



<u>Decision Ref:</u>	2022-0041
<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>	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to mortgage loan account ending **690/1** held by the Complainant with the Provider. The loan was secured on a residential investment property.

The loan amount for the original portion of the mortgage loan account was €145,360.00 and the term of the loan was 30 years. The Letter of Offer dated **19 January 2004** provided that the loan type was “*Flexi Annuity*” and the applicable interest rate was a 12-month discounted variable interest rate of 2.59% with the Provider’s “*prevailing variable rate*” applying thereafter. This portion of the mortgage loan was cleared by the Complainant in **October 2019**.

The loan amount for the top-up portion of the mortgage loan account was €35,000 and the term was 20 years. The Letter of Offer for the top-up loan dated **7 June 2006** provided for a variable interest rate of 3.60%.

The top up portion of the Complainant’s mortgage loan account was considered by the Provider as part of the Central Bank directed Tracker Mortgage Examination (“the Examination”). The Provider identified that an error had occurred on the top-up portion of the mortgage loan account and as such that portion was deemed to be impacted under the Examination.

The Provider contacted the Complainant on **22 March 2018** advising him of the error that had occurred on the top-up portion of his mortgage loan account. The Provider detailed in the letter that *“We should have applied a tracker rate to your account after your fixed rate period expired.”*

The Provider also made an offer of redress and compensation to the Complainant in its letter of **22 March 2018**, as follows:

1. Redress of €4,228.17 covering;
 - Total interest overpaid
 - Interest to reflect the time value of money
2. Compensation of €1,500.00 for the Provider’s failure
3. Independent Professional Advice payment of €650.00.

The Provider restored a tracker interest rate of ECB + 1.10% to the top-up portion of the mortgage loan account from the date of the fixed rate expiry in **November 2009**.

In **April 2019**, the Complainant submitted an appeal to the Provider’s Independent Appeals Panel.

The Complainant sought the following in his appeal to the Provider’s Independent Appeals Panel:

- Redress for *“the years that [the primary portion of the mortgage] was not reverted up to and including the date of redress payment”* and/or *“from period in which I was not advised the tracker was available to me as an option where the only two options given to me had break funding fees associated with them”*
- Compensation of €70,000.

On **24 June 2019**, the Appeals Panel decided that the Complainant’s appeal was unsuccessful on the basis that it did not agree with the Complainant that the financial and non-financial losses being claimed arose solely as a result of the failure of the Provider to apply the correct interest rate to his mortgage loan account. The Appeals Panel was satisfied that the compensation and redress already provided was adequate.

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When the Complainant completed the Provider's internal appeals process, this Office was in a position to progress the investigation and adjudication of the complaint.

The complaint to this office is that the Provider failed to restore the original portion of the Complainant's mortgage loan to a tracker rate from the end of the fixed rate period in **2009**.

The Complainant's Case

In **June 2004**, the Complainant drew down his primary mortgage loan of €145,360.00 on an initial 12-month discounted variable interest rate of 2.59%. At the end of the initial discounted period in **June 2005**, the mortgage account defaulted to the Provider's standard variable rate. In **August 2005**, the Complainant elected to apply a tracker interest rate of ECB + 1.25% to the primary mortgage loan account.

In **July 2006**, the Complainant drew down a top-up mortgage loan under the same mortgage loan account in the amount of €35,000, on a tracker interest rate of ECB + 1.10%.

The Complainant submits that he decided to apply a three-year fixed interest rate of 4.69% to both portions of the mortgage loan on **21 October 2006**, "*based [on] information given by [the Provider] that it would remain on this rate until 1.10.2009 and then revert automatically to [the Provider's] standard variable rate*". However, the Complainant submits that he was given no option when he applied for the three-year fixed interest rate to revert to a tracker mortgage at the expiry of the fixed interest rate period. The Complainant states that tracker mortgages were "*still in operation*" when he switched to a fixed interest rate and remained in operation up until the summer of **2008**. The Complainant maintains that he had a right to such information up until the Provider "*phased out*" tracker rates.

The Complainant details that he was not offered the option of a tracker interest rate at the end of the fixed rate period, although the Provider was still offering tracker rates until **mid-2008**. He submits that the Provider could not have known on **21 October 2006** that tracker rates would be discontinued at a later point in time and therefore the Provider was "*legally obliged to offer me the tracker rate option to revert to after the fixed rate period expired*". In this regard, he states that the **Fixed Rate Instruction Form** he signed on **21 October 2006** "*omitted key information from the terms with regards to the options available to me for products that were still active the date I signed the contract*".

The Complainant submits that the **Fixed Rate Authority form** he signed in **2006** also outlined that if the loan was redeemed in whole or in part or was converted to a variable rate or another fixed rate during a fixed interest rate term, the Complainant would be required to pay a *“break funding fee”*. He states that *“a tracker rate does not incorporate such a fee, therefore I was only given the two options that did incur such a fee.”* He states that *“As this information was withheld from me, I was not in a position to make an informed decision on how I would have liked to proceed with my account with [Provider]”*.

On the expiry of the fixed interest rate period in **November 2009**, the Complainant outlines that he was not offered the option to revert either portion of the mortgage loan to the tracker rate and both portions of the mortgage loan account defaulted to the Provider’s standard variable rate.

By letter dated **22 March 2018** the Provider informed the Complainant that the top-up portion of his mortgage loan account had been deemed impacted as part of the Central Bank directed Tracker Mortgage Examination on the basis that the Provider should have applied a tracker rate to the account after the fixed period expired in **November 2009**. This portion of the mortgage loan account was restored to a tracker interest rate with a margin of ECB + 1.10%.

The Complainant asserts that the original portion of his mortgage account, which is the subject of this complaint, should also have been deemed to be impacted by the Provider as part of the Tracker Mortgage Examination, on the basis that both the primary and top-up portions of the mortgage loan account were *“taken out in the same knowledge and practice”*.

The Complainant outlines that the Provider’s refusal to restore a tracker interest rate to the primary portion of his mortgage has caused him *“serious financial difficulty over the past number of years”*. He submits that the *“stress and strain”* he has suffered could have been avoided if he had been given the information in relation to the tracker rate that he was *“rightly entitled to as a customer of the [Provider]”*.

The Complainant states that a moratorium was applied to the mortgage account on one occasion and interest only repayment periods were applied *“on at least three occasions - all due to being unable to pay the large sums owed”*. He further states that he has *“taken similar mortgage reduction payments on my other property to make ends meet”* which has caused a *“considerable amount of stress and strain on my marriage over a number of years.”* He outlines that *“Numerous changes have been made to me and my wife’s lives over the time of this mortgage to date with regards to spending patterns, savings, change in lifestyle, and most importantly, not being able to plan for the future/present”*.

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The Complainant further states that the forbearance he has had to apply to his mortgage loans has affected his credit rating.

The Complainant made a partial redemption repayment to clear the main portion of his mortgage loan in **October 2019**. He submits that the *“sole reason we chose to literally empty our savings accounts to pay off the variable rate was we believed it was the only positive outcome we could hope for in that we would not have to overpay on the wrong interest rate for another 15 years.”* The Complainant states that *“the fact that we chose to pay off the variable part of our mortgage due solely to their malpractice should be factored in to any compensation.”*

The Complainant is seeking the following:

- (a) That mortgage loan account ending **2690** is restored to the tracker interest rate that applied before the fixed rate was applied in **2006**;
- (b) Refund for the interest overpaid on the mortgage loan account ending **2690** since the period in which the Complainant was not advised that the tracker rate was available to him; and
- (c) Compensation for the Provider's failure to offer the Complainant the option of a tracker interest rate in **2009** and thereafter.

The Provider's Case

The Provider submits that following an application from the Complainant for a facility to be secured on a residential property, it issued a **Letter of Offer** to him on **19 January 2004** which stipulated that the interest rate applicable to the loan was a variable rate of 2.59%. It states that **Special Condition 145** confirmed that this rate represented a discount of 0.86% for 12 months.

The Provider details that on the expiry of the discounted variable rate period, the interest rate on the account rolled to the standard variable rate then applicable to residential lending of 3.45%, until **August 2005**, when the Complainant contacted the Provider and *“agreed”* a tracker interest rate of ECB + 1.25% (then 3.25%) for the original portion of the mortgage loan.

The Provider notes that the Complainant subsequently drew down a top-up loan in **July 2006** under the same mortgage account ending **690/1**, on a tracker interest rate of ECB + 1.10%.

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The Provider outlines that in response to a request from the Complainant, it issued a **Fixed Rate Instruction Form** to the Complainant on **7 September 2006** which detailed the terms of the fixed rates then on offer and *“included the default application of the Banks standard variable rate at the expiry of the fixed rate term”*. It states that further forms were issued at the Complainant’s request on **4 October 2006**, **9 October 2006** and **18 October 2006** which *“presented the Terms of the Fixed Rate Agreement should the Complainant elect to proceed with same and those terms did not provide for a range of options at the expiry of the fixed rate term, rather that the loan would revert to the standard variable rate which had been applicable to the loan at draw down (discounted for the first 12 months)”*.

The Provider states that at the time of the Complainant’s decision to fix the interest rate on the mortgage loan account in **October 2006**, tracker rates were available from the Provider and *“the Provider had no reason to consider that the Complainant may not be able to request the option of a tracker rate again on the expiry of the fixed rate term”*.

The Provider considers that it is reasonable to conclude that the Complainant, who had been on a standard variable rate before the tracker interest rate for the original loan portion, understood what was meant by *“standard variable rate”* as stated in the Terms of the **Fixed Rate Instruction Form**. It further states that the Complainant *“demonstrated his awareness of the difference between the Banks standard variable rate and any other variable rate”* when he contacted the Provider in **2005** and requested a tracker interest rate for the mortgage loan account on the expiry of the discounted variable interest rate.

The Provider submits that the term *“standard variable rate”* is not defined within the Complainant’s mortgage loan documentation. It states that it *“is satisfied that the term was a widely used term and one that denoted the ordinary, usual, variable rate of interest that was offered by the Bank at the time.”* The Provider states that its **Mortgage Handbook** was provided to the Complainant with his **Letter of Offer** and explains the difference between a *“fixed”* rate, *“variable”* rate, *“split”* rate and *“tracker”* rate. It further outlines that the **Mortgage Handbook** explained that the tracker rate was a variable rate which would *“track the ECB reference rate within a specified margin”* and as such, *“was clearly distinct from the variable rate outlined which was the Banks standard variable rate.”*

The Provider submits that on the expiry of the fixed interest rate period in **November 2009** the Provider’s standard variable rate was applied to both the original and top-up portions of the mortgage loan account in accordance with the Terms of the **Fixed Rate Instruction form** dated **21 October 2006**. The Provider outlines that this rate was a *“contractually defaulted rate rather than an interest rate options offering”* and it did not offer the Complainant any interest rate options at that point in time.

The Provider further states that if interest rate options had been provided to the Complainant, a tracker interest rate would not have been included, as the Provider withdrew tracker rates in **mid-2008**.

The Provider states that the top-up portion of the loan account was subsequently found to be impacted as part of the Tracker Mortgage Examination in circumstances where that loan portion had never been on the standard variable rate prior to the fixed rate period in question. It states that the Provider found in its review that *“the subsequent move from fixed to a standard variable rate may not have been understood or expected by the Complainant, in circumstances where the loan portion had no exposure to a standard variable rate, and as such, notwithstanding the demonstrated awareness of standard variable rates for the main borrowing, the Bank afforded the benefit of the doubt”* on the top-up portion of the mortgage account and returned that portion to a tracker rate of ECB + 1.10% from the **November 2009** fixed rate expiry date.

The Provider submits that in line with the protocol agreed for the Tracker Mortgage Examination *“the specific interest rate journey for each individual loan portion was considered by the Bank in reaching its determination under the Examination for each loan portion”*.

The Provider states that it had tracker rates available, subject to criteria, in the period between **mid-2005** and **mid-2008** when tracker rate options from the Provider ceased. It states that customers such as the Complainant who contacted the Provider to request a tracker rate option, were generally accommodated based on a number of factors and criteria, including for example the rates available from the Provider at that point in time, the balance of the mortgage account, and the loan to value ratio of the lending.

The Provider submits that the Complainant made a payment in **October 2019** to clear the main portion of his mortgage loan account ending **690/1**.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider failed to advise the Complainant that, by applying a fixed rate to the main portion of his mortgage loan in **2006**, he would not be entitled to revert to the tracker rate at the end of the fixed interest rate period, and
- (b) The Provider failed to offer the Complainant the option to revert the main portion of his mortgage loan to a tracker rate at the end of the fixed rate period in **2009**.

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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 Complainant was 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.

A Preliminary Decision was issued to the parties on **24 May 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 parties made further submissions, copies of which were exchanged between the parties.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

At the outset, it is to be noted that the Provider, in its post Preliminary Decision submission dated **05 July 2021** requested an Oral Hearing in order to determine this complaint as follows:

"The FSPO proposes to make findings in relation to contested factual issues without hearing any evidence. The Bank submits that an oral hearing is essential if the FSPO intends to determine the matter as proposed".

The Provider further submits that:

"...the Preliminary Decision of the FSPO includes an important factual finding, as to the Complainant's understanding of the consequences of his execution of the Fixed Rate Instructions Form on 21 October 2006 and the impact (if any) of his purported entitlement to a tracker rate".

Upon a careful review and consideration of the documentary evidence furnished to this Office, together with the submissions made by both parties, I issued a letter to the Provider dated **19 August 2021** in relation to its request for an Oral Hearing after the issuing of my Preliminary Decision. In that letter, I confirmed that I was satisfied that the submissions and evidence made by the parties do not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict.

The Provider furnished this office with a further submission on **02 September 2021**, in which the Provider stated as follows:

“...the Bank is not seeking to make oral submissions on “the interpretation of the provisions of the Complainant’s mortgage loan documentation and the effect of signing the Fixed Rate Instruction Form” as suggested in the FSPO’s letter. Rather, an oral hearing is necessary for the Bank to cross examine the Complainant as to his understanding of the effect of his execution of the Fixed Rate Instruction Form and what he expected would happen at the end of the fixed rate period”.

I afforded the Provider an opportunity to make any further submissions it deemed appropriate in this regard. The Provider made further submissions to this Office by way of letter dated **02 September 2021**, a copy of which was exchanged with the Complainant on **03 September 2021**. The Complainant noted that he had *“no further submissions to make nor would [he] have any new information to provide on cross examination should the case arise”* by way of email to this Office on **03 September 2021**. This Office issued a letter to the Provider on **13 September 2021** to confirm that in circumstances where the Complainant has no further observations or comments to make in respect of the Provider’s submissions, the adjudication of the complaint would continue.

The Provider will no doubt be familiar with the broad jurisdiction afforded to me under case law as to whether or not to hold an Oral Hearing.

In ***Ryan v Financial Services Ombudsman***, unreported, High Court, 23 September 2011 MacMenamin J stated that *“[t]he Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing”* (page 35). He added that *“[i]t is important to recognise that, if the Ombudsman’s office is to be permitted to carry out its statutory function effectively, it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law”*. (Page 35).

In **Molloy v Financial Services Ombudsman**, unreported, High Court, 15 April 2011 MacMenamin J rejected a complaint that there should have been an oral hearing and stated as follows:

“It is necessary to bear in mind that what was before the FSO were matters which had taken place five years previously in 2005. Thus, other than looking at the documents, it is now unclear what effect an oral hearing would have had other than to demonstrate that Ms Finn had no recollection of what happened and/or that the documents at least indicated that Mr Cantwell had drawn the appellant’s attention to some parts of Section C. An inference from all this that an oral hearing would not have progressed matters further was not unreasonable and was within the FSO’s statutory remit.

It is not reasonably established, even taking the case at its height, and accepting that the appellant could have shown that Bank officials had imperfect recollections, even different recollections, that an oral hearing would have affected the outcome.”
(Page 13)

In **Cagney v Financial Services Ombudsman** unreported, High Court, 25 February 2011 Hedigan J stated as follows:

“in the circumstances of this case the decision made by the Ombudsman not to hold an oral hearing was a decision that was well within his jurisdiction and therefore not something with which this Court can interfere”. (Page 6)

In **Caffrey v Financial Services Ombudsman** unreported, High Court, 12 July 2011 Hedigan J stated that *“[i]t seems to me that in this case the fact that no oral hearing was requested is a factor that should be weighed in the balance. I am satisfied that it was reasonable for the Ombudsman to determine that an oral hearing was unnecessary”*. (Page 19)

In **Star Homes (Middleton) Ltd v The Pensions Ombudsman** [2010] IEHC 463 Hedigan J held that:

“The Ombudsman has a discretion whether or not to hold an oral hearing and in these circumstances the Ombudsman was entitled to take the view that the conflict surrounding the P45 was not such as to require him to hold an oral hearing. The applicant has also failed to satisfy this court that it had an explanation which required an oral hearing to adjudicate upon.

If an oral hearing were granted in this case its effect would simply be to allow the applicant to re-iterate what the applicant had already submitted to the respondent in writing, therefore fair procedures did not require the holding of an oral hearing in this case. In any event there are further reasons that support the Ombudsman's decision herein.” (Para 7.1)

With regard to the present complaint, I note that the Provider has made extensive submissions on the matters under consideration, and I do not accept that an Oral Hearing could advance matters or could be of assistance to me in arriving at my decision.

Furthermore, I must reiterate that in circumstances where I have been provided with clear and sufficient documentary evidence from the parties, I am of the view that there is no necessity for an Oral Hearing in the context of this particular complaint.

In ***Dola Twomey v. Financial Services Ombudsman*** unreported, High Court, 26 July 2013 Feeney J stated as follows:

“An oral hearing may be required as a matter of fair procedures, but such a requirement arises when there is a clear identified dispute as to particular events central to the case, and where there is not sufficient documentary evidence available to enable the FSO come to a conclusion on the evidence and where the resolution of the dispute requires oral evidence.” (Page 14)

Having reviewed and considered all of the evidence and 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.

Before dealing with the substance of this complaint, I also note that the Provider has made post Preliminary Decision submissions in relation to its engagement with the Central Bank of Ireland during the Central Bank directed Tracker Mortgage Examination. In its post Preliminary Decision submission of **5 July 2021**, the Provider has states as follows:

“The FSPO has failed to have regard to the significant engagement between the Bank and the CBI during the TME which specifically considered mortgage journeys similar to that of the Complainant's Primary Loan and resulted in them not being impacted. This position was ultimately supported by a decision of the Independent Appeals Panel, established as part of the TME to consider customer appeals.”

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As the Provider is aware, the investigation and adjudication of the Complainant's complaint by this office is separate to the review of the Complainant's mortgage loan undertaken by the Provider as part of the Central Bank of Ireland directed Tracker Mortgage Examination and the appeal by the Complainant to the Provider's Independent Appeals Panel. My Office did not have any role in the Tracker Mortgage Examination.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the mortgage loan account ending **690/1**. It is also necessary to consider the details of certain interactions between the Complainant and the Provider when the fixed interest rate was applied to the mortgage loan in **2006** and when the fixed rate period expired in **2009**.

I note that the Provider has furnished in evidence a copy of its **Mortgage Handbook** which details as follows:

"This handbook is intended to assist our customers in understanding detailed aspects of the mortgage they have taken with [the Provider] and aims to provide in plain English a clear understanding of how mortgages work.

..."

Page 8 of the Handbook details:

"3 RATES EXPLAINED

...

You can choose from:

FIXED RATE

VARIABLE RATE

SPLIT RATE

TRACKER

...

FIXED RATE:

...

NOTE: REDEMPTION FEES MAY APPLY IF YOU WANT TO EXIT EARLY FROM A FIXED RATE MORTGAGE CONTRACT

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VARIABLE RATE

With a variable rate, your monthly repayments may rise or fall from time to time, in line with general market interest rates. If rates fall, your monthly repayment reduces, but if rates rise, you pay more. A variable rate may suit you if you are in a financial position where an increase in interest rates would not adversely affect your ability to repay. You may also benefit from the fact that unlike fixed rate mortgages a fee will not be applicable if you wish to change to another mortgage type or voluntarily increase your repayments.

TRACKER RATE

'LOCK IN' TO CURRENT MARKET RATES

With a Tracker Mortgage, movements in the European Central Bank (ECB) rate are fully transmitted in a defined timeline to the customer. In effect, from the customer's perspective this is a 'lock in' to current market rates.

This is a 'variable rate' type mortgage which guarantees to track the ECB reference rate within a specified margin (percentage points), which means you will not be subject to any rate increases in the fixed period or any rate reductions that may be passed to variable rate customers.

PRICE GUARANTEE

Our Tracker Mortgage is a variable rate product that guarantees full European Central Bank (ECB) rate changes will be passed on to customers within 30 working days. This product gives a price guarantee to customers locking them in at various rates above the ECB rate, dependent on other factors, such as loan amount, loan-to-value, and the type of securities against which the loan is held (i.e. primary residence or residential investment property).

..."

Page 15 details:

"7 REDEMPTION

...

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You are free to repay your loan at any time. However it may be part of the agreement for some products that in return for certain benefits such as a fixed rate, if you repay the loan within the fixed rate period, you pay us an early redemption charge (sometimes known as a break funding fee). If such charge applies to your loan, it will be detailed in your Loan Agreement.

*In the case of a fixed-rate mortgage, the charge is to compensate us for costs we may incur if fixed-rate funds are repaid before the end of the fixed-rate period.
..."*

Page 17 details:

"IMPORTANT INFORMATION

NO LEGALLY BINDING LOAN AGREEMENT SHALL COME INTO EXISTENCE UNTIL SUCH TIME AS A FORMAL LETTER (WHICH INCLUDES [THE PROVIDER'S] STANDARD TERMS AND CONDITIONS) HAS BEEN SIGNED BY BOTH THE CUSTOMER AND [THE PROVIDER].

..."

I note that the Provider is seeking to rely on the contents of the *"Mortgage Handbook"* and it states that a copy was furnished to the Complainant together with the Letter of Offer in **January 2004**.

I am of the view that the **Mortgage Handbook** does not form part of the Complainant's loan documentation. There is no reference in the Letter of Offer to the Mortgage Handbook forming part of it.

Therefore, I do not accept that the definitions of *"variable rate"* and *"tracker rate"* contained in the Mortgage Handbook supports the Provider's position that the terms *"Standard Variable Rate"* and *"Tracker Variable Rate"* were defined clearly with respect to the Complainant's mortgage loan.

The **Letter of Offer** dated **19 January 2004** details as follows:

<i>"Amount of Credit Advanced:</i>	<i>€145,360.00</i>
<i>Period of agreement (Years – Months)</i>	<i>30 - 0</i>

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<i>Type of Advance</i>	<i>Flexi Annuity</i>
<i>Interest rate:</i>	<i>2.59%</i>
	<i>Variable”</i>

The **Special Conditions** relating to the mortgage loan detail as follows:

“145 The Interest Rate specified in the Particulars of Advance represents a discount of 0.86% on our variable rate. This discount applies for a period of 12 months from the date of drawdown. At the end of this discounted period the interest rate shall revert to the Lenders prevailing variable rate.”

The **Loan General Conditions** relating to the mortgage loan detail as follows:

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

The **Form of Acceptance** was signed by the Complainant on **17 May 2004** on the following terms:

“I/We the undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Special Conditions (if any);*
- (iv) the Lender’s General Conditions for Home Loans;*
- (v) the Lender’s standard Form of Mortgage;*
- (vi) the Assignment of Life Policy;*

Copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitors(s)”

The **Letter of Offer** provided for a variable interest rate of 2.59%. In accordance with **Special Condition 145**, the rate of 2.59% was a rate which was discounted by 0.86% and which applied for 12 months from the date of drawdown. The variable interest rate in the Letter of Offer 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 Complainant accepted the Letter of Offer, and in doing so detailed that he had been advised upon the terms and conditions of the mortgage loan by his solicitor.

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I note that the Provider's internal system notes entered on the following dates, state as follows:

18 Jul 2005	<i>"sent tracker appl[ication]"</i>
29 Jul 2005	<i>"req[uest] recvd to [switch] to int and cap, set payments at E700 and req for tracker rate, req not signed so returned to cust"</i>
02 Aug 2005	<i>"tried to contact cust as req not signed no answer so returning letter by post to [the Complainant's address]"</i>
08 Aug 2005	<i>"recvd signed req as below"</i>
10 Aug 2005	<i>part of [the Provider's representative's] letter form customer was snet (sic) over to me on team b, cusotmer (sic) wants override (sic) of 700.00 per month which i will set up now and they want a tracker rate which I will also send out"</i>

It appears that the Complainant contacted the Provider in **July 2005** requesting fixed mortgage repayments of €700.00 per month and requesting to apply a tracker interest rate to his mortgage loan.

I note that the Complainant signed a **Tracker Rate Instruction Form** on **15 August 2005** which detailed as follows:

"I/We hereby instruct [the Provider] to amend the interest rate to track the European Central Bank (ECB) Rate. The rate will be charged at a pre-agreed percentage above the ECB.

For information purposes this rate is currently 3.25% (Typical APR 3.30%) that is 1.25% above ECB.

*'The interest rate applicable to the loan identified is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the prevailing **European Central Bank Main Refinancing Operations Minimum Bid Rate ("REFI rate")** for the term of the loan. Variation in interest rate shall be implemented by the Lender not later than close of business on the 30th day following a change in the **REFI 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 the first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper.*

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*In the event that, or at any time, the **REFI 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.'*

WE RECOMMEND THAT YOU SEEK INDEPENDENT LEGAL ADVICE IN CONNECTION WITH THIS MATTER

..."

Having considered the mortgage loan documentation, it is my view that the Complainant did not have a contractual entitlement to a tracker interest rate in **August 2005**. It appears that the Provider, in line with its own commercial discretion and policy at the time, acceded to the Complainant's request to apply a tracker rate and offered the Complainant the option of a tracker interest rate of 3.25% (ECB + 1.25%) on the mortgage loan. By signing the **Tracker Rate Instruction Form** on **15 August 2005**, the Complainant agreed to amend the interest rate on his mortgage loan account from a variable interest rate to a tracker interest rate. The **Tracker Rate Instruction Form** clearly states that a tracker interest rate of ECB + 1.25% will apply to the mortgage loan account *"for the term of the loan"*. In effecting the change, the Provider therefore conferred a contractual entitlement to a tracker interest rate on the Complainant's loan, with the margin fixed at 1.25% for the term of the loan.

The Provider wrote to the Complainant by letter dated **22 August 2005**, detailing as follows:

"Thank you for your recent correspondence in relation to this account.

I have amended the loan to the tracker rate of 3.25%. As a result your next payment on the 1st September 2005 would be €665.32 but as you have an override set up your actual payment will be €700.00."

The Provider issued a further letter to the Complainant on **22 August 2005** which outlined as follows:

"I have put an instruction on your account to collect €700.00 per month from 1st September 2005 for 12 months. The instruction should be renewed in writing each year if you wish to continue it.

The overpayment will not reduce the term of your loan, unless left in place for the full term of the loan; however, it will reduce future repayments. If you wish the term to be reduced please instruct us in writing stating the revised term."

/Cont'd...

A copy of a letter issued by the Provider to the Complainant on **16 January 2006** has been provided in evidence, and outlines as follows:

“As announced by [the Provider] in the press recently, your revised interest rate is 3.5% (typical APR 3.55%) effective 1st January 2006. As a result your revised repayment from 1st February 2006 will be €660.92.

...

Currently we have very competitive fixed rate options available which are outlined below.

<i>1 year fixed</i>	<i>3.69% (3.76% Typical APR)</i>
<i>2 year fixed</i>	<i>3.79% (3.79% Typical APR)</i>
<i>3 year fixed</i>	<i>3.99% (3.86% Typical APR)</i>
<i>5 year fixed</i>	<i>4.29% (4.06% Typical APR)</i>

Should you wish to avail of one of these rates, please contact our Customer Services Department directly on [redacted] who will be more than happy to discuss your options with you.”

It does not appear from the evidence before me, that the Complainant responded to the Provider’s letter at that time. I note that the mortgage loan account continued to operate on a tracker interest rate of ECB + 1.25%, in accordance with the terms of the **Tracker Rate Instruction Form**.

The Complainant subsequently completed an **Application for a Top-Up loan** in the amount of €35,000 on **10 May 2006** which outlined that the purpose of the loan was to *“Clear Credit Union A/C + Credit Card”*.

The **Top-Up Letter of Offer** dated **07 June 2006** details as follows:

<i>“Amount of Credit Advanced:</i>	<i>€35,000.00</i>
<i>Period of agreement (Years – Months)</i>	<i>20 - 0</i>
...	
<i>Type of Advance</i>	<i>ANNUITY HOMELOAN</i>
<i>Interest rate:</i>	<i>3.60</i>
	<i>Variable”</i>

/Cont’d...

General Condition 5 of the **Loan General Conditions** details as follows:

*“The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer ... However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with fluctuations in the applicable interest rate. Payment of the monthly repayments shall be made by Direct Debit mandate.
...”*

The **Loan General Conditions** relating to the mortgage loan also detail as follows:

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

The **Special Conditions** relating to the mortgage loan also detail as follows:

“...

The Advance together with all prior and future advances will be secured by the Lender’s existing Mortgage granted by the Applicant(s) to the Lender.

...”

The **Form of Acceptance** was signed by the Complainant on **21 June 2006** on the following terms:

“I/We the undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender’s General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender’s standard Form of Mortgage*
- (vi) the Assignment of Life Policy;*

copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitors(s)”

/Cont’d...

The **Top-Up Letter of Offer** dated **07 June 2006** provided for a variable interest rate of 3.60%. The variable interest rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a rate which could be adjusted by the Provider. The Complainant accepted the **Top-Up Letter of Offer** having confirmed that it had been explained to him by his solicitor in **June 2006**.

The parties have submitted that the top-up portion of the mortgage loan was on a tracker interest rate of 3.85% (ECB + 1.10%) from the date of drawdown in **July 2006**. It does not appear to me from the evidence provided, that any documentation was signed by the Complainant effecting the application of the tracker rate of ECB + 1.10%. In these circumstances, it appears that there is no documentation to evidence the terms on which the rate of ECB + 1.10% was applied to the loan. Nonetheless it does not appear to be disputed between the parties that this portion of the mortgage loan was on a tracker interest rate of ECB + 1.10% from the date of drawdown.

The evidence shows that the Complainant signed a **Fixed Rate Instruction Form** on **21 October 2006**, which details as follows:

"I/We hereby instruct [the Provider] to fix the interest rate on my/our homeloan [illegible] of (please mark with an X the appropriate box below)

Fixed until 1st October 2007 at 4.69% (4.80% Typical APR)

Fixed until 1st October 2008 at 4.69% (4.80% Typical APR)

Fixed until 1st October 2009 at 4.69% (4.80% Typical APR) ✓

Fixed until 1st October 2011 at 4.89% (4.90% Typical APR)

in accordance with the terms set out below. I/We hereby agree once a letter is issued by [the Provider] to me/us, confirming that the interest rate on my/our Home Loan account has been fixed for the period requested by me/us then the terms below shall be binding on me/us for the fixed rate period in addition to the terms and conditions of my/our mortgage.

TERMS

Fixed rate repayments from the 1st November 2006 for the term as indicated above thereafter reverting to the company's standard variable rate. In order to provide this facility [the Provider] has entered commitments to fund same. If, during the fixed rate period, the Applicant redeems in whole or in part or converts the loan into a variable interest rate or to another fixed rate loan, on that date, (the redemption date) a "break funding fee" will be payable to the Lender.

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The break funding fee will be calculated by reference to the wholesale cost then prevailing for the unexpired portion of the fixed rate period and the wholesale rate prevailing at the date of drawdown. If, at the redemption date or switching date the wholesale rate prevailing is higher than the wholesale rate at drawdown no break funding fee arises. If however, the wholesale rate is lower a break funding fee will be chargeable.”

...

WE RECOMMEND THAT YOU SEEK INDEPENDENT LEGAL ADVICE IN CONNECTION WITH THIS MATTER

...”

The Provider wrote to the Complainant on **03 November 2006** as follows:

“Thank you for your instruction form to fix your loan on our 4.69% interest rate fixed to 1st November 2009.

We are pleased to let you know that your account has been amended accordingly and your revised mortgage repayment of €981.47 is due on 1st December 2006.”

It appears from the evidence that the Provider did not inform the Complainant that by opting for a three-year fixed rate period in **October 2006**, that the tracker interest rate applicable *“for the term of the loan”* may not be available to him on the primary portion of the mortgage loan at a later time. The Provider details that the standard variable rate provided for in the terms of the **Fixed Rate Instruction form** was a *“contractually defaulted rate rather than an interest rate option offering”*.

The Provider, in its post Preliminary Decision submission of **5 July 2021**, submits as follows:

“As the FSPO has noted, the Complainant himself has accepted that the Bank “could not have known on 21 October 2006 that tracker rates would be discontinued at a later point in time.” It is entirely unclear (and the FSPO has not explained) how it could be expected that the Bank could have known in 2006 that tracker rates may not be available in the future.”

For the avoidance of any doubt, I have not indicated that the Provider ought to have known in **October 2006** that it would withdraw tracker interest rates from the market at a later point in time. I would not expect the Provider to have known in **2006** that it would make a commercial decision in the future to withdraw tracker interest rates generally from its product offering.

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However, I do expect the Provider to provide clear and comprehensible information to the Complainant when he was seeking to make a rate change to his mortgage loan account. If the intended effect of the **Fixed Rate Instruction form** was to bring to an end the contractual entitlement to a tracker interest rate of ECB + 1.25% *“for the term of the loan”* then I am of the view that this should have been clearly communicated to the Complainant in the Fixed Rate Instruction form that was presented by the Provider to the Complainant for signing.

It appears to me that the Provider has failed to appreciate that a contractual entitlement to a tracker interest rate of ECB + 1.25% on the main portion of the mortgage loan was obtained by the Complainant when the Provider applied that rate to the mortgage loan on foot of the Complainant’s instruction in **August 2005**. As outlined above, that tracker interest rate was applied to the main portion of the Complainant’s mortgage loan on the basis that *“the interest rate shall be no more than 1.25% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“REFI rate”) for the term of the loan.”* This **Fixed Rate Instruction form** signed by the Complainant did not stipulate that this entitlement was coming to an end at that time.

The Provider has submitted the following in its post Preliminary Decision submission dated **5 July 2021**:

“It is incorrect to suggest that the Bank “failed to appreciate” the Complainant’s alleged contractual entitlement to a tracker rate. Rather it is the Bank’s position that the Complainant did not have an enduring contractual right to a tracker rate following the execution of the Fixed Rate Instruction Form, which clearly set out the rate which would apply for, and at the end of, the fixed rate period.”

The **Tracker Rate Instruction Form** signed by the Complainant clearly states that the tracker interest rate of ECB + 1.25% will apply to the mortgage loan account *“for the term of the loan”*. The **Fixed Rate Instruction form** does not expressly state that this entitlement to a tracker interest rate *“for the term of the loan”* will be superseded by the application of a fixed interest rate to the Complainant’s mortgage loan account or replaced in any way by the Terms set out in the **Fixed Rate Instruction form**. In fact, the **Fixed Rate Instruction form** states that the Terms, as detailed above, will be *“binding”* on the Complainant for the duration of the three-year fixed interest rate period in addition to the terms and conditions of the mortgage loan agreement. It is my view that the terms and conditions of the Complainant’s mortgage loan agreement at that point included the contractual entitlement to a tracker interest rate of ECB + 1.25% for the duration of the loan which had been applied by virtue the **Tracker Rate Instruction form**, which the Complainant had previously signed.

/Cont’d...

The **Fixed Rate Instruction form** signed by the Complainant on **21 October 2006** outlines that the fixed rate repayments would apply for the term selected by the Complainant *“thereafter reverting to the company’s standard variable rate.”* While the Complainant was informed that a standard variable rate would apply at the expiry of the fixed interest rate period, there is nothing in the **Fixed Rate Instruction form** to suggest that the Complainant would not be able to apply the tracker rate of interest of ECB + 1.25% at a later point during the term of the loan. The **Fixed Rate Instruction form** is silent as to whether the application of the fixed interest rate to the mortgage loan had any effect on the contractual entitlement to the tracker interest rate which had been conferred in **August 2005**.

The Provider, in its post Preliminary Decision submission of **5 July 2021**, maintains that this *“contention is inconsistent with the factual position”*. I find this assertion by the Provider to be most surprising in circumstances where I have not been provided with any evidence that the Provider specifically advised the Complainant that the contractual entitlement to the tracker interest rate of ECB + a margin of 1.25% would end when the **Fixed Rate Instruction form** was signed by the Complainant. If the effect of signing the **Fixed Rate Instruction form** on **21 October 2006** was that the Complainant was no longer entitled to the tracker interest rate *“for the term of the Loan”*, then it was incumbent on the Provider to advise the Complainant that this was indeed the case. The documentation that I have been furnished with does not set out the implications of applying a fixed interest rate to the Complainant’s tracker mortgage loan.

Consequently, I am of the view that the contractual entitlement to the tracker interest rate of ECB + 1.25% *“for the term of the Loan”* remained in being when the fixed interest rate was applied as the Complainant was not informed otherwise.

In its post Preliminary Decision submission of **5 July 2021**, the Provider states as follows:

“The Bank rejects entirely the implication on the part of the FSPO that it was not made clear to the Complainant that he would not have the option of a tracker at the end of the fixed rate period”.

Despite this strong assertion by the Provider, it has not produced evidence to demonstrate that it did make clear to the Complainant that the entitlement to the tracker interest rate ended when the fixed rate was applied to the mortgage loan.

In its post Preliminary Decision submission of **5 July 2021**, the Provider further states as follows:

“It is not the case that the language of the Fixed Rate Instruction Form is unclear or does not plainly spell out to the Complainant the consequences of expiration of the fixed rate period.

The mere absence of an express confirmation in the text of the Fixed Rate Instruction Form that the tracker interest rate would no longer be available at the end of the fixed rate period cannot justify the assertion in the Preliminary Decision that the Complainant could not be aware of this fact in circumstances where the text explicitly and unequivocally details what rate would apply by default.

In these circumstances, it is submitted that the Complainant cannot have reasonably believed that the tracker interest rate still applied or would remain available ad infinitum, when he agreed to and signed a form specifically stating the actual rate that would be applied for a fixed period and what would occur on the expiry of that period.

Considering the clarity of the terms used in the Fixed Rate Instruction Form and the Complainant’s familiarity with those same terms, it is respectfully submitted that the FSPO’s finding that the Fixed Rate Instruction Form does not displace the Complainant’s entitlement to be provided with an option to revert to a tracker interest rate can be achieved only by an incorrect construction of the document.

It is again worth emphasising that the Complainant in correspondence stated that he was “well aware I have signed the “terms” and that also that they are laid out “clear and concise” as you state” (letter from the Complainant to the Bank dated 6 March 2013).

Therefore, it must be concluded that the Preliminary Decision ultimately reached by the FSPO, resulting in a favourable outcome for the Complainant, was determined incorrectly.”

It is not disputed that the **Fixed Rate Instruction form** outlined “*thereafter reverting to the company’s standard variable rate.*” However, the Complainant submits that he was not provided with any information regarding the tracker interest rate in **2006**. It appears that the Complainant was of the view that he was still entitled to a tracker interest rate option up until tracker interest rates were withdrawn from the market by the Provider therefore he believed the Provider was “*legally obliged to offer*” him the option to revert to a tracker interest rate after the fixed rate period expired.

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The Complainant maintains that the tracker interest rate was still an “*active*” product when he signed the **Fixed Rate Instruction form**.

The fact remains that while the **Fixed Rate Instruction form** outlined that a standard variable rate would be applied at the end of the fixed interest rate period, it did not state that the Complainant’s right to a tracker interest rate of ECB + 1.25% “*for the term of the loan*” was relinquished by applying a temporal fixed interest rate to the mortgage loan. Therefore, I am of the view that it would have been reasonable on the part of the Complainant to have understood that a tracker interest rate could be made available to him as a rate option at the end of the fixed interest rate period. For the avoidance of any doubt, I am not making this determination on the basis that tracker interest rates were available generally to the market at the time that the fixed interest rate was applied to the Complainant’s mortgage loan. Rather on the basis of the information that was before the Complainant when he signed the **Fixed Rate Instruction form** and that form did not say that the right to the tracker interest rate of ECB + 1.25% “*for the term of the loan*” ended at that time.

If it was the intention of the Provider to no longer make a tracker interest rate available to the Complainant “*for the term of the loan*” as it had previously been outlined in the **Tracker Rate Instruction form**, after a temporal fixed interest rate was applied for three years, I believe this key piece of information should have been clearly and comprehensibly explained to the Complainant so that he could make a fully informed decision before selecting the fixed interest rate that was offered by the Provider while a tracker interest rate applied to his mortgage loan account. I am of the view that the failure on the part of the Provider to make it clear to the Complainant that he would no longer be contractually entitled to a tracker interest rate on foot of selecting a fixed interest rate was unreasonable and improper.

In the Provider’s post Preliminary Decision submission dated **5 July 2021**, it outlines as follows:

“The approach taken by the FSPO in the present case is inconsistent with that which the Office of the Ombudsman had previously taken in a number of similar complaints made against the Bank. Aside from the fact that this change in approach is unexplained, it is difficult to see how conduct which at one time was viewed by the Office of the Ombudsman, by the CBI and the Independent Appeals Panel, as not giving rise to grounds for complaints to be upheld, is now said to be unreasonable.”

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The FSPO has failed to provide any or sufficient reasoning as to how the Bank's conduct could be considered "unreasonable and inappropriate" or as to the legal consequences of a finding that conduct was inappropriate. The Bank further disputes that its conduct could properly be described as unreasonable or inappropriate in any event."

As the Provider is aware, each complaint made to this Office is decided on its own merits, and by reference to the evidence and material contained on the individual complaint file under consideration. I have not been provided with any evidence that the Central Bank of Ireland has confirmed that the conduct on the part of the Provider with respect to this individual mortgage holder who made his complaint to my Office does not give rise to grounds for this complaint to be upheld or conversely that the Provider acted appropriately with respect to this individual complainant.

Following careful consideration of the individual facts and circumstances of this complaint, I am of the view that it was unreasonable and improper for the Provider to expect that the Complainant should have known that he was foregoing his right to a tracker interest rate for the remainder of the term of the loan by selecting a three-year fixed interest rate, in circumstances where that information was not made available to the Complainant by the Provider.

The Provider owes a duty of care to the Complainant to ensure that all documents that change or amend contractual entitlements are clear as to the changes or amendments that are being made. It may be the case that the Provider intended or would have liked that the application of the fixed interest rate to the mortgage loan in **2006**, meant that the Complainant gave up his contractual entitlement to the tracker interest rate of ECB + 1.25% for the remainder of the term of the loan. However, that is not documented anywhere and there is no evidence that the Complainant agreed to this or was informed that this was a consequence of his decision to apply the fixed interest rate to the mortgage loan.

I am of the view that if the Provider had considered its own documentation in its entirety, it should have recognised the terms of the **Tracker Rate Instruction form**, signed by the Complainant on **15 August 2005**, provided that *"The interest rate shall be no more than 1.25% above the prevailing **European Central Bank Main Refinancing Operations Minimum Bid Rate ("REFI rate")** for the term of the loan"*.

I do not accept that it is reasonable or proper on the part of the Provider to interpret the terms of the **Fixed Rate Instruction form** that was signed in **October 2006**, as bringing an end to the Complainant's entitlement to the tracker interest rate, when the **Fixed Rate Instruction form** did not put the Complainant on notice that this was the effect of signing the form.

I note that the Complainant emailed the Provider on **9 February 2009** as follows:

"As opposed to using the moratorium form – I would like instead to just request that the house [Address redacted] is put back on an interest only option until further notice".

The evidence shows that the Provider issued a letter to the Complainant on **10 February 2009** which outlined:

"Thank you for your recent request to amend your mortgage account. I can confirm that interest only has been applied for the period outlined below. Your repayment for 1st March 2009 will be €754.01 and is charged as follows:

Loan Type	Balance	Term	Interest	Repayment	Fixed	Fixed Rate
Interest Only	(€)	(Mths)	Rate	(€)	End Date	Roll Date
<i>FLEXINTY</i>	<i>134,851.45</i>	<i>305</i>	<i>4.69%</i>	<i>529.08</i>	<i>Y</i>	<i>01 Nov 2009</i>
<i>01 Feb 2010</i>						
<i>HLANNUITY</i>	<i>58,185.81</i>	<i>263</i>	<i>4.25%</i>	<i>340.41</i>	<i>Y</i>	<i>01 Nov 2009</i>
<i>...</i>						

The Complainant has submitted that he had to enter into periods of forbearance on the mortgage loan *"all due to being unable to pay the large sums owed"*. This interest only repayment period on the mortgage loan was implemented some 8 months prior to the expiry of the fixed interest rate on the mortgage loan in **November 2009**. Based on the evidence before me I cannot accept that there is any link between the conduct complained of and the Complainant's request for interest only repayments in **February 2009**. Rather I am of the view that the Complainant would have made this request in any event owing to his pre-existing financial circumstances.

The three-year fixed interest rate on both portions of the mortgage loan account expired in **November 2009**. The Provider's standard variable rate of 3.24% was automatically applied to both portions of the mortgage account on **2 November 2009** when the fixed interest rate period expired.

It is from this point in time that the Provider subsequently identified that a failure had occurred on the top-up portion of the mortgage loan account, in that, the Provider should have applied a tracker rate of ECB + 1.10% to the top-up portion after the fixed interest rate period expired. The Provider restored a tracker rate of ECB + 1.10% to the top-up portion of the mortgage loan account and backdated it to the date of the fixed rate expiry in **November 2009**.

The Complainant asserts that the main portion of his mortgage account should also have been restored to a tracker interest rate in **November 2009**, on the basis that both the primary and top-up portions of the mortgage loan account were *"taken out in the same knowledge and practice"*.

A further issue that has arisen in this complaint is that the Provider did not give the Complainant the option of the tracker interest rate of ECB + 1.25% for the primary portion of his mortgage loan in **November 2009**. Contrary to what has been suggested by the Provider, for the reasons that I have outlined above I am of the view that the contractual entitlement to the tracker interest rate of ECB + a margin of 1.25% *"for the term of the Loan"* remained in being after the fixed interest rate was applied to the loan. In circumstances where the Provider was setting out the interest rate options that were available to the Complainant, contractual and otherwise, I am of the view the Provider should have also set out the tracker interest rate of ECB + 1.25% as an interest rate option to the Complainant in **November 2009**.

The Provider, in its post Preliminary Decision submission, submits as follows:

"This contention is factually and legally incorrect.

- (a) The Bank did not provide options of alternative rates or products to the Complainant at the end of the fixed rate period. Rather the Complainant's interest rate automatically defaulted to the Bank's standard variable rate in accordance with the terms of the Fixed Rate Instruction Form; and*
- (b) Even if the Bank had chosen to offer alternative options to the Complainant at the end of the fixed rate period, the options could not have included a tracker rate as the Bank had withdrawn tracker rates by that stage."*

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In its post Preliminary Decision submission of **5 July 2021**, the Provider states as follows:

“The Bank rejects entirely the implication on the part of the FSPO that it was not made clear to the Complainant that he would not have the option of a tracker rate at the end of the fixed rate period.

...

the Fixed Rate Instruction Form were binding on the Complainant in addition to the terms of the Complainant’s mortgage, not the terms of the Tracker Rate Instruction Form. It is concerning that the FSPO has apparently not placed any reliance on this aspect of the Fixed Rate Instruction Form”.

I find it most surprising that the Provider does not consider the **Tracker Rate Instruction form** to form part of the Complainant’s mortgage loan documentation. The Provider appears to almost set aside the **Tracker Rate Instruction form** even though a commitment was agreed between the parties at that time *“for the term of the loan”*.

I fully appreciate that the terms of the **Fixed Rate Instruction form** were binding on the Complainant, however the **Fixed Rate Instruction form** did not expressly state that the Complainant’s contractual entitlement to the tracker interest rate of ECB + 1.25% *“for the term of the Loan”* ended by virtue of those terms. For all intents and purposes the fixed interest rate was linked to a specific period of time. Contrastingly, the **Tracker Rate Instruction form** was outlined to be *“for the term of the Loan”*.

I have not been provided with any evidence to show that the Complainant was put on notice or advised that by agreeing to Terms of the **Fixed Rate Instruction form**, he was effectively giving up his contractual right to avail of a tracker interest rate *“for the term of the Loan”*, during the term of the loan. This is conduct that I consider to be unreasonable and improper on the part of the Provider.

The Provider did not provide interest rate options to the Complainant on the expiry of the fixed rate period in **November 2009**. However, in circumstances where the Complainant was not specifically informed that his contractual entitlement to a tracker interest rate for the term of the loan ended on foot of signing the **Fixed Rate Instructions form**, I am of the view that the Provider should have offered the Complainant a tracker interest rate option at the end of the fixed interest rate period in **2009** in addition to the option of a standard variable interest rate. The Provider however did not do so, and instead, automatically applied its standard variable rate of 3.24% in **November 2009**.

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In light of all the foregoing, I uphold the complaint on the basis that the Provider failed to advise the Complainant that, by applying a fixed rate to the main portion of his mortgage loan in **2006**, he would not be entitled to a tracker rate at the end of the fixed interest rate period or on any other future date, and the Provider failed to offer the Complainant the option to revert the main portion of his mortgage loan to a tracker rate at the end of the fixed rate period in **2009**.

I requested that the Provider furnish this Office with a table which compared the manner in which the primary portion of the Complainant's mortgage loan amortised on a monthly basis from **November 2009** on the standard variable rate and the manner in which it would have amortised if it had been on a tracker interest rate of ECB + 1.25%. During the time period between **November 2009** and **October 2019**, the Complainant made interest repayments totalling €47,089.86 to the primary portion of the mortgage loan. If the tracker interest rate of ECB + 1.25% was applied to the mortgage loan during that time period the evidence shows that interest repayments of €19,204.83 would have been required. In this regard, I note that the difference in interest paid during this period of approximately 10 years was €27,885.03. It appears that if the tracker interest rate of ECB + 1.25% had applied to the primary portion of the Complainant's mortgage loan account then the Complainant's monthly repayments would have been less than they were on a monthly basis from **November 2009**.

The 12-month interest only repayment arrangement which was applied to the Complainant's mortgage account in **March 2009** expired in **February 2010** when the mortgage loan reverted to full capital and interest repayments.

The Complainant emailed the Provider on **24 March 2010** as follows:

" ...

I want to discuss what is the best payment plan I can use to reduce monthly payments (not interest only/freeze)

..."

The Complainant submitted an undated **Income and Expenditure Form** which detailed that the Complainant's monthly income was €2,660.00, and his outgoings, inclusive of mortgage repayments and other debts, totalled €4,011.00, which created a monthly deficit of €1,351.00.

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The "Reason for Financial Distress" was detailed as follows:

"Unemployment [The Complainant's] wife has recently been made unemployed overall reduction to income. [The Complainant's] wife has applied for welfare but this has not processes [sic] as yet."

I note that the difference between the capital and interest monthly repayments that were actually paid by the Complainant and the amount that would have been paid if the Complainant was making capital and interest monthly repayments on the tracker rate of ECB + 1.25% between **February 2010** and **November 2010**, fluctuated between €68.84 and €111.97.

It appears from the evidence that the Complainant's requirement for forbearance on the mortgage loan account was probable even if a tracker interest rate of ECB + 1.25% had been applied to the account on the expiry of the fixed rate period in **November 2009**. The evidence shows this forbearance period was requested primarily due to the fact that the Complainant's wife was unemployed at the time.

The Complainant signed a **Letter of Variation** dated **December 2010** which was stamped received by the Provider on **3 December 2010**. This document states as follows:

"The following condition is added to the original Letter of Loan Offer.

Repayment of this Advance is to be by way of a capital and interest (repayment) mortgage. The Applicant(s) may elect at any time to pay interest only (Interest Only Period) on the advance during the term of the mortgage for minimum periods of 1 months and up to a maximum period of 12 months. In the event of the account falling into arrears, discontinuation of the Interest Only Period will be at the sole discretion of the Lender.

...

Please specify period of months of Interest Only payments initially required:

12 months (minimum 1 months, maximum 12 months)

As a result of this arrangement the interest cost attaching to your mortgage will increase by €1,973.05 which is repayable over the remaining term of the loan."

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The Provider issued a letter to the Complainant on **15 December 2010** which detailed as follows:

“Further to your recent request I wish to confirm that your account has been amended to interest only for 12 months only as approved, and is outlined as follows:

Loan Type	Balance (€)	Repayment (€)	Roll to Annuity
FLEXINT	161,447.80	518.49	2 ND November 2011

Please find enclosed with this letter a refund cheque for €400.94. This is a refund for the total amount of capital paid in your 1st December 2010 direct debit.

Your repayment due 1st January 2011 will be for €518.49”

The interest only repayments on the standard variable rate paid by the Complainant between **December 2010** and **December 2011** fluctuated between €307.97 and €495.93. If the Complainant had been making full capital and interest repayments on an interest rate of ECB + 1.25% during that period, his monthly repayments would have fluctuated between €595.92 and €627.82.

Prior to the expiry of the interest only repayment period in **December 2011**, the Complainant completed a **Standard Financial Statement** on **13 October 2011**. This document detailed that the Complainant’s monthly income was €2,614.00, his monthly expenditure was €3,546.00, and his monthly debt repayments were €2,670.00, creating a monthly deficit of €3,602.00. The monthly debt payment included the Complainant’s mortgage repayment of €1,072.00 on his primary residence.

The **“Reason for Review/Arrears”** was detailed as follows:

*“Wife only works 10 hrs p/w
Can not afford both houses”.*

The evidence shows this forbearance period was requested in **October 2011** primarily due to the fact that the Complainant’s wife was employed on a part-time basis at the time and the Complainant was having difficulty in meeting the mortgage repayments on both the primary residence and the residential investment property at that time due to the reduction in their income.

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It appears that a further 12-month interest only repayment arrangement was applied to the account in **December 2011**. No documentary evidence of this arrangement has been provided. Nonetheless it does not appear to be disputed between the parties that this is what occurred.

Between **December 2011** and **February 2012**, the monthly interest only repayments on the mortgage varied between €495.93 and €468.38. The capital and interest repayments on the tracker rate of ECB + 1.25% would have varied between €627.82 and €602.13 during that period.

It appears that the Complainant requested to apply a moratorium to his account in **February 2012**. I note from the evidence that the Provider issued a letter to the Complainant dated **9 February 2012** which outlined as follows:

“We refer to the above mortgage agreement and confirm that the agreed moratorium period has been activated for 3 months from March 2012.

Your Homeloan will still be paid within the agreed term of the mortgage, and your repayments will be automatically recalculated at the end of the moratorium. As the term of your mortgage is not extended, your monthly repayments will increase. Your moratorium will end on the 31st May 2012 at which stage a letter will be issued informing you of your revised repayment.

During the period of this moratorium arrangement your account will be recorded with the Irish Credit Bureau as “Moratorium in place”. [The Provider] submits details of your account to the Irish Credit Bureau at the end of each month. This may affect your ability to obtain further credit from other financial institutions. Your credit rating remains on record with the Irish Credit Bureau for a period of FIVE YEARS.”

The Complainant signed an **Acceptance** of the moratorium arrangement on the following terms:

“...

I have read and understand this amending letter and confirm that I accept and agree to this amending letter on the terms set out therein.

...

/Cont'd...

Summary of Arrangement:

Arrangement Type: *Moratorium*
Term of Arrangement: *3 months*
Start Date: *1st March 2012*

On the expiry of the three-month moratorium in **June 2012**, the mortgage loan account reverted to interest only monthly repayments until the expiry of that arrangement in **November 2012**. During that period the monthly interest only repayments of €471.70 being paid, were between €110.03 and €124.91 less than the monthly capital and interest repayments that would have been paid on the tracker interest rate of ECB + 1.25%.

I note that full capital and interest repayments on the standard variable rate of €784.85 commenced in **December 2012**. In the period between **December 2012** and **December 2013** the evidence shows that the capital and interest mortgage repayments on the standard variable rate were between €202.92 and €234.99 higher than they would have been on the tracker rate of ECB + 1.25%.

It appears that the Complainant had a telephone conversation with the Provider in **January 2014** regarding the monthly repayments on his mortgage loan account. The Provider issued a letter to the Complainant on **13 January 2014** which outlined as follows:

“Further to our telephone conversation on the 9th January 2014 we note that due to your current financial circumstances, you temporarily wish to reduce your monthly payments by making payments of Interest and Fixed capital for a period of three months.

At your request and as agreed in our telephone conversation, an Interest and Fixed Capital period on the Loan is being provided, which will be for a period of 3 months with effect from the 1st February 2014 or such other date as we determine (the “Effective Date”). Before the Effective Date, the current monthly repayment amount will remain in place. We set out below the details, terms and conditions applicable to this temporary arrangement. You should read these carefully.

During the period of this temporary arrangement you are required to complete a Standard Financial Statement in order for [the Provider] to complete a full assessment of your case and determine if a longer term alternative repayment arrangement is appropriate based on your individual circumstances. A copy of the SFS together with a guide to its completion is enclosed herewith.

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If you require assistance in completing the Standard Financial Statement or have any questions in relation to it please do not hesitate to contact us at [the Provider's telephone number].

...

The new monthly repayment amount will be €748.29 (as at today's interest rate). As a result of this temporary arrangement the balance of the Loan will be repaid more slowly than originally scheduled which would result in you paying additional interest of €490.36 over the remaining term of the Loan, however there will be no change to the original term of the loan. Interest shall continue to accrue during the Interest and Fixed Capital period and you must discharge all interest payments due during this period. This temporary arrangement does not affect the term of your mortgage.

At the end of the Interest and Fixed Capital period your repayments will revert to full interest and capital repayments as per the Letter of Offer unless otherwise agreed in writing. Prior to the end of the Interest and Fixed Capital period we will issue a letter to you informing you of your revised monthly loan repayment.

You retain the right to withdraw from this temporary arrangement provided you contact us within 10 working days of the date of this letter. You will revert to full interest and capital payments and must arrange to pay the full interest and capital amounts owing (if any) in full. This temporary arrangement changes the terms of your loan contract with us and we recommend that you seek independent legal and/or financial advice in relation to the terms of it.

...

[The Provider] submits details of your account to the Irish Credit Bureau at the end of each month and at the commencement of this arrangement your account will be recorded with the Irish Credit Bureau as 'Terms Amended'. This may affect your ability to obtain further credit from other financial institutions. Your credit rating remains on record with the Irish Credit Bureau for a period of five years.

This letter is supplemental to, and amends, all existing letter(s) of offer relating to the above loan account (together as amended from time to time the "Letter of Offer") with effect from the Effective Date as defined above. Subject to the specific amendments and terms contained herein, all other terms and conditions contained in or attaching to the Letter of Offer remain unchanged and continue to apply."

/Cont'd...

I note that the Complainant made interest and partial capital repayments of approximately €640.00 per month on the account in **February, March and April 2014** before the account reverted to full capital and interest repayments in **May 2014**. During that period the capital and interest repayments on the tracker interest rate of ECB + 1.15% would have been €553.98.

On **7 May 2014** the Complainant completed a further **Standard Financial Statement**. In **Section A** of the form, the Complainant outlined that the reason for the review of his mortgage loan was *“Tenant moved out – no rental income”*.

The **Standard Financial Statement** outlined that the Complainant and his wife had a combined monthly income of €4,440.00, monthly expenditure of €3,443.00, and mortgage repayments, costs associated with the upkeep of the security property and other debts of €2,972.00, which created a monthly deficit of €1,975.00.

The Provider has submitted that following an assessment of the information provided it refused the Complainant’s request for a reduced repayment arrangement as it was of the view that the Complainant was in a position to afford full capital and interest repayments.

No evidence of any further discussions between the parties in this regard has been furnished. I note from the **mortgage loan statements** that the Complainant continued to maintain annuity repayments from that point onwards.

Between **May 2014** and **June 2017**, the monthly capital and interest repayments on the mortgage varied between €805.61 and €789.54. The capital and interest repayments on the tracker rate of ECB + 1.25% would have varied between €553.98 and €541.21 during that period.

I note that the standard variable rate continued to apply to the main portion of the Complainant’s mortgage loan account until a fixed interest rate of 3.9% was applied on **21 June 2017**.

The **mortgage loan statements** show that the Complainant made a payment of €1,936.17 to the account on **5 April 2018**.

Between **July 2017** and **August 2018**, the capital and interest repayments on the fixed interest rate were €768.88 per month. The capital and interest repayments on the tracker rate of ECB + 1.25% would have been €541.21 during that period.

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The Complainant made partial redemption repayments of €86,394.00 on **5 September 2018** and €86,336.10 on **21 September 2018**. This had the effect of reducing the monthly repayment to €662.46 between **October 2018** and **September 2019**.

The capital and interest repayments on the tracker rate of ECB + 1.25% would have remained €541.21 during that period.

The Complainant wrote to the Provider on **9 October 2019** with respect to clearing the balance of the main portion of his mortgage loan as follows:

"I lodged in two instalments a total of €15,800 Friday 4.10.19. This was to pay off the balance of the variable part only of the mortgage (not to be allocated to the part of the mortgage on tracker rate).

As the amount may have reduced since you received the payment, please return to the account the DD is made from monthly the difference between what was required to clear the variable rate portion of the mortgage and the €15,800 paid."

The **mortgage loan statements** show that the Complainant made a payment of €10,000.00 on **7 October 2019** and a further payment of €5,280.00 on **8 October 2019** to clear the main portion of his mortgage loan account.

The Complainant has submitted that he emptied his savings accounts to pay off the main portion of his account at that time to so that he would *"not have to overpay on the wrong interest rate for another 15 years"* and he states that this *"should be factored in to any compensation."*

Whilst I accept the Complainant's submission that he did not want to enter into forbearance arrangements between **2009** and **2014**, nonetheless there is no evidence that these arrangements were brought about because of the interest rate on the Complainant's mortgage loan account. The contemporaneous evidence shows that the Complainant required forbearance due to personal circumstances including his wife's unemployment and rental voids, and they were the main reasons for the forbearance arrangements. The forbearance sought in **January 2009** was sought while the primary and top portions of the mortgage loan were still on a fixed interest rate.

The Complainant has further submitted that the forbearance applied to his mortgage loan account has had an impact on his Irish Credit Bureau record. I note that the Provider outlined the appropriate warnings to the Complainant regarding the effect of the forbearance agreements on his credit record when the Provider offered a moratorium on the account in **February 2012** and when it offered to apply a period of interest and fixed capital payments in **January 2014**. Having been informed of the effects of the agreements on his ICB record, the Complainant decided to accept each of the agreements.

In my Preliminary Decision dated **24 May 2021**, I proposed to direct that a sum of €8,000 compensation be paid to the Complainant in respect of the loss, expense and inconvenience the Complainant suffered as a result of the Provider's conduct.

In the Complainant's post Preliminary Decision submission dated **25 May 2021**, he expressed his dissatisfaction with the proposed compensation amount as follows:

"I feel the impact on our lives past, present and future has not been taken into account nor has the level of 'inconvenience'.

Lively hood impact; we paid over €101,000 between 2018 - 2019 to break away from this bank as the interest fees were extortionate. Had the correct interest rate been in place, we would be still paying an affordable mortgage with €101,000 in the bank. To get a loan for this amount now would be nigh on impossible at a much higher interest rate and as such, has scuppered our plans to move house due to lack of deposit. Very life changing indeed you would agree?

Inconvenience: As you have deciphered the file (excellently I might add) you will see in its sheer volume over a 10 year plus interaction with the provider, €8,000 would not cover minimum wage for the time, effort, frustration and sleepless nights caused by this situation which has dragged on for almost 13 years. Though it sounds like a win, if €27,885.03 of over paid interest is to be paid, great, it was our money anyway so we are no better off here. I do not accept €8,000 compensation for what was a hugely stressful time for us (I am aware it is noted that some of this was due to my wife being on short time, no tenants and such, but rest assured, to buy that house was my idea, not my wife's who has handed over €51,000 of her savings to clear it with me so that I can breath easily and break away from [The Provider]. Had the compensation offer been €15,000 I would be writing the same mail."

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I understand that this was no doubt a stressful period for the Complainant, however as outlined above and as noted by the Complainant, the main reasons that the Complainant required forbearance on his mortgage loan were due to personal circumstances, rather than the fact that he was not offered a tracker interest rate on his mortgage loan account in **2009**. In such circumstances, I remain of the view that compensation of €8,000 is sufficient to direct in respect of the loss, expense and inconvenience that the Complainant has suffered as a result of the Provider's conduct.

Having considered all of the evidence and submissions, including the post Preliminary Decision submissions, I uphold this complaint. The Provider did not clearly notify the Complainant that by applying a three-year fixed interest rate to the main portion of his mortgage loan in **2006**, he would no longer be entitled to the tracker interest rate commitment "*for the term of the Loan*". In the absence of such notification from the Provider or agreement between the Complainant and the Provider that this commitment ended, I am of the view that this commitment remained "*for the term of the Loan*". The Provider failed to offer the Complainant the option to revert the main portion of the Complainant's mortgage loan to a tracker interest rate at the end of the fixed rate period in **2009**.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld, on the grounds prescribed in **Section 60(2)(b)** and **Section 60(2)(g)** on the basis that the Provider's conduct was unreasonable and improper.

Pursuant to **Section 60(4)** and **Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to do the following:

- (i) Repay to the Complainant the difference between the interest paid on the main portion of the mortgage loan and a tracker interest rate of ECB + 1.25% between **2 November 2009** and the date the main portion of the mortgage loan was redeemed; and
- (ii) Pay a sum of €8,000 compensation to the Complainant in respect of the loss, expense and inconvenience the Complainant has suffered as a result of the Provider's conduct. This sum is to be paid to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

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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.

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

31 January 2022

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.