



<u>Decision Ref:</u>	2021-0411
<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>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The purpose of the loan was to assist the Complainants in purchasing a property which was under construction.

The loan amount was €850,000 and the term of the loan was 28 years. The Mortgage Loan Offer Letter dated **30 October 2008** provided that the interest rate applicable to the mortgage loan was a standard variable interest rate of 5.3%. The mortgage loan account was drawn down on **15 December 2008**.

The Complainants' Case

The Complainants state that when they signed and accepted a Mortgage Loan Offer Letter dated **14 May 2008** on **2 June 2008** a "*contract existed between the parties*". The Complainants submit that the Mortgage Loan Offer Letter dated **14 May 2008** provided for a tracker rate of interest.

On **25 September 2008**, the Complainants explain that the Provider wrote to their solicitor advising that all the "*conditions precedent*" attached to the Mortgage Loan Offer Letter dated **14 May 2008** were "*fully complied with*".

The Complainants state that their solicitor issued a letter dated **29 September 2008** referring to the Provider's letter dated **25 September 2008** noting the outstanding issues to be addressed before the loan could be drawn down to include a *"final inspection of the property and insurance"*.

The Complainants state that they *"arranged insurance but the reference to a final inspection is clear evidence drawdown was close at hand, however ... this matter was controlled by [the Provider] who employed professional advisors"*. The Complainants maintain that given the Provider's letter dated **25 September 2008** advised that the loan cheque would issue shortly, it was reasonable to assume that *"the house was all but finished"*. The Complainants state that the inspection *"was under the sole control of [the Provider]"* and that the Provider *"had ample time to organise it before withdrawal of the tracker product on 10th October 2008."*

The Complainants are of the view that all conditions precedent were fully complied with and that the Provider *"has not indicated what conditions were not met that were within [the Complainants] control."* The Complainants contend that *"If [the Provider] was aware of the tight timelines to ensure full compliance with the loan terms, why was this not brought to [the Complainants] attention at that time?"*. The Complainants state that *"some consideration could have been given to allow for stage payments and trigger the tracker"* in advance of tracker rates having been withdrawn from the market. The Complainants assert that the Provider must have known that it was not realistic to believe that the construction of the property could be completed within 3 months.

The Complainants state that the property *"on which a tracker was committed had to be constructed."* The Complainants explain that *"the construction project was to be overseen by [the Provider's] appointed advisors."* The Complainants assert that *"[t]his was the only major non-legal condition in the offer letter dated 14 May 2008 under the sole control of [the Provider]."* The Complainants submit that it is standard practice *"to allow for stage drawdowns in all new build contracts and a stage drawdown in this case would have guaranteed [the Complainants] the tracker mortgage [the Provider] promised them."*

The Complainants state that the Provider issued a further Mortgage Loan Offer Letter dated **30 October 2008**. The Complainants assert that they reject the Provider's contention that they accepted the change to the original loan offer terms by signing the subsequent Mortgage Loan Offer Letter dated **30 October 2008**. The Complainants contend that *"[n]othing can be further than the truth."* The Complainants state that they were *"unjustly and improperly"* denied a tracker variable interest rate in **December 2008** when they drew down their mortgage loan.

The Complainants maintain that they raised this issue with the Provider in **December 2008** however, by then, they had *“sold a property to generate equity and as this was a new build we were too far into construction to stop”*. The Complainants state that they had *“no choice but to accept the diminished offer under duress.”*

The Complainants state that they disagree with the Provider’s contention that the Complainants had an option to withdraw from the loan agreement and that this *“is not grounded in any kind of reality.”* The Complainants further disagree with the Provider’s contention that the Complainants had six weeks to obtain legal advice and the Complainants state the Provider’s *“response here is condescending and appears to indicate that a 6 weeks’ time frame to get legal advice may have changed matters; as stated earlier this is a commercial issue and no amount of legal advice was going to help.”*

The Complainants state that a *“face to face meeting should have taken place”* between them and the Provider. The Complainants assert that they have the protection of the **Consumer Protection Act 1995**. The Complainants contend that while they did have the benefit of legal advice, *“the issue at hand is more of a commercial than legal matter as this dispute centres on the loan rate charged”*. The Complainants maintain that the Provider has a *“duty of care to all clients to ensure products sold are as promised and commercial risks are highlighted”*.

The Complainants assert that the tracker process *“...clearly establishes that customers who had a legitimate expectation of a tracker rate mortgage in 2008, cannot have it unilaterally withdrawn or expunged merely because the bank determined that the tracker mortgages were withdrawn [in late] 2008.”*

The Complainants are seeking the following:

- (a) A tracker interest rate of ECB + 1.15% to be applied to the mortgage loan account; and
- (b) Redress and compensation.

The Provider’s Case

The Provider states that the Complainants applied for a mortgage loan to assist with the purchase of a property in **April 2008**. The Provider states that it issued a Mortgage Loan Offer Letter dated **14 May 2008** to the Complainants offering a tracker rate of interest. The Provider notes however that the Complainants did not ultimately draw down on that mortgage loan as they failed to comply with the conditions precedent in that loan offer.

/Cont’d...

The Provider states that the mortgage was required to be drawn down by **14 August 2008** and relies on **General Condition 9 (c)** of the Mortgage Loan Offer Letter dated **14 May 2008** in this regard.

The Provider asserts that the Complainants also failed to comply with **Part 3 Conditions Precedent, section b part (ii)** of the Mortgage Loan Offer Letter dated **14 May 2008** as the final inspection of the property was not carried out until **2 December 2008**. The Provider submits that while the inspection was carried out by the Provider's appointed valuer, in circumstances where the property was not completed until after the expiry of the period for completion and drawdown, *"the final inspection could not have taken place until the Property was completed."* The Provider relies on **Final Valuation Report for Mortgage Purposes Only** dated **2 December 2008** in this regard. The Provider also asserts that the Complainants failed to comply with **Part 4 Special Conditions, section (a) part (v)** as the insurance policy was not incepted until **10 December 2008**.

The Provider explains that in circumstances where the *"relevant conditions had not been met"* by the Complainants *"no contract existed between the Provider and the Complainants on foot of the First Offer Letter."* The Provider contends that the Complainants and their solicitor *"were aware of the requirements to comply with both the Conditions Precedent and the General and Special Conditions contained in the offer letter"*. The Provider submits that it was the Complainants' responsibility to comply with all conditions prior to drawdown and *"the Conditions Precedent were not in the sole control of the Provider."*

The Provider refers to a letter dated **25 September 2008** from the Provider to the Complainants' solicitor which drew attention in particular *"to the General and Special Conditions contained in the Offer Letter."* The Provider asserts that *"it is clear from subsequent correspondence between the Complainants solicitors and the Complainants dated 29 September 2008 that the Complainants were aware or were made aware that their obligations under Part 4 had yet to be complied with."*

The Provider states that it issued two further Mortgage Loan Offer Letters to the Complainants on **30 October 2008** as follows:

- Mortgage Loan Offer letter dated **30 October 2008** for a loan in the amount of €850,00 for a term of 28 years subject to a standard variable rate of 5.4% The Provider notes that this loan offer was not accepted by the Complainants.
- Mortgage Loan Offer letter dated **30 October 2008** for a loan in the amount of €850,00 for a term of 28 years subject to a standard variable rate of 5.3%. The Provider notes that the Complainants signed and accepted this loan offer on **14 November 2008**, and the mortgage loan account was duly drawn down on **15 December 2008** on a standard variable rate of 3.75%.

/Cont'd...

The Provider explains that it withdrew tracker rates from the market in **late 2008** therefore the Mortgage Loan Offer Letters that issued on **30 October 2008** “*did not contain a contractual entitlement to a tracker rate of interest.*” The Provider notes that the Mortgage Loan Offer Letters which issued on **30 October 2008** were “*clear as to the interest rate which is being offered, namely a standard variable rate.*”

The Provider asserts that by signing and accepting the Mortgage Loan Offer Letter dated **30 October 2008** on **14 November 2008**, “*the Complainants were not entitled to draw down funds on the conditions provided for in the First Offer Letter*” dated **14 May 2008**. The Provider relies on **General Condition Part 1 (d)** of the Mortgage Loan Offer Letter dated **30 October 2008** in this regard. The Provider states that it is satisfied that the “*documentation relating to the Complainants’ mortgage loan was sufficiently clear and transparent as to the Complainants’ entitlements with respect to a tracker interest rate.*” The Provider maintains that “*no breach of the Provider’s obligations under the Consumer Credit Act 1995 has occurred.*”

The Provider submits that it does not accept the Complainants’ contention that they had no choice but to accept the Mortgage Loan Offer Letter dated **30 October 2008** and states that “*no documentation has been provided to support this assertion*”. The Provider asserts that the Complainants had the “*benefit of legal advice before accepting the Mortgage Loan Offer Letter dated 30 October 2008*”.

The Provider explains that given the Mortgage Loan Offer Letter dated **30 October 2008** was accepted on **14 November 2008** and funds were not drawn down until **15 December 2008**, “*the Complainants had a period of 6 weeks to consider the offer, take financial and legal advice before drawing down funds.*” The Provider notes that the “*Complainants always had the option to refuse to sign*” the Mortgage Loan Offer Letter dated **30 October 2008**.

The Complaint for Adjudication

The conduct complained of is that the Provider failed to honour the initial loan offer that issued dated **14 May 2008** resulting in the Complainants not being able to draw down a mortgage loan on a tracker interest rate.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence.

/Cont’d...

The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

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

Following the issue of my Preliminary Decision, the Complainants' representative made a further submission on behalf of the Complainants by way of email to this office on **8 October 2021**, a copy of which was transmitted to the Provider for its consideration. The Provider has not made any further submissions.

Having considered the additional submission from the Complainants and all of the submissions and evidence furnished to this Office, I set out below my final determination.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider the details of certain interactions between the Complainants and the Provider from **April 2008 to December 2008**.

The Provider issued a **Mortgage Loan Offer Letter** dated **14 May 2008** to the Complainants which details as follows:

<i>"1. Amount of Credit Advanced:</i>	<i>€850,000</i>
<i>2. Period of Agreement:</i>	<i>28 years</i>
....	

/Cont'd...

11. Loan Type:	Repayment
12. Interest Rate:	5.150% Variable”

Part 3 – Conditions Precedent of Mortgage Loan Offer Letter dated **14 May 2008** provides as follows:

“The following conditions (the “Conditions Precedent”) must be complied with in full to the Lender’s satisfaction before the Loan can proceed.

(a) The following Conditions Precedent apply to [the First Complainant]:

- i. Original audited or certified accounts for [named company] the previous two years confirming gross income of at least EUR 50,000.00 excluding rental income.*

For a new business where two years Audited/Certified accounts are not available, one year’s audited/certified accounts or draft/management accounts or financial projections to be provided, confirming income details all documentation must be to the satisfaction of the Lender.

- ii. Accountant’s written confirmation that your tax affairs are up to date both personal and business.*

The following Conditions Precedent apply to the Loan:

- i. Accountant for [named company] to confirm [the Second Complainant] is in receipt of gross annual income EUR 17,145.00 and that [the First Complainant] is in receipt of EUR 12,000.00 rental income [named company].*
- ii. A valuation (including a photograph) of the Property for mortgage purposes (see Clause 2(c) of Part 5 – The General Conditions) showing the valuation in an amount of not less than EUR 1,600,000 and which must be on terms acceptable to the Lender. A final inspection will be required for properties under construction/undergoing significant repair. The Lender may raise further conditions after receipt of the valuation...”*

Part 4 - The Special Conditions of Mortgage Loan Offer Letter dated **14 May 2008** provides as follows:

“The Loan is subject to the following special conditions (the “Special Conditions”) which, unless stated to the contrary, must be complied with in full to the Lender’s satisfaction before the Loan, or any part of it, can be drawn down.

/Cont’d...

The following Special Conditions apply to the Loan:

- i. *The following special condition concerning interest shall apply: - 1) The interest rate applicable to the Loan is a tracker variable interest rate and may vary upwards or downwards. 2) The interest rate applicable to the Loan shall be 1.15% (the "Margin") above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the Loan..."*

...

- v. *The Property Policy required pursuant to General Condition 3(b) of the Offer Letter must be effected in the name of the Borrower with the interest of the Lender noted thereon."*

The notice at the end of the page containing **Part 4 – The Special Conditions** details as follows:

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

Part 5 – The General Conditions of Mortgage Loan Offer Letter dated **14 May 2008** provides as follows:

"1. Interpretation and General

...

- (d) This Offer Letter replaces and supersedes all earlier versions of this Offer Letter.*

2. Security and Valuation

...

- (c) The Lender requires a valuation of the Property. At the Borrower's cost, the valuation must be provided by a valuer acceptable to the Lender and the valuation remains the property of the Lender..*

3. Insurance and Assurance Policies

...

/Cont'd...

(b) The Property must be insured and kept insured against fire and usual risks for the full reinstatement value as states in the valuation report and in respect of public liability, all on terms acceptable to the Lender and, prior to draw down of the Loan, the Borrower shall produce the insurance policy (the "Property Policy") to the Lender. This Property Policy must be effected either with the Lender's interest noted thereon or in the joint names of the Lender and the Borrower as the Lender may decide at its absolute discretion.

...

9. Draw Down

(a) All and any Special Conditions (in Part 4) must be complied with in full to the Lender's satisfaction prior to draw down of the Loan. It is the responsibility of the Borrower and the Borrower's agents to ensure that all Conditions are complied with."

...

(c) All and any Conditions Precedent (in Part 3) must be complied with in full to the Lender's satisfaction within two months from the date hereof. The Loan must be drawn down within 3 months from the date hereof. The Lender may, at its absolute discretion, extend either or both periods.

(d) If the Loan is to be drawn down in stages, pending draw down in full, the "Loan", for the purposes of this Offer Letter shall mean so much of the Loan as has been drawn down at any time and the monthly payment of principal and interest (or in the case of an endowment loan, interest only) shall be of such provided always that this is without prejudice to the Borrower's solicitor's obligation to stamp and register the security documents referenced in clause 2(a) for the full amount of the Loan. Each stage shall only be drawn down on foot of an architect's certificate or that of some other suitable qualified person in the Lender's prescribed form or in such manner as shall be specified by the Lender in the Special Conditions."

The **cover letter** enclosing the Mortgage Loan Offer Letter dated **14 May 2008** details as follows:

"[...] This approval is subject to the terms and conditions contained in the enclosed Mortgage Loan Offer ("Offer Letter").

Based on the information you provided to us, we believe that the enclosed loan offer will meet your requirements and is suited to your needs as a customer who s moving house.

/Cont'd...

While details of fixed, variable and tracker rate options were discussed with you, we note that you have chosen the variable rate option as you are satisfied to accept that your repayments may change in line with market interest rate movement. A number of repayment options were also discussed with you and you have chosen a repayment mortgage where both interest and capital are paid over the terms of the loan, thus reducing the capital balance outstanding.

You have selected to pay your mortgage over 28 years, as this is the term that suits your requirements.

....

I have also enclosed some documentation that needs to be completed and returned to us. This documentation will help you comply with some of the conditions detailed in your Offer Letter. These are called 'Conditions Precedent' and can be found in Part 3 of your Offer Letter. There are also some 'General' and 'Special Conditions' applying to your loan, and these can be found in Parts 4 and 5 of your Offer Letter."

"Step 1 – WHAT SHOULD BE DONE NOW

(a) ... You are strongly recommended to seek legal advice prior to accepting the Offer Letter."

...

(d) Please make sure that you comply with the Conditions Precedent, which are contained in Part 3 of the Offer Letter"

"Step 2 – HOW TO GET YOUR MORTGAGE FUNDS

(a) Make sure you comply with the Special and General Conditions as outlined in the Offer Letter."

The Complainants signed the **Borrower's Acceptance and Consents** section of the Mortgage Loan Offer Letter dated **14 May 2008** on **2 June 2008** on the following terms:

"1. 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 dated **14 May 2008** envisaged that a tracker interest rate of ECB+1.15% would apply the Complainants' mortgage loan for the term of the loan.

/Cont'd...

The Mortgage Loan Offer Letter dated **14 May 2008** detailed that the Conditions Precedent must be complied with in full to the Provider's satisfaction within two months from the date of the loan offer, that is on or around **14 July 2008**. The General Conditions of the Mortgage Loan Offer Letter dated **14 May 2008** further detailed that the loan must be drawn down within 3 months from the date of loan offer, that is on or around **14 August 2008**.

It does not appear to me that this loan was structured in a way that it would draw down in stages, therefore the full loan amount of €850,000 was required to be drawn down by **August 2008**.

The Provider issued a letter dated **25 September 2008** to the Complainants' solicitor, which the Complainants have submitted in evidence, and which details as follows:

"Dear Solicitor

We contacted you previously in relation to the above Borrower and now confirm that all of the Conditions Precedent which were contained in Part 3 of the Borrower's copy of the Offer Letter have been fully complied with. Please find enclosed a copy of the most recent Offer Letter issued which is for information purposes only.

Please refer to earlier correspondence for instructions to obtain loan cheque and, should you have any queries, please contact the [Provider] on [telephone number].

Your attention is drawn in particular to the Special Conditions contained in Part 4 of the Offer Letter."

A further letter dated **29 September 2008** has been submitted in evidence by the Complainants which was issued to them by their solicitor and details as follows:

"We enclose copy letter received today from [the Provider] confirming the conditions precedent to your loan offer have now been completed in full by the branch.

We contacted the [location] office today and they confirm that the only matters that now remain outstanding before you can draw down your [sic] cheque are the following:

- 1. Cheque Requisition*
- 2. Final Inspection*

/Cont'd...

3. Buildings Insurance

This is just to let you know what the position is at the moment. We will be in a position to forward the Cheque Requisition to [the Provider] as soon as we get confirmation from you that it is in order to do so.”

It appears that while the Provider was satisfied that all Conditions Precedent had been complied with by **September 2008**, certain General and Special Conditions had not been complied with. It appears that the buildings insurance was not put in place in accordance with **Part 4- the Special Conditions (a) (v)** and **General Condition 3 (b)**, as outlined above. As per the Mortgage Loan Offer Letter dated **14 May 2008**, all Special Conditions were required to be complied with to the Provider’s satisfaction before the loan could be drawn down.

The Provider also appears to have highlighted to the Complainants’ solicitor that a final inspection had to be carried out prior to draw down. The Provider has submitted a document in evidence titled **Final Valuation Report for Mortgage Purposes Only** dated **2 December 2008** and provides as follows:

“

Mortgage Reference Number:	***4659
Name(s) of Applicant(s):	[the Complainants]
Address of Property being valued:	[Redacted]
Date of original inspection:	13 th June 2008
Final Valuation Figure:	€1,600,000.00
Reinstatement Value Figure:	€650,000.00

I certify that I have again inspected the above property and I confirm:

- a) All outstanding works have been carried out to my satisfaction and the property is now ready to be occupied.*
- b) There have been no alterations to the original property design.*
- c) The valuation figure quoted above reflects the true market value of the property at the time of final inspection.*
- d) I enclose photograph of property (listed above) in its complete state.”*

While it appears that a “*final inspection*” had yet to be carried out by **September 2008**, it appears from the evidence that a valuation had initially been carried out in **June 2008** and submitted to the Provider.

/Cont’d...

The Provider has submitted that “on the basis that no further conditions were raised by the Provider on receipt of the valuation, **Part 3 Conditions Precedent** had been fully complied with at that point”. I note that the final inspection and valuation were not completed until **December 2008**.

Moreover, I note that the mortgage loan was not drawn down within 3 months of the Mortgage Loan Offer Letter dated **14 May 2008** pursuant to **General Condition 9 (c)**.

The Provider submits that in circumstances where the Complainants did not draw down the loan within the required time frame and the Special and General Conditions of the Mortgage Loan Offer Letter dated **14 May 2008** had not been fully complied with, the initial loan offer lapsed and a new loan offer had to be issued. The Provider subsequently issued two further Mortgage Loan Offer Letters to the Complainants on **30 October 2008**.

I have not been provided with any evidence of communications between the Provider and the Complainants and/or their solicitor in relation to the lapsing of the original mortgage loan offer from **25 September 2008**, when the Provider highlighted to the Complainants’ solicitor that it required instructions in relation to the loan cheque and that the Special Conditions needed to be complied with, and to **30 October 2008**, when the Provider issued two further loan offers to the Complainants. The Provider submits that it does not hold any minutes or records of any telephone calls between the Provider’s branch manager and the Complainants at the time and maintains that there was no obligation on the Provider to hold such records.

The Provider has however submitted documentation titled “**Mortgage Desktop – Rationale – Mortgage Approval**” in evidence which details as follows:

*“Decision: Offer Sanctioned Amount: 850,000
Added By: [Redacted] on 14/05/2008 at 08:31:40”*

*“Decision: Release for Completion
Added By: [Redacted] on 25/09/2008 at 15:54:45”*

*No change in proposal.
Offer recalled, out of date, amended from tracker to LTV variable”*

*“Decision: Refer for Offer Sanctioned Amount: 850,000
Added By: [Redacted] on 29/10/2008 at 16:29:28”*

“Decision: Offer Sanctioned Amount: 850,000

/Cont’d...

Added By: [Redacted] on 30/10/2008 at 08:14:00"

The Provider's internal notes of **29 October 2008** show that the original loan offer was recalled as it had expired.

The Provider has also submitted a further internal note dated **22 October 2014** in evidence which details the following recollection from the branch manager of the Provider who dealt with the Complainants in **2008**.

The internal note details as follows:

"Title: Note created on 22/10/2014 14:47 by [Redacted]

OBC to [Redacted] Branch Manager [Redacted]. [Redacted] remembers these customers, and has had discussions with them in relation to this tracker issue earlier this year (18/02/2014). Confirmed that I understood this issue has been dealt with on numerous occasions, but that I plan on providing the customers with a comprehensive and very clear response. Discussed the below note and [internal mails] which is how [Redacted] understood the application and ultimate draw down to have gone. By October 2008 [the Complainants] had not yet complied with all the conditions and it appear that there was an issue with a set of accounts that were to be provided to [the Provider]. At that point the 3 months to draw down had expired and [internal mail] of 29/10/2008 confirms tracker rate no longer available and to be offered variable LTV rate. There was a 3 basis points reduction in the variable rate to be offered to take account of the tracker no longer being available. This was explained to [the Customers] and [Redacted] confirmed that it was his recollection that following this discussion of the new rate on offer, [the Complainants] took 6 weeks before they drew down.

*These 6 weeks was a period during which they could reconsider this rate. No other [Redacted] were offering trackers any more at that time ****See [the Complainants] complaint letter. I will confirm that [the Provider] does not accept this as fact. [the Complainants] ultimately drew this mortgage down 7 months after the original tracker offer."*

In his post Preliminary Decision submission received by this Office on **8 October 2021**, the Complainants' representative submits that there is an "Error of Fact" concerning the internal note dated **22 October 2014**, outlined above. The Complainants' representative states that the Complainants were "put under pressure to sign the variable rate offer letter" and that the Provider's internal note "reads otherwise".

/Cont'd...

As part of his post Preliminary Decision submission, the Complainants' representative has submitted an email dated **16 February 2018** from a branch manager who he maintains "*dealt directly with [the Complainants'] mortgage.*" I note that the email details as follows:

“...

I have gone through all of the documentation from the original timespan of the mortgage May 2008 when sanctioned to October 2008 when withdrawn. My belief is that the reliance the Bank have on the terms of the Offer Letter is flawed. Obviously not helped by the new Offer in October 2008 being signed off, but that was under significant duress. My own part in that is conveniently described, there is no data released of my appeal in the background.

“...

The most significant of these is to [Redacted] Solicitors by the Bank signing off on the Conditions precedent which is a telling document indeed, and should have been picked up on before now by them if involved.

“...”

The Complainants' representative, in his post Preliminary Decision submission, states that the branch manager's comments are "*telling and strongly oppose the position outlined above.*" The Complainants' representative is of the view that the email dated **16 February 2018** is evidence that the Complainants "*ultimately accepted and agreed to the terms of the second Mortgage Loan Offer dated 30 October 2008 but they did so under significant duress.*"

The Complainants' representative has submitted invoices to "*illustrate the significant pressure*" on the Complainants at the time and states that these invoices had to be paid from "*other resources*" pending drawdown of the new home loan.

As part of his post Preliminary Decision submission, the Complainants' representative has submitted another email from the branch manager referred to above dated **13 February 2018**, which I note details as follows:

“Bank have made contact with the Customer two weeks prior to expiration of the Tracker Offer? Were items indicating compliance with the Offer conditions withheld in the Branch and not submitted to Head Office - yes they were. It was the policy of [Redacted] to make up a pack of data at the Branch and submit once complete - why if the Banks Offer of 14th May expired did they not issue a new offer on the 14th August.

/Cont'd...

The timing of the new Offer was prompted by nothing other than a rush to withdraw from Tracker options. Was there any contact with the Branch to check compliance with the former May Offer before it was withdrawn - no - hence the Branch protestations over Oct to December.”

The Complainants’ representative is of the view that this “explains why the bank did not issue a new offer when the original offer letter expired in August 2008.”

The final response letter from the Provider to the Complainants dated **6 November 2014** also details the following in relation to the branch manager’s recollection of his discussions with the Complainants at that time:

“The Bank’s records clearly confirm that you did not comply with all the conditions set out in the Loan Offer Letter by October 2008 and therefore the Offer had expired at that time. ECB tracker products were no longer offered by the Bank at that time, therefore when the Bank issued you with a further Loan Offer Letter dated the 30th October 2008; this offer set out that the interest rate applicable to the Loan would be a variable rate. This was discussed with you by [name of Branch Manager]. In recognition of the tracker rate no longer being available to offer to you, the Bank offered you a reduced variable rate in the Loan Offer Letter of the 30th October 2008...”

As stated above, I discussed this matter with [name of Branch Manager] at [redacted], who also discussed it with you directly in February of this year. He confirms that he recalls your application and acceptance of this mortgage loan offer as having occurred as set out in the above paragraph. [Branch Manager] confirmed that it was his recollection that he had a full discussion with you about the new rate being offered”.

The first of the two Mortgage Loan Offer Letters that issued on **30 October 2008** provided for a loan in the amount of €850,000 for a term of 28 years subject to a standard variable rate of 5.4%.

Part 4 – The Special Conditions of Mortgage Loan Offer Letter dated **30 October 2008** provides as follows:

(iv) This offer replaces our offer of 14/05/2008.

The first Mortgage Loan Offer Letter dated **30 October 2008** was issued to fully replace the original mortgage loan offer which, despite having been signed and accepted by the

/Cont’d...

Complainants, had expired. I note that the first Mortgage Loan Offer Letter that issued on **30 October 2008** was not signed and accepted by the Complainants.

The Provider issued a second Mortgage Loan Offer Letter dated **30 October 2008** to the Complainants which details as follows:

“1. Amount of Credit Advanced:	€850,000
2. Period of Agreement:	28 years
....	
11. Loan Type:	Repayment
12. Interest Rate:	5.300% Variable”

Part 4 – The Special Conditions of Mortgage Loan Offer Letter dated **30 October 2008** provides as follows:

“The Loan is subject to the following special conditions (the “Special Conditions”) which, unless stated to the contrary, must be complied with in full to the Lender’s satisfaction before the Loan, or any part of it, can be drawn down.

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

(i) A satisfactory final inspection by the Valuer appointed by [the Provider], accompanied by a photograph of the completed property, will be required. Please note this must be submitted to [the Provider] prior to the issue of the loan cheque (or the final loan cheque where the loan is being drawn down in stages).

...

(iv) This offer replaces our offer of 30/10/2008.

The notice at the end of the page containing **Part 4 – The Special Conditions** details as follows:

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

/Cont’d...

Part 5 – The General Conditions of Mortgage Loan Offer Letter dated **30 October 2008** provides as follows:

“1. Interpretation and General

(d) This Offer Letter replaces and supersedes all earlier versions of this Offer Letter.

...

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), 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).

General Condition 9 of the Mortgage Loan Offer Letter dated **30 October 2008** is the same as **General Condition 9** of the Mortgage Loan Offer Letter dated **14 May 2008**. For the sake of brevity, I do not propose to repeat the text of General Condition 9 which has already been detailed above.

The **Consumer Credit Act Notices** appended to the Mortgage Loan Offer Letter dated **30 October 2008** detail as follows:

“If your mortgage loan is at any time at a variable rate, please note:

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

/Cont’d...

The **cover letter** enclosing the second Mortgage Loan Offer Letter dated **30 October 2008** details as follows:

"AMENDED OFFER LETTER

[..] This approval is subject to the revised terms and conditions contained in the enclosed Mortgage Loan Offer ("Offer Letter").

Based on the information you provided to us, we believe that the enclosed loan offer will meet your requirements and is suited to your needs as a customer who is moving house.

While details of fixed, variable and tracker rate options were discussed with you, we note that you have chosen the variable rate option as you are satisfied to accept that your repayments may change in line with market interest rate movement. A number of repayment options were also discussed with you and you have chosen a repayment mortgage where both interest and capital are paid over the terms of the loan, thus reducing the capital balance outstanding.

You have selected to pay your mortgage over 28 years, as this is the term that suits your requirements.

Could I ask you to refer to the information in Part 1(Statutory Loan Details) Section 1, 3 & 4 and Part 2 (Additional Loan Details) Section 11 and 12 of the enclosed Letter of Offer which detail your chosen options.

This Offer Letter supersedes and replaces all previous versions of this Offer Letter issued to you in respect of this loan."

It is clear to me that the Mortgage Loan Offer Letter dated **30 October 2008** replaced all previous loan offers to include the Mortgage Loan Offer Letter dated **14 May 2008**, which the Complainants previously accepted. Therefore, the contractual agreement between the Complainants and the Provider in the form of the Mortgage Loan Offer Letter dated **14 May 2008** was no longer valid.

The Complainants signed the **Borrower's Acceptance and Consents** section of the Mortgage Loan Offer Letter dated **30 October 2008** on **14 November 2008** on the following terms:

/Cont'd...

"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 that the Mortgage Loan Offer Letter dated **30 October 2008** envisaged that a variable interest rate of 5.3% would apply the Complainants' mortgage loan. The nature of the applicable variable rate was one that could be adjusted by the Provider from time to time as opposed to one that fluctuated in line with the ECB rate.

The Complainants ultimately accepted and agreed to the terms of the second Mortgage Loan Offer dated **30 October 2008**, having confirmed that they read and fully understood the terms and conditions attaching to the Mortgage Loan Offer Letter dated **30 October 2008**.

The **Statements of Account** provided in evidence show that mortgage loan account ending Provider **4659** was fully drawn down by the Complainants on **15 December 2008**. The lending rate at the date of drawdown was 3.750%, which is less than the standard variable rate of 5.3% as provided for in the second Mortgage Loan Offer Letter dated **30 October 2008**.

While I acknowledge that the Complainants had signed and accepted the Mortgage Loan Offer Letter dated **14 May 2008**, this loan offer ultimately expired in circumstances where the Complainants did not fully comply with the General and Special Conditions therein.

It was the responsibility of the Complainants and the Complainants' solicitor to ensure that all conditions of the loan offer were complied with before the loan could be drawn down. The full loan amount was required to be drawn down within 3 months of **14 May 2008** however it is clear that this was not done. Therefore, the Mortgage Loan Offer Letter dated **14 May 2008** was no longer valid.

The Complainants appear to submit that it was not possible to draw down the loan within 3 months as the property could not be fully built within 3 months. If indeed that was the case, the Complainants could have explored the option of drawing down the loan by way of staged payments with the Provider however the Complainants did not do so and instead signed and accepted the Mortgage Loan Offer Letter dated **14 May 2008** which required the full loan to be drawn down by **August 2008**. The Complainants could have approached the Provider in **August 2008** to look for an extension of the draw down period however I have not been provided with any evidence that would indicate that the Complainants sought an extension.

/Cont'd...

Further, I have not been provided with any evidence that the Complainants informed the Provider that there was a delay in the construction of the property. Even if the Complainants had approached the Provider to extend the draw down period, it was at the Provider's discretion to offer any such extension.

It would not be reasonable to expect the Mortgage loan Offer Letter dated **14 May 2008** to remain valid indefinitely when clear timelines in relation to draw down, despite having been accepted by the Complainants, were not ultimately complied with. It transpires that the property was not completed until some 7 months after the issuing of the original loan offer therefore the Complainants were not in a position to draw down a loan until **December 2008**.

In response to the Complainants' request for a loan, the Provider issued two further mortgage loan offers to the Complainants. The Complainants ultimately signed and accepted the second Mortgage Loan Offer letter that issued on **30 October 2008** on **14 November 2008**. By signing the terms of the Mortgage Loan Offer Letter dated **30 October 2008**, the Complainants acknowledge that it superseded and replaced the original loan offer of **14 May 2008**, which provided for a tracker interest rate. I note that a tracker rate of interest was not offered by the Provider in the Mortgage Loan Offer Letter dated **30 October 2008** in circumstances where the Provider had withdrawn its tracker interest rate product from the market. The Provider's decision to withdraw tracker interest rates from its suite of products on offer to customers was a commercial decision that the Provider was entitled to make. I note however that the Provider did apply a reduced variable rate of 3.750% when the Complainants drew down mortgage loan account ending **4659** in **December 2008**.

The Complainants are of the view that they had "*no choice but to accept the diminished offer under duress*". I note that the Complainants' representative further submits that the email correspondence from a branch manager, submitted as part of his post Preliminary Decision submission, supports the Complainants' contention that they signed the loan offer under duress. Having considered the evidence and the post Preliminary Decision submission, I remain of the view that the evidence does not support the Complainants' assertion of duress.

It is important to highlight that the decision to take out a mortgage loan with the Provider was a decision that rested solely with the Complainants. If Complainants were not happy with the terms and conditions of the Mortgage Loan Offer Letter dated **30 October 2008**, including the nature of the interest rate applicable to their loan, the Complainants were free to decline the amended loan offer. The Complainants could have sought a loan from another financial service provider.

/Cont'd...

However, the Complainants did not do so. Instead, the Complainants signed and accepted the terms of the Mortgage Loan Offer Letter dated **30 October 2008** confirming that they had fully understood the terms and conditions contained therein.

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

Conclusion

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

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



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

9 November 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.