



<u>Decision Ref:</u>	2021-0316
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

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

Mortgage loan account ending **9917** was drawn down on **20 August 2010** on the Provider's standard variable rate for a term of 22 years and 3 months.

Prior to the drawdown of mortgage loan account ending **9917**, the Provider sanctioned the following loans on **8 October 2008**:

- An interest only bridging loan facility under mortgage loan account ending **8001** for the sum of €150,000 for a period of 1 year and 2 months to complete the construction of the investment property. This mortgage loan account was fully drawn down by the Complainant by **28 July 2010**.
- An ECB tracker interest rate loan facility under mortgage loan account ending **8052** for the sum of €150,000 for a period of 24 years. This mortgage loan account was never drawn down by the Complainant and has since been terminated.

The Complainant's Case

The Complainant submits that he received two separate mortgage loan agreements dated **08 October 2008** from the Provider as follows:

- Mortgage loan account ending **8001**, a bridging loan facility for a period of 1 year and 2 months in the amount of €150,000; and
- Mortgage loan account ending **8052**, a loan facility on a tracker interest rate for a period of 24 years in the amount of €150,000.

The Complainant states that he drew down mortgage loan account ending **8001** on **24 October 2008**. The Complainant submits that as *"per standard process with new builds"*, mortgage loan account ending **8001** was operating *"parallel"* with mortgage loan account ending **8052**. The Complainant submits that he drew down funds *"as and when required until the project completion"*. The Complainant states that he was to make *"stage payments"* against mortgage loan account ending **8001** until *"final fund drawdown complete"*.

The Complainant asserts that the timeframe for completion of the new build was moved from **November 2009** to **January 2010** and contends that this *"seems to be the technicality and pushback stance from [the Provider]"*.

The Complainant submits that mortgage loan account ending **8001** continued to *"rollover"* until **July 2010**. The Complainant explains that he expected mortgage loan account ending **8001** to roll *"into the tracker agreement"* in **July 2010**, but he instead he *"was denied original Tracker offer and forced to take SVR product"*. The Complainant submits that he was given *"no option or alternative"* in this regard.

The Complainant submits that *"contrary to claims made by the Provider"* he never made a request for extensions to his bridging loan under mortgage loan account ending **8001**. The Complainant asserts that the first time he was made aware of any changes to either mortgage loan account ending **8001** or mortgage loan account ending **8052** was in **July 2010**. The Complainant submits that *"the initial facility and Stage payment letters do not make it clear that "Tracker product offer" is dependent on final drawdown date and that extension of bridging agreement would be treated differently to Home loan agreement."*

The Complainant asserts that *"the original tracker and bridging loan contract"* were the only agreements he had in place and *"had no reason to expect them not to be honoured"*.

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The Complainant maintains that the Provider did not make him aware of the consequences of changing the date of redemption of mortgage loan account ending **8001**. He further submits that he could have “*easily drawn down money earlier*” to prevent this from happening. The Complainant maintains that the “*increased costs*” have had an impact on his family.

The Complainant submits that “*The spirit of the original offer (i.e. ‘the home loan is not offered as a separate loan form the Bridging finance’) was clearly not adhered to and [the Provider] retrospectively in their correspondence are using bridging loan final drawdown date of the final 20% overrunning by 6 months as the basis to withdraw the associated tracker product offer from the original agreement.*”

The Complainant submits that the Provider “*proactively sought means to not honour Tracker contracts as per [the Provider’s] internal business procedures reference and retrospectively used clause 7.1 and drawdown date as a mechanism to not honour the original agreement which was first communicated to [him] on final drawdown in July 2010. The Complainant further submits that “If ECB rates had gone up [the Provider] would have inevitably followed through with the original agreement.*”

The Complainant is seeking the following:

- i. The tracker interest is applied to his mortgage loan account ending **9917** as per the original ECB tracker mortgage loan agreement ending **8052**; and
- ii. A reimbursement of the interest that he states has been overcharged since **July 2010**.

The Provider’s Case

The Provider submits that the Complainant was granted an interest only bridging loan facility for the sum of €150,000 for a period of 1 year and 2 months to fund the construction of an investment holiday home under mortgage loan account ending **8001**. The Provider states that the Complainant drew down this bridging loan facility on **24 October 2008**.

The Provider explains that, at the same time, the Complainant was also granted a separate 24-year tracker interest rate loan for the sum of €150,000 under mortgage loan account ending **8052** pursuant to the terms and conditions contained in a facility letter dated **8 October 2008**.

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The Provider details that the ECB tracker loan *“was approved on the basis that the property would be fully completed and the bridging loan facility would be fully drawn down prior to the expiry of the initial term of the bridging loan facility and the Complainant’s interest only bridging loan would then be refinanced by the long term ECB Tracker loan with capital and interest payments”*.

The Provider states that it withdrew its ECB tracker interest rate loan products in **late 2008** however, despite no longer offering any ECB tracker loan product, it would allow the drawdown of the ECB tracker loan as both facilities had been sanctioned prior to the withdrawal of the ECB tracker loan product on the basis that the Complainant had fully drawn down the bridging loan and the new build property was fully completed by the expiry of the bridging loan term on **24 December 2009**.

The Provider submits that the Complainant was made aware *“that the ECB Tracker loan had to be drawn down on the expiry of the initial term of the bridging loan”* in a letter from the Provider dated **8 October 2008**, which was issued *“in advance of him drawing down his bridging loan”*.

The Provider states that due to delays in the construction process, the Complainant’s holiday home was not completed on the expiry of the bridging loan period and the bridging loan was not fully drawn down. The Provider submits that the Complainant could therefore not draw down the ECB tracker loan as he was not in receipt of his architect’s certificate of completion and final valuation which were pre-conditions for the drawdown of the long-term ECB tracker loan. The Provider contends that it agreed to extend the bridging loan facility on five separate occasions up to **July 2010** when the property build was then completed. The Provider details that it did not agree to extend the period within which the long-term ECB tracker loan could be drawn down, *“which, by its terms, automatically lapsed.”*

The Provider submits that it does not agree with the Complainant’s submission that he did not request or have any discussion regarding the extension of the bridging loan. In this regard the Provider relies on the *“credit applications for the bridging loan extensions”* and notes that *“the employees of the Provider were in continuous contact with the Complainant after the expiry date of the initial bridging loan period until the property was finally completed.”*

The Provider submits that when the new build property was completed in **July 2010**, the option to refinance the Complainant’s long-term loan to an ECB tracker rate was no longer available.

The Provider further submits that the Complainant *“sought fundamental amendments to the terms of the initial approval in **2008** by requesting numerous further interest only extension periods to the bridging loan facility, which the Provider approved”*. The Provider contends that *“the proposed ECB Tracker loan facility letter and the stage payment customer letter set out the specific contractual requirements for drawdown of the proposed ECB Tracker loan. The Provider details that “The pre conditions of drawdown of the ECB Tracker loan were not met by the Complainant and thus the Complainant could not proceed to drawdown of the proposed ECB Tracker loan.”* The Provider details that *“[t]herefore the ECB Tracker loan under [mortgage loan account ending 8052] was not drawn down and this proposed loan did not come into existence”*.

The Provider states that, on receipt of the required architect’s certificate of completion, pursuant to the terms of a new facility letter dated **30 July 2010**, *“the Complainant agreed to refinance his short term bridging loan with a long term loan facility on the Provider’s standard variable rate with capital and interest payments”*. The Provider explains that a new loan was subsequently drawn down under mortgage loan account ending **9917** on **20 August 2010**.

The Provider asserts that *“the bridging loan was sanctioned for a period of 14 months and the facility letter did not make any reference to a default interest rate as it was proposed that the bridging loan would be repaid in full and closed on the expiry of the 14 month term”*. The Provider submits that *“the Complainant was aware (or ought reasonably to have been aware from the contractual documentation issued to the Complainant) that by seeking to extend the bridging loan facility the Complainant would no longer be in a position to draw down the ECB Tracker loan as the Complainant was unable to furnish the Bank with a final certificate of completion until July 2010.”* The Provider explains that *“on the expiry of the bridging loan facility in December 2009 the Complainant would not have been in a position to refinance the bridging loan into a long term loan with any other lending institution given the lack of completion certificates.”*

The Provider submits that it is satisfied that the Complainant’s loan documentation was sufficiently clear and transparent and maintains that the Complainant was aware that he would lose his entitlement to an ECB tracker loan if the new build property was not completed on the expiry of the original term of the bridging loan.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to advise the Complainant that he would lose his tracker interest rate entitlement when the term of his bridging loan on mortgage loan account ending **8001** was extended.

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Decision

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

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

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

A Preliminary Decision was issued to the parties on 19 August 2021, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

In order to determine this complaint, it is necessary to review and consider the background of the Complainant's mortgage journey prior to the inception of mortgage loan account ending **9917** in **July 2010**. In doing so, I will set out the relevant provisions of the Complainant's mortgage loan documentation in relation to the loan facilities that were sanctioned by the Provider under mortgage loan accounts ending **8001** and **8052** in **October 2008** and details of certain interactions between the Complainant and the Provider between **2008** and **2010**.

The Provider has submitted a copy of a document title "**Processing Stage Payments Home Loan Applications**" valid from **2 January 2008** and which was published on **07 February 2008**. This document details as follows:

"Background

An issue has been identified in relation to staged payment drawdown situations.

/Cont'd...

The bridging finance facility which accommodates these multiple drawdowns is for a limited period only- up to two years. Customers are being advised by their solicitors that they must have written confirmation that a full term home loan will replace the bridging in due course.

Documentation

To address the situation and to document the staged drawdown of a [Provider] home loan, the correct procedure is to offer the customer two facilities- the short term bridging finance facility and also a separate home loan facility. The home loan will be used later to repay the bridging finance.

These will be issued with a Staged Payment Customer Letter, also to be signed by the customer, which will make it explicit that we are not offering two loans for the total amount. If the customer draws down the bridging loan, the home loan must be used to repay it. If they choose not to use the bridging facility, but draw down the home loan immediately, then the offer of the bridging lapses.

*The letter also covers the issue of the Latest Drawdown Date, which would otherwise be three months after the home loan is issued. Instead, the Latest Drawdown Date, will be when the bridging facility terminates.
.....”*

A Final Financial Summary dated **24 September 2008** was issued to the Complainant following a meeting with the Provider which details as follows:

“Thank you for meeting with me to discuss your requirements regarding

- *Home Loan*

If anything has changed since our meeting, please let me know as soon as possible as this may affect your product choice.

.....

This home loan is linked to a separate agreement for bridging finance.

/Cont'd...

You agree that this home loan is not a separate loan, and will only be used to repay the bridging finance”.

A **Suitability Statement** dated **23 September 2008** issued to the Complainant in relation to a bridging finance loan which details as follows:

“Type of Loan

You mortgage your dwelling to the Bank as security until your home is repaid. You make interest only payments during the whole loan period so you will still have to repay original capital amount at the end of this mortgage term.

Type of Interest

Variable.

You have indicated that you are happy to accept that interest rates and amounts that you must repay go up and down.”

....

Interest Rate

5.90% Variable.

...

Amount of Loan

Eur 150,000.00”

A **Suitability Statement** dated **23 September 2008** issued to the Complainant in relation to an ECB tracker rate home loan which details as follows:

“Type of Loan

You mortgage your dwelling to the Bank as security until your home is repaid. You make capital and interest payments during the loan period so the full amount of the loan is repaid at the end of the term. The interest charged may vary during the course of the home loan.

Type of Interest

ECB Tracker.

You have indicated that you are happy to accept that interest rates and amounts that you must repay go up and down.”

Rate index

European Central Bank Refinancing Rate. Your interest rate will track the ECB Refinancing Rate by 1.39% for the full term of the loan.

...

Interest Rate

5.64% Variable.

/Cont'd...

...

Amount of Loan

Eur 150,000.00"

The Provider issued a **Stage Payment Customer letter** to the Complainant dated **8 October 2008** enclosing a facility letter in relation to a bridging finance agreement and a second facility letter in relation to a related home loan agreement which details as follows:

"With this letter, we are forwarding your bridging finance agreement and related home loan agreement.

Please sign one copy of this letter and have your signature witnessed by your solicitor. It must be returned to the Bank with your bridging finance and home loan agreements, when these have also been signed and witnessed.

By signing this letter, you confirm that you understand the basis on which we are offering your bridging and home loans, and that you agree to this. The return of this letter signed and witnessed is a pre-condition of our offer of these loans, and the Bank may withdraw its offer if you do not do this.

The home loan is not offered as a separate loan from the bridging finance. Our offer is that we will initially advance the bridging finance loan to accommodate your requirement to draw down your home loan in stages.

By signing this letter you hereby authorise us to draw down your home loan and to credit the proceeds of the home loan (when they draw down) towards clearing all principal and interest due on your bridging finance loan. We will exercise this authority when the period of the bridging finance agreement is over, subject to all preconditions to drawdown of your home loan having been satisfied. If you draw down your bridging facility in full prior to expiry of the period of your bridging finance agreement, you may request us to exercise this authority to draw down your home loan and clear your bridging facility, provided you have satisfied all preconditions to such drawdown. The terms of your home loan and your obligation to make the payments provided for in the home loan agreement will commence from the date of such drawdown of your home loan.

Your home loan will not be available for any purpose other than clearing your bridging finance.

If you decide that you do not need your bridging finance, you may request us to advance your home loan without drawing down any of your bridging finance loan.

/Cont'd...

You must request this in writing. If you make such a request, then our offer of your bridging finance will lapse. If you do not make such a request before requesting any loan monies, we may treat such a request for loan monies as a request to make an advance under your bridging finance agreement.

Condition 7.1 of your home loan agreement requires you to draw down your home loan before the Latest Drawdown Date specified in your home loan agreement. If we advance your bridging finance to you, then we agree that the Latest Drawdown Date for your home loan shall be extended to the last day of the period of the bridging finance agreement.”

The **Facility Letter** dated **8 October 2008** that issued to the Complainant in relation to the bridging finance loan under mortgage loan account ending **8001** (the “**Bridging Finance Facility**”) details as follows in the “**Important Information**” section:

<i>“Amount of credit advanced:</i>	<i>EUR 150,000.00</i>
<i>Period of Agreement:</i>	<i>1 years 2 month(s) from drawdown.***</i>
<i>Number of Repayment Instalments:</i>	<i>11 plus any final balance</i>

...
APR:* 6.12%

...
**Annual Percentage Rate of Charge*

...
**** The Period of Agreement is based on our discussion with you, when we estimated when you would draw down the Loan and when you would make your first payment. If you selected a first repayment date in a calendar month after the month in which the estimated drawdown date occurs, then the Period of Agreement will be extended to reflect one or more extra calendar months. the number of instalments that you will pay will remain the same.”*

The “**Schedule**” section on **page 2** of the **Bridging Finance Facility** details as follows:

*“Purpose of Loan:
Bridging Finance, as specified in your Loan Application.*

...
*Latest Drawdown Date: 8 January 2009
Rate of Interest: 5.90 % per annum.*

/Cont’d...

You will make interest only payments during the whole loan period so you will still have to repay the original capital amount at the end of the mortgage term. The interest charged may vary during the course of the loan.

Repayment intervals: month

..."

The **General Conditions for Annuity Home Loans** attaching to the **Bridging Finance Facility** dated **8 October 2008** detail as follows:

1. Definitions and Interpretation

1.1 Definitions

....

"Latest Drawdown Date" means the last date for drawdown of the Loan as specified in the Schedule or such other date as we may agree".

....

"Period of Agreement" means the period of agreement specified in the Important Information Notice.

7 Drawdown

7.1 *Subject to compliance with the terms of the Agreement (and subject to clause 7.3 below) you may draw down the Loan in one amount not later than the Latest Drawdown Date. We may, at our sole discretion, elect to extend the Latest Drawdown Date, but we shall not under any circumstances be obliged to do so. Any extension of the Latest Draw Down will not be effective unless it is confirmed in writing to you. If the loan is not drawn by the latest Drawdown Date and we do not exercise this discretion to extend the Agreement shall terminate without prejudice to your liability for fees and your obligation to comply with the terms of the Agreement in respect of sums already advanced.*

7.2 *Where the Loan is advanced to purchase property the purchase must be completed and you must get vacant possession when the Loan is drawn. Your solicitor must hold any funds drawn on trust for such purpose.*

7.3 *Where the purpose of the Loan includes financing the construction, improvement or renovation of a dwelling on the property (the "Works") the following apply:*

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- 7.3.1 *the Loan can only be drawn against architects or surveyors certificates for work done, the first drawdown to be made no later than the Latest Drawdown Date and, unless we otherwise agree, the last drawdown to be made no later than twelve months thereafter;*
- 7.3.2 *if the Works require planning permission, a copy of the relevant permission(s) must be furnished to us prior to any drawdown of the Loan;*
- 7.3.3 *on completion of the Works an architect's or surveyor's certificate confirming compliance with all applicable planning permissions and building regulations in a format acceptable to us must be furnished;*
- 7.3.4 *If the Works are exempt from planning permission and/or building regulations, an architect's or surveyor's certificate must be furnished confirming this."*

The **Acceptance and Authority** section of the **Bridging Finance Facility** was signed and accepted by the Complainant on **15 October 2008** and witnessed by his solicitor on the following terms:

"WARNING - THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE

I/We have read and understand the nature and contents of this Loan Agreement.

I/We agree to be bound by this Loan Agreement.

Where applicable I/We irrevocably authorise my/our Solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by my/our Solicitor)."

The **Facility Letter** dated **8 October 2008** that issued to the Complainant in relation to the ECB tracker interest rate home loan in relation to mortgage loan account ending **8052** (the **"ECB Tracker Home Loan Facility"**) details as follows under the **"Important information"** section:

<i>"Amount of credit advanced:</i>	<i>EUR 150,000.00</i>
<i>Period of Agreement:</i>	<i>24 years 0 month(s) from drawdown.***</i>
<i>Number of Repayment Instalments:</i>	<i>287 plus any final balance</i>

...

/Cont'd...

APR*: 5.80%

...

**Annual Percentage Rate of Charge.*

...

**** The Period of Agreement is based on our discussion with you, when we estimated when you would draw down the Loan and when you would make your first payment. If you selected a first repayment date in a calendar month after the month in which the estimated drawdown date occurs, then the Period of Agreement will be extended to reflect one or more extra calendar months. the number of instalments that you will pay will remain the same."*

The "**Schedule**" section on **page 2** of the **ECB Tracker Home Loan Facility** details as follows:

"Purpose of Loan:

Internal Transfer, as specified in your Loan Application.

...

Latest Drawdown Date: 8 January 2009

Rate of Interest: 5.64 % per annum.

Repayment intervals: month"

The **General Conditions for Annuity Home Loans** attaching to the **ECB Tracker Home Loan Facility** dated **8 October 2008** detail as follows:

"1. Definitions and Interpretation

1.1 Definitions

...

"Agreement" means the agreement between us and you relating to the Loan which these General Conditions are attached and form part;

...

"Latest Drawdown Date" means the last date for drawdown of the Loan as specified in the Schedule or such other date as we may agree".

...

"Period of Agreement" means the period of agreement specified in the Important Information Notice.

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2 Preconditions

Before you draw down the Loan we must receive in form and substance satisfactory to us:

...

2.5 the survey/valuation of the Property referred to in clause 4.

...

4 Survey/Valuation Report

4.1 *Unless we specify otherwise, you must provide us with a survey/valuation report given on our standard form...*

Where the Property comprises a building in the course of erection, alteration or renovation the report must be on the completed works and is in addition to any architect or surveyors periodic certificate as to the value of work done.

7 Drawdown

7.1 *Subject to compliance with the terms of the Agreement (and subject to clause 7.3 below) you may draw down the Loan in one amount not later than the Latest Drawdown Date. We may, at our sole discretion, elect to extend the Latest Drawdown Date, but we shall not under any circumstances be obliged to do so. Any extension of the Latest Draw Down will not be effective unless it is confirmed in writing to you. If the loan is not drawn by the latest Drawdown Date and we do not exercise this discretion to extend the Agreement shall terminate without prejudice to your liability for fees and your obligation to comply with the terms of the Agreement in respect of sums already advanced.*

7.2 *Where the Loan is advanced to purchase property the purchase must be completed and you must get vacant possession when the Loan is drawn. Your solicitor must hold any funds drawn on trust for such purpose.*

7.3 *Where the purpose of the Loan includes financing the construction, improvement or renovation of a dwelling on the property (the "Works") the following apply:*

7.3.1 *the Loan can only be drawn against architects or surveyors certificates for work done, the first drawdown to be made no later than the Latest Drawdown Date and, unless we otherwise agree, the last drawdown to be made no later than twelve months thereafter;*

- 7.3.2 *if the Works require planning permission, a copy of the relevant permission(s) must be furnished to us prior to any drawdown of the Loan;*
- 7.3.3 *on completion of the Works an architect's or surveyor's certificate confirming compliance with all applicable planning permissions and building regulations in a format acceptable to us must be furnished;*
- 7.3.4 *If the Works are exempt from planning permission and/or building regulations, an architect's or surveyor's certificate must be furnished confirming this.*

...

15 Events of Default

Notwithstanding any other provision of the Agreement, we shall be under no obligation to advance the Loan or any part of it and we shall be entitled to require full repayment of the Loan and accrued interest and all other monies owing under the Agreement if:-

...

- 15.1.4 *there is undue delay in complying with your solicitor's undertaking or in completing security or in furnishing architects or surveyors certificates or it comes to our notice that these will not be complied with, completed or furnished within a reasonable time"*

The **Acceptance and Authority** section of the **ECB Tracker Home Loan Facility** was signed and accepted by the Complainant on **15 October 2008** on the following terms:

"WARNING -THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE

I/We have read and understand the nature and contents of this Loan Agreement.

I/We agree to be bound by this Loan Agreement.

Where applicable I/We irrevocably authorise my/our Solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by my/our Solicitor)."

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The Complainant contends that he does not “recall” the **Customer Stage Payment Letter** dated **8 October 2008**. While I acknowledge that the Provider has submitted an unsigned copy of the **Customer Stage Payment Letter** in evidence, I have no reason to believe that the Provider did not issue this document with the two facility letters given the signing of the **Customer Stage Payment Letter** was a pre-condition to the Provider’s offer of both facilities, and the Provider could have withdrawn its offer if the Complainant did not sign the **Customer Stage Payment Letter**.

The Provider has submitted **Statement of Accounts** in evidence which show that the first stage payment of €20,000 was made in respect of the bridging finance loan (mortgage loan account ending **8001**) on **24 October 2008**. Therefore, I accept that the pre-condition in relation to signing the **Customer Stage Payment Letter** was satisfied.

I note that the following further stage payments were made in respect of the bridging finance loan:

- €10,000 on **19 November 2008**;
- €20,000 on **6 May 2009**;
- €20,000 on **23 June 2009**;
- €20,000 on **6 October 2009**;
- €15,000 on **25 November 2009**;
- €15,000 on **27 January 2010**;
- €15,000 on **2 June 2010**; and
- €15,000 on **19 July 2010**.

It appears from the Provider’s internal notes submitted in evidence that the Complainant made four separate applications to extend the Bridging Finance Facility. The Provider’s internal notes dated **23 November 2009** detail as follows:

“APPLICATION TO EXTEND BRIDGING FINANCE TO 24TH FEB.

Branch has been in contact with customers who confirm final works are [being] started. Architect attended site for sign-off of further E15k 17.11.2009. Branch have also visited the site and confirm works are as advised.

We are satisfied that final stage drawdown will be completed by mid January/early February and new mortgage product in place, but request extension to 24.02.2010 to prevent reapplication if there is further delay. No change in customers circumstance.

/Cont’d...

Approval of B/F extension recommended until 24.02.2010.”

The Provider’s internal notes dated **19 February 2010** detail as follows:

“APPLICATION TO EXTEND BRIDGING FINANCE TO 19th MARCH.

Branch has been in contact with customers who confirm final works were to be completed at this stage but due to the very poor weather conditions over the last two months a delay occurred with external works. While work has been restarted it will take approx one more month to complete. Branch have visited the site and confirm works are restarted.

We are satisfied that final stage drawdown will be completed by mid March and new mortgage product in place and request extension to 19.03.2010.

No change in customers circumstance.

Approval of B/F extension recommended until 19.03.2010.”

The Provider’s internal notes dated **11 March 2010** detail as follows:

“APPLICATION TO EXTEND BRIDGING FINANCE TO 24th MAY.

Branch has been in contact with customers who confirm final works were to be completed at this stage but due to the slowness of workmen with some external and internal works – they were offsite on another job for a number of weeks – his is [sic] not yet ready to drawdown the final stage payment. While work has been restarted it may take approx one more month to complete. Branch have visited the site and confirm that two months is now more realistic. The Architect, who is know[n] to branch, also expects full completion by Mid May.

We are satisfied that final stage drawdown will be completed by this time and new mortgage product in place and request extension to 24.05.2010.

No change in customers circumstance.

Approval of B/F extension recommended until 24.05.2010.”

/Cont’d...

The Provider's internal notes dated **11 May 2010** detail as follows:

"APPLICATION TO EXTEND BRIDGING FINANCE TO 27th JULY.

Branch has been in contact with customer who confirms final works were to be completed at this stage but due to delays it will now be end of June/beginning July.

Branch have visited the site and confirm that one month is realistic. The Architect, who is known to branch, also expects full completion by end of June/beginning July. I am requesting extension until end of July to allow for receipt of Certificate of Completion and other documentation required at final stage of project.

We are satisfied that final stage drawdown will be completed by this time – unforeseen delays [accepted] – and new Capital & Interest mortgage product will be in place by July.

No change in customers circumstances.

Approval of B/F extension recommended until 28.07.2010."

Following a consideration of the above internal notes submitted by the Provider, the evidence does not support the Complainant's assertion that he never made any request for extensions to the Bridging Loan Facility. The Provider's internal notes show that the Complainant was in regular communication with the Provider's branch in relation to extending the drawdown period of the Bridging Loan Facility. I note that the Provider exercised its discretion to allow a number of extensions to the Bridging Loan Facility which the Complainant had originally agreed to draw down on **8 January 2009**. In circumstances where the Complainant requested a 7-month extension in total to in respect of the Bridging Finance Loan, the Provider contends that the draw down date for the ECB Tracker Home Loan Facility, being **December 2009**, had lapsed come **28 July 2010** when the Bridging Loan Facility was finally drawn down in full.

The Provider's internal notes dated **29 July 2010** state the following:

"Application to convert Bridging Finance....to Capital & Interest Variable rate Home Loan.

Bridging facilities on customer have expired 28th July 2010.

...

/Cont'd...

[Complainant] is now in position to convert the bridging loan onto C & I Variable rate home loan. All the works have now been completed.

[Up to date] valuation dated 28th July held and the adjusted value has been amended in [Provider's internal system] to reflect the present climate. However, his LTV is still a comfortable 60%. Final Certificate of Completion is also held on file and final stage drawdown is complete. No new monies, excellent account holder who would not enter into any commitment he could not see his way to fulfil.

Happy to recommend for joint approval to convert product."

In circumstances where the Provider was of the view that the ECB Tracker Home Loan Facility had lapsed in **December 2009**, the Provider issued a new **Facility Letter** to the Complainant dated **30 July 2010** for mortgage home loan account ending **9917** which provided for a loan in the amount of €150,000 over a term of 22 years and 3 months.

The "**important information**" section of the new **Facility Letter** details as follows:

*"Amount of credit advanced: EUR 150,000.00
Period of Agreement: 22 years 3 month(s) from drawdown.***
Number of Repayment Instalments: 265 plus any final balance*

*...
APR*: 4.24%*

**Annual Percentage Rate of Charge."*

The "**Schedule**" section on **page 2** details as follows:

*"Purpose of Loan:
Internal Transfer, as specified in your Loan Application.*

...

Latest Drawdown Date: 1 November 2010

Rate of Interest: 4.15 % per annum."

The **“Statutory Notices and Other Warnings”** section on **page 3** details as follows:

“WARNING: THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (This will not apply during any period of fixed interest rate)”

The **Acceptance and Authority** section of the **Facility Letter** was signed and accepted by the Complainant whose signature was witnessed on **4 August 2010** on the following terms:

“WARNING - THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE

I/We have read and understand the nature and contents of this Loan Agreement.

I/We agree to be bound by this Loan Agreement.

Where applicable I/We irrevocably authorise my/our Solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by my/our Solicitor).”

While the nature of the applicable interest rate of 4.15% is not clear from the loan documentation submitted in evidence in respect of this new facility, both parties agree that the interest rate offered was the Provider’s standard variable rate. The Complainant submits that in **July 2010**, he expected mortgage loan account ending **8001** to roll “into the tracker agreement”, but instead he “was denied original Tracker offer and forced to take SVR product”.

Having considered the Complainant’s mortgage loan documentation, it appears to me that in order for the ECB Tracker Home Loan Facility (mortgage loan account ending **8052**) to be drawn down, the Complainant was first required to satisfy the conditions of the bridging loan under mortgage loan account ending **8001** by drawing down that loan in full. The documents that issued to the Complainant at the application stage and the **Customer Stage Payment Letter** that enclosed the Bridging Loan Facility and the ECB Tracker Home Loan Facility made it clear that ECB Tracker Home Loan Facility was not offered as a separate loan from the Bridging Finance Facility. That said, separate facility letters were issued by the Provider as the nature of each facility was different, one being a short-term bridging loan and the other being a long-term ECB tracker loan.

/Cont’d...

However, it is clear to me that both loans were inextricably linked in that the short-term bridging finance loan was advanced to allow the Complainant draw down his long-term ECB tracker home loan in stages and the purpose of the ECB tracker home loan with capital and interest repayments was to repay the bridging finance loan.

The "*Latest Drawdown Date*" in respect of both facilities is listed as **8 January 2009**, being the last date for draw down of the loans. However, in accordance with the terms of the **Customer Stage Payment Letter** dated **8 October 2008**, in circumstances where the Provider advanced the Bridging Finance Facility to the Complainant, the "*Latest Drawdown Date*" for the ECB Tracker Home Loan Facility was extended to the last day of the period of the bridging finance agreement. The period of the Bridging Finance Facility was initially 14 months, therefore the ECB Tracker Home Loan Facility was required to be drawn down by **December 2009**. I note that the first stage payment of the bridging finance loan (mortgage loan account ending **8001**) was made on **24 October 2008** therefore the ECB Tracker Home Loan Facility was required to be drawn down on or before **24 December 2009**.

In circumstances where the construction of the mortgaged property was delayed for various reasons, the build was not fully completed until 7 months after the Bridging Loan Facility was due to expire. Therefore, the bridging finance loan was not drawn down by the "*Latest Drawdown Date*" as per the terms of the Bridging Finance Facility. However, the Provider exercised its discretion by allowing the Complainant to extend the term of the bridging finance loan on four separate occasions. By doing so, the Provider extended the "*Period of Agreement*" of the Bridging Finance Facility from 14 months to 21 months. Given both the Bridging Finance Facility and ECB Tracker Home Loan Facility were so inextricably linked, I am of the view that it is reasonable to conclude that the "*Latest Drawdown Date*" for the ECB Tracker Home Loan Facility was therefore also extended to the last day of the new extended period of the bridging finance agreement which was **28 July 2010**.

It appears to me that the Provider is of the view that if the Complainant had drawn down the Bridging Loan Facility before **24 December 2009** and if the requisite architect's certificate had been furnished to the Provider, then the Provider would have been able to activate the ECB Tracker Home Loan Facility and therefore the Complainant could have availed of the tracker interest rate. However, in circumstances where the Complainant did not specifically request an extension of the ECB Tracker Home Loan Facility, the Provider maintains that this facility had essentially lapsed by the time the period of the bridging finance agreement expired in **July 2010**. The Provider relies on **Clause 7.1** of the ECB Tracker Home Loan Facility in this regard.

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While I acknowledge that **Clause 7.1** states that if the loan is not drawn down by the "*Latest Drawdown Date*" and the Provider does not exercise its discretion to extend that facility, then the Provider is entitled to terminate the agreement, I do not consider it reasonable for the Provider to have terminated the ECB Tracker Home Loan Facility in **December 2009** without any prior notice to the Complainant in circumstances where the Bridging Finance Loan had been extended to **July 2010**.

It is clear from the Provider's internal notes that representatives from the Provider's branch were in regular contact with the Complainant and the Complainant's architect when the Complainant sought an extension to the term of the bridging finance agreement and in fact also visited the site on a number of occasions. Despite being fully aware that construction had been delayed and having agreed to extend the period of the bridging finance agreement, I find it difficult to understand why the Provider did not automatically extend the "*Latest Drawdown Date*" of the linked ECB Tracker Home Loan Facility let alone explain to the Complainant that it was necessary to seek a separate extension of the ECB Tracker Home Loan Facility in writing when extending the bridging finance loan.

Further, I have not been provided with any evidence that would indicate that the Provider notified the Complainant that the ECB Tracker Home Loan Facility had purportedly lapsed in **December 2009** even though the purpose of the ECB Tracker Home Loan Facility was to repay the bridging finance loan which had been extended to **July 2010**.

In addition, I note that the requisite architect's certificate of completion, which was a pre-condition to drawing down the ECB Tracker Home Loan Facility, did not issue until **July 2010**. Further, **Clause 15** of the ECB Tracker Home Loan Facility provides that the Provider is under no obligation to advance the loan if there is undue delay in complying with furnishing the architect's certificate within a reasonable time. However, it is important to highlight that the Provider was well aware that construction had been delayed on the property and therefore understood that the Complainant would not be in a position to furnish the architect's certificate until **July 2010** when the term of the bridging finance loan ultimately expired, after a number of agreed extensions, and construction had completed. Therefore, I do not consider it fair or reasonable on the part of the Provider to rely on the fact that the Complainant was unable to comply with the pre-condition ECB Tracker Home Loan Facility in relation to supplying an architect's certificate on draw down as a reason for terminating that facility in **December 2009**.

The Provider states in its submissions to this office that despite no longer offering any ECB tracker loan product, it intended to allow the drawdown of the ECB tracker loan as both facilities had been sanctioned prior to the withdrawal of the ECB tracker loan product on the basis that the Complainant had fully drawn down the bridging loan and construction was fully completed by the expiry of the initial bridging loan term on **24 December 2009**. While I acknowledge that the initial term of the bridging finance loan was extended to **July 2010** and construction did not finish until **July 2010**, the Provider's own internal notes in respect of each extension request on the bridging finance facility record that the "*new mortgage product*", which I understand to be the ECB tracker loan, would be in place at the end of each extension period. It appears to me that the Complainant also understood this "*new mortgage product*" to be the ECB tracker home loan as the Provider had not provided for any other long-term loan to the Complainant to refinance the bridging loan.

However, on the expiry of the bridging finance loan in **July 2010**, the Provider decided not to allow the Complainant roll onto the ECB tracker loan agreement that was previously agreed between the parties. Rather, the Provider offered the Complainant a completely new home loan agreement at a standard variable rate of 4.15%.

Having regard to the manner in which the Bridging Finance Facility and ECB Tracker Home Loan were offered to the Complainant, I find it difficult to understand why the Provider decided to treat the ECB Tracker Home Loan Facility and the Bridging Finance Facility as separate loans in **July 2010** when it had considered the two loans to be "*linked*" up to that point. In circumstances where the ECB main refinancing rate had steadily decreased from 4.25% on **8 October 2008** to 1.00% in **July 2010**, it appears to me that it was more beneficial for the Provider to terminate the Complainant's ECB Tracker Home Loan Facility that attracted an interest rate of ECB + 1.39% and issue a new **Facility Letter** to the Complainant dated **30 July 2010** offering a standard variable interest rate of 4.15%. I believe this was unreasonable.

In light of all the foregoing, I substantially uphold this complaint.

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 + 1.39% to the Complainant's mortgage loan account ending **9917** from **July 2010**,
- (ii) Repay to the Complainant any interest overpaid between **July 2010** and the date on which the tracker interest rate of ECB + 1.39% is applied to mortgage loan account ending **9917**, and

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- (iii) Pay a sum of €4,000 compensation to the Complainants in respect of the loss, expense and inconvenience the Complainant has suffered.

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)** on the basis that the conduct on the part of the Provider was unreasonable and **Section 60(2)(g)**.

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

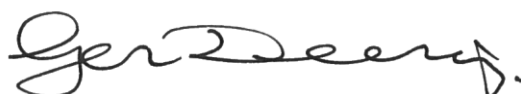
- (i) Apply a tracker interest rate of ECB + 1.39% to the Complainant's mortgage loan account ending **9917** from **July 2010**,
- (ii) Repay to the Complainant any interest overpaid between **July 2010** and the date on which the tracker interest rate of ECB + 1.39% is applied to mortgage loan account ending **9917**, and
- (iii) Pay a sum of €4,000 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered.

This sum of €4,000 is to be paid 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.

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

14 September 2021

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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.