  
It is very much hoped that this application can now proceed to approval*

*pros to this application;*

*“[First Complainant] working for a strong [redacted] co with excellent earnings and potential*

*2<sup>nd</sup> property in [Location] to be sold prior to drawdown with equity from this property to be used for this venture*

*savings of e2500 are now evident monthly and shows capacity to take on borrowings at this level*

*No other short-term borrowings held*

*LTV within guidelines (sic) and NDI*

*Cons;*

***Fails Mover/retainer calculation however exception requested given 2<sup>nd</sup> property to be sold [emphasis added]***

*[Second Complainant] on low salary with not much potential for increased earnings*

...

/Cont'd...

*Overall situation [h]as improved since Jan, by way of savings and given app[licant]s are now disposing of 1 property.*

*..."*

The Provider's internal note dated **27 August 2014** outlines as follows;

*"-Apps have improved significantly with demonstrating repayment capacity since Jan, and they are also disposing of a property.*

*-Overall debt 665k which is lower than initially sought.*

*-LTV will be strong upon completion of works, and apps will also have unencumbered land e/v 175k.*

*Overall happy to support*

*Refer for offer."*

An entry made on **22 September 2014** outlines as follows;

*"CHANGE IN PROPOSAL:*

*=====*

*-Overall PP is now 400k (250k for the property on c.1 acre + c.150k for the land), req amt 225k.*

*-The apps now intend on moving into the property without doing any works. They will carry out the works at a later date.*

*Gift has increased to 100k*

*...*

*DECISION / RECOMMENDATION:*

*=====*

*Much more straight-forward deal here.*

*Recommending approval now as proposed"*

The Complainants take issue with the fact that they were not informed of the Provider's Tracker Mover product when they applied for a mortgage loan in **January 2014** and **August 2014**.

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It is clear from the evidence in the form of the Provider's **mortgage loan application notes** that in the course of both applications submitted in **January 2014** and **August 2014** respectively, the Provider considered the application of the "Mover/Retainer" product and concluded that the Complainants did not satisfy the requirements to avail of this product.

It is also evident that both of the First Complainant's properties were rented and not owner-occupied at the time the mortgage application was submitted in **January 2014**. Therefore the matter of which of the First Complainant's properties was sold was not determinative in the Complainants not being able to avail of the tracker portability product. It is important for the Complainants to be aware that although the Tracker Mover product was on offer generally by the Provider as part of its suite of products when the Complainant applied for the mortgage loan in **2014**, there was no obligation on the Provider to furnish the Complainants with information on the Tracker Mover product offering at that time in circumstances where it did not consider that the Complainants were eligible for the Tracker Mover product.

The Complainants have further submitted that the Provider advised them to sell the BTL property securing mortgage account ending **9898** before the new mortgage could be obtained, instead of the First Complainant's previous PDH securing mortgage accounts ending **9839** and **4139**. It is clear from the evidence that the First Complainant had placed this property on the market in **2013** in advance of submitting the application in **January 2014**. The Provider's **mortgage application notes** from **January 2014** detail that a "*Recent offer fell through 240k*" for the investment property. I have been furnished with no evidence that the property was placed on the market on the Provider's instruction, as the Complainants have submitted.

The Provider wrote to the Complainants on **23 September 2014** and outlined as follows;

*"I am delighted to let you know that [the Provider] has approved your mortgage application. This approval is subject to the terms and conditions contained in the enclosed Mortgage Loan Offer ("Offer Letter").*

*Based on the information you provide to us, we believe that the enclosed loan offer will meet your requirements and is suited to your needs as a customer who is moving house.*

*While details of fixed and variable rate options were discussed with you, we note that you have chosen the 2 year fixed rate option as you wanted your repayments to remain the same over this period.*

/Cont'd...

A number of repayment options were also discussed with you and you have chosen a repayment mortgage where both interest and capital are paid over the term of the loan, thus reducing the capital balance outstanding.

You have selected to pay your mortgage over 19 years, as this is the term that suits your requirements.”

The **Mortgage Loan Offer Letter** for mortgage loan account ending **7062** dated **23 September 2014** sets out the following;

**“PART 1 – THE STATUTORY LOAN DETAILS  
IMPORTANT INFORMATION AS AT 17 JUNE 2015**

“1.	Amount of Credit Advanced		€225,000
2.	Period of Agreement		19 Years
3.	Number of Repayment <u>Instalments</u>	Instalment Type	4. Amount of each <u>Instalment</u>
	24	Fixed at 4.250%	€1,438.19
	204	Variable at 4.500%	€1,465.12”

The relevant sections of the **General Conditions** to the **Mortgage Loan Offer** detail as follows;

“6. Variable Interest Rates

- a) The variable rate of interest set out in this Offer Letter is the variable rate which would apply if the loan were drawn down today. The variable rate shown in this Offer Letter may be different when the loan is drawn down. This is because the Lender may vary the interest rate up and down at its discretion and the interest rate may change between the date of the Offer Letter and the date of draw down. In that case, the Lender shall change interest at the rate prevailing at draw down.
- b) Subject to clause 6 (d), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender’s discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.

/Cont’d...

- c) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1 (c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- d) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

#### 7. Fixed Interest Rates

- a) *The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. **The fixed rate of Interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of draw down.***
- b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate."*

The **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **7 November 2014**, which states as follows:

*"Acceptance of this Offer Letter must reach the Lender within 30 days of the date of this Offer Letter or the offer will lapse. (The Lender may, at its absolute discretion, extend this period). To signify your Acceptance of these terms and conditions, you must complete this Acceptance and Consent and return one part of the Offer Letter, duly completed, to the Lender.*

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

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It is clear that the **Mortgage Loan Offer** envisaged a fixed interest rate of 4.250% for a period of two years with a variable rate applying thereafter. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted at the discretion of the Provider. If the Complainants did not want to pursue this option because they were unhappy with the interest rate applicable to the mortgage loan, they could have decided not to accept the Provider's offer. Instead the Complainants accepted the Provider's offer by signing the **Acceptance and Consent** on **7 November 2014**.

In **2015** the Complainants drew down a further mortgage loan of €180,000 under mortgage loan account ending **0333**.

The Provider issued a **Mortgage Loan Offer Letter** for account ending **0333** on **17 June 2015**.

**Part 1 – The Statutory Loan Details** of the Loan Offer, sets out the following;

1.	<i>Amount of Credit Advanced</i>		€180,000
2.	<i>Period of Agreement</i>		19 Years
3.	<i>Number of Repayment Instalments</i>	<i>Instalment Type</i>	4. <i>Amount of each Instalment</i>
	24	Fixed at 3.750%	€1,103.94
	204	Variable at 4.500%	€1,167.67

**Part 4 – The Special Conditions** of the Loan Offer, outlines the following;

*“(a) The following Special Conditions apply to the Loan:*

- (i) This mortgage has been approved on the basis that the total cost of Work figure provided includes the full and comprehensive ancillary costings to fully complete the property. The Lender has no obligation to provide further finance in the event of cost over runs.*
- (ii) The Lender will require the Borrower(s) to input EUR 50,000.00 upfront towards the works advised works costing EUR 250,000. Further drawdowns will then be permitted against Property Report certificates for subsequent works completed.*

*A retention of EUR 20,000.00 will apply pending completion of the works and receipt of a satisfactory final inspection report confirming a valuation of not less than EUR 450,000.00 along with the supervising architect's opinion on compliance with planning regulations"*

The relevant sections of the **General Conditions** to the **Mortgage Loan Offer** detail as follows;

*"6. Variable Interest Rates*

- a) The variable rate of interest set out in this Offer Letter is the variable rate which would apply if the loan were drawn down today. The variable rate shown in this Offer Letter may be different when the loan is drawn down. This is because the Lender may vary the interest rate up and down at its discretion and the interest rate may change between the date of the Offer Letter and the date of draw down. In that case, the Lender shall change interest at the rate prevailing at draw down.*
- b) Subject to clause 6 (d), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- c) The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1 (c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- d) Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

*7. Fixed Interest Rates*

- a) The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the principal sum borrowed. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter.*

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***The fixed rate of Interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of draw down.***

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

The **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **24 June 2015**, which states as follows:

*"Acceptance of this Offer Letter must reach the Lender within 30 days of the date of this Offer Letter or the offer will lapse. (The Lender may, at its absolute discretion, extend this period). To signify your Acceptance of these terms and conditions, you must complete this Acceptance and Consent and return one part of the Offer Letter, duly completed, to the Lender.*

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

The **Mortgage Loan Offer Letter** clearly envisaged a fixed interest rate of 3.75% for a period of two years with a variable rate applying thereafter. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted at the discretion of the Provider.

Again if the Complainants did not want to pursue this option because they were unhappy with the interest rate applicable to the mortgage loan, they could have decided not to accept the Provider's offer. Instead the Complainants accepted the Provider's offer by signing the **Acceptance and Consent** on **24 June 2015**.

It is clear that neither of the First Complainant's two properties securing mortgage loan accounts ending **9839, 4139** and **9898**, were owner occupied in **2014**. Owner occupied was one of the criteria for availing of the Provider's Tracker Mover product.

It is important for the Complainants to understand that the Provider's own lending criteria falls within its commercial discretion. I accept that the Provider was entitled to reach the decision that the Complainants were not eligible for its Tracker Mover product in **2014**. The evidence supports that assessments were made and the application failed the assessment. There is no evidence that the Provider acted in a matter that was unreasonable, unjust, oppressive or improperly discriminatory in not offering the Complainants the Tracker Mover product. The evidence further shows that the choice to take out the mortgage loans ending **7062 and 0333** on the terms and conditions offered by the Provider in **2014** was a choice that was freely made by the Complainants.

For the reasons set out 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**

16 February 2021

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,

/Cont'd...

**(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.**

