



<b><u>Decision Ref:</u></b>	2021-0527
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to apply a tracker rate at a point in time CBI Examination Failure to offer appropriate compensation or redress CBI Examination
<b><u>Outcome:</u></b>	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 mortgage loan that is the subject of this complaint is secured on the Complainants' private dwelling house.

The mortgage loan amount is €400,000 and the term of the loan is 29 years. The mortgage loan offer signed by the Complainants on **06 December 2007** outlined that the initial interest rate was fixed for 3 years.

The Complainants' mortgage loan account was considered by the Provider as part of the Central Bank directed Tracker Mortgage Examination (the "Examination"). The Provider identified that a failure had occurred on the account and the mortgage loan account was deemed to be impacted under that Examination.

By letter to the Complainants dated **16 March 2018** the Provider detailed that they found that the Complainants' mortgage loan account "*was affected by a failure on our part*" as follows;

*“The terms and conditions of your mortgage account state that at the end of a fixed rate period you had the option to choose the then prevailing fixed, variable or tracker interest rates.*

*The interest rate on your account was fixed for a period and when this expired (between October 2008 and December 2013), we had withdrawn tracker rates. Because of this, you did not have the option of choosing the then prevailing tracker rate at the time.”*

With respect to the effect of the failure on the mortgage loan account, the Provider outlined as follows;

*“you did not suffer any financial detriment as a result of the prevailing tracker not being available during that period. However, we recognise that this option should have been available to you and we apologise for our failure.”*

The Provider made an offer of €1,615.00 to the Complainants by letter dated **16 March 2018**, which comprised of the following;

1. Compensation of €1,000.00 for the failure on the mortgage loan account.
2. Independent Professional Advice payment of €615.00.

In **April 2018** the Complainants appealed the redress and compensation offering to the Provider’s Independent Appeals Panel. The basis of the Complainants’ appeal was the inadequacy of the redress and compensation offered.

In **October 2018** the Appeals Panel decided that the Complainants’ appeal was unsuccessful for the following reasons;

*“...the Panel was satisfied that arguably, the Bank was contractually obliged to offer them a tracker mortgage at the end of their fixed rate period in December 2010.*

*However, the Panel was satisfied that, had the Bank offered a tracker mortgage at the end of this fixed rate period, it was contractually entitled to offer the then prevailing interest rate and did not have an obligation to offer any element of the rates prevailing when the mortgage was first entered into.*

*The Panel was satisfied that, had [the Complainants] been offered a tracker mortgage in December 2010, when their fixed rate period came to an end, the prevailing rate of such a tracker mortgage at that time would have equalled or exceeded the standard variable rate or fixed rate. Accordingly, the Panel*

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*determined that [the Complainants] have suffered no loss as a result of the Bank not having offered them a tracker mortgage, at the then prevailing rates, when their fixed rate period came to an end.*

*Over the course of its deliberations, the Panel agreed that certain documentation from the Bank to [the Complainants] could have been clearer, however, the Panel noted the compensation payment of €1,000 made to [the Complainants] and agreed that, in the circumstances, no further compensation should be awarded.”*

The Complainants signed a **Rejection Form** on **6 November 2018** rejecting the decision of the Appeals Panel.

As the Complainants had been through the Provider’s internal appeals process, this office was in a position to progress the investigation and adjudication of the complaint.

This complaint was subsequently placed on hold between **March 2020** and **September 2020** as a result of a Preliminary Decision issuing from this Office in respect of another complaint against the Provider which dealt with similar issues to those arising in relation to this complaint.

When the Legally Binding Decision issued in relation to that complaint, the Provider indicated that it accepted that Legally Binding Decision in full and intended to apply the direction to other mortgage account holders who were also affected by that particular conduct of the Provider.

The Provider wrote to the Complainant on **21 August 2020** detailing as follows;

*“We wrote to you on 10 July 2020 regarding your mortgage account [ending] 01/01. In that letter we advised that the Financial Services & Pensions Ombudsman (FSPO) recently upheld an individual FSPO complaint on an account on the same terms and conditions and circumstances as yours. He awarded what he deemed to be a fair and proportionate remedy for the wrong that he considered had been suffered by that customer.*

*We have decide to apply the award in this FSPO decision to your account and to other accounts having the same terms and conditions and circumstances. This will provide a fair and proportionate remedy in your circumstances.”*

The Provider’s letter further detailed;

***“What does this mean for you?***

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*In line with the FSPO decision we have taken the following steps:*

- *We have applied a 12% reduction of €45,390.60 on your mortgage balance. Your new mortgage balance is €292,404.79.*
- *As your balance has changed, your repayments have also changed. Your revised repayment is €1,650.00. If you would like to keep your current repayment amount the Q&A will outline the benefits and tell you what you need to do.*
- *We calculated the balance reduction based on the capital balance as it stood when your fixed rate period ended and you did not have the option to choose a tracker rate. When your fixed rate period ended on 06/12/2010, the capital balance on your mortgage account was €378,254.99.*
- *We have also calculated an interest refund of €15,887.66. This refund is based on the interest charged on the 12% balance reduction from the date your fixed rate period ended.*
- *Included with this letter is a cheque or a Payment Instruction Form. Where there is a Payment Instruction Form enclosed, you need to complete and return it so that we can send the payment of €15,887.66."*

The Complainants indicated to this office on **26 August 2020** that they were dissatisfied with the Provider's further offer of redress and wished for their complaint with this office to progress. In this regard the Complainants detailed:

*"Can we ask that the Ombudsman now adjudicate on our complaint taking into account our personal specific circumstances and decide if in fact "part 4 clause 3.1 and/or clause 3.2" entitles us to be retrospectively placed on a tracker mortgage?"*

The conduct complained of that is being adjudicated on by this office is that the Provider has not offered adequate redress and compensation to the Complainants by consequence of the Provider's failure in relation to their mortgage loan account.

### **The Complainants' Case**

The mortgage product the Complainants signed and accepted in **December 2007** was for an initial 3 year fixed rate of interest. The Complainants drew down their mortgage loan with the Provider through a Broker.

The Complainants detail that their loan offer letter *"only offered a fixed rate for 3 years followed by 26 years at the prevailing variable rate"*. They outline that the Provider withdrew tracker rates during the period between **late 2008** and **late 2013**. They state that their mortgage *"was drawn down in December 2007 and therefore I would argue we should have been offered a Tracker Option then and as [a] result have been seriously*

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*disadvantaged as a result of not being given this option. I believe they had a duty to offer a Tracker to us at this time but decided not to for the same sinister reasons they withdrew trackers from 2008 to 2013, they weren't earning enough profit."*

The Complainants detail that prior to the expiry of the initial 3 year fixed interest rate period in **December 2010**, they received a rate options letter from the Provider dated **23 November 2010**. They state that *"it only offers two options, fixed or variable rate, there was NO tracker option offered, which [the Provider] were contractually obliged to do. I would argue that we have been seriously disadvantaged as a result of not being given this option."* The Complainants' mortgage loan account rolled onto the Provider's standard variable rate when the fixed interest rate period expired in **December 2010**.

The Complainants detail that the First Complainant was made redundant on **1 May 2012**. They outline that during the period between **May 2012** and **October 2014** they *"entered into the MARP process and kept in contact with the bank. Various alternative payment options during this period ranging from interest only to interest and some capital repayments. [The Provider] advised us to sell the house as loan was unsustainable. Appealed to them on many occasions to come up with a solution to keep us in the house."* They detail that during this time they were under *"Huge pressure and anxiety"* and *"[The First Complainant] ended up on medication from April 2013 until February 2014 due to this."*

The Complainants outline that the First Complainant returned to work in **October 2014** *"on 40% of the salary"* he earned previously.

The Complainants detail that in **September 2015** they entered into a **Positive Equity Fixed Payment Restructured Loan Agreement** dated **18 September 2015** which provided for a fixed monthly mortgage payment of €1,650.00 which was to be reviewed after a period of 5 years. They state that as part of this arrangement a residual lump sum payment of approximately €200,000.00 is due to be paid when the mortgage term expires in **June 2037**.

The Complainants outline that *"The bank wrote to us in March 2018 to advise that there had been a breach of contract between us and them in respect of "Tracker Mortgages" and our contractual right to same to which they accepted complete responsibility for and provided compensation of approx €1600"*.

They state in this regard that *"If it becomes apparent that we would have benefited by being on a Tracker Mortgage then [the Provider] should retrospectively put us on that Tracker Mortgage and we should be enjoying the value of that mortgage going forward"*.

They outline that when they received the Provider's letter in **March 2018** "we were effectively put on notice that there may be other "breaches" that we were not aware of in the contract that the bank were equally liable for.

*We scoured the contract terms in March 2018 and found in Part 4 - 3.1 a clause that outlined our contractual right to switch within 21 days of draw down of the loan to the prevailing tracker mortgage option. We also found in Part 4 - 3.2 a clause that outlined our contractual right to be offered the prevailing tracker mortgage option at the expiry of any fixed rate period in 2010 and 2012."*

In relation to **Clause 3.1**, the Complainants submit that "The bank had suggested that it was our obligation to pursue [the Provider] at the time in 2007 to avail of that contractual right and that any recourse should be aimed towards the broker." They submit that "if we didn't know the contractual right existed until March 2018 and have nothing on record to alert us to our options "post draw down" we could only seek a remedy at that time, which we did by appealing our case to [the Provider] in March 2018 and beyond. We don't see how the bank can use that argument about pursuing them at the time, after all we hadn't pursued them about the breach of contract they had written to us about in March 2018 for which they had accepted complete responsibility. It would appear that they are happy to accept the lesser breach but not [t]he breach that exposes them to a greater liability, this can't be fair surely."

They further submit that the Provider should have "a documented process in place specifically where there is movement in the interest rate on draw down, the bank effectively should ensure the broker network advise their customers of the option to change within 21 days in writing, noting the customers decision to avail or decline, the document should be signed by the customer and held on file. This is a huge failing on behalf of the bank and not in the spirit of the consumer protection code. The bank should be auditing these brokers to make sure all of this is done so as not to expose the bank. They have a copy of every form imaginable right to the draw down of the loan, but nothing post draw down. In our book that simply is not a bullet proof process as it does not go far enough and any ambiguous situation that arises in the future (such as now) is the fault of the bank and it's processes."

They further state that when they "got into financial difficulty" in **2012** "the bank had ample opportunity to invoke clause 3.1 to assist us, instead they advised us to sell our home and trade down or voluntarily give them the house back. For the stress and anxiety they caused in this household at that time we feel very bitter indeed towards them."

The Complainants are seeking that this office now *“adjudicate on our complaint taking into account our personal specific circumstances and decide if in fact "part 4 clause 3.1 and/or clause 3.2" entitles us to be retrospectively placed on a tracker mortgage”*.

### **The Provider’s Case**

The Provider outlines that the Complainants applied for a mortgage in the sum of €412,000 through their Broker in **August 2007**, and as such no Provider staff met or had any direct contact with the Complainants, nor did the Provider offer product advice or sell the product directly to the Complainants. It details that *“As with all loans applied for through a mortgage intermediary, the Bank was acting on instruction from the intermediary on behalf of the Complainants.”*

The Provider further outlines that *“In line with its general practice, the Bank would have provided the intermediary with a full range of interest rates available by the Bank at the time. These rates would have been provided to the Complainants by their mortgage intermediary as illustrated in the Home Loan Rates table. The Complainants completed a mortgage application form after consideration of all rates available to apply for.”*

The Provider further details that *“It was the Bank’s practice to update mortgage Intermediaries on a regular basis of any rate changed or change to mortgage products by email, together with matrix tables outlining these interest rates”*. It states that *“The interest rate that is applied to a Mortgage Loan Account is a customer’s choice, and it is the intermediary’s responsibility to inform a customer of the different interest rate options available at the time.”*

The Provider outlines that both Complainants signed the **Declarations and Signatures** section of the **application form** on **24 August 2007** which stated that the rate of interest would be that which the lender was charging on the date of drawdown.

The Provider details that the Complainants’ mortgage loan application was approved and a **Letter of Offer** issued to the Complainants on **20 September 2007** approving a loan of €412,000 over a period of 29 years, on a 1 year discounted tracker interest rate of 4.45% (ECB + 0.45%) followed by a tracker rate of 4.75% (ECB + 0.75%) for a period of 28 years.

The Provider submits however, that the Complainants’ Broker contacted the Provider by email on **21 September 2007** to request that the terms of the mortgage application be amended to the lower amount of €400,000 and an initial fixed interest rate period of 3 years at 4.9%.

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The Provider details that it issued a revised **Letter of Offer** on **24 September 2007** approving a loan of €400,000 over 29 years, on an initial fixed rate period of 3 years at 4.9%, to convert to a variable rate of 5.1% thereafter.

It states the Complainants signed the **Letter of Offer** accepting the Provider's offer of €400,000 on a fixed rate of 4.9% on **22 November 2007** and the mortgage loan account drew down on **06 December 2007**, by which time the applicable fixed interest rate had increased to 5.1%.

The Provider submits that **Condition 3.1** of the **General Terms and Conditions of Offer** outlines that the interest rate attaching to the Letter of Offer is not guaranteed to apply to the mortgage loan at the date of drawdown. It details that **Condition 3.1(a)** specifically encompasses the initial interest rate that applied to the mortgage loan account at the date of draw down where either a variable rate or tracker rate is applicable, whereas **Condition 3.1(b)** specifically encompasses the initial interest rate that applies to the mortgage loan account at date of drawdown where a fixed rate is applicable. It further states that **Condition 3.1(b)** gives customers the option to "switch" from their fixed rate within 21 days of drawing "without incurring" any early breakage cost.

The Provider details that **Condition 3.1(b)** provided the Complainants with the opportunity to switch from their chosen fixed rate within 21 days of date of drawdown without incurring any early breakage cost in circumstances where the fixed rate changed between the date of issue of the Letter of Offer and the date of mortgage drawdown, however they would have had to notify the Provider in order to avail of a different interest rate. The Provider states that **Condition 3.1(b)** "did not impose a contractual or other obligation or requirement on the Bank to offer the Complainants a Tracker interest rate, or any other interest rate, following drawdown."

The Provider states that tracker interest rates remained available to the Complainants as options to choose from up until the Provider withdrew tracker interest rate in **late 2008**, albeit the Complainants may have incurred an early breakage charge had they chosen to do so after the 21 day period allowed for in **Condition 3.1(b)**.

The Provider states that a tracker interest rate has never applied to the Complainants' mortgage loan account and the terms and conditions clearly outline that at the end of the fixed rate period, the Complainants may choose between a number of "prevailing" rates. In the absence of a choice by the customer, the loan would convert to a variable interest rate.

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The Provider states that in **late 2008** it withdrew tracker interest rates for new mortgage customers and existing mortgage customers who wished to change from their then current contractual interest rate to a tracker rate. It states that existing customers who had tracker mortgages at the time were not affected by the change.

It states that a tracker rate was not available to the Complainants as an option to choose from when their fixed rate period ended on **6 December 2010**. It details that the reason it withdrew tracker interest rates in **late 2008** was because this rate type would have been "*prohibitively expensive*" for customers and as such, any prevailing tracker interest rate that existed in **December 2010** would have been much more expensive than the variable or fixed rates that were available at that time. It states that based on "*best available information*" it is estimated that the prevailing Private Dwelling House (PDH) tracker interest rate between **late 2008** and **late 2013** would have averaged circa 7.9% (and 9.0% for Buy to Let (BTL) mortgages). It states that at the time the PDH standard variable rate averaged 3.3% (4.4% for BTLs).

The Provider submits that on **05 November 2010** it sent the Complainants a **Notification of Fixed Expiry Letter** informing them that their fixed rate was due to expire and requested that the Complainants contact the Provider to discuss the various products available to them. It details that the letter also stated that in the absence of a reply the loan would convert to the standard variable rate on expiry of the fixed rate period on **6 December 2010**. The Provider states that in the absence of a response to its letter, the Complainants' mortgage loan account converted to the standard variable rate of 3.25% on the expiry of the fixed interest rate period on **6 December 2010**. It details that on **14 December 2010** the Provider applied a 2-year fixed interest rate of 3.95% as requested by the Complainants and backdated the interest rate to **06 December 2010**.

The Provider details that upon expiry of the 2-year fixed interest rate in **December 2012** a standard variable rate of 4.00% was applied to the mortgage loan account as the Complainants did not contact the Provider to request a specific rate.

The Provider submits that the Complainants were not contractually entitled at the end of their fixed interest rate to be offered a specific tracker interest rate or margin on their mortgage loan account or indeed any specific tracker interest rate and margin if none applied. It states that the General Terms and Conditions do not "*expressly state*" that the Provider was "*required to offer a Tracker interest rate at any particular rate on the expiry of a Fixed Interest rate period*". The Provider outlines that **General Condition 3.2** refers to the customer "*choosing*" between the Provider's rates which are "*then prevailing*" at the time this choice falls to be exercised. The Provider states that this is also clear from the use

of the words “then prevailing” elsewhere in the contract. It “therefore believes that this condition is permissive in nature rather than mandatory”.

The Provider outlines that this is supported by the use of similar language in **Condition 3.6.4**.

The Provider defines prevailing rates as:

*“In the context of Condition 3.2, the term “then prevailing rates” means the interest rates then current and available on the day that the fixed interest rate period ends. The phrase “then prevailing “ clearly relates to all three rates listed above (“a fixed interest rate”, “a variable interest rate” or a “tracker interest rate”) and can therefore only reasonably be interpreted as being the rates available on the day that the fixed interest rate period ends.”*

The Provider outlines that since there was no prevailing tracker interest rate available generally by the Provider, by not having one to offer “there was a service failure on the [Provider’s] part, but there was no breach of contract”.

The Provider submits that it recognises that the Complainants “may have had an expectation that the choice of the Provider’s then prevailing tracker rate would have been available when the fixed rate period on their Mortgage Loan Account expired.” The Provider outlines that it wrote to the Complainants on **16 March 2018** to apologise for its service failure. The Provider is of the view that the compensation offered of €1,615.00 to the Complainants is “adequate” and “fair” as it contends that they did not suffer any financial detriment by not having a choice of the then prevailing tracker rate at that time. The Provider outlines that its approach to compensating customers who were affected by this service failure was shared with the Central Bank of Ireland. The Provider also outlines that the Complainants’ appeal to the Independent Appeal Panel set up as part of the Tracker Mortgage Examination was unsuccessful.

The Provider outlines as follows;

*“In order to estimate the hypothetical Tracker rates for the period October 2008 to December 2013, (during which time Tracker rates were not available), the [Provider] used an international standard mortgage pricing model and the best available objective information to estimate what the prevailing margin and rate would reasonably have been at the time, had the [Provider] maintained the rate. In calculating the estimated Tracker Mortgage margin the [Provider] considered components such as;*

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- 1) *Funding costs;*
- 2) *Credit risk costs;*
- 3) *Capital costs; and*
- 4) *Operating costs”*

The Provider submits further that its calculations were independently reviewed by an international firm of financial market experts and by the External Independent Party for the Tracker Mortgage Examination. The Provider states that the *“setting of the prevailing tracker margin is and was at all times expressed to be, at the sole discretion”* of the Provider. The Provider outlines that its workings to calculate the estimated tracker rates for the period **October 2008 to December 2012** do not include the *“reasonable incremental cost to cover the financial risk of providing the lifetime guarantee margin over the European Central Bank rate (ECB) for the life of the loan”*. The Provider says these *“reasonable incremental costs”* were estimated by the international firm of financial markets.

The Provider states;

*“For context, the period in which the [Provider] did not have a prevailing Tracker rate was at the peak of the banking liquidity and sovereign crises. Given this economic backdrop, the vast majority of the total costs of the estimated prevailing Tracker rate is made up of the Bank’s funding costs during this period. By way of context, the average cost of five year Irish Government debt, on the secondary markets, for the same period was 5.2%. This peaked at an average of 14.5% for the month of July 2011.*

The Provider submits that it is satisfied that the documentation for the Complainants’ mortgage loan account is sufficiently clear and transparent as to the meaning of *“then prevailing rates appropriate to the Mortgage Loan.”*

As detailed above the Provider requested that this complaint be placed on hold in **March 2020**, as a result of a Preliminary Decision issuing from this Office in respect of another complaint against the Provider which dealt with similar issues to those arising in relation to this complaint. When the Legally Binding Decision issued in relation to that complaint, the Provider indicated that it *“accepted”* that Legally Binding Decision *“in full”* and intended to apply the direction to other mortgage account holders who were also affected by that particular conduct of the Provider. The Provider wrote to this Office on **16 September 2020** informing this office that a further payment had been made to the Complainants. The Provider referred to its letter dated **21 August 2020, wherein** the Provider detailed that

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the redress it was offering the Complainants provided *“a fair and proportionate remedy in your circumstances”*.

The Provider details that it *“has a process in place for assessing the forbearance requirements of customers and offering a number of different options with a view to putting in place a solution that is appropriate and compliant with the Code of Conduct of on Mortgage Arrears 2013 (CCMA) and the Consumer Protection Codes 2006 and 2012 (CPC) (as appropriate). In accordance with these Codes, the Bank worked with the Complainants to meet their requests for forbearance on their Mortgage Loan Account over several years from November 2010 to the present day”*.

The Provider outlines that in compliance with the **CCMA**, it has a Mortgage Arrears Resolution Process (MARP) in place and that the Complainants were informed of this process and provided with a MARP booklet from **November 2012**. It submits that from **May 2012** the Complainants' financial information has been assessed by the Provider by of **Standard Financial Statement (SFS)**. It details that *“Before the CCMA came into force and since, the Bank has worked with the Complainants to provide them with alternative repayments arrangements (ARAs) with the objective at all times of assisting them to meet their mortgage obligations. The Bank is satisfied that its level of engagement and contact with the compliant with both the CCMA and the CPC.”*

The Provider has outlined the following interactions with the Complainants in relation to forbearance on the mortgage loan account;

- On **24 November 2010** the First Complainant called the Provider to apply for reduced repayments and said they would send in a **Reduced Repayment Application Form**.
- On **30 November 2010** the First Complainant informed the Provider that they had submitted the form and also requested to fix the interest rate for 2 years at 3.69%.
- On **6 December 2010** the Provider requested that the Complainants complete a **Statement of Means** in order to assess their request for forbearance.
- On **14 December 2010** a 2 year fixed interest rate of 3.69% was applied to the mortgage loan account.
- On **21 December 2010** the Provider approved a 3 month capital and interest moratorium followed by 9 months' interest only.
- On **6 December 2011** the interest only period expired and capital and interest repayments resumed.

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- On **14 May 2012** the Complainants requested a 3 month interest only period and were asked to complete a Standard Financial Statement.
- On **20 July 2012** a 6-month interest only period was approved and backdated to **July**. The Complainants were also to clear the arrears of €1,166.08.
- On **6 December 2012** the Complainants' fixed interest rate period ended and the loan converted to the Provider's standard variable rate. The interest only period also ended and capital and interest repayments resumed.
- On **17 January 2013** a further 6 month interest only period was approved and backdated to January, with arrears of €1,263.94 outstanding.
- On **28 June 2013** the interest only period expired.
- On **17 September 2013** the mortgage loan account was assessed by the Arrears Support Unit and was deemed unsustainable and a Voluntary Sale for Loss was recommended.
- On **7 October 2013** the Complainants wrote to the Provider referring to a phone call on **23 September 2013** during which they were informed of the Provider's decision and asking why they had yet to receive written confirmation of same. They also requested interest only backdated from **July 2013** to **December 2013** inclusive.
- On **18 November 2013** the Provider wrote to the Complainants to advise them that their mortgage had been deemed unsustainable and outlining the available options of **Trading Down, Voluntary Sale** and **Voluntary Surrender**.
- On **25 November 2013** the Complainants wrote to the Provider to request that the Provider accept interest only repayments in respect of the arrears accrued between **July** and **October 2013**.
- On **27 March 2014** the Complainants wrote to the Provider seeking a response to their letter of **25 November 2013** and requesting that the outstanding arrears be capitalised.
- On **11 April 2014** the Complainants wrote to the Provider stating that they would consider trading down and enclosing an SFS dated **10 April 2014**.
- On **12 June 2014** a 6 month fixed repayment period of €1,500 per month was approved in order to assist the Complainants while the First Complainant sought employment, with arrears of €4,308.50 to remain outstanding.
- On **19 October 2014** the Complainants submitted a further SFS requesting that the Provider come up with a long term solution for them to remain in their home.
- On **6 November 2014** the assessment was completed and the loan was deemed unsustainable and fixed repayments of €1,000 per month were approved for 6 months to allow the property to be sold.
- On **11 December 2014** the Provider advised the Complainants that the only possible long term solution was the **Positive Equity Sustainable Solution (PESS)** provided the Complainants could make repayments of approximately €1,600 per month.

- **On 1 July 2015** the PESS was approved by the Provider based on monthly repayments of €1,650 per month for 22 years.
- **On 3 August 2015** the Complainants accepted and signed the PESS.

The Provider submits that it *“is sorry to hear that both the Complainants suffered stress and anxiety, and the first named Complainant suffered stress related health issues. The Bank is fully committed to providing its customers with the best possible service, and has always strived to deal with its customers in a sensitive and appropriate manner.”*

The Provider has indicated that following its review of the Complainants’ mortgage loan account it noted the following;

- *“The Complainants were overcharged interest for 5 days when their account was converted to the LTV rate in February 2018. This interest overcharge amount of €20.67 has been refunded on 24 October 2019.*
- *The Bank is unable to retrieve some phone call recordings requested.*
- *The Bank’s late written reply to the Complainant’s phone call 23 September 2013 and both their letters 17 and 25 October 2013.*
- *The Bank is unable to locate any reply to the Complainant’s letter to ASU on 25 November 2013.”*

The Provider outlines it would like to offer a goodwill gesture to the Complainants in the sum of €5,000 to acknowledge these *“additional service failures”*.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider has not offered adequate redress and compensation to the Complainants by consequence of the Provider’s failure in relation to their mortgage loan account.

### **Decision**

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

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

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

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is only 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 will not be investigating 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.

Furthermore, I note that the Provider has indicated that following its review of the Complainants' mortgage loan account it noted the following;

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- *The Bank's late written reply to the Complainant's phone call 23 September 2013 and both their letters 17 and 25 October 2013.*
- *The Bank is unable to locate any reply to the Complainant's letter to ASU on 25 November 2013.*”

In respect of these specific issues, the Provider offered a goodwill gesture to the Complainants in the sum of €5,000 to acknowledge these “*additional service failures*”. The Complainants did not accept this offer made by the Provider at the time. However, it appears to me that this offer remains open to the Complainants to accept.

The issue to be determined is whether the Provider has not offered adequate redress and compensation to the Complainants by consequence of the Provider's failure in relation to their mortgage loan account.

In order to adjudicate on this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation and details of certain interactions between the Complainants and the Provider since **August 2007**.

#### ***Mortgage Application and Letter of Offer***

The Complainants applied for a mortgage loan with the Provider through a Broker.

**Part G: Mortgage Required** of the mortgage application form dated **24 August 2007** details as follows;



### G. MORTGAGE REQUIRED

Purpose of mortgage (please specify) Trading up.

\*Where Title Insurance, please complete section O

First time buyer Yes  No

If joint application, is title of property to be in joint names Yes  No

If you are purchasing a property, please complete Section 1. Alternatively, if you are re-mortgaging or require funds for other purposes, please complete Section 2 below.

#### Section 1 (purchase only)

Purchase price/cost of building	<u>635,000</u>	Mortgage required	<u>€ 412,000</u>
Site price (if applicable)		Savings*	€
Legal & stamp duty (if applicable)		Grant	€
Repairs / renovations		Gifts	€
Other costs*	€	Other funds*	€
Total expenditure	€	Total finance	€

#### Section 2 (re-mortgage only)

Remortgage amount	€
Property value	€
Loan value %	%
Year of original purchase	
Age of property	

\*Please supply details of other costs and/or savings, or other funding sources

What type of repayment method do you require? Annuity  Endowment  Pension

Mortgage term 34 Years Interest Only  Other  (Initial years) (Supply details)

Type of loan required Variable  Fixed  for \_\_\_\_\_ years Tracker  Split   
Discount Variable  Other

The **Part L: Declarations and Signatures** section of the mortgage application form was signed by the Complainants on **24 August 2007** on the following terms;

*"I/We declare and agree that:*

...

*5. The rate of interest will be that which the lender is charging on the date on which the loan cheque is drawn down and subsequently the rate and repayment may vary within the terms of the mortgage."*

I note that tracker interest rates were on offer generally by the Provider when the Complainants applied for the mortgage loan in **August 2007**. The Complainants availed of the services of a third party Broker during the application stage for the mortgage loan. I again note that the application form outlined the types of interest rate options available generally on mortgage loans, including the tracker rate. The Complainants did not select the tracker rate option on the application form and instead selected the fixed rate option.

/Cont'd...

In circumstances where the Complainants were engaging with a Broker with respect to the mortgage application, there was no requirement for the Provider to communicate directly with the Complainants at that time. Furthermore, the fact that tracker interest rate options were available generally as part of the Provider's suite of products at the time, did not oblige the Provider to offer the Complainants a tracker interest rate for the mortgage loan.

The Provider's **Mortgage Enquiry Response Form** dated **19 September 2007** has been provided in evidence and details as follows;

...	...
<i>Decision</i>	<i>Sanction in Principle</i>
<i>Amount of Credit Advanced</i>	€412,000.00
<i>Period of Agreement</i>	29 Years
<i>LTV</i>	65.00%
<i>Product</i>	<i>DiscTkrHome LTV&gt;50%&amp;≤80%</i>
<i>Rate</i>	4.45%

The Complainants were issued with a **Letter of Offer of Mortgage Loan** dated **20 September 2007**. The "Important Information" set out in that letter, details as follows;

1. "Amount of Credit Advanced" €412,000
2. "Type of Loan" Annuity
3. "Period of Agreement" 29 years/348 months"

**Part 1 – Particulars of Offer of Mortgage Loan** sets out the following as the "Repayment Details as at date of Offer":

	<b>Term</b>	<b>Loan Type</b>	<b>Interest Rate Description</b>	<b>Rate</b>	<b>Margin</b>	<b>Net Rate</b>	<b>Amount of Each Instalment</b>
<b>1</b>	1 Year	Variable Annuity	<i>DiscTkrHome LTV&gt;50% &amp; ≤80%</i>	4%	0.45%	4.45%	€2,106.51
<b>2</b>	28 Years	Variable Annuity	<i>TrackerHome LTV&gt;50% &amp; ≤80%</i>	4%*	0.75%**	4.75%	€2,177.21

\*ECB Rate is the European Central Bank's Main Refinancing Operations Minimum Bid Rate, and will change within 5 working days of an ECB rate change.

\*\* Tracker Rate (ECB Rate – Margin)"



Part 4 of the **General Terms and Conditions of Offer of Mortgage Loan** outlines as follows;

**“3.1 RATE NOT GUARANTEED TO DRAWDOWN**

*Due to fluctuations in interest rates, the [Provider] does not warrant or guarantee that the rate specified in the Particulars will apply on drawdown:*

- (a) In the case of an offer at a variable rate or tracker rate, the initial rate which will apply to the Mortgage Loan will be the rate prevailing at date of drawdown.*
- (b) In the case of an offer at a fixed interest rate, the appropriate fixed rate which prevails at date of drawdown will apply to the Mortgage Loan if this is different from the rate specified in the Particulars. The Customer may accept this rate or, within 21 days of drawdown, opt to switch to the variable or tracker rates prevailing at the time without incurring any early breakage cost under Clause 3.3.*

**3.2 FURTHER FIXED INTEREST RATE OPTIONS/CHOICE**

*At the end of any fixed interest rate period, the Customer may choose between:*

- (a) a further fixed interest rate Mortgage Loan, or*
- (b) conversion to a variable interest rate Mortgage Loan, or*
- (c) conversion to a tracker interest rate Mortgage Loan,*

*at the [Provider's] then prevailing rates appropriate to the Mortgage Loan. If the Customer does not exercise this choice, then the Mortgage Loan will automatically convert to a variable interest rate Mortgage Loan.*

**3.3 FIXED INTEREST RATE EARLY BREAKAGE COSTS PAYABLE BY CUSTOMER**

*The Customer will be entitled, subject to prior advice to the Bank, to withdraw from a fixed interest rate agreement either:*

- (a) By repayment in full of the Mortgage Loan and interest accrued to the date of repayment; or*
- (b) By conversion to a variable interest rate or another fixed interest rate, or*
- (c) By making a partial out-of-course payment.*

/Cont'd...

*In any of the foregoing events, subject to the provisions of Section 121(2) of the Consumer Credit Act, 1995, an early breakage cost is usually payable to the Bank. The early breakage cost shall be fairly and conclusively determined by the Bank on the basis of the formula contained in Part 5.*

**3.4 FIXED INTEREST RATE MORTGAGE LOAN**

*In the case of a fixed interest rate Mortgage loan, the interest rate is the appropriate rate which prevails at the date of drawdown, and will be fixed for the period of time stated in the Particulars, subject to these conditions.*

**3.5 VARIABLE INTEREST RATE MORTGAGE LOAN**

*In the case of a variable interest rate Mortgage Loan the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the Bank, from time to time, subject to these conditions.*

**3.6 TRACKER INTEREST RATE MORTGAGE LOAN**

3.6.1 *The tracker interest rate is made up of two parts:*

- (a) the European Central Bank's main refinancing operations minimum bid rate (the "ECB Rate") which is variable, and*
- (b) the Tracker Margin as stated in Part 1 of the Particulars of Offer of Mortgage Loan, subject to 3.6.3 below.*

3.6.2 *The tracker interest rate applicable at any time will change within 5 working days of a change in the ECB Rate.*

3.6.3 *The [Provider] may adjust the Tracker Margin upwards if the Valuation Report values the property at less than the Property Price/Estimate Value shown in the Particulars of Offer of Mortgage Loan. The [Provider] will notify the Customer in writing of the new Tracker Margin.*

3.6.4 *The Customer may at any time convert a tracker interest rate Mortgage Loan to a fixed interest rate Mortgage Loan or a variable interest rate Mortgage Loan at the [Provider's] then prevailing rates appropriate to the Mortgage Loan. However, the Customer may not convert the tracker interest rate Mortgage Loan directly or indirectly from one tracker interest rate to another tracker interest rate in order to avail of a lower prevailing Tracker Margin."*

The **Acceptance and Consent** in **Part 7** of the **General Terms and Conditions of Offer of Mortgage Loan** was signed by the Complainants and witnessed by a solicitor on **22 November 2007**. The Acceptance and Consent states as follows:

“...

*I/We acknowledge and accept that the rate of interest which applies to the Mortgage loan may be different from the rate shown in the Offer, and in the case of fixed interest rates, the rate which prevails at the date of drawdown is the rate which will apply for the period of time stated in the Particulars.*

*I/We hereby confirm, that I/we have read the within Terms and Conditions attaching to this Offer, and acknowledge that I/we have received a copy thereof.”*

### **Application of General Condition 3.1**

The fixed interest rate had increased to 5.1% between the date of issue of the **Letter of Offer of Mortgage Loan** on **24 September 2007** and the drawdown date of **06 December 2007**. This variation in the interest rate on drawdown was provided for in **General Condition 3.1(b)**.

The Complainants have submitted that the Provider “*should have a documented process in place specifically where there is movement in the interest rate on draw down, the bank effectively should ensure the broker network advise their customers of the option to change within 21 days in writing*”. It is important for the Complainants to understand that there was no obligation on the Provider to contact the Complainants and/or their Broker to advise them that there had been a “*movement in the interest rate on draw down*”.

It was entirely a matter for the Complainants to decide whether to contact the Provider within 21 days of drawdown to request to switch to the variable or tracker rates prevailing at the time without incurring any early breakage cost in accordance with **Condition 3(1)(b)**. However they did not do so.

The Complainants have further submitted in relation to **Condition 3.1** that they “*didn't know the contractual right existed until March 2018 and have nothing on record to alert us to our options “post draw down”*”. As set out above the Complainants accepted the Letter of Offer, having confirmed that they had read the Terms and Conditions attaching to the offer. Therefore, they were aware or ought reasonably to have been aware of the Terms and Conditions of the loan offer, including **Condition 3.1**, from **November 2007**, as those Terms and Conditions were made available to the Complainants at that time.

/Cont'd...

I do not accept the Complainants submission that there is any additional obligation on the Provider under the Consumer Protection Code or otherwise to inform the Complainant in an additional manner of the detail contained in those Terms and Conditions.

***Communications with respect to interest rate options in 2010 and 2012***

The Provider wrote to the Complainants on **05 November 2010** and detailed as follows;

*“With reference to the above quoted Fixed Rate Mortgage Account, we wish to advise that the Fixed Rate Term is due to expire on the 6<sup>th</sup> December 2010.*

*We shall be grateful, therefore, if you will contact this Office at your earliest convenience in order to discuss the various Products which are now available to you. In the event that we do not hear from you prior to 6<sup>th</sup> December 2010 your Account will transfer automatically to the Banks prevailing Standard Variable Rate for mortgages at that time, or an alternative rate as agreed.”*

There are handwritten annotations on the copy letter of **05 November 2010** provided in evidence, as follows;

“Process

*[Redacted] to issue list of rate options*

*[First Complainant] to choose option that suits*

*Fax back to [Number]*

*[First Complainant] to phone and confirm receipt of same with [Redacted] by phoning after fax sent”*

I note that the letter that issued to the Complainants on **5 November 2010** did not contain any information about the interest rate options available to the Complainants, rather the letter operates as a prompt to the Complainants to contact the Provider to discuss the products available. It is unclear to me why the Provider did not set out the various options in writing to the Complainant in its letter of **5 November 2010**.

The Provider subsequently wrote to the Complainants by letter dated **23 November 2010**. This letter did detail the then current rate options, as follows;

*“I enclose a copy of our current rates and approximate repayment amounts for your attention as requested.*

/Cont'd...

**Residential Owner Occupier**

<b>Rate Category</b>	<b>Rate</b>	<b>Repayment</b>
<i>Standard Variable</i>	3.25%	€1807.09
<i>Loan to Value (LTV) Variable Rates</i>		
<i>LTV &lt;=50%</i>	3.09%	€1775.04
<i>LTV &gt;50%&lt;=80%</i>	3.29%	€1815.15
<i>LTV&gt;80%</i>	3.49%	€1855.75
<i>Fixed Rates</i>		
<i>Fixed One Year</i>	3.59%	€1876.22
<i>Fixed Two Years</i>	3.69%	€1896.82
<i>Fixed Three Years</i>	3.89%	€1938.38
<i>Fixed Four Years</i>	4.19%	€2001.58
<i>Fixed Five Years</i>	4.39%	€2044.30
<i>Fixed Ten Years</i>	5.20%	€2221.88

*Please note that these rates are quoted as of today's date and are subject to change or variation thereafter. If you have any queries please do not hesitate to contact any of my colleagues at the above number"*

The evidence before me does not indicate whether the Complainants contacted the Provider between receipt of the letter of **5 November 2010** and the letter of **23 November 2010**. In any event it is accepted by the parties that the Provider did not give the Complainants the option of a tracker interest rate on their mortgage loan in **November 2010**.

The Complainants wrote to the Provider by letter dated **24 November 2010** which details as follows;

*"Our fixed rate term expires on the 6<sup>th</sup> Dec 2010. From that date we would like to opt for a new 2 year fixed term at a rate of 5.69% with monthly repayments from 6<sup>th</sup> Jan 2011 of €1896.92.*

*We are also making an application for a repayment holiday from the 6<sup>th</sup> Jan 2011 to the 6<sup>th</sup> June 2011 inclusive. (See enclosed application)"*

I note from the **mortgage loan statements** that a fixed rate of 3.69% was applied to the mortgage loan account on **06 December 2010**.

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The **mortgage loan statements** show that on **6 December 2012** there was an interest rate change from “Fixed to Variable” and a “New Rate 4%” was applied.

The Provider wrote to the Complainants by letter dated **13 February 2013** which detailed as follows;

*“I refer to our telephone conversation this morning.*

*I wish to reiterate that [the Provider] are currently experiencing some technical difficulties in relation to a small number of mortgage accounts. These difficulties are impacting our ability to produce certain correspondence to some mortgage holders. Unfortunately your account is included in these mortgage accounts and therefore [the Provider] were unable to issue you with a letter advising you that your fixed period was about to end.*

*The bank is currently in the process of rectifying these issues.*

*The bank wished to apologise for any inconvenience caused in the interim. In the meantime, we appreciate your patience and understanding.*

*We assure you of [the Provider’s] commitment to resolving this matter ASAP.*

*I also refer to your query raised this morning in relation to the current rate being charged to your mortgage account. You may call [Number] and select the option from the Accounts department. You will then be able to speak to a member of our accounts team who will be able to advise you on the current interest rate options for your mortgage.”*

It is clear from the evidence that the Provider failed to issue correspondence to the Complainants to advise them that the fixed rate period would expire in **December 2012** or to outline the available rate options. The Provider has stated that this issue arose due to “technical difficulties”. However, it is unclear why the Provider did not set out the various options in writing to the Complainants when the Complainants enquired about this in **February 2013**. Rather, the Provider simply prompted the Complainants to again telephone the Provider to discuss the options available.

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The **Consumer Protection Code 2006** (the "**CPC 2006**") was in effect at the time of the expiry of the first fixed interest rate period in **November 2010** which outlines in Chapter 2 that:

*"A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."*

The **Consumer Protection Code 2012** (the "**CPC 2012**") was in effect at the time of the expiry of the second fixed interest rate period in **December 2012**. Chapter 4 states that:

*"A **regulated entity** must ensure that all information it provides to a **consumer** is clear, accurate, up to date and written in plain English. **Key information** must be brought to the attention of the **consumer**. The method of presentation must not disguise, diminish or obscure important information."*

I am of the view that the Provider did not act in a manner that was consistent with the **CPC 2006** in **December 2010** and the **CPC 2012** in **February 2013** by simply prompting the Complainants to contact the Provider to discuss interest rate options, as opposed to setting out those options in a clear and comprehensible durable medium to the Complainants. This would have afforded the Complainant the opportunity to consider the options before them and thereafter contact the Provider to discuss those options, if it was necessary. I understand that the Provider accepts that there were breaches of the **CPC 2006 and 2012**.

I note from the evidence that the mortgage loan account has remained on the Provider's standard variable rate since **December 2012**.

### ***Application of General Condition 3.2***

The Complainants maintain that the Provider breached General Condition 3.2 of their loan offer by failing to offer them a tracker rate on the expiry of their fixed rate periods in **2010** and again in **2012** and details that General Condition 3.2 "*entitles us to be retrospectively placed on a tracker mortgage*".

During the investigation of this complaint, the Provider initially put forward arguments that the failure to offer a tracker interest rate to the Complainants on their mortgage loan in **December 2010** and **December 2012** was "*service failure*" on the part of the Provider and not a breach of contract.

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However, as detailed above following the issuing of a Legally Binding Decision by me with respect to a separate complaint that dealt with similar issues to this complaint, the Provider subsequently wrote to this Office in **May 2020** and indicated that it accepted that Decision in full. To this end, it is my understanding that the Provider accepts that there was a breach of contract with respect to the Complainants' mortgage loan in **December 2010** and **December 2012**.

With respect to the Complainants' submission that General Condition 3.2 "*entitles us to be retrospectively placed on a tracker mortgage*" I do not accept this to be the case. The Complainants were entitled to be offered the option of a "*prevailing*" tracker interest rate to choose at end of the fixed interest rate period in **December 2010**. If the "*prevailing*" tracker interest rate had been given as an option by the Provider as it should have been, it would have been a matter for the Complainants to decide whether or not to choose the "*prevailing*" tracker interest rate.

However, it is clear from the evidence that a tracker interest rate at the "*then prevailing rates*" was not set by the Provider at the time the first fixed interest rate period expired in **December 2010**.

The Provider has furnished this office with a **Table of Tracker rates with Margins**. When the Complainants' mortgage loan was drawn down in **2007** the Loan to Value Ratio was 100%. With respect to Existing Private Dwelling House Customers whose borrowings were less than €500,000 and the Loan to Value Ratio was greater than 80%, the Provider has outlined the following tracker interest rates/margins that were set by the Provider.

The Provider submits that the tracker interest rate product was "*discontinued for new business effective 10/10/08 – continues as maturity product only*".

Established/Set Date	ECB Base Rate	Rate
17 December 2007	4.00%	5.10% – Includes Margin 1.1%
22 April 2008	4.00%	5.10% - Includes Margin 1.1%
16 June 2008	4.00%	5.5% - Includes Margin 1.5%
15 July 2008	4.25%	5.75% - Includes Margin 1.5%
01 December 2013 * LTV does not appear to apply to this rate	0.25%	5.61% - Includes Margin 4.91%

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The Oxford English Dictionary defines “*prevailing*” as “*existing or most common at a particular time*”. The term “*then prevailing rates*” by reference to its natural and ordinary meaning within **General Condition 3.2** appears to me to mean the prevailing rates of interest that had been set by the Provider and that existed or were most common at that time. It is clear from the evidence before me that there were a number of existing tracker rates applicable to customers of the Provider in **2010**. These ranged from a margin of 1.1% to 1.5% above ECB, and were set by the Provider and applied to existing borrowers who had tracker interest rates applied to their mortgage loans with the Provider at that time.

I accept that the Provider set a new tracker mortgage margin of 4.91% in **January 2013**. This margin may well have been the appropriate margin above ECB to be offered to mortgage holders coming off fixed interest rate periods after **January 2013**, but this rate or margin cannot be said to have existed or to have been the most common in **2010** or between **December 2010** and **January 2013**.

It is clear that while the Provider withdrew tracker interest rates for new customers, other customers whose mortgage loan accounts were on a tracker interest rate at the “*then prevailing rate*” in **October 2008** continued to avail of tracker interest rate margins of between 1.1% and 1.5% above ECB after **October 2008**. There is an argument that the appropriate rate to be offered to the Complainants, effective from **06 December 2010**, is a margin that had been set by the Provider and that existed for other mortgage holders of the Provider whose mortgage loans were on a tracker interest rate at the point in time when the Complainants’ fixed rate expired. It appears that the rate that had been set by the Provider closest in time to when the Complainants’ fixed rate period expired in **2010** was the rate of ECB + 1.5%.

I am conscious that there are several relevant factors that cannot be determined with any certainty at this point. I do not know what “*prevailing rate*” the Provider would have offered to the Complainants in **December 2010**, though I am prepared to accept that it would have been higher than a margin of 1.5% over the ECB rate. Without knowing this rate, I cannot determine the most likely option that would have been chosen by the Complainants in **December 2010** if they had been offered a choice of variable, fixed, and tracker rates.

Although they have not explicitly said as such, the Complainants seem to be of the view that they would have chosen the tracker rate, if it had been offered to them (which is the only real basis upon which they can claim to have suffered financial loss from the Provider’s breach). But this belief also results from a degree of hindsight; of knowing the movements in the ECB base rate since **December 2010**.

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If a prevailing tracker rate of 1.5% above ECB (which was 1% at the time) was offered to the Complainants in **December 2010**, it is understandable that the Complainants now believe they would have opted for such a rate as it would have been significantly cheaper over the past eleven years than the other options available to them. But, as I have outlined above, I do not accept that the margin of 1.5% above ECB would have been offered to the Complainant if the Provider had set a prevailing rate in **2010**. Without knowing the unknown but higher rate that would have been offered to the Complainants in **December 2010**, I do not accept that it can be established that the Complainants would (or would not) have accepted the tracker rate that should have been offered to them.

I note that the Complainants are of the view that "*clause 3.2*" *entitles us to be retrospectively placed on a tracker mortgage*", however having regard to all of the above I do not accept this to be the case.

In these particular circumstances, I am also of the view that a direction of a monetary lump sum compensation payment is not an appropriate remedy. I believe that the breach of **General Condition 3.2** of the Complainants' mortgage loan contract (which relates to the application of an interest rate to the mortgage loan), has a pivotal and ongoing impact on the cost of the Complainants' mortgage loan from the date the contract was breached in **December 2010**, and until the loan is repaid in full. A one-off compensatory payment does not, therefore, seem to me to adequately address such a breach.

I am mindful that **section 12(11)** of the *Financial Services and Pensions Ombudsman Act 2017*, requires me to act "*according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form*".

I am of the view that requesting the Provider to apply a tracker rate of ECB + 1.5% would not be equitable or just where I cannot determine what the tracker rate would have been on the expiry of the Complainants' fixed rate period in **2010** and if the Complainants would have chosen that tracker interest rate.

In **March 2018**, the Provider initially offered redress of €1,615 (€1,000 compensation + €615 professional advice payment) to the Complainants for its failure on the Complainants' mortgage loan account.

As previously outlined, I issued a Legally Binding Decision in **March 2020** in respect of another complaint against the Provider which dealt with similar issues to those arising in relation to this complaint.

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When the Legally Binding Decision issued in relation to that complaint, the Provider indicated that it accepted that Legally Binding Decision in full and intended to apply the direction to other mortgage account holders who were also affected by that particular conduct of the Provider.

The Provider wrote to the Complainants on **21 August 2020** detailing as follows;

*“We wrote to you on 10 July 2020 regarding your mortgage account [ending] 01/01. In that letter we advised that the Financial Services & Pensions Ombudsman (FSPO) recently upheld an individual FSPO complaint on an account on the same terms and conditions and circumstances as yours. He awarded what he deemed to be a fair and proportionate remedy for the wrong that he considered had been suffered by that customer.*

*We have decided to apply the award in this FSPO decision to your account and to other accounts having the same terms and conditions and circumstances. This will provide a fair and proportionate remedy in your circumstances.”*

The Provider then applied a 12% reduction of €45,390.60 to the Complainants’ mortgage account balance which reduced the balance to €292,404.79. The adjustment to the mortgage balance also reduced the monthly mortgage repayments to €1,650.00. The Provider also refunded the Complainants interest of €15,887.66 based on the interest charged on the 12% balance reduction.

While I am conscious that these issues spanned a period of more than nine years, I am nonetheless satisfied to note that the Provider has applied the learning and direction from my earlier decision to the Complainants’ complaint in **August 2020**.

I note that there were many interactions between the Complainants and the Provider between **November 2010 and August 2015**, wherein requests for forbearance arrangements were made by the Complainants and Standard Financial Statements were submitted, and certain forbearance arrangements were granted by the Provider during this time period. The contemporaneous evidence shows that there were various reasons advanced by the Complainants for the requests for forbearance during that time; the Complainants required forbearance so they could fund dental treatment for their children, the Complainants required forbearance so that the Complainants had funds to update their car and the Complainants required forbearance owing to unemployment between **2012 and 2014** when the First Complainant returned to employment “on 40% of the salary”.

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Ultimately, I note that the parties came to a long term agreement to restructure the mortgage loan and the Complainants accepted the Positive Equity Arrangement Agreement offered by the Provider, in the presence of a solicitor on **03 August 2015**.

The evidence shows that the Complainants experienced financial difficulty during the period between **2010** and **2015**. Whilst I have no doubt that this was a difficult period for the Complainants, however I believe the redress now offered to be reasonable in the circumstances.

Having regard to all of the evidence, I do not accept that there was any failure on the part of the Provider with respect to the application of General Condition 3.1 to the Complainants' mortgage loan in or around **2007**. There was a breach of contract with respect to the Complainants' mortgage loan in its application of General Condition 3.2 to the mortgage loan agreement in **December 2010** and **December 2012**. I note that the Provider has accepted this breach and made redress and compensation payments to the Complainants with respect to its failures in **March 2018** and **August 2020**, as follows:

The Provider initially paid compensation of €1,615. Following my decision referred to above it applied a 12% reduction of €45,390.60 to the Complainants' mortgage account balance which reduced the balance to €292,404.79. This reduced the monthly mortgage repayments to €1,650.00. It also refunded the Complainants interest of €15,887.66 based on the interest charged on the 12% balance reduction.

I do not accept the Complainants' submission that "*clause 3.2*" entitles us to be *retrospectively placed on a tracker mortgage*". Therefore, I accept that the amount of redress and compensation paid by the Provider to the Complainants is reasonable in the circumstances of this particular matter.

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

17 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.