



<u>Decision Ref:</u>	2022-0115
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint relates to three mortgage loan accounts held by the Complainants with the Provider. The mortgage loan accounts which are the subject of this complaint were secured on the Complainants' private dwelling house.

- A **Facility Letter** dated **21 July 2005** for mortgage account ending **6824** provided for a loan in the amount of €200,000.00, repayable over a term of 19 years on a tracker interest rate of 2.80% (ECB + 0.79%).
- A second **Facility Letter** dated **5 July 2007** for mortgage account ending **3834** provided for a loan in the amount of €187,572.00, repayable over a term of 17 years and 3 months and commencing on a 3-year fixed interest rate of 4.85%.
- A third facility letter dated **4 August 2010** for mortgage account ending **1078** provided for a loan in the amount of €164,030.00, repayable over a term of 14 years and 3 months on a tracker interest rate of 1.54% (ECB + 0.54%). Mortgage loan account ending **1078** was transferred to a third-party provider in **December 2017**.

The Complainants' Case

The Complainants state that they drew down a mortgage loan with the Provider on a tracker interest rate in **2005**. In **2007**, the Complainants submit that they approached the Provider as they were having "*financial problems*". The Complainants detail that they were advised by the Provider to "*switch to a fixed rate mortgage from a tracker mortgage*". The Complainants submit that following this advice, they transferred their mortgage loan account from a tracker interest rate to a fixed interest rate.

The Complainants state that documents that were signed by them at the time of switching from the original tracker interest rate to a fixed interest rate in **2007**, are dated incorrectly and were not witnessed.

The Complainants submit that "*the tracker rates then dropped*" and the Complainants assert that they were paying approximately €300 more per month on mortgage repayments than they would have been had they remained on the tracker interest rate. In **2008**, the Second Complainant lost his job, and the Complainants submit that they asked the Provider if they could "*reduce the payments*" on their mortgage loan account.

The Complainants submit that they asked the Provider whether the Second Complainant's income protection insurance "*would cover some of the repayments*" but the Provider informed them that given that the First Complainant was still employed, they were not entitled to "*any help even though [the Complainants] had an insurance policy with [the Provider]*".

The Complainants contend that they "*pleaded*" with the Provider "*on numerous occasions to get released from the fixed rate mortgage agreement*" but submit that the Provider informed them that this was not possible as the Complainants would "*have to pay a breakage fee in excess of €7,000*".

In **August 2010**, the Complainants detail that their mortgage loan account reverted to the tracker interest rate, however, the Complainants explain that in the interim, they began to use credit cards and borrow money in order to "*survive and pay the mortgage*" which led to them "*spiralling into excessive debt*". The Complainants state that this situation caused their health to suffer.

The Complainants submit that they fear that they will never have their "*credit rating restored*". The Complainants' "*biggest concern*" is that they "*won't be able to afford*" to finance their children going to college. The Complainants detail that they are considering selling their family home.

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The Complainants are seeking the following:

- (a) That the Provider explain why it *“advised”* the Complainants to apply a fixed interest rate to their mortgage loan account in or around **2007**;
- (b) That the Provider explain why it would not allow the Complainants to revert the mortgage loan account to the tracker interest rate, without the payment of a fee of €7,000.00, between **2008** and **2010**; and
- (c) Compensation for *“struggles and stress”* caused by the higher repayments.

The Provider’s Case

The Provider submits that it issued a Facility Letter to the Complainants on **21 July 2005** for a loan in the amount of €200,000.00, repayable over a term of 19 years. The Provider details that the Complainants drew down the loan on a tracker interest rate of ECB + 0.79% on **19 September 2005**, under mortgage loan account ending **6824**.

The Provider submits that the Complainants contacted an employee of the Provider on **27 June 2007** *“querying the specific fixed interest monthly payment amount”*. The Provider states that in **2007** the Complainants opted to enter into a LTV fixed interest rate mortgage loan agreement.

The Provider details that *“the European Central Bank increased the ECB Base rate steadily from 6 June 2003 until October 2008”* and *“The ECB Base rate was 2.00% in June 2003 however the ECB Base rate had increased to 4.25% by July 2008”*. The Provider submits that the Complainants subsequently drew down *“a new fixed interest rate loan”* under mortgage loan account ending **3834** for the sum of €187,572.00 pursuant to a Facility Letter dated **5 July 2007**. The Provider details that mortgage loan account **3834** *“fully repaid and replaced”* mortgage loan account ending **6824**.

The Provider states that the Facility Letter for mortgage loan account ending **3834** was signed and accepted by the Complainants on **10 July 2007** and a new loan was drawn down on a fixed interest rate which applied to the mortgage loan account until **1 August 2010**.

The Provider details that on expiration of the fixed interest rate period, *“the Complainants were offered and drew down a new ECB Tracker interest rate loan”* on **4 August 2010** under mortgage loan account ending **1078**, for the amount of €164,030.00. The Provider states that the applicable tracker interest rate was ECB + 0.54%. The Provider asserts that *“Despite the Complainants not having a contractual right to an ECB Tracker interest rate on the expiry of the fixed interest rate period in August 2010 the Complainants were offered a new ECB Tracker interest rate loan which they drew down on 4 August 2010.”*

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In response to the Complainants' submissions that they were not permitted to switch their mortgage loan account to a tracker interest rate during the fixed interest rate period from **2008** to **2010**, the Provider details that if the Complainants decided to break away early from the fixed rate period, they would have been required to pay a breakage fee pursuant to **Clause 9.3** of their Facility Letter. The Provider submits that the Complainants contacted the Provider on **15 June 2009** and requested details of the specific breakage fee.

The Provider states that it is satisfied that the terms and conditions in relation to mortgage loan account ending **3834** were *"sufficiently clear and transparent and unambiguously confirmed that a "breakage fee" would be applicable if the Complainants had chosen to terminate the fixed interest rate period early in order to draw down a new ECB Tracker interest rate"*.

The Provider submits that **Clause 11.4** of the Facility Letter for mortgage loan account ending **3834** provided that on expiration of the fixed rate period, the mortgage loan would revert to the *"applicable variable home loan rate"*. The Provider asserts that despite the Complainants *"not being contractually entitled to an ECB Tracker interest rate"* on expiration of the fixed interest rate period, the Provider offered the Complainants a tracker interest rate *"as a gesture of goodwill"*.

In response to the Complainants' submissions that they were in a *"situation for a number of years yet to come because of the bank's avoidance to help us when we were in financial difficulty"*, the Provider submits that a credit application for the ECB tracker loan dated **19 July 2010** states that the Complainants were on a reduced income as a result of the Second Complainant being made redundant in **late-2008**. The Provider states that *"any financial difficulties experienced by the Complainants were as a result of the above referenced redundancy and were not as a result of the action by the Provider."*

The Provider details, in relation to the Complainants' submissions that they were advised by the Provider they were not *"entitled to any help even though [the Complainants] had an insurance policy with [the Provider] in the event of [the Second Complainant] losing his job"*, that it has no record of the Complainants having *"income protection policy or a payment protection policy with the Provider"*. The Provider details that a form was completed by the Complainants on **19 September 2005** indicating that they *"did not wish to put in place any Accident, Sickness and Unemployment insurance policy with the Provider"*.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider failed to advise the Complainants adequately regarding whether or not mortgage payment protection insurance applied to their mortgage loan account;
- (b) The Provider wrongly advised the Complainants to move their mortgage loan account from a tracker interest rate to a fixed interest rate in or around **2007**; and
- (c) The Provider failed to allow the Complainants to revert their mortgage loan account to a tracker interest rate from **2008** to **2010**, without the payment of a breakage fee of in or around €7,000.00.

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 4 March 2022, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation and to consider certain interactions between the Complainants and the Provider between **2007** and **2010**.

The Complainants completed and signed a **Home Loan Application Form** on **19 July 2005**. The "*Home Loan required*" section of the application form outlined that the loan amount required was €200,000.00, the term requested was 19 years and the purpose of the loan was "*further advance/top up to purchase a different property*".

The **Home Loan Application Form** also contained a section titled "*Home Loan Repayment Protection Insurance*", which details as follows:

"We recommend that you protect your Home loan with Home Loan Repayment Protection Insurance which can take care of your repayments if you are unable to work due to accident, sickness or involuntary unemployment.

Home Loan Repayment Protection Insurance is underwritten by [named third party provider], a member of the [named entity] group.

Further details about this protection can be found in the booklet 'Home Loans Repayment Protection Insurance'. It contains details about the eligibility criteria, cover, exclusions and limitations which apply.

The monthly benefit is available in units of €50. The maximum monthly benefit is limited to 125% of your current monthly Home Loan repayment to the Bank up to a maximum of €1750.

***Where only one person is named below**, insurance benefits will apply to that person who must be the main income earner at the time the insurance cover starts.*

***Where two persons are named below**, insurance benefits will apply to each person in proportion to their income at the time of the claim."*

I note that the Second Complainant signed his name under the section "*Declaration 1*". There was no date recorded with the signature.

However, both Complainants signed their names under the section "*Declaration 2*" and dated their signatures.

/Cont'd...

"Declaration 1" of the "Home Loan Protection Insurance" section of the application form was signed by the Second Complainant on the following terms:

"I/We confirm that I/We have read the booklet 'Home Loan Repayment Protection Insurance' and consent to the disclosure and use of my/our data as set out therein. I/We agree that the Bank may charge the appropriate Home Loan Repayment Protection Insurance premium to the account (if any) detailed below or otherwise to the bank account detailed under the "Present Bank Details" section. I/We agree that if I/We fail to pay the premium when due, the insurance will cease after due notice has been given by the Bank."

"Declaration 2" of the "Home Loan Protection Insurance" section of the application form was signed by both Complainants on the following terms:

"I/We confirm that it has been recommended that I/We carefully consider taking out such insurance. I/We understand that if it is not in place, then in the event of an accident, sickness or unemployment, I am/we are responsible for maintaining the repayments on my/our Home Loan."

A document titled **Accident, Sickness and Unemployment Insurance Form** has been furnished in evidence which was signed by both Complainants on **19 September 2005**. This document details as follows under the "Recommendation Section":

"1. We have recommended that you take the following Accident, Sickness and Unemployment cover in connection with your home loan

...

Because of your home loan liabilities will remain outstanding in the event of accident, sickness or involuntary unemployment and

You have advised us that you require cover to protect your home loan and that you have no existing cover to protect your repayments for this home loan

You have advised us that you do not wish us to take into account any existing cover you may have, as you understand that we are unable to give advice relating to other providers insurance.

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*You have asked us to arrange top up cover and have specified the level and term of cover you require.
..."*

The "*Final Recommendation*" section of the **Accident, Sickness and Unemployment Insurance Form** outlines as follows:

" You agree with this recommendation

Having discussed the need to have sufficient cover, you have decided not to accept our recommendation.

You wish to vary the recommendation as follows..."

Upon considering the documentation completed by the Complainants in relation to home loan protection insurance, it is clear to me that the Provider recommended that the Complainants take out home loan repayment protection insurance with the Provider and clearly noted in the related documentation that the Complainants were responsible for maintaining repayments on their mortgage loan account in the event of an accident, sickness or unemployment. However, the Complainants decided not to accept this recommendation and proceeded with the mortgage loan application without arranging any additional home loan repayment protection insurance. It was entirely a matter for the Complainants to decide whether to accept the Provider's recommendation, however they did not do so. By signing the "*Declaration 2*" section of the Home Loan Application Form the Complainants confirmed that it had been recommended that Home Loan Protection Insurance be taken out and that they understood that they were responsible for maintaining repayments on the mortgage loan in the event of accident, sickness or unemployment.

The Provider issued a **Facility Letter** dated **21 July 2005** to the Complainants which details as follows:

"Dear [Complainants]

I am pleased to inform you that [the Provider] hereby offers a Tailored Home Loan to you linked to the refinance rate of the European Central Bank (ECB) as detailed hereunder.

IMPORTANT INFORMATION as at 21 July 2005

/Cont'd...

1. *Amount of credit advanced* : EUR 200,000.00 (“the Loan”)
2. *Period of Agreement* : 19 years from drawdown
3. *Number of Repayment Instalments* : 228 monthly, plus any final balance
4. *Amount of Each Instalment* : EUR1,137.37
- ...
8. *Amount of mortgage protection premium* : EUR 0.00”

The following “Warning” is contained at the bottom of page 1 of the **Facility Letter** dated **21 July 2005**:

“YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT. THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.”

The “Schedule” section at the bottom of **page 1** details as follows:

“Rate of Interest : The total of the ECB Refinance Rate plus .79% (the Added Percentage), currently 2.00% p.a.”

The **Tailored Home Loan ECB Tracker – Terms and Conditions** attached to the **Facility Letter** dated **21 July 2005** detail as follows:

“The following shall be read in conjunction with the effect of our Tailored Home Loan (the Offer) and acceptance of the Offer is also acceptance of these Terms and Conditions.

...

(3) Rate Of Interest

Until the loan is fully repaid, the Rate of Interest will be calculated by adding the Added Percentage specified in the Schedule to the current ECB Refinance Rate. Where the ECB Refinance Rate is changed by the European Central Bank, the new rate will be applied to your loan within three working days. If there ceases to be a rate of interest known as the ECB Refinance Rate, we will base your interest rate on the rate which is at that time the nearest equivalent to the ECB Refinance Rate.

Our Rate of Interest and APR are variable. Rates of Interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect. APR and other details quoted in the “Important Information” section assume that at drawdown of the Loan the Rates of Interest applicable will be those quoted at the date of this Offer.

/Cont’d...

If our Rates of Interest change prior to your acceptance of this Offer, any such change(s) will not be effective until we notify you in writing. Notice of such changes will be given by publication in the national press and will be exhibited in our Branches.

....

(4) Repayment

(a) You agree to repay the Loan by the Repayment Instalments (and final balance, if any) as they fall due on/or before the expiry of the Period of Agreement...

(e) You may at any time repay the Loan or any part thereof without penalty. Repayment Instalments may be varied by us if you exercise your right to make early repayment of part of the Loan to ensure as far as possible that the Loan will be repaid over the unexpired portion of the Period of Agreement”.

The Complainants signed the **Acceptance and Authority** section of the Facility Letter on **5 September 2005** on the following terms:

“I/ We accept the within Offer of a loan on the Terms and Conditions set out including your Tailored Home Loan Terms and Conditions attached.

I/ We irrevocably authorise my/ our Solicitor to give the undertaking(s) referred to in clause 2 of the Terms and Conditions.

I/ We irrevocably authorise you to pay the Loan through my/ our Solicitor (unless another mode of payment is agreed by the Solicitor).”

The Complainants’ solicitor witnessed the Complainants’ signatures and signed the Acceptance and Authority section noting as follows:

“Witnessed by me having explained the nature and content thereof to the Borrower(s)”.

It is clear to me that the **Facility Letter** dated **21 July 2005** provided for a tracker interest rate of 2.80% (ECB + 0.79%). This was clearly set out in the **Schedule** and **Condition 3** of the **Tailored Home Loan ECB Tracker – Terms and Conditions**.

Mortgage loan account ending **6824** was drawn down on **19 September 2005** on a tracker interest rate of ECB + 0.79%.

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It appears that the Complainants approached the Provider in **2007** to explore the option of switching their mortgage loan to a fixed interest rate. The Provider submits that in circumstances where the ECB base rate increased steadily from **June 2003** to **July 2008**, many of its customers opted to fix their interest payments. I note that the ECB base rate was 2% in **June 2003** however the ECB base rate increased to 4.25% by **July 2008**.

The Provider sent an email to the Complainants dated **22 June 2007**, which detailed as follows:

"[Name of First Complainant]

I can only apologise for the long, delay in dealing with your request. I have received authority to Fix your mortgage at the 3 Year Rate originally agreed.

You can pick up the letters on Monday in [Provider's branch location] and bring them back when you have them signed. I have marked where you and [Second Complainant] has (sic.) to sign. These letters are valid up to the 29.06.2007

Again, please accept my apologies..."

A **Credit Application** dated **22 June 2007** has been furnished in evidence. This document reflects that the Complainants sought a "Fixed Rate Home Loan" in the amount of €187,512.00. The "Comments" section of the **Credit Application** details as follows:

"Existing customer at branch. Customer are wishing to transfer their ECB Mortgage to a Fixed for 3 Years..."

...

Customer recently experienced damage to their home from leaking pipes. They had to repair same, and used their own funds to pay for same until their insurance cheque arrived. Customers went through a bad patch with this, but now has been rectified.

...

Reasons for support & provide recommendation.

** Existing Customers at Branch*

** No additional funds being requested*

/Cont'd...

- * Wages mandated to account
 - * LTV low
 - * Internal Transfer to Fixed for three years, which will give comfort to the customers.
- Branch [recommends] same.”

A **Home Loan Repayment Quotation, Fixed Rate Home Loan** dated **22 June 2007** was issued from the Provider to the Complainants detailing as follows:

“This quotation does not constitute a legally binding offer. The figures are provided in good faith and are an accurate representation of the offer that [the Provider] would make under current market conditions based on the information that has been provided. It should be noted that figures can fluctuate with market conditions. The provision of this information does not oblige [the Provider] to grant a credit.

...

1. Product Description

Type of Loan

You mortgage your dwelling to the Bank as security until your home loan is repaid. You make capital and interest payments during the loan period so the full amount of the loan is repaid at the end of the term. The interest charged may vary during the course of the home loan.

Type of Interest Rate

Fixed to 1 July 2010 then Standard Variable Rate for the remainder of the term.

...

Interest Rate

*5.15% Fixed
5.34% Variable*

Fixed Rate: Rollover date: 1 July 2010. The Rollover Date is the start date of the standard variable interest rate at that time. The fixed rate period expires on the date preceding this day.

...

Repayment Term

17 years 3 months

/Cont'd...

Amount of Each Instalment

36 payments of	EUR 1,378.38
170 payments of	EUR 1,394.88
1 payment of	EUR 1,392.29

3. Additional Costs Recurrent

Repayment Protection Insurance for Home Loans

Repayment Protection Insurance for Home Loans

This cover gives you the option to protect your monthly payments against Accident, Sickness or Unemployment. Cover will depend on level of benefit chosen.

Life Policy

We may require a suitable mortgage protection life assurance policy together with a mortgage over the property.

Property Policy

We may require that you insure your property through a reputable insurance company with the Bank's interest noted on the policy.

The above mentioned recurrent and non-recurrent costs are not included in the repayment amounts or APR calculations.

4. Early Repayment

A redemption fee shall be payable by you if you redeem the loan in full or in part at any time during a period where our Fixed Interest Rate applies. Such redemption fee will be the equivalent of six months interest calculated at the rate applicable to the Loan on the amount thereof redeemed or converted or the equivalent of interest on the amount redeemed or converted for the number of days remaining where the outstanding period is less than six months.

...

7. Warning

...

/Cont'd...

THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY [the Provider] FROM TIME TO TIME.

..."

The First Complainant sent an email to a representative of the Provider on **27 June 2007**, which detailed as follows:

"Hi [Provider's representative],

[Second Complainant] collected the forms from the bank yesterday. Unfortunately, the rate is not what we agreed on the 17th May. We agreed that I would be paying back €1,348 monthly, however, the amount on the forms is €1,378. We had calculated the difference, that I would be repaying was an extra €88 per month not €119.

Can you look into this for me or should I contact someone else dealing with Mortgages in the [location] branch?

Regards"

A further **Credit Application** dated **5 July 2007** has been provided in evidence. This document reflects that the Complainants sought to apply for a *"Fixed Rate Home Loan"* for the sum of €187,572.00. The *"Comments"* section of this further Credit Application detail that the Complainants sought *"to transfer their ECB Mortgage to a Fixed for 3 Years"*. The monthly repayment is detailed as *"EUR 1,343.06"*, which appears to be in line with the Complainants' request.

The Provider issued a **Final Financial Summary** to the Complainants dated **5 July 2007** which was accepted and signed by the Complainants on **10 July 2007** and details as follows:

"Thank you for meeting with me to discuss your requirements regarding

- *Home Loan*

If anything has changed since our meeting, please let me know as soon as possible as this may affect your product choice.

Please note that the summary must be read in conjunction with any product literature and your personalised illustration(s), if applicable.

/Cont'd...

Please check the information provided is correct, and if you have any questions do not hesitate to contact me.

Valuation-held on File

House Insurance- existing policy in place with [third party provider]

Life Cover- existing policy in place with [third party provider]

..."

Page 8 of the Final Financial Summary dated 5 July 2007 details as follows in relation to mortgage repayment protection insurance:

"Repayment Protection Insurance – Recommendation & Reason why

We have recommended that you take the following Accident, Sickness & Unemployment Cover in connection with your home loan

<i>Customer(s)</i>	<i>Monthly Benefit</i>	<i>Term (Years)</i>	<i>Total Monthly Premium</i>
<i>[First Complainant]</i>	<i>EUR 1,348.49</i>	<i>17</i>	<i>EUR 69.31</i>
<i>[Second Complainant]</i>	<i>EUR 1,348.49</i>	<i>17</i>	<i>EUR 69.31</i>

The recommendation fulfils your needs.

You have selected

<i>Customer(s)</i>	<i>Monthly Benefit</i>	<i>Term (Years)</i>	<i>Total Monthly Premium</i>
	<i>EUR 0.00</i>	<i>0</i>	<i>EUR 0.00</i>

Having discussed the need to have sufficient cover, you have decided not to accept our recommendation."

It appears to me that the Provider once again recommended to the Complainants that they take out mortgage repayment protection insurance in respect of the new fixed interest rate loan facility, however the Complainants decided not to accept this recommendation and proceeded with the mortgage loan application without availing of the home loan repayment protection insurance.

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It was entirely a matter for the Complainants to decide whether to accept the Provider's recommendation to take out this insurance protection in respect of the facility.

The Provider subsequently issued a **Facility Letter** dated **5 July 2007** in respect of mortgage loan account ending **3834**, which detailed as follows:

"This Agreement is made between us [the Provider], and you the borrower(s) named above for a housing loan on the terms and subject to the conditions set out below.

Important Information as at 5 July 2007

1. *Amount of credit advanced: EUR 187,572.00*
2. *Period of Agreement: 17 years 3 month(s) from drawdown.****

...

****The Period of Agreement is based on our discussion with you, when we estimated when you would draw down the Loan and when you would make your first payment. If you selected a first repayment date in a calendar month after the month in which the estimated drawdown date occurs, then the Period of Agreement will be extended to reflect one or more extra calendar months. The number of instalments that you will pay will remain the same.*

...

Schedule

*Purpose of the Loan:
Internal Transfer, as specified in your Loan Application.*

...

Latest Drawdown Date: 5 October 2007

*Rate of Interest: 4.85% per annum, fixed.
5.34% per annum, variable.*

/Cont'd...

Fixed rate: Roll-over dated: 1 August 2010. The Roll-over Date is the start date of the standard variable interest rate at that time. The fixed rate period expires on the date preceding this day.

...

If you wish to avail of the Loan and be bound by this Agreement you must all sign, date and return the original of this Agreement so that it will be received back by us at the above Branch within 21 days of the date set out at the beginning of this Agreement.

Statutory Notices

Statutory Warnings:

(These warnings are required by the Consumer Credit Act 1995)

WARNING: YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT.

WARNING: THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (This will not apply during any period of fixed interest rate).

FAILURE TO KEEP UP PAYMENTS ON THIS MORTGAGE MAY PUT YOUR ABILITY TO FINANCE FUTURE NEEDS AT RISK.

..."

The **General Conditions for Annuity Home Loans** attaching to the **Facility Letter** dated **5 July 2007** detail as follows:

"The following general terms and condition (these "General Condition") shall be read in conjunction with and form part of the Agreement.

....

9 Early Repayment

...

9.3 If you repay the whole or any part of the Loan during a Fixed Period of one year or more you must pay a redemption fee on such repayment. The amount of the redemption fee will be equal to the lesser of:

- (a) six months interest at the current facility rate on the amount repaid early; or*
- (b) the Cost to the Bank;*

/Cont'd...

where the Cost to the Bank means the amount by which the cost to us of funding the loan on the drawdown date exceeds the return to us on reinvesting the repaid amount on the date of early repayment by you for the balance of the term of this Loan Agreement.

...

11 Interest- Fixed Rate Loans

11.1 If the Loan is a fixed rate loan the rate of interest applicable to the Loan for the Fixed Period specified in the Schedule will be our applicable fixed home loan rate on the date of drawdown of the Loan or, if a margin over or under that rate is specified in the Schedule, the aggregate from time to time of that margin and the applicable fixed home loan rate. The applicable fixed home loan rate at the date specified in the Important Information Notice is the rate specified in the Schedule.

11.2 The APR and other details quoted in the Important Information Notice assume that at drawdown of the Loan the applicable fixed rate for the Fixed Period will be the rate applicable on the date indicated in the Important Information Notice.

However our rates of interest are altered in response to market conditions and if our rates of interest change between the date indicated in the Important Information Notice and the date of drawdown of the Loan, the rate of interest on the Loan for the Fixed Period specified in the Schedule will be our applicable fixed home loan rate for such period prevailing at the date of drawdown of the Loan or, if a margin over or under that rate is specified in the Schedule, the aggregate from time to time of that margin and the applicable fixed home loan rate.

11.3 You may, prior to the expiration of a Fixed Period, request us to fix the rate of interest on the Loan for such further period as you may specify (so long as it is a period for which we offer fixed rates on home loans). If we agree to such request (and we have no obligation to do so) the rate of interest applicable to the Loan for the requested Fixed Period shall be our applicable fixed home loan rate on the first date of the requested Fixed Period or, if a margin is specified in the Schedule, the aggregate from time to time of that margin and such fixed home loan rate.

11.4 Unless a further Fixed Period is agreed in accordance with clause 11.3, at the end of a Fixed Period the rate of interest applicable to the Loan will revert to our then applicable variable home loan rate.

11.5 You may at any time the rate of interest applicable to the Loan is variable request us to fix the rate of interest on the Loan for such period as you may specify (so long as it is a period for which we offer fixed rates on home loans).

/Cont'd...

If we agree to such request (and we have no obligation to do so) the rate of interest applicable to the Loan for the requested Fixed Period shall be our applicable fixed home loan rate on the first date of the requested Fixed Period or, if a margin is specified in the Schedule, the aggregate from time to time of that margin and such fixed home loan rate. You may not make such a request where you are in breach of any provision of the Agreement.

11.6 You may at any time during a Fixed Period opt to convert to our variable home loan rate (plus or minus any margin specified in the Schedule) by notifying us in writing. Upon conversion, a redemption fee shall be payable by you calculated in accordance with clause 9.3 above. You may not exercise this option where you are in breach of any provision of the Agreement.”

The Complainants signed the **Acceptance and Authority** section of the **Facility Letter** on **10 July 2007** which details as follows:

“WARNING -THIS IS AN IMPORTANT LEGAL DOCUMENT AND YOU ARE STRONGLY ADVISED TO SEEK INDEPENDENT LEGAL ADVICE BEFORE YOU SIGN YOUR ACCEPTANCE

I/We have read and understand the nature and contents of this Loan Agreement.

I/We agree to be bound by this Loan Agreement.

Where applicable I/We irrevocably authorise my/our Solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by my/our Solicitor).”

The **Facility Letter** was “Signed for and on behalf of [the Provider]” by an authorised official on **05 July 2007**. The same authorised official also signed her name under the “Witnessed by” section of the **Acceptance and Authority**. This is dated **5 July 2007**. The Complainants signed the **Facility Letter** on **10 July 2007**.

The Complainants also signed the **Conditions For [the Provider’s] LTV Mortgages** document on **10 July 2007**. The same authorised official of the Provider signed the “Witnessed By” section of the document.

The Complainants also signed a document on **10 July 2007** confirming as follows:

"I WISH TO CONFIRM THAT I HAVE BEEN OFFERED THE OPPORTUNITY TO SEEK INDEPENDENT LEGAL [ADVICE] IN CONNECTION WITH ADDITIONAL HOME LOAN FACILITIES BUT HAVE [DECLINED] THIS OFFER."

It clear to me that the **Facility Letter** dated **5 July 2007** provided for a 3-year fixed interest rate of 4.85%. This fixed interest rate loan was a new loan, the terms and conditions of which were set out in the form of a new **Facility Letter**.

The Complainants appear to submit that they would not have moved from an ECB tracker rate mortgage to fixed rate mortgage in **2007** only for the advice that they received from the Provider at that time. While I have not been provided with any notes of a meeting that purportedly took place in **2007** between the Complainants and the Provider, the two credit applications submitted in **June 2007** and **July 2007** together with the email exchange on **27 June 2007** suggest that the decision to draw down a new loan on a 3-year fixed interest rate was one that was made by the Complainants after a level of interaction with the Provider. It is not in dispute between the parties that the Complainants approached the Provider at that time to explore the options available with respect to their mortgage loan. The decision to move from an ECB tracker mortgage loan to a fixed rate mortgage loan, was one the rested solely with the Complainants. If the Complainants wanted independent advice about such a move, the Complainants could only get that advice from an independent third-party advisor. I note that the Complainants signed a declaration on **10 July 2007** indicating that they had been offered the opportunity to seek independent legal advice in relation to the fixed rate mortgage but chose not to seek such advice. If the Complainants wanted their mortgage loan to remain on a tracker interest rate, the Complainants could have decided not to accept the terms of the **Facility Letter** dated **5 July 2007**, however the Complainants signed their acceptance of the offer and drew down the loan.

The Complainants appear to suggest that the fixed interest rate mortgage loan was somehow not valid as the **Facility Letter** was not witnessed correctly however the mortgage loan statements provided in evidence show that Complainants proceeded to draw down mortgage loan account ending **3834** on **16 July 2007** on a fixed interest rate of 4.85% and make payments on foot of that mortgage loan.

The Complainants submit that between **2008** and **2010**, they requested the Provider to release them from the fixed interest rate mortgage agreement on a number of occasions so that they could switch to a tracker interest rate mortgage loan. They submit that they were told they would have to pay a breakage fee in excess of €7,000.00.

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The Provider's **internal notes** indicate that the Complainants contacted the Provider by telephone on **15 June 2009** to request redemption figures as they wished to break out of the fixed interest rate period.

The Provider's internal notes detail as follows:

"Send out A&L Statement and monthly budget form to be completed. Customers on fixed rate home loan maturing aug 10. Redemption figures requested to break term, customer has requested figure"

I have not been provided with any evidence of any further requests made by the Complainants in relation to breaking the fixed interest rate period and no evidence has been provided in relation to any discussions that may have taken place between the parties regarding a breakage fee.

The terms and conditions of the **Facility Letter** dated **5 July 2007** detail the fee payable if the Complainants chose to convert their fixed interest rate mortgage loan to a variable interest rate mortgage loan prior to the expiry of the fixed interest rate period. **Condition 11.6** stipulates that a redemption fee, calculated in accordance with **Condition 9.3**, is payable by the Complainants should they decide to change the interest rate applicable to their mortgage loan. **Condition 9.3** of the **Facility Letter** dated **5 July 2007** states that the redemption fee will be the lesser of "six months interest at the current facility rate on the amount repaid early" or "the Cost to the Bank". The cost to the bank is described as the amount by which the cost of funding the loan to the Provider at the date of drawdown exceeds the return to the Provider on reinvesting the repaid amount on the date of early repayment by the customer for the balance of the term of the loan agreement.

In **June 2009**, there were approximately 14 months remaining on the fixed interest rate period, which was due to expire in **August 2010**. Therefore, I accept that the Complainants were obliged to pay a breakage fee if they wished to move away from their 3-year fixed interest rate mortgage loan prior to its maturity date in **August 2010**. This was contained in the terms and conditions of the Complainants' mortgage loan that they had signed up to in **July 2007**. The evidence shows that the Complainants chose to remain on the fixed interest rate until **3 August 2010**.

The Provider's **internal notes** indicate that the Complainants contacted the Provider by telephone on **21 April 2010** querying the applicable interest rate upon expiration of the fixed interest rate mortgage loan in **August 2010**.

/Cont'd...

The Provider's internal note details as follows:

"Customer queried rates after fixed rate mortgage matures. She has the option to go back into an ECB Tracker as long as LTV is less than 80%."

A letter issued from the Provider to the Complainants dated **21 June 2010**, detailing as follows:

"Dear [First Complainant]

The agreed Fixed Rate period matures on your Fixed Rate Home Loan matures on the 03.08.2010, so you now have the opportunity to review and agree the interest terms for the amount outstanding on your loan.

Variable interest rate or a new fixed interest period?

You have the option to choose between a standard variable rate and a new fixed rate period. The fixed interest rate will be determined on the day you agree the new agreement.

If you wish to continue with a new fixed interest rate period, please contact your local branch on [number] to arrange a meeting to discuss your options.

If you do not respond to this letter by 28.07.2010 the interest rate on your Fixed Rate Home Loan will be changed to standard variable rate, as agreed in the original Terms and Conditions of your loan."

A **Credit Application** dated **19 July 2010** has been supplied in evidence. The "Comments" section of the Credit Application details as follows:

"Brief summary of application (Include comment on any connected borrowing). Application processed to enable LTV Fixed Rate mortgage, which is maturing on the 03.08.2010, to LTV ECB Tracker at margins detailed in letter dated 10.07.2007.

...

Customers are on reduced income as [Second Complainant] was made redundant back in late 2008 but managed to obtain alternative work in [employer], which initially was on a part time basis. He is now in fulltime employment with same.

..."

/Cont'd...

The Provider subsequently issued a new **Facility Letter** dated **23 July 2010** in relation to mortgage loan account ending **1078** which details as follows:

“This Agreement is made between us [the Provider], and you the borrower(s) named above for a housing loan on the terms and subject to the conditions set out below.

Important Information as at 23 July 2010

1. Amount of credit advanced: EUR 164,030.00
2. Period of Agreement: 14 years 3 month(s) from drawdown.***

...

****The Period of Agreement is based on our discussion with you, when we estimated when you would draw down the Loan and when you would make your first payment. If you selected a first repayment date in a calendar month after the month in which the estimated drawdown date occurs, then the Period of Agreement will be extended to reflect one or more extra calendar months. The number of instalments that you will pay will remain the same.*

Schedule

*Purpose of the Loan:
Internal Transfer, as specified in your Loan Application.*

...

Latest Drawdown Date: 26 October 2010

Rate of Interest: 1.54% per annum.

...

Statutory Notices

Statutory Warnings:

(These warnings are required by the Consumer Credit Act 1995)

WARNING: YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT.

/Cont'd...

WARNING: THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (This will not apply during any period of fixed interest rate).

FAILURE TO KEEP UP PAYMENTS ON THIS MORTGAGE MAY PUT YOUR ABILITY TO FINANCE FUTURE NEEDS AT RISK.

..."

The Complainants signed the **Acceptance and Authority** on **30 July 2010** on the following terms:

"I/We have read and understand the nature and contents of this Loan Agreement. I/We agree to be bound by this Loan Agreement.

Where applicable I/We irrevocably authorise my/our Solicitor to give the undertaking(s) referred to in clause 3 of the General Conditions and I/We irrevocably authorise you to pay the Loan through my/our Solicitor (unless another mode of payment is agreed by my/our Solicitor)."

The Complainants signed the **Conditions For [the Provider's] LTV Mortgages** on **30 July 2010**, which detail as follows:

"...

The Terms and Conditions set out in your [the Provider's] Housing Loan Agreement ("Housing Loan Agreement") apply to your [the Provider's] Mortgage as amended by these special conditions, which also apply.

1. LTV Interest Rate: Provided that the ratio of the amount of your total borrowing to the value of your property, expressed as a percentage [LTV], is not more than 80%, the LTV interest rate applicable to your loan (the 'LTV Rate') is calculated by reference to your LTV and the [the Provider's] Base Rate (if your loan is a fixed rate LTV loan) or ECB Base Rate (if your loan is an ECB Tracker LTV loan) (in either case the 'Reference Rate'), on a weighted, tiered pricing basis. For this purpose, we determine what portion of your loan falls within each of the following tiers of difference between your Reference Rate and your LTV Rate (the "Difference"), and calculate the average, weighted Difference for your loan ("Weighted Difference") accordingly:

(a) Lowest Tier LTV of 0% - 50% = Difference of 0.5%;

(b) Next Tier LTV of 50% - 60% = Difference of 0.6%;

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*(c) Highest Tier: LTV of 60% - 80% = Difference of 0.8%.
your LTV Rate is then the sum of your Reference Rate and your Weighted
Difference.*

*In the event that your LTV increases above 80% at any time during the term of your
LTV mortgage, we reserve the right to convert your LTV Rate to our then applicable
Home Loan rate (fixed or variable as the case may be).*

*Your LTV Rate at the date of drawdown of your loan will be our LTV Rate [fixed LTV
or ECB Tracker LTV as the case may be) applicable at that date.*

*2. Your LTV: The LTV for your loan as at the date hereof is 66%. Your Weighted
Difference is 0.54 %. If you have switched from an ECB Tracker with us to ECB
Tracker LTV mortgage, your Weighted Difference replaces the margin over your
Reference Rate specified in your Housing Loan Agreement.*

...

THIS IS AN IMPORTANT DOCUMENT AND SHOULD BE RETAINED CAREFULLY."

It is clear to me that the **Facility Letter** dated **23 July 2010** provided for a tracker interest rate of ECB + 0.54% based on the LTV of the mortgage loan, which at that point in time was 66%.

The mortgage loan statements provided in evidence show that mortgage loan account ending **1078** was drawn down on a tracker interest rate on **4 August 2010**. It appears that mortgage loan account ending **1078** remained on a tracker interest rate of ECB + 0.54% with the Provider until the Provider transferred the mortgage loan to a third-party provider.

Having considered the evidence before me, it is clear to me that the Complainants freely made the decision to move from an ECB tracker interest rate mortgage to a fixed interest rate mortgage in **June 2007**. If the Complainants believed that a fixed interest rate mortgage was not suitable for them, they were free to remain on the ECB tracker interest rate mortgage. However, the Complainants chose to move to a fixed interest rate loan. Furthermore, I accept that the Provider was correct in its dealings with the Complainants from **June 2009**, when the Complainants appear to have first enquired about the cost of moving from their fixed interest rate mortgage loan prior to its maturity, up until **August 2010**, when a tracker interest rate of ECB + 0.54% was applied to the Complainants' mortgage loan account.

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The Complainants' issue with the application of the fixed interest rate to the mortgage is that "*tracker rates then dropped after we fixed*", however the evidence shows that the recommendation of the fixed interest rate was to give the Complainants comfort at the time. While it may be that the tracker interest rates subsequently dropped in **2008**, it is not reasonable to expect the Provider to know this at the time the recommendation was made in **2007**.

In relation to the Complainants' assertion that the Provider failed to advise them adequately regarding whether mortgage payment protection insurance applied to their mortgage loan account, the evidence is that the Complainants did not take out mortgage payment protection insurance with the Provider. The Complainants appear to submit that they raised certain queries with the Provider in **2008** as to mortgage payment protection insurance as the Second Complainant was made redundant. The evidence on file indicates that the Provider recommended that the Complainants avail of mortgage payment protection insurance in **September 2005** and **July 2007**, however they chose not to accept the Provider's recommendation on both occasions. Therefore, I do not see how there could be any uncertainty as to whether mortgage payment protection insurance applied to the Complainants' mortgage loan in **2008**, or indeed at any other time. It was the Complainants who made the decision to not to avail of mortgage payment protection insurance therefore they should have been aware that they did not hold mortgage payment protection insurance with the Provider.

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

Conclusion

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

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



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

30 March 2022

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.