



<b><u>Decision Ref:</u></b>	2021-0192
<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 at point of sale 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**

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan account that is the subject of this complaint is secured on the Complainant's residential investment property.

The loan amount is €126,900 and the term of the loan is 25 years. The Loan Offer Letter dated **19 January 2007** detailed that the type of advance was a "LETTING ANNUITY" and the applicable interest rate was "Fixed For 24 months".

**The Complainant's Case**

The Complainant's mortgage loan account with the Provider was issued in **January 2007** on an initial 2-year fixed interest rate of 5.09%.

The Complainant submits that he was not offered a tracker rate mortgage when the mortgage loan was drawn down in **January 2007** or on any subsequent date since then.

The Complainant submits that other Providers were offering tracker mortgage products to their customers at the time and that the Provider had a "duty of care" to offer tracker rates to its customers too.

The Complainant states that the Provider's conduct "*flies in the face*" of the **Consumer Protection Code 2012**.

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

The Provider submits that the Complainant used a broker to apply for a mortgage loan with the Provider in **2007**. It states that "*For Broker introduced cases such as this, it was not the Banks practice to engage directly with the applicant with the exception of the issue of the requisite loan assessment and approval documentation. The Bank would primarily deal with the Broker appointed by the applicant to act as their Mortgage Intermediary.*"

The Provider states that it was Provider's policy to notify brokers of the New Business interest rates available for New Business applications through the issue of Communicates and the provision of Rate Matrices on an ongoing basis for consideration with their customers. The Provider details that prior to receipt of the Complainant's mortgage application from the Broker it had issued its **New Business Rates** effective from **8 November 2006** to brokers.

The Provider submits that it received the Complainant's mortgage loan application from the Broker on **23 November 2006** which "*specifically detailed a preference for a 1 year fixed rate product*" and made no reference to the Complainant seeking a tracker rate of interest on his mortgage loan.

The Provider further submits that "*As with all rates available, the tracker rates from the Bank were subject to applicable criteria being met.*" The Provider states that while it recognises that tracker interest rates were on offer to new customers at the time of the Complainant's mortgage loan application in **November 2006**, it submits that the tracker rate option would not have been available to the Complainant, had he requested a tracker interest rate, "*on the basis of his application for finance of €126,900 at 90% loan to value financing.*"

The Provider submits that it issued a **Letter of Approval in Principle** dated **24 November 2006** to the Complainant's Broker. The Provider submits that this was followed by further correspondence to the Broker dated **12 December 2006**.

The Provider submits that an updated rate matrix was forwarded to all brokers on **14 December 2006** "*which included a 2 year fixed rate of 4.69%.*"

The Provider submits that on **12 January 2007**, the Broker sent a letter to the Provider "*confirming the solicitor details and requesting a 2 year fixed interest rate of 4.69% with repayments on a capital and interest basis.*"

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The Provider details that it issued a **Loan Offer** on **17 January 2007** which provided that *“The interest rate is the 2 year fixed rate as requested and not a tracker rate. There is no reference to a tracker rate in the Letter of Offer.”*

The Provider submits that on **18 January 2007** the Complainant’s broker requested that the Letter of Offer be amended as there was a spelling error on the property address in the original Letter of Offer received. It details that the Provider issued an **Amended Letter of Offer** on **19 January 2007** *“on the same interest rate basis of 2 year fixed rate. No reference to a tracker rate in the Amended Letter of Offer.”*

The Provider submits that the Complainant’s mortgage loan was drawn down on **01 March 2007** pursuant to the terms of the **Amended Letter of Offer** dated **19 January 2007** which provided for a loan amount of €126,900 repayable over a term of 25 years, on an initial two-year fixed interest rate of 5.09%, thereafter moving to a standard variable rate. The Provider states that the Amended Letter of Offer and its attached conditions were signed and accepted by the Complainant and returned to the Provider on **24 January 2007**.

The Provider submits that the Complainant was aware that upon expiry of the fixed rate, a variable interest rate would apply to the mortgage loan account. It relies on **General Condition 7** in this regard. The Provider also submits that the Loan Offer Letter provided to the Complainant included a recommendation to receive independent financial and legal advice and relies on **General Condition 17** in support of this.

The Provider states that the Letter of Offer of **January 2007** provided no entitlement to a tracker interest rate. It further states that it is satisfied that the terms of the letter of offer the Complainant signed did not indicate in any way that the variable rate applicable to the loan account on the expiry of the fixed rate period would be in any way linked to, or a guaranteed margin above, the ECB rate, nor did the terms reference a *“tracker rate”* at any time.

The Provider further submits that the Complainant was provided with a **Mortgage Handbook** with his Letter of Offer *“which included a Rates Explained Section on page 7 which provided an explanation of the various types of interest rates generally available, including a variable rate, fixed rate and a tracker rate.”*

The Provider further states that *“On the expiry of the fixed rate, the Bank's standard practice at that time was that an automated system notification letter issued to the Complainant to confirm that the fixed rate term had ended and to notify the Complainant of the revised repayment. We had no contact from the Complainant in response to this notification.”*

It submits that in any case the Complainant was not offered a tracker interest rate on the mortgage loan account following the expiry of the fixed rate period in early **2009** *“as there was no default or contractual entitlement established for the Bank to do so. Further, outside of default or contractually provided for tracker rates, there were no tracker rates available from the Bank after [mid] 2008.”*

The Provider confirms that the Complainant’s mortgage loan is still active with the Provider.

### **The Complaint for Adjudication**

The conduct complained of is the Provider failed to offer the Complainant a tracker interest rate in **January 2007** or at any subsequent stage of the mortgage loan agreement.

### **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 Complainant was 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 18 May 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.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainant to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision.

The Complainant was informed of the parameters of the investigation by this Office, by letter dated **27 September 2019**, which outlined as follows;

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [The Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

Therefore, the conduct of the third party Broker engaged by the Complainant, does not form part of this investigation and decision for the reasons set out above.

The issue to be determined is whether the Provider ought to have applied a tracker interest rate to the Complainant’s mortgage loan accounts from inception. In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainant’s mortgage loan. It is also necessary to consider the details of certain interactions between the Complainant and the Provider in **2006, 2007** and **2009**.

The Provider has furnished in evidence a copy of its **New Business Rates** stated as being effective from **8 November 2006**. This document details as follows:

“ ...

<b>Mortgage Type</b>	<b>Rate</b>	<b>APR</b>
<b>Homeloans</b>		
<b>Residential Investment Loans</b>		
1 Year Fixed LTV < 80%	4.69%	4.93%
1 Year Fixed LTV > 80%	4.79%	4.94%
2 Year Fixed	4.69%	4.91%
3 Year Fixed	4.89%	4.96%
5 Year Fixed	4.99%	5.02%
Standard Variable	4.84%	4.94%
Tracker 95 (LTV < 80%, €750k+)	4.20%	4.28%
Tracker 110 (LTV < 80%, €300k+)	4.35%	4.44%
Tracker 125 (LTV < 80%, €250k+)	4.50%	4.59%
Tracker 135 (LTV > 80%, > €250k)	4.60%	4.70%
Capped Tracker 125 (LTV < 80% / €300k+)	4.50%	4.59%

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...”

I note that tracker interest rates were on offer generally by the Provider when the Complainant applied for the mortgage loan in **November 2006**.

The **New Business Rates** document clearly outlined the types of interest rates that were available for different types of mortgage loans, including tracker rates. The fact that tracker interest rate options were available generally as part of the Provider’s suite of products at the time, did not oblige the Provider to offer the Complainant a tracker interest rate on this loan application. There is also nothing to suggest that if a request was submitted by the Complainant seeking the application of tracker interest rate to the mortgage loan that this would have resulted in the Provider acceding to that request and issuing a Letter of Offer on that basis. It is important for the Complainant to note that there was no obligation on the Provider, contractual or otherwise, to give the Complainant the option of a tracker interest rate on his mortgage loan when he made his application to the Provider in **November 2006**.

In this regard the Provider has outlined that its **qualifying criteria** for tracker interest rates in **2006** were as follows:

*“Investment Tracker Less than 80% Loan To Value, Balance over €750,000 - 4.45%  
Investment Tracker less than 80% Loan To Value, Balance over €300,000 - 4.60%  
Investment Tracker less than 80% Loan To Value, Balance over €250,000 - 4.75%  
Investment Tracker greater than 80% Loan To Value, Balance over €250,000-4.85%  
Investment Capped Tracker Less than 80% Loan To Value, Balance over €300,000 - 4.75%”*

The Provider has detailed that in any event these rates would not have been available to the Complainant, if he had requested a tracker interest rate, on the basis that his loan application was for €126,900, at 90% loan to value financing. This was a commercial decision that the Provider was entitled to make.

I note that an **Application Form for Homeloans House Purchase** was stamped received by the Provider on **23 November 2006**. In the section titled **“Your mortgage type, rate & details”** on **page 3** of the application form, in response to the question **“Amount of total loan required”** the number **“126,900”** is written. In response to the question **“Please tick your choice of interest rate”** the **“Fixed”** option is ticked. The other options were **“Variable”** and **“Tracker”**.

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I note that the Complainant signed the mortgage application form on **21 November 2006** on the following conditions:

*“I/We hereby declare and acknowledge;*

*(a) This form must not be construed as an offer on behalf of [the Provider]*

*...*

*(g) The rate of interest will be that which [the Provider] is charging on that date on which the loan cheque is issued and subsequently the rate may vary within the terms of the mortgage.*

*(h) The rate of interest applicable to the loan may be varied at any time at the discretion of [the Provider], provided however that the applicant will be notified of the change in interest rates at the earliest opportunity.*

*(i) If a fixed rate is requested the interest rate will be the fixed rate available on the day the loan cheque issues. For costs associated with early repayment of a fixed loan please revert to the Consumer Credit Act 1995 notice within this form.*

*...”*

In circumstances where the Complainant was engaging with a Broker with respect to the mortgage loan application, I do not accept that there was any requirement for the Provider to communicate directly with the Complainant at that time in relation to the application form or the interest rate options for the loan.

The Provider wrote to the Complainant’s broker on **24 November 2006** as follows;

*“Thank you for your recent application in relation to loan facilities for the above client(s). We are delighted to advise that facilities of up to € 126,900.00 will be considered subject to:*

*1. Photo of Property- Initial*

*2. Satisfactory valuation report carried out by an [Provider] panel valuer*

*...*

*Warning:*

***This approval in principle does not constitute a formal offer and should not be relied upon to enter into binding contracts or purchase at auction.”***

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The Provider wrote to the Complainant’s broker again by letter dated **12 December 2006** repeating its request for the information outlined its letter of **24 November 2006**.

The Provider has furnished in evidence a copy of its **New Business Rates** stated as being effective **14 December 2006**. This document details as follows:

Term	Standard Investment Variable	1yr fixed <80%	1yr Fixed >80%	...	“Investment Tracker 95” >€750k, up to 80% LTV	“Investment Tracker 110” >€300k, LTV <80%	“Investment Tracker 125%” >€250k, LTV <80%	Capital Tracker 125 LTV <80% €300K +	“Investment Tracker 135” >€250k, LTV >80%
YR	4.84%	4.69%	4.79%		4.45%	4.60%	4.75%	4.75%	4.85%
...									

The Complainant’s broker wrote to the Provider on **12 January 2007** and stated as follows:

*“Enclosed, please find the valuation report and picture.*

*The Clients solicitor is [Redacted].*

*Please note that the Client would like to proceed with a 2 year fixed rate of 4.69%. He also wants a capital repayment mortgage.*

*...”*

If the Complainant wished to pursue the potential option of applying for a tracker interest rate mortgage loan at the time in **November/December 2006**, the Complainant’s broker could have indicated to the Provider that the Complainant had a preference for a tracker rate. It does not appear however that the Complainant did so. As outlined above, there is also nothing to suggest that if the Complainant had requested a tracker interest rate for the mortgage loan that this would have resulted in the Provider acceding to that request and issuing a Letter of Offer on that basis. The Complainant applied for a mortgage loan on a fixed interest rate and the Provider offered the Complainant a fixed rate, which was accepted by the Complainant, having acknowledged that the terms and conditions of the mortgage loans were explained to him.

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The Provider issued a **Loan Offer Letter** dated **17 January 2007** to the Complainant. However it does not appear to be disputed between the parties that the Complainant did not sign or accept the Loan Offer Letter dated **17 January 2007**.

The Provider has submitted that on **18 January 2007** the Complainant's broker phoned the Provider to advise of a spelling error on the property address in the Letter of Offer dated **17 January 2007**.

I note that an **Amended Letter of Offer** was subsequently issued on **19 January 2007** to the Complainant, which outlined identical terms and conditions to those outlined in the Letter of Offer dated **17 January 2007**.

The **Particulars of Advance** detailed:

***"IMPORTANT INFORMATION AS AT 19<sup>th</sup> January 2007***

<i>Amount of Credit Advanced</i>	<i>€126,900.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>25 – 0</i>
<i>..."</i>	

The **Additional Particulars of Advance** detailed:

<i>"...</i>	
<i>Type of Advance</i>	<i>LETTING ANNUITY</i>
<i>Interest Rate</i>	<i>5.09</i>
	<i>Fixed For</i>
	<i>24 months"</i>

**General Condition 5** of the **Loan General Conditions** details as follows;

*"The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant's Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will*

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*fluctuate in accordance with the fluctuations in the applicable interest rate.  
Payment of the monthly instalments must be made by Direct Debit Mandate.  
..."*

**General Condition 7** of the **Loan General Conditions** details as follows;

*"The rate of interest applicable to this loan will be fixed for 24 months from date of drawdown.*

*The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant (s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply."*

**General Condition 17** of the **Loan General Conditions** details as follows;

***"THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER, THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED ..."***

The **Loan General Conditions** also detail as follows;

***"WARNING:***

***...***

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

The **Form of Acceptance** was signed by the Complainant on **23 January 2007** on the following conditions;

*"I/We the undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-*

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- (i) *the Letter of Offer;*
- (ii) *the Particulars;*
- (iii) *the Special Conditions (if any);*
- (iv) *the Lender's General Conditions for Home Loans;*
- (v) *the Lender's standard Form of Mortgage*
- (vi) *the Assignment of Life Policy*

*copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s)."*

It is clear to me that the **Amended Letter of Offer** envisaged a fixed interest rate of 5.09% for a period of 24 months with a variable interest rate applying thereafter. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

I acknowledge that tracker interest rates, where the interest rate varies in line with the rate set by the European Central Bank, were on offer, subject to certain qualifying criteria, by the Provider at the time the Complainant applied for his mortgage loan with the Provider. However the **Loan Offer Letter** dated **19 January 2007** did not contain a contractual entitlement to a tracker interest rate or an expectation that a tracker interest rate would apply either at the time of drawdown or at any time during the term of the mortgage loan. I am of the view that in order for the Complainant to have a contractual right to a tracker interest rate either on drawdown or on expiry of the fixed interest rate period, that right would need to be specifically provided for in the Complainant's mortgage loan documentation. However, no such right was set out in writing in the **Loan Offer Letter** dated **19 January 2007**, which was signed by the Complainants on **23 January 2007**.

The Provider was free to exercise its commercial discretion in making a loan offer to the Complainant providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainant to decline that offer if he was dissatisfied that the terms and conditions did not provide for a tracker interest rate from the date of drawdown or if he was dissatisfied with the interest rate that would apply at the end of the initial fixed interest rate period. The Complainant signed the mortgage loan having confirmed that his solicitor had "*advised*" the terms and conditions of the mortgage loan to him.

The **Rate History** document furnished in evidence confirms that the mortgage loan account was drawn down on the fixed rate of 5.09% in **March 2007**.

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The Provider has submitted that at the time of the expiry of the initial 24-month fixed interest rate period on the mortgage loan account in **February 2009** its “*standard practice*” was to issue an “*automated system notification letter*” to the Complainant to confirm that the fixed rate term had ended and to notify the Complainant of the advised repayment.

I am disappointed to note that a copy of the letter purportedly issued by the Provider to the Complainant in or around **February 2009** has not been provided in evidence to this office. The Provider has submitted that “*A copy of this letter is not available.*”

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) governs retention of records and outlines 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.”*

The Complainant’s mortgage loan was incepted in **2007** for a term of **25 years** and the Provider purportedly issued the **letter** to the Complainant in or around **February 2009**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It appears that the mortgage loan account is still active with the Provider. It is therefore unclear to me why this documentation has not been provided by the Provider. This is most disappointing.

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In any event, it is not disputed between the parties that when the 2-year fixed interest rate period expired in **February 2009** the Complainant was not offered the option of a tracker interest rate for the mortgage loan account.

The **Rate History** document furnished in evidence shows that a variable interest rate of 4.54% was applied to the mortgage account in **March 2009**.

I note that the Provider wrote to the Complainant on **16 April 2009** as follows;

*“As announced by [the Provider] in the press on [date] March 2009, your revised interest rate is 4.29% (typical APR 4.38%) with effect from 6<sup>th</sup> April 2009. This was in response to the ECB rate decrease announced in March 2009.*

*On the 1<sup>st</sup> May 2009 your revised repayment will be €509.77, while your 1<sup>st</sup> June repayment will be €504.93.*

*...”*

As outlined above, having considered the Complainant’s mortgage loan documentation, I am of the view that there was no contractual or other entitlement to a tracker interest rate when the fixed interest rate period expired in **February 2009** or at any other time. It is important for the Complainant to understand that his mortgage loans are governed by the Loan Offer Letter and terms and conditions attaching to the Loan Offer Letter that were issued to him, none of which contain a contractual entitlement to a tracker interest rate.

If the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan account at any stage before tracker interest rates were withdrawn by the Provider in **mid-2008**, the Complainant could have contacted the Provider. It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainant to apply a tracker interest rate to the mortgage loan. It was entirely within the Provider’s rights and commercial discretion whether to accede to that request, if it was made. It appears from the evidence before me that the Complainant did not request that the Provider apply a tracker interest rate to his mortgage loan at any point in time. In any event, as I have already stated, even if he had, there was no obligation on the Provider to accede to such a request.

It is important for the Complainant to understand that the fact that other customers of the Provider, or indeed other customers of any other providers, had a tracker interest rate applied to their mortgage loans, did not in any way create an obligation on the Provider to offer the Complainant a tracker interest rate on his mortgage loan with the Provider, as the Complainant has submitted. The evidence shows that the choice to take out the

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mortgage loan on the terms and conditions offered by the Provider in **2007** was a choice that was freely made by the Complainant.

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**

14 June 2021

Pursuant to **Section 62** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—
  - (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,  
and
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.