



<u>Decision Ref:</u>	2021-0089
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to two mortgage loan accounts ending **8943** and **9720** held by the Complainants with the Provider. Both mortgage loan accounts were secured on a buy-to-let (“BTL”) property held by the Complainants.

The Mortgage Loan Offer Letter dated **16 April 2003** in respect of mortgage loan account ending **8943** outlined that the interest rate was fixed at 2.9% for the first year, after which the interest rate would revert to a variable rate of 4.05% and the monthly repayments were interest only for the first 10 years of the loan term. The loan amount was for €200,000 and the term of the loan was 25 years.

The Mortgage Loan Offer Letter dated **26 August 2005** in respect of mortgage loan account ending **9720** provided for a tracker interest rate of ECB+ 1.25% and interest only monthly repayments for the first 10 years of the loan term. The loan amount was for €75,000 and the term of the loan was 23 years.

The Complainants signed two Agreements to Amend Mortgage Loan Offer Letters in respect of each mortgage loan account on **19 August 2013** which provided for reduced monthly repayments for a period of 60 months and amended the interest rate applicable to both mortgage loan accounts at the time, from a tracker interest rate to a BTL variable rate.

Both mortgage loan accounts were subsequently redeemed on **17 September 2018**.

The Complainants' Case

The Complainants submit that they held two mortgage loan accounts with the Provider. The first mortgage loan account ending **8943** was drawn down in **May 2003** and the second mortgage loan account ending **9720** was drawn down in **September 2005**. The Complainants explain that an initial ten year interest only repayment period applied to both mortgage loan accounts.

The Complainants submit that the Second Complainant suffered from an illness in **2006** which left him unable to work and the First Complainant became his carer. The Complainants state that in circumstances where the interest only repayment period on mortgage loan account ending **8943** was due to expire in **2013** and they were not in a position to make full capital and interest payments, they entered into discussions with the Provider to extend the interest only period on that mortgage loan account.

The Complainants submit that they entered into two Agreements to Amend Mortgage Loan Offer Letters in relation to mortgage loan account ending **8943** and mortgage loan account ending **9720** on **19 August 2013**. The Complainants note that the agreements amended the interest rate on both mortgage loan accounts from a tracker rate to a BTL variable rate.

The Complainants maintain that they were "*pressurised*" into giving up the tracker interest rate on both mortgage loan accounts in order to extend the interest only repayment period in **2013**. They submit that the interest only period on mortgage loan account ending **9720** was not due to expire until **2015**, however the Provider "*insisted*" that both accounts be "*bulked together*" and therefore they lost the tracker rate on mortgage loan account ending **9720** "*2 years early*".

The Complainants state that in **2018** they "*began getting calls from the bank*" informing them that the alternative repayment arrangement was due to expire and the monthly repayments would amount to €2,235.79 on mortgage loan account ending **8943** and €813.76 on mortgage loan account ending **9720**. The Complainants contend that the previous "*five years had been so stressful, and now faced with this, the only thing to do was sell the property and try and get the bank "off our back"*". The Complainants state that at that point in time they had paid "*15 years of interest with little taken of the principle (sic.)*". The Complainants further submit that had paid a deposit of €65,000 of their own money "*as down payment at the time*" to purchase the BTL property and this was "*supposed to be [their] pension*" and they are "*left with nothing*".

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The Complainants explain that since the expiry of the alternative repayment arrangement in **2018**, they have had to sell the BTL property the subject of both mortgage loan accounts. The Complainants submit that it took three months to sell the BTL property which was *“very stressful”*. The Complainants state that they *“now survive on disability allowance & carers allowance which is very difficult, as [they] used to have so much more”*.

The conduct complained of is that the Provider acted inappropriately by removing the tracker interest rate from the Complainants’ mortgage loan accounts in **August 2013**.

The Complainants are seeking compensation from the Provider for the financial loss they have suffered due to the loss of the tracker interest rate on both mortgage loan accounts.

The Provider’s Case

The Provider submits that it issued Mortgage Loan Offer Letter dated **16 April 2003** (the **“First Loan Offer”**) to the Complainants which provided for a loan amount of €200,000 for a term of 25 years in respect of a BTL property. It states that the First Loan Offer provided for interest only payments for the first 10 years of the term of the mortgage, after which the mortgage would revert to capital and interest repayments. The Provider states that the Complainants signed and accepted the First Loan Offer on **24 April 2003** and mortgage loan account ending **8943** was drawn down on **19 May 2003**. The Provider explains that the interest rate at drawdown was fixed at 2.9% for one year, after which the interest would convert to a variable rate of 4.05%.

The Provider submits that the Complainants entered into a second mortgage loan agreement with the Provider in relation to the same BTL property by signing and accepting Mortgage Loan Offer Letter dated **26 August 2005** on **31 August 2005** (the **“Second Loan Offer”**). The Provider notes that the Second Loan Offer provided for a loan amount of €75,000 for a term of 23 years and interest only payments for the first 10 years of the mortgage, after which the mortgage would revert to capital and interest repayments. It states that mortgage loan account ending **9720** was drawn down on **9 September 2005** on a tracker interest rate of ECB + 1.25%.

The Provider submits that the Complainants signed and accepted a Mortgage Form of Authorisation (**“MFA”**) on **9 January 2006** to convert mortgage loan account ending **8943** to a tracker interest rate of ECB + 1.3%. The Provider details that the Complainants signed and accepted a further MFA on **12 January 2006** where they opted to apply a tracker interest rate of ECB + 1.25% to mortgage loan account ending **8943**.

The Provider states mortgage loan account ending **8943** was due to convert to capital and interest repayments in **May 2013** and mortgage loan account ending **9720** was due to convert to capital and interest repayments in **September 2015**. The Provider explains that it wrote to the Complainants to advise them of this in **April 2013** and the Complainants sought forbearance as they advised the Provider that they were *“not in a position to meet the increased repayments”*

The Provider has submitted details of the history of the Complainants’ mortgage loan account ending **8943** as follows;

- On **19 April 2013**, the Provider issued an Interest Only Review Letter to the Complainants.
- The First Complainant contacted the Provider by telephone on **24 April 2013** to advise the Provider that the Complainants were not in a position to meet full capital and interest repayments in **May 2013** and sought a meeting with the Provider to discuss options.
- On **24 April 2013**, the Provider issued a Standard Financial Statement (“SFS”) to the Complainants.
- On **30 April 2013**, the Provider received a completed SFS from the Complainants.
- On **9 May 2013**, the Provider issued a letter to the Complainants advising them that their request for forbearance had been declined as the Provider had deemed their financial situation to be unsustainable.
- The Provider issued an Interest Only Rollover Letter to the Complainants on **20 May 2013**.
- The Provider contacted the First Complainant by telephone on **24 May 2013** on foot of correspondence dated **15 May 2013** and **21 May 2013** received from the Complainants. The Provider states that the First Complainant stated during the call that the Complainants *“would not be in a position to repay the residual debt without rental income from the security property”* and, pursuant to the Complainants’ letter dated **21 May 2013**, they would agree to a voluntary sale of the BTL property *“if it was in full and final settlement of the debt”*. The Provider submits that it informed the First Complainant that *“debt write off is not a resolution policy employed by the Provider”*.
- Arrears commenced on mortgage loan account ending **8943** on **30 May 2013**.
- On **17 June 2013**, the Provider received a telephone call from the First Complainant who advised that that the Complainants were only in a position to pay €800 per month towards both mortgage loan accounts. The Provider submits that the Complainants appealed its decision to refuse forbearance and were successful.

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- On **2 August 2013**, the Provider issued an Agreement to Amend Loan Offer Letter to the Complainants which was signed and accepted by the Complainants on **19 August 2013** (the “**First Agreement**”). The Provider explains that the First Agreement reduced the monthly repayments on mortgage loan account ending **8943** to €582 for a period of 5 years. The Provider states that as at the date of the First Agreement, mortgage loan account **8943** was in arrears of €2,734.01.
- On **11 September 2013**, the Provider issued a Product Switch Letter to the Complainants in relation to the implementation of the First Agreement.
- The arrears on mortgage loan account ending **8943** were capitalised on **3 April 2014**.

In relation to mortgage loan account ending **9720**, the Provider submits that on **2 August 2013**, it issued an Agreement to Amend Loan Offer Letter to the Complainants which was signed and accepted by the Complainants on **19 August 2013** (the “**Second Agreement**”). The Provider explains that the Second Agreement reduced the monthly repayments on mortgage loan account ending **9720** to €219 for a period of 5 years. The Provider refers to the telephone call on **17 June 2013** where the First Complainant offered a sum of €800 per month in reduction of both mortgage loan accounts and submits that “*[w]ere it the case that the €800.00 per month would be applied only to mortgage loan account [ending 8943], then the logical conclusion, with reference to the Complainant[s]’ financial position, would be that the Complainants would have no income to service mortgage loan account [ending 9720] when it rolled off interest only payments in 2015*”. In that regard, the Provider submits that it was necessary to provide forbearance on both mortgage loan accounts in **August 2013**, even though the interest only repayment period on mortgage loan account ending **9720** was not due to expire until **2015**, to ensure that the Complainants had sufficient income to service both loans. The Provider explains that the decision to offer forbearance on both mortgage loan accounts in **August 2013** “*came about as a result of a careful consideration of the Complainant[s]’ financial situation with reference to the SFS as completed by the Complainants in April 2013, and the engagement between the parties subsequent to that*”.

The Provider states that the Complainants’ mortgage loan accounts are not subject to the **Code of Conduct on Mortgage Arrears (“CCMA”)** and therefore do not attract the protections afforded to mortgages secured by a borrower’s primary residence. It details that the Provider is not legally obliged to offer forbearance on mortgage loans and it is free to renegotiate the terms of a non CCMA mortgage loan in a manner it deems fit, except where the borrowers are personal consumers, and the relinquishing of a tracker rate is at issue, the Provider must then comply with certain provisions of the **Consumer Protection Code 2012**.

The Provider refers to **Chapter 2 of the Consumer Protection Code 2012** and states that it has acted *“honestly, fairly and professionally”* and *“with due skill, care and diligence in the best interest of its customers.”* The Provider outlines that both the First Agreement and Second Agreement reflect the requirements under the **Consumer Protection Code 2012** by *“containing the requisite legal notices to include warnings, indicative comparisons and details of the advantages and disadvantages”* and afforded the Complainants five weeks to consider the Provider’s offer. The Provider is also satisfied that it sought to agree an approach with the Complainants in relation to the mortgage loan accounts as required by **Chapter 8 of the Consumer Protection Code 2012** and in particular **Provision 8.3**.

In response to the Complainants’ submission that they felt *“pressurised”* by the Provider into agreeing to the removal of the tracker interest rate, the Provider contends that it was the Complainants who sought to amend the terms of their mortgage loans and *“only in response to this did the Provider seek to switch the applicable rate of interest under its new pricing policy”*. The Provider asserts that the *“request for forbearance in 2013 was entirely initiated and driven by the Complainants”*. The Provider is of the view that a *“reasonable offer”* was made in response to a request to renegotiate the terms of contract pursuant to the First Loan Offer and the Second Loan Offer *“which the Complainants by their own account could not make the repayments of capital and interest”*. The Provider asserts that at all times leading up to the offer, it *“clearly and unambiguously”* set out the new terms and implications for the Complainants, in particular the interest rates. The Provider states that given such agreements to amend the terms of an original loan offer are legally binding documents, it strongly recommended that the Complainants get *“independent financial and legal advice”* to help them decide whether to accept the Provider’s offer of alternative repayment arrangements. The Provider submits that the Complainants both confirmed, when returning the signed First Agreement and Second Agreement that they had received independent financial advice *“by checking the options on the form indicating that they had received such advice”*.

The Provider submits that it was open to the Complainants to accept or reject the Provider’s offer and *“avail of another method to address their financial issues”*. The Provider further submits that in line with **Condition 4 (d)** of the First Loan Offer and Second Loan Offer, any proposed variation to the terms of the loans can only be implemented *“with the consent of the borrower”* and so it is *“entirely a matter for a borrower to accept the amended terms as offered”*. The Provider asserts that the Complainants, having indicated that they received independent advice, chose to accept the First Agreement and Second Agreement on **19 August 2013** *“entirely of their own free will and volition, as opposed to the alleged (and refuted) insistence by the Provider to make an offer based on both mortgage loan accounts”*.

The Provider states that in circumstances where the Complainants chose to accept the First Agreement and Second Agreement, the Provider *“duly implemented the changes to the mortgage loan accounts which then converted from a tracker rate to a BTL variable rate”*.

The Provider submits that the First Agreement and Second Agreement set out clearly the effects of accepting the forbearance arrangement in respect of both mortgage loan accounts and the ending of the tracker interest rate if accepted. It states it is satisfied that it *“did not recklessly, negligently or deliberately mislead the Complainants as to the real or perceived advantages or disadvantages of any product or service”*, and it sought information from the Complainants relevant to the product requested (reduced repayments) and made a full disclosure to the Complainants of all relevant material information in a way that sought to inform the Complainants.

In response to the Complainants’ assertion that, since the expiry of the alternative repayment arrangements in **2018** in respect of both mortgage loan accounts, they had to sell the BTL property the subject of the mortgage loan accounts, the Provider submits that this sale was *“a personal decision of the Complainants and was driven by them at all times”*. The Provider states that no further request for forbearance was made by the Complainants and the Provider did not become aware of the decision to sell the BTL property until such time as it was put on the market in or around **May 2018**. The Provider notes that both mortgage loan accounts were redeemed in full on **14 September 2018**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider acted inappropriately by removing the tracker interest rate from the Complainants’ mortgage loan accounts ending **8943** and **9270** in **August 2013**.

Decision

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

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

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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 22 March 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 the jurisdiction of this Office in complaints regarding arrears handling. This Office can investigate the procedures undertaken by the Provider regarding the arrears, in this matter under the **Consumer Protection Code 2012**, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainant, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of **Section 60 (2) of the Financial Services and Pensions Ombudsman Act 2017**.

In order to consider this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider the interactions between the Complainants and the Provider in **2013** in relation to the alternative repayment arrangements proposed and offered.

I will firstly consider the particulars of the mortgage loan agreements between the Provider and Complainants in respect of mortgage loan accounts ending **8943** and **9720**.

Mortgage loan account ending 8943

The Provider issued a **Mortgage Loan Offer Letter** to the Complainants dated **16 April 2003**, which provided for an advance of €200,000 over a term of 25 years.

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Part 1 (The Statutory Loan Details) of the **First Loan Offer**, details as follows;

“1.	<i>Amount of Credit Advanced</i>	€200,000		
2.	<i>Period of Agreement</i>	25 Years		
3.	<i>Number of</i>		4.	<i>Amount</i>
	<i>Repayment</i>	<i>Instalment</i>		<i>of each</i>
	<u><i>Instalments</i></u>	<u><i>Type</i></u>		<u><i>Instalment</i></u>
	11	<i>Fixed at 2.900% until 30 April 2004</i>		€483.33
	109	<i>Variable at 4.050%</i>		€675.00
	180	<i>Variable at 4.050%</i>		€1,484.39”

Part 2 (The Additional Loan Details) outlines as follows;

11. *“Type of Loan: Interest Only*
12. *Interest Rate: 2.900% Fixed”*

At the bottom of **page 1** it states as follows;

“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

Condition 4 of Part 3 – The General and Special Conditions of the **First Loan Offer** details as follows;

“4. Repayment

- (a) *Unless otherwise stated herein or agreed by the Society in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower’s bank or other financial institution. For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and any other amounts payable and for an endowment loan shall comprise of interest and such other amounts only. The due date for repayment of the Loan are those dates that are from time to time set by the Society. The amounts of such repayments and the due dates for payment thereof shall be determined by the Society at its absolute discretion.*

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- (b) *In the event of any repayments not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Society may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.*
- (c) *If so agreed in writing by the Society, the Loan may be repaid in 10 or 11 payments in any year of the term and such payments (unless the Society at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during that year for the Loan.*
- (d) *The Society may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amount payable in respect of the Loan.*

Condition 11 of Part 3 – The General and Special Conditions details as follows;

11. Special Conditions

(a) *The following special conditions apply to the Loan:*

- (i) *For the first 10 years of the term of the Loan, repayment of this Loan shall be comprised of interest and any other amounts payable only and General Condition 4(a) is hereby varied. At the end that 10 year period, repayments shall comprise of principal and interest and any other amounts payable fully in accordance with General Condition 4(a). The amount of such revised repayment instalments shall be as advised to the Borrower by the Lender in writing. The Lender may at any time during the initial 10 year period and at its absolute discretion (or at the request of the Borrower), convert the Loan to an annuity or repayment loan whereupon the Borrower shall be obliged to make such revised repayment instalments comprising both of principal and interest and any other moneys payable as the Lender shall advise the Borrower in writing.
....”*

I note that the **Acceptance and Consents** section of the **First Loan Offer** was signed by the Complainants on **24 April 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.”

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It is clear to me that the First Loan Offer envisaged a fixed interest rate of 2.9% to apply to mortgage loan account ending **8943** for the first year of the term of the loan and a variable rate of 4.05% to apply thereafter. The **Special Conditions** provided that the repayments would be interest only for the first 10 years of the term of the loan. The Complainants accepted the terms of First Loan Offer, having confirmed that they had read and fully understood the particulars of the First Loan Offer.

On **9 January 2006**, the Complainants signed a document entitled **Mortgage Form of Authorisation Application for change to Tracker Mortgage (“MFA”)** to convert the mortgage loan account to a tracker interest rate of ECB +1.3%. The **MFA** details as follows;

“The interest rate shall be no more than 1.3% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan.

APPLICATION FOR CHANGE OF INTEREST RATE

I/We wish to apply for the tracker mortgage variable interest rate for my/our mortgage loan (the “Loan)”

On **12 January 2006**, the Complainants signed a further **MFA** to convert the mortgage loan account to a tracker interest rate of ECB + 1.25%. The **MFA** details as follows;

“The interest rate shall be no more than 1.25% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. ECB Rate is currently 2.25%

APPLICATION FOR CHANGE OF INTEREST RATE

I/We wish to apply for the tracker mortgage variable interest rate for my/our mortgage loan (the “Loan)”

Mortgage loan account ending 9720

The Provider issued a **Mortgage Loan Offer Letter** to the Complainants dated **26 August 2005**, which provided for an advance of €75,000 over a term of 23 years.

Part 1 (The Statutory Loan Details) of the **Second Loan Offer**, details as follows;

- | | | |
|-----|---------------------------|----------|
| “1. | Amount of Credit Advanced | €75,000 |
| 2. | Period of Agreement | 23 Years |

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3.	<i>Number of Repayment <u>Instalments</u></i>	<i>Instalment <u>Type</u></i>	4.	<i>Amount of each <u>Instalment</u></i>
	120	Variable at 3.250%		€203.13
	156	Variable at 3.250%		€590.10”

Part 2 (The Additional Loan Details) outlines as follows;

- 11. *“Type of Loan: Interest Only*
- 12. *Interest Rate: 3.250% Variable”*

At the bottom of **page 1** it states as follows;

“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

Condition 4 of Part 3 – The General and Special Conditions of the Second Loan Offer entitled ***“Repayment”*** is identical to Condition 4 of the First Loan Offer as detailed above.

Condition 11 of Part 3 – The General and Special Conditions of the Second Loan Offer details as follows;

“11. Special Conditions

(a) The following special conditions apply to the Loan:

...

- (iv) For the first 10 years of the term of the Loan, repayment of this Loan shall be comprised of interest and any other amounts payable only and General Condition 4(a) is hereby varied. At the end of the above period, repayments shall comprise of principal and interest and any other amounts payable fully in accordance with General Condition 4(a). The amount of such revised repayment instalments shall be as advised to the Borrower by the Lender in writing.*

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The Lender may at any time during the initial interest-only period and at its absolute discretion (or at the request if the Borrower), convert the Loan to an annuity or repayment loan whereupon the Borrower shall be obliged to make such revised repayment instalments comprising both of principal and interest and any other moneys payable as the Lenders shall advise the Borrower in writing.

...

- (vi) Equity release 75,000 for general home improvements. If applicable same must comply with planning and building regulations.*
- (vii) This facility is issued in addition to your existing mortgage account number [ending 8943].*
- (viii) The interest rate applicable to the loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer Letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Investment Variable Rate.*
- (ix) Prior to drawdown please forward a fully completed [Provider] Accountant's Report for [named agent], same to be to the satisfaction of the Society.*
- (x) The interest rate applicable to the loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.55% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer Letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Investment Variable Rate."*

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I note that the **Acceptance and Consents** section of the **Second Loan Offer** was signed by the Complainants on **31 August 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."

The special conditions attaching to the **Second Loan Offer** provide for two different margins above the ECB main refinancing rate. **Condition 11 (a) (viii)** provides that the interest rate will be no more than 1.25% above the ECB rate and **Condition 11 (a) (x)** provides that provides that the interest rate will be no more than 1.55% above the ECB rate.

It is unclear as to why two different rates are provided for in the **Second Loan Offer** however, I note that the lower tracker interest rate of ECB + 1.25%, as provided for in **Condition 11 (a) (viii)**, was applied to the loan at draw down on **9 September 2005**. The **Special Conditions** provided that the repayments would be interest only for the first 10 years of the term of the loan. The Complainants accepted the terms of **Second Loan Offer**, having confirmed that they had read and fully understood the particulars of the **Second Loan Offer**.

I note that the initial interest only repayment period on mortgage loan account ending **8943** was due to expire in **May 2013**. I will now consider the interactions between the Provider and the Complainants in respect of both mortgage loan accounts from **April 2013**.

The Provider states that it issued an **Interest Only Review Letter** to the Complainants on **19 April 2013** noting that mortgage loan account ending **8943** was due to convert to capital and interest repayments in **May 2013**. A copy of this letter has not been submitted in evidence by the Provider however this letter is not in dispute between the parties as I note that the Complainants entered into discussions with the Provider to extend the interest only period on that mortgage loan account on foot of receipt of the **Interest Only Review Letter**. The Provider has submitted records from its internal system in evidence in relation to telephone calls between the Provider and the First Complainant in **April 2013**. An internal note dated **24 April 2013** at **10:23** records the following on foot of an incoming call from the First Complainant;

"Inbound Call from [First Complainant] – Acc and unlinked acc [ending 9720] both online (sent email to link accs). Cust advised that i/o due to roll off acc in May'13 but cust was led to believe she had 20 year i/o on acc. Cust advised can't afford full repayments and has requested a face to face meeting with NAM.

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Advised cust I would arrange for NAM to call her and go over options and to set up possible meeting. Cust gave mob [telephone number] as best contact tel. Action: Routed acc to Network to allow NAM to contact cust as per cust request”.

The Provider’s internal notes show that the Provider’s Network Account Manager (“NAM”) attempted to call the Complainants on the same date. An internal note dated **24 April 2013** at **16:05** records the following outgoing call;

“USC – 1 To Home line – message left. USC – 2 To [Second Complainant] mobile & message left. Posted SFS, Guide, MARP with note & business card requesting they ring me. Tx”

It appears from the Provider’s internal notes that the First Complainant returned the Provider’s call on **24 April 2013**. An internal note dated **24 April 2013** at **17:21** records the following incoming call;

“[First Complainant] called – told her SFS was sent, advised letter of offer would have had 10 yr interest only term on it. Mtg. is currently on tracker told her that if forbearance was sought rate would change to variable, Client to fill out form & return same. Neither clients working [Second Complainant] is on disability & First Complainant] is on careers (sic) allowance. Tx”.

A copy of a completed Standard Financial Statement (“SFS”) signed by the Complainants on **29 April 2013** has been submitted in evidence by the Provider. I note that the Complainants have recorded their total monthly income in **Section B: Your Monthly Income** of the SFS as €2,605.00 The Complainants record their total monthly expenditure in **Section C: Monthly Household Expenditure** of the SFS as €2,157.00. The Complainants record their total monthly debt payments in **Section D: Your Current Monthly Debt Payments** as €424.96.

The Complainants also note the following in the SFS under the section “Please provide any other information which you believe to be relevant to above”;

“When we took out this mortgage, [Second Complainant] was in his own business, [First Complainant] had a good job and we were doing well. We were told that the interest free would be reviewed after the term and extended if we needed, unfortunately [Second Complainant] got a [illness] and had to give up the business. [First Complainant] went on a two day week and became his carer and then because of the downturn I lost my job in 09.

/Cont’d...

We thought that we would be in a position by now to sell this house and have a pension out of it instead we are in negative equity and are stuck with it."

The Provider's internal note dated **30 April 2013** details as follows;

"SFS received with supporting doc's."

The Provider subsequently sent a letter to the Complainants dated **9 May 2013** which details as follows in relation to mortgage loan account ending **8943**;

"I am writing in response to your recent request for an alternative repayment option for your mortgage(s) above. I have now completed a review and assessment of the financial and other information you provided and regret to advise that your request has been declined.

I have considered all the facts of your case and concluded that there is insufficient income evident now or in the foreseeable future to allow us to consider an alternative repayment plan at this time.

Given your present financial circumstances, I would like to draw your attention to other options open to you, the implications for you and our rights in each case. These options and other important information are set out in an appendix to this letter.

A member of our mortgage Arrears Support Unit will contact you in due course to discuss your financial position and the options that might be appropriate for you now. While we will continue to support you in any way possible, we strongly recommend that you also get independent financial and legal advice.

We recognise, based on the information you recently provided to us, that you are not in a position to continue to meet full repayments on your mortgage. However while we are in the process of reaching an agreement with you regarding your mortgage we request that you pay as much as you can afford to pay to your mortgage account each month...."

The Provider's internal notes dated **17 May 2013** detail as follows;

"corr recd from customer dated 15/05/2013 passed to workout team"

/Cont'd...

The Provider's internal notes dated **24 May 2013** detail as follows;

"corr rec'd from cust [First Complainant] dated 21/05/2013 passed to [redacted]"

It would appear that the Complainants sent correspondence to the Provider dated **15 May 2013** and **21 May 2013** appealing the Provider's decision not to offer an alternative repayment arrangement however a copy of this correspondence has not been provided in evidence to this office.

Provision 11.5 and 11.6, Chapter 11 of the Consumer Protection Code 2012 (which was effective from **01 January 2012**) outlines as follows;

"11.5 A regulated entity must maintain up-to-date consumer records containing at least the following:

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

11.6 A regulated entity must retain details of individual transactions for six years after the date on which the particular transaction is discontinued or completed. A regulated entity must retain all other records for six years from the date on which the regulated entity ceased to provide any product or service to the consumer concerned.

The Complainants' mortgage loan was incepted in **2003** for a term of **25 years** and the Provider purportedly received the above referenced correspondence in respect of the Complainants' request for an alternative repayment arrangement in **May 2013**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. In this case, the Complainants' mortgage loan account was redeemed in **September 2018** therefore unclear to me why this documentation has not been provided by the Provider.

/Cont'd...

It is disappointing that the Provider has failed to furnish a copy of this correspondence in evidence and that the Provider has not offered any explanation for not providing a copy of this correspondence. In any event, I note that the content of these letters is not in dispute between the parties.

The Provider's internal notes dated **24 May 2013** record details of an outgoing call to the First Complainant as follows;

"Spoke to [First Complainant], in response to ltr received. Pl[ease] refer to detailed assessment below. Client has advised that they will not be in a position to repay anything towards residual of c85k without the rental inc. She also noted that she has sent a further ltr advising that she would agree to vol sale if it was in full & final settlement. Advised [Provider] were not writing off debt. Have discussed case with MGT, proposal to be completed re: LT sustainable restructure in line with rental inc. D/f 2wks."

I note that mortgage loan account ending **8943** fell into arrears on **31 May 2013**. The Provider's internal notes dated **7 June 2013** record details of an outgoing call to the First Complainant as follows;

"Left message for [First Complainant] to revert, recommendation sent to MGT to explore the possibility of making BTL self financing. D/f 2 wks."

The Provider sent a letter dated **10 June 2013** which detailed as follows;

"Date Mortgage Fell into Arrears: 31/05/2013
Total of Missed Payments: €936.67
Amount of Arrears to Date: €936.67
Current mortgage Interest Rate: 1.600% (per annum)

...

We note that the most recent payment due on your mortgage account number [ending 8943] was not paid in full on the due date.

...

If you have not been in touch with us in relation to your arrears, it is important that you make contact as soon as possible.

/Cont'd...

We are committed to assisting you with your current circumstances and supporting you through any repayment difficulties you may be experiencing at present. We recommend that you take the opportunity to meet with your local [Provider's] Branch Mortgage Adviser, acting on behalf of [Provider], as many of our customers have benefitted from their support and knowledge in these matters."

The Provider's internal notes dated **17 June 2013** record details of an incoming call from the First Complainant as follows;

"Spoke to [First Complainant], she advised that realistically they would only be in a position to lodge 800pm in reduction of mtg. Client advised NPPR @ 200pm. House Ins @ 40pm & property tax @ 314. Case referred to MGT to review. D/f 1wk."

The Provider issued a further letter to the Complainants dated **1 July 2013** notifying the Complainants that mortgage loan account ending **8943** "has remained in arrears for 31 days or more" and detailed the current arrears outstanding at that time as "€1,873.34".

The Provider's internal review/update notes dated **8 July 2013** detail as follows;

"...Clients are in receipt of 850pm rental inc. PDH unencumbered. A/cEs deemed unsustainable on receipt of SFS 05/2013. Inlight (sic.) of circumstances recommendation sent to CL to consider restructuring a/c in line with rental inc."

The Provider's internal review/update notes dated **19 July 2013** detail as follows;

"RE-ASSESSMENT: SPLIT MORTGAGE ON ACC [ending 8943] ...Term 30 years @ 2.6% Interest Only on 120k-20pm..Annuity on 80.3k-322pm..Total Repayment -582 SPLIT MORTGAGE ON ACC [ending 9720] ...Term 30 years @2.6% ...Interest Only on 45k-98pm Annunity (sic.) on 30.1k-121pm..Total Repayment-219pm...OVERALL: Total Split mortgage over extended term and noting that offer is subject to [Provider's] BTL Pricing policy= 801pm V Gross Rent of 850pm

NON CCMA-BTL-LTV 128%. SUSTAINABILITY: As per recent conversations between MRT and the borrowers, an offer of the gross rental income per month has been offered. This repayment is in line with the Maximum Split mortgage available at 855pm this offer should bring property back into equity within circa 11-13 years depending on localised market conditions. Worth noting that this property is in a desirable location and very popular for both the rental market and as an option for FTB's.

/Cont'd...

This split mortgage will avoid a SAS situation and also not greatly impact on personal circumstances as the repayment will be covered by the rental income. Therefore willing to approve a maximum split mortgage in line with the advised affordability going forward.

DECISION: For NON CCMA Acc [ending 8943]- Split mortgage as follows- Interests Only 60% (120k), Capital & Interest 40% (80,264). Term to be extended to a new Maturity date of 30/08/2043. Offer is subject to [Provider] BTL pricing policy and thus movement of the account from the current tracker rate of 1.6% to a new discounted BTL variable rate of 2.6%.

DECISION: For NON CCMA Acc [ending 9720] Split mortgage as follows- Interest Only 60% (45k), Capital & Interest 40% (30,152). Term to be extended to a new Maturity date of 30/08/2043. Offer is subject to [Provider] BTL pricing policy and thus movement of the account from the current tracker rate of 1.6% to a new discounted BTL variable rate of 2.6%”.

The Provider’s internal review/update notes dated **22 July 2013** detail as follows;

“DECISION UPDATED...5 years fixed repayments at repayment levels as set out in split mortgage option. New repayment will be fixed at 801pm. Account to be reviewed in 5 years and either an asset disposal to be considered or an alternative exit strategy. Cross charge on the unencumbered PDH not required unless SAS is requested. MRT to clarify is borrowers have active Life Cover and is so then this should be assigned to ICS.

DECISION: For NON CCMA Acc [ending 8943] Fixed repayment at 582pm for 60 months. Offer is subject to [Provider] BTL pricing policy and thus movement of the account from the current tracker rate of 1.6% to a new discounted BTL variable rate of 2.6%...DECISION: For NON CCMA Acc [ending 9720]- Fixed repayments of 219pm for 60 months. Offer subject to [Provider] BTL pricing policy and thus movement of the account from the current tracker rate of 1.6% to a new discounted BTL variable rate of 2.6%”.

The Provider has outlined as follows with respect to its **Buy-to-Let pricing policy**;

“The Provider made a commercial decision to implement a pricing policy change in respect of Buy-to-Let mortgage loans. As part of a financial review, if a change of terms and conditions is deemed appropriate (e.g. Interest Only), the Buy-To-Let Tracker customer will be offered a new Standard Variable Interest Rate mortgage

/Cont’d...

for the life of the loan, which is initially priced at 1% above what they are currently paying on their tracker mortgage. This standard variable interest rate will be at the discretion of the Provider and will be influenced by market interest rates and can move up or down over the life of the mortgage. The tracker status of the loan ends completely on taking up of new amendments to the terms and conditions.”

It would appear from the Provider’s internal notes outlined above that the Provider carried out a re-assessment of the Complainants’ mortgage loan account ending **8943** and an assessment of mortgage loan account ending **9720** on foot of the Complainants’ appeal of the Provider’s decision to not offer an alternative repayment arrangement.

The Provider issued a further letter to the Complainants dated **1 August 2013** in relation to mortgage loan account ending **8943** detailing the then current arrears as “€2,734.01”.

It would appear from the Provider’s internal notes outlined above that the Provider carried out a re-assessment of the Complainants’ mortgage loan account ending **8943** and an assessment of mortgage loan account ending **9720** on foot of the Complainants’ appeal of the Provider’s decision to not offer an alternative repayment arrangement. Following a further assessment of the Complainants mortgage loan accounts, the Provider issued two letters dated **2 August 2013** to the Complainants offering an alternative repayment arrangement in respect of mortgage loan accounts ending **8943** and **9720**. Both letters dated **2 August 2013** detail as follows;

“We have carefully assessed your mortgage loan and Section A of the enclosed Agreement to Amend Mortgage Loan Offer (the “form of Agreement”) outlines the full details of the alternative repayment arrangement option available to you.

We have considered all aspects of your case including:

- a) Your personal circumstances;*
- b) Your overall indebtedness;*
- c) The information you provided in the financial assessment form or subsequently submitted;*
- d) Your current repayment capacity; and*
- e) Your previous payment history.*

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

/Cont’d...

We strongly recommend that you get independent financial and legal advice to help you decide whether to accept our offer of an alternative repayment arrangement. Your local MABS Office can provide free and independent financial advice. Their contact details together with other important information are set out in an appendix to this letter.

When deciding whether to take up this offer, there are some matters for you (and your advisers) to consider:

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

- Your loan capital may not be repaid as quickly as is provided for in your initial mortgage loan offer letter.*
- It is possible that you may owe us more at the end of the alternative repayment arrangement than you owe us now.*
- The total cost of the credit is likely to be higher than outlined in the initial version of your mortgage loan offer letter.*
- Where the alternative repayment arrangement lasts for an agreed period only, once that period ends, we will recalculate your repayment instalments and they will have to be enough to ensure you repay the mortgage over the remaining term of the loan. These repayments are likely to be higher than the repayment instalments set out in the initial version of your mortgage loan offer letter.*
- You agree to pay the repayment instalments for the alternative repayment arrangement set out in the form of Agreement and acknowledge that if the interest rate on the Loan increases, these repayments will increase accordingly.*
- We may record the alternative repayment arrangement with the Irish Credit Bureau (ICB). If you break the terms of the alternative repayment arrangement, we may report that to the ICB. Such a report could make it more difficult for you to get credit from us or other financial institutions, for example, you may have difficulty getting a new home/business loan.*
- The life assurance policy you have in place to cover the mortgage loan will probably need to be adjusted to make sure you have enough cover for the whole period of the mortgage loan. Please make sure you review your life policy with your assurance company to ensure you have enough cover.*
- **You will lose the present tracker variable rate for the remaining term of the mortgage loan. [My emphasis]***

/Cont'd...

- *We will change your mortgage repayment amount based on your current financial circumstances. Please now review, and continue to review, your expenses and outgoings to ensure you pay the new repayment amount in full and on time because if you do not pay the new repayment amount, we may end this alternative repayment arrangement.”*

....

To accept the form of Agreement, please return it to us properly completed to: [Provider’s address] within 5 weeks from the date of this letter.

We cannot hold the offer open after this date. If we do not get back the form of Agreement properly completed by this date, the offer contained in it will lapse. If the offer lapses, we do not have to renew it.”

An **Agreement to Amend Mortgage Loan Offer Letter** dated **2 August 2013** was enclosed with the letter that issued to the Complainants in respect of mortgage loan account ending **8943** (the “**First Agreement**”). I note that **Section A** of the **First Agreement** details as follows;

“SECTION A: WHAT THIS FORM DOES

Alternative Repayment Arrangement

...

If you accept this form you are to pay an amount equal to the greater of the following amounts in each regular repayment instalment during the Agreed Period:-

- i) €582.00 (the “reduced regular instalment”); or*
- ii) Interest due for payment on the Loan if the amount of interest due for payment is greater than the reduced regular instalment (that is possible, for example, because of a rise in interest rates).*

...

The “Agreed Period” means the period of 60 months starting from the date we put the alternative repayment arrangement into effect.

An **Agreement to Amend Mortgage Loan Offer Letter** dated **2 August 2013** was enclosed with the letter that issued to the Complainants in respect of mortgage loan account ending **9720** (the “**Second Agreement**”).

/Cont’d...

I note that **Section A** of the **Second Agreement** details as follows;

“SECTION A: WHAT THIS FORM DOES

Alternative Repayment Arrangement

...

If you accept this form you are to pay an amount equal to the greater of the following amounts in each regular repayment instalment during the Agreed Period:-

- iii) €219.00 (the “reduced regular instalment”); or*
- iv) Interest due for payment on the Loan if the amount of interest due for payment is greater than the reduced regular instalment (that is possible, for example, because of a rise in interest rates).*

...

The “Agreed Period” means the period of 60 months starting from the date we put the alternative repayment arrangement into effect.

Both the **First Agreement** and **Second Agreement** contain the following paragraph under **Section A**;

Conversion from Tracker Rate to New Interest Rate Type

Tracker to BTL Variable

This form converts the interest we charge on the Loan from a tracker rate which is 1.600% per annum at present to a BTL Variable rate. The BTL Variable Rate will apply for the remaining term of the Loan (except for periods in which you and we agree in writing to fix the interest rate for the Loan). At present this BTL Variable rate is 2.600% per annum.

Section B of the **First Agreement** and **Second Agreement** details as follows;

“SECTION B: FURTHER TERMS AND CONDITIONS OF THIS FORM

/Cont’d...

B.1 ANY COMMITMENT TO A TRACKER RATE ENDS

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

...

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

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

...

B.10 About Your Acceptance of this Form

/Cont'd...

- 10.1 *You have five weeks from the date of this form shown on page 1 (the "Acceptance Period") to consider it and to return it to us properly completed.*
- 10.4 *This form contains important information comparing (1) the costs of remaining on your tracker rate or moving to the rate provided for in this form; and (2) the advantages and disadvantages of tracker rates and interest rates of the type provided for in this form".*

Section C of the First Agreement provides as follows;

"SECTION C: LEGAL NOTICES

(PLEASE READ THESE CAREFULLY)

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

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

- a) *We estimate you are now obliged to pay us monthly instalments of €1,263.95 each and that the total cost to you of the Loan would be €24,823.25. This estimate (i) is based on the tracker interest rate and the terms and conditions that apply to the Loan before you accept this form; but (ii) assumes you pay instalments of principal and interest on a normal annuity basis (for example, this estimate takes no account of any alternative repayment arrangement we may have entered into with you before we sent you this form.)*
- b) *If you accept this form, we estimate you will be obliged to pay monthly instalments of €582.00 each during the Agreed Period and of €1,836.39 each thereafter. The total cost of the Loan would be €51,454.17. These estimates are based on the rate of interest and other terms (for example, your reduced payment obligations during the Agreed Period) provided for in this form. The increase in the cost of the Loan is because (i) the interest rate offered in this form is higher than your present tracker interest rate; and (ii) the Loan principal will not be repaid as quickly as set out in the initial version of your Mortgage Loan Offer Letter.*
- c) *Each estimate (i) assumes you met your payment obligations to us in full and in time; (ii) is indicative only, for example, the amounts you pay in regular instalments may differ because of future changes in interest rates;*

/Cont'd...

(iii) assumes you make 12 monthly payments each year even if you have another arrangement with us; and (iv) includes arrears, even if arrears are not being capitalised as part of this agreement.

Section C of the Second Agreement provides as follows;

“SECTION C: LEGAL NOTICES

(PLEASE READ THESE CAREFULLY)

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

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

- a) We estimate you are now obliged to pay us monthly instalments of €465.26 each and that the total cost to you of the Loan would be €9,535.78. This estimate (i) is based on the tracker interest rate and the terms and conditions that apply to the Loan before you accept this form; but (ii) assumes you pay instalments of principal and interest on a normal annuity basis (for example, this estimate takes no account of any alternative repayment arrangement we may have entered into with you before we sent you this form.)*
- b) If you accept this form, we estimate you will be obliged to pay monthly instalments of €219.00 each during the Agreed Period and of €669.27 each thereafter. The total cost of the Loan would be €19,649.40. These estimates are based on the rate of interest and other terms (for example, your reduced payment obligations during the Agreed Period) provided for in this form. The increase in the cost of the Loan is because (i) the interest rate offered in this form is higher than your present tracker interest rate; and (ii) the Loan principal will not be repaid as quickly as set out in the initial version of your Mortgage Loan Offer Letter.*
- c) Each estimate (i) assumes you met your payment obligations to us in full and in time; (ii) is indicative only, for example, the amounts you pay in regular instalments may differ because of future changes in interest rates; (iii) assumes you make 12 monthly payments each year even if you have another arrangement with us; and (iv) includes arrears, even if arrears are not being capitalised as part of this agreement.*

/Cont'd...

The **First Agreement** and **Second Agreement** each contain a section entitled “*Advantages and disadvantages of tracker and other rates (Consumer Protection Code, Provision 6.9)*” which details the advantages and disadvantages of a tracker variable rate, a BTL variable rate and a fixed rate.

It is clear that the **First Agreement** offered the Complainants reduced monthly repayments of €582 on mortgage loan account ending **8943** for a period of 60 months, subject to the BTL variable rate of 2.6%. The **Second Agreement** offered the Complainants reduced monthly repayments of €219 on mortgage loan account ending **9720** for a period of 60 months, subject to the BTL variable rate of 2.6%.

The Provider’s internal notes dated **8 August 2013** record details of an incoming call from the First Complainant as follows;

“Inbound Call from [First Complainant] - Cust calling for decision on SFS’s, advised will request case manager to call back to discuss. Sent email requesting call back”

The Provider’s internal notes dated **9 August 2013** record details of an outgoing call to the First Complainant as follows;

“Spoke to [First Complainant], advised of decision. She was delighted with outcome. Queried life cover as per review 22/07/13. Client has life cover in place, however the policy is assigned to her son[‘s] property for 10 yrs. Same can be reviewed again in 5yrs with a view to reassigning it to [Provider]. Clients have not yet received [First Agreement and Second Agreement] issued on 02/08/13, [internal mail] sent to request same is reissued. Client will revert if she has any questions re [First Agreement and Second Agreement]. Await return of same before routing case out of MRT”.

The Provider’s internal notes dated **14 August 2013** record details of an incoming call from the First Complainant to the Provider who requested a call back from the case manager appointed to deal with the Complainants’ mortgage loan accounts. The Provider’s internal notes dated **14 August 2013** record details of an outgoing call to the First Complainant as follows;

“Spoke to [First Complainant], re: the correspondence received. She was querying the fees & charges on arrears & outstanding balance. She will discuss same with husband & return MFA. Await the return of same before routing a/c out of MRT.”

/Cont’d...

The Complainants signed **Section E- Acceptance by (each) borrower** of the **First Agreement** and **Second Agreement** on **19 August 2013** on the following terms;

“By signing this form:-

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

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

The Complainants signed and accepted the **First Agreement** and **Second Agreement**, having ticked the box confirming that they had received independent financial advice and that they agreed to be bound by the terms and conditions of the agreements. If the Complainants were not satisfied with the terms of the **First Agreement** and **Second Agreement**, including the amendment to the interest rate to both of their mortgage loan accounts, the Complainants could have opted not to accept the offers as made by the Provider.

I note from the Provider’s internal notes that it received the signed **First Agreement** and **Second Agreement** on **22 August 2013**. The Provider’s internal notes dated **4 September 2013** record details of an outgoing call to the First Complainant as follows;

“...adv cust of arrs 3670.68 on acc [ending 8943] cust adv she has sent back in MFA on Friday last. Adv she will not talk about this as it has been sorted and she has been told arrs will be capitalised”.

/Cont’d...

The Provider's internal notes dated **5 September 2013** record details of an incoming call from the First Complainant as follows;

"...Cust very annoyed at getting[g] calls when she has MFA in place. Adv it was back. Call was due to pmnt due on 30/08. Cust on long term i/o. if cust calls again adv that pmnt is due from m30/08 and offer Dd mandate as a/c is man pay a/c."

The Provider's internal notes dated **11 September 2013** record details of an incoming call from the First Complainant as follows;

"...Cus calling to speak with [redacted]. Asked customer the nature of the query cus confirmed interest rate is incorrect, As per MFA scanned to AL on 02/09 new int rate of 2.600 with los[s] of tracker agreed, this is not in place, Have sent [internal mail] to have this amended. Cus also querying why she has not received copy of letter of offer adv cus she got this and signed and returned it, Cus claims was told by [redacted] she would rec[e]ive copy after agreement was put in place, Cus requested [redacted] call her..."

The Provider's internal notes dated **11 September 2013** record a review/update note as follows;

"Received call from Case manager. She believed that capitalisation would be offered as part of [First Agreement]. advised that this is not the case and I would not be in a position to approve arrears capitalisation until the borrower had made the step up in repayments for at least 6 months. The account could be monitored in D16 for this to be met."

The Provider's internal notes dated **26 September 2013** record a review/update note as follows;

"Cured case, LT FB in place. Pl[ease] route....to monitor pay[ments] with a view to capitalising arrears as per review 11/09/2013. Contact not required."

The Provider's internal notes dated **3 October 2013** record an outgoing call to the First Complainant as follows;

"Rang [First Complainant] as request call back. Customer was querying why balance increased on her account from May to August 2013. I explained this how interest is posted."

/Cont'd...

Advised that it is posted on different days and that when letter was issued in May 2013 she had made payment but in August 2013 interest had posted for July 2013 but payment was not made. Agreed to send out statements to her. She also advised that there should be no arrears on the a/c. Advised that we cannot cap arrears until she meets six payments under arrangement and when this is done arrears can be capped then. She understood this..."

I note from the Provider's internal notes that the arrears on mortgage loan account ending **8943** were capitalised in **April 2014**.

The Provider's internal notes dated **19 April 2017** record an outgoing call to the First Complainant as follows;

"...Advised calling as part of 3 year review. [First Complainant] confirmed payments ok g/f. I/O in place until 05/09/2018. No change in circumstances. Advised [Provider] will be in contact to/o to discuss step up."

The Provider issued a letter to the Complainants on **30 April 2018** in relation to mortgage loan account ending **9720** notifying the Complainants as follows;

"Your current repayments on this mortgage loan are €219.00. These repayments are due to end on 27/08/2018 after which the repayments will be full principal and interest amount due under the mortgage loan.

....

We will write to you again to confirm the actual repayment amount due on your mortgage account after 27/08/2018 when the full principal and interest repayments commence.

If you foresee difficulties in making your mortgage repayments, please contact our Customer Relationship Unit..."

The Provider issued a letter to the Complainants on **8 May 2018** in relation to mortgage loan account ending **8943** notifying the Complainants as follows;

"Your current repayments on this mortgage loan are €582.00. These repayments are due to end on 5/09/2018 after which the repayments will be full principal and interest amount due under the mortgage loan.

....

/Cont'd...

We will write to you again to confirm the actual repayment amount due on your mortgage account after 5/09/2018 when the full principal and interest repayments commence.

If you foresee difficulties in making your mortgage repayments, please contact our Customer Relationship Unit..."

The Complainants sent a letter dated **9 May 2018** to the Provider requesting that the direct debits on both mortgage loan accounts be omitted *"for June and July as we are in the process of putting [BTL property] on the market."*

The Complainants' solicitor issued a letter dated **26 June 2018** to the Provider requesting *"up to date redemption figures on all loans whatsoever"* secured on the BTL property. The Provider issued a redemption quote on **29 June 2018**. The Complainants' solicitor requested title documents in respect of the BTL property from the Provider by way of letter dated **3 July 2018** noting that the BTL property *"has now been placed on the market"*.

The Provider's internal notes dated **16 August 2018** record an outgoing call to the First Complainant as follows;

"...Adv cust of rolling off fb 05/09. Cust adv selling the property adv unable to meet full Capital and Interest repayments. Adv cust SFS is required if unable to meet step up. Non CCMA confirmed. RFA=SAL. Cust adv will not be completing the SFS. Conseq given. Cust adv mortgages a month ago property is up for sale. Cust adv nothing has changed last SFS adv new SFS still required. Cust adv property will be sold in the next 2 months and ended the call."

A further request for redemptions figures in respect of both mortgage loan accounts was made by the Complainants' solicitors on **7 September 2018** and the Provider issued a redemption quote on **11 September 2018**. I note that both mortgage loan accounts were redeemed on **14 September 2018**.

The Complainants contend that, on the expiry of the alternative repayment arrangements, *"the only thing to do was sell the property"*. I have not been provided with any evidence to suggest that the Complainants engaged with the Provider in advance of the expiry of the alternative repayment arrangements in **August** and **September 2018** by completing an up to date **SFS** to allow the Provider assess the Complainants' mortgage loan accounts for further forbearance. Instead, it would appear from the evidence submitted that the Complainants, of their own volition, decided to sell the BTL property in **2018**.

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It was always open to the Complainants to approach the Provider to renegotiate the terms of their mortgage loan account or seek an extension of the forbearance measures implemented on foot of the **First Agreement** and **Second Agreement**, subject to approval by the Provider.

It is important for the Complainants to be aware that pursuant to the terms and conditions of the **First Loan Offer** and the **Second Loan Offer**, they agreed to make interest only repayments for the first 10 years of the terms of their mortgage loan accounts and thereafter, they were obliged to commence making full capital and interest repayments. In circumstances where the Complainants were not in a position to meet the full capital and interest repayments on mortgage loan account ending **8943** (which rolled off the interest only payments in **May 2013**), the Complainants approached the Provider seeking forbearance. I note that the Provider initially declined the Complainants request for an alternative repayment arrangement in **May 2013** following an assessment of the Complainants' financial circumstances which concluded that there was insufficient income to service the loan going forward. However, following further engagement with the Complainants and an offer by the Complainants to pay a sum of €800 per month, raised by way of rental income from the BTL property, the Provider decided to carry out a further assessment of the Complainants overall liabilities with Provider in **June and July 2013**.

At that stage, mortgage loan account ending **8943** had fallen into arrears with the interest only repayment period having ended.

While I note that the interest only repayment period in respect of mortgage loan account ending **9720** was not due to expire until **September 2015**, the Provider was of the view that based on the Complainants' financial position in **2013** and the fact that this was not likely to improve in the foreseeable future, the Complainants would have no income to service mortgage loan account ending **9720**. Given the Complainants' personal and financial circumstances at the time, I am of the view that it was reasonable and prudent for the Provider to consider the Complainants' overall repayment capacity in respect of both mortgage loan accounts and offer forbearance on both loan accounts in **2013** to ensure that the Complainants could service both loans going forward. In this regard, it does not seem unreasonable that both mortgage loan accounts be dealt with together in terms of deciding on the implementation of appropriate forbearance measures. It is important for the Complainants to understand that they were seeking to vary the terms of their mortgage loan with the Provider by seeking forbearance. It was within the Provider's discretion to decide whether or not to accede to that request and in doing so, whether the Provider wished to introduce any different terms to the agreement.

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The Provider, in accordance with its buy-to-let pricing policy offered reduced monthly payments at a standard variable rate which was to start at 1% above the current tracker interest rate on the Complainants' mortgage loan accounts. In the circumstances of this particular complaint, it appears that the Provider offered a variable rate of 2.6%. I note that the **First Agreement** and **Second Agreement** refer to the tracker interest rate applicable to both mortgage loan accounts as being 1.6%. The loading of 1% was added to the tracker interest rate and a variable interest rate of 2.6% was offered by the Provider to the Complainants.

Provision 8.3 of the **Consumer Protection Code 2012** outlines as follows;

“Where an amount is in arrears, a regulated entity must seek to agree an approach (whether with a personal consumer or through a third party nominated by the personal consumer in accordance with Provision 8.5) that will assist the personal consumer in resolving the arrears.”

I have considered the arrears correspondence that has been furnished to this office in particular in relation to mortgage loan account ending **8943**. I accept that in its engagements with the Complainants, the Provider complied with its obligations under **provision 8.3** of the **Consumer Protection Code 2012** and sought to agree an approach with the Complainants to resolve the arrears.

Provision 6.9 of the **Consumer Protection Code 2012**, outlines as follows;

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

- i. Indicative comparisons of the cost of the monthly repayments at the personal consumer's current tracker interest rate and each of the alternative rate(s) being offered;*
- ii. An indicative comparison of the total cost of the loan if the personal consumer continue with the existing tracker interest rate and the total cost of the loan for each of the alternative rate(s) and terms being offered. Any assumptions used must be reasonable and justifiable and must be clearly stated; and*
- iii. Details of the advantages and disadvantages for the personal consumer of the tracker interest rate compared to each of the other rate(s) being offered.*

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

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

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

I accept that the Complainants may not have wanted to give up the entitlement to a tracker interest rate. However, the Complainants were in a difficult position and seeking to agree a forbearance measure with the Provider on a mortgage that was not secured on their principal private residence but rather a BTL property. The Provider made an offer to the Complainants to make reduced repayments for five years on their mortgage accounts on condition that a variable rate of 2.6% would apply to both mortgage loan accounts. The appropriate information and warnings under **provision 6.9** of the **Consumer Protection Code 2012** were contained in the **First Agreement** and **Second Agreement**.

I have been provided with no evidence to support the Complainants' assertion that they were "*pressurised*" into giving up the tracker interest rate on both mortgage loan accounts. While I accept that the Complainants were in a difficult position in light of the change in their personal and financial circumstances, it was nonetheless a matter for the Complainants to decide whether to accept the alternative repayment arrangements on offer by the Provider. The Provider offered the Complainants a period of forbearance and reduced repayments on the condition that the Complainants agreed to change the interest rate applicable to both mortgage loan accounts from a tracker interest rate to a variable interest rate. The Provider issued an offer to the Complainants in **August 2013** reflecting this proposal in the form of the **First Agreement** and **Second Agreement** which contained the appropriate warnings under the **Consumer Protection Code 2012** about moving from a tracker interest rate to a variable interest rate. If the Complainants were not happy with the terms of the **First Agreement** and **Second Agreement**, including the amendment to the interest rate, the Complainants could have decided not to accept the offer made by the Provider. However, the Complainants accepted the proposals contained within the **First Agreement** and **Second Agreement** having confirmed that they had taken independent financial advice. Therefore, having considered the circumstances of this case, I cannot accept that there was an inappropriate removal of a tracker rate of interest from the Complainants' mortgage loan accounts by the Provider in **August 2013**.

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

Conclusion

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

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

13 April 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,
 - (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.