



<u>Decision Ref:</u>	2021-0543
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants hold two mortgage loan accounts (ending **7738** and **7884**) with the Provider. Both mortgage loan accounts were secured on the Complainants' then principal private residence. At the time of the complaint to this office the property was rented. This complaint relates to the Complainants' mortgage loan account ending **7738**.

The mortgage loan account ending **7738** which is the subject of this complaint, was for the loan amount of €150,000 and the term of the loan was 35 years. The Letter of Approval dated **21 February 2008** detailed the loan type as "*Staff Home Loan*." The mortgage loan account ending **7738** was redeemed on **16 May 2019**.

The mortgage loan account ending **7884** was for the loan amount of €150,000 and the term of the loan was 35 years. The Letter of Approval dated **21 February 2008** detailed the loan type as "*Disc Tracker (LTV<=60%/<200K) HomeLoan*". The mortgage loan account ending **7884** was redeemed on **25 September 2019**.

The Complainants' Case

The Complainants are siblings. The First Complainant was an employee of the Provider from **2006** to **2013**.

The Complainants outline that they took out a *“split mortgage”* with the Provider in **April 2008**, as follows;

- a) Mortgage loan account ending **7738**, which is the subject of this complaint, was drawn down for the loan amount of €150,000 on a staff rate of 3.00% pursuant to the terms and conditions of a Letter of Approval dated **21 February 2008**.
- b) Mortgage loan account ending **7884** was drawn down for the loan amount of €150,000 on a 12-month tracker interest rate of ECB + 0.75% pursuant to the terms and conditions of a Letter of Approval dated **22 February 2008**.

The Complainants submit that the First Complainant *“took a redundancy offer in 2010 and left [the Provider]”*. They state that when the First Complainant left the Provider’s employment, mortgage account ending **7738** was switched to the Provider’s standard variable rate. They submit that at that time *“we felt we should have been offered a tracker rate however we didn’t take it further, assuming the Terms & Conditions of the Offer Letter allowed it.”*

The Complainants state that **Special Condition 4** of the Letter of Approval dated **21 February 2008** for account ending **7738** details that on the cessation of employment with the Provider the interest rate on the account *“will be immediately increased to the rate then payable by an ordinary mortgagor with similar advances”*. The Complainants say that *“Nothing stipulates the rate should be either a Tracker or a Standard Rate nor does it detail the basis for defining “an ordinary mortgagor with similar advances.”*

The Complainants submit that it is *“clear”* that the Provider has erred in not offering them a tracker rate on the mortgage account ending **7738**. They say that their other mortgage account ending **7884** is an example of a *“similar advance”* for the purpose of **Special Condition 4** in circumstances where *“it issued on the same date, related to the purchase of the same property and to the same borrowers.”* On that basis, they submit that the Provider should have applied the same rate interest that applied to the *“associated”* account ending **7884** to account **7738** when the First Complainant left the Provider’s employment.

The Complainants further submit that it is unclear from reading the Letter of Approval *“if the staff rate was in fact a variable or a fixed rate.”* They further state that the **European Standard Information Sheet** enclosed with the Letter of Approval provided that the rate on the mortgage account *“will roll over into a Tracker Mortgage Rate appropriate for the*

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balance outstanding on the loan at the end of this period and as may be varied from time to time.”

They do not accept the Provider’s submission that the **European Standard Information Sheet** was for illustrative purposes only. They submit that this document was *“misleading on the part of [the Provider] as it leads to false information being provided with no warning or mention that a tracker rate may not be available”*.

The Complainants say that *“at no point was a warning or guidance issued to [them] in relation to the potential of not being able to avail of the same rate that was applied to the associated [account ending 7884] at some point in the future.”* They submit that they *“have been unable to find anywhere that warns of the potential pitfall of [the First Complainant] accepting a Staff Rate (i.e. that it could affect the availability of a tracker rate at a later date)”*. They state that the Provider’s submission *“that as a staff member [the First Complainant] should have been aware is insulting.”*

The Complainants outline that the Provider’s failure to apply the tracker rate to the account ending **7738** *“led to a breakdown in the [Complainants’] relationship which has led to untold stress and arrears on account ending 7738 as [the First Complainant] is not working and cannot meet the repayments.”* They further submit that *“both personal finances and credit history has been impacted.”*

The Complainants detail that the mortgaged property was *“surrendered”* to the Provider in **March 2018**.

The Complainants want the Provider to *“amend the [Complainants’] icb and provide compensation”*.

At the time of making the complaint the Complainants had also sought to *“Back date the account to the applicable tracker rate”*, however the mortgage account has since been redeemed in **May 2019**.

The Provider’s Case

The Provider outlines that the First Complainant commenced employment with the Provider on **26 June 2006** and ceased employment with the Provider on **31 May 2013**.

The Provider states that the Complainants had two mortgage loan accounts with the Provider as follows;

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- The Complainants' mortgage loan account ending **7884** was issued on **9 April 2008** as a Discount Tracker Home Loan.

The Provider details that on the expiry of the initial 12-month discounted tracker period on **9 April 2009**, the applicable tracker rate was 3.75% (ECB + 2.25%) and this rate was applied to mortgage loan account ending **7884**.

- The **Letter of Approval** dated **21 February 2008** with respect to the Complainants' mortgage loan account ending **7738** specifies that the loan was a Staff Home Loan with an interest rate of 3% and makes no reference to the ECB refinancing rate or to a tracker interest rate. The Provider submits that the Complainants had no contractual right to a tracker interest rate on this loan at any time throughout the period of the loan, and as a result they were not offered a tracker rate in **2013** or at any other time. The Provider states that the rate of interest applicable at the end of the staff rate period was the Provider's current standard variable rate. It relies on **Special Condition 4** of the Complainants' **Letter of Approval** in support of this.

The Provider states that mortgage loan account ending **7738** and mortgage loan account ending **7884** are two separate mortgage loan agreements. It details that *"each loan was issued with separate loan approvals and each with its own individual contractual terms and conditions."* It submits that the loan approvals did not contain any condition detailing that the same terms and conditions would apply to both loans.

The Provider states that it is satisfied that **Special Condition 4** was sufficiently clear and transparent as to the interest rate to be applied to the account ending **7738** on termination of the First Complainant's employment with the Provider. It details that **Special Condition 4** provided that the rate of interest applicable in the event of an employment termination *"would be immediately increased to the rate then payable by an ordinary mortgagor with similar advances."* *The "ordinary mortgagor with similar advances" to which this condition relates is an ordinary mortgagor who has a variable rate mortgage loan."*

The Provider further relies on **Condition 1** of the **General Mortgage Loan Approval Conditions** which provided that the loan was a variable rate loan. The Provider submits that this condition was *"included in all loans issued by the Bank and it applied to all loans unless there is a specific provision in the Letter of Approval which provides otherwise."* The Provider further details that the **General Mortgage Loan Approval Conditions** and the Provider's **Mortgage Conditions** state that, if a loan is a variable rate loan, this means that the Provider may vary the rate of interest from time to time at the discretion of the directors of the Provider.

The Provider states that *“Although the staff rate rarely varies, the Revenue Commissioners regularly assess staff rates from the perspective of any benefit in kind (BIK) which may arise. The staff rate for some employees had to be adjusted following such an assessment by the Revenue Commissioners in 2009.*

The staff rate is generally otherwise regarded as “fixed” at 3%. In this regard, there is a condition in the special conditions related to fixed rates. It is also clear from that provision that the rate at the end of a “fixed rate” is a variable rate.”

The Provider states that in accordance with **Special Condition 4**, the Provider’s **Staff Credit Policy** relevant to the period in which the Complainants’ loan was issued stated that in the event of an employment terminating, the interest rate would be amended to the standard variable rate. It details that the Staff Credit Policy which provided for the Complainants preferential staff rate was *“clear”* as to what would happen to the mortgage loan account in the event of the First Complainant’s employment ceasing with the Provider.

The Provider states that as an employee of the Provider, the First Complainant would have been familiar with the **Staff Credit Policy**. It states that she had access to the Provider’s Staff Credit Policy through the Provider’s intranet website. It states that in addition, the mortgage application was submitted through the Provider’s branch and the branch staff would have been positioned to accurately communicate the staff rate policy to the First Complainant as with any other staff member.

The Provider states that the wording contained in the **European Standardised Information Sheet** is sufficiently clear and transparent as to its legal status with regard to the Complainants’ mortgage agreement. It refers to **page 1** of the European Standardised Information Sheet which states that *“This document does not constitute a legally binding offer.”* It states that this document contains information and illustrations only.

The Provider states that in order for the Complainants to be able to *“revert”* the mortgage account to a tracker interest rate *“in the future”*, such a tracker interest rate entitlement must exist in the first place. It states that this is not applicable in the Complainants’ mortgage loan contract and therefore the Provider states that it had no obligation to provide information to the Complainants in respect of *“reverting”* to a tracker rate.

The Provider further states that *“it is worth noting a ruling of the Financial Services and Pensions Ombudsman in respect of a similar loan agreement to that of the Complainants, a ruling dated 17 April 2020, in which it is stated:*

“It is clear to me that the Letter of Approval envisaged an interest rate of [] and in the event that the Complainant’s employment with the Provider ceased, a variable rate would then apply.”

The Provider states that there was a “*short delay*” between the end of the Complainant’s employment and receipt by the Provider of notice of the end of employment. It details that although the Staff Lending policy provided that a staff member who had borrowings from the Provider should contact their branch to inform the branch that their employment was ending, this did not always occur. It states that it does not hold a copy of such notification of the end of employment or the commencement of the rate switching process in respect of account ending **7738**.

The Provider details that it provided the Complainants with 30 days’ removal of the staff rate and application of the variable rate and wrote to them on **12 August 2012** to confirm that the change was being made. It states that *“the earliest date on which the switch could have been performed ... was in mid-September. At that time a rate change when processed mid-month automatically backdated the transaction to the 1st of the month. Had the change been processed in mid-September the Bank would not have provided the required 30 days notice. Therefore the earliest date ... from which the change could have occurred was 01 October 2013.”*

The Provider states that the mortgage account ending **7738** first went into arrears in **June 2013** and remained in arrears until the Provider agreed to capitalise the arrears in **January 2015**. It states that the account fell into arrears again in **October 2016**, and by **May 2019** the outstanding balance, including arrears of €23,845.34, was €166,099.73.

The Provider outlines that the Complainants voluntarily surrendered the property in **March 2018**. The Provider details that a lodgement of €275,981.58 was made to mortgage loan account ending **7738** on **3 May 2019** and the account was closed on **16 May 2019** with the balance of €109,667.85 transferred to the mortgage account ending **7884**.

The Provider states that the Complainants’ second mortgage loan account ending **7884** was redeemed on **25 September 2019** and the shortfall of €37,539.12 was written off.

The Complaints for Adjudication

The complaints for adjudication are as follows;

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- a) The Provider incorrectly failed to advise the Complainants in **2008** of the consequences of applying a staff rate to their mortgage loan account ending **7738**; and

- b) The Provider incorrectly failed to offer a tracker interest rate to the Complainants on mortgage loan account ending **7738** when the First Complainant's employment with the Provider ceased in **2013**.

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.

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

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

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

Following the issue of my Preliminary Decision, the Provider made a further submission to this office under cover of letter dated **26 October 2021**, a copy of which was transmitted to the Complainants for their consideration.

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The Complainants have not made any further submission.

Having considered the Provider's additional submission and all of the submissions and evidence furnished to this office, I set out below my final determination.

The Complainants applied for a mortgage on **1 February 2008**. I have considered the **Application for Credit** that has been furnished in evidence and I note that there is no reference to interest rates therein.

The Provider wrote to the Complainants on **21 February 2008**, detailing as follows;

"Mortgage Number: [ending 7738]

...

The following outlines our proposal based on the information you have given us regarding your personal circumstances, financial needs and plans. The loan preferences and options you have chosen are also listed, as at February 20th 2008.

Proposal

We propose the following:

Tracker – A variable interest rate that is linked to ECB rates.

Mortgage details agreed

You have selected a loan type from a range which we are prepared to offer you based on your needs and circumstances. You have chosen a repayment term and flexible options (where relevant) to achieve a repayment amount best suited to your needs and preferences. Details are as follows:

- *Amount of loan required* €150,000.00
- *Property price/value* €320,000.00/€320,000.00
- *Loan Purpose* Buying a Home (PPR)
- *Loan Type* Staff Home Loan
- *Repayment term required* 35 Years
- *Flexible repayment option* Big Freeze

...

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*Reason(s) if Mortgage Details different from our proposed mortgage options
Our proposed mortgage options are based on the information and preferences
you have supplied to us in initial discussions. If you have subsequently adjusted
your preferences the following reason(s) was/were provided:*

N/A

*Please review the information in this letter and ensure the mortgage features
and details best suit your requirements and wishes, given the advice from [the
Provider] staff and the information you provided.*

..."

The Complainants take issue with the information given to them in **2008**, when their mortgage loan was applied for. They state that they *"have been unable to find anywhere that warns of the potential pitfall of [the First Complainant] accepting a Staff Rate (i.e. that it could affect the availability of a tracker rate at a later date)"*. It is important for the Complainants to be aware that the mortgage options made available to them at the time they applied for the mortgage loan were the then available options from the Provider.

The Complainants elected to choose a split mortgage with mortgage account ending **7884** on an initial discounted tracker interest rate of ECB + 0.75% (an interest rate of 4.75% at the time), and mortgage account ending **7738** on the staff home loan rate of 3%. If the Complainants were not happy with two mortgage loans across two rate options, they could have requested a single mortgage loan with the entire sum on a tracker interest rate. However, the Complainants did not take issue at the time and the proposal proceeded to Letters of Approval being issued on the basis of the rate options selected by the Complainants.

The **Letter of Approval** with respect to mortgage loan account ending **7884** dated **22 February 2008** details as follows;

<i>"Loan Type:</i>	<i>Disc Tracker (LTV<=60%/<200K) HomeLoan</i>
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<i>Purchase Price / Estimated Value :</i>	<i>€320,000.00</i>
<i>Loan Amount :</i>	<i>€150,000.00</i>
<i>Interest Rate :</i>	<i>4.75%</i>
<i>Term :</i>	<i>35 year(s)"</i>

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

"Special Conditions

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...

4. *The interest rate and mortgage repayment indicated in the letter of approval are based on the ECB rate applicable at the date of the letter of approval and takes into account the discounted period referred to above. The ECB rate may change on or before drawdown.*

...

9. *The interest rate applicable to this tracker loan may be varied by [the Provider] provided it will not exceed 0.75% over the European Central Bank (the "ECB") refinancing rate (the "ECB rate") for the first 12 Months (the discount period) from the date of loan issue. The ECB rate may be varied from time to time by the ECB. In the event of any variation of the ECB rate during the discount period, the interest rate will not be more than 0.75% over the ECB rate as varied by the ECB. [The Provider] reserves the right to alter the said percentage over the ECB rate at any time prior to drawdown.*

On expiry of the discount period, the interest rate will be the then current [Provider] tracker mortgage rate (comprising of a certain percentage over the ECB rate) appropriate to the loan as may be varied in accordance with variations to the ECB rate. In the event of any variation of the ECB rate the revised interest rate will apply not later than 1 calendar month from the effective date provided by the ECB."

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **01 April 2008**. The Acceptance of Loan Offer states as follows:

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

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

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

...

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

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The **Letter of Approval** with respect to mortgage account ending **7738** dated **21 February 2008** details as follows;

<i>“Loan Type:</i>	<i>Staff Home Loan</i>
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Purchase Price / Estimated Value : €320,000.00

Loan Amount : €150,000.00

Interest Rate : 3%

Term : 35 year(s)”

The **Consumer Credit Act 1995** notices detail as follows;

“WARNING

...

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

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

“Special Conditions

...

4. *In the event of your employment with [the Provider] terminating, for any reason whatsoever, or your repayments being more than three months in arrears, the interest rate of this advance will be immediately increased to the rate then payable by an ordinary mortgagor with similar advances, and the advance will be at call.*

...

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

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

“1. STANDARD CONDITIONS RELATING TO ALL LOAN APPROVALS

...

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1.10 Whenever the directors of [the Provider] in their absolute discretion consider it desirable the interest rate payable under this advance may be varied.

...

5. CONDITIONS RELATING TO FIXED RATE LOANS

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

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

5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of, and at the time of such repayment, pay whichever is the lesser of the following two sums:

- (a) A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or
- (b) A sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum to that being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.

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

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

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

Page 1 of the **European Standardised Information Sheet** details as follows;

*“This document does not constitute a legally binding offer.
The figures are provided in good faith and are an accurate representation of the
offer that the lender **would** make under **current market conditions** based on the
information that has been provided. It should be noted, however, that the figures
could fluctuate with market conditions.” [my emphasis]*

...

Description of Product

...

*This is a staff loan and is based on your current employment with [the Provider] or
[another named Provider] (whichever is applicable).*

*Should your employment by either entity cease or if your repayments are more than
3 months in arrears, you will be required to switch to a non staff product. In
addition, if your loan is an interest only loan and your employment by either entity
ceases, you will be required to repay your loan by repayments of principal and
interest rather than interest only. You will also have the option of moving to
another lender.”*

Page 2 of the **European Standardised Information Sheet** details as follows;

“Nominal Rate *The interest rate is 3 percent*

*The interest rate may vary from time to time. Notice will be
given in respect of rate increases. No notice will be given for
decreases in rate.*

*The option to apply for a fixed rate product (if available) may
be exercised by you at any time otherwise the rate will*

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remain a variable rate. An administration fee of EUR 100 is payable when switching from a variable to a fixed rate product. In the case of [Product] loans where all or part of the loan has been advanced by way of transfer to a Holding Account, the option to apply for a fixed rate product (if available) only arises where all the funds have been withdrawn from the Holding Account. There are no lock-in periods or penalties associated with this product."

Pages 4 and 5 of the European Standardised Information Sheet contain an Illustrative Amortisation Table and details as follows;

"Illustrative Amortisation Table

Summarised amortisation table illustrating the capital outstanding and the monthly repayments for the first year followed by the yearly figures over the term of the loan and based on the assumptions referred to below. Note: Where the loan is a variable rate loan, the payment rates on the loan may be adjusted by the lender from time to time.

.....

Assumptions:

The table above illustrates the amortisation of the loan assuming the loan runs full term and interest rates that currently prevail are available for the term of the loan.

The rate is fixed for 2 year(s). The above table assumes that the loan will roll over into the Tracker Mortgage Rate appropriate for the balance outstanding at the end of this period and as may be varied from time to time."

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **01 April 2008**. The Acceptance of Loan Offer states as follows:

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

- iv. Letter of Approval*
- v. the General Mortgage Loan Approval conditions*
- vi. [the Provider's] Mortgage Conditions*

/Cont'd...

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

...

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

It is clear that the Letter of Approval envisaged an interest rate of 3% and in the event that the First Complainant's employment with the Provider ceased, the staff interest rate period would end and in accordance with **Special Condition 4** the interest rate would be changed to *"the rate then payable by an ordinary mortgagor with similar advances"*. The variable rate in the **General Mortgage Loan Approval Conditions** of the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the **Letter of Approval** having confirmed that it had been explained to them by their solicitor in **April 2008**.

The Complainants have outlined that the First Complainant ceased her employment with the Provider in **2010**. However, I note that the **Standard Financial Statement** for both Complainants dated **30 November 2011** details as follows;

<i>"</i>	<i>Borrower 1</i>	<i>Borrower 2</i>
...
<i>Occupation (if unemployed please give a previous employment)</i>	<i>[Redacted]</i>	<i>[The Provider]</i>
<i>In Permanent Employment Y/N</i>	Y	Y
<i>Name of Employer & Length of Service</i>	<i>[Employer name redacted]</i> 4 YRS	5 YRS"

The **Standard Financial Statement** for both Complainants dated **13 June 2012** details as follows;

<i>"</i>	<i>Borrower 1</i>	<i>Borrower 2</i>
...
<i>Occupation (if unemployed give previous occupation)</i>	<i>[Redacted]</i>	<i>[The Provider]</i>
<i>In Permanent Employment Y/N</i>	Y	Y

/Cont'd...

Name of Employer & Length of Service	[Employer name redacted] 3 YRS	6 YRS"
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The Provider's internal email dated **19 June 2012** details as follows;

"Subject: RE SFS [ending] 7738 & [ending] 7884

...

Re above mortgage account numbers please note that [the First Complainant] is a staff member of [the Provider], Mortgage is split into 2 separate loans as [the First Complainant] is entitled to a staff rate and repays toward mortgage account [ending] 7738 at the moment. Mortgage account [ending] 7884 is repayed [sic] by [the Second Complainant]".

The **Standard Financial Statement** for the First Complainant only dated **12 March 2014** details as follows;

"	Borrower 1
...	...
Occupation (if unemployed give previous occupation)	Homemaker
...	...
Permanent Employment Y/N	Y Unemployed

It does not appear to me that the First Complainant left the Provider's employment in **2010** as the Complainants have submitted. It appears from the evidence that the First Complainant was still employed by the Provider in **June 2012** and had left the Provider's employment by the time the SFS was completed in **March 2014**.

I note that the Provider wrote to the Complainants on **12 August 2013**, detailing as follows;

"As [the First Complainant] recently left the company I can confirm that your mortgage account is due to be switched from the staff rate of 3.00% to our LTV variable rate currently 4.34%. This rate will be applicable from 01 October 2013. Your revised monthly repayment will be approximately €573.45. We have calculated your new scheduled mortgage repayment based on the mortgage balance as at today's date. We will write to you when we have switched your loan and confirm your new revised repayment.

/Cont'd...

...

If you have any further queries in relation to your mortgage account please do not hesitate to contact us [the Provider's number]."

The Provider wrote to the Complainants again on **2 October 2013** detailing as follows;

"We have now amended your mortgage as follows :

**Product Type Home Loan – Variable Rate (ltv)
Term remaining: 355 Months
...
Interest rate: 4.34%"*

The Provider has furnished a document titled "**Mortgage Lending Rates**" which is stated to be *"effective from the start of business on 2nd September 2013"* and details as follows;

*"Existing business
Home Loan Rates*

Variable Rates

	Rate %	APR%
Standard Variable Rate (SVR)*	4.34	4.4
LTV Variable Rate	4.34	4.4

LTV Tracker Maturity Rate

	Rate %	APR%
LTV Tracker Rate*	3.75	3.8

Fixed Rates

	Rate %	APR%
2 Year Fixed	7.25	5.1
5 Year Fixed	8.75	6.8

**This rate is available to existing customers with this option noted in their terms and conditions.*

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Note: The rate applicable to existing customers is determined in accordance with their loan documentation and is available on request."

I note that the then current tracker interest rate in **October 2013** was 3.75% (ECB + 3.25%).

The Complainants have submitted that the Provider "*erred*" by not offering them a tracker rate at the time the First Complainant left the Provider's employment. I note that the Complainants say that they want the mortgage loan account ending **7738** to "*revert*" to the tracker rate of interest at this time. For the avoidance of doubt the evidence shows that mortgage loan account ending **7738** was never on a tracker rate of interest.

I note that the Provider is seeking to rely on the contents of the Provider's **Staff Banking Credit Policy** and has furnished an undated version of the **Staff Banking Credit Policy** in evidence. The Provider states that this version of the policy was applicable when the Letter of Approval issued in **February 2008**, and a version of the **Policy** effective from **12 November 2009** was applicable when the First Complainant ceased employment with the Provider. I have considered both versions of the **Policy** and I note that both detail as follows;

"Staff Accounts

The branch manager must make sure that all staff follow this policy.

If you leave the company, you cannot continue to hold a staff loan or account at preferential rates. You should tell your branch the date your employment will end. They will amend the interest rate to the standard variable rate or overdraft rates from the day after you leave the company.

...

If you leave the company

If you leave the company, for whatever reason, you must arrange to convert your facilities to normal customer accounts."

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The Complainants have submitted that they are entitled to rely on the rates used in the **European Standardised Information Sheet (ESIS)** which provided that the rate was fixed for 2 years and would roll over to a tracker interest rate at the end of that period.

Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider must provide certain standard pre-contractual information to borrowers by means of a personalised European Standardised Information Sheet. The purpose of a European Standardised Information Sheet is to enable a borrower to make an informed decision on whether or not to accept a loan offer from the Provider by comparing the credit available from the Provider to what is available in the market.

Having considered the content of this documentation, I note that it is specifically detailed on **page 1** of the European Standardised Information Sheet that the document is not a legally binding offer. Furthermore, on **pages 4 and 5** of the European Standardised Information Sheet, it is set out clearly that the illustrative table has been prepared based on current “*market conditions*”, but that those figures could “*fluctuate*”.

I am of the view that the Complainants do not have a contractual entitlement to a tracker interest rate on the basis of the information contained in the European Standardised Information Sheet. The information contained in the Illustrative Amortisation Table was for illustrative purposes only and was prepared on the basis of the rates applicable at the time the mortgage loan issued in **April 2008**.

The Illustrative Amortisation Table was specifically outlined to be based on the assumption that the interest rates that “*prevailed*” at the time would be available for the term of the loan.

The Provider has submitted that **Condition 1** of the **General Mortgage Loan Approval Conditions** provided that the loan was a variable rate loan. It has also submitted that “*The staff rate for some employees had to be adjusted following ... an assessment by the Revenue Commissioners in 2009. The staff rate is generally otherwise regarded as “fixed” at 3%.*” I find the Provider’s submissions as to whether the staff rate was fixed or variable to be somewhat contradictory.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, submits that the ESIS along with the Staff Policy documents, formed “*part of the 'factual matrix' of the contract and it therefore should be considered to assist in construing the contract*”. The Provider submits that “*the Preliminary Decision has failed to take account at all of the fact that the nature of the staff home loan rate was also made clear in the Bank’s Staff Credit Policy (the Policy) ...*” and “*It also stated expressly in the Policy that in the event of an employment terminating, the interest rate will be amended to the standard variable rate.*”

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I have not been provided with any evidence to suggest that the Provider's Staff Credit Policy was incorporated into the terms and conditions of the Complainants' mortgage loan documentation or that it was even accessed by or made available to the Complainants prior to accepting the terms and conditions of the Letter of Approval dated **21 February 2008**. I find it surprising that the Provider seeks to rely on a Staff Policy document as opposed to the actual Letter of Approval to explain the nature of the staff interest rate applicable to the Complainants' mortgage loan.

I note the Provider's suggestion that the ESIS should also be considered as part of the "factual matrix" of the mortgage loan agreement. However, I am of the view that this assertion on the part of the Provider does not consider the assumptions included in the ESIS which illustrate the Complainants' mortgage loan account as being "fixed" for two years and rolling onto a tracker mortgage rate thereafter as follows;

"The rate is fixed for 2 year(s). The above table assumes that the loan will roll over into the Tracker Mortgage Rate appropriate for the balance outstanding on the loan at the end of this period and as may be varied from time to time."

Therefore, it is unclear how the Provider considers that document to be helpful to "assist in construing the contract", when this document also appears to reflect the Provider's equivocal description of the staff rate. It appears to me that the Provider has failed to review and consider this document in its entirety before making its post Preliminary Decision submission.

I note that the Complainants' mortgage loan documentation is silent as to whether the loan is a fixed or a variable type loan. **Special Condition 6** provides that **General Condition 5** (Conditions relating to Fixed Rate Loans) applies to the mortgage loan. The Provider submits that this provision is only applicable if a fixed interest rate was applied to the Complainants' loan.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, details that my interpretation of the mortgage loan documentation is "incorrect" and that "it is clear from the Complainants' mortgage documentation... it was clearly referred to as a variable rate of 3%". This appears to contradict the Provider's previous submission that "the staff rate is generally otherwise regarded as "fixed" at 3%." I note that the Provider has stated that this reference to the staff rate as being "fixed" was "intended to convey how the staff preferential rate operated in practice (i.e. that the staff preferential rate would generally continue at a 'set' rate in most circumstances) rather than that the staff

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rate was a fixed rate product." I find this to be entirely unsatisfactory given the Provider has previously submitted that the staff rate *"is generally otherwise regarded as "fixed" at 3%"* but now seeks to qualify this statement by detailing that it *"was intended to convey how the staff preferential rate operated in practice"*. It would appear to me that the Provider has furnished contradictory statements as to the nature of the applicable staff interest rate. Therefore, I do not accept the Provider's submissions that there *"is nothing unclear about the language used in the mortgage documentation"*, as it appears that the Provider itself is unable to maintain a definitive description, even at this stage, of the nature of the staff interest rate.

For the purposes of adjudicating on this complaint about an entitlement to a tracker interest rate on the mortgage loan in **2013**, I am of the view that it is not necessary to decide on the nature of the staff home loan rate, save to say, that the mortgage loan is silent on this and there are references in the General Conditions to both variable rate loans and fixed rate loans. It is both disappointing and unacceptable that the nature of the rate is not stipulated by the Provider, and I would expect this to be clearly set out in the Complainants' mortgage loan documentation, in particular the Letter of Approval.

The Provider has submitted that the *"ordinary mortgagor with similar advances"* to which **Special Condition 4** relates *"is an ordinary mortgagor who has a variable rate mortgage loan."* It appears to me that in accordance with **Special Condition 4**, the appropriate rate to apply to the mortgage loan account when the First Complainant's employment with the Provider ceased in **2013** was *"the rate then payable by an ordinary mortgagor with similar advances"*. The *"rate then payable"* is referable to a rate when the employment ceased in **2013** and not a rate that was set by the Provider and accepted and payable by ordinary mortgagors in **2008**, when the Complainants' mortgage loan was taken out.

The Complainants submit that the applicable rate is a tracker interest rate of ECB + 2.25% as mortgage account ending **7884** was operating on a tracker rate and that mortgage loan constitutes a similar advance. They say that *"it issued on the same date, related to the purchase of the same property and to the same borrowers."* The documentary evidence shows that each of the Complainants' mortgage loan accounts are separate and subject to different terms and conditions and therefore, the fact that their other account was operating on a tracker rate of ECB + 2.25%, did not give the Complainants an entitlement to such a rate for the account which is the subject of this complaint.

There is no provision in the Letter of Approval or the Specific Loan Offer Conditions or the General Terms and Conditions to link the Complainants' mortgage account ending **7738** which is the subject of this complaint, to the Complainants' other mortgage account

ending **7884**, such that would mean that they share the same terms and conditions in relation to the applicable interest rates.

In the circumstances of this particular complaint, I accept that the Provider was not under any obligation to offer the Complainants a tracker interest rate in **October 2013**, in circumstances where the Complainants' mortgage loan documentation did not provide for a tracker interest rate entitlement at the end of the staff rate period. **General Condition 1.10** provides that the Provider in its absolute discretion may vary the interest rate payable.

There was no contractual right or obligation on the Provider to apply a tracker interest rate to the mortgage loan at that time. If the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan at the time, the Complainants could have contacted the Provider at the time.

I note that the Complainants have submitted that *"the increased rate has caused us hardship, as you'll see from subsequent arrears on the account and a number of forbearance requests submitted."* It is important for the Complainants to be aware that in signing the **Letter of Approval** and the **Acceptance of Loan Offer** on **1 April 2008**, the Complainants were binding themselves to the terms and conditions of the mortgage loan which included making the appropriate monthly repayments to discharge the loan.

I note that the Complainants entered into a number of forbearance arrangements with the Provider. The Complainants first completed a **Standard Financial Statement** in respect of both mortgage accounts on **18 November 2011**. The First Complainant emailed the Provider on **20 December 2011** as follows;

"The mortgage numbers are [ending] 7738 and [ending] 7884. 6 months interest only has been approved on both accounts. [Provider employee] just needs an email from yourself confirming you are supporting the recommendation".

In **January 2012**, the Complainants entered into an interest only repayment arrangement on the account for six months. In **July 2012**, they entered into a further interest only repayment arrangement on the account for three months. It appears that the Complainants first went into arrears in **June 2013** when they missed a repayment of €514.64. In **June 2014**, they entered into a reduced repayment arrangement for 6 months.

The evidence shows that the arrears on the account were capitalised in a capital and interest restructure agreement in **January 2015**. In **October 2016**, the Complainants again

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entered into arrears on the mortgage loan when they missed a repayment of €638.08. It appears that arrears continued to accrue on the account until **May 2019**.

I note that the Complainants signed a **Voluntary Surrender Offer** on **15 March 2019** in which they voluntarily and unconditionally offered to hand back possession of the mortgaged property to the Provider in full and final settlement of the mortgage.

A document titled "**Details re Proceeds of Sale**" dated **29 April 2019** has been furnished in evidence and states "*Sale Agreed Price: €283,500.00*".

The mortgage account ending **7738** was redeemed in full in **May 2019**. It appears from the evidence that funds lodged in excess of the balance of €109,667.85 were transferred to the related mortgage account ending **7884**.

The evidence shows that the Provider engaged with the Complainants between **2012** and **2016** in relation to the arrears on the account and agreed alternative repayment arrangements with the Complainants. The Complainants appeared to have experienced difficulty in meeting their mortgage repayments in **late 2011**, before the interest rate was amended from the staff rate of 3% to the LTV variable rate in **2013**.

I requested that the Provider furnish this office with a table which compared the manner in which the Complainants' mortgage loan amortised on a monthly basis from when the First Complainant ceased her employment with the Provider in **October 2013** to the date of redemption of the mortgage loan account in **May 2019** and the manner in which it would have amortised on a monthly basis if a tracker interest rate of (ECB + 3.25%) had been applied from **October 2013** to that date. The difference in monthly repayments made and the monthly repayments that would have been required to have been made if the tracker interest rate (ECB + 3.25%) had been applied to the mortgage account between **October 2013** and **May 2019**, is represented in the table below:

Date Range (inclusive)	Actual monthly repayments (€)	Monthly repayments if the mortgage was on the Tracker Rate of ECB + 3.25% (€)	Difference between the rates per month (€)
Oct 2013	€588.02	€474.47	€113.55

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Nov 2013 – Dec 2013	€587.98	Between €575.59 and €555.39	Between €12.39 and €32.59
Jan 2014	€746.87	€679.55	€67.32
Feb 2014	€623.07	€556.27	€63.01
Mar 2014	€591.50	€524.68	€1.44
Apr 2014	€702.07	€634.53	€142.01
May 2014	€618.07	€550.96	€58.01
Jun 2014	€604.04	€523.38	€43.98
Jul 2014	€510.61	€672.10	-€161.49
Aug 2014	€510.61	€530.91	-€20.30
Sep 2014	€512.26	€510.03	€2.23
Oct 2014 – Dec 2014	€512.18	€666.33	-€154.15
Jan 2015 – Aug 2015	€637.05	€690.84	-€53.79
Sep 2015	€639.31	€693.10	-€53.79
Oct 2015 – Mar 2016	€639.23	€693.02	-€53.79
Apr 2016 – Aug 2016	€639.23	€687.99	-€48.76
Sept 2016	€638.08	€686.84	-€48.76
Oct 2016 – Aug 2017	€638.00	€686.76	-€48.76
Sep 2017	€637.52	€686.28	-€48.76
Oct 2017 – Aug 2018	€637.43	€686.18	-€48.75
Sep 2018	€639.31	€688.07	-€48.76
Oct 2018 – Apr 2019	€639.25	€688.01	-€48.76

It is evident that from **July 2014** onwards, it was in fact more advantageous to the Complainants for the mortgage account ending **7738** to be on the variable rate instead of the tracker interest rate of ECB + 3.25%. Between **January 2015** and **April 2019**, the Complainants' monthly repayments were between €48.76 and €53.79 less per month on the variable rate. Therefore, it does not appear to me that the arrears on the account were linked to the interest rate on the account.

In any event, for the reasons outlined above I do not accept that the Complainants had any contractual entitlement to a tracker interest rate at the end of the staff rate period.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, states as follows;

"... the Ombudsman is "of the view that it is not necessary to decide on the nature of the staff home loan rate". The Bank respectfully submits that the Ombudsman cannot and should not state in his Preliminary Decision that it is not necessary to

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decide on an issue (and so fail to give full consideration to the issue) and then subsequently partially uphold a complaint, based on that issue.”

With respect to the above statement made by the Provider, I would point out that I have clearly given full consideration to this issue and have determined that the mortgage loan documentation is silent as to the nature of the staff interest rate and there are references in the General Conditions of the Letter of Approval to both variable rate loans and fixed rate loans. In determining the complaint for adjudication at (a) above, it is necessary to consider the particulars of the mortgage loan documentation to determine whether the Provider explained the consequences of applying a staff rate to mortgage loan account ending **7738** to the Complainants.

With that in mind, I am of the view that the nature of the applicable staff interest rate ought to have been clearly explained to the Complainants from the outset as well as the nature of the interest rate that would be applicable to the mortgage account when the First Complainant's employment with the Provider ended.

I am of the view that the information given to the Complainants in the Letter of Approval and the accompanying terms and conditions should have been clearer from the outset as to the nature of the applicable staff interest rate.

The **Consumer Protection Code 2006 (“CPC 2006”)** was in effect at the time the Letter of Approval issued to the Complainants in **February 2008**.

I note the following provisions of the **CPC 2006**;

“Chapter 1 – General Principles

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

...

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

...

(6) makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;

Chapter 2 – Common Rules for all Regulated Entities
Provision of Information to the Consumer

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(12) 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.”

In the circumstances, I am of the view that the Letter of Approval or the accompanying terms and conditions were not sufficiently clear, such that the Provider made full disclosure of all relevant material information to the Complainants in accordance with the **CPC 2006**. Given the potential implications for the customer, the Provider should have set out, in plain language, the nature of the staff rate applicable to the mortgage account, and the nature of the interest rate that would be applicable to the mortgage account when the Complainant's employment with the Provider ended.

The **CPC 2006** obliges the Provider to make full disclosure of all material information in a way that seeks to inform the customer and to ensure that important information is provided to a customer in a clear and comprehensible manner.

Nonetheless, this does not give rise to any obligation on the Provider's part to offer the Complainants a tracker interest rate in **October 2013**. It is clear that the Complainants' mortgage loan documentation did not provide for an entitlement to a tracker interest rate at the end of the staff rate period. Nor does it appear to me that the Complainants requested a tracker interest rate at the end of the staff rate period.

In addition, there is no provision in the Loan Offer or the Specific Loan Offer Conditions or the General Terms and Conditions to link the Complainants' mortgage account ending **7738** which is the subject of this complaint, to the Complainants' other mortgage account ending **7884**, such that would mean that they share the same terms and conditions in relation to the applicable interest rates.

To conclude, the Complainants do not have a contractual entitlement to a tracker interest rate on mortgage accounts ending **7738** at the end of the staff rate period. However, I am of the view that there have been failures on the part of the Provider in relation to the information contained in the Complainants' mortgage loan documentation with respect to the nature of the applicable staff interest rate. For this reason, I partially uphold this complaint.

The Provider, in its post Preliminary Decision submission dated **26 October 2021**, under the heading '*The Grounds Proposed to be Relied Upon*', details as follows;

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“4.2 The grounds upon which a complaint may be upheld under Section 60(2)(a) is where the “the conduct complained of was contrary to law” and under Section 60(2)(g) where the “conduct complained of was otherwise improper”.

4.3 The Bank submits that there is simply no basis for the complaint to be upheld on these grounds.”

The Provider will be aware that the **CPC 2006**, applied to regulated entities, that being “entities regulated by the Financial Regulator”. The **CPC 2006** outlines that “Regulated entities are reminded that they are required to comply with this Code as a matter of law.” Therefore, the Provider should be aware that its failings under the **CPC 2006**, as outlined above, are contrary to law therefore can be considered under **Section 60(2)(a)** of the **Financial Services and Pensions Ombudsman Act 2017**.

Moreover, I find that the Provider’s conduct in failing to set out clearly and plainly the nature of the applicable staff interest rate in respect of mortgage loan account ending **7738** to be improper in and of itself under **Section 60(2)(g)** of the **Financial Services and Pensions Ombudsman Act 2017**.

For the reasons set out above, I am of the view that this complaint is partially upheld. To mark the Provider’s shortcomings under the **Consumer Protection Code 2006**, I direct that the Provider pay to the Complainants a sum of €3,000 compensation.

For the reasons set out in this Decision, I partially 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 partially upheld, on the grounds prescribed in **Section 60(2)(a) and Section 60(2)(g)**.

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

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

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The Provider is also required to comply with **Section 60(8)(b)** of the ***Financial Services and Pensions Ombudsman Act 2017***.

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

20 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.