



<u>Decision Ref:</u>	2021-0156
<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>	Upheld

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

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

The loan amount was €247,100 and the term was 25 years. The Mortgage Loan Offer which was signed on **3 March 2003** detailed that the Interest Rate was a "4.24% Variable".

The Complainants' Case

The Complainants submit that they drew down their mortgage loan account in **March 2003** on a variable interest rate of 4.24%. On **24 February 2005**, the Complainants signed a **Mortgage Form of Authorisation** converting the interest rate applicable to the mortgage account to a tracker interest rate of ECB + 1.3%.

The Complainants submit that the Provider failed to inform them in **July 2006** and **July 2008** that in applying for the fixed interest rates to the mortgage loan account that they risked losing the tracker interest rate offering. The Complainants submit that, despite repeated requests, the Provider's representatives have been unable to explain the Provider's decision making process to them.

The Complainants submit that in their discussions with the Provider's representatives, they *"continuously emphasised the two overriding goals of: a. keeping to a tracker rate to ensure low interest rates b. balanced with the consideration of fixed rates to provide us with some certainty regarding levels of payments."* They submit that they were never informed *"that these two principles were, or would be as an indirect consequence of our actions, incompatible"*.

In response to the Provider's submission that there is no evidence to support this assertion, the Complainants say that *"no evidence' is not a positive assertion"*. They submit that at such a financially stressed time in their lives and in the context of such *"pronounced information asymmetry"*, they believe that it is reasonable that some positive evidence, rather than mere circumstantial evidence is required.

The Complainants detail that they *"are now left paying a higher interest rate than we originally had access to"*.

The complaint is that the Provider failed to inform the Complainants in **July 2006** and **July 2008** that in applying the fixed interest rates to the mortgage loan account that they risked losing the tracker interest rate offering.

The Complainants are seeking the following;

- (a) Redress in the form of the difference between the tracker interest rate and the variable rates applied to their account, backdating to **July 2008**; and
- (b) Restoration of the tracker rate to their mortgage loan account.

The Provider's Case

The Provider submits that the Letter of Offer accepted by the Complainants in **March 2003** provided for a variable rate of interest and that there was no provision for a tracker interest rate in the letter.

The Complainants converted the mortgage loan account to a tracker interest rate of ECB + 1.3% by way of a **Mortgage Form of Authorisation (MFA)** accepted and signed by the Complainants on **24 February 2005**. The Complainants applied a two year fixed rate of 4.89% to their account by accepting and signing a MFA on **28 July 2006**.

The Provider submits that this MFA detailed that its terms “*replace any other similar terms*” set out in the Letter of Offer and that the obligation of the Provider to offer a tracker rate under the **2005** MFA ceased when the Complainants entered the fixed rate period of 2 years by signing the **2006** MFA. The Provider asserts that there is nothing in the **2006** MFA to indicate the revival of a tracker rate of interest on expiry of the fixed rate period.

The Provider submits that it had no reason to inform the Complainants that by opting for a fixed rate period in **2006**, the tracker interest rate offering might no longer be available to them at the expiry of the fixed interest period. In this regard, the Provider submits that there was no regulatory requirement in **July 2006** for mortgage lenders to specifically warn that tracker rates might no longer be available. The Provider states that it is unaware of any industry practice to include such warnings in **July 2006** and submits that it is important not to assess practices in **July 2006** in light of changes introduced by correspondence by the Central Bank in **2010** culminating in formal changes to the **Consumer Protection Code** (a statutory code of practice) made by the Central Bank in **2012**.

The Provider points out that when the first fixed interest rate of 2 years’ duration expired in **July 2008**, the Complainants were offered a tracker interest rate of ECB + 1.5%, however, they selected a 3 year fixed rate of 5.49%. The Provider submits that the Complainants’ choice to opt for a fixed interest rate by way of the **2006** MFA and **2008** MFA was a reasonable choice made by the Complainants at a time when the ECB Rate was steadily increasing.

The Provider submits that both of the Complainants signed the MFA in **July 2008** opting to fix the interest rate on their account for 3 years, however, had they wished to avail of the tracker interest rate offered, they could have done so. The Provider submits that the ultimate decision to fix the mortgage interest rate was made by the Complainants alone and no evidence to the contrary has been submitted by the Complainants. It also submits that it has not found any evidence to the contrary on investigation. The Provider submits that it was its policy in **2008** not to provide any recommendations or advice on the choice of interest rate products to customers, and the MFA issued to the Complainants in **2008** presents the choices of tracker, investment variable and various fixed rates in a neutral manner.

The Provider further submits that the consequences of each choice are clearly set out in “*easy to understand*” clauses on **page 2** of the **2008** MFA. The Provider says that the Complainants could not have been in reasonable doubt that they were activating **Clauses 1** and **2** of the **2008** MFA and rejecting the opportunity to activate **Clause 3** of the **2008** MFA.

The Provider submits that *“the 2008 MFA says it amends the “terms and conditions applicable to the Loan” and in Clause 5 that “all terms and conditions applicable to the Loan remain unchanged” save as set out in the 2008 MFA. General Condition 7(b) of the Offer Letter is amongst the terms and conditions thus unchanged”*. The Provider notes that the **2008 MFA** contained the instruction to the Complainants *“Please read carefully before signing the below”*.

The Provider asserts that **General Condition 6(a)** and **7(b)** clearly and unequivocally state that the Provider has the sole discretion upon expiry of the fixed rate period, to provide a further fixed rate period, a choice of rates and if either of these is not selected, then the mortgage would revert to a variable rate. A variable rate has been defined in **General Condition 6(a)** and the Provider submits that it is clear that it does not include a tracker rate of interest.

The Provider submits that there is no ambiguity, lack of clarity or vagueness contained in the **2006 MFA** or the **2008 MFA** when read in conjunction with the offer letter concerning the rate which the Complainants’ mortgage loan account would revert to upon expiry of the fixed interest rate period. The Provider asserts that the Complainants could not reasonably have expected to revert to the tracker rate upon expiry of the 2 year fixed rate period and the 3 year fixed rate period respectively.

The Provider submits that the Complainants’ mortgage loan account was considered as part of the Tracker Mortgage Examination and has not been identified as being impacted. The Provider outlines that it did provide the Complainants the option of a tracker interest rate at the end of the first fixed interest rate period in **2008** and therefore it cannot within the context of the Examination be said to be *“guilty of [a] failure to provide the option of a tracker rate at the end of the first fixed rate period of 2 years’ duration”* and for this reason, it states that, the Complainants are not in scope for remediation as part of the Examination.

The Provider submits it found no evidence to support the Complainants’ submission that they had emphasised the *“overriding goals”* of keeping a tracker interest rate to ensure low interests, balanced with the consideration of fixed rates to provide the Complainants with certainty regarding level of payments. In this regard, the Provider points to circumstantial evidence which in the Provider’s view indicates that this assertion cannot be sustained. The Provider submits as follows;

1. The offer letter contains no contractual entitlement to a tracker rate of interest and the Provider holds no evidence of the Complainants ever seeking a tracker rate of interest prior to drawdown.

2. The Provider submits that the Complainants applied for and were given a tracker rate in the **2005** MFA, however the Complainants only remained on the tracker interest rate for a period of approximately 17 months. The Provider submits that this is inconsistent with the idea of *“keeping to a tracker rate”*.
3. The **2006** MFA applied a 2 year fixed rate at 4.89% to the mortgage loan account, at the Complainants’ request.
4. The **2008** MFA offered the Complainants a tracker rate of interest but the Complainants rejected the Provider’s offer and instead chose a 3 year fixed interest rate at 5.49%. The Provider states that this is also inconsistent with the idea of *“keeping to a tracker rate”*.

The Provider further submits that the background interest rates that prevailed when the Complainants made these choices also contradicts elements of the Complainants’ assertion that they continuously emphasised two overriding goals. The Provider states that tracker rates were not particularly *“low”* at the times the Complainants chose fixed rates in **2006** and **2008**. The Provider submits that the Complainants moved from the standard variable rate of 3.6% to a tracker interest rate of 3.3% on **03 March 2005**. The tracker interest rate increased to 3.55% on **05 December 2005**, then to 3.8% on **08 March 2006** and to 4.05% on **15 June 2006**. It submits that the Complainants then elected to move to a 2 year fixed rate of 4.89% in **August 2006**.

The Provider submits that the position expressed by the Complainants represents an *“incompatible”* combination of aims because the advantages and disadvantages of tracker rates as opposed to fixed rates are, ultimately, incompatible. The Provider submits that *“keeping to a tracker rate”* involves taking on the risk of upward variations in the ECB Repo Rate, this matter being in the control of the European Central Bank, whereas fixed rates provide certainty to a customer. The Provider notes, however, the downside risk from the customer’s viewpoint is that variable or tracker interest rates could reduce during the fixed rate period.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to inform the Complainants in **July 2006** and **July 2008** that they risked losing the tracker interest rate offering by applying fixed interest rates to their mortgage loan account.

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

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

- Letter from the Provider to this office dated **11 August 2020**
- Letter from the Complainants' representative to this office dated **18 August 2020**
- Letter from the Provider to this office dated **4 September 2020**
- Letter from the Complainants' representative to this office dated **18 September 2020**
- Letter from the Provider to this office dated **29 September 2020**
- Letter from the Complainants' representative to this office dated **12 October 2020**

Copies of these additional submissions were exchanged between the parties. Following the consideration of additional submissions from the parties and all of the submissions and evidence on the file, I set out below my final determination.

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In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also relevant to set out the interactions with the Complainants in **July 2006** and **July 2008** when the Mortgage Forms of Authorisation were signed by the Complainants.

The **Mortgage Loan Offer** dated **20 February 2003** details as follows;

***"Part 1 – The Statutory Loan Details
Important Information as at:***

- | | |
|-------------------------------------|-------------|
| 1. Amount of Credit advanced: | €247,100.00 |
| 2. Period of Agreement: | 300 months |
| 3. Number of repayment Instalments: | 300 |

...

Part 2 – The Additional Loan Details

- | | |
|----------------------------------------------------|----------------|
| 11. Type of Loan (e.g. Annuity or Endowment): | Annuity |
| 12. Interest Rate & whether Fixed or Variable: | 4.24% Variable |
| 13. Fixed Rate Period (if interest rate is fixed): | N/A |
| 14. Normal Review Date (if applicable): | 15/02/2004 |

...

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."

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

"6. Variable Interest Rates

- a) *Subject to clause 6 (c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Bank'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.*

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- b) *The Bank 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.*
- c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.5% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

7. Fixed Interest Rates

- a) *The Bank 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 Bank's fixed rate available for the fixed period selected by the Borrower at the date of draw down.***
- b) *The Bank shall have sole discretion to provide any further or subsequent fixed rate period. If the Bank does not provide such a further or subsequent fixed rate period or if the Bank 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 **3 March 2003**, which states as follows:

"Acceptance of this Offer Letter must reach the Bank within 30 days of the date of this Offer Letter or the offer will lapse. (The Bank 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 it to the Bank.

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 to me that the **Mortgage Loan Offer** envisaged a variable rate of 4.24%. 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. The nature of the variable interest rate that was applied to the mortgage loan from inception is not in dispute between the parties. The Complainants accepted the **Mortgage Loan Offer**, having confirmed that they fully understood the terms and conditions set out in the Offer Letter.

It appears from screenshots of the Provider's internal system which have been furnished in evidence that the Complainants were in contact with the Provider in **February 2005** with respect to obtaining an interest rate reduction on their mortgage loan.

The relevant entries by the Provider's representatives on the internal system outline as follows:

- **16 February 2005**
"Treasury have approved TRA less 0.30% for the term ECB Plus 1.30% to apply"
- **17 February 2005**
"Hi Treasury have appr red in this rate to 3.3% Confirmation rec. Please amend rate. See othe[r] mortgage [account number] which has been amended"
- **22 February 2005**
"Have Tracker MFAs been completed?"
- **22 February 2005**
"It is already a tracker mortg this is a reduction on that rate"
- **22 February 2005**
"The account is on a std Homeloan variable and not on a tracker rate so a Tracker MFA is required. Rate will not be amended until a tracker MFA is received."
- **02 March 2005**
*"Hi
I have received Tracker MFA to amend rate to ECB + 1.30% but we still haven't received Treasury approval. Could you arrange for this to be sent as soon as possible?"*

- **02 March 2005**

“The approval was included in the appr for the other ac no [account number]. Both were on the one form to treasury and both appr on 16/02/2005”

The Complainants signed an **Application for Change to Tracker Mortgage - Mortgage Form of Authorisation** on **24 February 2005**. The **Mortgage Form of Authorisation** 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 as detailed above for my/our mortgage loan (the “Loan”)

Please select when you wish to change your interest rate:

- I/We wish to change to the rate selected above immediately*.*
 I/We wish to change to the rate selected above at the expiry of my/our current fixed rate period (if applicable)

**Note: If you change from a fixed rate during the fixed rate period, you may be liable to pay a funding sum to [the Provider]. See conditions overleaf.*

....”

The reverse side of the **Mortgage Form of Authorisation** is titled **Acknowledgement and Agreement** and details as follows:

“Please read carefully before signing this form. Where there is more than one borrower, any references to “I” or “my” are to be construed as references to “we” or “our” respectively.

I acknowledge that following the acceptance by [the Provider] of this Application the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them.

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I acknowledge and agree that: -

....

- 3. *In converting the Loan to a Tracker Mortgage Loan, I agree that 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 the percentage stated on page 1 above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. Variation in interest rate shall be implemented by [the Provider] 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 either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time the Repo rate is certified [the Provider] to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.***
- 4. *Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged.” [emphasis in original]***

It appears from screenshots of the Provider’s internal system which have been furnished in evidence that the rate applicable to the mortgage loan was amended to a rate of 3.3% on **03 March 2005**. It is clear that the effect of the Complainants signing the **Mortgage Form of Authorisation** on **24 February 2005** and the Provider accepting the application was that the terms and conditions applicable to the Complainants’ mortgage loan were amended or varied by the terms of the **Mortgage Form of Authorisation** and that all other terms and conditions applicable to the mortgage loan remained unchanged. In effect the **Mortgage Form of Authorisation** gave the Complainants a contractual commitment to a Tracker Mortgage Loan of ECB + 1.3% “*for the term of the Loan*”.

The Provider, in its post Preliminary Decision submission dated **11 August 2020**, details that **clause 12** of the **Mortgage Loan Offer** was amended by the application of the tracker interest rate to the mortgage loan and that all other terms and conditions remained unchanged.

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The interest rate at the time the mortgage loan was drawn down in **2003** was a variable interest rate which was set out at **clause 12 in Part 2 of the Mortgage Loan Offer**. The definition of the variable interest rate and conditions associated with the application of the variable rate were contained in **General Condition 6 to the Mortgage Loan Offer**, as quoted above. The **Application for Change to Tracker Mortgage - Mortgage Form of Authorisation** which was signed on **24 February 2005** changed the interest rate applicable to the mortgage loan at that time in **2005**.

The Complainants' representative, in his post Preliminary Decision submission dated **18 August 2020**, outlines as follows;

"Firstly there is a substantial difference between the application signed in 2005, which applied a Tracker Rate of ECB plus 1.3% to the loan for the term of the loan and the MFA signed in 2006.

The MFA signed in 2005 is distinctly different as follows.

It is titled

***Application for Change to Tracker Mortgage
Mortgage Form of Authorisation***

This is a very distinct difference to the subsequent MFAs which were signed to fix the interest rate for a period.

The "Application to change to a Tracker Mortgage" effectively changed the variable basis for the loan for "the term of the loan."

...

In the subsequent forms signed by my clients all they were doing was fixing the interest rate for a period.

The underlying variable basis of the loan which was altered by the completion of the form,

'Application for change to Tracker Mortgage'

remained unaltered by the selection of a fixed rate for a period.

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Conditions 6(a) and 7(b) quoted by the Provider are also contained in every loan offer that commenced on a Tracker basis.”

It appears that the Complainants’ representative is suggesting that the **Application for Change to Tracker Mortgage - Mortgage Form of Authorisation** which was signed on **24 February 2005** had the effect of changing the variable basis of the loan so that the variable rate then became a variable tracker interest rate. I do not accept this submission. The variable interest rate, as referred to in the **Mortgage Loan Offer at Clause 12 and General Condition 6** remained as one which would “*vary at the Bank’s discretion upwards or downwards*”. Rather the effect of the **Application for Change to Tracker Mortgage - Mortgage Form of Authorisation** which was signed on **24 February 2005** was that the terms and conditions of the Complainants’ mortgage loan were “*amended/varied*” to include the entitlement to the tracker mortgage loan interest rate, which would be no more than ECB + 1.30% for the “*term of the loan*”. Furthermore there is no relevance to the Complainants’ representative’s submission about **General Condition 6(a) and 7(b)** being contained in other mortgage loan offers held by other customers of the Provider that commenced on a tracker basis. The terms and conditions applicable to the Complainants’ mortgage loan are governed by the terms and conditions of the Complainants’ mortgage loan alone. In adjudicating on this complaint, I will not consider the terms and conditions associated with other third parties’ mortgage loans. The inclusion of such material is neither relevant nor helpful. The Complainants’ mortgage loan did not commence on a tracker basis.

In the post Preliminary Decision submission dated **18 September 2020** the Complainants’ representative further states that;

“I have attached a copy of a Mortgage Brochure that was part of the available communications relating to Mortgages and in particular the definition of what a Variable Tracker rate was.

“A variable Tracker Rate gives you complete certainty of the rate over the full life of your mortgage, because it’s tied to the European Central Bank (ECB) repo rate”.

In its post Preliminary Decision submission dated **29 September 2020** the Provider states that;

“The Complainants have not confirmed that they were ever provided with the Mortgage Brochure and if they were, they have not evidenced how they relied on it in any meaningful way.

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In any event, we also note that the Mortgage Brochure was intended for potential new customers rather than existing customers (such as the Complainants) who would require a MFA to change an interest rate on their mortgage loan account.

Secondly, the definition of a “Variable Tracker rate” in the 2004 Mortgage Brochure is not sufficient to create any contractual entitlement to a tracker rate of interest.”

I am of the view that any contractual entitlement to a tracker interest rate on the Complainants’ mortgage loan does not arise on the basis of the information contained in the Provider’s **Mortgage Brochure** which has been submitted in evidence. The **Mortgage Brochure** does not form part of the Complainants’ mortgage loan documentation.

The Complainants’ representative, in his post Preliminary Decision submission dated **18 August 2020**, details as follows:

“I would contend that it is the Provider that has contradicted its own forms when the MFA completed in 2005 is substantially different to the MFA completed in 2006 and if this view is not accepted then [the Provider] will need to outline why it altered the entry of

“Product Switch”

on its mortgage system which occurred on 10 November 2008, along with many thousands of cases, such as this account, which had the effect of altering the roll to position of this account”.

Here again I must point out that the Complainants’ representative’s reference to many thousands of cases is completely irrelevant to the adjudication of this complaint.

The Provider, in its post Preliminary Decision submission dated **04 September 2020**, details as follows:

“It is notable that this matter has not been previously raised by the Complainants in any interactions with the FSPO.

2.2 Entries on the Bank’s internal mortgage administration system are for internal purposes only and are not communicated to a customer. Such records do not replace or amend the terms and conditions of a customer’s mortgage loan documentation.

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On this basis, the Bank is satisfied that such entries do not convey any right or legitimate expectation as to the rate an account would roll to upon expiry of a fixed rate period, as it does not form part of the governing loan documentation or a communication with the customer. As set out in previous correspondence, the only way to amend the terms of a customer's MLO is by way of an MFA."

For the avoidance of doubt, I would point out to the Provider that this Office will take all evidence into account including internal Provider records, whether or not they are raised by the Complainants.

The screenshots of the Provider's internal system show a number of entries for "product switches" which correlate to dates when interest rate changes were made to the Complainants' mortgage loan. I do not accept that these entries in and of themselves had the effect of altering the terms and conditions associated with the Complainants' mortgage loan, as has been suggested by the Complainants' representative.

The Complainants then signed a **Mortgage Form of Authorisation** on **28 July 2006**, applying a 2 year fixed rate of 4.89%. The **Mortgage Form of Authorisation**, signed on that occasion, details as follows:

1. "Changing from one Interest Rate to Another

I wish to apply for the interest rate indicated below for my Mortgage Loan. I understand this rate will apply to my Mortgage Loan from the expiry date of my current fixed rate period (if applicable).

...

Other 2 yr FR Rate 4.89%

...

I agree to the following terms:

- (i) *The interest rate I have chosen on this form will apply to my Mortgage loan from the expiry date of my current fixed rate (if applicable).*

...

(ii) *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to compensate [the Provider] for any loss it incurs as a result. This fee will be (Amount x (R-R1) x Time) divided by 36500 and for the purposes of this formula the variables are defined as follows:*

“Amount” means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments; in the case of an endowment loan, this will equal the full amount of the early repayment or conversion. “R” means the cost of funds for [the Provider] for the fixed rate period as incorporated in the existing interest rate applying to the Loan.

“R1” means the interest rate available to [the Provider] for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period. “Time” means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period.

I will not be liable for any fee if I repay all or part of my Mortgage Loan, or make repayments in excess of what I am obliged to make, provided it is at a variable rate.

...

These terms replace any similar terms in my HomeLoan Letter of Offer. I confirm that my Home Loan Letter of Offer as amended by this Authorisation remains in force.”

It appears from screenshots of the Provider’s internal system which have been furnished in evidence that the Complainants were in contact with the Provider with respect to the interest rate applicable to their mortgage loan as a result of the amendment. The relevant entries on the internal system show internal engagements between Provider representatives as follows:

- **04 August 2006**

“Following today call with [name] I wish to advise that the customer has received 2 letters of confirmation re change of rate.

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1 saying rate of 4.59% and one saying rate of 4.89%. They are insisting naturally on the 4.59% and you might let me know what can be done in the situation please."

- **05 August 2006**

"Rate of 4.59% was applied in error (as the previous discount of 0.3% was not removed). When this error was discovered, correct rate of 4.89% was applied – which the customer signed for in the MFA dated 28/07/2006."

- **08 August 2006**

"If they had an agreed discount should they not be entitled to continue it. All I can tell you is that they have a letter quoting the lower rate and they are not willing to accept the higher. I think we need to look at this again as I know they will not let it go."

- **10 August 2006**

"Rate will remain at 4.89%. The MFA signed by the customer was 4.89% and therefore the contract they signed into was 4.89%. The letter customer received stated they were on a rate of 4.59% and then they would have received a subsequent letter stating the rate they signed for of 4.89%.

We have set rate as per contract that customer entered into"

- **15 August 2006**

"Treasury have approved rs4 less 0.30% for 2 yrs"

- **16 August 2006**

"Hi I have gotten Treasury app for the reduced rate which I see has been applied. The customers were not going to let it go."

I note that the **Mortgage Form of Authorisation** which was signed on **28 July 2006** did outline that the *"terms replace any similar terms in [the] HomeLoan Letter of Offer"* and that the Home Loan Letter of Offer remained *"in force"*. However, it is not entirely clear from the content of the **Mortgage Form of Authorisation** what *"similar"* terms were in fact being replaced.

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The Provider, in its post Preliminary Decision submission dated **11 August 2020**, submits that the “*similar terms*” replaced were “*namely clause 12 of the 2003 MLO*”. For the avoidance of any doubt, the **Mortgage Form of Authorisation** which was signed on **28 July 2006** did not specify that the “*similar terms*” that were being replaced was **clause 12** of the **Mortgage Loan Offer**.

Condition 7 in the **General and Special Conditions** of the **Mortgage Loan Offer** applies to “*Fixed Interest Rates*”. It appears to me that the Provider offered the Complainants a fixed interest rate on their mortgage loan in accordance with its discretion that it had to do so under **Condition 7(a)** of the **General and Special Conditions**. **Condition 7(a)** of the **General and Special Conditions** of the Complainants’ Mortgage Loan Offer outlines that the Provider in its “*absolute discretion*” may permit the Complainants to “*avail*” of a fixed interest rate. This does not appear to be in dispute between the parties.

Condition 7(b) of the **General and Special Conditions** then provides what would happen at the end of the fixed interest rate period. **Condition 7(b)** outlines that the Provider has the “*sole discretion*” to provide the Complainants with “*any further or subsequent*” fixed rate period or if the Provider offers the Complainants a choice of interest rates and the Complainants failed to exercise that choice, then the interest rate applicable to their mortgage loan would be a variable interest rate. This variable rate was one which could vary at the Provider’s discretion in accordance with **Condition 6(a)** of the **General and Special Conditions**. **Condition 7(b)** of the **General and Special Conditions** does not specifically mention the potential application of a tracker interest rate at the end of the fixed interest rate period.

However that being said, I note that the **Mortgage Form of Authorisation** did not outline whether it had any effect on the terms and conditions associated with the earlier **Mortgage Form of Authorisation** which was signed on **24 February 2005** that had resulted in the application of the tracker interest rate of ECB + 1.3% to the Complainants’ mortgage loan “*for the term of the Loan*”.

The Provider, in its submission to this office, has outlined as follows:

“The Complainants signed the 2006 MFA accepting the 2 Year Fixed Rate and in doing so relinquished their entitlement to the tracker rate of interest which they had previously accepted.”

I cannot understand how the Provider has arrived at this position, as the **Mortgage Form of Authorisation** which was signed on **28 July 2006** does not outline that the entitlement to a tracker interest rate of ECB + 1.3% for the “*term of the loan*” was “*relinquished*”.

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Perhaps it was the case that it was the Provider's intention, or wish, that the effect of the **Mortgage Form of Authorisation** which was signed on **28 July 2006** was to relinquish the contractual right to the tracker interest rate "*for the term of the Loan*", however the document that was signed by the Complainants does not set out that the contractual commitment to the tracker interest rate with a margin of 1.3% "*for the term of the Loan*" was superseded and withdrawn.

It was not outlined in the **Mortgage Form of Authorisation**, which was signed on **28 July 2006** that the terms of the **Mortgage Form of Authorisation** which was signed on **24 February 2005** were being altered in any way. Therefore, I do not accept that the contractual commitment to the tracker interest rate with a margin of 1.3% "*for the term of the Loan*" was "*relinquished*" in **July 2006**.

I note that the Provider in its submission to this office outlines as follows:

"...The Provider points out that there was no regulatory requirement in July 2006 for mortgage lenders to warn specifically that tracker rates might no longer be available (the Central Bank first introduced these requirements in 2010 and they found final expression in the Consumer Protection Code Provision 6.9). The Provider is not aware of any industry practice to include such warnings in July 2006 and submits respectfully that it is important not to assess practices in July 2006 in light of changes introduced by correspondence by the Central Bank in 2010 culminating in formal changes to the CPC (a statutory code of practice) made by [the] Central Bank in 2012."

While I am not holding the Provider to the standards as expressed in the **Consumer Protection Code 2006** or the **Consumer Protection Code 2012**, I am holding the Provider to the standards that are expected of a financial service provider at any time. The Provider owes a duty to its customers to ensure that all documents that change or amend contractual entitlements are clear as to the changes or amendments that are being made.

In the Provider's post Preliminary Decision submission dated **11 August 2020** it has submitted that;

"...this statement lacks clarity and the Bank asks that the FSPO clarify, with specificity, what "standards that are expected of a financial service provider at any time" the FSPO is relying on.

It is, in the Bank's view, contrary to natural justice for the Bank to have to meet a charge that it has failed to uphold certain standards when those standards are, on the face of the decision, not clearly defined, described or rooted in law or codes/regulations issued by the Central Bank of Ireland. The Bank does not dispute the wide jurisdiction afforded to the FSPO. However, insofar as the FSPO intends on making a finding in relation to standards that the Bank is required to meet, the Bank requests that the FSPO set out in detail what those "standards" are and, if not rooted in the Consumer Protection Code 2006 or the Consumer Protection Code 2012, the basis for such standards."

The Complainants' representative, in his post Preliminary Decision submission dated **18 September 2020**, has submitted;

"I find it remarkable that a Provider such as [the Provider] would need to request clarification of what is meant by holding "to the standards that are expected of a financial services provider at any time".

I have attached the best article I have read on the matter which should help inform the Provider of some of the "standards" that should be standard when it comes to the fair and proper treatment of customers."

The Complainants have also submitted a document titled "*Memo 18 December 1992 Consumer Policy in the European Community – An Overview*". I note that this document was published some eleven years before the Complainants' mortgage loan was drawn down in **2003**.

For the Provider's information and for the avoidance of any doubt, I set out the standard that I am holding the Provider to in my Preliminary Decision. I stated that the "*Provider owes a duty to its customers to ensure that all documents that change or amend contractual entitlements are clear as to the changes or amendments that are being made*".

It would appear to me, from the Provider's post Preliminary Decision submission, that it believes it should not be required to ensure that all documents that change or amend a contract entitlement should be clear.

It is surprising, disappointing and worrying that the Provider disputes that it should have to operate to this standard. I believe this is a very basic standard that any regulated financial service provider should have to adhere to. I would be concerned that the Provider's position in this regard could have consequences for other customers.

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For this reason, I will refer this Decision to the Central Bank of Ireland for any action it may deem appropriate in the circumstances.

In my view, it is, and always has been, expected that a Provider is at all times fully transparent with its customers and to this end a provider should ensure that all documents that change or amend contractual entitlements are clear and precise as to the changes or amendments that are being made. Where a contract suffers from a degree of ambiguity, the doctrine *contra proferentem* means that those ambiguities are to be resolved against the party who structured the ambiguous clause (that is, against the Provider).

The **Mortgage Form of Authorisation** which was signed on **28 July 2006** merely says that the *“terms replace any similar terms in [the] HomeLoan Letter of Offer”* and that the Home Loan Letter of Offer remained *“in force”*. It is neither fair nor reasonable by any standard to expect that these words would be understood by any reasonable person to mean that the contractual entitlement to the tracker interest rate of ECB + a margin of 1.3% *“for the term of the Loan”* that had been signed up to by the Complainants on **24 February 2005** by way of **Mortgage Form of Authorisation** was being *“relinquished”*. I do not accept that the **Mortgage Form of Authorisation** which was signed on **28 July 2006** had any effect on the contractual entitlements obtained on foot of the **Mortgage Form of Authorisation** that had been signed up to by the Complainants on **24 February 2005**. Consequently I am of the view that the contractual entitlement to the tracker interest rate of ECB + 1.3% *“for the term of the Loan”* remained in being, at that time.

The Complainants then signed a **Mortgage Form of Authorisation** on **21 July 2008**, applying a 3 year fixed rate of 5.49%. The **Mortgage Form of Authorisation** details as follows:

“I/We wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate. (Please note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	<i>Tracker ECB + 1.5% RIL</i>	<i>5.750%</i>
<input type="checkbox"/>	<i>10 Year Fixed FIL</i>	<i>5.790%</i>
<input type="checkbox"/>	<i>INVESTMENT VARIABLE RATE</i>	<i>6.290%</i>
<input checked="" type="checkbox"/>	<i>3 YEAR FIXED RATE INV < 250K</i>	<i>5.490%</i>
<input type="checkbox"/>	<i>5 YEAR FIXED RATE INV < 250K</i>	<i>5.590%</i>
<input type="checkbox"/>	<i>1 YEAR FIXED RATE INV < 250K</i>	<i>5.490%</i>
<input type="checkbox"/>	<i>2 YEAR FIXED RATE INV < 250K</i>	<i>5.490%</i>

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The reverse side of the **Mortgage Form of Authorisation** contains a section titled **Acknowledgement and Agreement** and details as follows:

“Please read carefully before signing below. Where there is more than one borrower, any reference to “I” or “my” are to be construed as references to “we” or “our” respectively.

I acknowledge that following the acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. I acknowledge and agree that:-

- 1. If I have applied to convert to a fixed rate Loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender’s fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing interest rate.*
- 2. In the case of a fixed rate Loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to be calculated in accordance with the formula set out above under “Early Repayment”.*
- 3. If I have applied to convert to a tracker variable rate, I agree that 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 the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. Any variation in interest rate 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 either by notice in writing served on the Borrower, or first named Borrower where there is more than one Borrower, or by advertisement published in at least one national daily newspaper. 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 Home Loan Variable Rate.*
- 4. If I have applied to convert to a Home Loan Variable rate the payment rate on the Loan may be adjusted by the Lender from time to time.*
- 5. Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged.”*

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The **Mortgage Form of Authorisation** which was signed on **21 July 2008** again does not make any reference to its contractual terms having any effect on or making any alteration to the contractual terms already committed to by the parties under the **Mortgage Form of Authorisation** which was signed on **24 February 2005**. Rather the **Mortgage Form of Authorisation** details that “*save as set out in*” the form itself “*all terms and conditions applicable to the Loan remain unchanged*”. In these circumstances I am of the view that the contractual entitlement to the tracker interest rate of ECB + 1.3% “*for the term of the Loan*” remained in being, at that time.

I note that the **Mortgage Form of Authorisation** did not offer the Complainants the tracker interest rate with a margin of ECB + 1.3% “*for the term of the Loan*” which they were contractually entitled to under the terms of the **Mortgage Form of Authorisation** which was signed on **24 February 2005**. However the Provider offered the Complainants the option to apply a tracker interest rate of ECB + 1.5% to the mortgage loan at this time. It appears that the tracker interest rate of ECB + 1.5% was offered to the Complainants as it was an interest rate that the Provider had available at the time. In circumstances where the Provider was setting out the interest rate options that were available to the Complainants, contractual and otherwise, I am of the view the Provider should have also set out the tracker interest rate option of ECB + 1.3% to the Complainants in **July 2008**.

The evidence shows that the Complainants had a preference for a fixed interest rate at the time. The Complainants’ own submissions detail that their “*overriding goals*” were “*keeping to a tracker rate to ensure low interest rates*” and applying fixed rates to provide “*some certainty regarding levels of payments.*” Even though the Complainants were offered a tracker interest rate, albeit at 0.2% higher than the tracker rate of ECB + 1.3%, in **July 2008**, the Complainants elected to apply the 3 year fixed interest rate of 5.49% to the mortgage loan.

The Complainants’ representative in his post Preliminary Decision submission dated **18 August 2020** submits as follows:

“I would differ in the finding and suggest that I believe it is reasonable that the fixed rate selected in 2008 should be fully set aside due to the fact that the correct and applicable Tracker Margin was not offered to my clients in 2008 and the default Tracker Rate of ECB plus 1.3% was not made available, and this is the first error that occurred with the loan and I believe the correct Tracker Rate should apply from July 2008, the date of the first error.”

In its post Preliminary Decision submission dated **4 September 2020** the Provider states;

“[The Complainants’ representative] offers no evidence that a 0.2% difference in the applicable tracker interest rate in 2008 would have influenced the Complainants’ decision to fix the interest rate on their mortgage. This argument is not supported by the fact pattern: the Complainants rejected the Bank’s offer of a tracker rate and instead chose a 3 year fixed interest rate at 5.49%, which was a rate lower than ECB plus 1.3% at that time. Had the Complainants opted to return to a tracker interest rate in 2008 at a rate of ECB plus 1.5%, there may be some argument as to the appropriate rate that should have been offered to them at that time. However, it is not in dispute between the parties that the Complainants were offered and rejected a tracker interest rate in 2008 at the end of the first fixed rate period and instead chose to fix their interest rate for a further period of 3 years. Therefore, there is no basis to set aside the second fixed rate period.”

It is difficult to understand how the Complainants’ representative has come to this conclusion. In making his submission, the Complainants’ representative has clearly ignored the facts relevant to this complaint, in that, the Complainants were offered a tracker interest rate at this time albeit at 0.2% higher than the tracker rate of ECB + 1.3%, and decided not to choose it, because by their own submission they wanted the “certainty” of the fixed rate at the time. Further for the avoidance of any doubt, at no point does this Decision establish the tracker interest rate of ECB + 1.3% as the “default” rate, as has been suggested by the Complainants’ representative. This is not correct.

The 3 year fixed interest rate period expired on **15 August 2011**. The Provider submits that it issued a further **Mortgage Form of Authorisation** at that time setting out the Complainants’ interest rate options. The Provider has submitted that it does not hold a copy of the **Mortgage Form of Authorisation** that issued and has indicated that the following interest rate options were made available in **2011**:

“LT4 – 5.1% (This was the rate the mortgage loan account rolled to)

2 year fixed rate – 5.75%

3 year fixed rate – 5.80%

5 year fixed rate – 6.20%”

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Provision 49 of Chapter 2 of the Consumer Protection Code 2006 and Provision 11.5 and 11.6 of the Consumer Protection Code 2012, outline as follows;

“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.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”

In this regard, the Complainants’ mortgage account was incepted for a term of **25 years** commencing from **February 2003** and the **Mortgage Form of Authorisation** purportedly issued in or around **August 2011**. It is understood that the mortgage loan account remains presently active with the Provider. In the absence of an explanation, it is unclear why the Provider did not retain a copy of the **Mortgage Form of Authorisation**.

In any event it does not appear to be in dispute between the parties that a variable interest rate was applied to the Complainants’ mortgage loan from **15 August 2011** and that a tracker interest rate of ECB + 1.3% was not given as an interest rate option to the Complainants at this time. In circumstances where the Provider was setting out the interest rate options that were available to the Complainants, contractual and otherwise, I am of the view the Provider should have also set out the tracker interest rate option of ECB + 1.3% to the Complainants in **August 2011**.

The Complainants detail as follows;

“We are now left paying a higher interest rate than we originally had access to. Redress would consist of:

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- a. *The difference, from July 2008, between the tracker rate and the variable rates which we have paid since, and*
- b. *Restoration of the tracker rate.”*

It is important for the Complainants to be aware that the fact that the Complainants had “access” to a tracker interest rate in **2008** and did not select it, does not create an enduring right to that rate from that time. The fact that the rate selection that is made might ultimately end up in the long run being higher than other rate options that were available at an earlier point in time, does not create an obligation on the Provider to go back in time and provide a customer with a rate which, with the benefit of hindsight transpired to be a better interest rate. Further as outlined above, the evidence shows that the Complainants had a preference for a fixed interest rate at the time in **July 2008**. In these circumstances, I do not accept that the Complainants are entitled to the restoration of a tracker interest rate in **July 2008**.

However the issue that has arisen in this complaint is because the Provider did not give the Complainants the option of the tracker interest rate of ECB + 1.3% in **August 2011**. Contrary to what has been suggested by the Provider, I believe that the **Mortgage Form of Authorisation** that was signed by the Complainants on **28 July 2006** did not, as the Provider has suggested, bring an end to the contractual entitlement to the tracker interest rate of ECB + a margin of 1.3% “*for the term of the Loan*”. Rather that contractual right remained in being. In circumstances where the Provider was setting out the interest rate options that were available to the Complainants, contractual and otherwise, I am of the view the Provider should have also set out the tracker interest rate option of ECB + 1.3% to the Complainants in **August 2011**.

In its post Preliminary Decision submission dated **11 August 2020**, the Provider has submitted as follows;

- “1.5 *The FSPO’s reasoning suggests that, for a mortgage form of authorisation (“MFA”) to amend the terms of an earlier MFA, there must be explicit reference to the terms of the earlier MFA. In the event that no such reference is made, the terms of the earlier MFA would appear to prevail over and above the terms of the underlying letter of loan offer (“MLO”).*

This interpretation is, in the Bank’s view, fundamentally flawed. An MFA clearly and explicitly serves only to amend a term or terms of the underlying MLO. An MFA serves no other purpose than to amend the terms of the MLA and therefore the MFA and MLO must be read together.

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Where there are multiple MFAs, each MFA must be considered on its own terms as regards its impact on the MLO. Insofar as multiple MFAs exist which amend the same or substantially similar terms in the MLO, the latest MFA, and therefore the latest amendment to the MLO, must prevail as a matter of law.

...

1.7 *When one considers the specific terms of each of the MFA's in conjunction with the MLO, it is clear that the Preliminary Decision is flawed as a matter of law and based on an incorrect interpretation of the contractual arrangement between the Bank and the Complainants.*

1.8 *In addition, the Preliminary Decision incorrectly considers the 2006 MFA and 2008 MFA in light of the 2005 MFA, and not the 2003 MLO. The right to a tracker in the 2005 MFA, could not, therefore, have "remained in being" following the execution of the 2006 MFA as they both served to amend the same terms of the 2003 MLO. The right to a tracker in the 2005 MFA was superseded by the 2006 MFA and, subsequently, the 2008 MFA.*

1.9 *It is notable that the Preliminary Decision does appear to accept that the 2005 MFA amended the 2003 MLO, yet this logic is not then extended in the Preliminary Decision to either the 2006 MFA or the 2008 MFA. It is respectfully submitted that this inconsistency reflects an error in law in relation to the interpretation of the contractual documents. The 2005 MFA amended the terms of the 2003 MLO. This is not a matter in dispute between the parties. However, the Preliminary Decision fails to recognise that the 2006 MFA and 2008 MFA served the exact same purpose, i.e. to amend the terms of the 2003 MLO. If it is accepted that the 2005 MFA amended the 2003 MLO, then it must also be accepted that the 2006 MFA and the 2008 MFA also amended the 2003 MLO (without it being necessary for a subsequent MFA to refer to an earlier one). Given that each of the 2005 MFA, 2006 MFA and 2008 MFA amended the applicable interest rate in the 2003 MLO, the contractual nexus lies between the 2003 MLO and the latest MFA executed by the Complainants, namely the 2008 MFA."*

For the avoidance of any doubt, I accept that each of the **Mortgage Forms of Authorisations** that were signed by the Complainants on **24 February 2005, 28 July 2006** and **21 July 2008**, had the effect of changing the interest rate applicable to the mortgage loan at the time.

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However, I do not accept the Provider's submission that each Mortgage Form of Authorisation must be considered on its own terms, in circumstances where, the **Mortgage Forms of Authorisations** that were signed by the Complainants on **24 February 2005, 28 July 2006** and **21 July 2008** did not outline that each Mortgage Form of Authorisation was to be considered on its own terms, as regards the impact on the Mortgage Loan Offer. The Mortgage Form of Authorisations that were signed by the Complainants on **24 February 2005, 28 July 2006** and **21 July 2008** did not outline that the amendments to the Mortgage Loan Offer, as made by any previous Mortgage Form of Authorisations were to no longer apply. The Provider's submissions, as outlined above, appear to be predicated on the basis that the original contractual position between the parties, as set out in the **Mortgage Loan Offer** dated **20 February 2003** was restored, as if it had not been previously amended each time a new Mortgage Form of Authorisation was signed by the Complainants. However that is not what the Mortgage Forms of Authorisations that were signed by the Complainants provided for. I have quoted in full from the relevant Mortgage Forms of Authorisations earlier in my Decision. However, for the purposes of completeness and to ensure that there is clarity in relation to the provisions of the Mortgage Forms of Authorisation being considered, they provided as follows:

- **Mortgage Form of Authorisation** signed on **24 February 2005** outlined:
"Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged."
- **Mortgage Form of Authorisation** signed on **28 July 2006** outlined:
"These terms replace any similar terms in my HomeLoan Letter of Offer. I confirm that my Home Loan Letter of Offer as amended by this Authorisation remains in force."
- **Mortgage Form of Authorisation** signed on **21 July 2008** outlined:
"Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged."

I remain of the view that the **Mortgage Form of Authorisation** that was signed by the Complainants on **28 July 2006** or **21 July 2008**, did not bring an end to the contractual entitlement to the tracker interest rate of ECB + a margin of 1.3% *"for the term of the Loan"*. Rather that contractual right remained in being as an interest rate option available to the Complainants. In circumstances where the Provider was setting out the interest rate options that were available to the Complainants, contractual and otherwise, I am of the view the Provider should have also set out the tracker interest rate option of ECB + 1.3% to the Complainants in **August 2011**.

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For these reasons, I uphold this complaint.

I believe that the appropriate course of action to rectify the conduct complained of and its consequences is to direct that the tracker interest rate of ECB + 1.3% be reinstated to the Complainants' mortgage loan account from **15 August 2011** as the failure on the part of the Provider occurred at this time.

I requested that the Provider furnish this office with a comparison between (a) the manner in which the Complainants' mortgage loan account amortised on a monthly basis from **15 August 2011** to date and (b) the manner it would have amortised on a monthly basis if a tracker interest rate of ECB + 1.30% had been applied from **15 August 2011** to date. The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 1.3%) had been applied to the mortgage account between **August 2011** and **June 2020**, is represented in the table below:

Date Range (inclusive)	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Aug 2011 – Nov 2011	€1,428.59	€1,205.03	€223.56
Dec 2011	€1,428.59	€1,181.85	€246.74
Jan 2012 – Jul 2012	€1,428.59 and €14,19.37	€1,159.89	Between €268.70 and €259.48
Aug 2012 – May 2013	€1,419.37 and €1,470.43	€1,138.32	Between €281.05 and €332.11
Jun 2013 – Nov 2013	€1,470.43	€1,118.12	€352.31
Dec 2013 – Jun 2014	€1,470.43	€1,099.20	€371.23
Jul 2014 – Sept 2014	€1,470.43	€1,091.71	€378.72
Oct 2014 – Mar 2016	€1,470.43	€1,084.52	€385.91

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Date Range (inclusive)	Actual Monthly Repayments	Monthly repayments if the mortgage was on the Tracker Rate	Overpayment per month
Apr 2016 – Feb 2018	€1,470.43	€1,081.52	€388.91
Mar 2018 – Feb 2020	€1,411.06	€1,081.52	€329.54
Mar 2020 – Jun 2020	€1,413.63	€1,081.52	€332.11

It appears that if the tracker interest rate of ECB + 1.3% had applied to the Complainants' mortgage loan account then the Complainants' monthly repayments on the mortgage loan would have been significantly less than they were on a monthly basis from **August 2011** to date. I note from the above that the monthly overpayments were €223.56 in **August 2011** and continued to rise over the nine year period to €329.59 from **March 2018**. Further it appears that had a tracker interest rate of ECB + 1.3% been applied to the account from **August 2011** the capital balance on the Complainants' mortgage loan account would have been €15,670 less than the capital balance as it stood in **June 2020**.

For the reasons set out in this Decision, this complaint is upheld. Furthermore, given that the Provider, in its post Preliminary Decision submission, disputes that it had a duty to ensure the clarity of documents furnished to the Complainants and the potential implications for other customers of the Provider position, I am referring a copy of this Decision to the Central Bank of Ireland for any action it may deem necessary.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, on the grounds prescribed in **Section 60(2)(b) and (g)**, given the Provider's unreasonable and improper conduct.

I direct that pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017** that the Provider do the following;

- (i) Apply a tracker interest rate of ECB + 1.3% to the Complainants' mortgage loan account from **15 August 2011**, within a period of 35 days of this decision.

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- (ii) Repay to the Complainants any interest overpaid between **15 August 2011** and the date the tracker interest rate of ECB + 1.3% is retrospectively applied, to an account of the Complainants' choosing.

- (iii) Pay a sum of €3,500 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainants have suffered as a result of the Provider's conduct, to an account of the Complainants' choosing within a period of 35 days of the nomination of account details by the Complainants to the Provider.

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

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

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

19 May 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

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(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

