



<u>Decision Ref:</u>	2021-0234
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

The 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 was €117,000 and the term was 20 years. The **Loan Offer Letter** which was signed on **14 June 2007** outlined that the interest rate applicable to the loan was a *"Fixed rate of 4.49% until 30/11/2008 100% Capital and Interest"*.

The Complainant's Case

The Complainant submits that in **April 2005** she and her father drew down a joint mortgage loan (account ending **6896**) pursuant to the terms of an Offer Letter issued in **September 2004**. She submits that *"The interest rate agreed was ECB plus 1.65%, a margin which was set for the life of the home loan as per the content of the loan offer."*

The Complainant submits that as a condition of the original loan, the Provider insisted that her father was required to be a joint borrower to provide for additional security. She states that there was an understanding that at some future date the Complainant's father would be discharged as a joint borrower and there would be no need for a new loan.

In **January 2007** the Complainant and her father opted to apply a fixed interest rate of 4.49% to the account until **30 November 2008**.

In **May 2007** the Complainant states that they sought to have her father “taken” off the mortgage loan as an account holder. She submits that she was advised by the Provider that to do so, she would have to “take the loan in her own name but it would have to commence as a new loan with a new loan offer being issued”. She states that she was assured by the Provider that “all the terms attaching to her loan remained unchanged ... and that no alteration to the interest rate basis took place” and that she “was led to believe” that the only change that would occur was that her father’s name would be removed from the loan and the title deeds.

The Complainant refers to the **Special Conditions** attaching to the new Loan Offer dated **8 May 2007** and signed by her on **14 June 2007**, which provided that the interest rate applicable to the new mortgage loan account ending **4741 (01)** was as follows:

“Fixed rate of 4.49% until 30/11/08 carried over from legacy case [XX]6896/NT”

The Complainant submits that there is “no mention whatsoever” in the new Loan Offer of what was to happen at the end of the fixed interest rate period in **2008**. She states that therefore she “assumed and ... was entitled to believe that her tracker margin would continue to apply in the very same way her fixed rate rolled over to the new account from the old account.” She submits that “both the old and the new accounts are linked as is confirmed in the special conditions of the new loan offer.”

The Complainant submits that it “seems utterly unfair” that only the fixed rate element of the mortgage loan ending **6896** was transferred to the new mortgage account ending **4741 (01)**. She asserts that the Provider “cannot have it both ways” by suggesting that the fixed interest rate can be carried over to the new account “but the Tracker Rate cannot even though the declaration page states the loan is a Tracker Mortgage which is not a “typographical error” and is certainly not in this instance.”

The Complainant further states that the fixed rate arrangement agreed between the parties in **January 2007** was “still in force” when her father’s name was “removed from the loan account” in **June 2007** and therefore she expected that the mortgage loan ending **4741 (01)** “...would have also reverted to the original tracker margin following the fixed rate period”.

The Complainant submits that the Provider is in breach of **Section 12 of Chapter 2** of the **Consumer Protection Code 2006** (the “CPC 2006”) by referring to the Complainant’s mortgage loan account ending **4741 (01)** as a “*completely new borrowing*”.

She submits that the only change to the loan was the removal of her father as an account holder, and that if any other changes occurred it should have been “*clearly shown*” to her by the Provider, as required by the CPC 2006.

The Complainant submits that she sought and secured a top up loan of €40,000 in **June 2008** which was issued on a tracker interest rate of ECB + 1.15% under the mortgage loan sub-account ending **4741 (02)**. She states that her position that the “*legacy rate*” on mortgage loan account ending **6896** should have carried over to the mortgage loan account ending **4741 (01)** is “*...supported by the fact that a top up loan was arranged in June 2008 on the same property, same account number and is a “Tracker Mortgage” with the identical declaration page signed.*”

The Complainant submits that prior to the expiry of the fixed interest rate period on the mortgage loan account ending **4741 (01)**, she “*was in shock to receive a letter from [the Provider] on 22nd Oct 2008 offering [her] only a variable or fixed rate, after enquiring further [she] felt very let down by [her] mortgage provider when these were the only options given to [her].*” She states that she “*was certain that the margin attaching to the loan account which carried over from the “legacy case” was to be made available*” and should have been offered to her on the expiry of the fixed rate period in **December 2008**.

The Complainant further submits that she has another mortgage account with the Provider which is held jointly with her husband. She states that this mortgage account had a tracker interest rate issue which was “*corrected*” by the Provider in **2013**.

The Complainant is seeking the following:

- (a) A tracker interest rate of ECB + 1.65% applied to her mortgage loan account ending **4741 (01)**
- (b) A refund of overpaid interest from **31 November 2008** to present; and
- (c) Compensation.

The Provider’s Case

The Provider submits that the Complainant previously held a mortgage loan account with her father under mortgage loan account ending **6896**.

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The Provider states that the Complainant later drew down the mortgage loan account ending **4741 (01)** in her sole name, the proceeds of which were used to redeem mortgage loan account ending **6896**, which was redeemed in full and closed on **26 September 2007**. The Provider submits that the Complainant applied for the mortgage loan account ending **4741 (01)** through a mortgage broker and as a result the Provider *“is not in a position to comment in relation to what may or may not have been discussed between the Complainant and her Broker when the Complainant signed the mortgage contract.”*

The Provider states that, while the Complainant is of the opinion that the new solely held mortgage loan ending **4741 (01)** is a *“direct continuation”* of the original jointly held mortgage account ending **6896**, the Provider *“cannot simply take or remove a named party from a joint mortgage account. This is a material change to the Terms and Conditions and requires detailed assessment.”* The Provider further details that a *“joint mortgage is secured by way of a legal charge registered over the property given as security. In such cases the Title Deeds of the said property from a joint mortgage account is a material change that could potentially impact the security which is held and may also increase the risk to Bank, as only one person remains on the home loan and is responsible for the maintenance of same. In order to transfer the title of a mortgage there are both legal and lending considerations to be addressed.”* The Provider further states that *“it is a requirement that the party wishing to proceed with the mortgage is required to obtain the funds in their sole name and use the same to redeem the borrowing in joint names.”*

The Provider asserts that the mortgage that issued in the Complainant’s sole name was a *“completely new borrowing”* and was *“drawn down on completely separate Terms and Conditions”*. The Provider submits that it *“was exceptionally agreed”* to allow the Complainant to retain the fixed interest rate that had applied to the previous joint mortgage. It states that this was *“advantageous”* to the Complainant as otherwise she would have broken from the fixed interest rate early and incurred an early breakage fee. It states that the conditions of the Loan Offer dated **8 May 2007** *“clearly states that the interest rate will be fixed until 30 November 2008, however this condition does not state that on expiry of that fixed rate term the mortgage would roll onto a tracker rate.”*

The Provider states that it is *“satisfied”* that the Complainant’s mortgage loan documentation was *“sufficiently clear and transparent with respect to the consequences of applying the fixed rate to her mortgage loan in 2007.”* The Provider states that all *“relevant information including what would transpire at the end of the initial fixed interest rate period in November 2008 was clearly explained in the General Terms and Conditions that accompanied the customer’s Loan Offer.”*

The Provider submits that in line with the terms and conditions of the mortgage loan documentation, and in particular **Condition 14 (a) (ii)**, on expiry of the fixed rate period the Complainant would be offered the option of a further fixed rate or a variable interest rate, and in the event that no option was made available by the Provider or if the borrower failed to exercise the option, the interest rate that would apply would be a *“variable interest rate option which may be increased or decreased by the Lender at any time”*.

The Provider states that the variable interest rate as described in the **Standard Mortgage General Terms and Conditions** was the Provider’s standard variable rate, which was a variable rate which could be increased or reduced by the Provider at any time. It states that by comparison, a tracker interest rate is linked to the European Central Bank (ECB) base rate and so would only rise and fall in line with movements in the ECB base rate. The Provider also states that at no point did it offer a fixed interest rate product which defaulted to a tracker interest rate product at the end of the fixed interest rate period. The Provider states that the Loan Offer *“did not contain any specific condition specifying a tracker interest rate nor did this document state that a tracker interest rate would be made available to the customer when the initial fixed interest rate period ended, or at another future date.”*

The Provider states that the Complainant signed and accepted the Loan Offer on **14 June 2007** and in doing so confirmed she had the **Loan Offer**, the **Specific Loan Offer Conditions** and the **General Terms and Conditions** explained to her by her solicitor and fully understood them.

The Provider acknowledges that the **Loan Acceptance** *“erroneously”* refers to a *“Tracker Mortgage”*. The Provider states that this reference was a *“typographical error”* and it is *“satisfied that this erroneous reference to a ‘tracker mortgage’ did not confirm that the interest rate type applicable to the mortgage sub-account was a tracker interest rate.”* It submits that the purpose of the paragraph contained in the **Loan Acceptance** is *“to confirm that they fully understand the specific nature of the mortgage, that the debt owed to [the Provider] is secured on the mortgaged property and must be repaid in full before the title deeds will be returned or the security released.”* The Provider asserts that the *“incorrect reference”* to a *“Tracker Mortgage”* did *“not in itself create a right or expectation to a tracker interest rate.”*

The Provider further submits that the *“reference to a ‘tracker mortgage’ in one document as part of all the documentation provided to the customer cannot change the entire basis of the mortgage loan and when the Loan Offer Acceptance and all relevant mortgage loan documentation is viewed holistically, it is clear that the reference to a tracker mortgage is incorrect. The wording does not confer a right or an expectation to a tracker interest rate.”*

The Provider submits that on **22 October 2008** it wrote to the Complainant by way of a **Product Expiry letter**, advising her of the upcoming end of the fixed rate period and confirming that *“Any borrowings you have on this fixed rate will change to our Standard Variable Rate from 01 December 2008”*. It states that this letter also outlined the alternative interest rate options available to the customer at that time, and as tracker interest rates had been withdrawn by the Provider in **mid-2008**, this product type could not have been offered at that time and consequently was not included in the letter.

The Provider details that as there was no response to its letter, the Complainant’s mortgage loan account rolled onto the Provider’s variable interest rate. The Provider states that it *“does not consider that the customer could have formed any reasonable expectation”* that her mortgage account would default to a tracker interest rate at the end of the initial fixed rate period in **November 2008**.

The Provider does not accept the Complainant’s submissions that it has not complied with the provisions of the **Consumer Protection Code 2006**. The Provider states that it is satisfied that throughout her mortgage journey the Complainant was provided with all the relevant and required information regarding her mortgage account in order for her to make informed decisions.

The Provider offered the Complainant a goodwill gesture of €3,000.00 in its formal response to the complaint dated **24 June 2015**, which detailed as follows:

“The Bank offered the Complainant as a gesture of goodwill the amount of €500 in recognition of the long period our investigation took and the added frustration and inconvenience this may have had on the Complainant ... That said however, we are mindful given that the Complainant’s previous mortgage availed of a tracker interest rate, and the potential confusion that may have been caused to the Complainant as a result of the typographical error contained in her Letter of Loan Offer. With this in mind, we would like to offer the Complainants a further €2,500 as an additional goodwill gesture. Our total offer therefore amounts to €3,000.”

The Provider offered a further goodwill gesture offer of €1,250.00 to the Complainant by letter dated **23 November 2020**, which detailed as follows:

“In light of recent decisions made by the FSPO on this subject for customers with similar facts to [the Complainant], we would like to offer her €1,250 with a view to resolving this matter for her now. Our offer of €1,250 is in recognition that she has had to take her complaint to the FSPO for resolution and the length of time it has taken, from the date of her original complaint, to arrive at this outcome.”

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The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant a tracker interest rate of ECB + 1.65% on expiry of the fixed interest rate period in **November 2008**.

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 **25 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.

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

1. Letter from the Provider to this office dated **01 June 2021**;
2. Letter from the Complainant's representative to this office dated **16 June 2021**; and
3. Letter from the Complainant to this office dated **01 June 2021** received by this office from the Complainant's representative on **21 June 2021**.

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Copies of these additional submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this office, my final determination is set out below.

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 correspondence to the Complainant's representative dated **16 March 2021**, which outlined as follows;

"In the interests of clarity, the complaint that your client is maintaining under this complaint reference number is against Ulster Bank and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint. If your client has any complaint to make in relation to the advice given by her Broker, any such conduct must form the basis of a separate complaint. It is not possible for this office to maintain complaints against two separate entities under the one complaint reference.

Please be advised however that any complaint submitted will be assessed for eligibility, including the regulatory status of the Broker."

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.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainant and the Provider in **2007** when she applied for and drew down on the mortgage loan.

The Complainant and her father were issued an **Offer of Advance** from the Provider dated **13 September 2004** which provided for a loan amount of €122,000 over a term of 25 years.

The **Special Conditions** section of the **Offer of Advance** dated **13 September 2004** detailed that *"The rate of the [Provider's] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term.*

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The margin for this Home Loan is ECB rate plus 1.65%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged."

The Provider issued a letter to the Complainant and her father dated **15 January 2007** in relation to mortgage loan account ending **6896** which detailed:

"Thank you for your enquiry about fixed rates.

We currently have the following fixed rate options available:

4.49%* Fixed Rate until **30/11/2008** (APR 4.8%)

4.75 %* Fixed Rate until **30/11/2009** (APR 4.8%)

4.99%* Fixed Rate until **30/11/2011** (APR 5.0%)

...

****The fixed rates above are subject to availability and may be withdrawn at any time, without prior notice.***

Please note, if you opt for a fixed rate, six months penalty interest at the Fixed Rate of Variable Home Loan Rate, whichever is higher, will apply if the mortgage is paid off, capital payments exceeding €1,200 are made in any calendar year, or you change to an alternative product, before expiry of the fixed rate period.

If you wish to avail of a fixed rate, please indicate your chosen fixed rate on the enclosed form and sign and return same to this office. Please note that all parties to the mortgage are required to sign the written confirmation.

..."

The **form** enclosed with the letter of **15 January 2007** detailed as follows:

"A fixed rate mortgage guarantees the rate on your mortgage will remain unchanged for the fixed rate period, although your payments may alter if you receive Tax Relief at Source.

You should bear in mind that if, within the fixed rate period, you are considering discharging your mortgage, lodging capital payments to reduce your mortgage, or transferring your mortgage to a different product, you will incur a charge equal to six months interest at the Fixed Rate or the Variable Home Loan Rate, whichever is higher, on any amount prepaid.

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If, within three months of redeeming a fixed rate mortgage, you drawdown a new mortgage with [The Provider] on the same Fixed Rate Terms then, where the amount of drawdown equals or exceeds the amount redeemed the full charge will be refunded. Where the drawdown is for a lesser amount than the amount redeemed the refund will be on a pro rata basis.

The Fixed Rates currently available are:

<i>4.49%* Fixed Rate until 30/11/2008</i>	<i>(APR 4.8%)</i>	<input type="checkbox"/>
<i>4.75 %* Fixed Rate until 30/11/2009</i>	<i>(APR 4.8%)</i>	<input type="checkbox"/>
<i>4.99%* Fixed Rate until 30/11/2011</i>	<i>(APR 5.0%)</i>	<input type="checkbox"/>

The above APRs are based on a typical mortgage of €100,000 over 20 years.

***At the end of the fixed rate period:** [The Provider] may offer to continue the advance for such a period and at such a fixed rate as it may decide. It may also offer alternative available products. If such offer is made and you elect to accept then you must do so in writing, your acceptance to be signed by all parties to the mortgage and to be received by [the Provider] If no such offer is made or if an offer is made and no acceptance received as prescribed above, then, from the day following the expiry of any option selected above, the [Provider's] Home Loan Rate shall apply in accordance with General Condition 2 of the Offer of Advance originally accepted by you being the Bank's General Conditions Relating to Advances by [the Provider] House Mortgages Section, which varies the Interest Rate, and the said General Conditions relating to the Advances shall be construed accordingly.*

If you wish to transfer to one of the fixed rates above, please tick the box opposite your chosen foxed rate, sign the declaration below (must be signed by all borrowers), and return it to us immediately."

The Complainant and her father signed the **options form** on **22 January 2007** indicating their preference for the fixed rate of 4.49%, which was to apply to the mortgage account until **30 November 2008**.

It appears that in or around **May 2007** the Complainant's broker contacted the Provider on her behalf. I note that the Provider wrote to the Complainant's broker by letter dated **8 May 2007**, as follows:

"I have pleasure in enclosing a copy of the Offer of Loan that has today been made to the above applicant(s). This replaces any previous offer with this reference number. Copies have also been sent today to your client's Solicitor.

If you are arranging any of the items detailed overleaf, I require this information prior to completion of the mortgage, and release of funds. If you have not already done so, please advise me of completion date when known.

Should you have further queries, please do not hesitate to contact me on the above telephone number."

The following page of the letter details:

*"Account number: [ending **4741**]*

Summary of loan details

Details of Loan and Fees

<i>Initial Loan Amount</i>	€	<i>117,000.00</i>
<i>Additions</i>		
<i>Higher Lending Charge</i>	€	<i>0.00</i>
<i>Arrangement/Booking Fee</i>	€	<i>0.00</i>
<i>Valuation Fee</i>	€	<i>126.97</i>
<i>Total Additions</i>	€	<i>126.97</i>
<i>Less: Payments Received</i>	€	<i>126.97</i>
<i>Gross Loan</i>	€	<i>117,000.00"</i>

A letter also issued from the Provider to the Complainant's solicitor dated **8 May 2007** which stated as follows:

"We understand that you act for the above applicant(s) who has/have been offered [Provider] Remortgage mortgage. We enclose herewith the original loan offer letter, the Specific Terms and Conditions, the General Terms and Conditions and the Loan Acceptance for your attention. Please note that the Loan Acceptance should be signed and dated by the applicants.

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The original Loan Acceptance should be detached from the loan offer letter and should accompany the cheque request and Solicitor's Undertaking when you wish to request the cheque from [the Provider].

..."

In circumstances where the Complainant was engaging with a Broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainant during the application stage.

The Complainant, in her post Preliminary Decision submissions dated **01 June 2021**, states that she engaged the services of a third party Broker in **2004** when she *"did a combined remortgage and a purchase of another property but [she] never used them for removing [her] dad's name off the mortgage in 2007"*. The Complainant further states that she *"did all the enquiries by phone [her]self and on the advice of [Provider] I engaged with a solicitor"*. The Complainant acknowledges that the name of a third party Broker is mentioned on the Loan Offer Letter dated **08 May 2007** however maintains that *"this is obviously because [Provider] copied the previous loan offer where [she] was led to believe all terms and conditions would stay the same"*.

While I acknowledge the Complainant's additional submissions in this regard, the documentary evidence at the time of the application supports the Provider's position that the Provider did not have any direct communication with the Complainant and that all communications were made with the Complainant's Broker and her solicitor with respect to the mortgage loan application for mortgage loan account ending **4741**.

The **Loan Offer Letter** dated **08 May 2007** details as follows:

<u>"Purpose of Loan</u>	: Re-finance non-[Provider] debt
<u>Repayment Details</u>	<u>Loan Account</u>
Mortgage Account Number	: [ending 4741]
Loan Type	: Fixed Rate 4.49% until 30/11/08 100% Capital and Interest
Loan Amount	: €117,000.00
Interest Rate	: 4.49%
Interest Type	: Fixed
Term	: 20 years"

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The **Important Information** section details as follows:

“WARNING

...

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

The **Specific Loan Offer Conditions** detail as follows:

“This offer supersedes all previous offers.

Fixed rate of 4.49% until 30/11/2008 carried over from legacy case [account ending 6896]/INT.

Acting solicitor to confirm that there is no third party interest in the property being mortgaged.

...

The loan offer is made on the strict understanding that the monies being advanced to the borrowers are being used to discharge in full the borrowers liabilities to [the Provider] joint mortgage with applicant’s father”

Two sets of General Terms and Conditions have been furnished in evidence by the Provider: The **General Terms and Conditions** dated **8 May 2007** and the **Loan Offer - General Terms and Conditions**.

The **Loan Offer - General Terms and Conditions** detail as follows:

“1. Introduction

(a) These General Mortgage Terms and Conditions apply in all circumstances to the Lender’s Standard Mortgage/Tracker Mortgage. These General Terms and Conditions are supplemental to and form part of the Loan Offer which comprises Specific Loan Offer Conditions and General Terms and Conditions. In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply.”

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Therefore, I accept that the **Loan Offer - General Terms and Conditions** are supplemental to the Specific Loan Offer Conditions and the General Terms and Conditions comprised in the Complainant's Loan Offer Letter dated **08 May 2007**.

Condition 14 of the **Loan Offer - General Terms & Conditions** details as follows;

"14. INTEREST RATE

(a) Subject to Sub-Clause 14(b), all Loans are subject to the Bank's Mortgage Rate at the date the Loan is drawdown.

(b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:-

(i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank ("ECB") rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement;

(ii) There will be no reduction in the Tracker Mortgage Interest rate as a result of the Loan to Value reducing in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.

(c) In the case of a fixed Interest rate Mortgage, the following conditions will apply:-

(I) The rate of Interest applicable will be fixed at the rate and for the period specified in the Loan Offer;

(II) The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed Interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable interest rate which may be increased or decreased by the Lender at any time, and in this respect, the decision of the Lender will be final and conclusively binding on the Borrower;

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(III) Balance on a daily basis. Where, during a Fixed Rate Period, the Lender accepts:

- (A) early repayment of the Loan in full,*
- (B) a Lump Sum Repayment, or*
- (C) the conversion of a fixed interest rate Loan to a variable interest rate Loan (or other fixed interest rate Loan),*

The Borrower must pay to the Lender a redemption fee. The redemption fee will be the equivalent of a sum equal to six months interest, calculated at the fixed interest rate applicable prior to the conversion or redemption, on the Mortgage Balance at the date of conversion or the date of redemption or part redemption, whichever is applicable.

*If the Borrower redeems a fixed interest rate Loan and, within 3 months of redemption, the Borrower draws down a new Loan with the Lender at the same fixed interest rate the redemption fee will be refunded. If the new Loan is for less than the redeemed Loan the refund of the redemption fee shall be reduced proportionately. This redemption fee will not be payable in the event of death.
(d) Interest is calculated on the Mortgage Balance on a daily basis."*

Page 1 of the **European Standardised Information Sheet** attaching to the **Loan Offer Letter** details as follows:

"This document does not constitute a legally binding offer.

The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.

...

*"Interest rate: 4.49%
Interest Type: FIXED and variable thereafter*

"(a) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

(i) The rate of interest applicable to the loan will be fixed at the rate and for the period specified in the Loan Offer;

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(ii) The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to [the Provider], opt to choose a further fixed rate of interest for a certain period if such an option is made available by [the Provider] and on terms and conditions as may be specified by [the Provider]. Where such an option is not made available by [the Provider] or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower.

(b) In the case of a Monthly Rest Mortgage, interest is calculated on the Mortgage Balance at the end of each preceding month.”

The Complainant signed the **Loan Acceptance** on **14 June 2007** on the following terms:

“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

I/We fully understand and accept the specific nature of this Remortgage Mortgage.

I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deeds released.”

It is clear that the **Loan Offer** envisaged that a fixed interest rate of 4.49% would apply to the mortgage until **30 November 2008** and on the expiry of the fixed interest rate period on the mortgage loan account, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainant. The variable interest rate set out in **Condition 14(c)** was clearly one which may be increased or decreased by the Provider at any time. **Condition 14 (c)** of the **General Terms and Conditions** does not mention the application of a tracker interest rate to the Complainant’s mortgage loan. The **Specific Loan Offer Conditions** also detailed that the Loan Offer was made “on the strict understanding that the monies being advanced to the borrowers are being used to discharge in full the borrowers liabilities to [the Provider] joint mortgage with applicant’s father”.

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The Complainant appears to be of the view that the mortgage loan accounts ending **6896** and **4741** are “linked”. In this regard, it is important for the Complainant to understand that while the mortgage loans relate to the same secured property, both loans drew down on different interest rate products and different terms and conditions as outlined in the separate loan agreements applicable to each mortgage loan.

The Complainant’s representative is of the view that my Preliminary Decision that issued on **25 May 2021** “*totally sets aside what [the Complainant] was told by the bank at the time namely that all that was clanging (sic.) was the lenders agreement for her father’s name to be removed*”. Similarly, the Complainant, in her post Preliminary Decision submissions dated **01 June 2021**, states that she feels that she has been “hoodwinked” by the Provider who she spoke to “*many time[s] during the course of the transfer from a joint mortgage to a sole mortgage and always trusted what they advised me telling me terms & conditions would remain the same*”.

Following a review of the mortgage loan documentation and the additional submissions received from the parties, it remains clear to me that each of the Complainant’s mortgage loans are entirely separate and were drawn down on different terms and conditions. The evidence does not support the Complainant’s contention that the terms and conditions applicable to mortgage loan account ending **6896**, that she held jointly with her father, would be the same terms and conditions that applied to her new mortgage loan account ending **4741** that was drawn down in her sole name. While the Provider allowed the Complainant to retain the fixed interest rate of 4.49% and apply that rate of interest to the new mortgage loan ending **4741** until **30 November 2008**, the particulars of each mortgage loan and the terms and conditions attaching to each mortgage loan were entirely distinct and separate.

The Complainant accepted the Loan Offer in respect of the new mortgage loan ending **4741** by signing the **Loan Acceptance**, having confirmed that the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions had been explained to her by her solicitor and she understood them. If the Complainant was not happy with the terms of the new Loan Offer, including the terms with respect to the applicable interest rate and in particular **General Condition 14 (c)** which clearly outlines what will happen on the expiry of the fixed interest rate period, the Complainant could have decided not to accept the offer made by the Provider.

The Complainant did not have a contractual entitlement to the application of the tracker interest rate of ECB + 1.65% which was previously held on mortgage account ending **6896** on the new mortgage loan ending **4741**.

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It is important for the Complainant to understand that there was no obligation on the Provider to offer the Complainant a tracker interest rate of ECB + 1.65% when applying for the new mortgage loan in her sole name under mortgage account ending **4741**. The Provider was entitled to make an offer on its then available rates for new borrowings.

The Provider issued a **Top-Up Loan Offer** dated **6 June 2008** to the Complainant which detailed:

“[The Provider] is pleased to advise that your recent application for a TOP-UP Loan has been approved at a flex interest rate of 5.15% and now offers loan facilities on the Following Terms and Conditions.

IMPORTANT INFORMATION AS AT 6 JUNE 2008

- | | |
|------------------------------|------------|
| 1. Amount of credit advanced | €40,000.00 |
| 2. Period of Agreement | 25 years |
| ...” | |

I note that the Complainant signed the **Acknowledgement and Consent – Additional Loan Secured on the Family Home** on **11 June 2008**.

The **Mortgage Transaction Summary** provided in evidence indicates that the mortgage sub-account ending **4741 (02)** was drawn down on **23 June 2008** on a tracker interest rate of ECB + 1.15%. I note that mortgage loan account ending **4741** then became known as mortgage loan sub-account ending **4741 (01)**.

The Complainant has submitted that the fact that the mortgage loan account ending **4741 (02)** drew down on a tracker interest rate of ECB plus 1.15%, “*further confirmed*” that a tracker interest rate should have applied to the mortgage loan account ending **4741 (01)**. Further, the Complainant’s representative, in his post Preliminary Decision submissions dated **16 June 2021**, states that “*if the Bank could not, simply remove [the Complainant’s] father from the loan, then none of the legacy loan conditions should have carried over including the fixed rate. If that had occurred, the loan would have commenced as a new loan on a Tracker Rate as per the top up loan a number of months later*”. As outlined above, it is important for the Complainant to understand that the Provider was under no obligation, contractual or otherwise, to offer a tracker interest rate to the Complainant when she decided to take out mortgage loan account ending **4741(01)** in her sole name. At the time, the Provider offered the Complainant a fixed interest rate, which she accepted.

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The fact that the Provider offered the Complainant a tracker interest rate on the top-up mortgage loan account ending **4741 (02)** has no bearing on the Complainant's entitlements under her mortgage loan account ending **4741 (01)**.

As outlined above, it is important for the Complainant to understand that while the top-up mortgage loan relates to the same secured property, both loans drew down on different interest rate products and different terms and conditions as outlined in the separate loan agreements applicable to each mortgage loan.

Prior to the expiry of the fixed interest rate on the mortgage loan sub-account **4741 (01)** on **30 November 2008**, the Provider issued correspondence to the Complainant dated **22 October 2008** which stated as follows:

"The Fixed Rate Rate [sic] on your mortgage is due to expire on 30 November 2008. Any borrowings you have on this Fixed Rate will change to our Standard Variable Rate from 01 December 2008. The Standard Variable Rate will be 5.60% (APR 5.80% effective from 1st November 2008)

This is a great opportunity to look at your options as your decision now could save you money.

Option 1: Flexible Variable mortgage – *[the Provider's] Flexible Variable mortgage is a variable rate mortgage that allows you to take advantage of any interest rate reductions that may occur over the term of your mortgage.*

[Provider product] can avail of a Flexible Variable mortgage with a reduced rate. By applying for a Flexible Variable Mortgage rate today, you could take advantage of our lowest Flexible Variable Mortgage with a [Provider's product] discount rate of 5.89% (6.1% APR).

Option 2: Fixed Rate mortgage – *if you'd like the peace of mind of knowing your interest rate will stay the same for a fixed length of time. Simply choose the fixed rate term that suits you now. And remember, at the end of your fixed rate period you will have the flexibility to explore your options again.*

Just call our dedicated team on [telephone number]. We are here to make the process of choosing your new mortgage rate simple and hassle-free. If we don't hear from you before the end of November your current rate will automatically revert to the standard variable rate. This could mean an increase in your monthly repayments so now is the time to act."

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The Complainant submits that she was “*in shock*” when she received the Provider’s correspondence of **22 October 2008** offering her the flexible variable mortgage or fixed rate mortgage options.

Based on the evidence before me it does not appear that the Complainant responded to this correspondence or contacted the Provider on receipt of this correspondence.

The Provider issued a further letter to the Complainant on **1 December 2008** detailing as follows:

“Mortgage Account: [ending 4741]

We are writing to advise that the interest rate you have enjoyed with your current mortgage deal has now come to an end. In accordance with the terms of your agreement, part or all of your above noted mortgage account has reverted to our Standard Variable Rate.

The table below details what your new payment is at the new rate. Our Standard Variable Rate can fluctuate and you will be notified in writing prior to any change taking place.

<i>Loan Account No.</i>	<i>New Payment</i>	<i>Payment Date</i>	<i>Product</i>	<i>Rate (%)</i>
<i>1</i>	<i>775.59</i>	<i>17 December 2008</i>	<i>SVR</i>	<i>5.10</i>
<i>2</i>	<i>219.01</i>	<i>17 December 2008</i>	<i>ECB + 1.15%</i>	<i>4.40</i>
<i>Total Repayment</i>	<i>994.60</i>			

If you have recently arranged for your mortgage to be switched to a new product with us, then please disregard this letter. You will shortly be notified of your new product and payment details under separate cover.”

I have not been provided with any evidence that would indicate that the Complainant contacted the Provider when the mortgage loan account ending **4741 (01)** defaulted to the Provider’s standard variable rate in **December 2008**.

I have considered the Complainant’s mortgage loan documentation in its entirety and I accept that the Complainant had no contractual or other entitlement to a tracker interest rate on the expiry of a fixed interest rate in **November 2008**.

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The Complainant was entitled to a further fixed interest rate, or if no such rate was offered by the Provider, to the Provider's standard variable interest rate, in line with the **Loan Offer - General Terms and Conditions** attaching to the Loan Offer Letter of **14 June 2007**.

It is important for the Complainant to understand that she was formally offered and accepted a loan at a fixed interest rate, as opposed to a tracker interest rate. Further, there was no contractual entitlement to a tracker interest rate on her mortgage loan account at the end of the fixed interest rate period, or indeed at any time during the term of the loan. Therefore, there is no basis for the Complainant's contention that the Provider failed to advise her in **2007** that she would not be entitled to revert to a tracker interest rate at the end of the fixed period, given a tracker rate never applied to the mortgage loan account ending **4741** in the first instance.

I note that there is a reference to "*Tracker Mortgage*" in the second paragraph of the **Loan Acceptance**, as quoted above. This appears to be an error on the part of the Provider as the sentence that contains this erroneous reference to "*Tracker Mortgage*" is in relation to potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainant understood this had to be repaid before the deeds of the property could be released and returned.

I agree that errors are unacceptable. However, the reality is that they sometimes occur.

I do not consider that the single, erroneous, use of the word "*Tracker*" in this sentence, which was not related to the interest rate applicable to the Complainant's mortgage loan, should have led the Complainant to reasonably form the understanding that the interest rate that would be applicable to the loan was a tracker interest rate. This sentence was clearly not in relation to the interest rate applicable at the end of the initial fixed interest rate period. Whilst this error on the part of the Provider is entirely unsatisfactory, I am satisfied that the particulars of the **Letter of Loan Offer** are sufficiently clear as to the type of mortgage offered to the Complainant and confirm that the Complainant was offered a mortgage loan on a fixed interest rate as opposed to a tracker rate.

The Complainant, in her post Preliminary Decision submissions dated **01 June 2021**, contends that "*there should be NO typographical errors in any loan offer this is totally unacceptable and this alone should be cause for compensation*".

In relation to the **Loan Offer Letter** dated **08 May 2007** that was signed and accepted by the Complainant on **14 June 2007**, the Complainant's representative, in his post Preliminary Decision submissions dated **16 June 2021**, states as follows:

"The Loan offer stated;

- *In the case of a Tracker Mortgage the conditions of this sub clause will apply*
- *I/We fully understand and accept the **specific nature** (emphasis added) of this Remortgage mortgage*
- *We further understand that an outstanding debt owing (whether owing now or in the future) to [Provider] by me/us at any given time is secured on the property the subject of the Tracker Mortgage and must be repaid."*

According to the decision from the case there is only one "typographical error" in [Complainant's] letter of offer".

I note that the "typographical error" to which the Complainant's representative refers above is the reference to "Tracker Mortgage" in the **Loan Acceptance** section of the **Loan Offer Letter** dated **08 May 2007** which I addressed in my Preliminary Decision dated **25 May 2020**.

The Complainant's representative, in his post Preliminary Decision submissions dated **16 June 2021**, further states:

In fact, any carry-over from the previous loan should not have remained or indeed [the Complainant] should, an[d] indeed would, have waited until the expiry of the fixed rate if a breakage fee was applying which is what should have occurred as the 'legacy' carryover appears from the decision only to have applied to one part of the loan, the fixed rate.

That is factually incorrect and I feel is an Error of Fact as there is also a legacy carryover in the amount of the loan and of course in [the Complainant] being the applicant".

It appears to me that the Complainant's representative is of the view that my reference to only one "typographical error" in the Complainant's **Loan Offer Letter** dated **08 May 2007** is "factually incorrect" and amounts to an "Error of Fact". The Complainant's representative appears to consider what he terms as "legacy carryover[s]" to also amount to errors in the Complainant's **Loan Offer Letter** dated **08 May 2007**.

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I find the Complainant's representative's use of the term "*legacy carryover*" to be unhelpful and confusing in this regard. The word "*legacy*" is contained in the **Special Conditions** attaching to the Loan Offer dated **8 May 2007** which provided that the interest rate applicable to the new mortgage loan account ending **4741 (01)** was a fixed rate of 4.49% until **30 November 2008** "*carried over from legacy case*", that is mortgage loan account ending **6896** which the Complainant held jointly with her father. As previously outlined, the Provider allowed the Complainant to retain the fixed interest rate of 4.49% that had applied to mortgage loan account ending **6896** on her new mortgage loan ending **4741** in her sole name until **30 November 2008**. However, it is clear to me that the particulars of each mortgage loan and the terms and conditions attaching to each mortgage loan were entirely distinct and separate.

I consider it unreasonable for the Complainant's representative to state that just because the Complainant was an applicant in respect of both mortgage loans that this somehow linked the loan agreements applicable to each mortgage loan. Contrary to the Complainant's representative's assertions, the loan amount differs in respect of both loan agreements and so too does the term of each loan. It is also important to highlight that mortgage loan account ending **6896** was held in the joint names of the Complainant and her father, however, in circumstances where the Complainant wished to remove her father's name from the mortgage loan, which amounted to a material change, a completely new mortgage loan offer had to be issued to the Complainant in her sole name, which she duly accepted.

Therefore, I do not consider it reasonable for the Complainant's representative to posit that my reference to one "*typographical error*" in my Preliminary Decision dated **25 May 2020** amounts to an "*Error of Fact*".

I note that there is no other mention of "*Tracker Mortgage*" in the Complainant's loan documentation apart from **Condition 14 (b)** of the **Loan Offer - General Terms and Conditions**, as outlined above and to which the Complainant's representative alludes to in his post Preliminary Decision submissions. However, I am of the view that **Condition 14(b)** did not apply to the Complainant's mortgage loan given the interest rate applicable was a fixed interest rate as opposed to a tracker interest rate. If the Complainant's mortgage loan was a tracker mortgage then I would expect the particulars of the Loan Offer Letter and Specific Loan Offer Conditions to contain details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14(b)**, however, there is no reference to a fixed rate margin or an ECB rate in the Complainant's loan documentation.

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Whilst this error on the part of the Provider is entirely unsatisfactory, I am satisfied that the particulars of the **Loan Offer Letter** are sufficiently clear as to the type of mortgage offered to the Complainant and confirm that the Complainant was offered a fixed interest rate mortgage loan that after which the Complainant would have the option of applying a further fixed rate and or a variable interest rate, which could be adjusted by the Provider from time to time as opposed to a tracker interest rate.

However, whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainant's mortgage loan account, I am also of the view that the information provided to the Complainant in the **Loan Acceptance** was somewhat confusing.

The standards expected of the Provider in all its dealings with the Complainant are set out in the **Consumer Protection Code 2006**, which came into force on **1 August 2006**, and provides that:

"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers".

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainant. Whilst I accept that errors can occur and in this circumstance that error did not affect the Complainant's underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought this typographical error to the Complainant's attention and highlighted how the error occurred, in advance of the Complainant making her complaint to this office.

I note that in its formal response to this office dated **24 June 2015**, the Provider offered a goodwill gesture of €3,000.00 to the Complainant. It does not appear that the Complainant accepted this offer at that time. That said, I understand that this offer remains available to the Complainant.

I note that by way of letter dated **23 November 2020**, the Provider offered the Complainant a goodwill offer of €1,250 with a view to resolving her complaint and noted that the offer "*remains open at any time up until the FSPO makes a final decision on her complaint*". The Complainant did not accept the Provider's goodwill offer.

I consider these offers to be a reasonable attempt to resolve this complaint in the context of the Provider's error.

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In my Preliminary Decision dated **25 May 2021**, I stated that where I consider that an offer made by a Provider is reasonable, and that offer remains available to the Complainant, I would not generally uphold a complaint. However, I also noted in my Preliminary Decision that the Provider stipulated in its letter of **23 November 2020** that the offer of €1,250 to the Complainant *“only remains available to her up until I make my final decision”*. In those circumstances, I indicated my intention to partially uphold the complaint.

Following the issuing of my Preliminary Decision on **25 May 2021**, the Provider sought to clarify matters in relation to its goodwill offer of €1,250 to the Complainant. In this regard, the Provider, in its post Preliminary Decision submission dated **01 June 2021**, submits as follows:

“An Additional Point of Fact (by way of clarification)”

We wish to clarify that the Bank’s offer of €1,250.00 to the customer was unconditional and not time bound in any way. It remains open to the customer to accept at any time. The offer also remains open should the Ombudsman wish to take it into consideration in terms of reaching a final decision on the complaint.

For the avoidance of any doubt, we would clarify that it was not the Bank’s intention to withdraw the offer of €1,250.00 at any point”.

I welcome the Provider’s clarification on this point and note that both gestures of goodwill offered by the Provider remain available to the Complainant to accept.

Both the Complainant and the Complainant’s representative in their respective post Preliminary Decision submissions dated **01 June 2021** and **16 June 2021** appear to be of the view that the Provider’s goodwill gesture was *“shredded from €3,000.00 to €1,250.00”*. The Complainant’s representative, in his post Preliminary Decision submissions dated **16 June 2021**, further states that my office has *“punish[ed] [his] client for continuing her challenge and now she is punished for doing that in the terms of the offer of compensation”*. I do not accept the Complainant’s representative’s assertion that my office has somehow *“punished”* the Complainant and consider this submission to be entirely misplaced and without merit. At no point in my Preliminary Decision dated **25 May 2020** did I propose to direct that the Provider reduce the compensation already offered by the Provider. On the contrary, I stated that I intended to direct the Provider pay to the Complainant a sum of €1,250 compensation as the Provider had previously stipulated that that particular offer only remained available for a certain period of time whereas the offer of €3,000 remained available to the Complainant to accept at any time.

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It is now clear to me that the Provider's two offers of goodwill totalling €4,250 remain open to the Complainant to accept at any time. Therefore, in circumstances where I consider the offers made by the Provider to be a reasonable attempt to resolve this complaint in the context of the Provider's error, 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**

12 July 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.