



<u>Decision Ref:</u>	2021-0266
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to one of two mortgage loan accounts held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' buy-to-let property.

The loan amount is €335,750 for a term of 25 years. Mortgage loan account ending **5615-1** was drawn down in **April 2007** on a fixed rate of 4.20% until **30 March 2009**, with a variable rate to apply thereafter.

The Complainants' Case

The Complainants state that they hold two mortgage loan accounts with the Provider, mortgage loan account ending **5615-1** which is the subject of this complaint and mortgage loan account ending **0456**.

The Complainants explain that they received a letter from the Provider dated **07 December 2017** informing them that mortgage loan account ending **0456** was deemed to be impacted under the Central Bank led Tracker Mortgage Examination (the "Examination") because of the use of "*ambiguous and confusing terminology*" in the loan documents provided to them. The Complainants note that they were offered redress and compensation as a result of the Provider's failure in respect of mortgage loan account ending **0456**.

The Complainants contend that mortgage loan account ending **0456** was “taken out” at the same time as mortgage loan account ending **5615-1**. The Complainants state that they “presumed that [mortgage loan accounts ending 5615-1 and 0456] were operating on an equal footing – if they were not, this was not clear to [them]” and maintain that both mortgage loans were “established on the same basis” and “shared the same tracker interest rate feature”. The Complainants state that “it is correct that both applications we[re] separate” and that is “obvious” however, they are of the view that “it is untenable to maintain that they were not linked”. The Complainants further state that they considered both mortgage loan accounts to be “interrelated” because they concerned their “overall liability” with the Provider. The Complainants are of the view that it is “entirely reasonable that [they] would have thought that, and operated on that basis”.

The Complainants detail that they wrote to the Provider on **03 January 2018** regarding the treatment of mortgage loan account ending **5615-1** noting that there was also “a lack of transparency and the use of ambiguous and confusing terminology” in the documentation received from the Provider in respect of that mortgage loan account. In this regard, the Complainants note that the loan offer letter for mortgage loan account ending **5615-1** does not state “[t]he interest rate applicable at the end of the fixed rate” and this “is clearly ambiguous”. In response to the Provider’s contention that **General Condition 14 (c)(ii)** of the **Standard Mortgage General Terms and Conditions** clearly explains what is to happen at the end of the fixed interest rate period, the Complainants contend that the Provider’s **Standard Mortgage General Terms and Conditions** do not “form part of the loan offer and acceptance signed by [them] and to [their] knowledge was not received by [them]” and “did not feature in the paperwork supplied to” their solicitor at the time. The Complainants rely on a cover letter from the Provider to the Complainants’ solicitor dated **31 January 2007** in this regard. The Complainants state that “there is no reference to this document in either the Specific Loan Offer Conditions, the General Terms and Conditions attached to Loan Offer or on the Loan Acceptance form signed by [them].” The Complainants submit that they are “satisfied that not only were [they] not aware of the content of those conditions, [they] could not have been aware of them as they were not produced to [them] at any stage in the process”. The Complainants further note that this document did not form part of the Provider’s response dated **20 March 2019** to their subject access request. The Complainants are therefore of the view that all references to **Standard Mortgage General Terms and Conditions** “should be ignored”.

The Complainants note that the **Loan Acceptance** form attached to the Letter of Loan Offer which they signed on **19 February 2007** “clearly states that [their] mortgage is a Tracker Mortgage”. The Complainants assert that the “appearance of the term in this manner led [them] to understand that what we are dealing with was in fact what we understood at all times i.e. that this mortgage was a tracker rate mortgage, and that it would revert to a tracker rate”.

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The Complainants state that the *“inconsistency between the Loan Offer, which is silent on the default rate, and the Loan Acceptance which refers expressly to “Tracker Mortgage” is certainly unfortunate, but is one which must be construed in [their] favour”*.

The Complainants contend that the Provider sent an email to their broker on **11 January 2007** attaching an **Agreed in Principle** document which *“shows that the Mortgage was approved at an interest rate of 4.65% (1.15 margin over ECB rate of 3.50%)”*. The Complainants further assert that they *“would not have agreed to permanently giving up [their] right/option to a tracker interest rate at the expiry of the fixed rate period merely for the temporary benefit of fixing the interest rate for a 2 year period”*. The Complainants are of the view that the Provider’s *“continued treatment of [their] mortgage other than on an ECB tracker basis is wrong, unjustified and without any valid basis”*.

The Complainants explain that they sent further letters to the Provider on **09 March 2018** and **21 May 2018** to follow up on their letter of complaint dated **03 January 2018** and received letters from the Provider dated **08 January 2018, 13 March 2018, 23 May 2018, 17 July 2018** and **11 September 2018**. The Complainants state that they received a letter dated **22 October 2018** from the Provider to confirm that the Provider had completed its review of mortgage loan account ending **5615-1** and that this account was deemed not to have been impacted under the Examination.

The Complainants are seeking an offer of redress and compensation in respect of mortgage loan account ending **5615-1**, similar to mortgage account ending **0456-1**.

The Provider’s Case

The Provider submits that the Complainants applied for mortgage loan account ending **5615-1** on **13 December 2006**. The Provider notes that the Complainants initially applied for a split mortgage, with a portion of the loan to avail of a tracker interest rate and the remainder to avail of a fixed interest rate.

The Provider states that the Complainants availed of the services of a third-party broker during the application stage of the mortgage loan. The Provider notes that the Second Complainant was employed by the third-party broker at the time and acted in her capacity as a broker during the application stage of the Complainants’ mortgage loan. The Provider further states that in accordance with its agreement with brokers, the Provider was prohibited from contacting the broker customers directly until the mortgage funds were drawn down.

The Provider details that no advice or recommendation regarding products or suitability of products was provided by the Provider. The Provider states that its own practice was that the range of interest rate options that were available to customers, subject to credit criteria, eligibility and terms and conditions, were outlined to customers. The Provider therefore confirms that it provided information when requested in relation to the various interest rate options that may have been available at that time. The Provider further states that the decision as to what interest rate to select rested with the Complainants.

The Provider submits that it received an email from the Complainants' third-party broker on **18 January 2007** stating that the Complainants wished to avail of a fixed interest rate of 4.20% in respect of their mortgage loan. The Provider states that it subsequently issued a **Letter of Loan Offer** dated **01 February 2007** which "*clearly confirmed*" that the Complainants' mortgage was to draw down on a fixed interest rate as opposed to a tracker interest rate. The Provider states that the particulars of the Complainants' **Letter of Loan Offer** outlined the monthly loan repayment amount based on a fixed interest rate of 4.20% and details that the **Letter of Loan Offer** also outlined the monthly mortgage loan repayment amount due based on the Provider's variable rate that would apply on the expiry of the fixed rate. The Provider submits that the **Letter of Loan Offer** "*did not contain any condition indicating that a tracker interest rate would be made available to the customers when the fixed interest rate period ended, or at any future date.*" The Provider states that "*such a reference would have been necessary for a tracker interest rate to apply.*"

The Provider details that the information in relation to the default interest rate and interest rates that the Complainants may opt to choose upon the expiry of the initial fixed interest rate period is outlined at "*section 14 (c) of the Standard Mortgage General Terms and Conditions applicable to the customers' mortgage loan*". The Provider states that **condition 14 (c) of the Standard Mortgage General Terms and Conditions** and in particular, **condition 14 (c)(ii)**, does not specify that a tracker interest rate would be made available to the customers when the fixed interest rate period ended, or at another future date. The Provider asserts that this condition "*clearly explains that on expiry of the fixed interest rate period the customers may 'opt to choose a fixed interest rate for a further Fixed Rate Period.*" The Provider further contends that this condition also explains that in the event that no option is made by the Provider, or if the Complainants fail to exercise the option, the interest rate that will apply will "*be a variable interest rate which may be increased or decreased by the Lender at any time.*"

The Provider also relies on the **European Standardised Information Sheet** ("ESIS") which accompanied the Complainants' **Letter of Loan Offer**, which the Provider states described the interest rate type as "*FIXED and variable thereafter.*"

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The Provider states that the *“purpose of the ESIS document was to summarise the information contained in the customers’ Letter of Loan Offer.”* The Provider contends that **Point 3 (ii) of the ESIS document** outlined what would happen at the end of the fixed interest rate period and also stated that *“the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time”*.

The Provider submits that the variable interest rate described in both the **Standard Mortgage General Terms and Conditions** and the **ESIS** is the Provider’s standard variable rate, which is a variable rate that can be increased or decreased by the Provider at any time. The Provider states that *“[b]y comparison, a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will only rise and fall in line with movements in the ECB base rate.”* The Provider further states that the ECB base rate *“cannot be changed by [the Provider]”*.

The Provider maintains that it has *“never offered a fixed interest rate that automatically defaulted to a tracker interest rate.”* The Provider further submits that it is *“important to note that interest rate products are subject to change and can be withdrawn by the Bank at any time”*. The Provider therefore maintains that a written or verbal communication which guaranteed the availability of a specific interest rate product at a future date could not have been provided to the Complainants by the Provider.

The Provider details that the Complainants were not offered a tracker interest rate on their mortgage loan upon expiry of the initial fixed interest rate period in **April 2009** because the Provider had withdrawn them from the market on **30 September 2008**. In addition, the Provider states that, based on their loan documentation, the Complainants *“had no contractual entitlement to a tracker interest rate”* and therefore the Complainants could not have formed any reasonable expectation of defaulting to a tracker rate at the end of the fixed rate period in **2009**.

Prior to the expiry of the fixed interest rate applicable to the Complainants’ mortgage loan, the Provider explains that it wrote to the Complainants noting that the mortgage loan would automatically default to the Provider’s standard variable rate when the fixed interest rate expired and *“informed the customers of the option to avail of a fixed interest rate product”*. The Provider submits that it has not been able to locate the specific letter that issued to the Complainants in **2009** however notes that the letter *“invited the customers to contact the Bank”* in relation to the fixed rate option available at that time.

The Provider notes that in circumstances where it did not receive a response from the Complainants in relation to this letter, mortgage loan account ending **5615-1** *“automatically rolled onto the Bank’s Standard Variable Rate when the initial fixed interest rate ended in April 2009”*.

The Provider states that the Complainants’ mortgage loan account remained on a standard variable rate until **April 2019**, at which point the Complainants’ chose an interest rate of 2.60% fixed until **30 June 2023**.

In response to the Complainants’ assertion that confusing and ambiguous terminology was used on mortgage loan account ending **5615-1** as well as **0456** in respect of which the Provider has admitted to and offered redress and compensation, the Provider asserts that mortgage loan accounts ending **5615-1** and **0456** are *“completely separate”* and *“followed different and separate mortgage journeys and drew down on different terms and conditions as detailed in the separate loan documentation applicable to each loan”*. The Provider notes that mortgage loan account ending **0456** was drawn down on a tracker variable rate and subsequently switched to a fixed interest rate on the request of the Complainants, whereas mortgage loan account ending **5615-1**, which is the subject of this complaint, was drawn down on a fixed interest rate. In relation to mortgage loan account ending **0456**, the Provider states that following a review of that particular mortgage loan account in line with the Central Bank’s framework, it was determined that this mortgage loan was impacted by the use of ambiguous and confusing terminology regarding what default interest rate was to apply on expiry of the fixed rate term and therefore redress and compensation was offered to the Complainants. However, the Provider contends that it is *“satisfied that the information made available to the customers in respect of [account ending 5615-1] was sufficiently clear and transparent with respect to the consequences of drawing down their mortgage on a fixed interest rate in April 2007”* and what would transpire at the end of the initial fixed interest rate period.

The Provider acknowledges that the **Loan Acceptance** section of the Complainants’ **Letter of Offer Letter** erroneously referred to the term *“Tracker Mortgage”* and this was a *“typographical error.”* The Provider states that it is *“satisfied that this erroneous reference to a ‘tracker mortgage’ did not confirm that the interest rate type applicable to the mortgage account was a tracker interest rate.”* The Provider confirms that the **Loan Acceptance** was only one part of the mortgage loan documentation provided and should be read in conjunction with the **Letter of Loan Offer** and all of the relevant terms and conditions.

The Provider details that following the Examination carried out by the Provider, it was determined that this *“incorrect”* reference to a tracker mortgage *“was not capable of transforming the entire basis of the loan to a tracker interest rate when there was no reference to a tracker interest rate in other documentation evidencing the agreement.”* The Provider further details that the Examination has found that this *“incorrect reference to a ‘Tracker Mortgage’ did not in itself create a right or expectation to a tracker interest rate.”* The Provider maintains that when taking *“the full customer journey and all the mortgage documentation provided to the customers into account”*, it does not consider that the Complainants could have formed any *“reasonable expectation that their mortgage loan would default to a tracker rate at the end of the initial fixed rate period in 2009”*.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- A. The Provider incorrectly failed to offer the Complainants the option to apply a tracker interest rate to mortgage account ending **5615-1** on the expiry of the two-year fixed interest rate period in **2009**; and
- B. The Provider incorrectly failed to advise the Complainants in **2007** that, by opting for a two-year fixed interest rate, they would not be entitled to revert to the tracker interest rate at the end of the fixed period.

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 do 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 are sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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A Preliminary Decision was issued to the parties on **20 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 Complainants to this office dated **02 June 2021**; and
3. Letter from the Provider to this office dated **18 June 2021**.

Copies of these additional submissions were exchanged between the parties.

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

Before dealing with the substance of the complaint, I note that the application for the mortgage loan was submitted by the Complainants 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.

In addition, it is important to note at the outset that the Complainants appear to be of the view that they should have been offered redress and compensation as part of the Provider's Tracker Mortgage Examination on mortgage loan account ending **5615-1**, which is the mortgage account the subject of this complaint, because they were offered redress and compensation by the Provider in respect of their other mortgage loan account **0456** and the Complainants view both mortgage loan accounts as being "*linked*" or "*inter-related*". In this regard, it is important for the Complainants to understand that each of the mortgage loans not only relate to different secured properties and different loan amounts, but also drew down on different interest rate products and different terms and conditions as outlined in the separate loan agreements applicable to each mortgage loan. Following a review of the mortgage loan documentation in relation to each mortgage loan, it is clear to me that each mortgage loan is entirely separate and were drawn down on different terms and conditions. Therefore, I do not consider it appropriate to draw a comparison between the Provider's treatment of each mortgage loan account as part of the Provider's Tracker Mortgage Examination in my determination of this complaint which relates only to mortgage loan account ending **5615-1**.

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The issue to be determined is (i) whether the Provider failed to offer the Complainants the option to apply a tracker interest rate to mortgage account ending **5615-1** on the expiry of the two-year fixed interest rate period in **2009** and (ii) whether the Provider failed to advise the Complainants in **2007** that, by opting for a two-year fixed interest rate, they would not be entitled to revert to the tracker interest rate at the end of the fixed period. In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also necessary to consider the details of certain interactions between the Provider and the Complainants between **January 2007** and **March 2009**.

An **Agreed in Principle** document dated **10 January 2007** was issued by the Provider and submitted by the Complainants in evidence. This document details as follows;

Amount	€335,750	Term: 25 years	Our Ref:
Interest Rate	4.65%	Variable	Direct Line:
Decision:		Agreed in Principle	

The Second Complainant, who I understand was employed by the third-party broker at the time and who acted in her professional capacity as a broker during the application stage of the Complainants' mortgage loan, requested that a fixed rate of 4.2% be applied to the mortgage loan by way of email to the Provider dated **18 January 2007**. The email dated **18 January 2007** details as follows:

"...Please note the fixed rate on the letter of offer should read 4.2% as agreed with [redacted]..."

If you could arrange for letter of offer to be issued asap that would be much appreciated as need to sign contracts".

A **Letter of Loan Offer** dated **01 February 2007** was subsequently issued by the Provider which details as follows:

Purpose of Loan : *Buy to Let*

Repayment Details **Loan Account**

Mortgage Account Number : *[account ending 5615]*

Loan Type : *Fixed Rate 4.20% until 30/03/2009 100%*

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	<i>Interest only</i>
<i>Loan Amount</i>	<i>: €335,750.00</i>
<i>Interest Rate</i>	<i>: 4.2%</i>
<i>Interest Type</i>	<i>: Fixed</i>
<i>Term</i>	<i>: 25 years</i>
<i>Monthly Loan Repayment</i>	<i>: €1,175.13 from 01/03/2007</i>
	<i>: €1,400.67 from 01/03/2009</i>
	<i>: €2,213.85 from 01/03/2012</i>
<i>Retention Amount</i>	<i>: €0.00"</i>

The **Specific Loan Offer Conditions** attaching to the **Letter of Loan Offer** detail as follows:

"Life policy schedule for the amount and term of the mortgage to be forwarded to this office prior to the release of the mortgage monies.

A fully completed Direct Debit Mandate to be forwarded to this office prior to release of the mortgage monies.

Two signed notice of interest in fire policy forms to be forwarded to this office prior to release of the mortgage monies (these forms are not required if buildings insurance is taken with [the Provider].

A copy of the buildings insurance schedule, with the amount of cover to be at least that recommended by our valuer to be forwarded to this office prior to the release of the mortgage monies.

One copy of the offer of advance to be signed by all applicants and witnessed by the acting Solicitor and returned to this office prior to the release of the mortgage monies.

A satisfactory Valuation report on the Banks standard form to be forwarded to this office prior to the release of the mortgage monies.

Interest Only repayments will be collected for this mortgage for the first 60 months, after that the mortgage will revert to Capital and Interest.

The repayments overleaf are based on interest only.

Prior to drawdown we require the last 3 months original bank statements on [account ending 1478] with these proving satisfactory / showing no deteriorating trends.

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Acceptable original identification to be sighted and confirmed to us by any [Provider] Branch if not already submitted and approved.

Separate acceptable original address verification to be sighted and confirmed to us by any [Provider] branch if not already submitted and approved."

The **Specific Loan Offer Conditions** had to be met by the Complainants before the Provider was in a position to release the mortgage monies to the Complainants.

Two sets of **General Terms and Conditions** have been furnished in evidence by the Provider: The **General Terms and Conditions** and the **Standard Mortgage General Terms and Conditions**.

The set titled **Standard Mortgage General Terms and Conditions** are stated to be effective from "01/06/2006" and 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."

I accept that the **Standard Mortgage General Terms and Conditions** are supplemental to the **Specific Loan Offer Conditions** and the **General Terms and Conditions** comprised in the Complainants' **Loan Offer Letter**.

General Condition 14 of the **Standard Mortgage General Terms and 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 drawn down.

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(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 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 to the Loan 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 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...”

The European Standardised Information Sheet attaching to the Complainants’ **Letter of Loan Offer** 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.

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3. Interest Rate

Interest rate: 4.2%

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;
- (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."

The Complainants signed their acceptance of **the General Terms and Conditions** and **Specific Conditions** attached to the **Letter of Loan Offer** on **19 February 2007**. The **Loan Acceptance** signed by the Complainants states as follows:

"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 Purchase 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 deed released."

It is clear from **Condition 14 (c)** that, on the expiry of the fixed interest rate period on the Complainants' 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 Complainants.

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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)** does not mention the application of a tracker interest rate to the Complainants' mortgage loan.

The Complainants contend that neither they nor their solicitor at the time received a copy of the **Standard Mortgage General Terms and Conditions** from the Provider. The Complainants refer to a letter dated **31 January 2007** that was sent by the Provider to the Complainants' solicitor which "*takes care to refer to a number of documents in addition to the original loan offer letter*" and "*proceeds to itemise what documents are contained in the Solicitor's Mortgage Pack, and none of what follows is a document called the Standard Mortgage General Terms and Conditions.*" The Complainants have submitted a copy of an unsigned letter dated **31 January 2007** that is not on headed paper which was purportedly issued by the Provider to the Complainants' solicitor and details as follows:

"We understand that you act for the above applicant(s) who has/have been offered [name of Provider] 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..."

The Complainants further note that the Provider's **Standard Mortgage General Terms and Conditions** were not included in the documentation received from the Provider in **2019** as part of the Complainants' subject access request. The Provider explains that the **General Terms and Conditions** are contained within the **Letter of Loan Offer** and the **Standard Mortgage General Terms and Conditions** were issued as a booklet which is supplemental to and forms part of the Complainants' **Letter of Loan Offer**. The Provider submits that it is "*confident*" that the **Standard Mortgage General Terms and Conditions** were sent to the Complainants' solicitor. The Provider explains that the **Standard Mortgage General Terms and Conditions** do not contain any personal information and therefore would not be furnished as part of a data protection request.

The evidence suggests that any documentation that issued in **2007** was issued by the Provider to the third-party broker and/or the Complainants' solicitor. Whilst the letter dated **31 January 2007** refers to the **General Terms and Conditions** being issued, it is unclear whether the Provider intended this wording to also encapsulate the Provider's **Standard Mortgage General Terms and Conditions** which formed part of the **Letter of Loan Offer**. Having considered the evidence, there does not appear to me to be any reason why the Provider would not have issued the full set of the terms and conditions to the Complainants' solicitor in **January 2007** or why the Complainants' solicitor would not have received them.

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I note that the Complainants appear to have received the **Letter of Loan Offer** that issued on **31 January 2007** and in those circumstances I have no reason to doubt that all terms and conditions pertaining to the Complainants' mortgage loan account were issued to the Complainants' agents. Further, I have not been provided with any evidence by the Complainants to suggest that their solicitor raised any issues or concerns as to the content of the **Letter of Loan Offer** with the Provider, to include the terms and conditions attaching to the mortgage loan or indeed the applicable interest rate at draw down or the applicable interest rate after the expiry of the initial fixed interest rate period.

Any issues in relation to data protection or subject access requests are more appropriate for the office of the Data Protection Commission.

The Complainants, in their post Preliminary Decision submission dated **02 June 2021**, state as follows:

“An Error of Fact

You have pointed to a lack of clarity concerning whether the General Terms and Conditions were intended (by the Provider) to encapsulate the Standard Mortgage General Terms and Conditions. You have stated that the source of that lack of clarity lies with the Provider. We have stated that the Standard Mortgage General Terms and Conditions were not received by us or our solicitor. Yet you have resolved the point in favour of the Provider. It is our view that you have no valid basis for doing so. The letter of loan offer did not refer to the Standard Mortgage General Terms and Conditions. Had it done so it would support the contention that the Provider had, in fact, supplied them. Given the lack of clarity identified by you and the failure of the letter of loan offer to refer to the Standard Mortgage General Terms and Conditions, it is surely a conclusion too far to state that “I have no reason to doubt that all terms and conditions pertaining to the Complainants' mortgage loan account were issued to the Complainants' agents”. Neither is it of probative to point to the absence of any issues or concerns raised by us by or by our solicitor as to the content of the letter of offer. This letter did not refer to the Standard Mortgage General Terms and Conditions and did not enclose them. How then would it have been possible to raise a point about a document the existence of which was unknown to us or to our advisors? That fundamental point is not addressed by you”.

I have considered the Complainants' additional submissions in relation to what they term as an *“Error of Fact”* in my Preliminary Decision. However, I remain of the view that there does not appear to me to be any reason why the Provider would not have issued the full set of the terms and conditions to the Complainants' solicitor in **January 2007** or why the Complainants' solicitor would not have received them.

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The evidence demonstrates that the Complainants signed the **Loan Acceptance** acknowledging receipt of the **General Terms and Conditions** and **Specific Conditions** attached to the **Letter of Loan Offer** and that they had the **Letter of Loan Offer, the Specific Loan Offer Conditions** and the **General Terms and Conditions** explained to them by their solicitor and they understood them. Therefore, I find it difficult to understand why the Complainants appear to be of the view that their mortgage loan account ending **5615-1** *“was approved at an interest rate of 4.65% (1.15 margin over ECB rate of 3.50%)”*. The Complainants rely on the **Agreed in Principle** document, as referred to above, in this regard.

However, it is important for the Complainants to be aware that the **Agreed in Principle** document does not amount to a formal loan offer and no formal offer of a tracker interest rate loan ever issued from the Provider in respect of mortgage loan account ending **5615-1**. The evidence shows that the only **Letter of Loan Offer** that issued to the Complainants in respect of mortgage loan account ending **5615-1** was for a two-year fixed interest rate. The Complainants maintain that they *“would not have agreed to permanently giving up [their] right/option to a tracker interest rate at the expiry of the fixed rate period merely for the temporary benefit of fixing the interest rate for a 2 year period”*. If it was the case that the Complainants were of the view that mortgage loan commencing on a two- year fixed interest rate loan was not suitable to them, then the Complainants could have decided not to sign and draw down the loan and instead, seek an alternative rate with the Provider or indeed with another mortgage provider. However, the Complainants did not do so. The Provider has submitted that prior to the expiry of the initial two-year fixed interest rate period in **April 2009**, it issued a letter to the Complainants noting that the fixed interest rate period was coming to an end and outlined what would transpire upon the expiry of the fixed interest rate period. I note that the Provider has been unable to locate a copy of the specific letter that issued to the Complainants in this regard. The Provider submits that the *“reason for a particular document not being retained on the customers’ file may be due to the expiration of the Bank’s agreed period for retention of documents and consequently, the Bank may have securely disposed of the relevant document”*. The Provider further notes that its agreed period for retention of documents *“is in line with our obligations under data protection and other legislation”*.

I am disappointed to note that a copy of this letter that purportedly issued to the Complainants in **April 2009** has not been furnished in evidence to this office by the Provider.

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Provision 49 of the **Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) 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 Complainants' mortgage loan was incepted for a term of 25 years commencing from **April 2007** and this letter purportedly issued in **April 2009**. It is understood that the mortgage account remains presently active with the Provider. As such, it appears to me that the Provider is obliged to retain that documentation on file for 6 years from the date the relationship with the mortgage holder ends.

However, the Provider has furnished this office with a **template letter** which was in use at that time. The **template letter** details as follows:

"The fixed rate on your mortgage is coming to an end on 30 April 2009 so now it's time to start thinking about your next mortgage deal. Any borrowings you have on this Fixed Rate will automatically roll to our Standard Variable Rate from 01 May 2009, in line with the terms and conditions of your mortgage. The Standard Variable Rate will be 3.85% (APR 3.9% effective from 1 April 2009).

Alternatively, you can select a new Fixed Rate. With this, you will continue to have the security of knowing what your monthly repayments will be. You can choose your new fixed rate over 2,3 and 5 years.

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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 April your current rate will automatically revert to the Standard Variable Rate...."

It does not appear to be in dispute between the parties that this letter was issued by the Provider and received by the Complainants in or around **April 2009**. In the absence of a response to this letter from the Provider, the Complainants' mortgage loan account defaulted to the Provider's standard variable rate.

I have not been provided with any evidence that would indicate that the Complainants raised any concerns with the Provider when their mortgage loan account defaulted to the Provider's standard variable rate in **April 2009**. I note that the Complainants' mortgage loan account remained on the Provider's standard variable rate for 10 years until **08 April 2019**, at which point the Complainants chose an interest rate of 2.60% fixed until **30 June 2023**.

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 Complainants understood this had to be repaid before the deeds of the property could be released and returned. 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 Complainants and confirm that the Complainants were offered a mortgage loan on a fixed interest rate as opposed to a tracker rate.

The Complainants appear to be of the view that they had "*a right/option to a tracker interest rate (ECB +0.75%)*" in respect of mortgage loan account ending **5615-1** on expiry of the two-year fixed interest rate. It is unclear as to where this specific tracker interest rate stems from on the Complainants' part, however it is important for the Complainants to understand that they were 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 their mortgage loan account at the end of the two-year fixed interest rate or indeed at any time during the term of the loan.

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Therefore, I do not consider it reasonable for the Complainants to contend that the Provider failed to advise them in **2007** that by opting for the two-year fixed interest rate they 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 Complainants' mortgage loan in the first instance.

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

The standards expected of the Provider in all its dealings with the Complainants are set out in the **Consumer Protection Code 2006** and the **Consumer Protection Code 2012** which provide 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 Complainants. Whilst I accept that errors can occur and in this circumstance that error did not affect the Complainants' underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought this typographical error to the Complainants' attention and highlighted how the error occurred, in advance of the Complainants making their complaint to this office.

I have considered the Complainants' mortgage loan documentation in its entirety and it appears to me that the Provider was under no obligation to offer the Complainants a tracker interest rate when they applied for a mortgage loan in **December 2006**. If the Complainants were of the view that the fixed interest rate offered was not suitable to them, the Complainants could have decided not to accept the offer made by the Provider. Instead, the Complainants signed the **Loan Acceptance** on **19 February 2007** in the presence of their solicitor and confirmed that they accepted the **Letter of Loan Offer** on the terms and conditions set out therein.

I note that by way of letter dated **10 November 2020**, the Provider offered the Complainants a goodwill payment €1,250 with a view to resolving their complaint and noted that the offer "*remains open at any time up until the FSPO makes a final decision on your complaint*". By way of letter to this office dated **25 November 2020**, the Complainants declined to accept the Provider's goodwill offer and requested this office to proceed with the determination of their complaint.

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I consider these offers to be a reasonable attempt to resolve this complaint in the context of the Provider's error. In my Preliminary Decision dated **20 May 2021**, I stated that where I consider that an offer made by a Provider is reasonable, and that offer remains available to the Complainants, I would not generally uphold a complaint. However, I also noted in my Preliminary Decision that the Provider stipulated in its letter of **10 November 2020** that the offer of €1,250 to the Complainants *"only remains available to the Complainants up until I make my final decision"*. In those circumstances, I proposed to partially uphold the complaint.

Following the issuing of my Preliminary Decision on **20 May 2021**, the Provider sought to clarify matters in relation to its goodwill offer of €1,250 to the Complainants. 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 customers was unconditional and not time bound in any way. It remains open to the customers 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."

The Provider, in its post Preliminary Decision submission dated **18 June 2021**, submits that *"the offer of €1,250 to the customers to remedy and conclude this complaint is unconditional and not time bound in any way whilst this complaint remains open with the FSPO"*.

I welcome the Provider's clarification on this point and note that the gesture of goodwill offered by the Provider remains available to the Complainants to accept.

As the Provider's offer of €1,250 remains open to the Complainants to accept at any time, 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.

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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**

4 August 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.