



<b><u>Decision Ref:</u></b>	2021-0479
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Partially upheld

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

This complaint relates to three mortgage loan accounts held by the Complainants with the Provider. The mortgage loan accounts that are the subject of this complaint are secured on the Complainants' principal private residence.

The mortgage loan account ending **4899** was for the loan amount of €700,000 and the term of the loan was 20 years. The Letter of Approval dated **16 April 2004** detailed that the loan type was "*Endowment 1 Year Fixed Rate Home Loan*".

The mortgage loan account ending **6690** was for the loan amount of €200,000 and the term of the loan was 20 years. The Letter of Approval dated **12 August 2005** detailed that the loan type was a "*1 Year Fixed Home Loan, New Business (Interest Only)*".

The mortgage loan account ending **2378** was for the loan amount of €300,000 and the term of the loan was 13 years. The Letter of Approval dated **16 February 2007** detailed that the loan type was a "*Further Advance Endowment 1 Year Fixed Rate*".

**The Complainants' Case**

The Complainants submit that if they had been correctly advised of their interest rate options by the Provider when they should have been, all three of their mortgage loan accounts with the Provider would currently be on a tracker interest rate.

- The Complainants' first mortgage loan account ending **4899** was drawn down in **June 2004** on a one-year fixed interest rate of 2.54%. The Complainants submit that on the expiry of the fixed rate period in **June 2005**, they were offered fixed and variable interest rate options, but were not offered a tracker interest rate.
- The Complainants' second mortgage loan account ending **6690** was drawn down in **September 2005** on a one-year fixed interest rate of 2.55%. The Complainants submit that on the expiry of the fixed rate period in **September 2006** they did not receive an interest rate options letter from the Provider. They do not accept the Provider's submission that a rate options letter was sent to them at that time which included a tracker interest rate option of 4.25%.
- The Complainants' third mortgage loan account ending **2378** was drawn down in **March 2007** on a one-year fixed interest rate of 4.39%. On the expiry of the fixed rate period in **February 2008**, the Complainants were offered fixed and variable interest rates, but not a tracker interest rate. The Provider acknowledged that an error had occurred on this account in **August 2010**, in that, it failed to include a tracker rate option in the rate options letter sent to the Complainants in **February 2008**. The Provider refunded the Complainants for the overpayment of interest and restored a tracker interest rate of ECB + 0.75% to the mortgage loan account, backdated to **March 2008**.

The Complainants detail that due to the Provider's failure on mortgage loan account ending **2378** in **February 2008**, they were unaware of their entitlement to a tracker interest rate on that account at that time. They say that if they had known they were entitled to the tracker interest rate on that account at that time, they *"...could have immediately identified a huge difference in the interest rate this account should have been on and the rate the other 2 accounts were on."* The Complainants state that *"because [the Provider] did not inform [them] of their right to default to a Tracker margin of ECB plus 0.75% on [account ending] 2378, [they] were not in a position of requesting [the Provider] to apply the same margin to the other 2 accounts, namely [account ending] 6690 and [account ending] 4899."*

The Complainants outline that the Provider is *"attempting to suggest that as the loans [accounts ending 4899 and 6690] were Endowment or Interest only we would not have been entitled to tracker rates on those accounts"*. They submit that this is not consistent with the fact that mortgage loan account ending **2378** is also *"an Endowment interest only loan and is on a tracker rate"*. They state that *"Interest only or repayment mortgages never dictated what rate you could have"*.

The Complainants submit *“In short [the Provider] said one thing for one account, then tried to say opposite view for the other account with only one objective, stop the other accounts being put on the Tracker rates that would have been applied if [the Complainants] had received the letter in 2008 as [the Provider] confirmed should have been sent.”*

The Complainants further outline that the terms and conditions for the three mortgage loans were *“identical”*. They say that from **2006** *“many customers accounts...were switched to the more advantageous tracker margins”* and it was a *“common occurrence”* with all lenders to apply the *“appropriate tracker margins”* to the loan accounts in question. They outline that it was *“the accepted norm at the time”*.

The Complainants further submit that *“There are so many incorrect and inconsistent replies from [the Provider] that this matter must be addressed as part of the complaint.”*

The Complainants are seeking that the tracker rate of ECB + 0.75% is applied to the mortgage loan accounts ending **4899** and **6690** with immediate effect and backdated to **March 2008**. In addition, they are seeking a *“proper level of compensation to be paid including all costs relating to this complaint and investigation”*.

### **The Provider’s Case**

The Provider submits the following with respect to the Complainants’ three mortgage loan accounts:

- **Mortgage loan account ending 4899**

The **Letter of Approval** for the mortgage loan account ending **4899** issued on **16 April 2004** and was accepted by the Complainants with the benefit of independent legal advice on **20 April 2004**.

The Provider states that the **Letter of Approval** does not contain an entitlement for a tracker rate of interest to be offered on the expiry of the fixed rate period in **June 2005** or at any stage during the term of the mortgage loan. The Provider relies on **Condition A** of the **Special Conditions** and **Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this.

The Provider states that this mortgage was noted on the **Letter of Approval** as an ‘Endowment Mortgage’ but was actually an interest only home loan and not an Endowment Mortgage with the associated insurance policy to redeem the loan at the end of the term. It states that in order to set up the loan on the Provider’s system at the time as interest only, the coding of ‘Endowment’ was used.

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The Provider states that prior to the expiry of the one-year fixed rate period in **June 2005**, the Complainants received from the Provider a list of current rate options from which they could choose a rate to apply to the account on expiry of the fixed term. The options included a standard variable rate option of 3.55%, which was the Provider's default option if no rate was chosen by the Complainants, and fixed rates for one, two, three, five, seven and ten year terms. The Provider submits that a tracker interest rate was not included in these options as the Provider did not introduce a policy of offering a tracker rate to its existing customers maturing from a fixed rate period and whose contract did not specify an entitlement to a tracker rate at maturity, until **mid-2006**.

The Provider states that the interest rate on the mortgage account defaulted to the variable rate of 3.55% and has remained on a variable rate.

- **Mortgage loan account ending 6690**

The Provider states that the **Letter of Approval** for the mortgage loan account ending **6690** issued on **12 August 2005** and was accepted by the Complainants with the benefit of independent legal advice on **16 August 2005**.

The Provider states that the Letter of Approval does not contain an entitlement for a tracker rate of interest to be offered on the expiry of the fixed rate period in **September 2006** or at any other stage during the term of the mortgage loan. The Provider relies on **Condition A** of the **Special Conditions** and **Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this.

The Provider states that prior to the expiry of the one-year fixed rate period in **September 2006**, the Complainants received from the Provider a list of current rate options from which they could choose a rate to apply to the account on expiry of the fixed term. The options included a standard variable rate option, which was stated to be the Provider's default option if no rate was chosen by the Complainants, and a tracker interest rate option of ECB + 1.00%, and fixed rates for one, two, three, four, five, seven and ten year terms. The Provider states that in **September 2006** the interest rate on the mortgage account defaulted to the variable rate of 4.35%.

The Provider states that it was not, and is not, contractually obliged to offer the Complainants a tracker rate of interest for mortgage loan account ending **6690** on the expiry of a fixed rate period.

It states that the fixed rate period on mortgage loan account ending **6690** expired during a period when the Provider had made a commercial decision to include a tracker rate in the options provided to existing customers whose fixed interest rate was due to expire. It states that it is for this reason that a tracker rate option was included in the list of options provided to the Complainants prior to the fixed interest rate expiry on **1 September 2006**. It submits that on this basis, the Complainants would have been aware of the Provider's tracker rate offering from the options letter issued to them in **August 2006**.

The Provider states that it was the practice of the Provider in and around **August 2006** not to retain a fixed rate expiry letter when it issued to a customer automatically twenty days before the fixed rate expiry. It submits that the reason for this is that it retained all of the information contained in the options letter, including a copy of the template options letter in use by the automated system and details of the entire rate options automatically included in the options letter. It states that this information was available and could be accessed any time, whether arising from a customer enquiry or otherwise. The Provider states that it is satisfied that the issuing of rate options letters operated correctly.

- **Mortgage loan account ending 2378**

The Provider states that the **Letter of Approval** for the mortgage loan account ending **2378** issued on **16 February 2007** and was accepted by the Complainants with the benefit of independent legal advice on **20 February 2007**. The Provider states that the Letter of Approval does not contain an entitlement for a tracker rate of interest to be offered on the expiry of the fixed rate period in **March 2008** or at any other stage during the term of the mortgage loan. The Provider relies on **Condition A** of the **Special Conditions** and **Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this.

The Provider states that prior to the expiry of the one-year fixed rate in **March 2008**, it issued an options letter and form to the Complainants with a list of the then available interest rates, including the standard variable rate of 5.44%, and fixed rate options for one, two, three, five, seven and ten year terms. It states that the mortgage account loan defaulted to the standard variable rate of 5.44% in **March 2008**.

The Provider states that on **23 August 2010**, it wrote to the Complainants to advise them that it had come to the Provider's attention that due to the manner in which the Complainants' mortgage loan account ending **2378** was classified on the Provider's mortgage processing system, the options letter issued to the Complainants on the expiry of their fixed rate term in **March 2008** had not included a tracker rate option. It states that at that time its internal policy was to offer a tracker interest rate to its existing customers who were maturing from a fixed interest rate period, and therefore the Complainants' options letter would have included a tracker rate option of ECB + 0.75%.

The Provider states that it proposed to redress this oversight by replacing the interest charged to the account since **7 March 2008** with the applicable tracker rate of ECB + 0.75%, which resulted in the Provider reimbursing interest of €9,109.08 to the Complainants. It also offered the Complainants the tracker option with effect from **7 March 2008**. It states that the Complainants accepted this offer and returned a signed acceptance form dated **27 August 2010** and the mortgage loan account was switched to the tracker rate of 1.75% (ECB + 0.75%) on **1 September 2010**.

With respect to the three mortgage loans, the Provider states that there were no differences in the contractual provisions/entitlements. It states that the difference in respect of the loans arose due to the Provider's practice from **mid-2006** to **mid-2009** of including a tracker rate option in the fixed rate expiry options provided to customers with no contractual entitlement to a tracker. It submits that this meant that the latter two mortgage loan accounts ending **6690** and **2378** were offered a tracker rate option at the fixed rate expiry, and the earliest loan account ending **4899** was not. It states that there was a further difference between the two later accounts, in that by the time the latest account ending **2378** was maturing, the Provider's default variable rate was a tracker variable rate, whereas when account ending **6690** was maturing the default variable rate was the standard variable rate.

The Provider states that tracker rates for new business were launched by the Provider in **early 2004** for both interest only and annuity loans. It states that when introducing tracker rates, the Provider decided not to apply them to certain lending products, including equity release, endowment and pension backed loans. It states that from **mid-2006** until **mid-2009**, the Provider had a policy of offering tracker interest rate options to its existing customers, including customers who had interest only loans, whose accounts were maturing from a period of a fixed rate of interest and whose contract did not provide an entitlement to be offered a tracker rate at maturity.

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The Provider states that it identified an error in **2010** in which certain interest only loans had not had a tracker rate option offered or applied to them. It outlines that the circumstances of this error were that certain loans, which were not endowment loans, had been categorised as endowment loans in the Provider's mortgage processing system, as a result of which, these loans had matured without a tracker rate option having been provided.

The Provider states that the Complainants' accounts ending **6690** and **4899** had no contractual entitlement to be offered a tracker rate in **February/March 2008**, however, it was possible at that time to request that the Provider switch the interest rate applying to an existing mortgage loan account to a tracker rate and, if the account was in a fixed rate period, a fixed rate exit fee calculated in accordance with **General Condition 5.3** was applicable.

The Provider does not accept the Complainants' submission that, if they were aware in **February 2008** of the tracker rate option on mortgage loan account ending **2378**, they would have converted their other two mortgage loan accounts ending **4899** and **6690** to a tracker interest rate. The Provider submits that this "*appears to be no more than speculation after the fact*".

### **The Complaints for Adjudication**

The complaints for adjudication are as follows:

- (i) The Provider failed to offer the Complainants a tracker interest rate for mortgage loan account ending **4899** in **May 2005**
- (ii) The Provider failed to issue a rate options letter including a tracker interest rate option to the Complainants for mortgage loan account ending **6690** in **September 2006**
- (iii) The Provider failed to offer the Complainants a tracker interest rate option for mortgage loan account ending **2378** in **February 2008**, and as a result, the Complainants lost the opportunity to request the tracker interest rate for mortgage loan accounts ending **4899** and **6690** at that time.

### **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.

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The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties **28 February 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

1. Email from the Complainants to this office dated **20 March 2020**;
2. Letter from the Provider to this office dated **03 April 2020**;
3. Letter from the Complainants' representative to this office dated **07 July 2020**;
4. Letter from the Provider to this office dated **27 July 2020**;
5. E-Letter from the Complainants' representative to this office dated **11 August 2020**;
6. Letter from the Provider to this office dated **21 August 2020**;
7. E-Letter from the Complainants' representative to this office dated **07 September 2020**;
8. Letter from the Provider to this office dated **18 September 2020**;
9. E-Letter from the Complainants' representative to this office dated **28 September 2020**;
10. Letter from the Provider to this office dated **09 October 2020**;
11. Letter from the Provider to this office dated **09 November 2020**;
12. E-Letter from the Complainants' representative to this office dated **08 December 2020**;



13. E-Letter from the Complainants' representative to this office dated **15 December 2020**;
14. Letter from the Provider to this office dated **08 January 2021**;
15. E-Letter from the Complainants' representative to this office dated **18 January 2021**;
16. Letter from the Provider to this office dated **28 January 2021**;
17. E-Letter from the Complainants' representative to this office dated **11 February 2021**;
18. Letter from the Provider to this office dated **24 February 2021**;
19. E-Letter from the Complainants' representative to this office dated **01 March 2021**; and
20. Letter from the Provider to this office dated **08 March 2021**.

Copies of these additional submissions were exchanged between the parties.

I note that the parties have repeated previous submissions made to this office in relation to the merits of the complaint as outlined in my Preliminary Decision. This is neither helpful nor appropriate.

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

Before dealing with the substance of the complaint, I note the application for the mortgage loans were submitted by the Complainants to the Provider through a third-party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this office, by letter, which outlined as follows:

*"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office has not investigated any conduct of the named Broker in the course of investigating and adjudicating on this complaint."*

Therefore, the conduct of the third-party Broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

I will firstly deal with the issues raised by the Complainants with respect to an entitlement to tracker interest rates on each mortgage loan account. I will then deal with other matters raised by the Complainants with respect to inconsistencies, inaccuracies and shortcomings in information and documentation given by the Provider to the Complainants.

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**Entitlement to a tracker interest rate**

In order to determine this element of the complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation for each mortgage account (ending **4899**, **6690** and **2378**). It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2005** and **2008**. I will deal with each mortgage loan account in turn.

- ***Mortgage loan account ending 4899***

The **Letter of Approval** dated **16 April 2004** in respect of mortgage loan account ending **4899** details as follows:

<i>“Loan Type:</i>	<i>Endowment 1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 2,200,000.00</i>
<i>Loan Amount:</i>	<i>EUR 700,000.00</i>
<i>Interest Rate:</i>	<i>2.54%</i>
<i>Term:</i>	<i>20 year(s)”</i>

The **Special Conditions** to the **Letter of Approval** detail as follows:

*“A. General Mortgage Loan Approval Condition 5 “Conditions relating to fixed rate loans” applies in this case. The interest rate specified above may vary before the date of completion of the mortgage.”*

**General Condition 5** of the **General Mortgage Loan Approval Conditions**, states as follows:

***“CONDITIONS RELATING TO FIXED RATE LOANS.***

*5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*

*5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*

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*5.4 Notwithstanding Clause 5.1, [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."*

The **General Mortgage Loan Approval Conditions** also outlines:

*"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:  
"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."*

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **20 April 2004**. I note that the Acceptance of Loan Offer states as follows:

*"1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. [the Provider's] Mortgage Conditions*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us"*

It is clear that the Letter of Approval in respect of mortgage loan account ending **4899** envisaged a 1-year fixed rate of 2.54% and thereafter the option of a variable rate. The variable rate, in the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

The Complainants accepted the **Letter of Approval** having confirmed that it had been explained to them by their solicitor in **April 2004**.

The Provider states that it issued an **options letter and form** to the Complainants prior to the expiry of the one-year fixed rate period in or around **May/June 2005**. The Complainants, in their post Preliminary Decision submissions dated **20 March 2020** state that they "*did NOT receive*" this options letter and maintain that the letter "*should have been a registered letter posted*" to them.

It is important to highlight however that **condition 23- Notices** of the Provider's **Mortgage Conditions 2002**, which form part of the mortgage loan agreement between the parties, stipulates that any notice required under the terms of the **Letter of Approval** dated **16 April 2004** to be given by the Provider "*shall be sufficiently given if sent by ordinary pre-paid post*". Therefore, I do not consider it necessary for the Provider to have issued an **options letter and form** by way of registered post. The Provider has not furnished a copy of the options letter and form that issued to the Complainants at this time. It is disappointing that the Provider has failed to furnish a copy of the correspondence that issued to the Complainants. Furthermore, it is disappointing that the Provider has failed to offer any explanation to this office as to why this has not been furnished. Nonetheless, it does not appear to be in dispute between the parties that the **options letter and form** that issued to the Complainants in or around **May 2005** did not include the option of a tracker interest rate.

Having considered the mortgage loan documentation, it is my view that that the Complainants did not have a contractual or other entitlement to a tracker interest rate at the end of any fixed rate period, including the end of the fixed rate period which ended in **June 2005**.

The Provider has summarised its policy as follows:

*"The Bank introduced tracker interest rate loans for new mortgage business in [early] 2004.*

*... [in mid] 2006, the Bank introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest although their loan contract did not specify an entitlement to be offered a tracker rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period. In the absence of a customer selection, the tracker rate was applied to the mortgage. The Bank also provided in options letters issued from [later in] 2006 that, in default of selection of one of the offered options, the loan would default to the tracker rate of interest on maturity of the fixed rate period.*

*While the Bank commenced the withdrawal of its tracker mortgage interest rate offerings in [mid] 2008 it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.*

*After [mid] 2009, the Bank continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to a tracker rate."*

The expiry of the Complainants' fixed interest rate term on their mortgage loan account in **June 2005**, pre-dated the Provider introducing the policy that it would offer a tracker interest rate to customers on the expiry of the fixed interest rate, where mortgage holders had no contractual right to a tracker interest rate. This policy was not introduced until **mid-2006** and ceased in **mid-2009**. There was a further revision of the Provider's policy later in **2006**, whereby a tracker interest rate became a default rate where fixed interest rates were expiring on mortgage loans, even though there was no contractual obligation on the Provider to do so.

The expiry of the Complainants' fixed interest rate period pre-dated these policy introductions and as such the Complainants could not have been offered a tracker interest rate under that policy in **June 2005**. The Provider has submitted a copy of its Lending Rates effective from start of business on **23 May 2005** in evidence which detail the following interest rates available at the time for existing customers like the Complainants:

	<b>RATE</b>	<b>APR</b>
<b>Repayment Home Loans</b>		
Variable Rate	3.55%	3.6%
1 Year Fixed Rate	3.45%	3.6%
2 Year Fixed Rate	3.74%	3.7%
3 Year Fixed Rate	3.95%	3.7%
4 Year Fixed Rate	4.20%	3.9%
5 Year Fixed Rate	4.44%	4.1%
7 Year Fixed Rate	4.99%	4.5%
10 Year Fixed Rate	5.35%	5.1%

In the absence of written instructions from the Complainants, mortgage loan account ending **4899** defaulted to a variable rate of 3.55% in **June 2005**. This was in accordance with **General Condition 5.4** of the terms and conditions applicable to mortgage account ending **4899**. The Complainants did not have a contractual or other entitlement to be offered a tracker interest rate on mortgage account ending **4899**.

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- **Mortgage loan account ending 6690**

It is important to note at the outset that much of the parties' later post Preliminary Decision submissions relate to a "newly produced" version of the **Letter of Approval** dated **12 August 2005** in relation to mortgage loan account ending **6690**, a copy of which has been submitted in evidence by the Complainants' representative. This recently produced version of the **Letter of Approval** dated **12 August 2005** differs from the amended letter of approval that the Provider submitted to this office under schedule of evidence 2(b) and cover letter dated **22 August 2019**. It appears to me that this "newly produced" version (as referred to by the Provider) has come to light on foot of the Complainants' representative's consideration of the documents received by the Complainants from the Provider on foot of a data access request made by the Complainants in **2018**. The first two pages of the Letter of Approval dated **12 August 2005** submitted by both the Complainants and the Provider are the same, however the special conditions attaching to each version of the Letter of Approval differ. Of note, the Special Conditions of the "newly produced" version of the Letter of Approval differ insofar as the Complainants now appear to maintain that **Special Condition A** of the version of the **Letter of Approval** dated **12 August 2005** that they have on file provides as follows:

A. GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 "CONDITIONS RELATING TO FIXED RATE LOANS" APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF ISSUE OF THE LOAN. ON EXPIRY OF THE FIXED RATE PERIOD, AND WHERE THE APPLICANT CHOOSES THE OPTION OF A TRACKER MORTGAGE INTEREST RATE, THE INTEREST RATE APPLICABLE TO THE LOAN WILL BE THE TRACKER MORTGAGE RATE APPROPRIATE TO THE BALANCE OUTSTANDING ON THE LOAN AT THE DATE OF EXPIRY OF THE FIXED RATE PERIOD. IN THE ABSENCE OF INSTRUCTIONS FROM THE APPLICANT AT THE EXPIRY OF THE FIXED RATE PERIOD, THE INTEREST RATE FOR THE LOAN WILL BE THE TRACKER MORTGAGE RATE APPLICABLE TO THE BALANCE OUTSTANDING ON THE LOAN, AT THE DATE OF EXPIRY OF THE FIXED RATE PERIOD AND AS MAY BE VARIED IN ACCORDANCE WITH VARIATIONS TO THE EUROPEAN CENTRAL BANK REFINANCING RATE.

The Provider, in its post Preliminary Decision submissions, states that the above Special Condition A was contained in the **Letter of Approval** dated **14 February 2007** in respect of mortgage loan account ending **2378**, which was never accepted by the Complainants. The Provider further notes that this is a special condition which was "*first introduced by the Bank in September 2006 when the Bank introduced a new form of Letter of Approval which provided for a tracker rate entitlement at the end of the fixed rate period*". The Provider submits that in circumstances where the Letter of Approval dated **12 August 2005** for mortgage loan account ending **6690** was issued in **2005**, it did not contain this special condition.

**Special Condition A** of the Letter of Approval dated **12 August 2005** submitted by the Provider to this office on **22 August 2019**, during the investigation of this complaint, provides as follows:

**A. GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 "CONDITIONS RELATING TO FIXED RATE LOANS" APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE.**

The Complainants' representative submits that the Complainants received a copy of the **Letter of Approval** dated **12 August 2005** in a format where the former version of **Special Condition A** was attached as part of the data access request documentation, which was generated by the Provider in **November 2018**.

The Provider has made extensive submissions in relation to the steps it takes in assembling documentation in response to data access requests. The Provider explains that it has an *"electronic system for this purpose which tracks the contemporaneous creation and unique identification of the PDF image of each individual DAR response"*. The Provider further explains that the *"PDF of Complainants' DAR documents"* was assigned a unique electronic identity when it was created on **7 November 2018** which can be viewed at *"any computer terminal in the Bank which has access to the electronic system used to created and store the PDF"*.

The Provider invited a representative of my office and the Complainants' representative to attend at the Provider's offices to inspect the original electronic copy of the documents supplied to the Complainants on foot of the data access request in their original electronic location in a socially distanced manner.

In circumstances where I did not consider an inspection of the documents to be necessary, by way of letter dated **27 October 2020**, my office wrote to the Provider seeking the following as an alternative to attending the Provider's office in light of Covid-19 restrictions:

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1. A certified true copy of the single PDF image of the entire documentation that issued to the Complainants in **November 2018** on foot of their data access request in its original sequence.

Please provide confirmation that the sequence of the documentation is the same as that issued by the Provider to the Complainants in November 2018, together with any evidence to support the date of creation of the PDF.

If the Provider is not in a position to confirm that the sequence of the documentation is the same as the original sequence, please provide a detailed outline of the reason(s) for this.

2. A certified true copy of the original amended letter of approval dated 12 August 2005 in respect of mortgage loan account ending **6690** together with the special conditions, general terms and conditions and loan acceptance signed by the Complainants; and
3. A certified true copy of the original amended letter of approval dated 14 February 2007 in respect of mortgage loan account ending **2378** together with the special conditions, general terms and conditions and loan acceptance signed by the Complainants.

The Provider duly complied with this request and a copy of the documents furnished to my office was exchanged with the Complainants' representative for his inspection.

Similarly, by way of letter dated **27 October 2020**, my office requested that the Complainants' representative provide the following:

1. A certified true copy of the documentation received by the Complainants from the Provider on foot of their data access request in **November 2018**, in its original sequence.

Please provide confirmation that the sequence of the documentation is the same as that received by the Complainants in November 2018, together with any evidence to support the confirmation.

If the Complainants are not in a position to confirm that the sequence of the documentation is the same as the original sequence, please provide a detailed outline of the reason(s) for this.

The Complainants' representative replied by way of letter dated **09 November 2020** noting as follows:



In respect of your request of the Complainant's to furnish certain documents, I have taken instructions from the Complainant in relation to this matter.

Unfortunately, they are not in a position to provide the documents in the manner requested by you. Upon receipt of the documents in that format from [REDACTED], they would have viewed the documents comprising it in a different order as to how it was received. It would have been sorted into different categories, and in particular the three accounts to which it related. It would also have been filed along with such correspondence and documentation the Complainants had compiled at that time.

I have carefully considered the vast volume of documentation contained in the PDF image which is the entirety of the documentation that issued from the Provider to the Complainants in **November 2018** on foot of a data access request. In addition, I have carefully considered the sequence of the all the documents in particular the letters of approval that issued to the Complainants. Following my consideration of the documents, I am satisfied that the first Special Condition A detailed above is part of the Letter of Approval dated **14 February 2007** that issued in respect of mortgage loan account ending **2378**, which was not ultimately accepted by the Complainants and therefore does not form part of the Complainants' mortgage loan agreement with the Provider. Furthermore, I am satisfied that the second Special Condition A detailed above is part of the Letter of Approval dated **12 August 2005** on which I based my Preliminary Decision and which I consider to be the correct "version" of the Letter of Approval on which to make my final determination.

The **Letter of Approval** dated **12 August 2005** in respect of mortgage loan account ending **6690** details as follows:

"Loan Type:	1 Year Fixed Home Loan, New Business (Interest Only)
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 3,500,000.00</i>
<i>Loan Amount:</i>	<i>EUR 200,000.00</i>
<i>Interest Rate:</i>	<i>2.55%</i>
<i>Term:</i>	<i>20 year(s)"</i>

The **Special Conditions** to the **Letter of Approval** details as follows:

*"A. General Mortgage Loan Approval Condition 5 "Conditions relating to fixed rate loans" applies in this case. The interest rate specified above may vary before the date of completion of the mortgage."*

The mortgage loan contains the same **General Condition 5** of the **General Mortgage Loan Approval Conditions**, as quoted above, with respect to mortgage account ending **4899**.

/Cont'd...

The **General Mortgage Loan Approval Conditions** also outlines:

*"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:*

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

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **16 August 2005**. The Acceptance of Loan Offer was on the same terms, as quoted above, with respect to mortgage account ending **4899**.

It is clear to me that the **Letter of Approval** envisaged a one-year fixed rate of 2.55% and thereafter the option of a variable rate. The variable rate again in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the Letter of Approval having confirmed that the Loan Offer had been explained to them by their solicitor.

Having considered the mortgage loan documentation, it is my view that that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of any fixed rate period, including the end of the fixed rate period which ended in **September 2006**. Having regard to the Provider's policy which is quoted above, it appears that the Provider, as a matter of policy, offered the Complainants a tracker interest rate of ECB + 1.00% in **September 2006**. It was under no obligation to do so.

The Complainants' representative, in his post Preliminary Decision submissions dated **07 July 2020**, states that the *"Complainants accept that they had no contractual entitlement to a tracker rate after the initial 1-year fixed rate period ended"* however they maintain that they did have an *"other entitlement"* to be offered the tracker rate *"by reference to the policy in place at the time; the policy to offer a tracker rate to account holders where fixed term periods were ending"*. The Complainants' representative, in his post Preliminary Decision submissions, further states that *"the Complainants would certainly contend that a failure to offer to them a product that was offered to every other similar customer would be unreasonable, unjust, oppressive and/or discriminatory conduct contrary to Section 60(2) of the Financial Services and Pensions Ombudsman Act 2017"*.

In this regard, it would appear to me that the Complainants, while not contractually entitled to a tracker interest rate, were offered a tracker interest rate by the Provider as tracker interests were available to existing customers moving from a fixed interest rate at that time. The Provider states that it issued an **options letter and form** which included the tracker interest rate option of ECB + 1.00% to the Complainants prior to the expiry of the one-year fixed rate period in or around **September 2006**.

/Cont'd...

The Complainants, in their post Preliminary Decision submissions dated **20 March 2020** state that they “*did NOT receive*” this options letter and maintain that the letter “*should have been a registered letter posted*” to them. Again, it is important to highlight however that **condition 23- Notices** of the Provider’s **Mortgage Conditions 2002**, which form part of the mortgage loan agreement between the parties, stipulates that any notice required under the terms of the **Letter of Approval** dated **12 August 2005** to be given by the Provider “*shall be sufficiently given if sent by ordinary pre-paid post*”. Therefore, I do not consider it necessary for the Provider to have issued an options letter and form by way of registered post. Again, the Provider has not furnished a copy of the letter or the rate options form that issued to the Complainants at this time. It is most disappointing that the Provider has failed to retain a copy of this letter in its records. It appears that the Provider is indicating that it did not retain copies of system generated letters issued at the time. The Complainants take issue with the Provider’s failure to retain a copy of this letter and options form and believe that they did not receive them at the time.

While I am disappointed that the Provider has not retained a copy of the rate options letter and form it claims to have issued in **August 2006**, on balance, I accept that the letter and options form was issued by the Provider to the Complainants at that time. There does not appear to me to be any reason why the Complainants would not have received it, for example there was no change of address for correspondence at any time. I note that the Complainants appear to have received the rate options letters that issued in **May 2005** and in **February 2008** and in those circumstances, I have no reason to doubt that the rate options letter and form was also issued to the Complainants in **August 2006**.

The Complainants’ representative, in his post Preliminary Decision submissions dated **07 July 2020**, asserts as follows;

*“The foregoing is a remarkable statement in circumstances where there is an express denial that the letter was received and in circumstances where the Provider is incapable of producing a letter it ought to be in a position to produce, if indeed it exists or ever existed”. The Preliminary Decision states that “there does not appear to me to be any reason why the Complainants would not have received it”; plainly it would not have been received if it was not sent and the fact that the Provider is incapable of proving that it was sent due to fact that it cannot produce the letter should lead to the matter being decided against the Provider. It is noteworthy that the Provider has admitted that it was mistaken regarding the detail of a different letter regarding account ending 2378; it must surely be possible, if not probable, that it is also mistaken regarding the correspondence purportedly issued in respect of this account.*

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*The foregoing, it is submitted, amounts to an error of fact within the Preliminary Decision. In the alternative, at a minimum, the conflict represents a fundamental dispute of a material fact entirely central to the Preliminary Decision which would warrant the holding of an oral hearing if the matter is not to be resolved in favour of the Complainants."*

The Provider, in its post Preliminary Decision submissions dated **03 April 2020**, explains that the "address provided by the Complainants to the bank in respect of correspondence for all three of their mortgage loan accounts was their [business address]. In 2014, the Complainants provided a new correspondence address to the Bank and this was applied to the accounts by the Bank".

The Complainants' representative appears to place considerable emphasis on the fact that the Complainants did not purportedly receive the **rate options and form** that the Provider says it issued in **August 2006**. I do not consider this element of the complaint to amount to "a fundamental dispute of a material fact" that warrants the holding of an Oral Hearing, as suggested by the Complainants' representative. I do not believe an Oral Hearing some 15 years after the event could help in establishing whether a letter was posted or received.

In any event, regardless of whether or not the Complainants received the letter that issued in **August 2006**, the evidence is that the mortgage loan agreement provided that the contractual default rate at the end of the fixed interest rate period was the Provider's standard variable interest rate and not a tracker interest rate. Therefore, I am satisfied that the Provider adhered to the terms and conditions of the **Letter of Approval** dated **12 August 2005** in respect of mortgage loan account ending **6690**.

I do not accept the Complainants' representative's suggestion that because other customers were offered tracker rates, the Complainants should have been offered a tracker interest rate.

The Provider however also offered a range of other interest rates, to include tracker rate options to customers similar to the Complainants who were nearing the end of a fixed interest rate period. The Provider has submitted a copy of its Lending Rate effective from start of business on **09 August 2006** in evidence which detail as follows:

Repayment Home Loans	RATE	APR
Variable Rate	4.35%	4.4%
1 Year Fixed Rate	4.45%	4.5%
2 Year Fixed Rate	4.65%	4.5%
3 Year Fixed Rate	4.85%	4.6%
4 Year Fixed Rate	4.89%	4.7%
5 Year Fixed Rate	4.99%	4.8%
7 Year Fixed Rate	5.15%	5.0%
10 Year Fixed Rate	5.25%	5.2%
<b>Rates applicable to new Home Loans</b>		
1 Year Discounted Variable Rate	3.69%	4.4%
1 Year Discounted Variable Rate (when borrowing <50% of the property value)	3.49%	4.3%
2 Year Discounted Variable Rate	3.99%	4.4%
1 Year Fixed Rate	3.95%	4.4%
2 Year Fixed Rate	4.39%	4.4%
3 Year Fixed Rate	4.69%	4.5%
4 Year Fixed Rate	4.89%	4.7%
<b>Tracker Mortgage (Home Loan and Residential Investment Property)</b>		
Loan Amount of €0 - €99,999	4.35%	4.4%
Loan Amount of €100,000 - €249,999	4.25%	4.3%
Loan Amount of €250,000 - €749,999	4.10%	4.2%
Loan Amount of €750,000 or more	3.90%	4.0%
<b>Endowment Home Loans</b>		
Rates applicable to Endowment Home Loans where available are the same as the above.		

The above interest rates were publicly available on the Provider’s website and in its branches. If the Complainants had any concerns or queries nearing the end of their fixed interest rate period in **September 2006**, they were free to contact the Provider to discuss available interest rates other than the Provider’s standard variable interest rate. In fact, if the Complainants wanted their mortgage loan account to convert to another rate other than the Provider’s standard variable interest rate in **September 2006**, it was up to the Complainants to make a written request to the Provider in this regard. Given the nature of the contractual relationship between a mortgagor and mortgagee, it is only right that the mortgagor must consent to any change in the contractual terms before a lender can implement any such change.

In the absence of a signed instruction from the Complainants, mortgage loan account defaulted to the variable rate of 4.35% in **September 2006**. This was in accordance with **General Condition 5.4** of the terms and conditions applicable to mortgage account ending **6690**.

- **Mortgage loan account ending 2378**

The **Letter of Approval** dated **16 February 2007** in respect of mortgage loan account ending **2378** details as follows;

“Loan Type:	<i>Further Advance Endowment 1 Year Fixed Rate</i>
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*Purchase Price / Estimated Value: EUR 4,500,000.00*  
*Loan Amount: EUR 300,000.00*  
*Interest Rate: 4.39%*

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Term: 13 year(s)"

The **Special Conditions** to the **Letter of Approval** details as follows;

*"A. General Mortgage Loan Approval Condition 5 "Conditions relating to fixed rate loans" applies in this case. The interest rate specified above may vary before the date of completion of the mortgage."*

The mortgage loan contains the same **General Condition 5** of the **General Mortgage Loan Approval Conditions**, as quoted above, with respect to mortgage account ending **4899**.

The **General Mortgage Loan Approval Conditions** also outline;

*"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:  
"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."*

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **20 February 2007**. The Acceptance of Loan Offer was on the same terms, as quoted above, with respect to mortgage account ending **4899**.

It is clear to me that the **Letter of Approval** envisaged a one-year fixed rate of 4.39% and thereafter the option of a variable rate. The variable rate again in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the Letter of Approval having confirmed that the Loan Offer had been explained to them by their solicitor.

The Provider states that it issued an **options letter and form** to the Complainants prior to the expiry of the one-year fixed rate period in or around **February 2008**. Again, the Provider has not furnished a copy of the letter that issued to the Complainants at this time, which is most disappointing. Nonetheless, it is not in dispute between the parties that the options letter and form sent by the Provider to the Complainants at that time, did not provide the option of a tracker interest rate. I note from the evidence that the Provider did not receive any written instruction from the Complainant and the default standard variable rate was applied to the account.

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The Provider wrote to the Complainants on **23 August 2010** in respect of mortgage loan account ending **2378** detailing as follows;

*“During 2006 [the Provider] introduced the option of a tracker mortgage rate on interest-only loans at the expiry of a fixed rate term. It has come to our attention that, due to the manner in which your mortgage was classified in our system, the options letter we issued to you on the expiry of your fixed / discount rate term on 15<sup>th</sup> February 2008, did not include a tracker option. The tracker option at that time applicable to your type of loan was 0.75% above ECB.”*

I note that the Provider corrected this error and applied the tracker interest rate of 1.75% (ECB + 0.75%) to account ending **2378** from **07 March 2008**. The Provider also offered the Complainants a refund of the difference in interest paid which amounted to €9,109.08, which was accepted by the Complainants.

It is clear to me from the evidence, that the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage account ending **2378**, but the Provider recognised that as a result of an incorrect classification of the account that an incorrect options form issued to them in or around **February 2008**, which excluded the tracker interest rate offering (ECB + 0.75%) that the Provider would have made to the Complainants as a matter of policy even though there was no contractual obligation. This has been corrected by the Provider as a result of its offering made to and accepted by the Complainants with respect to mortgage account ending **2378** in **August 2010**.

The Complainants have submitted that if they were aware of their tracker rate entitlement on account ending **2378** in **February 2008**, they *“believe it is a certainty [the Provider] would have been contacted immediately in regard to the other 2 accounts”*.

The Complainants’ representative, in his post preliminary Decision submissions dated **07 July 2020**, states that;

*“...had proper notification been provided in August 2006 (in respect of account 6690), or indeed in March 2008 (a failing acknowledged by the Provider in respect of account 2378), the Complainants would have immediately sought to move accounts 4899 & 6690 (this being a second ground for relief in respect of the latter account) on to tracker rates, a request to which the Provider would almost certainly have acceded (see letter 24th November 2016 - Appendix 2 to this letter).*

/Cont’d...

*The foregoing should be considered set against the contention that the failure to provide proper notification in August 2006, in addition to representing a breach of an "other entitlement", amounted to unreasonable, unjust, oppressive and/or discriminatory conduct contrary to Section 60(2) of the Financial Services and Pensions Ombudsman Act 2017 and set against the acknowledgement on the part of the Provider that the failure to provide proper notification in March 2008 amounted to a failing on the part of the Provider, a failing which it is contended also amounted to unreasonable, unjust, oppressive and/or discriminatory conduct contrary to same legislation. In other words, there is a direct and foreseeable causative link between the improper conduct of the bank and the financial loss suffered by the Complainants relating to both account 4899 and account 6690.*

As set out above the Complainants had no contractual or other entitlement to a tracker rate of interest on mortgage loan accounts ending **4899** and **6690** at the end of the fixed rate periods in **May 2005** and **September 2006** respectively. In relation to mortgage loan account ending **4899**, In any event, though not determinative of this complaint, I have already set out in the earlier paragraphs of this Decision that a tracker interest rate could not have been offered to the Complainants at the end of the fixed rate period in **June 2005** as the Provider did not introduce a policy of offering a tracker rate to its existing customers maturing from a fixed rate period and whose contract did not specify an entitlement to a tracker rate at maturity, until **mid-2006**. However, it was open to the Complainants to explore their interest rate options with the Provider at any time. If the Complainants were not satisfied with the standard variable interest rate that applied to their mortgage loan account, they could have contacted the Provider to discuss alternative interest rate options at any point during the term of their loan. That said, it would have been a matter of commercial discretion on the part of the Provider to accede to a request to change the interest rate on the mortgage loan account given the standard variable interest rate was the only interest rate that the Complainants were contractually entitled to.

In relation to mortgage loan account ending **6690**, I have already detailed that although the Complainants were not contractually entitled to a tracker interest rate at the end of the fixed interest rate period in **August 2006**, the Provider, as a matter of its own policy at the time, offered the Complainants a tracker rate option of ECB + 1.00%, which was not taken up by the Complainants. Again, If the Complainants were not satisfied with the standard variable interest rate that applied to their mortgage loan account, which was the interest rate that they were contractually entitled to, they could have contacted the Provider to discuss alternative interest rate options at any point during the term of their loan.



The Complainants' representative appears to be of the mistaken view that the fact that the Provider was offering tracker interest rates to existing mortgage customers at the time creates some sort of "*other entitlement*" and the Provider's conduct was in breach of an "*other entitlement*". I do not consider interest rates that were offered as a matter of policy, or indeed for any other reason, by the Provider to somehow equate to a contractual or regulatory entitlement or otherwise on the part of the Complainants to some of "those other" interest rates, as has been suggested by the Complainants' representative in his post Preliminary Decision submissions.

For the avoidance of any doubt, the Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan accounts ending **4899** and **6690**, and accordingly, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on these accounts in **February/March 2008** or at any other time, even if they had contacted the Provider and requested that a tracker interest rate be applied to mortgage loan accounts ending **4899** and **6690**. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers at the time, did not create an obligation (contractual or otherwise) on the Provider to accede to any request, if made, by the Complainants to apply a tracker interest rate to the Complainants' mortgage loans ending **4899** and **6690**. I note that the Provider did not have any policy on offering tracker interest rates to customers, on demand, where there was no contractual right to a tracker interest rate in the underlying mortgage loan documentation.

Furthermore, the fact that all three mortgage loans were secured on the same property does not entitle the Complainants to the same interest rates on all three accounts. Each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that tracker interest rates were offered as a matter of policy on an individual mortgage loan, having regard to the fact that the loan was coming off a fixed interest rate at a particular point in time, does not entitle the Complainants to avail of that offering across all of their accounts.

#### **Inconsistencies, inaccuracies and shortcomings in information and documentation**

Having considered this complaint and the documentation furnished in evidence I note that there are significant inconsistencies, inaccuracies and shortcomings in information and documentation with respect to each mortgage loan account.

With respect to mortgage loan accounts ending **4899** and **2378**, I note that both of these mortgage loans are described as "*Endowment*" loans in the **Letters of Approval**.

I note that the Provider has detailed in its response to this office in respect of those mortgage loans that *“Although described as “Endowment” in the Letter of Approval this was not an endowment loan. For a period, the Bank’s system required interest-only loans to be input as endowment loans.”*

In circumstances where it appears that these mortgage loan accounts were not *“Endowment”* type loans it is very disappointing that it was outlined in the Letter of Approval to be this type of mortgage loan. Whilst I note that the Provider has indicated that this was owing to a *“system requirement”*, I find it wholly inappropriate that a Letter of Approval would outline a mortgage loan to be of a particular type, when it was not in fact that type of loan. I also find it to be completely unacceptable that the Provider considers the incorrect detail in a Letter of Approval to be acceptable or in some way justified because it arose because the Provider’s system dictated it.

Fortunately, it would appear that this incorrect description in the **Letters of Approval** did not have an impact on the terms and conditions of the Complainants’ mortgage loans or how they were applied to those mortgage loans. It is also worth observing that the incorrect coding as an *“Endowment”* loan on mortgage account ending **4899** also did not have any impact on the Complainants being offered a tracker interest rate, as the policy of offering tracker interest rates at the end of fixed interest rate periods on mortgage account types, other than Endowment mortgages, had not yet come into being when the fixed interest rate period on that account expired in **June 2005**.

I note that the incorrect classification on mortgage account ending **4899** has led to incorrect information being given by the Provider to the Complainants during the consideration of their complaints by the Provider. In this regard, I note that the Provider’s Final Response Letter to the Complainants’ representative dated **2 November 2015**, details as follows;

*“As your clients’ First Mortgage is an Endowment Mortgage, their monthly payments are interest only (“IO”), meaning that the capital balance does not reduce.”*

The Provider has further detailed in its Final Response letter to the Complainants dated **16 July 2018**, as follows;

*“As your mortgage account XXXX4899 was an Endowment Loan and coded on the system correctly for this product, you would not have been offered a Tracker Rate on this mortgage.”*

/Cont’d...

It has since transpired that mortgage loan account ending **4899** is not an Endowment mortgage and as such, the information given by the Provider to the Complainants was incorrect. It is very disappointing that the Provider would allow incorrect information to be given to the Complainants. I accept that mistakes can occur. However, this mistake was wholly of the Provider's making and to me appears to originate from the inaccurate classification of this mortgage as an "Endowment" in the Letter of Approval, which was knowingly done by the Provider. I find it difficult to understand how this did not come to light when the Provider was investigating this complaint before it issued its Final Response Letters. I find this to be a significant shortcoming on the part of the Provider.

The Complainants' representative, in his post Preliminary Decision submissions dated **07 July 2020**, contends that "*the Provider unilaterally changed this mortgage account from an endowment mortgage to a home loan without consultation with them and without their agreement. They have never received the conditions of the home loan mortgage*". I do not agree with the Complainants' representative's assertion in this regard. The Provider has explained that the Complainants' mortgage loan was categorised incorrectly as an "Endowment" mortgage on its systems, however I accept that mortgage loan account ending **4899** was not at any time an endowment mortgage loan. The nature of the mortgage loan account ending **4899** was in fact a mortgage home loan and the terms and conditions attached to the **Letter of Approval** dated **16 April 2004** are the terms and conditions applicable to the Complainants' mortgage loan account ending **4899** and remain the terms and conditions applicable to that particular mortgage loan. The Provider, in its post Preliminary Decision submissions dated **27 July 2020**, correctly notes that the terms and conditions attaching to the **Letter of Approval** dated **16 April 2004** contain "*no requirement that the Complainants should procure an endowment mortgage policy. No endowment policy was produced by the Complainants to the Bank nor were they required by the Bank to do so when they drew down the account ending 4899*". The Complainants' representative, in his post Preliminary Decision submissions dated **07 July 2020**, refers to an "*endowment policy*" with another provider "*to facilitate the redemption of the endowment mortgage*". In this regard, the Complainants' representative has submitted a copy of a letter dated **23 March 2004** in evidence which relates to a "*Pension Options Plan*" for the First Complainant. I have considered the contents of this letter and find that it makes no reference whatsoever to a mortgage loan endowment policy nor does it make any reference to mortgage loan account ending **4899**. The Provider, in its post Preliminary Decision submissions dated **27 July 2020**, states that it "*holds no information concerning the first-named Complainant's pension policy to which the letter dated 23 March 2004 applies*".

With respect to mortgage account ending **6690**, I note that incorrect information has also been furnished to the Complainants by the Provider, whilst the Provider was responding to their complaint. The Provider's letter to the Complainants dated **26 May 2015**, details that prior to the expiry of the fixed interest rate period in **September 2006**, an options letter issued to the Complainants quoting fixed and variable rate options. The Provider's letter to the Complainants in **November 2016**, outlines that a tracker interest rate (ECB + 1.00%) was also given as an option, in addition to the fixed and variable rates in **September 2006**. This office queried this inconsistency with the Provider during the investigation of this complaint. The Provider responded and outlined that the letter of **26 May 2015**, should have included the tracker rate as this was an option made available to the Complainants in **September 2006**. The Provider made an offer of an ex-gratia payment to the Complainants of €250 at the time. It appears to me that the Complainants did not accept this offer. The Provider, in its post Preliminary Decision submissions, dated **27 July 2020** states that it *"regrets these matters and sincerely apologises to the Complainants for them"*.

Furthermore, with respect to mortgage account ending **2378**, I note that there have been further inconsistencies in information given by the Provider to the Complainants. The Provider detailed in its Final Response Letter to the Complainants' representative dated **2 November 2015**, as follows:

*"Our records show the Third Mortgage was issued on 8 March 2007 as a Further Advance 1 Year Fixed at an interest rate of 4.39%. I enclose a copy of your clients' Letter of Approval which states;*

*"A. General Mortgage Loan Approval Condition 5 "Conditions Relating to Fixed Rate Loans" applies in this case. The interest rate specified above may vary before the date of issue of the loan. On expiry of the fixed rate period, and where the Applicant chooses the option of a tracker mortgage interest rate, the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period.*

*It will therefore be apparent that the Third Mortgage is different and that the relevant Special Condition specifically envisages that the applicant will have to [sic] option of choosing a tracker rate (although there is no particular 'price promise' as to what that rate will be)."*

However, in the Provider's Final Response Letter to the Complainants dated **2 July 2018**, it details as follows;

*"A Letter of Approval was issued to you on the 16<sup>th</sup> February 2007 for a Further Advance 1 Year Fixed Rate mortgage..."*

*I would like to refer to you to Special Condition "A" of the mortgage Terms and Conditions where it states;*

*"A. General mortgage loan approval condition 5 "conditions relating to fixed rate loans" applies in this case. The interest rate specified above may vary before the date of completion of the mortgage."*

*...your Letter of Approval did not contain a Special Condition outlining you had a contractual right to a Tracker rate at the end of a fixed rate period or at any point during the term of the mortgage."*

It appears that the Provider in its letter of **2 November 2015**, is referring to the terms and conditions of a Letter of Approval that issued on **14 February 2007**, which was not accepted by the Complainants. The Letter of Approval that the Complainants signed and accepted was a Letter of Approval dated **16 February 2007** and this offer was subject to different terms, which did not include a contractual entitlement to a tracker interest rate.

The lack of clarity from the Provider in the above communications to the Complainants is concerning. I am very disappointed that the Provider did not accurately represent the position with respect to the application of the tracker interest rate on mortgage account ending **2378** to the Complainants. This inconsistency has created significant confusion as to whether the entitlement arose as a matter of policy or as a matter of contract.

The **General Principles in Chapter 2 of the Consumer Protection Code 2012 (the "CPC 2012")**, which were in effect from **01 January 2012**, outline as follows;

*"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:*

*...*

*(2) acts with due skill, care and diligence in the best interests of its customers"*

/Cont'd...

I am of the view that the Provider did not act in accordance with **Provision 2 of Chapter 2** of the **CPC 2012**. The Provider did not act with due skill, care and diligence in responding to the Complainants' complaint and ensuring that it accurately represented the position to the Complainants as to why a tracker interest rate had been applied to mortgage account ending **2378**. It is important that all information furnished by the Provider to the Complainants is clear and accurate.

I note that issues with respect to document retention have arisen with respect to the Complainants' mortgage loan accounts. It appears that the Provider has not retained copies of the letters or options forms that issued to the Complainants as follows;

- With respect to mortgage account ending **4899** in **May/June 2005**
- With respect to mortgage account ending **6690** in **September 2006**
- With respect to mortgage account ending **2378** in **February 2008**

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows;

*"A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."*

I cannot make any findings with respect to retention of records on accounts ending **4899** and **6690**, as the **CPC 2006** was not in effect when the letters or options forms issued with respect to those accounts.

However, with regard to mortgage account ending **2378**, the Complainants' mortgage loan was incepted for a term of **13 years** commencing from **February 2007** and the letter purportedly issued in **February 2008**. There is no indication that the mortgage has been redeemed or disposed of in any way. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It is unclear to me, in the absence of any explanation, why this documentation has not been furnished by the Provider. This is most disappointing.

To conclude, the Complainants do not have contractual entitlements to tracker interest rates on mortgage accounts ending **4899** and **6690** at any of the points in time outlined by the Complainants such that the Provider was obliged to apply a tracker interest rate to those mortgage loans.

However, I am of the view that there have been failures on the part of the Provider in relation to inconsistencies and inaccuracies in information contained in documentation and correspondence with the Complainants. Furthermore, the Provider has failed to retain documentation when it is required to do so under the **CPC 2006**. For this reason, I partially uphold the complaint. To mark the Provider's shortcomings, I direct the Provider to pay the Complainants a sum of €3,000 compensation.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(a) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider pay the Complainants the sum of €3,000 in compensation, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants 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.

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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

**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

6 December 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.**