



<b><u>Decision Ref:</u></b>	2021-0162
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

The complaint relates to one of the mortgage loan accounts held by the Complainants with the Provider. The mortgage loan account which is the subject of this complaint was secured on a Buy-to-Let (“BTL”) property held by the Complainants.

The loan amount was €170,000 and the term of the loan was 20 years. The particulars of the Mortgage Loan Offer which was signed on **30 January 2008** outlined the Loan Type as “*Interest Combo*”.

An Agreement to Amend Mortgage Loan Offer Letter was signed on **13 February 2013** which provided for a 24-month interest only payment period.

**The Complainants’ Case**

The Complainants submit that they had a “*tracker mortgage*” with the Provider which was drawn down in **2008**. They say that the purpose of the mortgage loan was to purchase and develop a site.

The Complainants state that “*there was never a question of a rental income from the property until planning permission for total redevelopment of the site was attained, a fact which we repeatedly brought to [the Provider’s] attention which was made difficult and delayed due to the downturn in the property market immediately following our purchase of the site*”.

They submit that *“The economic bubble in which our loan was taken out was not of our making, nor were we made aware of it by [the Provider], who as professional lenders were in the business of economic forecasting”*.

The Complainants say that consequently they *“sought to renegotiate the terms of [their] mortgage in December 2012 due to financial difficulties”*. On **13 February 2013** the Complainants accepted and signed an **Agreement to Amend Mortgage Loan Offer Letter** dated **05 February 2013**. This agreement amended the interest rate on the mortgage loan from a tracker rate (2.25% per annum at the time) to a BTL Variable rate (3.25% per annum at the time), provided for a 24-month interest only payment period and capitalised the arrears on the mortgage loan.

The Complainants state that they *“felt [they] had no other option at the time”* but to accept the Agreement to Amend Mortgage Loan Offer Letter. They submit *“We feel strongly that [the Provider] did not offer us any alternative options but to release our Tracker mortgage to BTL variable rate”*. They say that *“The terms of the interest only being offered were completely unfair, we had no choice but to accept and give up our BTL Tracker rate, otherwise we would not be afforded the I/O arrangement and the bank were fully aware that this was the case and that we had little option at this time.”* They assert that *“we should have been offered an Interest Only arrangement which would have meant once the I/O period ended we would revert to our Tracker rate”*.

The Complainants further submit that *“the terminology used in the [Agreement to Amend Mortgage Loan Offer] letter is very difficult for us to understand and the wording somewhat misleading”*.

The Complainants detail that *“Rental income was taken into account in all agreements but it never materialised which we continually informed [the] bank of as the house remains derelict due to down turn in the market.”* They detail that the mortgage loan is currently *“non performing”* and *“The resale of the property could not be facilitated at that time despite every effort on our part to do so. It is still on the market with full planning permission.”*

The Complainants also say that *“We were forced to extend the terms on our mortgages by 3 years plus severe pressure was applied to put a charge on our family home. We have correspondence from the Bank urging us to remortgage our family home, if we had of [sic] done that we would be under even more pressure than we already are under.”*

The Complainants detail that the removal of the tracker rate from their mortgage loan in **2013** has *“impacted negatively on all aspects of our lives.”* They say that *“We were not given enough options at the time we were in financial difficulty, we were in constant engagement with the bank and pursued all avenues with the bank to come to an arrangement that would ease our burden and keep the arrears to a manageable level.”*

The Complainants are seeking compensation for *“the financial losses + stress we have suffered.”*

### **The Provider’s Case**

The Complainants entered into an agreement with the Provider by **Mortgage Loan Offer Letter** dated **24 January 2008**, whereby the Provider agreed to advance a mortgage loan facility to the Complainants in the sum of €170,000 for a term of 20 years. The Complainants signed and accepted the Loan Offer on **30 January 2008**.

The Provider details that the Complainants’ mortgage loan account first went into arrears on **31 December 2011** and remained in continuous arrears until **8 April 2013**, at which point the Provider capitalised the arrears of €1,696.98 on the account pursuant to an **Agreement to Amend Mortgage Loan Offer Letter** signed and accepted by the Complainants on **13 February 2013**.

The Provider states that the Complainants’ indebtedness to the Provider arises on foot of binding written loan agreements freely entered into by them with the Provider. It states that whilst the Provider will consider proposals put forth by a customer, it is under no obligation to offer a specific alternative repayment arrangement requested by a customer, unless it is deemed appropriate and sustainable. It further states that it is imperative when accepting the terms of such agreements, that the customer is satisfied and fully aware of the full implications of their commitment in respect of the transaction, and that if they have any doubt about the contents of such agreements, they should raise this with their legal or financial advisor.

The Provider has set out a detailed timeline of all its interactions with the Complainants with respect to the arrears arising on the mortgage loan account. It states that it offered the Complainants a 6-month period of interest only payments for the mortgage loan account in **June 2011** which they accepted on **14 June 2011**.

At the end of that forbearance period the Complainants completed and signed a **Standard Financial Statement** (“SFS”) which was received by the Provider on **06 December 2011**.

/Cont’d...

The loan first entered into arrears on **31 December 2011**. The Provider states that it declined the Complainants' application for forbearance on **11 January 2012** on the grounds that their financial situation was unsustainable. The Complainants appealed this decision on **13 February 2012** and were successful. On **4 April 2012** the Provider offered the Complainants a 12-month interest only period by way of **Mortgage Form of Authorisation** which was signed and accepted by the Complainants on **24 April 2012**.

The Provider outlines that at the end of the 12-month interest only period in **December 2012** the Complainants sought further forbearance. It details that at a meeting with the Second Complainant on **14 December 2012**, the Second Complainant said the interest only period would bring him up to retirement age at which point he would receive a lump sum or he expected one of his children to purchase a property. The Provider says that it was suggested by its employee that the Complainants could sell one of their properties to reduce their liabilities to the Provider, however this was rejected by the Complainants and instead an interest-only repayment period of 24 months was sought. The Complainants completed and signed another SFS which was received by the Provider on **17 December 2012**.

On **5 February 2013** the Provider issued the **Agreement to Amend Mortgage Loan Offer Letter** to the Complainants, which they signed and accepted on **13 February 2013**. The Provider submits that the **Agreement to Amend Mortgage Loan Offer Letter** offered the Complainants a 24-month period of interest only repayments, after which the mortgage loan account would revert to capital and interest repayments which would be repayable over the remainder of the term. In addition, the interest rate on the mortgage loan account would convert from a tracker rate of interest to a Buy-To-Let variable rate of interest. The Provider states that this alternative repayment arrangement also included a provision for the capitalisation of the arrears of €1,696.48 on the account.

The Provider states that the **Agreement to Amend Mortgage Loan Offer** is set out clearly and comprehensively with each part explaining the content and effect of the **Agreement**. It states that it has taken time to ensure that the document "*avoids legal and financial jargon*" and does not accept that the document "*is in any way misleading or difficult to follow*". The Provider states that the warning notices contained in the **Agreement** would alert "*any reasonable person*" to its content and effect and no reasonable person would fail to understand it. The Provider further states that the Complainants were advised on the **front page** of the document to seek independent financial and legal advice before accepting any offer and/or signing the document. It states that the Complainants both confirmed when returning the document that they had received independent legal and financial advice prior to their signing of it, by checking the option on the form indicating they had received such advice. The Provider submits that the Complainants "*were thus apprised of all their options and the consequences of accepting the Provider's offer.*"

/Cont'd...

The Provider also states that the Second Complainant, during a telephone call with the Provider on **5 April 2013**, confirmed that he understood that the **Agreement** would switch the rate of interest to the Provider's Buy-to-Let variable rate and he would lose his entitlement to revert to a tracker rate of interest. In light of the foregoing, the Provider submits that *"there is no substance to the claim the Complainants were misled or in any [way] misunderstood the effect of the Agreement."*

The Provider states that a reasonable offer was made in response to a request to renegotiate the terms of contract pursuant to the **Mortgage Loan Offer** which the Complainants by their own admission could not make the repayments of capital and interest. It submits that the Complainants always had the option to refuse the alternative repayment arrangement or to take such steps which did not require a change to the terms of the **Mortgage Loan Offer**. The Provider states that alternative options were recommended to the Complainants, such as the voluntary sale of a property, which was rejected by the Complainants. The Provider submits that *"It cannot be said that the Complainants had no choice or were forced to accept this offer. It was always open to them to reject it and to avail of another method to address their mortgage arrears. They did not do so. There is nothing to suggest an element of coercion, undue influence or an improvident bargain here."*

The Provider details that it was the Complainants who sought to amend the terms of their mortgage loan and only in response to this did the Provider seek to switch the applicable rate of interest under its new pricing policy. It outlines that in **late 2012** a new pricing policy was implemented for Buy-to-Let tracker customers seeking any change to their existing repayment terms and conditions. Under this policy, if a change of terms and conditions was deemed appropriate, the customer was offered a new standard variable rate mortgage for the life of the loan which was initially priced at 1% above what they were currently paying on their tracker mortgage.

The Provider submits that the Complainants' mortgage loan account was not subject to the **Code of Conduct on Mortgage Arrears** ("CCMA") which meant that the Complainants' mortgage loan did not attract the protections afforded to mortgages secured by a borrower's primary residence.

The Provider outlines that it is satisfied that it has acted fairly with respect to the offer of a new arrangement with the Complainants, with reference to the **Consumer Protection Code 2012** ("CPC 2012"). The Provider refers to Chapter 6 of the CPC 2012 and in particular **Provisions 6.9** and **6.10**. It further refers to Chapter 8 and in particular **Provision 8.3**.

The Provider submits that the **Agreement to Amend Mortgage Loan Offer Letter** contained the requisite legal notices to include warnings, indicative comparisons and details of the advantages and disadvantages and afforded the Complainants 5 weeks to consider the Provider's proposal.

The Provider 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 (extension of the term and reduced repayments) and made a full disclosure to the Complainants of all relevant material information in a way that sought to inform the Complainants.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider acted inappropriately by removing the tracker rate of interest from the Complainants' mortgage loan account in **February 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.

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 29 April 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.

/Cont'd...

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 Complainants, 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 ascertain if the Provider did act inappropriately, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider the Provider's interactions with the Complainants between **2011** and **2013** in relation to the arrears on the mortgage loan account and the possible alternative repayment arrangements proposed and offered.

The Provider issued a **Mortgage Loan Offer Letter** to the Complainants dated **24 January 2008**, which provided for an advance of €170,000 over a term of 20 years.

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

<i>3. Number of Repayment Instalments</i>	<i>Instalment Type</i>	<i>4. Amount of each Instalment</i>
<i>12</i>	<i>Fixed at 4.890%</i>	<i>€689.95</i>
<i>12</i>	<i>Variable at 5.500%</i>	<i>€775.62</i>
<i>216</i>	<i>Variable at 5.500%</i>	<i>€1,239.18</i>

The Loan Offer outlines that the loan type is *"Interest Combo"* and the interest rate is *"4.890% Fixed"*.

The **Part 4 – The Special Conditions** of the **Mortgage Loan Offer Letter** details as follows;

"...

- (ii) The interest rate applicable to the loan is a fixed rate and is fixed for the period set out in Part 1 of this Offer Letter. At the end of the fixed rate period the Lender shall have sole discretion to provide any further or subsequent fixed rate period.*

/Cont'd...

*If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, in accordance with general condition 7 (b) of the Offer Letter, the interest rate applicable to the Loan will be a variable interest rate. This variable interest rate may vary upwards or downwards.*

*The interest rate shall be no more than 1.50% above the European Central Bank Main Refinancing Operations Minimum 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 5<sup>th</sup> working day following a change in the Repo rate by the European Central Bank. Notifications 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 Home Loan Variable Rate.*

*(iii) For the first two 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. The Lender may at any time during the initial interest only-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.”*

**General Condition 4 of Part 5 – The General Conditions details as follows:**

**“4. Repayment**

*(a) Unless otherwise stated herein or agreed by the Lender 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.*

/Cont’d...



*The due dates for repayment of the Loan are those dates that are from time to time set by the Lender. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender at its absolute discretion.*

- (b) In the event of any repayment 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 Lender 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 Lender, the Loan may be repaid in 10 or 11 payments in any year of the term and such payments (unless the Lender at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during the year for the Loan.*
- (d) The Lender 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."*

I note that the Complainants signed the **Acceptance of the Loan Offer** on **30 January 2008** on the following terms:

*"1. 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 Complainants accepted the Letter of Offer, having confirmed that they had read and fully understood the Loan Offer.

I note that arrears first started to accrue on the Complainants' mortgage loan account in **December 2011**.

The Provider has submitted that it offered the Complainants a 6-month interest only period for the mortgage loan in **June 2011** which was accepted by the Complainants on **14 June 2011**. I am disappointed that no documentation relating to this alternative repayment arrangement has been provided in evidence by the Provider. Nor has any explanation been provided as to why this documentation has not been furnished.

/Cont'd...

Nonetheless, it does not appear to be disputed between the parties that this is what occurred.

The Provider's internal file note dated **09 December 2011**, details as follows;

*"...SFS received and logged 6/12. All a/c's UTD but back on full repayment in DEC.*

*IBC from [Complainant] who adv[ise]s will not be able to afford full repayment and hoping to continue with i/o as currently. Adv to cancel d/d and continue to pay i/o amt until decision is reached. Adv letters are sent automatically and of ICB, advs to request a/c to be backdated if i/o agreed. Sending lodgement book and advs cust he has to request d/d to be reinstated."*

The Provider's internal file notes dated **10 January 2012** detail:

*"REQUEST: i/o REASON FOR REQUEST: Reduced income REPAYMENT RECORD: Good overall ... PREVIOUS APPROVAL HISTORY: 2yrd d/d: I/O X6 June-Dec 2011*

*...*

*No rental income coming off site. This is adjoining property to PDH & secured on PDH. Remaining a/c are PDH. Long term cust cannot sustain mtg reps here on current income level ...*

*...*

*Adv can appeal decision and needs to send in letter regarding this.*

*...*

*DECISION: Declined as mtg unsustainable on current income level ... Declining as cust 60yrs old presently, no current rep to cl[ea]r mtg in next 10 yrs ... Extending the term-already at max age cap.*

*..."*

The Provider's internal notes detail that the Complainants submitted a letter appealing the Provider's decision to decline their forbearance request which was received by the Provider on **06 February 2012**.

I have not been provided with evidence to show when a tracker interest rate was first applied to the Complainants' mortgage loan account. However, it is not disputed between the parties that a tracker interest rate was applied. I note from the **mortgage loan statement** that an interest rate of 2.50% was applied to the mortgage loan account on **24 February 2012** which reduced to 2.25% on **11 July 2012**.

/Cont'd...

The Provider's internal notes dated **2 April 2012** detail:

*"Appeal Heard 30/3/12. The board discussed the case noting 28% LTV (pf the debt relating t[o] the PDH) and arrears of [€]4,601. The Board took into account that these were long standing customers with a good track record and that [the Second Complainant] was due to retire soon and entitled to pensions and benefits.*

*The only previous forbearance granted was 6 months I/O across all 4 a/cs as the initial 2 yr I/O period was part of the original T&C[s]. The Board agreed to 12 month I/O payments on all a/cs, to be back dated if necessary..."*

The Provider issued the Complainants a **Mortgage Form of Authorisation** dated **04 April 2012** which provided for repayments of interest only for a period of 12 months. The Complainants signed and accepted the **Mortgage Form of Authorisation** on **24 April 2012**.

The Provider wrote to the Complainants on **30 October 2012** in relation to arrears of €1,357.92 on the mortgage loan account.

I note that the 12-month interest only repayment period was due to expire in **December 2012**. The Complainants submitted a **Standard Financial Statement** completed and signed by the Complainants on **19 November 2012**, which outlined that their total monthly income was €3,760.00 and their total monthly expenditure was €2,853.00.

The Complainants detailed as follows in the **SFS** in response to the question 'Please provide details of any steps you propose to take to reduce your monthly expenditure and the savings you expect to achieve':

*"To make every effort to make dwelling house on mortgage [Account number], complete for rental. Proposed income €600 pm. Very little other cutbacks on expenditure can be achieved. The possibility of selling property when I get planning permission Cost 5000 value of property with planning €300,000 New dwelling incomplete would have rental income, if [the Complainants] could complete new building cost €60k to finish".*

The Provider's internal note dated **14 December 2012** detailed:

*"...Couple do not sh[o]w repay capacity for anything more than i/o I did mention selling one of properties to reduce the debt but [Second Complainant] not interested in this option at present recommend i/o x 24 months. Longstanding customers of [the Provider].*

/Cont'd...

*[Second Complainant] will have a lump sum when he retires which could reduce level of debt. Term extension not suitable because of age”.*

The Provider’s internal note of **25 January 2013** details:

*“Recommend 24 months interest only on all loans with a plan to be developed around asset sales with own capital generated from pension lump sum if necessary to complete building works. BTL – [Provider] pricing policy to apply and arrears to be capitalised as criteria met.”*

The Provider wrote to the Complainants on **28 January 2013** in relation to arrears of €1,263.00 on the mortgage loan account.

The Provider issued an **Agreement to Amend Mortgage Loan Offer Letter** dated **05 February 2013** to the Complainants. I note that **Section A** of the form details as follows;

***“SECTION A: WHAT THIS FORM DOES***

***Alternative Repayment Arrangement***

***Interest only***

***What you pay in each instalment***

**1.1** *If you accept this form (a) you are to pay interest only as it falls in each regular instalment in the Agreed Period; and (b) you agree to make these payments during the Agreed Period.*

***The Length of the Agreed Period***

**1.11** *The “Agreed Period” means the period of 24 months starting from the date we put the alternative repayment arrangement into effect.*

***What Happens when the Agreed Period Ends***

**1.2** *When the Agreed Period ends you will have to repay the Loan over the rest of the period of the Loan. The amount of the Loan then to be repaid will include all of the principal and other sums which you did not pay during the Agreed Period (and which you would have been obliged to pay if this form did not come into force).*

- 1.3 We will calculate the repayment instalments that you have to pay when the Agreed Period ends. You agree to pay these repayments instalments in full as they are calculated by us.

The terms and conditions of the Mortgage Loan Offer Letter which provide for repayment of the Loan on an annuity basis will operate after the Agreed Period by reference to the amount you then owe under the Loan.

## **2. 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 2.25% 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 3.25% per annum.

## **3. Arrears**

If there are arrears on the Loan this form capitalises them. That means we will add the arrears to the principal amount of the Loan after you accept this form. We estimate the principal amount of the Loan will then be €141,785.67. Where arrears are being capitalised Clause B.3 does not apply.”

**Section B** of the form details as follows;

### **“SECTION B: FURTHER TERMS AND CONDITIONS OF THIS FORM**

#### **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).

/Cont’d...

*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**

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.*

...”

**Section C** of the form 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.***

/Cont’d...

**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 €916.84 each and that the total cost to you of the Loan would be €25,571.48. 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 €385.09 each during the Agreed Period and of €1,112.22 each thereafter. The total cost of the Loan would be €41,668.53. 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; and (iii) assumes you make your Loan payments monthly even if you have another arrangement with us.”*

The **Agreement to Amend Mortgage Loan Offer Letter** also contained a section entitled “*Advantages and disadvantages of tracker and other rates (Consumer Protection Code, Provision 6.9)*” which provided the advantages and disadvantages of a Tracker Variable Rate, a BTL Variable Rate and a Fixed Rate.

The Complainants signed the **Acceptance** of the **Agreement to Amend Mortgage Loan Offer Letter** on **13 February 2013** on the following terms;

*“By signing this form:-*

/Cont’d...

- (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 **Agreement to Amend Mortgage Loan Offer Letter**, having ticked both boxes to confirm that they had received independent legal advice and independent financial advice on the Agreement and that they agreed to be bound by the terms and conditions of the Agreement. If the Complainants were not happy with the terms of the **Agreement to Amend Mortgage Loan Offer Letter**, including the amendment to the interest rate, the Complainants could have decided not to accept the offer made by the Provider.

The Complainants have submitted that they "*had no other option at the time*" but to accept the Agreement to Amend Mortgage Loan Offer Letter, in circumstances where the Provider "*did not offer us any alternative options*". I accept that the Complainants did not want to give up the entitlement to the tracker interest rate on the mortgage loan, however, the reality of the situation at that time in **February 2013**, was that the Complainants were, unfortunately, unable to make the repayments required within the original term of the loan. As outlined above, the Complainants were seeking to agree an alternative arrangement and it was a matter for them to decide whether to accept the arrangement on offer by the Provider. The consequences of accepting the offer and the appropriate information was furnished to the Complainants in the Offer Letter.



If the Complainants were not happy with the terms of the **Agreement to Amend Mortgage Loan Offer Letter**, including the amendment to the interest rate, the Complainants could have decided not to accept the offer made by the Provider.

It is important for the Complainants to be aware that the Complainants at all times remained obliged to comply with the terms and conditions of the original **Mortgage Loan Offer Letter**, which was signed and accepted by them, that is, to make the repayments on the mortgage loan. At the time the agreement was entered into with the Complainants in **February 2013** the mortgage loan account was in arrears.

I note the Provider had suggested to the Complainants that they could sell the property in order to reduce their debt but the Complainants did not wish to pursue that option.

The Complainants were seeking to vary the terms of the mortgage loan with the Provider by seeking further forbearance on the loans. 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. There was no obligation on the Provider to offer the Complainants forbearance on the mortgage loan at the time.

The Provider, in accordance with its Buy-to-let Pricing policy, offered a Standard Variable Rate which I understand was to start at 1% above the current tracker interest rate on the Complainants' mortgage loan which is the subject of this complaint. In the circumstances of this particular complaint, it appears that the Provider offered a rate of 3.25%. I note that the **Agreement to Amend Mortgage Loan Offer Letter** dated **5 February 2013** refers to the tracker interest rate applicable to the loan as being 2.25%. The loading of 1% was added to the tracker interest rate of 2.25% and a variable interest rate of 3.25% was offered by the Provider to the Complainants.

I accept that the Complainants did not want to give up the entitlement to the tracker interest rate, however the Complainants were seeking to agree an alternative arrangement with the Provider on a mortgage that was not secured on their principal private residence. The Provider made an offer to the Complainants to extend the term of the loan on condition that a variable rate of 3.25% would apply to the mortgage loan. It was a matter for the Complainants to decide whether to accept that arrangement on offer by the Provider.

**Provision 6.9** of the **CPC 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;*

/Cont'd...

*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 continues 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."*

The appropriate information and warnings under **provision 6.9** of the **CPC 2012** were contained in the **Agreement to Amend Mortgage Loan Offer Letter**. The mortgage loan was not a Private Dwelling House mortgage loan.

Therefore I have no evidence to support the Complainants' contention that there was an inappropriate removal of a tracker rate of interest from the Complainants' mortgage loan account by the Provider in **February 2013**.

Following this, I note that the Provider issued letters to the Complainants in respect of arrears on the mortgage loan account, on the following dates:

- **8 May 2013**
- **10 June 2013**

/Cont'd...

- **1 July 2013**

The Complainants completed another **Standard Financial Statement** on **31 July 2013** which detailed that the “*Reason for Review/Arrears*” was “*Cut of 35% in salary*”. It further detailed that the Complainants’ total monthly income was €1,858.99 and their total monthly expenditure was €2,894.56.

The Provider issued further letters to the Complainants in respect of arrears on the mortgage loan account, on the following dates:

- **30 September 2013**
- **30 December 2013**
- **17 February 2014**

The 24-month interest only period expired in **February 2015**. The Complainants completed another **Standard Financial Statement** on **26 January 2015** which detailed that the Complainants’ total monthly income was €3,338.52, and their total monthly expenditure was €3,310.09, plus the monthly mortgage repayment of €517.15 and other monthly debts of €584.43, leaving a total deficit of €1,073.15.

The Complainants’ letter dated **26 January 2015** enclosed with the SFS detailed:

“...

*Mortgage XXXX8601 of €141,334 was for purchase of an old house on a one acre site in [Location]. The intention was to get planning for a five house development and sell it on. Unfortunately the deal fell through and the market has not recovered since. This was a tracker mortgage and I was unaware that I would lose this when original deal was agreed.*

...”

The Provider’s internal note of **5 February 2015** details:

*“...Approving further 24 months i/o on the BTL on condition it is cross secured with the PDH...”*

The Provider issued another **Agreement to Amend Mortgage Loan Offer Letter** dated **12 February 2015** to the Complainants which provided for a further 24-month interest only repayment period. The interest only repayments during the agreed period were estimated at €384.66 per month. However, it does not appear from the evidence that the Complainants signed or accepted this offer.

/Cont’d...

The Provider's internal note of **24 February 2015** details:

*"... [First Complainant] will probably sign and return the MFA's re the two PDH mortgages, but wont be signing the BTL MFA as neither he nor [Second Complainant] agreeable to Spec[ial] Cond[ition] of cross coll sec of pdh. ..."*

The Complainants wrote to the Provider on **2 April 2015** as follows:

*"...*

*The loan was originally a Tracker mortgage but due to what on [hindsight], was bad advice, we unfortunately relinquished which served only to increase repayments and pressure.*

*...*

*The repayment increase from €517 to €845 is too much in our present circumstances and we ask that you revisit this situation.*

*..."*

The Provider's internal note of **22 April 2015** details:

*"... BTL [ending] 8601 ... This mortgage has returned to full repayments. MFA not signed because of Spec Cond re 2<sup>nd</sup> charge on their PDH...."*

The Provider issued further letters to the Complainants in respect of arrears on the mortgage loan account, on the following dates;

- **9 April 2015**
- **1 May 2015**
- **2 June 2015**
- **30 July 2015**

The Provider issued another **Agreement to Amend Mortgage Loan Offer Letter** dated **16 September 2015** to the Complainants which provided for a 3-month interest only repayment period. The interest only repayments during the agreed period were estimated at €372.96 per month. The Complainants signed and accepted this offer on **8 October 2015**.

/Cont'd...

The Provider issued a further letter to the Complainants in respect of arrears on the mortgage loan account, on **28 October 2015**.

The Complainants completed another **Standard Financial Statement** on **20 December 2015** which detailed that the Complainants' total monthly income was €3,748.38, and their total monthly expenditure was €2,291.08, plus the monthly mortgage repayment of €113.35, leaving a total surplus of €1,343.95.

The Provider issued a further letter to the Complainants in respect of arrears on the mortgage loan account, on **26 January 2016**.

The Provider issued a **Mortgage Form of Authorisation Application for Change to Interest Only Loan** dated **24 February 2016** to the Complainants which provided for an interest only period of 9 months. The Complainants signed and accepted the MFA on **5 March 2016**.

The Provider issued further letters to the Complainants regarding arrears on the mortgage loan account on the following dates:

- **25 April 2016**
- **25 July 2016**

The Provider issued an **Agreement to Amend Mortgage Loan Offer Letter** dated **30 September 2016** which was signed by the Complainants on **29 March 2017** and provided for a 12-month period of interest only repayments.

The Provider issued further letters to the Complainants regarding arrears on the mortgage loan account on the following dates;

- **24 October 2016**
- **20 January 2017**
- **19 July 2017**

The Complainants wrote to the Provider on **16 October 2017** and stated:

*"We wish to make a further request for redress for having been removed from our tracker mortgage. We feel our case warrants a review as our financial circumstances have been very strained since the change in our payment plan and has placed us under enormous pressure.  
..."*

The Provider issued further letters to the Complainants regarding arrears on the mortgage loan account on the following dates;

- **17 October 2017**
- **15 January 2018**
- **16 April 2018**
- **16 July 2018**

The Provider wrote to the Complainants on **2 October 2018** as follows;

“...

*Whilst the Bank acknowledges you entered into the Voluntary Sale process in February 2017, to date the property has not sold. In an email to you on 1<sup>st</sup> May 2018 a final period of 8 weeks was consented to by the Bank in which to secure an offer on the property, however no offers have been received. Therefore, the Bank is no longer prepared to facilitate your mortgage account remaining in this consensual treatment.*

*Due to the increasing arrears and as no payments are being made to the mortgage the Bank is now seeking the Voluntary Surrender of the property and attach a Voluntary Surrender pack in this regard.*

...”

The Provider issued further letters to the Complainants regarding arrears on the mortgage loan account on the following dates;

- **12 October 2018**
- **10 January 2019**
- **10 April 2019**

**Provision 8.3** and **Provision 8.4** of the **Consumer Protection Code 2012** outline as follows;

*“8.3 Where an account 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**.”*

8.4 *Where an account remains in **arrears** ten **business days** after the arrears first arose, a **regulated entity** must immediately communicate clearly with the **personal consumer** to establish in the first instance why the **arrears** have arisen.”*

Under **Provision 8** of the **CPC 2012** the Provider is obliged to issue correspondence to customers in arrears. Having considered the evidence, I accept that the Provider issued arrears correspondence to the Complainants in accordance with its obligations under the **CPC** in circumstances where arrears were accruing at the time.

Having considered the evidence, I find the evidence does not support the Complainants' assertion that there was an inappropriate removal of a tracker rate of interest from the Complainants' mortgage loan account by the Provider in **February 2013**. In **February 2013** the Provider offered the Complainants interest only repayments on their mortgage loan account for a period of 24 months, on the condition that the Complainants agreed to change the interest rate applicable to the mortgage loan from a tracker interest rate to a Buy-to-Let variable interest rate. The Provider issued an offer to the Complainants to this effect on the mortgage loan in the form of the **Agreement to Amend Mortgage Loan Offer Letter**, which contained the appropriate warnings in compliance with the **CPC 2012**, about moving from a tracker interest rate to a variable interest rate. The Complainants accepted the **Agreement to Amend Mortgage Loan Offer Letter** with respect to the mortgage loan.

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**

21 May 2021

/Cont'd...

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.

