



<u>Decision Ref:</u>	2022-0142
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainant's principal private residence.

The loan amount was €300,000.00 and the term of the loan was 35 years. The Mortgage Loan Offer Letter dated **14 July 2006** detailed that mortgage loan would "issue in stages" and commence on a discounted interest rate of ECB +0.85% for the first 12 months with an interest rate of ECB +1.25% applying thereafter.

The Complainant's Case

The Complainant submits that he "signed/entered into a 'Tracker' Mortgage Agreement in good faith with [the Provider] in 2006 for €300,000 on certain terms and conditions." The Complainant details that the mortgage was "activated with a drawdown of €103,500 in 2006".

The Complainant contends that "Due to personal & economical circumstances in Ireland [he] had to pause construction on [his] house until 2016 and when [he] went to drawdown the next part of the balance [he] was informed that [he] could not & that [he] would have to take out a 'Standard Rate Variable' 2nd mortgage with very different terms and conditions."

The Complainant states that the Provider *“refused to allow [him] to drawdown [his] tracker mortgage and insisted [he] re-apply and take out a standard variable rate mortgage for the balance of [his] mortgage to finish the build of [his] house.”*

The Complainant maintains that the Provider has *“offered the explanation that [he] did not draw down the full mortgage within 6 months”* but the Complainant insists that this would be *“impossible for a self build house.”* The Complainant asserts that *“At no stage was [he] ever contacted or informed by [the Provider] that [he] was not complying with the terms and conditions or that [he] was running out of time to drawdown the balance of the mortgage”.*

The Complainant details that *“Nowhere in the Terms & Conditions was it stated that 100% of the mortgage must be drawn down within any timeframe.”* The Complainant submits that if the Provider had notified him that he was *“in danger of losing [his] Tracker Mortgage, [he] would have immediately have progressed [his] house build and drawn down the balance of the Tracker Mortgage”.* The Complainant further submits that *“Surely, there is an onus/responsibility on the provider to contact/warn a loyal Customer of over 20 years on such a serious issue?”*

The Complainant asserts that it is *“quite obvious that the only reason to insist on a new variable rate mortgage is to renege on the original tracker mortgage agreement.”* The Complainant further asserts that *“This has forced [him] to have two separate mortgages on the same property – one a ‘Tracker’ and another at ‘Variable Rate’.”*

The Complainant states that his *“contention is that the ‘Provider’ in 2016 just saw this as an opportunity to unilaterally cancel [his] tracker mortgage and force [him] to take out a 2nd higher interest rate mortgage.”*

The Complainant submitted that in an effort *“to try and alleviate the financial pressure”* he has been forced to *“secure a private loan (€65,000 interest free) to pay back a lump sum off the mortgage and renegotiate a new loan with [the Provider] at 2.9% for the balance.”* The Complainant asserts that for the Provider *“[t]o try and suggest that the 2nd. Mortgage which [the Complainant] was ‘forced’ to take out because the Provider reneged on the original Mortgage to complete the building on [the Complainant’s] house is not relevant to the complaint is ludicrous.”*

The Complainant details that *“The 2nd. Mortgage only exists because of [the Provider’s] behaviour in refusing to allow [the Complainant] to draw down the balance of the 1st. Mortgage, that is the kernel of the complaint.”*

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The Complainant is seeking that the Provider honour the original tracker mortgage loan offer or issue the remainder of mortgage account ending **6840** under a new offer at the original tracker rate.

The Provider's Case

The Provider submits that it issued a Mortgage Loan Offer Letter to the Complainant for a loan in the amount of €300,000.00 repayable over a term of 35 years. The Provider details that from a review of its records, *"it was understood at the time that this was to be a stage draw down, the first stage of which was for the purchase of the security site."*

The Provider details that the Complainant initially drew down the sum of €86,000.00 on **17 October 2006** and drew down a further sum of €17,500.00 on **25 October 2006**. The Provider states that it *"holds no evidence or records subsequent to the drawdown of 25 October 2006 of any discussion or request by the Complainant of any further drawdown pursuant to the Offer Letter until March 2016"*. The Provider further states that when the Complainant made a request to draw down further funds in **March 2016**, this was *"in effect 9 and a half years after the expiry of General Condition 9 (c) in the Offer Letter."*

The Provider asserts that *"the Complainant's failure to notify the Provider of his change in plans reasonably promptly and the cessation of the construction for a lengthy period as a change in his personal circumstances [is] of fundamental importance to the mortgage loan"* and the Provider believes that it allows it *"the right to refuse any further drawdown of the mortgage loan account."* The Provider states that the failure to notify the Provider is a breach of **General Condition 9(b)** of the Mortgage Loan Offer Letter.

The Provider submits that it is *"satisfied that it has been wholly compliant with its obligations to the Complainant under the Consumer Protection Code 2012."*

The Provider details that throughout the application period, the Complainant *"had the full benefit of legal advice"* and that it is the responsibility of the Complainant's solicitor to advise as to the nature of the agreement, *"including terms and conditions that might be consequential to the Complainant."* The Provider submits that therefore, *"it was reasonable to expect that the Complainant, having the benefit of legal advice, and having confirmed in writing that he had read the terms and conditions of the Offer Letter, was aware of General Condition 4(b), 9(b) and 9(c), and the consequences thereof"*. The Provider further submits that on that basis, the Complainant should have been aware that *"after 6 months of the agreement, the Provider was not obliged to advance any balance of loan facilities not already advanced."*

The Provider details that it was not its responsibility to follow up with the Complainant as to whether he intended to draw down the remaining balance of the loan in good time. The Provider further details that the Complainant *“indicated his awareness of this condition and made a personal choice not to act in compliance with same.”*

The Provider submits that it has *“no record that it was aware that the Complainant was not in a position to draw down the remainder of the funds within 6 months.”* The Provider further submits that *“it can reasonably be inferred from the fact that the mortgage loan account was being satisfactorily serviced with no issues that there was no reason to suspect that the Complainant was not in a position to drawn down the remaining balance.”*

The Provider states that in circumstances where the loan amount was not drawn down in full within a 6-month period, the loan offer expired. The Provider explains that given the Complainant sought to draw down the remainder of his mortgage some 9 and a half years later in **March 2016**, the Complainant was required to make *“an entirely new application”* for another mortgage loan.

The Provider details that it withdrew tracker interest rates from its product offering in **late 2008** therefore tracker rates were not available for new lending in **March 2016**.

The Provider *“entirely refutes”* the Complainant’s submission that it sought to renege on the original tracker mortgage agreement by requiring the Complainant to apply for a new mortgage loan. The Provider maintains that it *“acted in full compliance with the terms and conditions of the Offer Letter”* and it *“did not seek to renege on any aspect of it.”* The Provider asserts that rather, the Complainant *“breached the terms and conditions of the Offer Letter, resulting in the Provider refusing to allow the remainder of the loan to be drawn down.”*

In response to the Complainant’s submission that he was *“forced to secure a private loan (65,000 interest free) to pay back a lump sum off the mortgage and renegotiate a new loan with [the Provider] at 2.9% for the balance”*, the Provider details that this comment does not refer to the mortgage loan account which is the subject of this complaint, but rather another loan account held by the Complainant, which was initially drawn down on **17 February 2017**. The Provider details that the Complainant contacted the Provider on **02 February 2021**, *“enquiring about making a lump sum payment of €65,000.00 to mortgage loan account [ending 2450] and further moving the mortgage loan account to a 1 year fixed rate at 2.9%, as seen by the Complainant on the Provider’s website.”*

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to allow the Complainant to draw down the remainder of the funds of his mortgage loan in **2016** on a tracker interest rate, as provided for in his original Mortgage Loan Offer Letter dated **14 July 2006**.

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.

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

A Preliminary Decision was issued to the parties on 29 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.

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 the relevant provisions of the Complainant's mortgage loan documentation and to consider certain interactions between the Complainant and the Provider between **2006** and **2016**.

The Provider issued a **Mortgage Loan Offer Letter** dated **14 July 2006** to the Complainant which provided for a loan in the amount of €300,000.00, repayable over a term of 35 years.

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Part 1 – The Statutory Loan Details of the Mortgage Loan Offer Letter details as follows:

“1. Amount of credit advanced:	€300,000
2. Period of Agreement:	35 Years
3. Number of Repayment Instalments	4. Amount of each Instalment
<u>Instalments</u>	<u>Instalment Type</u>
12	Variable at 3.600%
408	Variable at 4.000%
...	
7. APR*	4.0%
...	

**Annual Percentage Rate of Charge”*

Part 2- The Additional Loan Details of the Mortgage Loan Offer Letter details as follows:

“11. Type of Loan: Repayment
12. Interest Rate: 3.600% Variable”

Part 3 – Conditions Precedent of the Mortgage Loan Offer Letter details as follows:

“The following conditions (the “Conditions Precedent”) must be complied with in full to the Lender’s satisfaction before the Loan can proceed.

(a) The following Conditions Precedent apply to the Loan:

- (i) Supervising Architect/Engineer/Building Surveyor to complete the enclosed letter of supervision. No responsibility whatsoever is implied or accepted or warranty given by the Lender for the value or condition of the Property by reason of such report.*
- (ii) A valuation (including a photograph) of the Property for mortgage purposes (see Clause2(c) of Part 5 – The General Conditions) showing the valuation in an amount of not less than EUR335,000 and which must be on terms acceptable to the Lender.*

A final inspection will be required for properties under construction/undergoing significant repair. The Lender may raise further conditions after receipt of the valuation....”

Part 4- The Special Conditions of the Mortgage Loan Offer Letter details as follows:

“The Loan is subject to the following special conditions (the “Special Conditions”) which, unless stated to the contrary, must be complied with in full to the Lender’s satisfaction before the Loan, or any part of it, can be drawn down:

(a) The following Special Conditions apply to the Loan:

(i) The Loan will issue in stages in line with the approved Architect’s/Engineer’s/Surveyor’s Report and the following conditions apply:
(a) Title to Property must pass to the Borrower on the first stage payment
(b) To draw down each stage, the Borrower’s Solicitor is required to furnish the Lender with their Cheque Requisition form, AND a Property Report Certificate (from an Architect/Engineer/Surveyor acceptable to the Lender).
(c) The final 5% of the loan will be retained until the Lender has been furnished and is satisfied with its Property Report Certificate from the supervising Architect/Engineer/Surveyor AND a final valuation from a valuer acceptable to the Lender.

...

(iii) (a) Subject to part (b) of this condition, the interest rate applicable to the loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo Rate”) for the term of the loan. Variation in interest rates shall be implemented by the Lender not later than close of business on the 5th working day following a change in the Repo Rate by the European Central Bank. Notification shall be given to the borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer letter. In the event that, or at any time, the repo rate is is [sic] certified by the Lender to be unavailable for any reason the interest rate applicable shall be the Lender’s prevailing Homeloan variable rate. (b) For the first 12 months from the date of draw down of the loan the interest rate as outlined in (a) above shall be discounted by 0.40% and shall be no more than 0.85% above the Repo rate and shall be subject to the terms and conditions outlined in (a) above.

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At the end of the said 12 month discount period the interest rate applicable to the loan shall revert to the rate as outlined in (a) above i.e. not more than 1.25% above the Repo rate. The discount set out in this special condition is the discount which would apply if the loan were drawn down today. There is no guarantee that this discount will be available when the loan is in fact drawn down. The actual discount that will apply shall be the discount then offered by the Lender at the date of drawdown”.

The notice at the end of the page containing **Part 4 –The Special Conditions** details as follows:

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

General Condition 4 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter details as follows:

“4. Repayment

- (a) *Unless otherwise stated herein or agreed by the Lender in writing, the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrower’s bank or other financial institution. For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and any other amounts payable and for an endowment loan shall comprise of interest and such other amounts only. The due dates for repayment of the Loan are those dates that are from time to time set by the Lender. The amounts of such repayments and the due dates for payment thereof shall be determined by the Lender at its absolute discretion.*
- (b) *In the event of any repayment not being paid on the due dates or any of them, or of any breach of the Conditions of the Loan or any of the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.*

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- (c) *If so agreed in writing by the Lender, the Loan may be repaid in 10 or 11 payments in any year of the term and such payments (unless the Lender at its absolute discretion permits an extension of the term) shall be of such amounts as will discharge the liability of the Borrower during the year for the Loan.*
- (d) *The Lender may at its absolute discretion, and with the consent of the Borrower, vary any payment of principal, interest or any other amount payable in respect of the Loan.”*

General Condition 5 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter details as follows:

“5. General Interest Rate Provisions

- (a) *Interest at the fixed or variable interest rate prevailing from time to time during the term of the Loan, shall be calculated on the daily balance outstanding and shall be compoundable at such monthly, quarterly or other periodic rests as the Lender shall, from time to time and at any time, at its absolute discretion, determine.*
- (b) *Any variation in the interest rate (whether an adjustment of interest rate as between one fixed rate period and another fixed rate period or any variation in the variable rate) may be accommodated at the discretion of the Lender by way of: (i) an adjustment to the amount of the regular repayments during the remaining term of the Loan; or (ii) an adjustment to the number of repayments within the remaining term of the Loan; or (iii) an adjustment in the amount of the final repayment; or (iv) an adjustment in the term of the Loan.*
- (c) *Any sum not paid by the Borrower to the Lender by its due date shall be subject to an additional interest charge of 0.5% per month or part of a month (i.e. 6% per annum) subject to a minimum charge of €2.54 per month from such due date until payment and is charged monthly on the arrears balance at the end of that month. This is in addition to the relevant interest charge and shall accrue both before and after any judgement and shall be charged to the Borrower’s accounts and payable at the same time and in the same manner as the relevant interest charge. The said rate or minimum charge may at any time and from time to time be changed by the Lender at its absolute discretion. The Lender shall give the Borrower at least one month’s prior notice in the event of any such change occurring during the term of the Loan.*

Any such additional interest charge is intended to constitute liquidated damages to the Lender including the Lender's increased administration and related charges due to the Borrower's default. Notwithstanding clause 1(c) the Lender may give notice to the Borrower under this clause by any means it considers reasonable."

General Condition 6 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter details as follows:

"6. Variable Interest Rates

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

General Condition 9 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter details as follows:

"9. Draw Down

- a) All and any Special Conditions (in Part 4) must be complied with in full to the Lender's satisfaction prior to draw down of the Loan. It is the responsibility of the Borrower and the Borrower's agents to ensure that all Conditions are complied with.*
- b) The Borrower shall notify the Lender of any change in the Borrower's personal or financial circumstances prior to draw down of the Loan. Without limiting its ordinary meaning, 'financial circumstances' shall include actual or threatened redundancy or other matter which would in the Lender's opinion be likely to reduce the Borrower's repayment capacity.*

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In the event of any change in financial or personal circumstances or in the event of the Lender becoming aware of any mis-statement in the Borrower's application for the Loan, the Lender may refuse to allow the Loan to be drawn down and withdraw this Offer Letter.

- c) All and any Conditions Precedent (in Part 3) must be complied with in full to the Lender's satisfaction within 2 months from the date hereof. The Loan must be drawn down within 6 months from the date hereof. The Lender may, at its absolute discretion, extend either or both periods.*
- d) If the Loan is to be draw down in stages, pending draw down in full, the "Loan", for the purposes of this Offer Letter shall mean so much of the Loan as has been drawn down at any time and the monthly payment of principal and interest (or in the case of an endowment loan, interest only) shall be of such amounts as having regard only to the amount of the Loan which has been drawn down at that time, as the Lender at its absolute discretion shall stipulate provided always that this is without prejudice to the Borrower's solicitor's obligation to stamp and register the security documents referenced in clause 2(a) for the full amount of the Loan. Each stage shall only be drawn down on foot of an architect's certificate or that of some other suitably qualified person in the Lender's prescribed form or in such manner as shall be specified by the Lender in the Special Conditions."*

The Complainant signed the **Borrower's Acceptance and Consents** of the **Mortgage Loan Offer Letter** on **01 August 2006** on the following terms:

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

The Complainant signed the **Mortgage Loan Offer Letter** on **01 August 2006** confirming that he had read and fully understood the Mortgage Loan Offer Letter dated **14 July 2006** and the terms and conditions contained therein.

Mortgage Loan Offer Letter dated **14 July 2006** provided that the mortgage loan would commence on a discounted tracker interest of ECB + 0.85% for the first 12 months with an interest rate of ECB +1.25% applying thereafter for the remainder of the term of the loan.

The Complainant's solicitor sent a letter to the Provider dated **07 September 2006** enclosing "*Solicitors Undertaking & Clients Retainer and Authority duly completed*" as well as "*Cheque Requisition Form €86,000*".

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The Complainant's solicitor further wrote to the Provider on **16 October 2006** as follows:

"We refer to the above matter and to yours which we received on even date enclosing cheque in the amount of €86,000.00 for which we thank you."

The mortgage loan statements provided in evidence indicate that €86,000.00 was drawn down on **18 October 2006**.

The Complainant's solicitor subsequently wrote to the Provider on **18 October 2006** requesting the drawdown of further funds as follows:

*"We **enclose** herewith Cheque Requisition Form duly completed.*

We await hearing from you with cheque in the sum of €17,500 on or before the 20 October, next. We have already drawn down €86,000, but we need the additional monies to complete the purchase of the Site."

The Complainant's solicitor completed and signed the Provider's **Cheque Requisition Form** on **18 October 2006** to request a stage payment in the amount of €17,500.00 to be drawn down. The mortgage loan account statements submitted in evidence show that €17,500.00 was drawn down on **25 October 2006**.

In the absence of the Complainant or this Office having been furnished with a specific schedule from the Provider outlining the drawdown stages and the amount of each staged drawdown, it is not clear if it was envisaged that there would be a number of staged drawdown payments or only three stage payments, being the first, the second and a final drawdown. It is disappointing that this is not clearly set out in the Mortgage Loan Offer Letter itself.

I note that there were no further drawdowns by the Complainant after **25 October 2006**. The evidence shows that the Complainant did not approach the Provider to draw down further funds until **March 2016**.

The term "*draw down*" is not specifically defined in the Mortgage Loan Offer Letter and a question arises as to whether "*draw down of the Loan*" in this case means the drawdown of the first stage payment, each subsequent individual drawdown or the drawdown of the entire loan, that is the collective draw down of the entire sum. **General Condition 9 (d)** provides that if the loan is to be drawn down in stages, as is the case in respect of the mortgage loan that is the subject of this complaint, then the term "*Loan*" means that

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amount of the loan that has been drawn down at any time and the monthly payment of principal and interest equates to an amount as having regard only to the amount of the entire loan which has been drawn down. It is not entirely clear how this definition of the term "Loan" applies to **Condition 9 (b)** which relates to something that is required "prior to the drawdown of the Loan".

However **General Condition 1** also defines "Loan" as "the mortgage loan described in this Mortgage Loan Offer Letter ("Offer Letter") the details of which are set out in Parts 1 to 5 inclusive". It is this Office's view therefore that "prior to the drawdown of the Loan" means prior to the drawdown of any part of the loan.

This view is reinforced by **Part-4 Special Conditions** attaching to the Mortgage Loan Offer Letter which details that the Complainant must comply with certain conditions to the Provider's satisfaction "*before the Loan, or any part of it, can be drawn down*". As outlined above, **Special Condition, Part 4(a)(i)** provides that the "Loan will issue in stages in line with the approved Architect's/Engineer's/ Surveyor's Report". **Special Condition Part 4(a) (i)** goes on to specify how each stage is to be drawn down. **Special Condition Part 4(a) (b)** requires a **Cheque Requisition form** and a **Property Report Certificate** to be furnished to the Provider in order "*to draw down each stage.*" Further, **General Condition 9(d)** provides that each stage of the loan can only be drawn down on foot of an architect's certificate or that of some other suitably qualified person in the Provider's "*prescribed form*" or in such a manner as specified by the Provider in the Special Conditions as outlined above.

In light of the above consideration of the terms "*loan*" and "*draw down*", this Office is of the view that reference to "*draw down*" in the Mortgage Loan Offer Letter must be in regard to stage drawdowns in line with **Special Condition 4 (a) (i)** as it clearly makes reference to issuing the loan in stages and how a borrower is to go about drawing down each stage.

General Condition 9 (b) requires the Complainant to inform the Provider of any change in his personal or financial circumstances prior to draw down of the loan and moreover the Provider can refuse to allow the loan to be drawn down and withdraw the Loan Offer. In circumstances where "*draw down*" in this case refers to the drawdown of each stage payment, **General Condition 9 (b)** indicates that the Complainant was obliged to notify the Provider of any changes to his financial or personal circumstances that would likely reduce his repayment capacity when applying for the release of any part of the loan, that is when applying for each stage payment. **General Condition 9 (b)** also details that the Provider may refuse to allow the loan to be drawn down and withdraw the offer letter if repayment capacity was reduced.

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While I acknowledge that “*drawn down*” is not specifically defined, given the loan in this case was to be drawn down in stages, **General Condition 9 (b)** gave the Provider the discretion to refuse to allow the drawdown of any of the staged drawdowns of the entire loan in the event of a change in the Complainant’s financial or personal circumstances.

General Condition 9 (c) provides that the mortgage loan must be drawn down within six months from the date of the Mortgage Loan Offer Letter, that is before on or around **14 January 2007** subject to the Provider extending this period at its discretion. I note that the first and second stage drawdowns totalling €103,500.00 were within six months of the date of the Mortgage Loan Offer Letter. It is unclear however as to whether the mortgage loan must be drawn down in full within six months of the date of the Mortgage Loan Offer Letter or whether it was envisaged that the first stage payment would be drawn down within those six months. If it was the case that the entire mortgage loan was required to be drawn down within six months, then a question arises as to why the Provider did not specify this in the conditions by inserting the words “*in full*”. The time period of six months to draw down all stage payments for a self-build project is somewhat unrealistic. I would have expected the Provider to have provided the Complainant a period of between 12-18 months to draw down all stage payments for a self-build project. It is most disappointing that the parties did not agree a schedule of staged drawdowns specifying when exactly each stage ought to be drawn down. This would have provided greater clarity for the parties. Nevertheless, by signing the **Mortgage Loan Offer Letter on 01 August 2006**, the Complainant confirmed that he had read and fully understood the terms and conditions of the mortgage loan, and that he accepted the loan offer on the terms and conditions outlined.

It appears that the Complainant did not approach the Provider to draw down further funds on his mortgage loan account until **March 2016**, some 9 and a half years after the Complainant drew down the first stage payment and 3 months prior to the expiry of the Complainant’s planning permission, which had already been extended in 2011 for a further 5 years.

The Provider’s internal mail between a mortgage adviser of the Provider and the Provider’s credit department dated **14 March 2016** states as follows:

“Customer was approved this loan of 300k in 2006. He drewdown funds of €103,500 to help purchase site & balance of funds were to be used to help built property. He decided with economic downturn that back then was not the right time to proceed with building of property. He got planning permission extended in 2011 for a further 5yrs which is due to expire in July 2016.”

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He now wishes to commence building of property. He has a fixed price contract for build of €227k, additional 18k required for Kitchen & Fireplace. He will have supervising engineer in place.

He is anxious to keep his Tracker rate.”

The Provider's internal mail between the Provider's credit department and the Provider's mortgage adviser dated **16 March 2016** details as follows:

“Hi [Provider's representative]

It has been over 10yrs since this case was approved with the last cheque issuing on the 23/10/2006 the time line [is] too far out to allow further stages on this account all information held is historic and that previous letter of offer has expired therefore a full new application is required and it will be subject to current criteria, CBOI guidelines, new searches and current rate

current rates have to apply to all new cases can only offer rates on our current rate sheet this is the same for all cases that have left the offer go out of date, whether the prev rate was a fixed rate , tracker or variable rate – we can only issue offer today on current rates

the time line on the existing case is too far out to reactivate its been 10 years.. offer letter has expired.

Please transmit a new application for the funds to commence build

- *re confirm full up to date details on*
- *1) income / employment*
- *2) marital status / any dependents*
- *3) savings held*
- *4) loans held*
- *5) the build itself*
 - *what is the full cost to complete the property*
 - *has the plans changed / size of prop etc**assume different architect now in place will need revised new Alet with full costings outlined will be required with current planning ref,*
- *6) revised value on the site which has been left vacant for 10yrs and the revised value once property completed*

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- *Make sure all of the above items are covered on the new application for reassessment”*

I have not been provided with any evidence to suggest that the Complainant approached the Provider prior to **March 2016** to inform the Provider that he decided not to proceed with the construction of the self-build property.

In this regard, there is no evidence to suggest that the Complainant approached the Provider even in **2011** when he was seeking an extension to the planning permission. The Provider’s internal mails indicate that the Complainant decided not to proceed with the construction of the self-build property because of the economic downturn. The Complainant should have informed the Provider of his decision to postpone the self-build project until a later date however the Complainant did not do so.

The evidence on file indicates that the Complainant was not permitted to draw down the remainder of his mortgage loan account ending **6840** on a tracker interest rate in **March 2016** given almost 9 and a half years had elapsed since the drawn down of the first stage payment. The Provider is of the view that the **Mortgage Loan Offer Letter** dated **14 July 2006** had expired and therefore the Complainant was required to make a new mortgage loan application for additional borrowings. The Provider’s internal mails indicate that any loan offer made pursuant to this new mortgage loan application would be subject to one of the interest rates on offer by the Provider at that time. The Provider states that in circumstances where tracker interest rates were withdrawn from its product offering in **late 2008**, tracker interest rates were not available for selection by the Complainant in **2016**.

The Complainant made a new application for additional borrowings in the amount of €200,000.00 to complete the build. The Provider issued a Mortgage Loan Offer Letter to the Complainant on **29 April 2016** for the sum of €200,000.00 repayable over a term of 25 years commencing on a variable interest rate of 4.2%. The Complainant accepted and signed the Mortgage Loan Offer Letter on **10 November 2016** and a new mortgage loan account ending **2450** was subsequently drawn down. **Special Condition 4 (a)(viii)(g)** of the Mortgage Loan Offer Letter dated **29 April 2016** provides that where the Complainant chose to draw down the loan amount in stages, the time limit for the drawdown of the final stage would be 18 months. A tracker interest rate was not offered to the Complainant as the Provider had withdrawn tracker interest rates from its product offerings some 8 years previously.

If the Complainant wished to avail of the tracker interest rate offered in the **Mortgage Letter Loan Offer** dated **14 July 2006**, he could have drawn down the remaining funds in a timely manner pursuant to **General Condition 9 (c)**.

The evidence shows that the Complainant only drew down €103,500.00 of his mortgage loan funds in **October 2006** and decided to wait over 9 years to approach the Provider in **March 2016** to draw down the remaining balance of the loan. The Complainant could have approached the Provider in **2006/2007** to explain that given the economic circumstances at the time, he decided to not proceed with the self-build project.

It would have been a matter for the Provider to agree to extend the time within which the loan was required to be drawn down. However, the Complainant did not notify the Provider of the change in his personal circumstances at the time.

Therefore, it does not appear to this Office that the Provider acted in an unreasonable manner in refusing the drawdown of further monies in respect of the Complainant's mortgage account ending **6840** given the significant length of time that had passed since the drawdown of the first stage payment. Given that this loan was to issue in stages and as far as the Provider was concerned the entire loan was required to be drawn down by **2007**, I consider it reasonable on the part of the Provider to request updated financial information from the Complainant in **2016** to assess his repayment capacity and require the Complainant to make a new application for borrowings in the amount required to complete the building project.

In light of all the foregoing, I accept that there was no obligation on the Provider to permit the Complainant to drawdown the remainder of mortgage loan account ending **6840** in **2016** on a tracker interest rate.

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

Conclusion

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

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



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

22 April 2022

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.