



<u>Decision Ref:</u>	2021-0293
<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>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The loan amount was €275,000 and the term of the loan was 30 years. The Mortgage Loan Offer Letter which was signed by the Complainant on **14 December 2006** detailed that the interest rate was "4.24% Variable".

The Complainant's Case

The Complainant submits that she was issued with a Mortgage Loan Offer Letter dated **06 December 2006** providing for a mortgage loan in the amount of €275,000 repayable over a period of 30 years. The Complainant notes that her mortgage loan account drew down on a staff non-standard variable rate of interest of 3.50%.

The Complainant states that she completed a Mortgage Form of Authorisation on **16 January 2007** to change her mortgage loan to a 2-year staff fixed interest rate of 3.95%.

The Complainant submits that she subsequently received an internal staff email advising that *“Staff who are currently on Staff 2-Year Fixed Rate – currently 3.95% will roll to ECB +.75% as per their original signed mortgage agreement at the end of their 2-year fixed period. Staff will receive notification 30 days prior to the end of their fixed rate term”* and *“if you do not respond to this notification, your account will automatically default to the Staff Tracker ECB + 0.75%.”*

The Complainant submits that she emailed the Provider on **09 October 2008** seeking confirmation that the staff tracker interest rate of ECB + 0.75% would be available to her on the expiry of her 2-year fixed interest rate period. The Complainant submits that she also asked the Provider if it was necessary for her to complete an *“application for change to staff LTV variable Mortgage Form of Authorisation”*.

On **10 October 2008**, the Complainant states that the Provider confirmed to her, by way of email, that her mortgage loan would rollover to the staff tracker of ECB + 0.75% when her fixed interest period expired on **04 February 2009**.

The Complainant explains that she emailed the Provider on **15 January 2009** advising that her *“new mortgage rate letter”* did not include the option of a staff tracker interest rate which she understood she was entitled to on the expiry of her fixed rate period as per the Provider’s email dated **10 October 2008**.

The Complainant submits that she emailed the Provider again on **15 April 2010** to explain that she would have applied to switch her mortgage to a tracker interest rate in **October 2008**, however, she was advised by the Provider at the time that it was not necessary to do so because her loan account would automatically transfer to a tracker rate of interest when her 2-year fixed interest rate expired.

The Complainant submits that by email dated **08 October 2010**, the Provider confirmed that she could have changed her mortgage loan to a tracker interest rate on **09 October 2008** (when she emailed the Provider on that date) if she had formally requested a Mortgage Form of Authorisation on that date which would have given her 14 days to complete, return and secure the tracker interest rate.

The Complainant further submits that her mortgage loan account was *“amended by [the Provider] on 10th Nov 2008... without [her] consent”*.

The Complainant details that *“[i]t is very difficult dealing with this when [she is] also a bank staff member”* and that *“[i]t is extremely stressful and sole (sic.) destroying going to work for them every day”*. The Complainant further details that *“while [she is] not in extreme*

financial difficulty as some unfortunate people find themselves in as a result of this debacle, it has had a massive impact on [her] quality of life and happiness.”

The Complainant is seeking the following:

- (a) A tracker interest rate is applied to her mortgage loan account;
- (b) A refund of all overpaid interest on the mortgage loan account backdated to **February 2009**; and
- (c) Compensation.

The Provider’s Case

The Provider submits that the Complainant’s mortgage loan account was drawn down on **04 January 2007** pursuant to a Mortgage Loan Offer Letter dated **6 December 2006**, accepted and signed by the Complainant on **14 December 2006**. The Provider states that the Mortgage Loan Offer Letter provided for a loan in the amount of €275,000 repayable over a term of 30 years. The Provider notes that the interest rate applicable was a staff non-standard variable interest rate of 4.50%. The Provider asserts that the Mortgage Loan Offer Letter “*did not contain a contractual entitlement to a tracker rate of interest*”.

The Provider explains that when the Complainant signed the Mortgage Loan Offer, the staff non-standard variable interest rate was 3.50%, however, following a revision to the Revenue Benefit in Kind (BIK), it “*was required*” to increase the staff non-standard variable rate to 4.50% on **02 January 2007**.

The Provider submits that on **16 January 2007** the Complainant signed a Mortgage Form of Authorisation to convert the interest rate on her mortgage loan to a staff fixed interest rate of 3.95% for a period of 2 years. The Provider states that the 2-year fixed interest rate was applied to the Complainant’s mortgage loan account on **18 January 2007**

The Provider details that it withdrew tracker rate products in **autumn 2008**. The Provider states that it published a notice on its internal staff intranet platform on **09 October 2008** which stated as follows:

“Staff who are currently on Staff 2-Year Fixed Rate – currently 3.95% - will roll to ECB + 0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period. Staff will receive notification 30 days prior to the end of their fixed rate term. This notification will also offer a range

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of fixed and variable rate products. If you do not respond to this notification, your account will automatically default to the Staff Tracker ECB + 0.75%.”

The Provider details that the notice also detailed as follows:

“Staff trackers are therefore not available for any new or existing staff mortgages, with the exception of those that are currently either on the staff tracker mortgage of ECB + 0.75% or those rolling to ECB + 0.75% as per their original signed mortgage agreement (see existing staff mortgage section below)” [Provider’s emphasis]

The Provider details that *“neither of the above mentioned paragraphs”* could have applied to the Complainant as:

*“a) she was not “on” the staff tracker mortgage rate of ECB + 0.75% on 9 October 2008 (she was on a fixed rate, having moved to that fixed rate from a non-tracker variable rate); and
b) she had no entitlement to “roll” to a mortgage rate of ECB + 0.75% under her mortgage agreement.”*

The Provider details that the Complainant contacted the Provider on **09 October 2008** by email following the publication of the Provider’s notice on the same day. The Provider states that there was nothing in the Complainant’s email *“that suggests that the Complainant was urgently seeking an MFA to move to a tracker rate of interest, prior to its withdrawal [in Autumn] 2008.”* The Provider further submits that the Complainant’s email *“would be more accurately described as a general query in relation to the operation of the Complainant’s mortgage loan account”* and there was *“no request for an urgent response”*.

The Provider submits that on **10 October 2008** a different representative of the Provider responded to the Complainant’s email of **09 October 2008**, as the representative that the Complainant had originally contacted had moved to a different department. The Provider notes that its representative responded as follows:

“As per the note below from [Provider’s intranet system], your mortgage will rollover (on 4/2/2009) to the staff tracker of ECB + 0.75% - currently 4.50% following the ECB recent reduction” [Provider’s emphasis]

The Provider asserts that its advice to the Complainant was *“as per”* its internal notice. In relation to its representative’s response to the Complainant dated **10 October 2008**, the Provider submits as follows:

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“The advice provided was given within the scope of the [Provider’s intranet system] notice only, and did not seek to expand on this notice.

In this respect, the advice that was given by the Provider’s representative was based on the belief that the Complainant fell into the category of a customer whose Offer Letter provided for a contractual entitlement to a tracker rate of interest. While this belief was based on the best information made available to the representative at the time, this was not the case in respect of the Complainant’s Offer Letter.”

The Provider asserts that the email response of **10 October 2008** *“could not constitute a contractual amendment to the Complainant’s Offer Letter”*. The Provider further indicates that it responded to the Complainant’s email *“in less than 24 hours which the Provider considers to be in a timely manner”*. The Provider maintains that if a Mortgage Form of Authorisation was issued to the Complainant on **10 October 2008**, it is *“satisfied”* that the Complainant could not have applied a tracker interest rate as she would not have completed a *“MFA for a tracker rate while tracker rates were available.”*

The Provider accepts that its representative’s email correspondence of **10 October 2008** *“may have caused confusion on its face”* but the Provider submits *“it was clear that the advice given should be read entirely within the context of the [Provider’s intranet] Notice of 9 October 2008.”*

The Provider states that, after this date, only existing customers who had a contractual entitlement to a tracker rate of interest could avail of tracker interest rates. The Provider explains that given the Complainant’s mortgage loan account did not have a tracker interest rate entitlement, she was not offered the option of a tracker rate upon expiry of the fixed interest rate in **February 2009**.

The Provider submits that **General Condition 7(b)** of the Mortgage Loan Offer Letter *“clearly and unequivocally”* details the interest rates that will be available at the end of a fixed rate period. The Provider refers to the Mortgage Form of Authorisation signed by the Complainant on **16 January 2007** and maintains that there *“is no ambiguity, lack of clarity or vagueness contained in the January 2007 MFA, when read in conjunction with the Offer Letter, concerning the rate which the Complainant’s mortgage loan account would revert to upon expiry of the fixed rate period.”*

The Provider states that prior to the expiry of the fixed interest rate period in **February 2009**, the Provider issued a Product Review Notice enclosing a Mortgage Form of Authorisation which detailed the interest rates available to the Complainant at that time to include a staff variable rate, a fixed rate and a staff rate of 4.00%.

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On expiration of the 2-year fixed interest rate on **04 February 2009**, the Provider details that the Complainant's mortgage account "rolled" onto the staff non-variable interest rate of 3.25% as per **General Condition 7(b)** of the Mortgage Loan Offer Letter.

The Provider details that on **21 February 2011**, the Complainant signed a Mortgage Form of Authorisation to apply a discounted fixed interest rate of 3.74% to her mortgage loan account for a period of 3 years.

The Provider submits that the Complainant applied a staff variable rate of 4.30% to her mortgage loan account on **25 February 2014** by signing a further Mortgage Form of Authorisation. The Provider details that this interest rate was applied to the Complainant's mortgage loan account on **26 February 2014**.

The Provider states that the Complainant applied a 2-year fixed interest rate of 3.00% by completing a Mortgage Form of Authorisation on **21 September 2018**. The Provider submits that this interest rate was subsequently applied to the Complainant's mortgage loan account on **24 September 2014**.

The Provider submits that it did not have any specific policy in place in relation to tracker interest rate offerings between **December 2006** and **February 2009**. The Provider details that it was "at all times open between December 2006 and 10 October 2008 for a customer to approach the Provider with a request to move their mortgage loan account to a tracker interest rate". The Provider further details that "if the Complainant was to move from the fixed interest rate to a tracker rate during this time (prior to the removal of the tracker product), this move would have been subject to a funding fee upon that conversion" and "this did not preclude the Complainant from seeking to convert the mortgage loan account from that fixed rate to the tracker rate prior to 10 October 2008". The Provider states that the Complainant "had the opportunity to move to a tracker rate of interest at any time between January 2007 and 10 October 2008, by providing the Provider with a completed and signed MFA instructing the Provider to move the mortgage loan account to a tracker rate of interest, albeit the Provider notes that a breakage fee would be applicable given that the Complainant was within the fixed rate period".

The Provider details that even if the Complainant had requested a tracker interest rate to be applied to her mortgage loan account this "could not have been facilitated by the time of the response on 10 October 2008."

In response to the Complainant's submission that the Provider amended her mortgage loan account on **10 November 2008** without her consent, the Provider submits that the amendment recorded on **10 November 2008** was recorded on its mortgage administration system.

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In this regard, the Provider explains that it *“makes amendments to its mortgage administration system..but those amendments are for internal administrative purposes only and do not constitute communication with a customer. The presence of such content does not represent an amendment to the terms and conditions of a customer’s mortgage loan account”* .

The Provider details that it *“is satisfied”* that the content on its staff intranet notice *“does not convey any right or legitimate expectation as to the rate an account would roll to upon expiry of a fixed rate period as it does not form part of the governing loan documentation or communication with the Complainant”*.

The Complaints for Adjudication

The conduct complained of is:

- (a) the Provider incorrectly failed to advise the Complainant on **09 October 2008** that she was required to request a Mortgage Form of Authorisation on that date to secure a tracker interest rate on her mortgage loan; and
- (b) the Provider incorrectly failed to offer the Complainant a tracker interest rate on the expiry of the fixed interest rate period in **February 2009**.

Decision

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

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

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

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A Preliminary Decision was issued to the parties on **05 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.

In order to determine this complaint, it is necessary to review the relevant provisions of the Complainant's mortgage loan documentation and to consider certain interactions between the Complainant and the Provider between **November 2006** and **February 2009**.

A **Mortgage Loan Offer Letter** was issued to the Complainant dated **06 November 2006** which provided for a loan amount of €275,000 over a term of 30 years. **Part 1 – The Statutory Loan Details** of the **Mortgage Loan Offer Letter** details as follows:

<i>"1. Amount of credit advanced:</i>	<i>€275,000</i>
<i>2. Period of Agreement:</i>	<i>30 Years</i>
<i>3. Number of</i>	<i>4. Amount</i>
<i>Repayment</i>	<i>of each</i>
<i><u>Instalments</u></i>	<i><u>Instalment</u></i>
<i>360</i>	<i>€1,234.87</i>
<i>...</i>	
<i>APR*:</i>	<i>4.31% fixed</i>
<i>...</i>	
<i>*Annual Percentage Rate of Charge"</i>	

Part 2- The Additional Loan Details of the **Mortgage Loan Offer Letter** details as follows:

<i>"11. Type of Loan:</i>	<i>Repayment</i>
<i>12. Interest Rate:</i>	<i>3.500% Variable"</i>

Part 4- The Special Conditions of the **Mortgage Loan Offer Letter** details as follows:

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

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(v) *In the event of the Borrower (or both Borrowers where both are members of the permanent staff of the [Provider]) ceasing to be employed by the [Provider] the Staff Mortgage Rate shall cease and the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the Bank may, at its absolute discretion, offer to the Borrower. The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The rate shall be the higher of the two following indicators (1) the prevailing Revenue Commissioners BIK (Benefit in Kind) reference rate;*

(2) the one month Cost of Funds reference rate (which is equivalent to the one month EURIBOR rate issued by the [Provider's] Global markets on a daily basis). In the event that the Staff Mortgage Rate is certified by the Society to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate. Notification of any change in the interest rate shall be given in accordance with Condition 6(b) of the General Conditions of the original offer letter. Condition 6 (c) of the General Conditions of this Offer Letter is not applicable for the duration of the Loan when the interest rate is the Staff Mortgage Rate."

The **Mortgage Loan Offer Letter** also details the following:

"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 Conditions of the Mortgage Loan Offer Letter 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*

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dates for payment thereof shall be determined by the Lender at its absolute discretion.

- (b) In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.*
- (c) If so agreed in writing by the Lender, the Loan may be repaid in 10 or 11 payments in any year of the term and such payments (unless the Lender at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during the year for that 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.”*

General Condition 5 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter details as follows:

“5. General Interest Rate Provisions

- (a) Interest at the fixed or variable interest rate prevailing from time to time during the term of the Loan, shall be calculated on the daily balance outstanding and shall be compoundable at such monthly, quarterly or other periodic rests as the Lender shall, from time to time and at any time, at its absolute discretion, determine.*
- (b) Any variation in the interest rate (whether an adjustment of interest rate as between one fixed rate period and another fixed rate period or any variation in the variable rate) may be accommodated at the discretion of the Lender by way of: (i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan; or (iii) an adjustment in the amount of the final repayment; or (iv) an adjustment in the term of the Loan.*
- (c) Any sum not paid by the Borrower to the Lender by its due date shall be subject to an additional interest charge of 0.5% per month or part of a*

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month (i.e. 6% per annum) subject to a minimum charge of €2.54 per month from such due date until payment and is charged monthly on the arrears balance at the end of that month. This is in addition to the relevant interest charge and shall accrue both before and after any judgement and shall be charged to the Borrower's accounts and payable at the same time and in the same manner as the relevant interest charge. The said rate or minimum charge may at any time and from time to time be changed by the Lender at its absolute discretion.

The Lender shall give the Borrower at least one month's prior notice in the event of any such change occurring during the term of the Loan. Any such additional interest charge is intended to constitute liquidated damages to the Lender including the Lender's increased administration and related charges due to the Borrower's default. Notwithstanding clause 1(c) the Lender may give notice to the Borrower under this clause by any means it considers reasonable."

General Conditions 6 and 7 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter detail as follows:

“6. Variable Interest Rates

- (a) Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- (b) The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR)."*

7. Fixed Interest Rates

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(a) *The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. **The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down.***

The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of draw down.

(b) *The Lender shall have 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 the interest rate applicable to the Loan will be a variable interest rate.*

(c) *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower will be liable today a sum to be calculated in accordance with the following formula: $(\text{Amount} \times (R-R1) \times \text{Time})$ divided by 36500 and for the purpose of this formula, the variables are defined as follows: "Amount means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term, allowing for scheduled repayments; in the case of an endowment loan, this will equal the full amount of the early repayment or conversion. "R" means the cost of funds for the Lender for the fixed rate period as incorporated in the existing interest rate applying to the Loan. "R1" means the interest rate available to the Lender for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period. "Time" means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period.*

(d) *At the Borrower's request, the Lender may, at its absolute discretion agree to add any sum payable in accordance with clause 7(c) to the principal amount from time to time owing and this may be accommodated at the*

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discretion of the Lender by way of: (i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan; or (iii) an adjustment in the amount of the final repayment; or (iv) an adjustment in the term of the Loan AND it shall be a condition of any such adjustment that then Borrower shall immediately effect, maintain and assign to the Lender a suitably amended Life Policy (of Endowment Policy as appropriate) in respect of this additional amount."

The Complainant signed the **Borrower's Acceptance and Consents** of the **Mortgage Loan Offer Letter** on **13 November 2006** on the following terms:

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

It is clear to me that the **Mortgage Loan Offer Letter** provided for a variable interest rate of 3.5% which *"may vary upwards or downwards"*. If the Complainant ceased to be employed by the Provider, then the applicable staff mortgage interest rate would no longer apply and the Provider's home loan variable rate, which varies *"at the Lender's discretion upwards or downwards"*, would apply instead.

The mortgage loan statements submitted in evidence indicate that the Complainant's mortgage loan account was drawn down on **05 January 2007** on a lending rate of 4.50%.

The Complainant completed a **Mortgage Form of Authorisation** on **16 January 2007** to apply for a 2-year staff fixed interest rate of 3.95%.

The **Mortgage Form of Authorisation** detailed as follows:

"APPLICATION FOR CHANGE OF INTEREST RATE:

I/We wish to apply for the Staff 2 Year Fixed Rate 3.95% Mortgage Rate fixed to 4th February 2009 as detailed above for my/our mortgage loan (the "Loan")

**Note: If you change from a fixed rate during the fixed rate period, you may be liable to pay a funding sum to the Bank. See conditions overleaf."*

The **Acknowledgement and Agreement** section of the Mortgage Form of Authorisation signed by the Complainant on **16 January 2007** details as follows:

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"I acknowledge and agree that:-

In converting the Loan from a fixed rate to the Staff 2 Year Fixed Mortgage Rate, I understand that I will be liable to pay a funding sum to the Society calculated in accordance with the formula set out above under 'Early Repayment'.

- 1. In the event of the Borrower (or both Borrowers where both are members of the permanent staff of [the Provider]) ceasing to be employed by [the Provider] the Staff Mortgage Rate shall cease and the interest rate applicable to the Loan shall immediately revert to the prevailing Homeloan Variable Rate or such other rate which the Society may, at its absolute discretion, offer to the Borrower.*
- 2. **If the loan is to be converted to a Tracker Mortgage Loan**, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the rate notified above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate") for the term of the Loan. Variation in interest rate shall be implemented by the Society 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 either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time, the Repo rate is certified by the Society to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*
- 3. Save as set out in this Form of Authorisation all the terms and conditions applicable to the Loan remain unchanged."*

The mortgage loan statements provided in evidence indicate that the 2-year staff fixed interest rate of 3.95% was applied to the Complainant's mortgage loan account on **18 January 2007**.

It is clear to me that the **Mortgage Form of Authorisation**, as accepted and signed by the Complainant dated **16 January 2007**, envisaged a 2-year fixed rate of 3.95% to apply to the Complainant's mortgage loan account until **4 February 2009**. The **Mortgage Form of Authorisation** further detailed that if the Complainant, who was employed by the Provider, ceased to be employed by the Provider then the staff interest rate would no

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longer apply and the interest rate applicable to the loan would switch to the “*prevailing Homeloan Variable Rate*” or such other rate which the Provider may, at its absolute discretion, offer to the Complainant. I note that the Mortgage Form of Authorisation also outlined what would transpire if the Complainant chose to convert her mortgage loan to a tracker mortgage loan. I do not consider that this reference to a tracker mortgage loan in the Mortgage Form of Authorisation is sufficient to amount to a contractual entitlement on the part of the Complainant to a tracker rate of interest. Rather, the Provider was setting out the terms and conditions applicable to a tracker mortgage loan if the Provider offered a tracker interest rate to the Complainant.

The Provider issued an internal communication through its staff intranet on **09 October 2008** which detailed as follows:

“An update on staff mortgage options

[The Provider] no longer offers customer or staff tracker mortgages with effect from start of business Friday 10 October 2008

An announcement from Consumer Banking

Staff trackers are therefore not available for any new or existing staff mortgages, with the exception of those that are currently either on the staff tracker mortgage of ECB +0.75% or those rolling to ECB +0.75% as per their original signed mortgage agreement (see existing staff mortgage section below).

1. New staff mortgage applications

New staff applications are entitled to avail of the best customer rates available on the matrix. Currently the best rates are:

- *2-Year Fixed Rate (currently 5.20%)*
- *Variable LTV products. The best available rates are: for residential property, 5.30%, or for investment property, 5.65%*

2. Existing staff mortgage accounts

- *Staff 2-Year Fixed Rate: rate currently 3.95%*

Staff who are currently on Staff 2-Year Fixed Rate – currently 3.95% - will roll to ECB +0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period. Staff will receive notification 30 days prior to

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the end of their fixed rate term. This notification will also offer a range of fixed and variable rate products. If you do not respond to this notification, your account will automatically default to the Staff Tracker ECB + 0.75%.

Staff Tracker Mortgage: ECB + 0.75%

Staff that are currently on the Staff Tracker of ECB +0.75% will remain on this product. This product does not attract BIK.

3. Existing staff wishing to switch to alternative product options

To avail of any of the Variable LTV based product options (5.30% for Residential property and 5.65% for investment properties) staff will need to complete a Mortgage Form of Authorisation (MFA) for either Bank or [Provider] depending on where the account is held. The MFA will need to be completed and signed by all parties on the mortgage account.

Please print off and complete the appropriate Mortgage Form of Authorisation below to switch to either of these options”.

The Complainant has submitted a series of emails in evidence that were exchanged between her and a representative of the Provider. The Complainant sent the following email after receipt of the above internal notice from the Provider at 12.39 pm on **09 October 2008** detailing as follows:

“Hi [Provider’s representative],

Just enquiring about the notice on [Provider’s intranet] today regarding Tracker Mortgages.

Can you confirm if this option will be available to me when my 2yr fixed rate expires (in January 09, I think) or do I have to complete the APPLICATION FOR CHANGE TO STAFF LTV VARIABLE MORTGAGE FORM OF AUTHORISATION form? And if I do have to complete this form and fax it to [Provider], is there a penalty for switching before my Fixed Rate expires?

*Thanks very much,
[Complainant]”*

The Provider responded on **10 October 2008** at 11.34 pm stating as follows:

/Cont’d...

"Hi [Complainant] - how are you keeping?"

[Provider's representative] does not work in [Provider branch location] anymore.

As per the note below from [Provider's intranet], your mortgage will rollover (on 4/2/2009) to the staff tracker of ECB + 0.75% - currently 4.50% following the ECB recent reduction.

You will also have the option of switching to a fixed or variable rate before you rollover - there will be no penalty.

Best regards

[Provider's representative]"

The Complainant responded on **10 October 2008** at 11.48 pm as follows:

"I'm keeping very well [Provider's representative], loving [Provider branch location], so glad I managed to make the move when I did.....everything worked out perfectly.

Thanks for your e-mail below, panic over!

Hope all is well with you.

Best Regards,

[Complainant]"

The Provider issued a letter to the Complainant on **20 November 2008** detailing as follows:

"Re: Staff Fixed Rate Mortgage 3.95%

Dear [redacted]

I am writing to let you know about Staff Fixed Rate Mortgage rollover options, which came into effect on the 7th November 2008.

As you may be aware, [the Provider] removed tracker mortgage products for new customers on the 10th October 2008. All major financial institutions have also removed their tracker products at this stage. We then assessed the impact of the removal of trackers on Fixed Rate customers at the time of their roll-over.

/Cont'd...

The key finding is that those currently on a fixed rate fall into one of two categories

1. Those who opened their mortgage account on a fixed rate, or took the option of further fixed rates at previous roll-over times, will have a Tracker option on their roll-over letter, as per the terms and conditions of their Letter of Offer.

2. Those who moved into a fixed rate from another product, by signing a Mortgage Form of Authorisation, will not have a tracker option on their roll-over letter. The signed Mortgage Form of Authorisation supersedes the original Letter of Offer.

As, according to our records, your mortgage(s) is currently on the 3.95% staff fixed rate, you will fall into one of the two categories above. As per our contractual commitments to you and the terms and conditions of your agreement with us, this letter outlines your options.

It is very important to note that as we have introduced similar steps for customers, if we were to treat you as a staff member differently, it would be deemed preferential and would incur BIK. The options available to you now (with the exception of the Staff Preferential 4%) are all exempt from BIK.

As outlined above

- If you are in category 1 you will receive your roll-over letter with the staff tracker (ECB+0.75%) option, as well as the options offered below.
- If you are in category 2 you will receive your roll-over letter with the options outlined below.

Homeloans

Staff Preferential Rate (for all loan amounts)	4% (subject to BIK)
Highly Competitive 2 year fixed rate	Currently 4.75%*
Variable LTV Rate	Currently 4.50%*

If you do not respond to the roll-over letter, we will automatically roll your mortgage to the Variable LTV based rate, currently 4.50%.

/Cont'd...

Please note only staff on the 3.95% fixed rate can move the full amount of their mortgage into the 4%. This is an exception for this group of staff. For staff on all other products, normal limits apply.

RIL (Residential Investment Loan)

Highly Competitive 2 year fixed rate	Currently 4.95%*
Variable LTV Rate	Currently 4.85%

If you do not respond to the roll-over letter, we will automatically roll your mortgage to the Variable LTV based rate, currently 4.85%.

These rates above are highly competitive and we continue our policy of offering our staff the best available customer rates.

A communication was issued on [Provider's intranet] on the 9th of October indicating that the Tracker Mortgage would be available on roll over – this preceded our final assessment on our withdrawal from Tracker Mortgages and represented the most accurate information available at the time. The subsequent assessment of the impact of the decision to remove the Tracker Mortgages has led to the outcome outlined in this letter. We apologise for any confusion this has caused.

This letter is for your information only. There is no action required by you at this time. Your roll-over letter will issue about 4 weeks before you are due to roll off your fixed rate.”

The Provider issued a letter to the Complainant dated **05 January 2009**, prior to expiration of the 2-year fixed interest rate in **February 2009**, which detailed as follows:

“Dear [Complainant]

I am writing to let you know that your current rate of 3.950% will expire on 4/02/2009. We have a number of attractive mortgage products and I am pleased to offer you the following range of options:-

Description	Rate	* Projected Standard Repayment
STAFF H/L LTV VARIABLE (PDH)	3.750%	€1,298.23
Fixed to 14 Jan 2011 Staff PDH	4.750%	€1,453.83

/Cont'd...

Staff Rate 4.00% (BIK APPLIES)	4.000%	€1,336.27
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** This is an estimated figure only and may be higher on the actual date that the rate is changed on your account.*

To avail of your selected option, please tick the relevant rate on the enclosed Mortgage Form of Authorisation. Please sign and date this form and return it to us at [Provider's address]. Unfortunately, we cannot hold the above choice of rates open after this date.

If you would like more information on the above options, please do not hesitate to contact our Customer Relationships team on [Provider's number].

If I do not hear from you by 4/02/2009, our homeloan will, in accordance with your loan offer, automatically move to the variable rate of 3.750%

Finally, to ensure we have your most up-to-date details, please confirm the information on the attached sheet is correct, amend if necessary and return it in the same envelope.

I would like to thank you personally for choosing [the Provider] for your mortgage and for your continued valued business. If you have any queries on your mortgage or indeed any other matter, please do not hesitate to contact me."

The Complainant subsequently contacted the Provider's representative to query why she was not offered a tracker interest rate, as per her previous email exchange with the Provider's representative on **09 October 2008**. The Complainant's email to the Provider dated **15 January 2009** at 3.27pm reads as follows:

"Hi [Provider's representative],

Hope all is well with you.

I've received my new mortgage rate letter and the Staff Tracker rate does not appear as an option. Can you confirm if this is correct? I was of the understanding that this was part of my mortgage agreement with yourselves that Staff Tracker was an option after the 2 year fixed rate, hence I didn't change over on 10th Oct.

*Many thanks,
[Complainant]"*

/Cont'd...

The Provider's representative replied on **15 January 2009** at 4.32 pm as follows:

"Hi [Complainant] - I am very well thanks.

Hope you are keeping well also.

I am checking matters out with our Treasury unit and I'll revert to you tomorrow.

Regards

[Provider's representative]"

The Provider's representative followed up with the Complainant by way of email on **16 January 2009** which details as follows:

"Hi [Complainant] - I am attaching a communication from [Provider's employee]...

Evidently you should have received a communication dated 20th November explaining the position.

I hope that this clarifies matters for you [Complainant].

Regards

[Provider's representative]"

Unfortunately as our letter dated 20th November outlined, the current situation has arisen as a result of a decision to remove trackers for new business on 10th October 2008. As the impacts of this decision were assessed in subsequent days, it became clear that staff would also be impacted.

In the same letter we also state the following in relation to a communication on [Provider's Intranet]:

A communication was issued on [Provider's Intranet] on the 9th of October indicating that the Tracker Mortgage would be available on roll over - this preceded our final assessment on our withdrawal from Tracker Mortgages and represented the most accurate information available at the time. The subsequent assessment of the impact of the decision to remove Tracker Mortgages has led to the outcome outlined in this letter. We apologise for any confusion this has caused.

/Cont'd...

The exact same principle applies to the information given to you by [redacted] or anyone else in the business, again, this being the most accurate information available at that time. Unfortunately, it was only after the assessment was completed (which took quite a number of days) that the full impact of the situation on staff was realised.

It is important that I also confirm that [the Provider] are honouring all the terms & conditions and legal obligations of the Mortgage Forms of Authorisation signed by you in relation to the relevant accounts above.

As a result, the rollover options that we outlined in our letter dated 20th November are now the only options that are available to you. Rolling to tracker is not now an alternative. As you know we have now put together the best possible rollover options for you and in the main attempted within these options to avoid Benefit-in-Kind. We cannot provide an equivalent form of product offering to the tracker without incurring a BIK liability. The Revenue rules are quite specific on this matter and anything we do which is different to how we treat our general customers is liable for BIK. For example, the after tax cost of a tracker rate for a homeloan (with BIK applying) would be approximately 4.09% per annum. This is obviously more costly than the LTV Variable rate of 3.75% per annum that is now on offer as an option (The 3.75% will now reduce to 3.25% after the 0.50% decrease in rates announced yesterday).

Unfortunately there are no other options available at this time and there can be no exceptions to this policy.”

The mortgage loan statements provided in evidence indicate that the staff variable rate of 3.25% was applied to the Complainant’s mortgage loan account on **4 February 2009**.

The Complainant sent an email to the Provider on **12 April 2010** as follows:

“Hi [Provider’s representative]

Has there been any more on this situation at all? Given that I would have changed my mortgage to the Tracker Rate in October, see e-mails below saying that I didn’t need to. Do I have any comeback on this at all?

*Thanks,
[Complainant]”*

/Cont’d...

The Complainant sent a follow up email to the Provider on **15 April 2010** at 11.12 am which details as follows:

"Hi [Provider's representative]

Not sure if you've managed to look at my email below yet?

*Thanks,
[Complainant]"*

The Provider's representative responded to the Complainant by email dated **15 April 2010** at 1.58 pm which details as follows:

"Hi [Complainant] – apologies – I had planned to get back to you earlier – thanks for reminding me.

As mentioned before, I am in a similar situation on some of my mortgages – I haven't heard anything more on the subject.

You could phone [redacted] to discuss the situation.

Sorry I cannot be of more assistance.

Best regards"

The Complainant sent a further email to another of the Provider's representatives dated **15 April 2010** at 2.18 pm which reads as follows;

"Afternoon [redacted]

I am getting in touch with you regarding the information I received below for Tracker mortgages. I was advised that I did not have to change my mortgage to the Tracker rate because it would automatically roll-over when my 2 year fixed rate expired, in Jan 2009.

Had I not been given this false information I would now be on the Tracker rate, see e-mails below.

I am very unhappy about this situation and would like to know what can be done about this now?

/Cont'd...

Many thanks,
[Complainant]"

The Provider's representative responded to the Complainant's email on **22 April 2010** stating as follows:

"Hi [Complainant]

Apologies for not coming back to you sooner but I have been in and out of the office over the last few days.

Unfortunately the situation has not changed at all since [redacted]'s memo to you dated 16th January 2009 which incorporated details of a note which should have issued to you in and around 20th November 2008. I have again extracted the relevant sections below.

Unfortunately as our letter dated 20th November outlined, the current situation has arisen as a result of a decision to remove trackers for new business on 10th October 2008. As the impacts of this decision were assessed in subsequent days, it became clear that staff would also be impacted.

In the same letter we also state the following in relation to a communication on [Provider's intranet]:

A communication was issued on Insite on the 9th of October indicating that the Tracker Mortgage would be available on roll over - this preceded our final assessment on our withdrawal from Tracker Mortgages and represented the most accurate information available at the time. The subsequent assessment of the impact of the decision to remove Tracker Mortgages has led to the outcome outlined in this letter. We apologise for any confusion this has caused.

The exact same principle applies to the information given to you by [redacted] or anyone else in the business, again, this being the most accurate information available at that time. Unfortunately, it was only after the assessment was completed (which took quite a number of days) that the full impact of the situation on staff was realised.

It is important that I also confirm that [the Provider] are honouring all the terms & conditions and legal obligations of the Mortgage Forms of Authorisation signed by you in relation to the relevant accounts above.

/Cont'd...

As a result, the rollover options that we outlined in our letter dated 20th November are now the only options that are available to you. Rolling to tracker is not now an alternative. As you know we have now put together the best possible rollover options for you and in the main attempted within these options to avoid Benefit-in-Kind. We cannot provide an equivalent form of product offering to the tracker without incurring a BIK liability.

The Revenue rules are quite specific on this matter and anything we do which is different to how we treat our general customers is liable for BIK. For example, the after tax cost of a tracker rate for a homeloan (with BIK applying) would be approximately 4.09% per annum. This is obviously more costly than the LTV Variable rate of 3.75% per annum that is now on offer as an option (The 3.75% will now reduce to 3.25% after the 0.50% decrease in rates announced yesterday).

Unfortunately there are no other options available at this time and there can be no exceptions to this policy.

As this note outlines, there are no other options now available in relation to Tracker rates and products which have been removed from our product portfolio. I regret that I cannot assist you in this instance.”

The Complainant followed up with another representative of the Provider by way of email on **5 May 2010** which details as follows:

“Good afternoon [Provider’s representative],

*I need to get in touch with you regarding a problem I have with my [Provider] mortgage [ending **1833**].*

On the 9th October 2008 I contacted [the Provider] to enquire about the notice on [Provider’s intranet] regarding the removal of Tracker mortgages. At the time I had a Staff 2-Year Fixed Rate of 3.95%. I asked if I had to manually change over to the Tracker rate before 10th October 2008 and was informed that I did not have to do anything as my mortgage would roll-over to the Tracker rate in February 2009. This did not happen and I am now on the standard variable rate.

I have a number of e-mails relating to this situation along with a letter advising me that my mortgage would roll-over to the ECB +0.75% with no BIK implications. I have been in contact with [redacted] and [redacted] about this but unfortunately they can offer no assistance.

/Cont’d...

My mortgage has just increased by €66.87 to €1151.36 per month.

Can you please advise me what can be done to rectify this situation?

I look forward to a favourable reply.

Many thanks,"

The Provider's representative sent an email to the Complainant on **6 May 2010** indicating as follows:

"Please leave it with me for another few days as I've asked someone to investigate it for me. Will revert ASAP."

The Provider sent an email to the Complainant dated **17 May 2010** which details as follows:

"Dear [Complainant]

I refer to your email to [redacted] of 5th May. [redacted] has asked me to investigate the matter and respond on his behalf.

YOUR MORTGAGE LOAN DOCUMENTATION

Your Mortgage Loan Offer Letter is dated 6 December 2006 and in it provides that the interest rate on your loan is the Staff Mortgage Rate. The Staff Mortgage Rate is a variable rate being the higher of (1) the Revenue Commissioners BIK rate and (2) one month EURIBOR (see Part 4, Paragraph (a)(v) of the Mortgage Loan Offer Letter). Thus, the Mortgage Rate is certainly not a tracker rate (such a rate reflects or "tracks" movements in the ECB Repo Rate). There is nothing in your Mortgage Loan Offer Letter to suggest you are entitled to a tracker rate at any time during the period of your loan.

You converted to a 2 year fixed rate by completing a Mortgage Form of Authorisation (or MFA) on 16 January 2007. There is nothing in the MFA to suggest you are entitled to a tracker rate at the end of the fixed rate period. Clause 7(b) of Part 5 - The General Conditions of the Mortgage Loan Offer Letter describes what happens at the end of the fixed interest period. It reads as follows (my emphasis added):-

/Cont'd...

*“The Lender shall have 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 rates at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be **a variable interest rate**”.*

Note, there is nothing in Clause 7(b) which indicates you are entitled to a tracker rate at the end of the fixed rate period. Therefore, [the Provider] had no obligation to include a tracker rate option in the MFA it sent you in January 2009 when the fixed rate period expired.

In short, based on your Mortgage Loan Documentation (Offer Letter and MFA), [the Provider] has no contractual commitment to provide you with a tracker rate.

[Redacted] EMAIL OF 10 OCTOBER 2008.

In this email [redacted] indicated that you would rollover to a tracker rate on expiry of the fixed rate period. [Redacted] also confirmed you had the option to switch to a “fixed or variable rate before you rollover” (i.e., before the end of your fixed rate period) and that no penalty would apply if you did. I wish to make the following points on this email.

- 1 The extract from the [Provider’s intranet] notice of 9 October 2008 which you quote in your email to [redacted] also of 9 October (to which [redacted]replied explaining [redacted] no longer worked in [Provider’s branch location]) appeared in the notice under the heading “**2. Existing staff mortgage accounts**” and itself makes clear that staff then on the 2-year fixed rate would (and I quote, my emphasis added) “...roll to ECB + 0.75% with no BIK implications **as per their original signed mortgage agreement** at the end of the 2-year fixed period.” It is also important to read the paragraph you quote in the context of the preceding parts of the Insite notice of 9 October 2009. The notice began with two preliminary un-numbered paragraphs. The 2nd of these un-numbered paragraphs appeared under the heading “An announcement from Consumer Banking” and it said (my emphasis added) that “Staff trackers are therefore not available for any new or existing staff mortgages, with the exception of those that are currently either on the staff tracker mortgage of ECB + 0.75% or those rolling to ECB + 0.75% **as per their original signed mortgage agreement** (see existing staff mortgage section below)”. The “existing staff mortgage section below” referred to in parenthesis is, of course, none other than the paragraph you quoted in*

/Cont’d...

your email of 9 October. In short, the extract from the notice of 9 October 2008 which you quoted in your email of the same day was directed to staff customers who were entitled to rollover to a tracker rate as per their original signed mortgage agreement.

As I have demonstrated, your Mortgage Loan Offer Letter did not commit [the Provider] to provide you with a tracker at the end of the fixed rate period so that the extract you quoted in your email from the notice of 9 October 2008 was not directed to you.

- 2 As explained previously, [redacted] response was based on the best information available to him on 10 October 2008, namely the [Provider's intranet] notice posted on 9 October 2008. Also, [redacted] took care to say that your entitlement to roll to a tracker was "As per the note below from [Provider's intranet]..." meaning his email cannot be read as expanding the scope of the [Provider's intranet] notice. As noted above, the extract you quoted in your email of 9 October 2008 from the [Provider's intranet] notice was directed to staff customers whose mortgage loan documentation committed [the Provider] to provide a tracker rate on rollover. For reasons already explained, your mortgage was out of the scope of the paragraph quoted in your email.*
- 3 As also as explained previously, [the Provider] wrote to you on 20 November 2008 explaining that some staff customers would have an entitlement to roll from a fixed rate to a tracker rate based on the terms and conditions of their letter of offer and others would not. It was clear from the letter of 20 November 2008 that you fell into the category of customers who would not have such an entitlement (and, indeed, this is borne out by the above analysis of your Mortgage Loan documentation).*
- 4 In your email of 5 May 2010 to [redacted] you said that you "... asked if I had to manually change over to the Tracker Rate before 10th October 2008 and was informed I did not have to do anything as my mortgage would roll-over to the Tracker Rate in February 2009." There is nothing in your email of 9 October 2008 which indicates you wished to request a MFA for urgent completion to switch to a tracker rate by 10 October 2009. If you wished [the Provider] to respond so promptly on 9 October surely you would have had to make that clear in your email. At any rate, nothing in [redacted] email indicated you could have switched to a tracker rate before the end of the fixed rate period by a manual changeover ([redacted] indicates, simply, that you could have switched*

/Cont'd...

to a “fixed or variable rate before your rollover”). It seems to me you cannot argue (as you did, for example, in your email of 15 April 2010 to [redacted]) that the email caused you to miss an opportunity to secure a tracker rate by completing an MFA.

In conclusion, I do not believe [redacted] email of 10 October 2008 had the result of committing [the Provider] to providing you with a tracker rate at the end of the fixed rate period.

Kind Regards”

The Complainant subsequently emailed the Provider’s representative on **06 August 2010** querying as follows:

“Good afternoon [Provider’s Representative],

I received the copies of my mortgage loan documentation, thank you.

Can you tell me, could I have changed over to the Tracker Rate mortgage on the 9th / 10th October 2008, regardless of what my mortgage documentation does or does not say?

Kind Regards,
[Complainant]”

The Provider’s response dated **08 October 2010** at 11.16 am was from another of the Provider’s representatives and detailed as follows:

“Hi [Complainant],

[Provider’s representative] has passed me on your recent correspondence and asked me to respond.

You could have changed over to a tracker rate on the 9th October if you had formally requested that. A Mortgage Form of Authorisation would have issued to you and you would have had 14 days to complete same and return it to us to secure this tracker rate.

The tracker rate would not have been available to you on the 10th October as they had been withdrawn.

/Cont’d...

In this regard can I attach a quote from [redacted] email to you dated 17th May 2010.

- 1. In your email of 5 May 2010 to [redacted] you said that you "... asked if I had to manually change over to the Tracker Rate before 10th October 2008 and was informed I did not have to do anything as my mortgage would roll-over to the Tracker Rate in February 2009." There is nothing in your email of 9 October 2008 which indicates you wished to request a MFA for urgent completion to switch to a tracker rate by 10 October 2009. If you wished [the Provider] to respond so promptly on 9 October surely you would have had to make that clear in your email. At any rate, nothing in [redacted] email indicated you could have switched to a tracker rate before the end of the fixed rate period by a manual changeover ([redacted] indicates, simply, that you could have switched to a "fixed or variable rate before your rollover"). It seems to me you cannot argue (as you did, for example, in your email of 15 April 2010 to [redacted]) that the email caused you to miss an opportunity to secure a tracker rate by completing a MFA.*

Regards"

The Complainant responded to the Provider's email on **8 October 2010** at 1.46 pm as follows:

"[Provider's representative],

Thank you for your reply in which you confirm I could have changed over to a tracker rate in October 2008.

I asked if I had to complete a Mortgage Form of Authorisation but I was advised by a [the Provider's] mortgage specialist that my mortgage would roll over to the Staff Tracker Rate in 2009.

I have included this e-mail as evidence below.

I have copied some other e-mails below also and underlined some key points/comments.

Regards"

/Cont'd...

The Provider's representative responded to the Complainant's email on **8 October 2010** at 4.05 pm as follows:

"Hi [Complainant],

Thanks for your email.

As you will see from the email you sent me as evidence, you enquired about the Staff LTV Variable Mortgage Form of Authorisation highlighted in Red below. This type of account has nothing whatsoever to do with a tracker mortgage.

[Redacted] in his email dated the 10th October advised you what your account was due to roll to on our system, which was a tracker rate at that time. As [redacted] has already outlined to you in previous mails this was the best information available to [redacted] at that time. In other communications from [redacted] dated 20th November 2008 you would also have been advised what the process was and the products that you were entitled to on rollover.

In any event, your enquiry on the 9th related to a staff variable LTV mortgage. [Redacted] mail to you dated the 10th October could not have provided you with the opportunity to switch to a tracker rate as they were no longer available to existing customers or staff on that date.

Can you confirm if this option will be available to me when my 2yr fixed rate expires (in January 09, I think) or do I have to complete the APPLICATION FOR CHANGE TO STAFF LTV VARIABLE MORTGAGE FORM OF AUTHORISATION form? And if I do have to complete this form and fax it to [redacted], is there a penalty for switching before my Fixed Rate expires?

Regards"

The Complainant subsequently signed and accepted a **Mortgage Form of Authorisation** to apply a 3-year discounted fixed interest rate of 3.74% to her mortgage loan account on **21 February 2011**. The **Mortgage Form of Authorisation** details as follows:

"Date: 7 February 2011

[...]

/Cont'd...

This form allows you to select a new interest rate for your Loan. We have sent you this form because (a) you fixed the rate of interest on your Loan for a period which is due to end shortly; OR (b) you have asked us for a new interest rate for the Loan.

[...]

SWITCHES TO FIXED RATES

If you avail of a Fixed Rate, our tracker rate commitment to you is deemed to be at an end and the lender's prevailing Standard Variable Rate will apply on expiry of this fixed term. For the avoidance of doubt, we wish to advise you that if you avail of a Fixed Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

SWITCHES TO STANDARD VARIABLE RATES OR OTHER RATES

If you avail of a Standard Variable Rate or Other Rate, our tracker rate commitment to you is deemed to be at an end. For the avoidance of doubt, we wish to advise you that if you avail of a Standard Variable Rate or Other Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

[...]

Selected Rate	Description	Rate
<input checked="" type="checkbox"/>	<i>Discounted 3 year fixed rate</i>	<i>3.74 %</i>

The mortgage loan statements submitted in evidence indicate that a fixed interest rate of 3.74% was applied to the Complainant's mortgage loan account on **24 February 2011**.

The Complainant sent the following email to the Provider on **04 November 2011**:

"Morning [redacted],

I have attached the pages of e-mails I have relating to this issue and request that someone review this case again. I have also noted the e-mail dates below.

I request that my mortgage be put onto a Tracker rate and a full refund of the increased mortgage payments I have had to make as a result of this.

In Feb 2011 I had to opt for a fixed rate mortgage as I could not take the risk of an increase in the variable rate I was put on in 2009.

/Cont'd...

Unfortunately [redacted], if I do not get a favourable result to this issue by Tuesday next I will have to make complaint to the Financial Services Ombudsman and request that they review this case.

Many thanks,

[Complainant]

To [redacted], CC [redacted] 09/10/08 - Just enquiring about the notice on [Provider's intranet] today regarding Tracker Mortgages. Can you confirm if this option will be available to me when my 2yr fixed rate expires (in January 09, I think)

From [redacted] 10/10/2008 - As per the note below from [Provider's intranet], your mortgage will rollover (on 4/2/2009) to the staff tracker of ECB + 0.75% - currently 4.50% following the ECB recent reduction.

To [redacted] 10/10/2008 - Thanks for your e-mail below, panic over!

To [redacted] 15/01/09 - I've received my new mortgage rate letter and the Staff Tracker rate does not appear as an option.

From [redacted] 15/01/2009 - I am checking matters out with our Treasury unit and I'll revert to you tomorrow.

From [redacted] 16/01/2009 - I am attaching a communication from [redacted], Product Management - Mortgages, Consumer Banking. Evidently you should have received a communication dated 20th November explaining the position.

To [redacted] 12 April 2010 - Given that I would have changed my mortgage to the Tracker Rate in October, see e-mails below saying that I didn't need to. Do I have any comeback on this at all?

To [redacted] 05 April 2010 - Not sure if you've managed to look at my e-mail below yet?

From [redacted] 15 April 2010 - As mentioned before, I am in a similar situation on some of my mortgages - I haven't heard anything more on the subject.

To [redacted] 15 April 2010 - I am getting in touch with you regarding the information I received below for Tracker mortgages. I was advised that I did not have to change my mortgage to the Tracker rate because it would automatically roll-over when my 2 year fixed rate expired, in Jan 2009.

/Cont'd...

From [redacted] 22 April 2010 - As this note outlines, there are no other options that are now available in relation to Tracker rates and products which have been removed from our product portfolio. I regret that I cannot assist you in this instance.

To [redacted] 05 May 2010 - I need to get in touch with you regarding a problem I have with my [Provider] mortgage (mortgage ref [ending 1833]).

From [redacted] 06 May 2010 - Please leave with me for another few days as I've asked someone to investigate it for me.

To [redacted] 17 May 2010 - Just wondering if there is any update on the e-mail below?

From [redacted] 17 May 2010 - See attached e-mails. In conclusion, I do not believe [redacted] email of 10 October 2008 had the result of committing [the Provider] to providing you with a tracker rate at the end of the fixed rate period

To [redacted] 06 August 2010 - I received the copies of my mortgage loan documentation, thank you. Can you tell me, could I have changed over to the Tracker Rate mortgage on the 9th / 10th October 2008, regardless of what my mortgage documentation does or does not say?

To [redacted] 07 September 2010 - I have not had a reply to my e-mail below.

To [redacted] 06 October 2010 - Can you please reply to my e-mails below.

From [redacted] 08 October 2010 - You could have changed over to a tracker rate on the 9th October if you had formally requested that. A Mortgage Form of Authorisation would have issued to you and you would have had 14 days to complete same and return it to us to secure this tracker rate. The tracker rate would not have been available to you on the 10th October as they had been withdrawn.

To [redacted] 08 October 2010 - I asked if I had to complete a Mortgage Form of Authorisation but I was advised by an [Provider's] mortgage specialist that my mortgage would roll over to the Staff Tracker Rate in 2009. I have copied some other e-mails below also and underlined some key points/comments

From [redacted] 08 October 2010 - As you will see from the email you sent me as evidence, you enquired about the Staff LTV Variable Mortgage Form of Authorisation highlighted in Red below. This type of account has nothing whatsoever to do with a tracker mortgage. [redacted] in his email dated the 10th

/Cont'd...

October advised you what your account was due to roll to on our system, which was a tracker rate at that time. As [redacted] has already outlined to you in previous mails this was the best information available to [redacted] at that time. In other communications from [redacted] dated 20th November 2008 you would also have been advised what the process was and the products that you were entitled to on rollover."

The Provider sent an email to the Complainant dated **7 November 2011**, detailing as follows:

"Hi [Complainant],

Thank you for the e-mail below.

Unfortunately we have nothing further to add to our e-mails dated 17/5/2010 from [redacted] and 8/10/2010 from myself. We do not believe that you have any entitlement to a tracker mortgage rate on your account and won't be in a position to respond favourably to your request below.

You have the right to contact the Financial Services Ombudsman.

This is a free, independent office that investigates unresolved complaints against financial institutions.

The contact details were included

Regards"

The mortgage loan statements submitted in evidence show that a standard variable rate of 4.8% was applied to the Complainant's mortgage loan account on **24 February 2014**, on expiry of the fixed interest rate period.

The Complainant signed a **Mortgage Form of Authorisation** on **25 February 2014**, applying a staff variable interest rate of 4.30% to her mortgage loan account. The **Mortgage Form of Authorisation** details as follows:

"Date: 17/02/2014

[...]

This form allows you to select a new interest rate for your Loan. We have sent you this form because (a) you fixed the rate of interest on your Loan for a period which is due to end shortly; OR (b) you have asked us for a new interest rate for the Loan.

/Cont'd...

[...]

SWITCHES TO FIXED RATES

If you avail of a Fixed Rate, our tracker rate commitment to you is deemed to be at an end and the lender's prevailing Standard Variable Rate will apply on expiry of this fixed term. For the avoidance of doubt, we wish to advise you that if you avail of a Fixed Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

SWITCHES TO STANDARD VARIABLE RATES OR OTHER RATES

If you avail of a Standard Variable Rate or Other Rate, our tracker rate commitment to you is deemed to be at an end. For the avoidance of doubt, we wish to advise you that if you avail of a Standard Variable Rate or Other Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

[...]

Selected Rate	Description	Rate
<input checked="" type="checkbox"/>	STAFF VARIABLE RATE LTV	4.300%

The mortgage loan statements submitted in evidence indicate that a variable interest rate of 4.3% was applied to the Complainant's mortgage loan account on **26 February 2014**.

The Complainant subsequently applied a fixed interest rate of 3.00% to her mortgage loan account in **September 2018** by signing a **Mortgage Form of Authorisation** on **21 September 2018** which detailed as follows:

"Date: 17 September 2018

[...]

This form allows you to select a new interest rate for your Loan. We have sent you this form because (a) you fixed the rate of interest on your Loan for a period which is due to end shortly; OR (b) you have asked us for a new interest rate for the Loan.

[...]

SWITCHES TO FIXED RATES

If you avail of a Fixed Rate, our tracker rate commitment to you is deemed to be at an end and the lender's prevailing Standard Variable Rate will apply on expiry of this fixed term. For the avoidance of doubt, we wish to advise you that if you avail of a Fixed Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

SWITCHES TO STANDARD VARIABLE RATES OR OTHER RATES

If you avail of a Standard Variable Rate or Other Rate, our tracker rate commitment to you is deemed to be at an end. For the avoidance of doubt, we wish to advise you that if you avail of a Standard Variable Rate or Other Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

[...]

Selected Rate	Description	Rate
<input type="checkbox"/>	1 Year Fixed LTV 61%-80%	3.000%
<input checked="" type="checkbox"/>	2 Year Fixed 61%-80%	3.000%
<input type="checkbox"/>	3 Year Fixed LTV 61%-80%	3.000%
<input type="checkbox"/>	5 Year Fixed LTV 61%-80%	3.000%
<input type="checkbox"/>	10 Year Fixed LTV 61%-80%	3.300%

The mortgage loan statements submitted in evidence indicate that a fixed interest rate of 3% was applied to the Complainant's mortgage loan account on **24 September 2018**.

Following a consideration of the Complainant's mortgage loan documentation, it is clear to me that the **Mortgage Loan Offer Letter** dated **06 November 2006** did not contain a contractual entitlement on the part of the Complainant to a tracker interest rate at inception of the loan or indeed during the term of the loan. Rather, the **Mortgage Loan Offer Letter** dated **06 November 2006** provided for a staff non-standard variable interest rate of 4.50%. The Complainant subsequently signed a **Mortgage Form of Authorisation** on **16 January 2007** to apply a 2-year fixed rate of 3.95% to her mortgage loan account until **4 February 2009**. Again, I do not consider the Mortgage Form of Authorisation to have conferred any entitlement to a tracker interest rate mortgage on the Complainant.

However, prior to the expiry of the 2-year fixed interest rate, the Provider issued an internal communication to its staff customers through its staff intranet on **9 October 2008**.

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It appears to me that the purpose of the Provider's internal communication was to notify its staff customers that it intended to withdraw its tracker interest rate offerings from **10 October 2009**, the day after the Provider circulated its internal communication. The Provider's staff intranet notice specifically outlined what would happen to existing staff customers who were on a 2-year fixed interest rate of 3.95% at that time. The staff notice stated that staff who were currently on a staff 2-year fixed interest rate of 3.95% would "*roll to ECB +0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period*". The staff notice also advised staff customers that they would receive a notification 30 days prior to the end of their fixed rate term which would offer a range of fixed and variable rate products, however if they did not respond to this notification their mortgage loan account would "*automatically default to the Staff Tracker ECB + 0.75%*". The Complainant's mortgage loan account was never on a tracker interest rate of ECB + 0.75% at any stage. Therefore, it would appear to me that the Provider's reference to mortgage loans on the 2-year staff interest rate, which would "*roll to ECB + 0.75% with no BIK implications as per their original signed mortgage agreement at the end of their 2-year fixed period*", in the staff intranet notice dated **09 October 2008** was not intended to apply to the Complainant's mortgage loan account. However, the engagements that ensued between the Complainant and representatives of the Provider thereafter are of particular relevance. These communications appear to have caused confusion as to what would transpire at the end of the Complainant's fixed interest rate period in **February 2009**.

The Provider's internal communication prompted the Complainant to make enquiries with the Provider in relation to her mortgage loan account on the same day she read the staff intranet notice. By way of email on **9 October 2008**, the Complainant specifically asked the Provider to confirm whether a tracker interest rate option would be available to her on the expiry of her fixed interest rate period in **February 2009** or if she would be required to complete a Mortgage Form of Authorisation. The Provider's representative, in very clear terms, told the Complainant by way of email on **10 October 2008** that her mortgage loan account would "*rollover*" to the staff tracker rate of ECB + 0.75% on **4 February 2009**.

The Provider contends that the Complainant's enquiry was in relation to the availability of staff variable rate LTV mortgages as opposed to the availability of tracker mortgages. While I acknowledge that the Complainant specifically requested whether she was required to complete an "*application for change to staff ltv variable mortgage form of authorisation form*", it is clear on any reasonable consideration of this communication that from the outset of the Complainant's email she was "*enquiring about the notice on [Provider's intranet] today regarding Tracker Mortgages*". In this regard, I am of the view that the Complainant was requesting information from the Provider about the availability of tracker interest rates.

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I am surprised that the Provider is of the view that the email from the Provider's representative dated **10 October 2008** is somehow "*qualified*" from the outset because it contains the words "[a]s per the note below from [Provider's intranet]". The Provider contends that in circumstances where the advice given to the Complainant was "*entirely within the confines of the [Provider's intranet] notice of 9 October 2008, and did not expand the information provided in that notice*" it was therefore clear that "*there was no entitlement to a tracker rate arising from the Offer Letter, and thus no entitlement to be offered one upon the expiry of the fixed rate period in February 2009*". I do not consider the Provider's assessment of the contents of the email to be correct or reasonable in this regard. The Provider's email does not explain to the Complainant that there was no entitlement to a tracker rate of interest unless an entitlement to a tracker rate was included in her Mortgage Loan Offer Letter. Rather, the Provider's email clearly informed the Complainant that her mortgage loan account would switch to a tracker interest rate of ECB + 0.75% upon expiry of the fixed interest rate. I do not consider it fair or reasonable on the part of the Provider to suggest that this statement was qualified in any way.

The **Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) states as follows in relation to the provision of information to the consumer:

12. *A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.*
13. *A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following:*
 - a. *the urgency of the situation; and*
 - b. *the time necessary for the consumer to absorb and react to the information provided.*
14. *Where a regulated entity intends to amend or alter the range of services it provides, it must give notice to affected consumers at least one month in advance of the amendment being introduced."*

The Provider owes a duty to its customers, including its employee customers, and in particular, the Complainant, to ensure that all communications are "*clear and comprehensible*" and that "*key items*" are brought to the attention of its customers.

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I do not consider the interpretation that the Provider now seeks to attribute this communication (email of **10 October 2008**) to have clearly and comprehensibly explained to the Complainant that her mortgage loan account would not rollover to a tracker interest rate at the end of the fixed interest rate period. The Complainant specifically asked the Provider's representative whether a tracker interest rate option would be available to her upon the expiry of the 2-year fixed interest rate or whether she had to complete a Mortgage Form of Authorisation. Rather than explaining to the Complainant that her mortgage loan account did not fall into the second category referred to in the Provider's intranet notice of **09 October 2008**, that is, "*2. Existing staff mortgage accounts- Staff 2-Year Fixed Rate: rate currently 3.95%*" and therefore she would not be entitled to a tracker interest rate option on the expiry of the fixed interest rate period, the Provider's representative definitively stated that the Complainant's mortgage loan account would rollover to the staff tracker rate of ECB + 0.75% on **04 February 2009**.

The Provider submits that it was at all times open to the Complainant between **December 2006** and **10 October 2008** to approach the Provider with a request to move her mortgage loan account to a tracker interest rate. The Provider maintains that at no stage did the Complainant request a Mortgage Form of Authorisation to be issued to her to move to a tracker rate of interest. It is clear to me that the Complainant did not make a specific request for a Mortgage Form of Authorisation to convert her mortgage loan account to a tracker interest rate because she was advised by the Provider that her mortgage account would switch to a tracker interest rate in **February 2009**. Having received this information and confirmation from the Provider, the Complainant decided to take no further action as she was assured that a tracker interest rate would be applied to her mortgage loan account on **04 February 2009**.

I acknowledge that the Provider's letter to the Complainant dated **20 November 2008** clearly outlined that given the Complainant was on a fixed interest rate from another product, by signing a Mortgage Form of Authorisation, she would not in fact have a tracker option on her "*roll-over letter*". However, it is my view that this clarification came too late as tracker interest rates had been withdrawn by the Provider at that point and the Complainant had missed out on the opportunity to convert her mortgage loan to a tracker interest rate.

The Provider appears to place greater emphasis on the fact that the Complainant's mortgage loan documentation did not contain a contractual entitlement to a tracker interest rate and less emphasis on the Provider's engagements with the Complainant which led the Complainant to form a legitimate expectation that her mortgage loan account would switch to a tracker interest rate in **February 2009**.

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While it may be the case that the Provider did not intend for all staff customers availing of the 2-year fixed staff rate to rollover to a tracker rate of interest, given the terms and conditions applicable to each customers' mortgage loan, the Provider clearly advised the Complainant that her particular mortgage loan account would rollover to a tracker rate of interest on **04 February 2009**. It is therefore disappointing that the Provider did not offer the Complainant the option of choosing from a tracker interest rate in its "roll-over letter" to the Complainant dated **05 January 2009**. Instead, the Provider offered the Complainant a staff LTV variable rate of 3.75%, a fixed interest rate of 4.75% or a staff interest rate of 4.00%. In circumstances where the Complainant did not select a specific interest rate, her mortgage loan account defaulted to a staff LTV variable rate of 3.25% despite having been assured by the Provider that her mortgage loan account would switch to a tracker interest rate of ECB + 0.75%.

I believe that a tracker interest rate of ECB + 0.75% should have been applied to the Complainant's mortgage loan account on **04 February 2009** on foot of the Provider's engagements with the Complainant in **October 2008** notwithstanding the lack of a contractual entitlement to a tracker interest rate. The Provider should have applied a tracker interest rate of ECB + 0.75% to the Complainant's mortgage loan account however the Provider did not do so. On **04 February 2009**, the ECB base rate was 2.00% therefore the Complainant reasonably expected that a tracker rate of 2.75% would apply to her mortgage loan account. The Complainant thereafter decided to apply a 3- year discounted fixed interest rate of 3.74% to her mortgage loan account in **February 2011**, a staff variable interest rate of 4.30% in **February 2014** and a fixed interest rate of 3.00% in **September 2018** for two years. From **2011 to 2021**, the ECB base rate has varied from 0% to 1.5% therefore the tracker interest rate of ECB + 0.75% on offer by the Provider would have been more beneficial to the Complainant if it had been applied to her mortgage loan account from **February 2009**. Consequently, it appears that if the tracker interest rate of ECB + 0.75% had applied to the Complainant's mortgage loan account then the Complainant's monthly repayments on the mortgage loan would have been less than they were on a monthly basis from **February 2009** to date.

In light of all the foregoing, I substantially uphold this complaint and I direct pursuant to **Section 60(4) of the Financial Services and Pensions Ombudsman Act 2017** that the Provider do the following;

- (i) Apply a tracker interest rate of ECB + 0.75% to the Complainant's mortgage loan account from **04 February 2009**.
- (ii) Repay to the Complainant any interest overpaid between **04 February 2009** and the date the tracker interest rate of ECB + 0.75% is retrospectively applied.

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- (iii) Pay a sum of €3,500 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered as a result of the Provider's conduct.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld on the grounds prescribed in **Section 60(2)(b) and (g)** on the basis that the conduct complained of was unreasonable and otherwise improper.

Pursuant to **Section 60(4) and Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of by:

- (i) Applying a tracker interest rate of ECB + 0.75% to the Complainant's mortgage loan account from **04 February 2009**.
- (ii) Repaying to the Complainant any interest overpaid between **04 February 2009** and the date the tracker interest rate of ECB + 0.75% is retrospectively applied.
- (iii) Paying a sum of €3,500 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered as a result of the Provider's conduct to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.
- (iv) I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

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**

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