



<u>Decision Ref:</u>	2021-0559
<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
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €160,000 and the term was 35 years. The **Mortgage Loan Offer** which was signed on **19 July 2005** provided for a fixed interest rate of 2.75% for a period of 12 months, following which a "*Variable at 3.600%*" would apply.

The Complainants' Case

The Complainants state that they were issued with a **Mortgage Loan Offer** dated **July 2005** offering a fixed interest rate of 2.75% for a 12-month period.

In **August 2006**, prior to the expiry of the 12-month fixed rate period, the Complainants submit that they received a **Mortgage Form of Authorisation** which included the option of a tracker variable interest rate however they selected a 2-year fixed interest rate on **23 August 2006**.

The Complainants state that they completed a further **Mortgage Form of Authorisation** on **15 August 2008** and selected a further 5-year fixed interest rate of 5.99%. The Complainants note that the option of a tracker interest rate was also contained in the **Mortgage Form of Authorisation**.

The Complainants submit that the **Mortgage Form of Authorisation** stated that *"If I do not hear from you by 04/09/2008, your homeloan will, in accordance with your loan offer, automatically move to the variable rate of 5.500%."* The Complainants maintain that the only *"variable rate"* option of 5.5% referred to in the **Mortgage Form of Authorisation** was the tracker interest rate.

The Complainants submit that they *"were not offered the Tracker Variable ECB + 1.25% rate along with the other options"* when the 5-year fixed interest rate term expired in **2013**. In this regard, the Complainants rely on a **Product Review Notice** dated **5 August 2008** which they assert *"supports [their] claim to be entitled to the offer of the tracker rate"*. The Complainants further submit that the **Product Review Notice** clearly shows that the Provider not only offered *"the Tracker rate but it was also the default position."* The Complainants maintain that the tracker interest rate would have applied by default without any **Mortgage Form of Authorisation**. The Complainants are of the view that this correspondence is *"proof that our loan was going to revert to a Tracker variable rate"*.

The Complainants submit that they do not agree with the Provider's submission in relation to **General Condition 7(b)** of the **Mortgage Loan Offer Letter** dated **14 July 2005** where it details that the interest rate will switch to the Provider's variable rate at the end of the fixed rate period. The Complainants contend that the Provider *"has clearly not advised if this is a standard, existing, homeloan or tracker variable rate."* The Complainants are of the view that relying on **General Condition 7(b)** means that the Provider is *"allowed to argue which of the above variable rates the Loan can revert depending on the markets at the time"*. The Complainants state that they should be *"entitled to argue the same"*. The Complainants are of the view that given the Provider does not *"clearly identify what the variable rate under Clause 7(b) refers to, [they] believe strengthen[s] [their] case."*

The Complainants explain that when they applied to fix the rate on their mortgage loan account in **2008**, *"they did so on the assumption that their account had a roll to rate."* The Complainants are of the view that any account on a fixed rate *"had a 'parent rate' attaching."* The Complainants maintain that, in their case, the *"parent rate"* to which their account would roll to *"was ECB + 1.25% and it is further understood that this was the default roll to rate on this account at the end of any future fixed rate periods."*

The Complainants submit that they find it “*extraordinary*” that the Provider has not provided an explanation regarding the alteration to the Provider’s “*mortgage system that took place in November 2008*”.

In this regard, the Complainants assert that the roll to rate was ECB + 1.25% but “*the deliberate action by the Bank in November 2008 altered the roll to position of the account*”. The Complainants submit that if the alteration had not occurred, “*this account would have rolled to its tracker rate.*” The Complainants are of the view that the Provider “*altered the system internally to ensure that the automatic roll to option (as was agreed) for this case was changed from Tracker to [the Provider’s] standard variable rate.*”

The Complainants disagree with the Provider’s view that a “*warning*” was contained in the **Product Review Notice of August 2008** and detail that “*neither the first nor second page contained any such warning and that such warnings were issued much later.*” The Complainants state that “*The first time this warning was ever issued to [them] was when [their] fixed rate was coming to an end on the mortgage form of authorisation dated 06/08/2013.*”

The Complainants state that in the **Product Review Notice** dated **6 August 2013**, the Provider advises that their “*tracker commitment to us would be deemed to be [at an] end if [the Complainants] availed of a fixed rate or standard rate.*” However, the Complainants state that the Provider did not include the option of a tracker variable interest rate, which they maintain that they “*would have selected if shown.*”

The Complainants disagree with the Provider’s view that the term “*Variable Rate*” is defined clearly and submits that defining a variable rate “*in conditions that were never updated to account for the introduction of a new variable rate type namely tracker*” is “*trite and cliched*” on the part of the Provider. The Complainants submit that the **Consumer Protection Code 2006** was fully in force in **2008** and “*its rules are affected here*”. The Complainants state that the term “*standard variable rate*” is not used in the mortgage loan documentation and “*variable rate*” is the term used to refer to both a tracker variable rate and a non-tracker variable rate. The Complainants submit that the term “*standard variable rate*” is used for the first time in their mortgage documentation in the **Product Review Notice** dated **6 August 2013**.

The Complainants dispute the Provider’s assertions in relation to the Complainants obtaining legal advice in respect of signing their loan offer and state that “*legal representatives were under an assumption the Lenders explained matters thoroughly either by verbal or written words.*” The Complainants submit that this is another “*trite*” example of the Provider “*suggesting it was the responsibility of the Solicitor to advise on interest rates*”.

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The Complainants are seeking the following:

- (a) The tracker rate of ECB plus 1.25% to be applied to the mortgage loan account;
- (b) The application of the tracker interest rate to be backdated from the date of expiry of the fixed interest rate period in **September 2013** to present; and
- (c) All overpaid capital and interest to be refunded and taken from the principal loan.

The Provider's Case

The Provider submits that the **Mortgage Loan Offer Letter** dated **14 July 2005** was signed and accepted by the Complainants on **19 July 2005**. The Provider states that this **loan offer** provided the Complainants with a "twofold" interest rate as follows:

- 12 Months – Fixed Rate at 2.750%; and
- 408 Months – Variable Rate at 3.60%

The Provider maintains that there *"is no provision anywhere in the Complainants' mortgage loan offer letter for a tracker rate of interest."* The Provider is of the view that the *"mortgage loan offer was clear as to what would happen at the end of the fixed rate period"*. The Provider relies on **General Condition 7(a)** and **General Condition 7(b)** in this instance. The Provider submits that when the initial fixed rate period expired, the mortgage loan account *"rolled onto a home loan standard variable rate of 4.44% on 25 August 2006 in line with Clause 7 (b)."* The Provider is also relying on **General Condition 6(a)** as this *"sets out what is meant by a variable rate of interest"*. The Provider maintains that there is no *"legitimate expectation"* for a tracker rate of interest to apply and if a tracker interest rate was to apply on expiry of the fixed rate period, this would *"have been clearly specified in the Special Conditions"*.

The Provider submits that the mortgage loan account was amended on **23 August 2006** when the Complainants signed and accepted a **Mortgage Form of Authorisation** in which the *"Complainants chose to fix for a 2 year period"*. The Provider states that the Complainants did not select the tracker option which was offered to them at the time. The Provider maintains that **General Condition 7(b)** *"is clear on what happens at the end of a fixed rate period; and it is clear that the 2006 MFA preserves General Condition 7(b) in force."* The Provider further asserts that there was *"no regulatory requirement in August 2006 for mortgage lenders to warn specifically tracker rates might no longer be available"*.

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The Provider submits that the mortgage loan account was further amended on **15 August 2008** when the Complainants signed and accepted a **Mortgage Form of Authorisation** in which the Complainants chose *“to convert their mortgage loan account to a 5 year fixed rate of interest of 5.99%.”*

The Provider maintains that the Complainants did not select the tracker interest rate option that was offered at this time. The Provider submits that it was the Complainants' *“personal decision”* not to avail of the tracker rate. The Provider maintains that the contents of the *“2008 MFA are clear as to its effect on the question of tracker interest rates.”* The Provider asserts that the *“consequences of each choice of product is clearly set out”* and that it was *“abundantly clear to the Complainants that they were rejecting the offer of a tracker rate contained in the 2008 MFA by choosing the 5 year fixed rate offered.”*

The Provider submits that *“upon the review of documentation”*, it cannot confirm that a warning was present in the **Product Review Notice** dated **5 August 2008** as the Provider *“does not hold a copy of this Product Review Notice.”*

The Provider maintains that the wording of the **Product Review Notice** *“could not have been plainer: if the Complainants did not tick the form to select one of the rates on offer (and that includes the tracker rate option) the choice of rates would not be open after 4 September 2008.”* The Provider submits that the Complainants were *“made aware of the option to contact the Provider in respect of the various options”* and that this *“illustrates that the Provider went out of its way to ensure the Complainants had every means the Provider could make available to them to discuss their choice of rates”*.

The Provider states that it is *“fully satisfied that it has provided fair, reasonable, and clear information on the Product Review Notice letter so as to inform the Complainants of their options”*.

The Provider submits that the mortgage loan account was further amended on **14 August 2013** when the Complainants signed and accepted a **Mortgage Form of Authorisation** in which the Complainants chose to *“convert their mortgage loan account to a home loan standard variable rate of interest”* of 4.35%.

The Provider disagrees with the Complainants' assertion that, given the home loan variable rate is at 5.79% and the tracker offered is 5.5%, then the *“variable rate”* referred to in the Product Review Notice dated **5 August 2008** must be the tracker rate. The Provider submits that the **Mortgage Offer Letter** dated **14 July 2005** provides that the loan would revert to the standard variable rate. The Provider is of the view that a *“Rate Options*

*Letter does not create legal relations as between the parties” and that the language used in the **Product Review Notice** in **2008** “unequivocally advises the Complainants that if they chose a fixed rate of interest, they would lose their tracker rate”.*

The Provider states that in **August 2006** and **August 2008**, the Complainants were offered the choice of “*Homeloan Variable Rate*”, “*Tracker Variable Rate ECB + 1.25%*” and fixed rate options over various terms. The Provider submits that both **Mortgage Forms of Authorisation** were in accordance with **General Condition 7(b)**. The Provider submits that in **2006** and **2008**, the Provider “*was satisfied to offer the tracker interest rate option to the Complainants at the end of the fixed rate periods.*”

The Provider maintains that **General Condition 6(a)** and **General Condition 7(b)** “*are clear, concise and comprehensible*” and that when the Complainants signed the **Mortgage Forms of Authorisation** in **2006** and **2008** “*they were on notice of the fact that a variable interest rate could be amended at the Provider’s discretion*”.

The Provider submits that the term “*Variable Rate*” is defined in **General Condition 6 of Mortgage Loan Offer** dated **14 July 2005** and notes that this is the term “*used across the financial industry to denote a Provider’s base variable rate.*” The Provider is of the view that the term “*is defined in clear and transparent language, and can be easily understood.*” The Provider submits that the Complainants had the benefit of legal advice and that if they had any doubts about the contents of the **Mortgage Loan Offer** dated **14 July 2005**, “*they should have raised this with their legal representatives at the time.*” The Provider submits that the variable rate is commonly referred to as a ‘standard variable rate’ and that the standard variable rate does not have a reference rate or an additional fixed margin.

The Provider disagrees with the Complainants’ assertion that they breached the **Consumer Protection Code 2006** as the Complainants “*had access to independent legal advice before they borrowed the mortgage loan*” and that both Complainants were “*certainly informed of General Condition 6(a) and 7(b) from the outset.*”

The Provider notes the Complainants reference to a “*top up loan*” in **October 2006** and submits that “*each account is dealt with in reference to its individual terms and conditions as set out in the individual Mortgage Loan Offer Letter.*” The Provider states that it is not “*appropriate to make comparisons in the terms or operation between individual accounts.*” The Provider submits that to “*undermine the legal binding contracts with reference to other documents would be contrary to the fundamental principles of a contract.*”

The Provider maintains that the **Mortgage Loan Offer Letter** dated **14 July 2005** *“forms the contractual basis of the relationship between the Provider and the Complainants and it is on this legally binding contract which the Provider relies.”* The Provider notes that the Complainants reference a *“rate matrix”* but submits that this *“does not alter the content of the Offer Letter.”*

The Provider refutes the Complainants’ assertion that the account would have converted to a tracker rate and states that the *“account was never on a tracker rate, nor did it have any entitlement to do so.”*

The Provider submits that it is in their *“commercial discretion to alter the rates offered to Borrowers and the Provider exercised this discretion in withdrawing tracker interest rates on 10 October 2008.”*

The Provider disagrees with the Complainants’ assertions in relation to the *“Product Switch”* and states that *“the rate to which a mortgage loan account rolls at the end of a fixed rate period is informed entirely by the provisions of a Borrower’s loan documentation and any subsequent amendments to same by way of signed Mortgage Forms of Authorisation.”* The Provider states that that while their administration system did detail a tracker roll to product, this *“does not represent a commitment to the Complainants and does not replace the terms and conditions which require a mortgage to revert to the rate as provided for in the loan documentation.”* The Provider asserts that the information within the administration system is for internal purposes and *“does not represent communication with the Complainants.”*

The Provider refutes the Complainants’ assertion that the mortgage loan account would have reverted to a tracker rate. The Provider submits that if the Complainants failed to sign the **Mortgage Form of Authorisation** in **2008**, *“their account would have rolled to a variable rate in accordance with the Offer Letter.”*

The Provider maintains that the Complainants’ assertions are *“unstateable”* having regard to the **Mortgage Loan Offer** dated **14 July 2005** and the subsequent **Mortgage Forms of Authorisation**. The Provider submits that the Complainants’ submissions are *“misconceived”* on their contractual entitlement to a tracker rate.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate of ECB + 1.25% on the expiry of the fixed interest period in **September 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 **22 November 2021** outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the Complainants and their representative made further submissions by way of letters to this Office dated **30 November 2021**, a copy of which was transmitted to the Provider for its consideration. The Provider has not made any further submissions.

I note that the Complainants and their representative have repeated previous submissions made to this office in relation to the merits of the complaint as outlined in my Preliminary Decision. The nature of the submissions that can be made in response to my Preliminary

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Decision were set out in the accompanying letter to that Preliminary Decision. It is neither helpful nor appropriate to repeat previous submissions.

The Complainants' representative, in his post Preliminary Decision submission dated **30 November 2021**, submits that the Central Bank of Ireland is due to issue a report concerning the Provider and "*its behaviour on all matters Tracker related*".

The Complainants' representative appears to be of the view that I should not issue my Legally Binding Decision in respect of this complaint pending the publication of this report. While I have considered the Complainants' representative's submission in this regard, I do not consider it appropriate to delay the adjudication of this matter in circumstances where this report does not relate to the specific complaint for adjudication as detailed above. I have considered this complaint on its own facts and merits.

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

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider certain interactions between the Provider and the Complainants between **July 2005** and **August 2013**.

The Complainants, in their post Preliminary Decision submissions dated **30 November 2021**, assert that it is necessary for me to consider mortgage loan account ending **1291** and, to compare the terms and conditions of that mortgage loan account with mortgage loan account ending **9322**, the account which is the subject of this complaint. Mortgage account ending **1291** was drawn down in **October 2006** and various submissions have been made previously in respect of this mortgage loan by both the Complainants and the Provider. It is not appropriate for me to consider the documentation or submissions concerning a separate mortgage loan account that is completely distinct and separate from the mortgage loan that is the subject of this complaint. Each mortgage loan is confined to its individual terms and conditions. This Decision deals with a complaint relating to mortgage loan account ending **9322** only. Therefore, I do not find it is neither necessary nor appropriate for me to consider the documentation provided in relation to mortgage loan account ending **1291**, despite the Complainants' assertions to the contrary.

The Provider issued a **Mortgage Loan Offer Letter** dated **14 July 2005** to the Complainants, which details as follows:

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**"PART 1 – THE STATUTORY LOAN DETAILS
IMPORTANT INFORMATION AS AT 14 July 2005**

- | | |
|------------------------------|---------------------|
| 1. Amount of Credit Advanced | €160,000 |
| 2. Period of Agreement | 35 Years |
| 3. Number of Repayment | |
| <u>Instalments</u> | <u>Type</u> |
| 12 | Fixed at 2.750% |
| 408 | Variable at 3.600%" |

Page 2 of the **Mortgage Loan Offer Letter** dated **14 July 2005** contains the following warning:

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

The relevant provisions of the **General Conditions** attaching to the **Mortgage Loan Offer Letter** provide as follows:

"PART 5 - THE GENERAL CONDITIONS

...

5. General Interest Rate Provisions

...

- (b) Any variation in the interest rate (whether an adjustment of interest rate as between one fixed rate period and another fixed rate period or any variation in the variable rate) may be accommodated at the discretion of the Lender by way of: (i) an adjustment to the amount of the regular repayment during the remaining term of the Loan; or (ii) an adjustment to the number of the repayments within the remaining term of the Loan; or (iii) an adjustment in the amount of the final repayment; or (iv) an adjustment in the term of the loan

...

6. Variable Interest Rates

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- (a) *Subject to clause 6 (c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards. It at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- (b) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c), or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR).*

7. Fixed Interest Rates

...

- (b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*

..."

The Complainants accepted the **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer Letter** on **19 July 2005** on the following terms:

"BORROWER'S ACCEPTANCE AND CONSENTS

...

1. *I confirm that I have read and fully understand the Consumer Credit Act notices, set out above and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."*

I note that mortgage loan account ending **9322** was drawn down on **25 August 2005**.

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It is clear to me that the **Mortgage Loan Offer Letter** dated **14 July 2005** provided for a fixed interest rate of 2.75% for the first 12 months of the term of the loan, after which a variable interest rate would be applied for the remainder of the life of the mortgage loan. The variable interest rate that was offered to the Complainants makes no reference to varying in accordance with variations in the European Central Bank main refinancing rate. Rather, the nature of the variable rate was one which could be adjusted by the Provider from time to time.

The Complainants accepted and signed the **Borrower's Acceptance and Consents** on **19 July 2005**, having confirmed that they fully understood the terms and conditions set out in the **Mortgage Loan Offer Letter** dated **14 July 2005**.

Condition 7(b) of the **General Conditions** specifically outlines what will happen at the end of any fixed interest rate period during the term of the loan. **Condition 7(b)** stipulates that the Provider has the sole discretion to offer the Complainants a further fixed interest rate period or an alternative choice of interest rates, and if the Complainants fail to make a selection, then a variable interest rate will apply to their mortgage loan. The nature of the variable rate was one which could vary at the Provider's discretion in accordance with **Condition 6(a)** of the **General Conditions**, as detailed above.

There is no reference to a tracker interest rate or an interest rate which would track the ECB rate in the **Mortgage Loan Offer Letter**. In order for the Complainants to have a contractual right to a tracker interest rate at the end of the fixed rate period, that right would need to have been specifically outlined in the mortgage loan documentation. However, no such right was set out in writing in the **Mortgage Loan Offer Letter** which was signed by the Complainants on **19 July 2005**.

The Complainants have submitted that the Provider's reference to a "*variable rate*" in **General Condition 7(b)** of **Mortgage Loan Offer Letter** dated **14 July 2005** does not make it clear whether this is "*a standard, existing, homeloan or tracker variable rate*". The Complainants, in their post Preliminary Decision submission dated **30 November 2021**, assert that the Provider "*uses 7(b) as their main defence*" and question why they are not entitled "*to the reasonable expectation that 'variable rate' could represent a Tracker Variable rate.*" I do not accept the Complainants' submission that there was ambiguity or a lack of clarity about the nature of the variable interest rate in their mortgage loan. There is no basis for the Complainants to reasonably expect that the term "*variable rate*", as it appeared in the **Mortgage Loan Offer Letter**, related to a tracker interest rate given that there is no reference whatsoever to a tracker or the ECB rate in **General Condition 7(b)**. The Complainants had an entitlement to a variable rate which could be increased or decreased by the Provider at any time. This is quite different to a tracker interest rate.

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Upon expiry of the initial fixed interest rate period, the Complainants signed a **Mortgage Form of Authorisation** on **23 August 2006** which details as follows:

“...

I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate.

(Please Note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)

Selected Rate	Description	Rate
<input type="checkbox"/>	HOMELoAN VARIABLE RATE	4.240%
<input type="checkbox"/>	1 Year Fixed	4.490%
<input checked="" type="checkbox"/>	2 YEAR FIXED	4.590%
<input type="checkbox"/>	3 YEAR FIXED RATE	4.690%
<input type="checkbox"/>	5 YEAR FIXED RATE	4.890%
<input type="checkbox"/>	10 Year Fixed	5.190%
<input type="checkbox"/>	TRACKER VARIABLE ECB + 1.25%	4.00%

...

ACKNOWLEDGEMENT AND AGREEMENT

Please read carefully before signing below. Where there is more than one borrower, any reference to “I” or “my” are to be construed as referenced to “we” or “our” respectfully.

I acknowledge that following the acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/varied by the terms

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and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. I acknowledge and agree that :-

1. *If I have applied to convert to a fixed rate Loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing interest rate.*
2. *In the case of a fixed rate Loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to be calculated in accordance with the formula set out above under "Early Repayment".*
3. *If I have applied to convert to a tracker variable rate, I agree that the interest rate applicable to the Loan is a variable interest rate any may vary upwards or downwards. The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo rate") for the term of the Loan. Any variation in interest shall be implemented by the Lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one daily newspaper. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason, the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*
4. *If I have applied to convert to a Homeloan Variable rate the payment rate on the Loan may be adjusted by the Lender from time to time.*
5. *Save as set out in this Form of Authorisation, all terms and conditions applicable to the Loan remain unchanged."*

By signing this **Mortgage Form of Authorisation**, the Complainants opted to apply a 2-year fixed interest rate to their mortgage loan account. The **Mortgage Form of Authorisation** provided that, with the exception of the conditions set out in the form, the terms and

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conditions of the Complainants' mortgage loan remained unchanged. Therefore, the **Mortgage Form of Authorisation** did not confer a new entitlement to a tracker interest rate on the Complainants on the expiry of the further fixed interest rate that they selected.

Prior to the expiry of the fixed interest rate period in **September 2008**, the Provider issued a **Product Review Notice** dated **5 August 2008** to the Complainants, which details as follows:

“ ...

I am writing to let you know that your current rate of 4.590% will expire on 4/09/2008. We have a number of attractive mortgage products and I am pleased to offer you the following rate of options:-

Description	Rate	*Projected Standard Repayment
TRACKER VARIABLE ECB +1.25%	5.500%	€850.02
1 Year Fixed	6.250%	€924.53
3 Year Fixed	6.040%	€903.41
5 Year Fixed	5.990%	€898.41
2 Year Fixed	6.140%	€913.44
HOMELoAN VARIABLE RATE	5.790%	€878.52

****This is an estimated figure only and may be higher on the actual date that the rate is changed on your account.***

To avail of your selected option, please tick the relevant rate on the enclosed Mortgage Form of Authorisation. Please sign and date this form and return it to us at [Redacted] before 4/09/2008. Unfortunately, we cannot hold the above choice of rates open after this date.

If you would like to discuss the best option for you, please do not hesitate to contact me or any member of my branch team. I would be more than happy to discuss the various options available to you.

If I do not hear from you by 4/09/2008, your homeloan will, in accordance with your loan offer, automatically move to the variable rate of 5.500%.

...”

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I note that the Provider is unable to provide a full copy of the **Product Review Notice** from **August 2008** due to a “*lapse of time*” and the Complainants have provided a copy of this document in evidence. **Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows:

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

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

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

The Complainants’ mortgage loan was drawn down for a term of 35 years. The Provider is obliged to retain documentation on file for six years from the date the relationship with the mortgage holder ends. No evidence has been submitted to this office to show that the mortgage account has been redeemed. It is therefore unclear to me why the Provider failed to retain a copy of the documentation.

The **Product Review Notice** dated **5 August 2008** set the various interest rate options available to the Complainants at the end of the fixed interest rate period. Although the Complainants were not contractually entitled to a tracker interest rate option, the Provider offered the Complainants a tracker rate option in accordance with its own commercial discretion at the time. If the Complainants did not revert to the Provider by **4 September 2008** with their preferred rate selection, then mortgage loan account would convert to the Provider’s home loan variable interest rate. The Complainants, in their post Preliminary Decision submission dated **30 November 2021**, state that the **Product Review Notice** dated **5 August 2008** states that the “*mortgage was going to revert to the Tracker Variable interest rate of 5.500%.*” It is important to note however that the **Product Review Notice**

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did not specifically state that the mortgage loan account would revert to a tracker rate in absence of a rate selection by the Complainants.

The Complainants signed a **Mortgage Form of Authorisation** on **15 August 2008**, which details as follows:

“ ...

I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate.

(Please Note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)

Selected Rate	Description	Rate
<input type="checkbox"/>	TRACKER VARIABLE ECB + 1.25%	5.500%
<input type="checkbox"/>	1 Year Fixed	6.250%
<input type="checkbox"/>	3 Year Fixed	6.040%
<input checked="" type="checkbox"/>	5 Year Fixed	5.990%
<input type="checkbox"/>	2 Year Fixed	6.140%
<input type="checkbox"/>	HOMELOAN VARIABLE RATE	5.790%

...

I note that the **Acknowledgement and Agreement** section of the **Mortgage Form of Authorisation** signed on **15 August 2008** contains the same wording as detailed in the **Mortgage Form of Authorisation** signed on **23 August 2006**. For the sake of brevity, I do not propose to repeat the details.

It is clear to me that the Complainants selected a five-year fixed interest rate of 5.99% by signing the **Mortgage Form of Authorisation** on **15 August 2008**. I note that a tracker

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interest rate of ECB + 1.25% was also available for selection however the Complainants opted for a further fixed interest rate.

The Complainants maintain that the Provider altered the default rate, or what the Complainants term as the “*roll to position*”, on their mortgage loan account from a tracker interest rate of ECB + 1.25% to the Provider’s standard variable interest rate in **November 2008**. The Complainants are of the view that the Provider “*altered the system internally to ensure that the automatic roll to option (as was agreed) for this case was changed from Tracker to [the Provider’s] standard variable rate*”.

The **Mortgage Form of Authorisation** provided that if the Complainants did not make a rate selection, their mortgage loan account would default to a variable interest rate of 5.5% in **August 2008**. It is important to highlight however that it was not agreed that the “*roll to position*” would change to a tracker interest rate of ECB +1.25% if the Complainants selected a five-year fixed interest rate, which they did by signing the **Mortgage Form of Authorisation** on **15 August 2008**.

The Complainants, in their post Preliminary Decision submissions dated **30 November 2021** appear to submit that because they were offered a tracker interest rate in the **Product Review Notice** dated **5 August 2008**, they should have been offered a tracker interest rate again at the end of the five -year fixed interest rate period. Despite the Complainants having been offered a tracker interest rate of ECB + 1.25%, they did not choose a tracker interest rate. They chose a five-year fixed interest rate. The selection of a five-year fixed interest rate by the Complainants did not confer a contractual entitlement to a tracker interest rate on the Complainants either on the expiry of the fixed interest period or at any other time during the term of the loan.

In this regard, it is important to note that the **Mortgage Form of Authorisation** that was accepted and signed by the Complainants provided that all terms and conditions applicable to the Complainants’ mortgage loan remained unchanged, save as set out in the terms of the **Mortgage Form of Authorisation**. The **Mortgage Form of Authorisation** does not contain a term that states that a tracker interest rate of ECB + 1.25% will apply or will be offered on the expiry of the fixed interest rate period. Rather, **Condition 7(b)** of the **General Conditions** attaching to the **Mortgage Loan Offer Letter** is the applicable term which outlines what will transpire at the end of the fixed interest rate period.

Prior to expiration of the five-year fixed interest rate period in **September 2013**, the Provider issued correspondence to the Complainants dated **6 August 2013** which details as follows:

“...

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I am writing to let you know that your current rate will expire on 4/09/2013. Your current rate is Repayment, 5.99% and your current repayment is €955.09. The following table sets out the choice of rates available to you. The table also contains an indicative estimate of the cost of repayments for each rate being offered which you should compare to your current repayment which we have quoted above:

Description	Rate	*Estimated Standard Repayment
Existing Variable LTV Rate PDH	4.35%	€804.94
2 Year Fixed (PDH)	4.69%	€835.06
3 Year Fixed (PDH)	4.89%	€835.03
5 Year Fixed (PDH)	5.29%	€889.53
10 YEAR FIXED RATE	6.19%	€974.24

****PLEASE NOTE: These estimates are calculated for your mortgage account AS IT IS TODAY. If your mortgage account is on a variable rate, the repayment instalment could change to reflect future interest rate changes. It is also possible that your repayment instalment could change in future to reflect the terms of your mortgage loan, for example, the end of an interest-only period. For these reasons your future repayment instalments could be significantly higher than indicated here.***

...

SWITCHES TO STANDARD VARIABLE RATES OR OTHER RATES

If you avail of a Standard Variable or Other Rate, our tracker rate commitment to you is deemed to be at an end. For the avoidance of doubt, we wish to advise you that if you avail of a Standard Variable Rate or Other Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

...

SWITCHES TO FIXED RATES

If you avail of a Fixed Rate, our tracker rate commitment to you is deemed to be at an end and the lender's prevailing Standard Variable Rate will apply on the expiry of this fixed term. For the avoidance of doubt, we wish to advise you that if you avail of a Fixed Rate, you will lose the ability to avail of a Tracker Rate Mortgage in the future.

To avail of your selected option, please complete the enclosed Mortgage Form of Authorisation (MFA) and return it to us at [Redacted] before 4/09/2013.

Unfortunately, we cannot hold the above choice of rates open after this date. **If we do not hear from you by 4/09/2013, your home loan will, in accordance with your loan offer or amended documentation, automatically move to the variable rate of Existing Variable LTV Rate PDH, a current rate of 4.35%...**

The Complainants appear to have completed a further **Mortgage Form of Authorisation** dated **6 August 2013** which details as follows:

“... ”

***Note for Customers now on a Fixed Rate of Interest**

If we do not hear from you by 4/09/2013, your home loan will in accordance with your loan offer or amended documentation, automatically move to the variable rate of Existing Variable LTV Rate PDH, a current rate of 4.35%.

Selected Rate	Description	Rate
<input checked="" type="checkbox"/>	Existing Variable LTV rate PDH	4.35%
<input type="checkbox"/>	2 Year Fixed (PDH)	4.69%
<input type="checkbox"/>	3 Year Fixed (PDH)	4.89%
<input type="checkbox"/>	5 Year Fixed (PDH)	5.29%
<input type="checkbox"/>	10 YEAR FIXED RATE	6.19%

/Cont'd...

...”

I do not appear to have been furnished with a signed **Acknowledgement and Agreement** by the Complainants however, it is not disputed between the parties that the Complainants chose the “*Variable LTV rate PDH*” of 4.35%. I have reviewed the **mortgage loan account statements** and I note that on **4 September 2013** the interest rate on the Complainants’ mortgage loan account was changed to 4.35%.

The Complainants are of the view that they were entitled to be offered a tracker interest rate when the fixed interest rate period expired in **September 2013**. As outlined above, the Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan account, and accordingly, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account in **September 2013**, or indeed at any other time. The Provider offered the Complainants a tracker interest rate of ECB + 1.25% on two separate occasions in **August 2006** and **August 2008**, despite there being no contractual obligation on the part of the Provider to do so. The Complainants however chose not to select a tracker interest rate in **August 2006** and **August 2008** and instead opted to apply a two-year fixed interest rate and a five-year fixed interest rate respectively to their mortgage loan account. While a tracker interest rate was listed as an available option in the **Mortgage Forms of Authorisation**, this did not give rise to a contractual entitlement on the part of the Complainants to a tracker rate at a future date.

Moreover, no commitment was ever given by the Provider to the Complainants that a tracker interest rate would be applied to the mortgage loan account at the end of any of the fixed interest rate periods, let alone in **2013**. On the expiry of the fixed interest rate period in **2013**, the Provider offered the Complainants the option of a further fixed interest rate period or in the absence of selection by the Complainants, a variable interest rate, and I accept that this was in line with the terms of the **Mortgage Loan Offer Letter** dated **14 July 2005**.

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

Conclusion

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

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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

22 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.