



<u>Decision Ref:</u>	2022-0148
<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 a mortgage loan account held by the Complainants with the Provider. The mortgage loan account was secured on the Complainants' buy-to-let ("BTL") property.

The mortgage loan amount was €170,000.00 and the term of the loan was 25 years. The **Mortgage Loan Offer Letter** dated **14 December 2004** detailed the interest rate as a tracker interest rate of ECB + 1.30%, which was subsequently reduced to ECB + 1.20% by agreement with the Provider.

The Complainants' Case

The Complainants detail that they had a mortgage loan account with the Provider which "*was provided on a tracker basis at inception*".

The Complainants state that they entered into an Agreement to Amend Mortgage Loan Offer Letter in **June 2016** to amend the interest rate on the mortgage loan from a tracker rate of ECB + 1.20% to a BTL variable interest rate of 2.20%. The Complainants state that they felt that they "*had no choice*" but to sign the Agreement to Amend Mortgage Loan Offer Letter dated **28 June 2016**.

The Complainants question how it could be in their *“best interests to remove a market leading interest rate to a less favourable”* and higher interest rate given it was evident that they were experiencing *“strained cash flow at that time”*.

The Complainants are of the view that the Provider is *“being disingenuous”* and that the only *“rational explanation”* to explain why the Complainants would execute a financial agreement that is *“clearly less favourable to their position”* is that of *“undue influence or coercion (via enforcement threats).”*

The Complainants note that the Provider *“neglects to outline that the Bank were aggressively threatening the complainants with enforcement absent their consent.”* The Complainants detail that after the Agreement to Amend Mortgage Loan Offer Letter issued, they were contacted by an agent of the Provider *“and threatened that they had only two options either sign the document immediately (today) or the Bank were going to initiate enforcement and appoint a Receiver over the property.”* The Complainants refute the Provider’s assertion that it was their choice to accept the offer. The Complainants state that it is apparent that the Provider *“undoubtedly exerted undue influence on them under the then live threat of enforcement.”* The Complainants submit that the Provider’s internal notes of a telephone call on **21 June 2016** do not *“relate in any way to the call received by the complainants from [representative of Provider]”*. The Complainants are of the view that the person who recorded the telephone call on the Provider’s internal system is not the same person who spoke to the Complainants on **21 June 2016**. The Complainants note that it is *“convenient”* that the telephone recording cannot be located by the Provider.

The Complainants assert that the Provider *“has engaged in duplicitous tactics to remove a loss making product favourable to customers by using their misfortune to entrap them into executing amended agreements more favourable to the provider by way of structural adjustments”*.

The Complainants refute the Provider’s assertions that it complied with the provisions of the **Consumer Protection Code 2012** (CPC 2012) in circumstances where they maintain that the Provider *“aggressively”* unduly influenced them.

The Complainants state that they are *“dismayed”* at the Provider’s response which *“served to only compound their frustration”* by using *“obfuscation and deception”* to convince this Office that the Provider complied with its obligations. The Complainants submit that the Provider has attempted to present the Complainants as *“irresponsible customers whom, by their own choice, executed an agreement that was clearly less favourable to them.”*

The Provider's Case

The Provider submits that the **Mortgage Loan Offer Letter** dated **14 December 2004** provided for a tracker interest rate of ECB + 1.30%. The Provider states that the Complainants signed and accepted the **Mortgage Loan Offer Letter** on **20 December 2004**. The Provider explains that it agreed to reduce the interest rate to ECB + 1.20% on **4 December 2004**, prior to the issue of the **Mortgage Loan Offer Letter**. The Provider states that the Complainants drew down the mortgage loan on **18 January 2005**.

The Provider details that following a five-year period of interest only repayments, the Complainants' mortgage loan account switched to capital and interest repayments on **18 January 2010**. The Provider states that it agreed to a further 12-month period of interest only repayments and the mortgage loan account reverted to capital and interest repayments on **25 January 2011**.

The Provider submits that the Complainants' mortgage loan account first went into arrears on **31 January 2011** and *"remained in arrears until 04 July 2016 when the arrears on the Mortgage Loan Account were capitalised in the amount of €31,564.27."*

The Provider states that it issued a Standard Financial Statement (SFS) to the Complainants to complete in **February 2011**. The completed SFS was submitted by the Complainants to the Provider in **April 2011** with supporting documentation. The Provider notes that it declined the Complainants' request for forbearance. The Provider submits that further SFSs were sent to the Complainants in **2011, 2012, 2013** and **2014**, none of which were completed fully by the Complainants.

The Provider explains that on **26 November 2012** *"a new pricing policy was implemented for non CCMA Buy to Let (BTL) Tracker Customers seeking any change to their existing repayment terms and conditions."*

The Provider explains that a SFS was submitted by the Complainants in **July 2015** which was assessed by the Provider. The Provider states that it subsequently offered the Complainants an alternative repayment arrangement by issuing an Agreement to Amend Mortgage Loan Offer Letter on **6 May 2016** *"offering the Complainants reduced repayments of €600.00 per month, capitalisation of the arrears on the mortgage loan account and an extension of the maturity date of the mortgage loan to 28 January 2040."* The Provider explains that the offer of capitalisation of arrears and reduced repayments *"was assessed by reference to the criteria as outlined by the Provider's 'Buy-To-Let' Pricing Policy."*

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The Provider maintains that it *“sought to engage fully with the Complainants when the Complainants approached the Provider seeking forbearance on their mortgage loan account.”* The Provider refutes the Complainants assertion that they had *“no choice”* but to accept the terms of the Agreement to Amend Mortgage Loan Offer Letter. The Provider submits that the Complainants consented to the removal of the tracker interest rate and that this was not a *“unilateral decision taken by the Provider.”* The Provider notes that there were significant interactions between the Complainants and the Provider *“throughout the period of arrears.”* The Provider is of the view that it *“worked constructively with the Complainants, and in their best interests, to seek to bring about a resolution to the arrears arising from the mortgage loan account.”* The Provider seeks to rely on **General Condition 4(d)** of the **Mortgage Loan Offer Letter** which details that any variation in the terms of the loan is with the consent of the borrower.

The Provider states that the Agreement to Amend Mortgage Loan Offer Letter converted the mortgage loan account to the Provider’s BTL variable rate. The Provider submits that the Complainants signed and accepted the terms of the agreement on **28 June 2016**. The Provider submits that this was done *“solely with the consent of the Complainants”*. The Provider explains that if the Complainants declined to accept the terms of the agreement, the mortgage loan account would have remained on the tracker rate of interest. The Provider submits that it is *“unfair”* for the Complainants to suggest that they had *“no choice”* but to accept the Agreement to Amend Mortgage Loan Offer Letter.

The Provider submits that it has reviewed its records and notes with respect to the telephone call on **21 June 2016** and relies on its internal records in this regard. The Provider maintains that it is *“obliged to advise its customers of the potential consequences of failure to keep up with mortgage repayments, including that a Receiver may be appointed to the property.”* The Provider explains that it cannot locate a recording of the telephone call referred to, but it is satisfied that it advised the Complainants correctly. The Provider refutes the Complainants’ submission that it *“threatened”* the Complainants. The Provider refers to the Complainants’ submission that its internal records detail that the person who recorded the telephone call on the Provider’s internal system is not the same person who spoke to the Complainants. In this regard, the Complainant states that the abbreviation *“OBC”* is not the agent’s initials but stands for *“Out-bound call”*.

The Provider notes that the mortgage loan account is not subject to the Code of Conduct on Mortgage Arrears (CCMA) *“as it is not secured by the primary residence of the Complainants”*. The Provider is of the view that it acted fairly with respect to the offer of new arrangements with reference to the Consumer Protection Code 2012 (CPC 2012).

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The Provider maintains that it issued “*letters to the Complainants pursuant to its obligations under provision 8.4, 8.6, 8.8 and 8.9 of the Consumer Protection Code 2012.*” The Provider submits that it is not “*legally obliged to offer forbearance on mortgage loan accounts.*”

The Provider is of the view that it acted “*honestly, fairly and professionally in the best interests of its customers.*” The Provider states that it reviewed the Complainants’ financials “*and offered them the most sustainable solution for both parties having extensively reviewed their financial situation.*” The Provider asserts that it did not act “*recklessly, negligently or deliberately mislead the Complainants as to the real or perceived advantages or disadvantages of any product or service.*”

The Complaint for Adjudication

The complaint for adjudication is that the Provider acted inappropriately by removing the tracker interest rate from the Complainants’ mortgage loan account in **June 2016**.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider’s response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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

A Preliminary Decision was issued to the parties on 29 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 consider this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider certain interactions between the Provider and the Complainants from **2011** to **2016**.

The Provider issued **Mortgage Loan Offer Letter** dated **14 December 2004** to the Complainants which details as follows:

" ...

PART 1 – THE STATUTORY LOAN DETAILS
IMPORTANT INFORMATION AS AT 14 December 2004

1.	<i>Amount of Credit Advanced</i>	€170,000
2.	<i>Period of Agreement</i>	25 Years
3.	<i>Number of</i>	
	<i>Repayment</i>	<i>Instalment</i>
	<u><i>Instalments</i></u>	<u><i>Type</i></u>
	60	Variable at 3.200%
	240	Variable at 3.200%

...

PART 2 – THE ADDITIONAL LOAN DETAILS

11. <i>Type of Loan:</i>	<i>Interest Combo</i>
12. <i>Interest Rate</i>	<i>3.200% Variable</i>

..."

Special Condition (a) (iv) and (vi) of PART 4 – THE SPECIAL CONDITIONS detail as follows:

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

...

- (iv) *For the first 5 years of the term of the Loan, repayment of this Loan shall be comprised of interest and any other amounts payable only and General Condition 4(a) is hereby varied. At the end of the above period, repayments shall comprise of principal and interest and any other amounts payable fully in accordance with General Condition 4(a). The amount of such revised*

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repayment instalments shall be as advised to the Borrower by the Lender in writing.

The Lender may at any time during the initial interest-only period and at its absolute discretion (or at the request of the Borrower), convert the Loan to an annuity or repayment loan whereupon the Borrower shall be obliged to make such revised repayment instalments comprising both of principal and interest and any other moneys payable as the Lender shall advise the Borrower in writing.

...

- (vi) *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 1.30% 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 certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*

..."

PART 5 – THE GENERAL CONDITIONS provides for the following:

"...

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*

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clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.

- (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.*

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.*

...

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), 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).
..."*

The **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer Letter** was signed by the Complainants on **20 December 2004** 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.
..."*

It is clear to me that the **Mortgage Loan Offer Letter** provided for a tracker rate of interest of ECB + 1.30% to apply for the term of the loan. The Complainants accepted the **Mortgage Loan Offer Letter**, having confirmed that they had read and fully understood the terms and conditions of the loan offer.

The **internal records** furnished in evidence indicate that the mortgage loan was drawn down in **January 2005**. The Provider's submissions indicate that prior to the issue of the mortgage loan a reduction in the tracker interest rate was agreed by the parties and the loan drew down on a tracker interest rate of ECB + 1.20%.

The Provider's **internal notes** show that the Complainants' mortgage loan account entered arrears on or around **31 January 2011**. I will now consider the key interactions between the Complainants and the Provider from the date the Complainants entered into arrears to the date on which the Provider issued the Agreement to Amend Mortgage Loan Offer Letter to the Complainants. The Provider's **internal notes** from **February 2011** to **May 2016** outline as follows:

- The Complainants attended a branch of the Provider on **02 February 2011** to inform the Provider that they could not afford the mortgage repayments and agreed to complete a Standard Financial Statement (SFS). A SFS was received and assessed by the Provider in **April 2011** and the Provider's **internal note** dated **26 April 2011** details as follows:

*"...
Cust has not looked to sell any assets here, cust's have had io on acc for 6 yrs in total.*

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...

Strategy, Cust must seek mabs assistance, re setting up manageable monthly budget in order to ensure, full C&I repays are maintained.

...

*Sent decline letter to customer, account to remain on Standard repays going fwd.
..."*

- In circumstances where the arrears remained outstanding on the Complainants' mortgage loan account, the Provider issued a "legal proceedings threat letter" to the Complainants on **16 June 2011**.
- The Provider issued a further letter to the Complainants on **05 September 2011** to offer the Complainants a "final chance...to communicate with [the Provider] so [the Provider] can get an arrangement in place to clear the arrears."
- The Second Complainant attended the branch of the Provider on **19 October 2011** and the Provider's internal notes show that the Second Complainant requested "no further phone calls as he find[s] the situation stressful. have given SFS to complete".
- In circumstances where the Complainants did not return this SFS to the Provider, the Provider issued further **legal proceedings letters** to the Complainants on **22 February 2012** and **01 May 2012**.
- The First Complainant contacted the Provider by telephone on **11 July 2012** to inform the Provider that that the Complainants will complete the SFS that the Complainants received by post on the same date. This SFS was not returned by the Complainants.
- The Complainants' solicitor wrote to the Provider on **02 October 2012** with a "proposal to pay rental income". The Provider subsequently issued a further SFS to the Complainants on the same date.
- The Provider issued a voluntary surrender pack to the Complainants on **27 August 2013**. The Provider contacted the Complainants' accountant by telephone on **01 November 2013** during which the accountant informed the Provider that the Complainants "do not wish to surrender property".

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- A SFS was received by the Provider from the Complainants on **14 February 2014**. The Provider declined to offer forbearance to the Complainants on foot of its review and assessment of the SFS.

The Provider's reasoning for declining forbearance was "*due to excess income*". The Provider's internal notes show that the "*customer can clearly afford full annuity reps according to the assessed sfs figures.*"

- The Provider issued a "*Receiver Warning letter*" to the Complainants on **30 June 2014**.
- The Complainants' accountant wrote to the Provider on **09 July 2014** noting that the Complainants "*have secured through family members additional funding*" and will be able to make monthly repayments of €863.00. The Provider responded on **24 July 2014** confirming that it still required a proposal for the arrears. The arrears at this time amounted to €27,783.00.
- The Provider engaged in various pieces of correspondence with the Complainants' accountant from **July 2014 to February 2015**, at which time a further SFS was issued to the Complainants' accountant for completion by the Complainants. In **April 2015**, it was agreed that the Complainants would "*step up*" to make capital and interest repayments and that the mortgage loan account would be monitored for three months.
- A further SFS was issued to the Complainants on **7 July 2015**.
- The Second Complainant contacted the Provider by telephone on **15 October 2015** at which time the Provider offered the Complainants fixed monthly repayments of €600.00 together with a term extension to **2040**. The Provider also noted that there will be a "*residual debt on maturity which may require the sale of property to discharge if there are no other means to do so*". The Second Complainant was also informed that this offer of an alternative repayment arrangement was subject to a 1% loading on the tracker interest rate.
- The Provider contacted the Second Complainant by telephone on **07 December 2015** at which time the Complainants confirmed that they were agreeable to the Provider's proposal for an alternative repayment arrangement.

The Provider issued an **Agreement to Amend Mortgage Loan Offer Letter** dated **06 May 2016** to the Complainants which details as follows:

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***“Agreement to Amend Mortgage Loan Offer Letter
(Including Move from Tracker Rate of Interest)***

...

The Total Amount of Arrears you owe under the Mortgage Loan: €31,059.17

...

SECTION A: WHAT THIS FORM DOES

1. THE ALTERNATIVE REPAYMENT ARRANGEMENT (ARA) IS AS FOLLOWS:

1.1 The Borrower and Lender agree that:

1.1.1. An amount of €306.00 towards repayment of the principal (capital) amount of the Loan in addition to the interest due for repayment (the “Regular Fixed Payment”) in regular instalments for the duration of the Loan as calculated by the Lender. The Lender estimates that the Regular Fixed Payment amount will be €600.00 each month. If the interest rate on the Loan changes, the Regular Fixed Repayment amount will vary;

1.1.2. The principal (capital) amount of the Loan, together with any other amounts outstanding, by the maturity date of 28/1/2040 to repay the Loan in full. If any amount under the Loan other than principal (capital) becomes due for payment during the mortgage term, the Borrower remains obliged to pay it in full and on time.

1.2 Capitalisation of Arrears

1.2.1. If there are arrears on the Loan this Form capitalises them. That means the Lender adds the arrears to the principal (capital) amount of the Loan after the Borrower accepts this Form. If any more arrears arise between the date of this Form and the date the Lender capitalises arrears, the Borrower agrees the Lender may (but is not obliged to) add those arrears to the principal (capital) amount of the Loan.

1.3 Maturity Date

1.3.1. This Form extends the current maturity date of the Loan by 120 months to a maturity date of 28/01/2040. This means that the mortgage repayments will continue for longer.

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3. Conversion from Tracker Rate to New Interest Rate Type

3.1. Tracker to BTL Variable

3.1.1 *This Form converts the interest that applies to the Loan from a tracker rate which is 1.200% per annum at present to a BTL Variable rate. The BTL Variable Rate will apply for the remaining term of the Loan (unless the Lender and Borrower agree otherwise in writing in future, for example, to fix the interest rate for the Loan).*

3.1.2. *At present this BTL Variable rate is 2.200% per annum. Generally, the Lender applies the new rate within ten days after it receives this Form from the Borrower correctly accepted.*

3.1.3. *The Lender can vary the BTL Variable interest rate at any time up or down at its discretion. This Clause also applies to any other variable rate that applies to the Loan in future (for example, by agreement between the Lender and Borrower). The BTL Variable Rate can change up or down before the Borrower accepts this Form or before the Lender applies that rate to the Loan. If that happens, the Lender will notify the Borrower.*

4. COMMITMENT TO TRACKER ENDS

4.1. *Any commitment or obligation in the Mortgage Loan Offer Letter for a tracker variable rate for the Loan, now or in the future, will end once the Borrower completes and returns this Form. This Clause takes precedence over any condition of the Mortgage Loan Offer Letter, this form or elsewhere concerning interest in general or tracker variable rates in particular including any Special Condition. The phrases “tracker rate”, “tracker interest rate” or “tracker variable rate” are popular expressions to describe an interest rate that is an agreed margin above the European Central Bank (“ECB”) Main Refinancing Operations Rate (including where it is described in the Mortgage Loan Offer Letter or elsewhere as the ECB Main Refinancing Operations Minimum Bid Rate). A tracker rate follows or “tracks” movements of this ECB rate. The word “tracker” and phrases containing that word are used with that meaning in this Form.*

SECTION B: GENERAL CONDITIONS OF THIS FORM

1. THIS FORM WILL AMEND YOUR MORTGAGE LOAN OFFER LETTER

1.1 *This Form will amend the terms and conditions that apply to the Loan, including the Mortgage Loan Offer Letter.*

1.2 *This Form does not change the maturity date of the Loan unless it says so (if it does say so, the term of the Loan is amended to the new maturity date shown in the Form) [...]*

1.3 *To the extent they are not amended or replaced by this Form, each of the terms and conditions of the Mortgage Loan Offer Letter, including those concerning how interest is applied to the Loan, will remain in full force and effect. (For example, the General Terms and Conditions attached to the Mortgage Loan Offer Letter remain in effect and are not replaced by these General Conditions).*

1.4 *If this Form provides for the Borrower to pay amounts to the Lender (for example, as part of an alternative repayment arrangement), the Borrower is obliged to pay those amounts in full and on time [...]*

...”

SECTION C: LEGAL NOTICES of the **Agreement to Amend Mortgage Loan Offer Letter** details the following warning:

Warning: if you switch to an alternative interest rate, you will not be contractually entitled to go back on to a tracker rate in the future.

SECTION C: LEGAL NOTICES also contains an indicative comparison of the cost of the loan on the tracker interest rate to the cost of the loan at the Provider’s BTL variable interest rate and on the terms offered in the **Agreement to Amend Mortgage Loan Offer Letter**.

SECTION C: LEGAL NOTICES also sets out the advantages and disadvantages of a tracker interest rate and other rates to include the BTL variable interest rate as follows:

“ ...

Tracker Variable Rate

With a Tracker Variable Rate Mortgage, we automatically move the variable rate in line with ECB (European Central Bank) Repo Rate changes, either increases or

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decreases. These increases or decreases will be applied within 5 working days of an ECB rate change.

Advantages of the Tracker Variable Rate include the following:	Disadvantages of the Tracker Variable Rate include the following:
<ul style="list-style-type: none"> • We cannot vary the Tracker Variable Rate at our discretion but must adjust the rate to follow or “track” ECB Repo Rate changes. • Decreases in the rate must be applied within 5 working days of an ECB Repo Rate change. • You can make lump sum payments or overpayments on your monthly repayment on your Tracker mortgage account at no cost. 	<ul style="list-style-type: none"> • It is a variable rate which means your monthly repayments may go up and/or down to reflect changes in the rate. • If the ECB raises its Repo Rate, your tracker rate will automatically increase within 5 business days.

Variable Rates (e.g. BTL Variable Rate, LTV Variable Rate)

We can move variable rates up or down during the life of your mortgage, at our discretion. Generally, variable rates are influenced by market or reference rates but they do not automatically follow such rates.

Advantages of the Variable Rate include the following:	Disadvantages of the Variable Rate include the following:
<ul style="list-style-type: none"> • We try to set the rate at a competitive and attractive level. • If the ECB increases its Repo Rate, it is possible that we may decide not to increase the Variable Rate. • You can make lump sum payments, overpayments on your monthly repayment on your Variable Rate mortgage account at no cost. 	<ul style="list-style-type: none"> • It is a variable rate which means your monthly repayments may go up and/or down to reflect changes in the rate. • The rate is variable at our discretion – it does not track any ECB or other reference rate. • If the ECB decreases its Repo Rate, it is possible that we may decide not to decrease the Variable LTV Rate.

...”

Both Complainants completed and signed **SECTION E: ACCEPTANCE BY (EACH) BORROWER** of the **Agreement to Amend Mortgage Loan Offer Letter** on **28 June 2016**.

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The evidence shows that both Complainants signed the **Agreement to Amend Mortgage Loan Offer Letter on the following terms:**

"...

DECLARATIONS

BY SIGNING THIS Form:-

1. I confirm I understand both the Form and the information given to me in the letter that the Lender sent me with this Form;
2. I accept and agree to be bound by the terms and conditions of the Form;
3. I understand I am moving from a tracker rate of interest using this Form. I have read and understood each part of the Form concerning that including Section C.

INDEPENDENT ADVICE

Each borrower must fully complete the Financial and Legal Advice section of the Form by **TICKING ONE OF THE BOXES IN PART A AND PART B and SIGNING BELOW.**

A. FINANCIAL ADVICE

I confirm that: PLEASE TICK ONE OF THE FOLLOWING BOXES:

I have received independent financial advice on this Form.

 ⇐

OR

I did not get independent financial advice on this Form because I understand it and I am satisfied to sign it without such advice. I will never raise the lack of advice as a reason to question this Form

 ⇐

B. LEGAL ADVICE

I confirm that: PLEASE TICK ONE OF THE FOLLOWING BOXES:

I have received independent legal advice on this Form.

 ⇐

/Cont'd...

OR

I did not get independent legal advice on this Form because I understand it and I am satisfied to sign it without such advice. I will never raise the lack of advice as a reason to question this Form”

 ↩

The Provider wrote to the Complainants on **04 July 2016** as follows:

“...

I confirm that the agreed changes to your mortgage have been applied to your account the updated details for your account are as follows.

Mortgage Type:	<i>Endowment & Part Capital</i>
Mortgage Rate Type:	<i>Buy to Let Variable</i>
Interest Rate:	<i>2.200%</i>
Repayment Frequency:	<i>Monthly</i>
Next Repayment Date:	<i>31/07/2016</i>
Mortgage Repayment:	<i>€598.46</i>
Maturity Date:	<i>28/01/2040</i>

...”

The **Agreement to Amend Mortgage Loan Offer Letter** provided for an alternative repayment arrangement pursuant to which the Complainants were required to make monthly repayments of approximately €600.00 to their mortgage loan account. The **Agreement to Amend Mortgage Loan Offer Letter** clearly detailed that a tracker interest rate would no longer apply to the Complainants’ mortgage loan account and instead, a BTL variable interest rate of 2.20% would apply. The **Agreement to Amend Mortgage Loan Offer Letter** further detailed that the mortgage term would be extended by 120 months however, the capital amount outstanding would be due by the new maturity date on **28 January 2040**.

The Complainants have submitted that that the Provider “*aggressively*” applied undue influence to inappropriately remove the tracker interest rate from their mortgage loan account in **June 2016** and maintain that they were under “*undue influence or coercion*” from the Provider to sign the **Agreement to Amend Mortgage Loan Offer Letter**.

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I appreciate that the Complainants did not want to give up their entitlement to a tracker interest rate. However, the reality of the situation at that time in **2016** was that the Complainants' mortgage loan account was in arrears of over €30,000 and the Provider was willing to enter an alternative repayment arrangement with the Complainants on the condition that the Complainants agreed to change the interest rate applicable to the mortgage loan from a tracker interest rate to a BTL variable interest rate of 2.20%. The Provider issued an offer to the Complainant to this effect in the form of an **Agreement to Amend Mortgage Loan Offer Letter** which contained the appropriate warnings under the **Consumer Protection Code 2012**, relating to moving from a tracker interest rate to a variable interest rate.

The Provider, in accordance with its BTL pricing policy offered a BTL variable interest rate which started at 1% above the tracker interest rate on the Complainants' mortgage loan which is the subject of this complaint. In the circumstances of this particular complaint, the Provider offered a variable rate of 2.20%. I note that the **Agreement to Amend Mortgage Loan Offer Letter** dated **06 May 2016** refers to the tracker interest rate applicable to the loan as being 1.20%. The loading of 1% was added to the tracker interest rate of ECB + 1.20%, and a variable interest rate of 2.20% was offered by the Provider to the Complainants.

The Complainants were seeking to agree an alternative arrangement with the Provider on a mortgage that was not secured on their principal private residence. While I accept that the Complainants were in a difficult position, it was nonetheless a matter for the Complainants to decide whether to accept that arrangement on offer by the Provider.

The Complainants were afforded the opportunity to seek independent legal and financial advice before agreeing to the terms of the alternative repayment arrangement. However, the Complainants chose not to seek independent advice and confirmed that they understood the contents of the **Agreement to Amend Mortgage Loan Offer Letter** and were satisfied to accept the terms of the agreement without seeking any independent advice. The evidence therefore does not support the Complainants' contention that they were coerced in any way by the Provider to accept the terms of the alternative repayment arrangement.

Provision 6.9 of the **Consumer Protection Code 2012** outlines as follows:

"Where... b) a regulated entity offers a personal consumer the option to move from a tracker interest rate to an alternative rate on their existing loan;

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the lender must provide the personal consumer with the following information on paper or on another durable medium:

- i. Indicative comparisons of the cost of the monthly repayments at the personal consumer's current tracker interest rate and each of the alternative rate(s) being offered;*
- ii. An indicative comparison of the total cost of the loan if the personal consumer continues with the existing tracker interest rate and the total cost of the loan for each of the alternative rate(s) and terms being offered. Any assumptions used must be reasonable and justifiable and must be clearly stated; and*
- iii. Details of the advantages and disadvantages for the personal consumer of the tracker interest rate compared to each of the other rate(s) being offered.*

The following warning statement should also appear with the information above, in circumstances where a personal consumer will not be able to revert to a tracker interest rate if they move to an alternative rate:

Warning: If you switch to an alternative interest rate, you will not be contractually entitled to go back onto a tracker interest rate in the future.

This provision does not apply to a mortgage on a primary residence covered by the Code of Conduct for Mortgage Arrears which is in "arrears" or "pre-arrears" as defined in the Code of Conduct for Mortgage Arrears."

The appropriate information and warnings under **provision 6.9** of the **Consumer Protection Code 2012** were contained in the **Agreement to Amend Mortgage Loan Offer Letter**, as detailed above. The mortgage loan was not a private dwelling house mortgage loan.

Provision 8.3 and **Provision 8.4** of the **Consumer Protection Code 2012** outline as follows:

*"8.3 Where an account is in **arrears**, a **regulated entity** must seek to agree an approach (whether with a **personal consumer** or through a third party nominated by the **personal consumer** in accordance with Provision 8.5) that will assist the **personal consumer** in resolving the **arrears**.*

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8.4 *Where an account remains in **arrears** ten **business days** after the arrears first arose, a **regulated entity** must immediately communicate clearly with the **personal consumer** to establish in the first instance why the **arrears** have arisen.”*

Under **Provision 8** of the **Consumer Protection Code 2012**, the Provider is obliged to issue correspondence to a customer in relation to arrears arising. Having considered the evidence, including the Provider’s internal records, I accept that the Provider issued arrears correspondence to the Complainants in accordance with its obligations under the **Consumer Protection Code** in circumstances where arrears were accruing at the time. The Complainants’ mortgage loan remained in arrears for some time.

This Office will not interfere with a financial service provider’s commercial discretion in relation to renegotiating terms of a mortgage loan agreement, other than to ensure that the Provider complies with the relevant codes/regulations and does not treat the Complainants unfairly or in a manner that is unreasonable, unjust, oppressive, or improperly discriminatory. There is no evidence to suggest that the Provider acted in a manner that was unreasonable, unjust, oppressive, or improperly discriminatory in offering the Complainants a forbearance measure which involved amending the interest rate on their mortgage loan account in the circumstances of this complaint.

For the reasons outlined 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

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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.