



<u>Decision Ref:</u>	2021-0292
<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 Complainants with the Provider. The mortgage loan account which is the subject of the complaint was secured on the Complainants' buy-to-let ("BTL") property.

The loan amount was €100,000 and the term of the loan was 25 years. The Mortgage Loan Offer Letter which was signed on **29 June 2007** outlined that the interest rate applicable to the loan was a 24-month fixed rate of 4.79%, with a tracker interest rate of ECB + 1.10% to apply thereafter.

The Complainants' Case

The Complainants detail that an ECB tracker interest rate applied to their mortgage loan account ending **7462** which was secured on their BTL property.

They detail that they "went into arrears in the Spring of [2018] and brought it to the attention of [the Provider] that we were selling our PDH after a marriage split and with circa €400,000 in equity in the house we would be in a position to clear this mortgage in full."

The Complainants submit that they asked the Provider to accept interest only repayments on mortgage loan account ending **7462** for a year, *“by which time we would expect that our PDH would be sold and we would pay off the mortgage in full”*. The Complainants submit that the Provider agreed to their request but only on the condition *“that we agreed to move off the ECB tracker rate to a standard variable rate”*.

The Complainants submit that they complained to the Provider’s complaints department *“about what we thought was the opportunism of this decision”* but their complaint was *“denied”* by the Provider.

At the time of making the complaint in **2018** the Complainants wanted the Provider to grant the alternative repayment arrangement but allow the mortgage to remain on the tracker interest rate.

The Provider’s Case

The Provider submits that it issued a Mortgage Loan Offer Letter to the Complainants on **26 June 2007** which was signed and accepted by the Complainants on **29 June 2007**. It states that the mortgage loan account was drawn down on **24 July 2007**.

The Provider states that the Loan Offer Letter provided for interest only repayments for the first 7 years with capital and interest repayments to commence thereafter. It states that as per the Loan Offer Letter, the Complainants were obliged to repay both the capital and the interest on the mortgage loan account. It states that by seeking to pay interest only, the Complainants were seeking to vary the terms and conditions of the Loan Offer Letter. It refers to **Condition 4(d)** which specifies that the Provider *“may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amount payable in respect of the Loan”*. It states that therefore the Provider will not amend any such terms and conditions without the express consent and agreement of the Complainants.

The Provider submits that it implemented a new pricing policy in **late 2012** in respect of non-CCMA (BTL) customers who were availing of tracker interest rate mortgages. The Provider details the following in respect of its pricing policy:

“The Provider made a commercial decision to implement a pricing policy change in respect of Buy-to-Let mortgage loans. As part of a financial review, if a change of terms and conditions is deemed appropriate (e.g. Interest Only), the Buy-To-Let Tracker customer will be offered a new Standard Variable Interest Rate mortgage for the life of the loan, which is initially priced at 1% above what they are currently paying on their tracker mortgage.

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This standard variable interest rate will be at the discretion of the Provider and will be influenced by market interest rates and can move up or down over the life of the mortgage. The tracker status of the loan ends completely on taking up of new amendments to the terms and conditions. Buy-To-Let Tracker customers who do not amend their terms and conditions continue on their existing tracker interest rate. Exclusions from the policy applied for capitalisations of arrears, customers who had agreed consensual asset disposal due to financial distress or those customers entering a personal insolvency arrangement. In 2014, exclusions were expanded to include customers with sales at shortfall/residual debt.”

The Provider has outlined the following interactions with the Complainants in respect of the mortgage loan account:

- Following the move to capital and interest repayments from **2014**, the mortgage periodically entered arrears which were occasionally cleared with the payment of a lump sum.
- On **18 November 2015**, the Second Complainant outlined the terms of the Complainants’ separation agreement to the Provider, whereby the Second Complainant would retain ownership of the properties mortgaged with the Provider. The sale of properties would be sought to clear debt; however, the sale of the properties would not be possible until the separation was finalised. Rental income from other properties would be used to maintain payments on the mortgage loan account.
- On **24 May 2016**, the Provider received correspondence from the Second Complainant advising of their intention to put their primary residence on the market and for the proceeds of sale to be used to clear the balance of the subject mortgage loan account.
- On **16 March 2017**, the Provider had a telephone call with the First Complainant who advised that arrears on the *“mortgage account would be cleared within 4 weeks following sale of one of their investment properties”*. The Provider states that the First Complainant was advised *“that enforcement action could be forestalled if a solicitor’s letter of undertaking guaranteeing arrears will be cleared within 4 weeks and full repayments made until private dwelling house is sold.”*
- On **24 February 2017**, a **Calling in Debt letter** was issued to the Complainants.
- During a telephone call with the First Complainant on **20 March 2017** the Provider was advised that the sale of the Complainants’ primary residence *“was expected to happen in May/June 2017 with balance of mortgage loan account cleared from proceeds”* and *“there is no need to appoint a receiver in such circumstances”*.

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- An email from the First Complainant was received by the Provider on **4 April 2017** which detailed that the *“primary residence is valued at €750,000 with a mortgage of €280,000”* and was being *“readied at the moment for sale which is expected to happen in May/June of this year”* and asking the Provider to *“stand down”* the appointment of a receiver.
- The Provider responded by email dated **4 April 2017** to advise that enforcement action could be prevented if the Complainants delivered a solicitor’s letter of undertaking regarding the clearing of arrears and making full repayments until the balance of the mortgage loan account was cleared.
- On **8 May 2017**, €15,963.44 was lodged to the subject mortgage loan account to clear the arrears. However, arrears on the mortgage loan account recommenced on **20 May 2017**.
- The Second Complainant called the Provider on **8 November 2017** advising again that the mortgage loan account would be cleared once the primary residence was sold.
- The Provider contacted the Complainants on **23 February 2018** to seek an update on the sale of the primary residence in circumstances where it had been *“on the market for months with no payments being made to the mortgage account”* since **May 2017**.
- The Provider issued another **Calling in Debt** letter to the Complainants on **6 March 2018** and issued a **Receiver Warning** letter on **13 April 2018**.
- €5,655.98 was lodged to the account on **19 April 2018** to clear the arrears.
- The Provider advised the Complainants on **19 April 2018** that a receiver would not now be appointed as the arrears had been cleared, but that the full capital and interest repayments must be recommenced. The First Complainant advised that they could not make full repayments but would undertake to make interest only payments for 6 months and review then if the private dwelling house had been sold.
- Arrears recommenced on the mortgage account on **20 April 2018**.
- The Provider sent separate emails to both Complainants on **23 April 2018** asking them to complete an **Income and Expenditure Form** to enable the Provider to complete an assessment and to advise that *“any arrangement applied on this account would be subject to the BTL tracker repricing (rate will be amended to a standard variable rate).”*
- The Provider received a response from the First Complainant on **23 April 2018** objecting to the rate amendment outlined by the Provider in its previous email, which he stated was *“both opportunistic on your behalf and perhaps illegal”* and advising that his email should be taken by the Provider as a formal complaint.
- The Provider wrote to the First Complainant on **27 April 2018** and acknowledged his complaint in accordance with **Chapter 10.9(a)** of the **Consumer Protection Code 2012**.

- A further update was issued to the First Complainant on **21 May 2018**, with a **Final Response letter (FRL)** issuing to the Complainants on **12 June 2018**.
- The Second Complainant submitted an Income and Expenditure form to the Provider on **25 July 2018** and the First Complainant submitted an Income and Expenditure form on **8 August 2018**.

The Provider submits that, as a result of the Complainants' request for forbearance, an **Agreement to Amend Mortgage Loan Offer Letter** issued to the Complainants on **9 August 2018** which offered them 12 months' interest only repayments, subject to the Provider's BTL Pricing Policy. It states that the Complainants did not accept the Provider's proposal.

The Provider states that it does not accept the Complainants' contention that the decision of the Provider to offer this alternative repayment arrangement represented "*opportunism*" on the part of the Provider. It states that the Complainants "*sought interest only payments at a time where no repayments were being made to their mortgage loan account and arrears were continuing to accrue*" and that the Complainants' circumstances were "*carefully considered*" when offering them an alternative repayment arrangement.

The Provider submits that the Complainants stated that they were unable to afford full repayments and required the mortgage loan account to be restructured. It states that it is entitled to ensure that any restructure is done on a commercially viable basis and to condition any prospective offer on such a basis. It outlines that the Provider "*is entitled to act commercially where a borrower is seeking to amend the terms of repayment as set out in their Mortgage Loan Offer Letter*". It states that at all times, it is the borrower's "*choice whether to accept the terms of a prospective Agreement to Amend Mortgage Loan Offer Letter or reject them.*"

The Provider further states that "*There is no opportunism here as the Provider's offer only arose following a clear request from the Complainants for reduced repayments on their mortgage loan account. The decision to offer an alternative repayment arrangement subject to a change in the applicable rate of interest reflects a general policy on the part of the Provider; it applies across all residential investment mortgage loan accounts where a change in terms and conditions is sought. The application of such a commercial policy from a Provider is not opportunism but rather a reflection of the Provider's commercial sensibilities and its entitlement under Condition 4(d) of the Mortgage Loan Offer Letter.*"

The Provider states that the Complainants' mortgage loan account is not subject to the Code of Conduct on Mortgage Arrears and therefore, does not attract the protections afforded to mortgages secured by a borrower's primary residence.

The Provider states that it has abided by the **Consumer Protection Code** in its dealings with the Complainants, specifically Provisions 6.9 and 6.10 of the **Consumer Protection Code 2012**. It states that the Agreement to Amend Mortgage Loan Offer dated **9 August 2018** reflects the requirements of the Consumer Protection Code 2012 by containing the requisite legal notices to include warnings, indicative comparisons and details of the disadvantages and advantages. It states that the Complainants were afforded 5 weeks to consider the Agreement to Amend Mortgage Loan Offer.

The Provider submits that on **28 September 2018** the Agreement to Amend Mortgage Loan Offer Letter was deemed to be declined by the Complainants as it was not signed or returned within 5 weeks of issue. It states that as the Complainants did not accept the offer, the mortgage account remained on a tracker rate of interest.

The Complaint for Adjudication

The complaint for adjudication is that in **August 2018** the Provider wrongfully made its offer of an alternative repayment arrangement subject to the condition that the applicable interest rate would be changed from an ECB tracker rate to a standard variable rate.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **5 August 2021**, outlining the preliminary determination of this Office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

At the outset, it is important to point out the jurisdiction of this Office in complaints regarding arrears handling. This Office can investigate the procedures undertaken by the Provider regarding the arrears, in this matter under the **Consumer Protection Code 2012**, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainants, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a complainant, within the meaning of **Section 60 (2) of the Financial Services and Pensions Ombudsman Act 2017**.

In order to consider this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider the interactions with the Complainants in **2018** in relation to the alternative repayment arrangement proposed and offered.

The Provider issued a **Mortgage Loan Offer Letter** to the Complainants dated **26 June 2007**, which provided for an advance of €100,000 over a term of 25 years.

Part 1 (The Statutory Loan Details) of the **Mortgage Loan Offer Letter** details as follows;

1. "Amount of Credit advanced:	€100,000
2. Period of Agreement:	25 Years
3. Number of Repayment Instalments	4. Amount of each Instalment
24	Fixed at 4.790%
60	Variable at 5.100%
216	Variable at 5.100%

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Part 2 (The Additional Loan Details) outlines as follows;

- | | |
|--------------------|----------------|
| 11. "Type of Loan: | Interest Combo |
| 12. Interest Rate: | 4.790% Fixed" |

Part 4 – The Special Conditions details as follows;

"(a) The following Special Conditions apply to the Loan:

[...]

(ii) The interest rate applicable to the loan is a fixed rate and is fixed for the period set out in Part 1 of this Offer Letter. At the end of the fixed rate period the Lender shall have the sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, in accordance with general condition 7(b) of the Offer Letter, the interest rate applicable to the Loan will be a variable interest rate. This variable interest rate may vary upwards or downwards. The interest rate shall be no more than 1.10% above the European Central Bank Main Refinancing Operations Minimum Rate ("Repo Rate") for the term of the Loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.

(iii) For the first seven years of the term of the Loan, repayment of this Loan shall be comprised of interest and any other amounts payable only and General Condition 4(a) is hereby varied. At the end of the above period, repayments shall comprise of principal and interest and any other amounts payable fully in accordance with General Condition 4(a). The amount of such revised repayment instalments shall be as advised to the Borrower by the Lender in writing. The Lender may at any time during the initial interest-only period and at its absolute discretion (or at the request of the Borrower), convert the Loan to an annuity or repayment loan whereupon the Borrower shall be obliged to make such revised repayment instalments comprising both of principal and interest and any other moneys payable as the Lender shall advise the Borrower in writing."

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At the bottom of **page 2** it states as follows;

“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

General Condition 4 of Part 5 – The General and Special Conditions details as follows;

“4. Repayment

- (a) *Unless otherwise stated herein or agreed by the Lender in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower's bank or other financial institution. For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and any other amounts payable and for an endowment loan shall comprise of Interest and such other amounts only. The due dates for repayment of the Loan are those dates that are from time to time set by the Lender. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender at its absolute discretion.*
- (b) *In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained. In any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued Interest or otherwise alter the Conditions of the Loan.*
- (c) *If so agreed in writing by the Lender, the Loan may be repaid in 10 or 11 payments In any year of the term and such payments (unless the Lender at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during that year for the Loan.*
- (d) *The Lender may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal. Interest or any other amount payable in respect of the Loan.”*

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I note that the **Acceptance and Consents** section of the **Mortgage Loan Offer** was signed by the Complainants on **29 June 2007** on the following terms;

"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the term and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions".

It is clear to me that the Loan Offer Letter envisaged an initial fixed interest rate of 4.79% with a tracker variable interest rate of ECB + 1.10% to apply for the remaining term of the loan. The **Special Conditions** provided that the repayments would be interest only for the first 7 years of the term of the loan with capital and interest repayments to commence thereafter. The Complainants accepted the Loan Offer Letter, having confirmed that they had read and fully understood the loan offer.

Prior to the expiry of the initial fixed interest rate period in **June 2008**, the Provider issued a **Mortgage Form of Authorisation** ("MFA") to the Complainants. The Complainants completed and signed the MFA on **26 June 2008** selecting a tracker interest rate of 2.10% (ECB + 1.10%).

The Second Complainant completed and signed a **Standard Financial Statement** (SFS) on **14 October 2012**. The SFS recorded the "*Reason(s) for Review/Arrears*" as "*Unable to afford movement to Capital Repayment*".

The SFS recorded that the Second Complainant's total monthly income was €3,652.40 and her monthly expenditure was €2,723.00, plus monthly debt of €2,113.00, resulting in a monthly deficit of €1,184.24.

The Second Complainant further detailed in the SFS as follows;

*"2 BTL House presently not let -
Extra effort to get them let.
My husband was made redundant from [Employer] [late] 2010 – started a business last year – slow to make money."

A letter from the Second Complainant to the Provider dated **14 September 2012** and stamped as received by the Provider on **23 November 2012** stated as follows;

"Re Account [ending 1435]

I would refer to your letter of the 04/09/2012 re: the above.

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I cannot pay any more than interest only at present. I have four buy to let properties two of which I cannot rent. The other 3 lenders have agreed to interest only until circumstances improve.

The house is for sale but there is no interest to date. I would be very happy to hand the ownership of the house over to you if you will accept the sale proceeds in full and final settlement of my outstanding mortgage”.

The First Complainant also completed and signed a SFS on **16 January 2013**. The “Reason(s) for Review/Arrears” detailed “Inability to pay capital + interest”.

The SFS detailed as follows in response to the question “Please provide details of any steps you have already taken to reduce your monthly expenditure and the savings you have achieved”:

“We do not go out + we live very frugally. We have 5 Properties that are like anchors around our neck. I was made redundant in [late] 2012 From [Employer] + from a standing start I have opened up [a business] – very difficult 1 ½ years resulting in me being unable to work in June Due to Financial Stress. Our marriage is presently under enormous stress + I doubt it will survive.

The houses are in [the Second Complainant’s] name + were always meant to be solo. There is no market for them now so keeping our head above water for the moment is all we can aspire to.”

The SFS recorded that the First Complainant’s total monthly income was €3,500.00 and monthly expenditure was €2,471.00, plus mortgage repayments of €360.00 and other monthly debt of €800.00, resulting in a total monthly deficit of €121.00.

I note that the mortgage account ending **7462** which is the subject of this complaint, was held jointly by the Complainants. I note that the Second Complainant held a further three residential investment mortgages in her sole name.

The Provider’s internal note dated **22 March 2013** states;

“2 Non CCMA BTL's with [Provider] (overall LTV 118%). Also 270k [third party Provider] PDH mortgage and a further 2 BTL properties, 1 with [third party Provider] (LTV 125%) and 1 with [third party Provider] (LTV 142%). No previous forbearance but i/o applied to accounts from drawdown with expiry dates approaching. Arrears of A5012 currently. [Redacted] Married couple with [number] dep[endant]s.

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[Second Complainant] (age) ... receives 2 pensions from [redacted] of A1874 p/m & A908.74p/m.

Also stated that she owned a business called the [Redacted] ... Business has ceased trading with clients owing o/s debt to [Provider] business banking. [First Complainant] is now a self employed [occupation] earning a net income of A3500 p/m which is mandated to this c/a. Child benefit of A390 p/m giving total income of A5764 p/m excluding rental income. The clients are currently paying A360p/m to [third party Provider] PDH mortgage which is on i/o. The clients have 61.2k in STD. The reps are A1196 p/m. No scope for standard restructure. There expenses are 2836 p/m as per SFS which is above [Provider] guidelines of A2500 p/m ...

Taking income at A5764 p/m less PDH reps A360 less exps A2500 less STD reps A1196 p/m leaves a surplus of A1708 p/m excluding rental properties. The clients earn rent of A1350 p/m with two of 4 rented properties. Taking rental income A1350 p/m less full [Provider] rep[ayment]s A2464 p/m less [third party Provider] reps A575 and [third party Provider] reps of A245 p/m (both on i/o arrangements) leaves a total rental deficit of A1934 p/m. Taking this away from the clients surplus leaves a total deficit of A226 p/m. Also the clients cannot continue on i/o on their mortgages with other financial institutions ...

A max term extension plus split would reduce [Provider] repayments to A1485 p/m which is just short of rent received of A1350 p/m. This leaves the clients with an overall surplus of A753 p/m. This surplus must be used to allow clients return to long term forbearance solutions on their other mortgages. The remaining BTL mortgages with [third party Provider] and [third party Provider] would most likely have to be split also to make all mortgages affordable given lack of rental income due to two properties being vacant. Clients must also engage in radically restructuring STD if they cannot afford split repayments as mortgage debt must be given priority ... 1% increase in rate on mortgage a/c [ending 7462] to apply.”

The Provider's internal notes dated **26 March 2013** detail as follows;

“Please issue decline letter all of the above accounts as clients are overindebted...”

“Accounts [ending] 7462, all declined FB mortgages deemed unsustainable...”

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The Provider's internal note dated **5 April 2013** details;

"Returned call to [Second Complainant] - unhappy I/O declined, she noted her husband is back working 2 months & they have long term plan, i explained FB declined & if borrowers now cannot afford annuity then we need to look at disposal of assets, Client was not agreeable to any of this & insistant [sic] on I/O & asked for further SFS, noted Bank still may not approve FB and we will then need to look at selling, client noted bank not getting property, noted receiver appointment again not happy and said she was being harrassed by us now, Client would no let me fully explain situation and hung up. SFS issued and requested same returned in two weeks"

The Provider's internal notes show that an **Interest Only decline letter** was issued to the Complainants in or around **April 2013**. A copy of this letter has not been provided in evidence.

The Provider's internal note dated **25 October 2013** reads as follows;

*"Clients have made 100% of repayments to mortgage a/c [Redacted] a/c *[ending 7462], [Redacted] over the past 6 months. When all mortgage are taken together the clients total repayments over the past 6 months is 91.2%. As such these mortgages are sustainable. Note mortgage a.c [ending 7462] is still on i/o until July 2014 (i/o product since drawdown) but step up to full reps is achievable with stepup increasing reps by E380 p/m. Previous steup [sic] up shows mortgage is affordable ... the clients advise that their circumstances have improved since then ... If step up is not achievable there is scope for term ext. Decision: Overall agreeable to capping arrears on mortgage a/c's [ending 7462], Also recommend assessment of provision upgrade. Capitalised repayment amounts will increase total mortgage reps from E2005 p/m to circa E2053 p/m. Note Mortgage a/c [ending] 7462 is currently on i/o. The arrears cap letter will show full amount of mortgage to be repaid. However as on i/o until 2014 the capitalisation will not affect the i/o on the a/c. The letter must contain the full repayment amount as per compliance."*

An **Authorisation to Capitalise Arrears** form was signed by the Complainants on **8 November 2013** which outlined as follows;

"I / We wish to capitalise the current outstanding arrears on our mortgage account number [ending] 7462.

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I / We understand the implications of capitalising the arrears which include the following:

- *The total amount of interest payable may be higher than outlined in our original repayment terms.*
- *Repayments are recalculated in order to discharge the mortgage over remaining term of the Loan, so repayments will increase.*
- *A new repayment of approximately €514.75 will apply monthly.*
- *My/Our life cover may not fully cover the loan balance and it is advisable to carry out a review with my/our insurance advisor.*
- *The original Mortgage Term remains unchanged.*

We are pleased to offer you the option of capitalising arrears on the mortgage account above while continuing on your existing alternative repayment arrangement.

You may wish to take independent legal and / or financial advice prior to signing this form.”

Based on the evidence before me, it is clear that the Complainants were experiencing some financial difficulty prior to the mortgage account rolling off the interest only repayment schedule onto capital and interest repayments in **July 2014**.

Prior to the expiry of the interest only repayment period, I note that the Provider's internal note dated **30 June 2014** details that a “SFS meeting” was scheduled to take place with the Complainants at the Provider's branch on **1 July 2014**.

Both Complainants completed and signed a joint **SFS** on **30 June 2014**. The “Reason(s) for Review/Arrears” was recorded as “Unable to make full Repayments.”

The SFS recorded the Complainants' total monthly income at €10,028.01, with monthly expenditure of €4,430.11, plus mortgage repayments of €1,435.17 and other monthly debt of €6,086.23, resulting in a total monthly deficit of €1,932.50.

The Provider's internal note dated **1 July 2014** details as follows;

“... [account ending 7462] no change + E530.95 [redacted] Long term solution has been identified through inheritance and sale of property within 12 mths and long term solution in place for remaining BTL, this is affordable for customers and I would recommend approval of same”

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The Provider's internal note dated **8 July 2014** details as follows;

"...A/C no [ending 7462], NON CCMA off Tracker(Discount Code: 3.25%), Letter: AALOO/MFA, Details: Ter, Extension by 96 months. New maturity date: 01/08/2040 Plus Capitalisation in 24 months. Est. repayment amount: A425.14..."

I am disappointed to note that a copy of the **Mortgage Form of Authorisation** which was purportedly issued by the Complainants to the Provider on **14 July 2014** has not been provided in evidence to this office. The Provider has submitted that it *"does not hold a copy of this Agreement as same was not accepted by the Complainants"*.

Provisions 11.5 and 11.6, Chapter 11 of the Consumer Protection Code 2012 (which was effective from **01 January 2012**) outline as follows;

"11.5 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.*

11.6 A regulated entity must retain details of individual transactions for six years after the date on which the particular transaction is discontinued or completed. A regulated entity must retain all other records for six years from the date on which the regulated entity ceased to provide any product or service to the consumer concerned."

The Complainants' mortgage loan was incepted in **2007** for a term of **25 years** and the Provider purportedly issued the **Mortgage Form of Authorisation** to the Complainants in **July 2014**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends.

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I have been provided with no evidence which reflects that the mortgage account has been redeemed. It is therefore unclear to me why this documentation has not been provided by the Provider. This is most disappointing.

Nonetheless it is not in dispute that the Mortgage Form of Authorisation dated **14 July 2014** was not signed or accepted by the Complainants.

I note that the interest only repayment period on the mortgage loan account expired and capital and interest repayments were commenced from **24 July 2014**.

The Provider's internal note dated **3 September 2014** details as follows;

"adv cust of arrears on acc of 726.97 ... cust adv she has sep[arated] with her husband and he has refused to pay towards the morg, cust adv she prev spoke with [redacted] over the phone and would like to set up an appt to meet with her to sort out the acc, I adv cust could see she prev spoke with [redacted] in relation to FB however cust adv she wante to set up an appt with her. adv would Route acc back to netwrk for NAM to contact her. cust decl pymt today, dates ok..."

The Provider's internal note dated **23 September 2014** details as follows;

"[Redacted] [account ending 7462] arrears of E726 cleared in full today, she needs to set up DD for joint mort # [ending 7462]"

The Provider's internal note dated **23 September 2014** details as follows in relation to a telephone call between the Second Complainant and the Provider;

"...I also advised any change to repay ... of # [ending] 7462 will result in a change in the tracker rate i.e moving to a variable rate with a 1% loading on the existing tracker rate."

The Provider's internal note dated **15 October 2014** details as follows;

"...cust called back due to missed call, adv cust of arrs on a/c's and of recent missed payments ... cust not in a postion [sic] to do so now and doesnt know when she can clear arrs. cust adv she will try and clear arrs on these a/c's first but that joint a/c is not priority, adv cust calls and letters will continue, call ended."

/Cont'd...

A further note from the Provider's internal system dated **13 November 2014** details as follows;

"IBC from [Second Complainant] - I gave her the arrears balance on the four accounts which totals [redacted] BH- her plan is to call back today and bring all the accounts utd. she is getting assistance from her brother. I told her that her credit rating may be affected once there are arrears on the account, that she will continue to receive letters and that she may be deemed non-co-op. she is very anxious to bring the accounts up to date, monitor for call back today for [Second Complainant] to bring the account utd. tels utd. ok with payments going forward. RFA: separation."

A further note from the Provider's internal system dated **1 December 2014** details as follows;

"...[First Complainant] was to look after joint # [ending] 7462 as this relates to [location], there is a court hearing for maintenance scheduled for [date] but until then [the Second Complainant's] finances are precarious"

A note from the Provider's internal system dated **9 March 2015** details as follows;

"Issued CID (sep case) on acc [redacted] (Sole account for [Second Complainant] on the same property) and a separate CID on acc: [ending] 7462 (joint borrowers same property)

PTL sent 16.01.15. No arrangement in place on acc: [ending] 7462 and no payments being made. Demand Due to issue 24.03.15"

The Provider's internal note dated **18 September 2015** details:

"...CID to issue on all accounts per notes on [account ending] 7462"

The Provider's internal note dated **22 September 2015** details;

"Not issuing CID's at this time"

The Provider's internal note dated **29 September 2016** states;

"...2 X BTL properties across 4 accounts. 1 of which is in joint names between [Second Complainant] and her husband [First Complainant]. Arrears due to separation".

The Provider's internal note dated **27 January 2017** states;

"No proposals for BTL a/c's ... and joint a/c BTL [ending] 7462 ... If no proposals CIDL to issue followed by RWL."

The Provider's internal note dated **31 January 2017** details as follows;

"[Redacted] 2 a/c's remain outstanding 1 sole and 1 joint. [Second Complainant] advised same was correct with 2 a/c's but 1 property. [Second Complainant] advised sole a/c drawn down first but then bought site at [location] in joint names (a/c [ending] 7462). [Second Complainant] advised that she is going to sell her family home ... will not be clearing arrears on joint a/c. I advised as it is the same property on 2 a/c's if arrears are outstanding legal proceedings will commence on property with both joint and severally liable."

The Provider's internal note dated **13 February 2017** details;

"CIDL to now issue on a/c and joint a/c [ending] 7462. Same property but joint a/c and 2 letters required. [Second Complainant] has proposed to clear arrears from family loan on sole a/c and not joint as it is in both names. Further to this plans to sell family home for E600k and clear outstanding [Provider] mortgage balances and reside in [address] (a/c's [ending] 7462) ... LOA requested for solicitor who is looking after sale of PDH but advised is not dealing with one. Proposal cannot be progressed without same as solicitor and SA would be required if PDH on the market."

The Provider's internal note dated **9 March 2017** details as follows;

"... [Second Complainant] has proposed to clear arrears on sole a/c but not on joint a/c. Next action: RWL to now issue with Receiver paper to be requested in circa 3 weeks".

/Cont'd...

The Provider's internal note dated **16 March 2017** details as follows;

"[Inbound call] spoke with [First Complainant] cust phoning in to discuss acc adv cust will try and transfer him to speak with CM [redacted] if not will have to send a email for callback ... cust was not happy regarding same and wanted my email address and full name adv cust unable to give my email I gave my staff id[redacted]. Cust was not happy ... adv he will be logging a complaint regarding myself as he adv I was very aggressive on call adv cust these are the procedures we have to follow regarding call backs cust got personal on call adv I will end call and arrange call back as we were going around in circles..."

"[Outbound call] to [First Complainant] as requested. Borrower gave history of account. Advised that there was no need to appoint a receiver advised that a sale of a property was going through in the next 4 weeks and proceeds of same would clear arrears on account. Advised had other party no advised of same. I advised could not discuss details of conversations with other party with him for data protection, borrower questioned if this was right I confirmed it was but happy to discuss mortgage. Borrower advised could submitted [sic] sol letter of undertaking regarding the clearing of arrears is estimated would be cleared in 4 weeks but would get exact date... Borrower also stated that all debt would be cleared from sale of PDH which he expected to be completed in circa 3mths. I advised borrower if letter of undertaking was provided & the full repays continued to be met until PDH sold clearing the debt in full. Bank would hold appointment of receiver. Borrower took my email address in order to send in proposals as discussed during conversation and wanted it noted that he only receive[d] [Receiver Warning Letter] today when same was dated 13/3/17. Borrower not happy that appointment of receiver would happen within 10 working days from same when time already lapsed. I advised would note same".

The Provider's internal note dated **13 April 2017** details as follows;

"Email from [First Complainant] 7/4:"Hi [Redacted] I would refer to our telephone conversation of this morning in relation to this account. The following is the proposal I put to you: [Second Complainant] has this week signed contracts in relation to the sale of a rented house which will net her proceeds which will allow her to clear the arrears on our joint loan account in Full. I will ascertain from her exactly when the proceeds will be due and she will organize a letter of undertaking for you from her solicitor to clear the arrears in FULL and also to pay 4 monthly repayments of circa A500 per month being an extra A2,000 in advance to bring....

/Cont'd...

contd.. payments up to date to August 2017. I outlined to you that [Second Complainant] & I are legally separated since [redacted] and as part of the separation agreement contd.. we have agreed to sell our PDH which is due to be put on the market in early May 2017. We would expect to have equity of circa A400K from the sale of the house and it was part of the Judicial Separation that we would be clearing in FULL all Joint Loans so we intend to clear the balance of the joint loan on completion of the PDH sale which should happen in Circa July/August 2017...."

The Provider's further internal note dated **18 April 2017** details as follows;

"Email response sent to [First Complainant] 18/4: "Dear [First Complainant], I confirm receipt of your email below and the contents therein. Apologies in the delay in responding to you as I have been out of the office. As discussed on our telephone conversation on 7/4/17, in order for proposals to be reviewed by our credit department, documentation is required to support same. In the absence of supporting documentation and no payment made to the account since March 2016 a Receiver may be appointed to the property."

The Provider's internal note dated **20 April 2017** details:

"Email from [Second Complainant] 18/4 16:59: "[Redacted], I tried ringing you just now, I wish to confirm the sale of my property has been completed...funds will be paid by the end of this week...We will need to discuss a joint payment structure on the site at the [location] going forward until our PDH is sold"

The Provider's internal note dated **20 April 2017** states:

"Call made to [Second Complainant]. Confirmed receipt of emails and vmails. Apologised in the delay in responding to same..."

The Provider's internal note dated **21 April 2017** details:

"Email from [First Complainant] 20/4 10:53: "Hi [redacted] I must admit that I am VERY disappointed with your lack of professionalism in this case [redacted]. Once you contacted me in relation to the receiver I immediately [sic] responded with a 4 month plan to completely clear the said joint named loan. I pointed out that ALL the arrears would be cleared in FULL witin [sic] a few weeks from the sale of a house that [the First Complainant] was completing and to which contracts have been signed."

/Cont'd...

I also let you know that as a result of our marriage [sic] split that our own PDH was being sold and that the sizeable equity from same would clear the joint loan in FULL ... I emailed [the First Complainant] to contact you to verify that same would happen and it turns out from her email above that she quote unquote "emailed her and rang 4 times and left messages" & yet you DID NOT RESPOND. You then have the temerity to email me some 11 days after I emailed you with a threatening email despite the fact that you did not have the good manners to return [the First Complainant's] emails & calls & that you took all of 11 days to respond to me. Shame on you. I would be obliged if you could email me a copy of your customer complaint procedure so I can make a formal complaint against you for your lack of professionalism".

The Provider's internal note dated **15 May 2017** details as follows;

"... [Second Complainant] has now sold a property her sons have inherited ... and cleared the arrears in full on ... [account ending] 7462 on 8/5/17. [Second Complainant] proposes to clear [Provider] debt in full from sale of PDH and will live in security with children ... 6 mths payments to be monitored in W40 and referred to BAU..."

The Provider's internal note dated **30 June 2017** details;

"No payment for May or June"

The Provider's internal note dated **7 November 2017** details as follows;

I/B call from [Second Complainant] ... Advised [Second Complainant] we previously spoke in April 17 and was following up on call. Advised after conversation arrears of over E15 were cleared in full which is why the ASU did not stay in contact with her. I advised the a/c however has gone back into arrears as there has been no payment made to a/c since arrears cleared. I confirmed I was discussing a/c with joint borrower [First Complainant] ... She advised this full debt will be cleared once family home is sold. She confirmed the "[site description]" is also on the market but is a site and will not sell as it is only worth ... about E15k. I advised I understood but it is not acceptable for no payments to be made on a/c and we may need to issue vol sale docs that include LOAs to discuss a/c with solicitor and selling agent. [Second Complainant] said this would not be needed as it is not the site that will clear the debt but the family home on the market. I advised we may need further docs to support this proposal. I asked if there was a letter of undertaking to clear a/c [ending 7462] from sale of family home.

/Cont'd...

[Second Complainant] said it is in the separation agreement and property can be viewed online, [redacted] with auctioneer [redacted]. She advised it is on the ...market since July 17. I advised I will review a/c and info and will revert in 1 week on how to proceed on a/c. [Second Complainant] advised she is doing exams next week. I advised I will call back in 2 weeks (22/11). [Second Complainant] agreed to same."

The Provider's internal note of **15 December 2017** details:

"... [account ending] 7462 which has 3.5k arrears"

A telephone call took place between the parties on **22 February 2018**. I have considered the content of the audio recording of the telephone call, which has been provided in evidence and I have considered the Provider's internal systems note of the same date. I accept that it was an accurate account of the conversation and details as follows;

"Call made to [First Complainant]. [First Complainant] was abrupt on call from the start. [First Complainant] began to give background on a/c by advising himself and [Second Complainant] separated in [redacted] and decided to put family home on the market in Sept 2017 which has positive equity in same. I advised I was fully aware of history on a/c and that the property has been on the market for a number of months with no payments made to a/c. [First Complainant] asked had I no patience. I advised this was not the case that I was advising [First Complainant] that I was just letting him know that I was aware of history and that arrears were building on a/c that need to be address[ed]. [First Complainant] said I was wasting my time ... and to do whatever it is I need to do. I advised letters may issue as arrears remain outstanding. [First Complainant] said he understood."

The Provider's internal note dated **5 March 2018** states that a Calling in Debt Letter was issued to the Complainants.

The Provider's internal note dated **9 April 2018** detailed;

"Email sent to MRT support to issue receiver warning letter to borrowers. No payment since May 17 and no response to contact attempts made."

The Provider's internal note dated **12 April 2018** states that a Receiver Warning Letter was issued to both Complainants.

/Cont'd...

The Provider's internal note dated **18 April 2018** details;

"email from [Second Complainant]: "Hi [redacted] I have tried to contact you. I received a letter only this morning dated 13th of April, stating that a Receiver was being appointed to my property in [Location], held in my sole name, because of arrears due on a [location], held jointly between my ex husband and myself. I have paid the arrears in full this morning, and would like an opportunity to discuss payment options going forward. My primary residence is as you know for sale, the full amount outstanding on the site in the [location] will be cleared following same. Activity in the housing market picked up in ... the last few weeks, and I have dropped the asking price in the hope to reach a conclusion as fast as possible..."

The Provider's further internal notes dated **18 April 2018** detail;

"...[First Complainant] calling ... regarding correspondence he received ... cust finds letter very threatening and is worried about the timeframes outlined in the letter. cust requested urgent call back..."

"OBC to [First Complainant] as requested-spoke to cust and discussed reason for receiver letter-adv that arrears cleared now so receiver will not be appointed however C&I repayments needs to recommence. Cust is asking for few months I/O to allow time for their other property to be sold-on the market for A695k. Adv need to check with management, cust took my email address and adv will submit his proposal via email before I discuss with T/E."

"email from [First Complainant]: Hi [redacted], I would refer to our telephone conversation of today re the above account and I would like ask you to put this account on interest only for 6 months please. The reason why is because : 1. [Second Complainant] & I have separated since [redacted] and as part of the separation we agreed to put our PDH up for sale when the market was right. The market is right now and it is up for sale with two auctioneers, [redacted] with an asking price of A695,000 ... The Mortgage on the PDH is at circa A270,000 so there is plenty of equity. 2. We presently have [number] children in 3rd level education & [number] in second level education which is costly. We cannot at the moment afford FULL repayments but we will undertake to make the interest only payments for 6 months and if the PDH is not sold we will review then."

Three audio recordings were provided in evidence of telephone calls which took place on **19 April 2018**.

/Cont'd...

I have considered the content of the first telephone call between the parties on **19 April 2018**. During this call the Second Complainant stated that she received a letter and wished to speak to the Provider's case manager. The Provider's representative informed her that the case manager assigned to the Complainants' mortgage account would return her call.

I have not been provided with an audio recording of the subsequent call between the Second Complainant and the Provider's case manager. The Provider's internal note dated **19 April 2018** details as follows;

"Inc call from [Second Complainant]-spoke to cust and discussed acc. Confirmed that as arrears are cleared, the receiver will not be appointed. Cust confirmed that she would like to have a/ra of I/O for 6m to allow her time to sell the primary residence. Adv i'm aware of the background and I received a proposal from [First Complainant] yest-adv that it will need to be approved my management. Cust adv that this will be her primary residence once the other property is sold so she is the one making repayments and she can not lose the house. Cust gave me her card details to proceed with A80 (I/O for April). Adv will contact her next week with the decision."

I have considered the content of the audio recording of the third call which took place between the parties on **19 April 2018**, which has been furnished in evidence. I note that the First Complainant stated that on **19 April 2018** he received a letter from the Provider dated **13 April 2018** which indicated that if he failed to respond in 10 working days, a receiver would be appointed to the secured property. The Provider's representative stated that this message would be passed to the appointed case manager with a request that they return his call as a matter of urgency.

I have considered the content of the third audio recording dated **19 April 2018** which has been provided in evidence. This call was between the Provider's appointed case manager and the First Complainant. It was noted that the arrears on the mortgage loan account were cleared that morning. The Provider's representative advised the First Complainant that the Complainants should recommence the capital and interest repayments on the mortgage loan account. The First Complainant requested a further period of interest only repayments in order to facilitate the sale of the secured property. The Provider's representative indicated that she would make contact the next day.

/Cont'd...

The Provider's internal notes dated **20 April 2018** detail as follows;

"email sent to [First Complainant] with I&E attached.

Good afternoon [First Complainant], I referred your proposal to our credit department and in order for an assessment to be completed, an Income & Expenditure form along with proof of income and 3 months bank statements are required . Please see the form attached . I have also issued the form to [Second Complainant] for completion. Once completed , please return to me at your earliest convenience. Please also note that any arrangement applied on this account would be subject to BTL tracker repricing (rate will be amended to a standard variable rate). Many thanks"

"email from [First Complainant]: Hi [redacted] Correct me if I am wrong but I think that your suggestion that any arrangement applied on this account would be subject to BTL tracker repricing (rate will be amended to a standard variable rate) is both opportunistic on your behalf and perhaps illegal. I am referring this email of yours to my solicitor and I would be obliged if you could log it as a formal complaint against you for trying to take advantage of our present situation. Please advise me by return of the complaint number".

I have considered the content of the audio recording of a telephone call between the Second Complainant and the Provider's case manager on **20 April 2018**, which has been provided in evidence. During this call the Second Complainant requested a 6-month interest only period in order to assist the Complainants in selling their private dwelling house in order to clear the mortgage loan account. The Provider's representative replied that she *"should have a decision by next Friday"*.

The Provider's internal notes dated **20 April 2018** detail;

"email sent to [First Complainant]: Hi [First Complainant], Just to clarify that the pricing policy is a variable rate, which is initially set at 1% above the customers previous overall tracker rate. The current rate is 1.1% so the propose initial variable rate will be 2.1%. (As per the terms and conditions of a variable rate mortgage - at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lenders discretion upwards or downwards) This re-pricing policy is applied to Buy to Let accounts where terms and conditions are being amended ie: forbearance required. I will forward your complaint to the relevant department and a letter will be issued to you in 5 days to acknowledge same"

/Cont'd...

“email from [Second Complainant]: Hi Can you please confirm I will not be losing my tracker mortgage rate please, only repayment will be at variable rate, any excess will be put against mortgage? Regards, [Second Complainant]”

“email sent to [Second Complainant]: Hi [Second Complainant], Just to clarify that the pricing policy is a variable rate, which is initially set at 1% above the customers previous overall tracker rate. The current rate is 1.1% so the propose initial variable rate will be 2.1%. (As per the terms and conditions of a variable rate mortgage - at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lenders discretion upwards or downwards) This re-pricing policy is applied to Buy to Let accounts where terms and conditions are being amended ie: forbearance required...”

The Provider’s internal notes dated **23 April 2018** detail as follows;

“email from [Second Complainant]: Thank you for this clarification. Can you please forward me the figure that the repayment would be if this was to be the case, worst case scenario”?

“email to [Second Complainant]: Hi [Second Complainant], If the rate is amended to 2.1% the interest only repayments would be c. A144 per month”.

The Provider’s internal note dated **29 June 2018** show that separate emails were sent to both Complainants as follows;

*“... I refer to your mortgage account ending ***462. Please note that there are outstanding arrears of A1,462.54. As previously discussed, in order for the bank to carry out an assessment, a Financial Form is required along with supporting documentation. I also advised you that any arrangement applied to this account would be subject to BTL tracker repricing. A final response letter from our complaints team was issued to you on the 12/6/18 explaining same. As your financials havent been submitted, could you please advise when the arrears are going to be cleared ... If the arrears are not cleared by the end of July, the bank may look at different strategy. If you have any further questions do not hesitate to contact me”.*

A **SFS** was submitted by the Second Complainant which was stamped as received by the Provider on **25 July 2018**.

/Cont’d...

The SFS recorded that the Second Complainant's total monthly income was €3,515.00 and her monthly expenditure was €3,428.00.

The SFS outlined as follows;

"As discussed previously I separated in [dates redacted]. As per our agreement our PDH is to be sold and the mortgage for the investment land bought, which this mortgage pretains [sic] to is to be cleared in full.

My PDH is up on [property website] and I'd hope it will sell in the next no. of months. The deeds of the investment site are held jointly between my ex husband and I. The house that was used as security is going to be my New Home for my children and myself. It is held in my sole name.

I have offered to pay on my own the interest on this mortgage until I can clear it in full to maintain the security of the property held against it which is held jointly. My ex husband is not communicating with me on this matter as he has nothing to loose [sic], nor was he requested to give any financial information regarding this joint mortgage."

The Provider's internal note dated **2 August 2018** details as follows;

"email to [First Complainant] with FIF attached: Hi [First Complainant], As explained in my previous email, in order for the bank to carry out an assessment, a Financial Information Form is required along with supporting documentation from all parties. As the documentation has not been submitted by you, can you please advise if you are in a position to clear the arrears as there is no formal arrangement regarding the arrears and they are increasing each month. The attached paperwork needs to be completed within a week. If for some reason, you do not want to complete same ... can you advise if we are to assess this account based on [the Second Complainant's] financials alone and an arrangement is offered, whether you will agree to same. If no mutual agreement can be reached, the bank will have no option and may proceed with the appointment of a Receiver".

The Provider's internal notes dated **2 August 2018** detail as follows;

"OBC to [Second Complainant] [redacted] -spoke to cust and went through FIF-cust confirmed she is not working at present and is getting pension of A1925 plus rental income. She is going back to work (part time) as a [occupation redacted] from Sept- she has her medical test next week.

/Cont'd...

She had difficulties to complete an I&E hence incorrect figures however she can afford I/O until her family home is sold and acc [ending 7462] is cleared in full. She adv[ised] her ex husband will not complete a FIF but he will sign an ARA.

Cust apologised for not making any payments since April-her son was sick ([details redacted]) and she had to look after him ... He is getting better now so [Second Complainant] can recommence employment. She would like to pay 12m I/O until her family house is sold and acc full and she will be living @[address] and making rep to She will pay A80 (I/O) today for July and A80 in 2 weeks time for Aug. I adv I will refer all to credit dep to be reviewed and I will come back to her if any further questions."

"I&E from [Second Complainant] referred to SFS prep team. [First Complainant] will not provide financials however he will sign any ARA offered. Cust's family home is on the market for A695 (see link 19/4) however price will be reduced to A670 from Sept and acc [ending 7462] will be cleared. Cust would like 12m I/O ARA to allow time for family home to be sold. When family home sold- [Second Complainant] will move to property @ [address] and it will be her family home. Payment not met as cust's son was sick and [Second Complainant] was looking after him-A80 for July will be lodged today and A80 in 2 weeks for Aug. Cust also adv that exp figures on FIF too high as she had ... difficulties to complete it. She wants to keep this house as it will be her family home once her PDH (joint name) is sold"

The Provider's internal note dated **8 August 2018** details as follows;

****Borrowers Request***: 12 months i/o on non ccma btl a/c: [ending 7462] only to facilitate asset disposal of unencumbered pdh to clear a/c: [ending] 7462 only in full"*

A **SFS** was completed by the First Complainant and was received by the Provider on **8 August 2018**.

The SFS recorded the First Complainant's total monthly income as €4,000.00 and his monthly expenditure as €2,283.33.

The First Complainant outlines as follows in the SFS;

"The joint owned PDH @ [location] is for sale now for 12 months @ price of €685,000. It is A 4000 Square foot house in the most desirable location in [location].

/Cont'd...

The development of the [location] will be a game changer for the value of the property here so we would expect the house to sell in the next 6 months."

The Provider wrote to each Complainant individually by letter dated **9 August 2018** as follows;

"We have carefully assessed your mortgage loan to see if there is an alternative repayment arrangement (ARA) to suit your individual circumstances.

Offer of an Alternative Repayment Arrangement

The attached Agreement to Amend Mortgage Loan Offer Letter (the "Form") sets out the full details of the ARA that we are offering to you at Section A of the Form. This Form includes any special conditions that may apply and also the General Terms and Conditions.

What this ARA means for you

When deciding whether to take up this offer, please consider what the arrangement will mean for your individual circumstances including:

- i) The balance you owe us throughout the term of your mortgage loan will be higher than if this ARA was not put in place.*
- ii) In general, putting an ARA in place means the overall cost of your loan increases.*
- iii) We may record the ARA with the Irish Credit Bureau (ICB). If you break the terms of the alternative repayment arrangement, we may report that to the ICB. Such a report could make it more difficult for you to get credit from us or other financial institutions, for example, you may have difficulty getting a new home/business loan.*
- iv) If you have a mortgage repayment protection policy, please review its terms and whether the ARA may impact on any repayments that may be made by your policy provider.*

The enclosed Form sets out the full details of the ARA. Please read this Form carefully.

Acceptance of this ARA

*If you wish to take up this offer we require you to review, sign and return the enclosed Form. **Please ensure the signed Form (all pages) is returned properly completed to us within 5 weeks of the date of this letter.***

/Cont'd...

[...]

We strongly recommend you get independent financial and legal advice to help you decide whether to accept our offer of an alternative repayment arrangement. Your local Money Advice and Budgeting Service (MABS) Office can provide free and independent advice. Their contact details together with other important information which we have a duty to tell you about, are set out in an appendix to this letter."

An **Agreement to Amend Mortgage Loan Offer Letter** dated **9 August 2018** was enclosed with the letter issued to the Complainant. I note that **Section A** of the form details as follows;

"SECTION A: WHAT THIS FORM DOES

1. ALTERNATIVE REPAYMENT ARRANGEMENT (ARA) IS AS FOLLOWS:

...

1.1.1. The Borrower will pay Interest Only for 12 month(s) (the "Interest Only Period"). The Lender estimates that the repayments of interest only will be €140.88 each month during the Interest Only Period. The actual amount of the repayment instalments may differ (for example, if the interest rate changes).

1.1.2. After the preceding Interest Only Period, the Borrower will be obliged to repay the Loan on a capital and interest repayment basis over the rest of the period of the Loan so that the Loan is repaid by 20/08/2032 (the "Maturity Date"). The Loan balance is estimated to be €80,501.11 and will include all of the principal (capital), interest and other sums which the Borrower did not pay (and which the Borrower would have been obliged to pay if this Form did not come into force). The Lender estimates the new repayment amount will be €587.77 each month. The actual amount of the Loan balance and repayment instalments may differ (for example if the interest rate changes).

[...]

4. CONVERSION FROM TRACKER RATE TO NEW INTEREST RATE TYPE

4.1. Tracker to BTL Variable

/Cont'd...

4.1.1. *This Form converts the interest rate that applies to the Loan from a tracker rate which is 1.100% per annum at present to a BTL Variable rate.*

The BTL Variable Rate will apply for the remaining term of the Loan (unless the Lender and Borrower agree otherwise in writing in future, for example, to fix the interest rate for the Loan).

4.1.2. *At present the BTL Variable Rate is 2.100% per annum. Generally, the Lender applies the new rate within ten days after it receives this Form from the Borrower correctly accepted.*

4.1.3. *The Lender can vary the BTL Variable interest rate at any time up or down at its discretion. This Clause also applies to any other variable rate that applies to the Loan in future (for example, by agreement between the Lender and Borrower). The BTL Variable Rate can change up or down before the Borrower accepts this Form or before the Lender applies that rate to the Loan. If that happens, the Lender will notify the Borrower.*

5. COMMITMENT TO TRACKER ENDS

5.1 *Any commitment or obligation in the Mortgage Loan Offer Letter for a tracker variable rate for the Loan, now or in the future, will end once the Borrower completes and returns this Form. This Clause takes precedence over any condition of the Mortgage Loan Offer Letter, this Form or elsewhere concerning interest in general or tracker variable rates in particular including any Special Condition. The phrases "tracker rate", "tracker interest rate" or "tracker variable rate" are popular expressions to describe an interest rate that is an agreed margin above the European Central Bank ("ECB") Main Refinancing Operations Rate (including where it is described in the Mortgage Loan Offer Letter or elsewhere as the ECB Main Refinancing Operations Minimum Bid Rate). A tracker rate follows or "tracks" movements in this ECB rate. The word "tracker" and phrases containing that word are used with that meaning in this Form.*

Section B of the form details as follows;

"SECTION B: GENERAL CONDITIONS OF THIS FORM

1 THIS FORM WILL AMEND YOUR MORTGAGE LOAN OFFER LETTER

1.1. *This Form will amend the terms and conditions that apply to the Loan, including the Mortgage Loan Offer Letter.*

/Cont'd...

1.2. This Form does not change the maturity date of the Loan unless it says so (if it does say so, the term of the Loan is amended to the new maturity date shown in the Form). The maturity date coincides with the due date for the payment by the Borrower of the last instalment due under the Loan.

1.3. To the extent they are not amended or replaced by this Form, each of the terms and conditions of the Mortgage Loan Offer Letter, including those concerning how interest is applied to the Loan, will remain in full force and effect. (For example, the General Terms and Conditions attached to the Mortgage Loan Offer Letter remain in effect and are not replaced by these General Conditions).”

Section D of the form provides as follows;

“SECTION D: LEGAL, REGULATORY & CONSUMER CREDIT ACT NOTICES (PLEASE READ THESE CAREFULLY)

[...]

Tracker Variable Rate

With a Tracker Variable Rate Mortgage, we automatically move the variable rate in line with ECB (European Central Bank) Repo Rate changes, either increases or decreases. These increases or decreases will be applied within 5 working days of an ECB rate change.

Advantages of the Tracker Variable Rate include the following:	Disadvantages of the Tracker Variable Rate include the following:
<ul style="list-style-type: none">• We cannot vary the Tracker Variable Rate at our discretion but must adjust the rate to follow or “track” ECB Repo Rate changes.• Decreases in the rate must be applied within 5 working days of an ECB Repo Rate change.• You can make lump sum payments or overpayments on your monthly repayment on your Tracker mortgage account at no cost.	<ul style="list-style-type: none">• It is a variable rate which means your monthly repayments may go up and/or down to reflect changes in the rate.• If the ECB raises its Repo Rate, your tracker rate will automatically increase within 5 business days.

It is clear that the **Agreement to Amend Mortgage Loan Offer Letter** offered the Complainants interest only repayments of €140.88 on the mortgage loan for a period of 12 months, subject to the BTL variable rate of 2.10%.

I have considered the audio recording of a telephone call between the First Complainant and a representative of the Provider dated **12 August 2018** which has been furnished in evidence. I note that the Provider's representative outlined that the offer of the 12-month interest only period was subject to a variable rate being applied to the mortgage loan in place of the tracker interest rate. The First Complainant stated that he was unhappy with this and that he would follow up by email to the Provider's representative detailing their conversation.

The Provider's internal note dated **13 August 2018** details as follows;

"email from [First Complainant] 10/8: Hi I am just following up on our telephone conversation of today regarding the above account. You stated that you had sanctioned interest only for 12 months to allow us time to sell our PDH and clear the balance BUT it was on the condition that we lose the ECB tracker rate. I argued that what you were attempting to do was in effect illegal as the wording of the condition you cited: ' The Lender may at its absolute discretion, and with the consent of the borrower, vary any payment of principal, interest or any other amount payable in respect of the loan' meant that you needed our ... consent to do so. I pointed out that I was surprised that [the Provider] was being mean spirited and opportunistic in this case and to this end I stated that I was allowed and intended referring this situation to the Financial Ombudsman. You agreed that I could and asked that when I do that I advise you of the complaint log number which I agreed to do. You stated that you would put a hold on all action on your side for a period of two months to allow the Financial Ombudsman adjudicate on this situation. I advised that I was going on annual leave today for 1 week and that I would communicate ... with the Financial Ombudsman on Monday week the 20th August. Please acknowledge and copy to [Second Complainant]. [First Complainant]"

The Provider's internal note dated **13 August 2018** details as follows;

"email to [First Complainant]: Good morning [First Complainant], Thank you for your email. Yes, credit department approved 12 months Interest only subject to BTL pricing policy (this re-pricing policy is applied to Buy to Let accounts where terms and conditions are being amended). I confirm I will hold all actions for 2 months to allow you the time to go to the Financial Ombudsman and to provide us with a reference number.

/Cont'd...

In the meantime, as discussed on the phone, please make sure that repayments of minimum A140 per month are being maintained. Looking forward to hearing from you. Many thanks, [redacted]"

I have considered the audio recording of a telephone call between the Second Complainant and a representative of the Provider dated **31 August 2018** which was provided in evidence. The Second Complainant stated that she had made a mortgage repayment of €140.00 to the mortgage loan account which was the minimum agreed repayment.

The Provider has submitted that the Agreement to Amend Mortgage Loan Offer was deemed declined on **28 September 2018** as it was not signed or returned within 5 weeks of issue.

It is clear from the evidence that the Complainants were aware of the consequences of accepting/signing the agreement issued to them in **August 2018**. If the Complainants were not happy with the terms of the **Agreement to Amend Mortgage Loan Offer**, including the amendment to the interest rate from the tracker interest rate to the variable interest rate, the Complainants could have, and did decide, not to accept the offer made by the Provider.

The Complainants have submitted that the proposed amendment of the interest rate from tracker variable to BTL variable in the **Agreement to Amend Mortgage Loan Offer** was "*opportunism*" on the Provider's part. I appreciate that the Complainants did not want to give up their entitlement to a tracker interest rate. However, it remains the case that the Complainants were seeking to vary the terms of their mortgage loan with the Provider by seeking forbearance on the loan. It was within the Provider's discretion to decide whether or not to accede to that request. Agreeing to renegotiate the terms of the mortgage gave the Provider the opportunity to introduce different terms to the agreement. It is important for the Complainants to understand that there was no obligation on the Provider to offer the Complainants any form of forbearance on their mortgage loan at the time. Until the new terms were agreed, the original terms continued to apply.

The Provider, in accordance with its BTL pricing policy offered a standard variable interest rate which I understand was to start at 1% above the current tracker interest rate on the Complainants' mortgage loan which is the subject of this complaint. In the circumstances of this particular complaint, it appears that the Provider offered a variable rate of 2.10%. I note that the **Agreement to Amend Mortgage Loan Offer** dated **9 August 2018** refers to the tracker interest rate applicable to the loan as being 1.10%.

/Cont'd...

The loading of 1% was added to the tracker interest rate of ECB + 1.10%, and a variable interest rate of 2.10% was offered by the Provider to the Complainants.

The Complainants were seeking to agree an alternative arrangement with the Provider on a mortgage that was not secured on their principal private residence. The Provider made an offer to the Complainants to make interest only repayments for 12 months on the mortgage account on condition that a variable rate of 2.10% would apply to the mortgage loan. While I accept that the Complainants were in a difficult position, it was nonetheless a matter for the Complainants to decide whether to accept that arrangement on offer by the Provider.

Provision 6.9 of the **Consumer Protection Code 2012**, outlines as follows;

“a regulated entity offers a personal consumer the option to move from a tracker interest rate to an alternative rate on their existing loan; the lender must provide the personal consumer with the following information on paper or on another durable medium:

- i. Indicative comparisons of the cost of the monthly repayments at the personal consumer’s current tracker interest rate and each of the alternative rate(s) being offered;*
- ii. An indicative comparison of the total cost of the loan if the personal consumer continues with the existing tracker interest rate and the total cost of the loan for each of the alternative rate(s) and terms being offered. Any assumptions used must be reasonable and justifiable and must be clearly stated; and*
- iii. Details of the advantages and disadvantages for the personal consumer of the tracker interest rate compared to each of the other rate(s) being offered.*

The following warning statement should also appear with the information above, in circumstances where a personal consumer will not be able to revert to a tracker interest rate if they move to an alternative rate:

Warning: If you switch to an alternative interest rate, you will not be contractually entitled to go back onto a tracker interest rate in the future.

This provision does not apply to a mortgage on a primary residence covered by the Code of Conduct for Mortgage Arrears which is in “arrears” or “pre-arrears” as defined in the Code of Conduct for Mortgage Arrears.”

The appropriate information and warnings under **provision 6.9** of the **Consumer Protection Code 2012** were contained in the **Agreement to Amend Mortgage Loan Offer**. The Complainants' mortgage loan was not a private dwelling house mortgage loan.

I accept that the Complainants did not want to give up the entitlement to the tracker interest rate of ECB + 1.10% on the mortgage loan, however, the reality of the situation at that time in **August 2018**, was that the Complainants could not service the repayments required within the original terms of the loan. As outlined above, the Complainants were seeking to agree an alternative arrangement and it was a matter for them to decide whether to accept the arrangement on offer by the Provider. The consequences of accepting the offer and the appropriate information were provided to the Complainants in the **Agreement to Amend Mortgage Loan Offer**.

The evidence as outlined above shows a significant amount of correspondence between the Provider and both Complainants in relation to the arrears on the mortgage loan account.

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

*“8.3 Where an account is in **arrears**, a **regulated entity** must seek to agree an approach (whether with a **personal consumer** or through a third party nominated by the **personal consumer** in accordance with Provision 8.5) that will assist the **personal consumer** in resolving the **arrears**.”*

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

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

On **9 August 2018**, the Provider offered the Complainants interest only repayments on their mortgage loan account for a period of 12 months, on the condition that the Complainants agreed to change the interest rate applicable to the mortgage loan from a tracker interest rate to a BTL variable interest rate.

/Cont'd...

The **Mortgage Loan Offer Letter**, under the General Conditions, allowed the Provider to “*at its absolute discretion, and with the consent of the Borrower, vary any payment of principal. Interest or any other amount payable in respect of the Loan*”. The Provider issued an offer to the Complainants to this effect on the mortgage loan in the form of the **Agreement to Amend Mortgage Loan Offer**, which contained the appropriate warnings in compliance with the **Consumer Protection Code 2012**, about moving from a tracker interest rate to a variable interest rate.

The Complainants did not proceed with the Provider’s offer and the interest rate on the Complainants’ mortgage account was not altered.

For the reasons outlined in this Decision, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

31 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

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

