



<u>Decision Ref:</u>	2021-0542
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

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

The complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan account is secured on the Complainants' private dwelling house.

The loan amount was €372,000.00 and the term of the loan was 30 years. The **Loan Offer Letter** which was signed on **11 January 2007** outlined that the interest rate applicable to the loan was a *“Fixed rate of 4.49% until 30/11/2008 100% Capital and Interest.*

The Complainants' Case

The Complainants maintain that *“at all times the agreement with loan account was agreed at a Tracker Rate of ECB plus 1.15%”*. The Complainants outline that before the mortgage loan was drawn down, they requested that the mortgage loan commence initially on a 2-year fixed interest rate period. The Complainants contend that it was their intention and understanding that a tracker interest rate would apply to the loan on expiry of the fixed interest rate period.

The Complainants assert that they signed a declaration on **11 January 2007**, which confirmed that the loan was a tracker mortgage. The Complainants submit that *“this effectively titles the product of the mortgage and is the reason the loan was agreed.”*

The Complainants outline that the sole purpose of securing the mortgage loan with the Provider was to re-mortgage from another third-party provider and to obtain a tracker interest rate.

The Complainants assert that there is no reference to *“standard variable rate”* in the loan documentation. The Complainants submit that they were informed by the Provider that if the rate of interest was fixed, they would have the option of reverting to a tracker rate.

The Complainants assert that the Provider must show *“in a manor fit and proper[sic]”* that there was ever the *“remotest possibility for the loss of their Tracker Rate”*.

The Complainants are seeking the following:

- (a) The correct tracker interest rate of ECB + 1.15% is applied to mortgage loan account ending **2534**; and
- (b) A refund of overpaid capital and interest from **01 December 2008**.

The Provider’s Case

The Provider submits that during the application stage, the Complainants chose to avail of the services of a third-party mortgage broker, and in accordance with the Provider’s agreement with brokers, it was prohibited from contacting broker customers directly until the mortgage loan funds were drawn down. The Provider states that it cannot comment on any advice that the Complainants were given by the broker at the application stage of their mortgage, in particular the information provided regarding the loan type and what would transpire at the end of the fixed rate period.

The Provider outlines that on foot of the mortgage loan application received from the Complainants’ broker, it issued a **Loan Offer Letter** on **18 December 2006** which provided for a tracker interest rate of ECB base rate + 1.15%. It details that following further discussions with the Complainants’ broker, amendments were made to the loan offer to include changing the interest rate from a tracker interest rate to a fixed interest rate and also applying an interest only repayment period at the commencement of the loan.

The Provider states that a further **Loan Offer Letter** issued to the Complainants on **09 January 2007**. It details that due to an oversight, the interest rate details were not amended and that a tracker interest was quoted. The Provider states that it subsequently issued a corrected revised **Loan Offer Letter** on the same date which provided for a fixed interest rate at 4.49%.

The Provider explains that the date of the loan acceptance was **28 December 2006** however this was amended by hand by the Complainants' solicitor and corrected to **09 January 2007**. The Provider details that acceptance of this document *"was done on the understanding that the customers were fully aware of the fact their mortgage was being drawn down on a fixed interest rate (and not a tracker interest rate)."*

The Provider outlines that the default rate applicable to the Complainants' fixed interest rate product was a standard variable rate and as such there was no entitlement to default to a tracker interest rate on the expiry of the fixed interest rate period in **November 2008**. The Provider relies on **Section 14 (c)** of its **Standard Mortgage Terms and Conditions**. The Provider submits that the standard variable rate is a *"variable interest rate which may be increased or decreased by the Lender at any time"* whereas a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will rise and fall in line with movements in the ECB base rate only. The Provider states that it cannot change the ECB base rate.

The Provider submits that it is satisfied the mortgage loan documentation was sufficiently clear and transparent. The Provider outlines that the Complainants confirmed that they had acknowledged receipt of the conditions applicable to the mortgage loan, that they had been explained to them by their solicitor and that they understood them. The Provider outlines that the conditions accepted by the Complainants were *"clear"* and that the default rate that would apply would be a variable interest rate which may be increased or decreased by the Lender at any time.

The Provider submits that prior to the expiry of the fixed interest rate period in **November 2008**, it issued a **Product Expiry Letter** to the Complainants which outlined the fixed and variable interest rates available to the Complainants. The Provider details that it did not receive a response from the Complainants and the interest rate rolled to the Provider's standard variable rate in line with the loan agreement. The Provider outlines that tracker interest rate products had been removed from **mid-2008**.

/Cont'd...

The Provider acknowledges the reference to “*Tracker Mortgage*” in the **Loan Offer Acceptance**. The Provider submits that the purpose of this paragraph was for the Complainants to acknowledge that they fully understood the specific nature of the mortgage, that the debt owed to the Provider was secured on the mortgaged property and must be repaid in full before the title deeds will be returned or the security released. The Provider outlines that the reference to “*Tracker Mortgage*” was a typographical error and did not in itself create a right or expectation to a tracker interest rate.

The Provider details that tracker interest rates had been withdrawn from the market in **mid-2008** and therefore a tracker interest rate was not available for selection in **November 2008**, when the initial fixed rate period on the Complainants’ mortgage account expired. The Provider submits that there was no contractual or regulatory obligation to offer the Complainants a tracker interest rate when the fixed interest rate period expired on **30 November 2008**.

The Provider outlines that, based on a full review of the Complainants’ mortgage loan documentation in its entirety, it does not consider that the Complainants could have formed a reasonable expectation that they were drawing down their mortgage loan on a tracker interest rate as a result of one typographical error appearing on one part of their overall documentation.

The Provider refutes the Complainants’ contention that they were verbally informed that the fixed interest rate would convert to a tracker interest rate on expiry.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate on the expiry of their fixed interest rate term in or around **December 2008**.

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

/Cont’d...

response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on **16 November 2021** outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Complainants' representative made a further submission by way of email to this office dated **07 December 2021**, a copy of which was transmitted to the Provider for its consideration. The Provider has not made any further submission.

Following the consideration of the Complainants additional submission and all of the submissions and evidence on the file, my final determination is set out below.

Before dealing with the substance of the complaint, I note that 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 the conduct of the Respondent Provider and not the broker which will be investigated and dealt with in this Decision. For the avoidance of doubt, in circumstances where the Complainants did not have any direct engagement with the Respondent Provider until after the loan offer was accepted and signed, any engagements that occurred between the Complainants and the third-party broker do not form part of this Decision.

I note that the Complainants' representative, in his post Preliminary Decision submission dated **07 December 2021**, appears make general references to other cases that he has

/Cont'd...

“dealt with on this matter” on behalf of other customers of the Provider. It is important to note that any reference to another complaint by a customer of the Provider is neither helpful nor appropriate and has not been considered in my determination of this complaint.

The terms and conditions provided for in mortgage loan offers that issued by the Provider to its other customers or indeed any commercial decisions made by the Provider in respect of those customers are of no relevance to the Complainants’ dealings with the Provider. Each complaint to this office is considered on its own merits.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants’ mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2006**, when the Complainants made the application for the mortgage loan, and **2008**, when the fixed interest rate period expired.

On foot of an application for a mortgage loan submitted by the Complainants’ broker to the Provider, the Provider issued a **Loan Offer Letter** dated **18 December 2006** (the “**first loan offer**”) which detailed as follows:

“Important Information as at 18/12/2006

1. Amount of credit advanced	€372,000.00
2. Period of Agreement	30 years
3. Number of Repayment Instalments	360
4. Amount of Each Instalment from 18/01/2007	€1,918.17”
....	
Loan Type	Flexible Tracker ECB + 1.15% 100% Capital and Interest
...	
Interest Rate	4.65%
Interest Type	Variable”

It is clear from the evidence before me that the **first loan offer** issued to the Complainants on **18 December 2006** provided for a tracker interest rate product. However, I note that this loan offer was not signed and accepted by the Complainants.

I understand from the submissions received by both parties to the complaint, that discussions subsequently took place between the third-party broker and the Provider in relation to the interest rate and repayment type. I have not been provided with any evidence or documentation in relation to those discussions. Nevertheless, in circumstances

/Cont’d...

where the Complainants were engaging with a broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainants during the application stage.

I note that two further **Loan Offer Letters** issued to the Complainants on **09 January 2007**. The **Loan Offer Letter** dated **09 January 2007** (the “**second loan offer**”) provided for a “*Flexible Tracker ECB + 1.15% 100 % Interest Only*” loan type. The Provider explains that the **second loan offer** letter issued in error as the Complainants had requested a fixed interest rate. I note that this **second loan offer** was never signed and accepted by the Complainants.

The Provider subsequently issued another **Loan Offer Letter** dated **09 January 2007** (the “**third loan offer**”) which details as follows:

“IMPORTANT INFORMATION AS AT 09/01/2007

1. Amount of credit advanced	€372,000.00
2. Period of Agreement	30 years
3. Number of Repayment Instalments	360

....

Purpose of Loan Remortgage

....

Loan Type Fixed Rate 4.49% until 30/11/08 100%
Interest

Loan Amount €372,000.00

Interest Rate 4.49%

Interest Type Variable

Term 30 years

Monthly Term Repayment €1,391.90 from 29/01/2007
€1,547.01 from 29/11/2008”

Condition 1 of the **Provider’s Standard Mortgage General Terms & Conditions (effective from 01/06/2006)** details as follows:

“1. Introduction

(a) *These General Mortgage Terms and Conditions apply in all circumstances to the Lender’s Standard Mortgage/Tracker Mortgage. These General Terms and Conditions are supplemental to and form part of the Loan Offer which comprises Specific Loan Offer Conditions and General Terms and Conditions.*

/Cont’d...

In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply.”

Therefore, I accept that the **Provider’s Standard Mortgage General Terms & Conditions** are supplemental to the Specific Loan Offer Conditions and the General Terms and Conditions contained in the **third loan offer** dated **09 January 2007**.

Condition 14 of the **Provider’s Standard Mortgage General Terms & Conditions** details as follows:

“14. Interest Rate

(a) Subject to Sub-Clause 14(b), all Loans are subject to the Bank’s Mortgage Rate at the date the Loan is drawn down.

(b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:

(i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank (“ECB”) rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement.

(ii) There will be no reduction in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.

(c) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

(i) The rate of interest applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer.

(ii) The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable interest rate which may be increased or decreased by the

/Cont’d...

Lender at any time, and in this respect, the decision of the Lender will be final and conclusively binding on the Borrower”.

The **Loan Acceptance** was signed by the Complainants on **11 January 2007**, on the following terms:

“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

I/We fully understand and accept the specific nature of this Remortgage Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.”

I note that that the loan acceptance document is dated **28 December 2006** however the Complainants’ solicitor corrected by hand the date to **09 January 2007**.

It is clear that the **third loan offer** provided for an interest-only mortgage on a fixed interest rate of 4.49% to apply until **30 November 2008**, after which a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainants. The nature of the variable interest rate set out in **Condition 14 (c)** was clearly one that could be increased or decreased by the Provider at any time. **Condition 14 (c)** does not mention the application of a tracker interest rate to the Complainants’ mortgage loan on the expiry of the fixed interest rate period.

I accept that the Provider issued the **first loan offer** on **18 December 2006** and the **second loan offer** on **09 January 2007**, which both offered a tracker interest rate, however the Complainants did not accept either of those loan offers. The Complainants subsequently requested a fixed interest rate, and the Complainants accepted the **third loan offer** dated **09 January 2007**, which provided for a fixed interest rate. The Complainants signed the **Loan Acceptance**, having confirmed that the Loan Offer Letter, the Specific Loan Offer Conditions and the General Terms and Conditions had been explained to them by their solicitor and that they understood the terms of the loan offer.

/Cont’d...

The Complainants' representative, in his post Preliminary Decision submission dated **07 December 2021**, submits that the *"loan was applied, underwritten, and agreed as Tracker Mortgage"*.

I accept that the **first loan offer** did provide for a tracker interest rate however this loan offer was not accepted or signed by the Complainants. On foot of a request made by the Complainants, the Provider issued the **third loan offer** which provided for a fixed interest rate. By accepting and signing the terms of the **third loan offer**, the Complainants entered into a fixed interest rate mortgage loan agreement with the Provider. Therefore, it is incorrect to state that the Complainants' mortgage loan was underwritten or agreed as a tracker mortgage loan.

The Complainants' representative, in his post Preliminary Decision submission dated **07 December 2021**, also seeks to rely on **Condition 14 (b)** of the **Provider's Standard Mortgage General Terms & Conditions** and in particular the reference to *"In the case of a Tracker Mortgage"*. As noted above, it is **Condition 14 (c)** that applies to the Complainants' mortgage loan on the basis that it is a fixed interest rate mortgage loan. **Condition 14 (b)** is not applicable to Complainants' mortgage loan because it is not a tracker interest rate mortgage loan. The **third loan offer** which was the loan offer accepted by the Complainants provided no contractual or other entitlement to a tracker interest rate at draw down or at any other time during the term of the loan. The mere reference to the term tracker mortgage in the **Provider's Standard Mortgage General Terms & Conditions** does not in and of itself create an entitlement to a tracker interest rate on the part of the Complainants.

I note from the **mortgage loan account statements** that the full loan amount was drawn down on **24 January 2007**.

Prior to the expiry of the fixed interest rate period, the Provider states that it issued a Product Expiry Letter to the Complainants. I am disappointed to note that a copy of the Product Expiry Letter that purportedly issued to the Complainants in **November 2008** has not been furnished in evidence to this office by the Provider. **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;

/Cont'd...

- 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."

The Complainants' mortgage loan was incepted for a term of 30 years commencing from **11 January 2007** and the **Product Expiry Letter** purportedly issued in **November 2008**. I understand that the mortgage loan was transferred to a third-party provider in **2017**. As such, it appears to me that the Provider is obliged to retain that documentation on file for 6 years from the date the relationship with the mortgage holder ends.

The Provider has however furnished this office with a **template Product Expiry Letter** which was in use at that time. The **template letter** details as follows:

"Dear XXX

The fixed term on your mortgage is coming to an end on XXXX so now its time to start thinking about your next mortgage deal.

Any borrowings you have on this Fixed Rate will automatically roll to our Standard Variable Rate from XXXX [in] line with the terms and conditions of your mortgage. The Standard Variable Rate will be XXX.

Alternatively, you can select a new Fixed Rate. With this, you will continue to have the security of knowing what your monthly repayments will be. You can choose your new fixed rate over 2, 3 and 5 years.

Just call our dedicated team on [number]. We are here to make the process of choosing your new mortgage rate simple and hassle-free. If we don't hear from you before the end of XXXX your current rate will automatically revert to the Standard Variable Rate.

/Cont'd...

We would like to take this opportunity to thank you for your continued business and we look forward to offering you another great deal on your mortgage!

...

Variable Rate Loans: The payment rates on this housing loan may be adjusted by the lender from time to time. Fixed Rate Loans: You may have to pay charges if you pay off a fixed-rate loan early

In circumstances where the Complainants did not respond to the Product Expiry Letter, the interest rate on their mortgage loan account switched to the Provider's standard variable rate. I have not been provided with any evidence that would indicate that the Complainants raised any concerns with the Provider when their mortgage loan account defaulted to the Provider's standard variable rate in **November 2008**.

The Complainants appear to be of the view their mortgage loan "*should have reverted to the Tracker margin from 1st of December as outlined in their loan offer*". It is important to note that the Complainants did not avail of the offer of a tracker interest rate as provided for in the **first loan offer** dated **18 December 2006** or the **second loan offer** dated **09 January 2007** as they did not sign and accept those loan offers. I am satisfied therefore that no legally binding agreement was formed on foot of either the **first loan offer** or the **second loan offer**. The evidence shows that the Complainants were formally offered and accepted a loan at a fixed interest rate, as opposed to a tracker interest rate, by signing and accepting the **third loan offer** dated **09 January 2007**.

The Complainants' representative, in his post Preliminary Decision submission dated **07 December 2021**, submits that this office "*is allowed look beyond the 4 corners of the loan agreement*" and is of the view that "*consideration should be given to the journey which began with an application and everything until initial loan offer was Tracker Mortgage and the only change was that the customers sought to fix for the initial period*". In determining this complaint, I have carefully considered both the documentary evidence submitted by both parties together with the submissions made by the parties to the complaint. From the evidence before me, it is clear that the Complainants ultimately entered into a fixed interest rate mortgage loan agreement with the Provider. It is the **third loan offer** that forms the contractual basis of the mortgage loan agreement between the Complainants and the Provider. The **first loan offer** and **second loan offer** were never accepted or signed by the Complainants and therefore are no longer valid and have no bearing on the Complainants' mortgage. The Complainants clearly chose to proceed with a fixed interest rate mortgage loan rather than a tracker interest rate mortgage loan. The fixed interest rate mortgage loan that the Complainants agreed to did not provide for a contractual or

/Cont'd...

regulatory entitlement to a tracker interest rate on the expiry of the fixed interest rate period.

I note that there is a reference to “*Tracker Mortgage*” in the second paragraph of the **Loan Acceptance** pertaining to the **third loan offer** dated **09 January 2007**, as quoted above.

This appears to be an error on the part of the Provider as the sentence that contains this erroneous reference to “*Tracker Mortgage*” is in relation to potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainants understood this had to be repaid before the deeds of the property could be released and returned.

The Complainants’ representative, in his post Preliminary Decision submission dated **07 December 2021**, appears to maintain that the single reference to “*Tracker Mortgage*” in the “*declaration*” section of the **third loan offer** somehow has the effect of overriding the true nature of the mortgage loan. I am assuming that any reference to “*declaration*” by the Complainants’ representative in his post Preliminary Decision submission means the **Loan Acceptance** that was signed by the Complainants on **11 January 2007**. I cannot accept the Complainants’ representative submission in this regard as a “*declaration*”, in my view, cannot determine the type of mortgage. In this case, the “*Loan Type*” and “*Interest Type*” are clearly particularised in the “*Important information*” section of the **third loan offer** as being fixed in nature, and not a tracker mortgage loan. Furthermore, **Condition 14(c)** of the terms and condition of the **Provider’s Standard Mortgage General Terms & Conditions** attached to the **third loan offer** clearly stipulates what will transpire at the end of the fixed interest rate, as detailed above. **General Condition 14 (c)** does not state that a tracker interest rate will apply.

The Complainants’ representative, in his post Preliminary Decision submission dated **07 December 2021**, maintains that the terms of the **third loan offer**, in particular the nature of the applicable interest rate, were not set out clearly by the Provider and refers to **Article 5, Article 6 and Article 7** of the **Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts**. In this regard, it is appropriate to firstly consider **Article 5** of the **Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts** which details as follows:

“In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.

Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).”

I have reviewed the **third loan offer** dated **09 January 2007** together with the terms and conditions attaching thereto and I accept that the mortgage loan documentation is drafted in "*plain, intelligible language*".

As outlined above, it is clear that the terms and conditions of the **third loan offer** provided for an interest-only mortgage on a fixed interest rate of 4.49% to apply until **30 November 2008**, after which a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainants. The nature of the variable interest rate set out in **Condition 14(c)** was clearly one that could be increased or decreased by the Provider at any time.

The Complainants' representative also refers to **Articles 6 and 7** of the **Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts** which deal with misleading actions and misleading omissions with respect to commercial practices. I do not consider that the single, erroneous, use of the word "*Tracker*" in this sentence of the **Loan Acceptance**, which was not related to the interest rate applicable to the Complainants' mortgage loan, could have led to any reasonable understanding that the interest rate applicable to the loan was a tracker interest rate. This sentence was clearly not in relation to the interest rate applicable at the end of the initial fixed interest rate period. Whilst this error on the part of the Provider is entirely unsatisfactory, I am satisfied that the particulars of the **third loan offer** dated **09 January 2007** are sufficiently clear as to the type of mortgage offered to the Complainants and confirm that the Complainants were offered a mortgage loan on a fixed interest rate as opposed to a tracker rate. Therefore, I am of the view that the evidence before me does not support the Complainants' representative's contention that reference to "*Tracker Mortgage*" in the **Loan Acceptance**, that was signed by the Complainants on **11 January 2007**, amounted to a "*misleading*" commercial practice on the part of the Provider.

There is no other mention of "*Tracker Mortgage*" in the Complainants' **third loan offer** which was signed and accepted on **11 January 2007**, apart from **Condition 14 (b)** of the **Provider's Standard Mortgage General Terms & Conditions**, as outlined above. However, I am of the view that **Condition 14 (b)** did not apply to the Complainants' mortgage loan given the interest rate applicable was a fixed interest rate as opposed to a tracker interest rate. If the Complainants' mortgage loan was a tracker mortgage, then I would expect the particulars of the Loan Offer Letter and Specific Loan Offer Conditions to contain details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14 (b)**, however, there is no reference to a fixed rate margin or an ECB rate in the Complainants' loan documentation.

/Cont'd...

I have considered the Complainants' mortgage loan documentation in its entirety, and I note that the Complainants had no contractual or other entitlement to a tracker interest rate on the expiry of a fixed interest rate in **November 2008**.

In accordance with the **Provider's Standard Mortgage General Terms & Conditions** attaching to the **third loan offer** dated **09 January 2007**, the Complainants were entitled to a further fixed interest rate, or if no such rate was offered by the Provider, to the Provider's standard variable interest rate. If the Complainants were of the view that the fixed interest rate mortgage loan offered to them in **January 2007**, was not suitable to them, or indeed were not satisfied as to what would transpire at the end of the fixed interest rate period, the Complainants could have decided not to accept the **third loan offer** dated **09 January 2007**. However, the Complainants signed the **Loan Acceptance** on **11 January 2007** in the presence of their solicitor and confirmed that they accepted the **third loan offer** on the terms and conditions set out therein.

I note that tracker mortgages had been withdrawn from the market by the Provider from **mid-2008** and therefore the Complainants could not have been offered a tracker interest rate when the fixed interest rate period expired in **November 2008**. In any event, the Complainants had no contractual entitlement to a tracker interest rate when the fixed interest rate period concluded in **November 2008**.

However, whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainants' mortgage loan account at the end of the fixed interest rate period on **November 2008**, I am also of the view that the information provided to the Complainants in the **Loan Acceptance** was somewhat confusing.

The standards expected of the Provider in all its dealings with the Complainants are set out in **Chapter 1** of the **Consumer Protection Code 2006**, which came into force on **1 August 2006**, and provides that:

"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers".

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainants. Whilst I accept that "*typographical*" errors can occur and in this circumstance that error did not affect the Complainants' underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought

/Cont'd...

this typographical error to the Complainants' attention and highlighted how the error occurred, in advance of the Complainants making their complaint to this office.

I note that by way of letter dated **23 November 2020** addressed to the Complainants' representative, the Provider offered the Complainants a goodwill payment of €1,250 with a view to resolving their complaint and noted that the offer "*remains open to your clients to accept at any time up until the FSPO makes a final decision on their complaint*". By way of letter to this office dated **26 May 2021**, the Provider clarified to this office that the goodwill offer "*remains open to the customers to accept at any time, and it remains open should the Ombudsman wish to take it into consideration in terms of reaching a decision on the complaint*". A copy of this letter was furnished to the Complainants' representative however no response was received. This office sent a further letter to the Complainants' representative on **05 October 2021** to inform him that "*in circumstances where we have not received a response from your office, we will take it that the Complainants do not wish to accept the Provider's goodwill offer at this time.*"

For the reasons set out in this Decision, on the basis that the Complainants had no entitlement to a tracker mortgage interest rate, I consider the offer of €1,250 to be a reasonable attempt by the Provider to resolve this complaint in the context of its error. Therefore, 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**

20 December 2021

/Cont'd...

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.