



<u>Decision Ref:</u>	2021-0562
<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>	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' principal private residence.

The loan amount was €150,000 and the term of the loan was 30 years. The particulars of the Letter of Approval dated **27 November 2006** detailed that the loan type was a "3 Year Fixed Rate Home Loan."

The Complainants' Case

The Complainants submit that they had two mortgage loan accounts (ending **0153** and **6752**) with the Provider. They submit that in **2006**, they applied for a third mortgage loan through a broker working on behalf of the Provider. The Complainants submit "that the bank and the broker were working as one in [the] same building".

In **January 2007**, the Complainants explain that they redeemed the two existing mortgage loan accounts ending **0153** and **6752** and drew down a new mortgage loan account ending **3849** on a three-year fixed interest rate.

The Complainants submit that during the application process for the new mortgage loan account ending **3849**, they were advised that in order to obtain an additional €30,000 on the loan amount they *“would have to give up [their] tracker mortgage”*. The Complainants contend that given they already had two mortgage loan accounts with the Provider, they should have been given a tracker mortgage for the third mortgage loan.

The Complainants state that they feel that their options were not explained to them by the tied agent of the Provider and that they were misled *“and later were put on a variable mortgage.”*

The Complainants are seeking the following:

- a) A tracker interest rate to be applied to their mortgage loan account ending **3849**, and
- b) Compensation for overcharging on mortgage loan account ending **3849**.

The Provider’s Case

The Provider details that the Complainants had two previous mortgage loan accounts ending **0153** and **6752**. The Provider states that *“A tracker interest rate was never applied to the Complainants’ mortgage loan account ending 0513 and/or mortgage loan account ending 6752.”* The Provider submits that mortgage loan accounts ending **0153** and **6752** *“preceded the Bank’s tracker interest rate offerings which commenced in 2004. Consequently, neither of these mortgage accounts held any tracker rate entitlements.”*

The Provider states that on **19 October 2006** it received a letter from a tied agent dated **18 October 2006**, enclosing two completed mortgage loan applications. The Provider details that the applications *“were for a new home loan in an amount of €150,000 and a residential investment loan in an amount of €175,000 respectively.”*

The Provider states that the Complainants applied for a loan in the amount of €150,000 repayable over a term of 30 years on a fixed interest rate in their home loan application dated **13 October 2006**. The Provider submits that *“the purpose of the loan was to remortgage their family home”*. The Provider submits that on **18 October 2006** its agent confirmed that *“the Complainants were seeking to redeem their existing home loans as part of a new loan application.”*

In response to the Complainants' submission that they were informed during the application process that they would have to "give up" their tracker mortgage in order to obtain an additional €30,000, the Provider states that the "*Complainants did not have a tracker rate in respect of any loan held by them with the Bank in November 2006.*" The Provider asserts that "*the Complainants had no contractual entitlement to a tracker rate at any time in respect of their existing accounts in 2006.*"

The Provider confirms that tracker interest rates were on offer to new and existing customers when the Complainants submitted their mortgage loan application to the Provider in **2006**. However, the Provider explains that the Complainants "*chose to apply to the Bank for an amount of €150,000, a thirty year loan term, and a three-year initial fixed rate period.*"

The Provider details that it issued an **Approval in Principle** dated **27 October 2006**.

The Provider states that the tied agent confirmed on **27 November 2006** that the Complainants had elected to apply the Provider's 3-year fixed interest rate and requested a term of 30 years. The Provider details that it subsequently issued a **Letter of Approval** for a mortgage loan in the amount of €150,000 repayable over a term of 30 years with an initial fixed interest rate of 4.79% to apply at draw down. The Provider submits that **Special Condition A** of the **Letter of Approval** detailed that a tracker interest rate would be applicable on expiration of the fixed rate period.

The Provider states that the Complainants signed the **Acceptance of Loan Offer** on **6 December 2006** "*with the benefit of legal advice from their solicitor*".

The Provider submits that it received an undertaking from the Complainants' solicitor on **8 December 2006** "*which contained an undertaking to redeem accounts ending 0153 and 6752 from the proceeds of the new loan account.*" The Provider details that on **17 January 2007** it received two cheques to redeem mortgage loan accounts ending **0153** and **6752** in full.

The Provider submits that prior to the expiry of the fixed interest rate period in **January 2010**, it issued a rate options letter to the Complainants. The Provider details that the Complainants signed the rate options letter on **30 December 2009** indicating their preference for a tracker interest rate of 4.25% (ECB + 3.25%).

In relation to the nature of the Provider's relationship with the broker the Provider states that "*the Complainants' broker was a separate business and operated independently from the Bank while being a tied agent of the Bank for the sale of the Bank's mortgages only.*" The Provider further details that "*The broker was a tied agent of the Bank which meant*

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that the agent could offer to the Complainants and other customers only the products and services being offered by the Bank. On completion by the Complainants of each of their credit applications, the broker sent the application to the Bank's head office where the application was assessed and approved." The Provider refutes "any suggestion whatsoever by the Complainants that the broker and the Bank were working "as one" to the detriment of the Complainants."

The Complaint for Adjudication

The complaint for adjudication is that the Complainants were not adequately advised in relation to interest rate options when they applied for, and drew down mortgage loan account ending **3849**, which the Complainants state has resulted in the loss of a tracker rate.

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

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

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a “*tied agent*” as opposed to a third-party broker.

A letter issued from this office to the Complainants on **26 July 2019** prior to commencing the investigation of this complaint to inform the Complainants of the parameters of the investigation by this office. The letter dated 26 July 2019 stated that “*this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint*”.

However, over the course of investigating and adjudicating this complaint, it became apparent that the Complainants dealt with a tied agent of the Provider as opposed to a third-party broker in respect of their mortgage loan application in **2006**.

In the circumstances of this particular complaint, the tied agent who the Complainants dealt with in **2006** appears to have been a natural or legal person who acted for and on behalf of the Respondent Provider and engaged with the Complainants on behalf of the Respondent Provider.

While I acknowledge that the Complainants’ relationship was ultimately with the Respondent Provider, I am of the view that it is in fact necessary to consider and investigate the conduct of the broker s a tied agent of the Respondent Provider, together with that of the Provider in order to determine this complaint.

In order to determine this complaint, it is also necessary to review and set out the relevant provisions of the Complainants’ mortgage loan documentation and to consider any interactions between the Provider and/or its tied agent and the Complainants in **2006**. While I acknowledge that mortgage loan accounts ending **0153** and **6752** are not the subject of this complaint, it is helpful to consider some of the details of those mortgage loans in the context of this complaint.

The Provider issued a **Letter of Approval** dated **23 February 2001** in respect of mortgage loan account ending **0153** for a loan in the amount of IR£85,000.00 repayable over a term of 360 months. The **Special Conditions** of the **Letter of Approval** detailed that the mortgage loan was “*being issued at the Bank’s Discount Variable Rate Home Loan*” of 4.95% which would be applied for 1 year from the date of draw down, with a variable rate of interest to apply thereafter.

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The nature of the applicable variable rate in this case was not a rate which would track the European Central Bank main refinancing rate but rather a variable rate which would vary *“from time to time at [the Provider’s] absolute discretion”*. The Complainants accepted the terms of the Letter of Approval by signing the **Acceptance** section on **6 March 2001** noting that they had been advised by their solicitor in relation to the loan offer and mortgage loan account ending **0153** was subsequently drawn down.

The Provider subsequently issued a **Letter of Approval** dated **18 February 2003** for mortgage loan account ending **6752** for an *“Equity Release Variable Rate Secured Personal Loan”* in the amount of €180,000 on an interest rate of 4.20% for a term of 25 years. The Complainants accepted the terms of the Letter of Approval by signing the **Acceptance of Offer of an Additional Loan** attaching to the **Letter of Approval** dated **18 February 2003** on **28 February 2003** and mortgage loan account ending **6752** was subsequently drawn down.

It is clear to me from the **Letter of Approval** dated **18 February 2003** that the loan envisioned was an equity release mortgage loan on a variable rate. The variable rate to be applied in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

Having considered the mortgage loan documentation in respect of mortgage loan accounts ending **0153** and **6752**, I note that the Complainants did not have a contractual entitlement to a tracker interest rate in respect of either of those mortgage loans. The variable rate referenced in the mortgage loan documentation in both mortgage accounts was a variable rate which could be adjusted by the Provider.

It appears that the Complainants approached a tied agent of the Provider in relation to the drawing down a new mortgage loan in **October 2006**. The Complainants signed a **Loan Application** and an **Application for Credit** on **13 October 2006** and submitted the requisite supporting documentation to the tied agent of the Provider. The **Loan Application** details as follows under the heading *“case summary”*:

“This Application is in conjunction with the other one and is for the purpose of remortgaging [mortgaged property the subject of mortgage loan accounts ending 0153 and 6752] with LTV of 50% A/C No’s [ending 0153 and 6752] will be redeemed.”

Under the *“type of loan”* section of the **Application Form**, the Complainants selected *“home loan”*. Under the *“rate type”* section of the **Application Form**, the Complainants selected *“fixed”* and specified that they wanted *“3 years”* fixed rate period.

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I note that a “*tracker home loan*” and “*tracker*” rate were also available for selection by the Complainants in the **Application Form** however the Complainants chose a 3 year fixed interest rate.

A letter from the tied agent to the Provider dated **18 October 2006** details as follows:

“I enclose two completed Applications for the above as they wish to do the following:- Redeem their existing Home loan [ending 0153 and 6752] on PDH and take out a new mortgage of €150,000 on that property. [...] The netts are a bit out but they are good clients and have a good track record.”

It appears to me that the purpose of the new mortgage loan was to re-mortgage the secured property the subject of the Complainants’ then existing mortgage loan accounts ending **0153** and **6752**. In order to do so, the Complainants had to redeem those existing mortgage loans and take out a new mortgage loan.

The Provider subsequently issued a **Letter of Approval** dated **27 November 2006** which details as follows:

“

Loan Type:	3 Year Fixed Rate Home Loan
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*Purchase Price/Estimated Value: EUR 300,000.00
Loan Amount: EUR 150,000.00
Interest Rate: 4.79%
Term: 30 year(s)”*

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

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

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...

E. THAT THE LOANS YOU HAVE WITH [the Provider's] REF: [ending 0153] AND [ending 6752] BE REPAYED IN FULL FROM [Provider's] DRAWDOWN."

General Condition 5 of the **General Mortgage Loan Approval Conditions** attaching to the **Letter of Approval** details as follows:

"CONDITIONS RELATING TO FIXED RATE LOANS

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

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

5.3 Whenever repayment of a loan in full or in part is made before 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 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 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 a sum to a Borrower at its then current New Business Fixed Rate with a maturity date 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:

“IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

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

The reverse side of each page of the **Letter of Approval** contains the following in relation to tracker mortgage loans under the heading **Housing Loans under Consumer Credit Act 1995**:

“1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate.

The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.

2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.

3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.

4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate.”

The **Acceptance of Loan Offer** was signed by the Complainants on **6 December 2006** on the following terms:

“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] 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.

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

A letter from the Complainants' solicitors to the Provider dated **8 December 2006** has been submitted in evidence, which details as follows:

"We enclose herewith Cheque Requisition together with Acceptance of Loan Offer, Solicitors Undertaking/Clients Authority and Retainer.

We would be obliged if you would arrange to let us have our client loan cheque for completion on the 15th inst.

We hereby undertake to redeem the [the Provider's] Ref [ending 0153] and [ending 6752] from the proceeds of our client loan cheque."

It is clear that the **Letter of Approval** dated **27 November 2006** envisaged that a fixed interest rate of 4.79% would apply to the Complainants' new mortgage loan account ending **3849** for three years, with tracker interest rate appropriate to the loan to apply thereafter. The **Special Conditions** and the **General Mortgage Loan Approval Conditions** attaching to the Letter of Approval do not stipulate that a specific tracker interest rate margin would apply to the mortgage loan account on the expiry of the initial fixed interest rate period. The **Special Conditions** required that the Complainants redeem mortgage loan accounts ending **0153** and **6752** from the proceeds of the mortgage loan cheque for mortgage account ending **3849**.

The Complainants accepted the **Letter of Approval** having confirmed that the Letter of Approval and the mortgage conditions had been explained to them by their solicitor.

The **mortgage loan account statements** provided in evidence indicate that mortgage loan account ending **3849** was drawn down on **12 January 2007**.

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being "*effective from the start of business on the 4 December 2009*". This document outlines as follows:

"Home Loan Rates for Existing Business

....

RATE

APR

***LTV Variable applicable to existing Home Loans
since 27/07/09.LTV Tracker Maturity Rates***

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applicable to existing Home Loans since 31/08/09

...

Tracker Rate LTV < 80%	4.25%	4.3%
Tracker Rate LTV > 80%	4.25%	4.3%

Prior to expiry of the 3-year fixed interest rate period in **January 2010**, the Provider issued a **rate options form** to the Complainants, which details as follows:

"Current options available:

You may only select one option.

Account Number: [ending 3849]

Monthly
Repayment
EUR

--- Tracker Variable Rate*	- Currently 4.2500%	813.81
--- LTV Variable Rate **	- Currently 3.5500%	757.84
--- 2 Year Fixed Rate	- Currently 5.2500%	897.74
--- 5 Year Fixed Rate	- Currently 5.7500%	941.37
--- 7 Year Fixed Rate	- Currently 6.1000%	972.54
--- 10 Year Fixed Rate	- Currently 6.1000%	972.54

...

- Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).

- * The interest rate that applies to this Tracker Mortgage Loan will never be more than 3.2500% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans.

- ** In calculating your loan to value ("LTV) ratio, we use the current loan balance and the most recent valuation on file, for this mortgage."

The reverse of the rate options form details as follows under the heading 'Tracker Mortgage Loans':

"1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate.

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The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.

2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.

3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.

4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate."

The Complainants signed the **rate options form** on **30 December 2009** indicating their preference for a tracker interest rate. The mortgage loan statements provided in evidence show that a tracker interest rate was applied to mortgage loan account ending **3849** on **12 January 2010**.

The **mortgage loan statements** submitted in evidence indicate that a tracker interest continues to be applied to the Complainants' mortgage loan account, with the latest rate change on **31 March 2016** reflecting a decrease in the ECB rate resulting in a tracker interest rate of 3.25% (ECB + 3.25%).

The Complainants appear to take issue with the advice that they received from the tied agent of the Provider and the Provider when applying for their new mortgage loan in **2006** and drawing down the mortgage loan in **2007**. While I have not been provided with any documented communications of any discussions in relation to interest rate options between the parties, there is no evidence to suggest that the Complainants were informed by the Provider that a tracker interest rate was not available at the time of their mortgage loan application in respect of mortgage loan account ending **3849**. In addition, if the Complainants wanted independent advice about interest rates available in the market, it was a matter for the Complainants to get that advice from an independent third-party advisor as opposed to an employee of the Provider or a tied agent of the Provider. In any event, it is important to note that the Complainants approached the Provider for additional borrowings in **2006**, and it was up to the Provider to firstly decide whether to agree to lend further funds to the Complainants and secondly to decide on how any loan ought to be structured.

The evidence shows that the Complainants applied for a 3-year fixed interest rate in respect of the new mortgage loan and that is what was offered to them by the Provider by way of **Letter of Approval** dated **27 November 2006**. If it was the case that, upon considering the particulars of the **Letter of Approval**, the Complainants were of the view that an initial 3-year fixed interest rate was not suitable to them, then the Complainants could have decided not to sign the **Acceptance of Loan Offer** and draw down the loan. Instead, they could have sought an alternative rate with the Provider or with another mortgage provider.

Furthermore, it is clear to me that the two original mortgage loans that were previously held by the Complainants with the Provider (mortgage loan accounts ending **0153** and **6752**) were not tracker mortgages and a tracker interest rate never applied to either loan. In fact, those mortgage loans were drawn down in **2001** and **2003** respectively, before the Provider introduced a tracker mortgage product offering in **2004**.

Therefore, there is no evidence to support the Complainants' assertion that they "*would have to give up [their] tracker mortgage*" when they sought additional borrowings from the Provider in **2006**.

The evidence shows that the Complainants, of their own choice, decided to redeem mortgage loan accounts ending **0153** and **6752** and take out a new mortgage loan with the Provider by agreeing to the terms and conditions of the **Letter of Approval** dated **27 November 2006**. While I note that the Complainants appear to believe that they 'lost' a tracker interest rate, the reality is that they did not have a tracker rate when they drew down their mortgage loan account ending **3849**, but in fact obtained a tracker rate in **January 2010** on this new mortgage when the initial 3-year fixed interest rate expired.

The tracker interest rate on offer by the Provider in **January 2010** was ECB + 3.25%, which the Provider was entitled to set at its own commercial discretion. The Provider offered a tracker interest rate to the Complainants along with the option of a LTV variable interest rate or a further fixed interest rate. The Complainants selected a tracker interest and the Complainants' mortgage loan account ending **3849** has remained on a tracker interest rate.

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.

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.