



<b><u>Decision Ref:</u></b>	2022-0230
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

This complaint relates to the following two mortgage loan accounts held by the Complainants with the Provider:

- **Mortgage loan account ending 4272**

Mortgage loan account ending **4272** was for a loan amount of €327,000.00 repayable over a term of the loan was 25 years. The **Credit Agreement** dated **2 February 2007** detailed the interest rate as a tracker interest rate of ECB + 0.95% and that interest only repayments would apply for the first 7 years of the term of the loan. The mortgage loan was secured on the Complainants' residential investment property.

- **Mortgage loan account ending 4597**

Mortgage loan account ending **4597** was for a loan in the amount of €425,000.00 repayable over a term of 25 years. The **Mortgage Loan Offer Letter** dated **30 March 2007** detailed the interest rate as a tracker interest rate of ECB + 0.95% and that interest only repayments would apply for the first 7 years of the term of the loan. The mortgage loan was secured on the Complainants' residential investment property.

On **15 April 2014**, the Complainants signed and accepted an **Agreement to Amend Mortgage Loan Offer Letter ("AAMLO")** dated **10 March 2014**, which converted the mortgage loan to an interest only loan for a period of 24 months and converted the interest rate to the Provider's buy-to-let ("**BTL**") variable interest rate of 2.20%.

### The Complainants' Case

The Complainants submit that they have two mortgage loan accounts with the Provider ending **4272** and **4597**. The Complainants detail that both mortgage loan accounts "*were interest only for 7 years.*"

- **Mortgage loan account ending 4272**

The Complainants maintain that mortgage loan account ending **4272** was overpaid by them as they made full capital and interest repayments even though they had agreed to an interest only repayment period with the Provider. The Complainants state that the Provider "*did not afford any acknowledgment of the overpayment*" and had this not occurred they "*may have been in a better financial position to address the repayments of capital and interest*" on mortgage loan account ending **4597**.

The Complainants indicate that the Provider has acknowledged the error but "*has made no effort to make good the error.*" The Complainants state that "*on the one hand they say that they have no obligation on the overpayment (though due to their error) and on the other hand they have taken the overpayment (inter alia) into account.*" The Complainants maintain that this is not "*consistent thinking/practice and the result is confusion and loss to the complainants.*"

The Complainants explain that if they had "*UNDERpaid the loan account ending 272, the provider would have pursued the complainants vigorously and no doubt issued proceedings against them but were happy to be OVERpaid for 7 years.*"

The Complainants assert that they were not "*aware of the payment of capital and interest*" on mortgage loan account ending **4272** during the first 7 years of the term of the loan, from **2007** to **2014**. The Complainants states that the Provider's submissions regarding this point are "*not relevant*" as "*neither the provider nor the complainants were aware of the overpayment*". The Complainants query how they could have sought the reinstatement of interest only repayments when they were not aware that they had overpaid until **2014**. The Complainants assert that the Second Complainant "*knows for a fact that had the*

*complainants requested any repayment other than the repayment of capital and interest on this loan at that time this request would have been flatly refused by the Provider."*

The Complainants note the Provider submits that they were "*happy*" to continue paying capital and interest. The Complainants state that the term "*happy*" is a "*relative term in the financial situation that prevailed at the time*". The Complainants explain that they were "*happy*" in that they were "*prepared to*" pay capital and interest, however they were not "*dancing up and down with joy.*"

The Complainants submit that the Provider has failed to consider the "*net effect*" that this situation has had on them as they had "*less money at [their] disposal in 2014*".

- **Mortgage loan account ending 4597**

The Complainants detail that mortgage loan account ending **4597** changed in **2014** to "*capital + interest*" but "*due to financial difficulties*" the Complainants were unable to make full capital and interest repayments and they accepted the Provider's offer of an **Agreement to Amend Mortgage Loan Offer Letter (AAMLO)**. The Complainants submit that they lost the tracker interest rate on mortgage loan account ending **4597** because of this **AAMLO**.

The Complainants refute the Provider's assertion that they had a choice to accept or reject the offer of the **AAMLO** made to them in **2014** and state that "*[c]hoice did not exist during this time. Survival was what mattered for business and for people in all aspects of their lives*".

The Complainants state that this is an "*exhausting process*" as it is "*almost 2 years since [they] initiated [their] complaint*" and the Provider "*continues to rebuff/refute everything [they] say*". The Complainants submit that they have suffered financial loss but the Provider "*comes back with the same reply each time.*" The Complainants are of the view that the "*main retail banks...in 2014 were not engaging with their customers at a personal level, customers had become anonymous numbers*".

The Complainants rely on Central Bank of Ireland's "*Behaviour and Culture of the Irish Retail Bank*" report of **July 2018** and refer to the following two prerequisites set out in the summary of findings:

*"(a) an understanding of what consumer focus means and the behaviour it requires and*

*(b) an embedded consumer focus in structures, processes and systems".*

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The Complainants submit that they do not see the above referenced prerequisites in practice and note that the Provider *“has to date not offered anything by way of compensation to the complainants”* despite it acknowledging the error made on its part.

The Complainants are seeking the following:

1. A tracker interest rate to be applied to mortgage loan account ending **4597** from **2014**; and
2. A refund of any overpaid interest from **2014** to date.

### **The Provider’s Case**

- **Mortgage loan account ending 4272**

The Provider states that the **Credit Agreement** dated **2 February 2007** offered the Complainants a mortgage loan for the sum of €327,000.00 for a period of 25 years to purchase a property. The Provider details that the mortgage loan was subject to a tracker interest rate of ECB + 0.95% for the term of the loan. The Provider submits that the mortgage loan account was drawn down on **11 December 2007**. The Provider asserts that the **Credit Agreement** *“provided that for the first 7 years of the term of the loan, repayments would comprise of interest only.”*

The Provider submits that due to an *“administrative error on behalf of the Provider, the Complainants made repayments of Capital and Interest for the duration of the loan account.”* The Provider notes that this error went unnoticed *“until the Complainants sought forbearance on mortgage loan account ending 4597 in 2014.”* The Provider relies on its internal notes from a meeting on **21 February 2014** during which the Complainants acknowledge that they would be happy to continue paying capital and interest going forward. The Provider details that these notes were compiled by the Provider’s representative *“contemporaneously and within 24 hours of the meeting between the Provider’s agent and the Complainants on 21 February 2014.”* The Provider submits that its internal notes indicate that *“once the Complainants were made aware of the overpayment of capital and interest on mortgage loan account ending 4272, they were satisfied to continue making Capital and Interest repayments.”*

The Provider states that the Complainants could have *“approached the Provider at any point after the drawdown of mortgage loan account ending 4272, advising that Capital and*

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*Interest Repayments were being charged rather than interest only repayments, and seek to have interest only repayments reinstated."*

The Provider explains that it has not suggested that the Complainants "*were aware of the overpayment on mortgage loan account ending 4272.*" The Provider submits that the Complainants did not request to have interest only repayments reinstated and the Complainants "*intimated to the Provider that they were satisfied to continue with capital and interest repayments.*"

The Provider submits that mortgage loan accounts ending **4272** and **4597** "*are independent of one another and are not linked accounts.*" The Provider states that the Complainants "*cannot presume to speculate on what actions the Provider would have taken if the mortgage loan account was "underpaid".*"

The Provider disagrees with the Complainants' submission that any proposal for an alternative repayment arrangement would have been flatly refused by the Provider. The Provider maintains that it "*sought to engage constructively with the Complainants and strongly refutes any suggestion that a request would have been "flatly refused".* The Provider also disagrees with the Complainants' assertion that it was not engaging with its customers in **2014**.

The Provider highlights that an alternative repayment arrangement was not implemented in respect of mortgage loan account ending **4272** and that mortgage loan account has "*remained subject to a tracker interest rate of ECB + 0.95% from drawdown to date.*"

- **Mortgage loan account ending 4597**

The Provider submits that in **January 2007**, the Complainants applied for a mortgage loan with the Provider for the purposes of purchasing a residential investment property. The Provider details that **Mortgage Loan Offer Letter** dated **30 March 2007** offered the Complainants a loan in the amount of €425,000.00, repayable over a term of 25 years. The Provider notes that the Complainants signed and accepted the **Mortgage Loan Offer Letter** on **4 April 2007** and the mortgage loan account was drawn down on **20 April 2006**.

The Provider submits that the **Mortgage Loan Offer Letter** provided for a tracker interest rate of ECB + 0.95% and also provided for interest only repayments for the first 7 years of the term of the mortgage loan.

The Provider states that on **20 January 2014**, the second Complainant contacted the Provider "*seeking a meeting to discuss the rollover of the repayments to capital and interest.*"

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The Provider submits that on **19 February 2014**, the Complainants completed a standard financial statement (“SFS”) *“seeking an extension of interest only repayments on the mortgage loan account.”* The Provider outlines that a meeting was held between the Provider and the Complainants on **21 February 2014** during which the Complainants *“sought an extension of interest only repayments for a period of 2 years as they had decisions to make with regard to the First Named Complainant’s pension and the potential sale of a Buy to Let (BTL) property”*. The Provider explains that the Provider’s BTL pricing policy was discussed at this meeting and the Provider informed the Complainants *“of the loss of the tracker rate of interest, if their request for an extension of the interest only period was approved by the Provider.”*

The Provider submits that it was not obliged to offer the Complainants an alternative repayment arrangement and any offer of forbearance *“is at the commercial discretion of the Provider”* and subject to the following criteria:

- The customer’s personal circumstances;
- The customer’s overall indebtedness;
- The information provided in the SFS;
- The customer’s current repayment capacity; and
- The customer’s previous repayment history.

The Provider submits that it contacted the First Complainant on **3 March 2014** to advise that the request for an extension of the interest only repayment period had been approved and the Provider issued an **AAMLO** on **10 March 2014** which was subject to the Provider’s BTL pricing policy.

The Provider asserts on **4 April 2014** the Second Complainant contacted the Provider to advise that the Complainants were unsure if they were accepting the offer detailed in the **AAMLO** and were seeking independent financial advice. The Provider states that on **11 April 2014**, the Second Complainant *“queried whether the tracker rate could be retained in light of the overpayment of account [ending 4272.]”* The Provider notes that it confirmed on **15 April 2014** *“that there were no exceptions with regard to the BTL pricing policy and that the Complainants could [write] to the Provider querying why full capital and interest repayments were taken if they so wished.”*

The Provider details that the Complainants signed and accepted the **AAMLO** on **15 April 2014** *“converting the loan to an interest only loan for a period of 24 months.”* The Provider explains that the **AAMLO** converted the interest rate from the previously held tracker interest rate to the Provider’s BTL variable rate, which was *“2.20% per annum.”* The Provider submits that this *“ended any contractual entitlement of the Complainants to avail of a tracker interest rate.”*

The Provider maintains that it made a commercial decision to implement a pricing policy change in respect of BTL mortgage loans and *“if a change of terms and conditions is deemed appropriate (e.g. Interest Only), the Buy-To-Let Tracker customer will be offered a new Standard Variable Interest Rate mortgage for the life of the loan, which is initially priced at 1% above what they are currently paying on their tracker mortgage.”* The Provider states that the offer to the Complainants in **March 2014** *“was assessed by reference to the criteria as outlined by the Provider’s ‘Buy-To-Let’ Pricing Policy.”*

The Provider submits that the mortgage loan account was not subject to the **Code of Conduct on Mortgage Arrears** but rather certain provisions of the **Consumer Protection Code 2012**. The Provider maintains that it has *“evidenced its compliance”* with the **Consumer Protection Code 2012** and has *“acted honestly, fairly and professionally in the best interests of the Complainants”*. The Provider states that it *“is satisfied that it has acted with due skill, care and diligence in the best interest of the Complainants.”*

The Provider explains that following the assessment of the SFS *“the Provider offered to extend the interest only repayments on the mortgage loan account for a period of 2 years.”* The Provider is of the view that this represents a *“genuine attempt to assist the Complainants following their request for forbearance, despite in the Provider’s assessment, that full capital and interest repayments were affordable.”* The Provider asserts that the Complainants suggestion that they had no choice but to agree to the removal of the tracker interest rate is *“an unreasonable one.”* The Provider submits that it is *“entirely a matter for the borrowers to accept the amended terms as offered.”* The Provider details that if the Complainants rejected the offer, then the mortgage loan account would have remained on a tracker interest rate.

The Provider notes that the in **January 2016**, the Complainants sought *“an extension of the interest only repayments for a period of 2 years as the First Named Complainants’ pension was due to mature in August 2017 and this would allow the Complainants to encash the funds from same.”*

### **The Complaints for Adjudication**

The complaints are that:

- (a) The Provider failed to take into consideration that the Complainants had “*overpaid*” on mortgage loan account ending **4272** for seven years from **2007**, when the Complainants sought an alternative repayment arrangement from the Provider in or around **February 2014** in respect of mortgage loan account ending **4597**; and
- (b) The Provider acted inappropriately by failing to allow the Complainants to retain a tracker interest rate on mortgage loan account ending **4597** in or around **February 2014**.

### **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 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 22 June 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' mortgage loan documentation and to consider certain interactions between the Provider and the Complainants in or around **2014**.

I will now consider the provisions of the mortgage loan documentation in relation to both mortgage loan accounts held by the Complainants with the Provider.

**1. Mortgage loan account ending 4272**

The **Credit Agreement** dated **2 February 2007** for mortgage loan account ending **4272**, details as follows:

“ ...

**IMPORTANT INFORMATION AS AT 2<sup>nd</sup> February 2007**

1. Amount of credit	€327,000
2. Period of Agreement	300 months
3. Number of Repayment Installments [sic]	300
4. Amount of Each Installment [sic]	84 interest only @ €1,239.88 216 Capital & Interest @ €2,217.26

...

**ADDITIONAL INFORMATION AS AT 2<sup>ND</sup> February 2007**

...

10. Rate of interest (Fixed or Variable)

*:The interest rate quoted for this facility is the Bank's Investment tracker variable rate, currently 4.45% pa. 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 0.95% above the European Central Bank Main Refinancing Operations Minimum Bid*

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*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 5<sup>th</sup> 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 Investment Variable Rate.*

...

*12. Date on which each repayment Installment [sic] falls due (subject to the terms and conditions of this Credit Agreement)*

*:The Residential Investment Loan is repayable in full within 300 months of drawdown. Monthly interest only payments of €1,239.88 at the current indicative interest rate will apply for a period of 84 months from drawdown. Monthly repayments of capital and interest will commence following this period at a rate sufficient to redeem the Residential Investment Loan within the remaining repayment term of 216 months.*

..."

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The **Form of Acceptance and Consent** section of the **Credit Agreement** was signed by the Complainants on **15 March 2007** and witnessed by their solicitor on the following terms:

“ ...

(1) *We accept the offer of the Loan and the terms and conditions as set out in this Credit Agreement.*

...

(4) *We hereby authorise the Bank to debit any account(s) with the Bank in my names or in the names of either of us with all payments of interest and principal and all fees and other charges due by me to the Bank in accordance with this Credit Agreement.*

...”

The **terms and conditions** of the **Credit Agreement** are provided for at page 9 of the **Credit Agreement** and outline as follows:

“ ...

**4.0 REPAYMENT OF PRINCIPAL AND INTEREST**

4.1 *Subject to the provisions of clause 3.6, repayments of principal and interest shall be made in accordance with point number 3 and point number 4 of the front page of this Credit Agreement and must be made on the due dates therefor as detailed at point number 12 on the second page of this Credit Agreement, unless otherwise agreed with the Bank provided that any repayment which would otherwise fall to be made on a day which is not a Business Day shall instead fall to be made on the next following Business Day.*

...”

The **Credit Agreement** provided for a tracker interest rate of ECB + 0.95% to apply for the term of the mortgage loan. The Complainants accepted the terms and conditions of the **Credit Agreement** by signing the **Form of Acceptance and Consent** section of the **Credit Agreement** on **15 March 2007**. The **Credit Agreement** also envisaged that the Complainants would make interest only repayments for the first 7 years of the term of the

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mortgage loan. Mortgage loan account ending **4272** was drawn down on **11 December 2007**.

It is submitted that due to an “*administrative error*” on the part of the Provider, the Complainants mortgage loan account was set up in such a way that the Complainants made capital and interest repayments instead of interest-only repayments on their mortgage loan account for the first 7 years of the term of the mortgage loan, as provided for in the **Credit Agreement** dated **2 February 2007**. The Complainants submit that they only became aware that they were paying both capital and interest repayments in **2014** when they sought forbearance for another mortgage loan account (ending **4597**). The Provider’s **internal records** dated **21 February 2014** detail as follows in this regard:

“ ...

*It should be noted that a second BTL granted in Dec 2007 for E327k was meant to be interest only for 7 years also, but due to a Bank error was set up as Capital & Interest repayments. [Complainants] gave me a copy of the letter of offer which states interest only payments.*

...

*Cont... are due for 84 months. However, they did not realize this at the time and continued to pay C&I payments so effectively they have overpaid this mortgage by E59k. They are happy to continue paying C&I on this going forward. They are requesting interest only for a 2 year period on mortgage [ending 4597] as they have a few decisions to make....”*

It is disappointing that the Provider set up mortgage loan account ending **4272** incorrectly from inception, however, it appears that that the Complainants were in a position to maintain the capital and interest repayments during this time and did not proactively approach the Provider to raise concerns as to their affordability in respect of mortgage loan account ending **4272** over the course of the 7 years. When the error eventually came to light in **2014**, the evidence shows that the Complainants were satisfied to continue making capital and interest repayments on mortgage loan account ending **4272** at that time. The seven year interest only period on that mortgage loan, as was envisaged in the Credit Agreement, would have been due to expire in late **2014**.

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The Provider's **internal records** further indicate that the Complainants were advised by the Provider that they could submit a complaint to the Provider to query why the mortgage loan account was set up on capital and interest repayments instead of interest-only repayments.

The Provider's **internal records** dated **14 April 2014** outline as follows:

"...

*[Redacted] in reply to [second Complainant's] call. Left message telling her I have queried pricing policy in view of Bank error taking full C&I payments instead of I/O on other mortgage since drawdown. Told her there are no exceptions to pricing policy and she can write in querying why full C&I payments were taken if she wishes.*

..."

## **2. Mortgage loan account ending 4597**

The Provider issued a **Mortgage Loan Offer Letter** dated **30 March 2007** to the Complainants in respect of mortgage loan account ending **4597** which details as follows:

"...

### **PART 1 – THE STATUTORY LOAN DETAILS IMPORTANT INFORMATION AS AT 30 March 2007**

1.	<i>Amount of Credit Advanced</i>	<i>€425,000</i>
2.	<i>Period of Agreement</i>	<i>25 Years</i>
3.	<i>Number of Repayment Instalments</i>	<i>Instalment Type Variable at 4.700% Variable at 4.700%</i>

...

### **PART 2 – THE ADDITIONAL LOAN DETAILS**

11. <i>Type of Loan:</i>	<i>Interest Combo</i>
12. <i>Interest Rate</i>	<i>4.700% Variable</i>

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...”

**Special Conditions (a) (iii) and (vi) of PART 4 – THE SPECIAL CONDITIONS** outline as follows:

“...

*(iii) For the first 7 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 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 0.95% 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 5<sup>th</sup> 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 as follows:

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“ ...

**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.*
- (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 that 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*

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*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 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 **Acceptance and Consents** section of the **Mortgage Loan Offer Letter** was signed by the Complainants on **4 April 2007** 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 **Mortgage Loan Offer Letter** dated **30 March 2007** in respect of mortgage loan account ending **4597** provided for a tracker interest rate of ECB + 0.95% to apply for the term of the mortgage loan. The **Mortgage Loan Offer Letter** further detailed that an interest-only repayment period would apply for a period of seven years.

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. I note from the **mortgage loan account statements** furnished in evidence that the mortgage loan account ending **4597** was drawn down on **20 April 2007**.



The Provider's **internal records** dated **9 January 2014** detail as follows in relation to the expiry of the interest only repayment period:

*"... account [ending 4597] due to roll off io and revert to full c&i repayments of approx. 2,158.04 on the 20/04/2014. ltr not issued to date. TRC TRACKER VAR ECB+1.25% INV> - no arrears..."*

It appears that the Complainants approached the Provider in or around **February 2014**, to seek forbearance in respect of mortgage loan account ending **4597**. The Provider's **internal records** dated **19 February 2014** detail as follows:

*"...  
Note: Pricing policy was discussed with customers and they realize they will lose the tracker rate if f/b request is approved.  
..."*

The Provider's **internal records** dated **21 February 2014** detail a meeting which occurred between the Complainants and the Provider around this time, as follows:

*"...  
They just require a short period of forbearance i.e. interest only got 2 years on [account ending 4597] with [account ending 4272] to continue on full C&I (It was due to revert to C&I in Nov this year)  
...  
I am recommending interest only got 2 years on a/c [ending 4597] based on their excellent record over the years and this comes with a strong recommendation from [Redacted] branch manager [Redacted].  
..."*

The Provider submits that the Complainants' repayment history in respect of both mortgage loan accounts, repayment capacity and overall indebtedness were taken into account when assessing the Complainants' proposal for an alternative repayment arrangement in respect of mortgage loan account ending **4597**.

The evidence shows that the Provider ultimately agreed to a 2-year interest only repayment period by way of a forbearance measure.

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The Provider's **internal records** dated **27 February 2014** in respect of the Complainants' second mortgage loan account ending **4597** outlines as follows:

"...

*Noting the overpayments to date on [account ending 4272] – willing to offer 24 months I/O on this account.*

..."

The Provider's **internal records** dated **28 February 2014** detail a telephone call between the Provider and the First Complainant, as follows:

"...

*He was happy with decision from [Redacted] and promised to sign and return MFA as soon as they get it. He thanks me for prompt result.*

..."

An **Agreement to Amend Mortgage Loan Offer Letter ("AAMLO")** dated **10 March 2014** was issued to the Complainants in respect of mortgage loan account ending **4597** which details as follows:

***"Agreement to Amend Mortgage Loan Offer Letter  
(Change from Tracker Rate and Amend other Terms of the Mortgage Loan)***

***Date of this Form: 10 March 2014***

...

***Mortgage Account No: [ending 4597]***

***The amount you owe under Mortgage Loan: €425,129.43***

***The Total Amount of arrears you owe under the Mortgage Loan: €0.00***

***This is an important legal document. It will amend the terms and conditions that apply to your mortgage loan. The form is divided into Sections A to E. You need to read each section carefully. We strongly recommend you get independent legal advice or financial advice before you sign in.***

...

***"SECTION A: WHAT THIS FORM DOES***

***Interest Only***

/Cont'd...

### *What you pay in each instalment*

*1.1 If you accept this form (a) you are to pay interest only as it falls in each regular instalment in the Agreed Period; and (b) you agree to make these payments during the Agreed Period.*

### *The Length of the Agreed Period*

*1.1.1 The "Agreed Period" means the period of 24 months starting from the date we put the alternative arrangement into effect.*

### *What Happens when the Agreed Period Ends*

*1.2 When the Agreed Period ends you will have to repay the Loan over the rest of the period of the Loan. The amount of the Loan then to be repaid will include all of the principal and other sums which you did not pay during the Agreed Period (and which you would have been obliged to pay if this form did not come into force).*

*1.3 We will calculate the repayment instalments that you have to pay when the Agreed Period ends. You agree to pay these repayment instalments in full as they are calculated by us. The terms and conditions of the Mortgage Loan Offer Letter which provide for repayment of the Loan on an annuity basis will operate after the Agreed Period by reference to the amount you then owe under the Loan.*

### **Conversion from Tracker Rate to New Interest Rate Type**

#### *Tracker to BTL Variable*

*This form converts the interest we charge on 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 (except for periods in which you and we agree in writing to fix the interest rate for the Loan). At present this BTL Variable rate is 2.200% per annum*

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## **SECTION B: FURTHER TERMS AND CONDITIONS OF THIS FORM**

### **B.1 ANY COMMITMENT TO A TRACKER RATE ENDS**

/Cont'd...

*Any commitment or obligation in your Mortgage Loan Offer Letter or otherwise to provide you with a tracker variable rate for the Loan, now or in the future, will end once you complete and return this form. This Clause takes precedence over any condition of your Mortgage Loan Offer Letter, this form or elsewhere concerning interest in general or tracker variable rates in particular including any Special Condition. The phrase “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 your 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.*

...

**B.7 This Form will amend the Mortgage Loan Offer Letter**

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

...

*7.3 Unless amended or replaced by this form, each of the terms and conditions of the Mortgage Loan Offer Letter will remain in full force and effect. (For example, the General Terms and Conditions contain clauses dealing with interest in general, additional interest charges on overdue payments, variable interest rates and fixed interest rates).*

...”

**SECTION C: LEGAL NOTICES** of the **AAMLO** dated **10 March 2014** details the following warning:

***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.***

The **Legal Notices** section also provides an indicative comparison of the cost of the mortgage loan and the monthly repayments at a tracker interest rate and the cost of the mortgage loan and the monthly repayments at the BTL variable interest rate, in accordance with **Provision 6.9** of the **Consumer Protection Code 2012**.

/Cont'd...

The **Legal Notices** section also details the advantages and disadvantages of a tracker interest rate and other interest rates, in accordance with **Provision 6.9** of the **Consumer Protection Code 2012** 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 decreases. These increases or decreases will be applied within 5 working days of an ECB rate change.*

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

**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.***

<b><i>Advantages of the Variable Rate include the following:</i></b>	<b><i>Disadvantages of the Variable Rate include the following:</i></b>
<ul style="list-style-type: none"> <li>• <i>We try to set the rate at a competitive and attractive level.</i></li> <li>• <i>If the ECB increases its Repo Rate, it is possible that we may decide not to increase the Variable Rate.</i></li> <li>• <i>You can make lump sum payments, overpayments on your monthly</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>It is a variable rate which means your monthly repayments may go up and/or down to reflect changes in the rate.</i></li> <li>• <i>The rate is variable at our discretion – it does not track any ECB or other reference rate.</i></li> </ul>

<i>repayment on your Variable mortgage account at no cost.</i>	<ul style="list-style-type: none"><li>• <i>If the ECB decreases its Repo Rate, it is possible that we may decide not to decrease the Variable Rate.</i></li></ul>
--	---

...”

The Provider’s **internal records** dated **14 April 2014** outline as follows:

“ ...

*[Redacted] in reply to [second Complainant’s] call. Left message telling her I have queried pricing policy in view of Bank error taking full C&I payments instead of I/O on other mortgage since drawdown.*

*Told her there are no exceptions to pricing policy and she can write in querying why full C&I payments were taken if she wishes.*

...”

The Complainants signed **SECTION E: ACCEPTANCE BY (EACH) BORROWER** of the **AAMLO** on **15 April 2014** on the following terms:

“ ...

**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.**
- (4) PLEASE TICK AT LEAST ONE OF THE FOLLOWING BOXES:**

*I have received independent legal advice on this form.*

*I have received independent financial advice on this form.*

*I did not get independent legal or financial advice on this form because I have sufficient appreciation of financial and legal matters and of the meaning of this form to understand this form completely. I am satisfied to sign it without such advice; I will never raise the lack of advice as a reason to question this form...”*

/Cont’d...

The Complainants ticked the boxes confirming that they received independent legal and financial advice when signing the form

The Complainants submit that the Provider acted inappropriately by failing to allow the Complainants to retain a tracker interest rate on mortgage loan account ending **4597** in **2014**. However, it is clear that by signing the **AAMLO** on **15 April 2014**, the Complainants confirmed that they understood that they were moving off a tracker interest rate to a BTL variable interest rate and would not be contractually entitled to go back onto a tracker interest rate in the future.

I accept that the Complainants did not want to give up the entitlement to the tracker interest rate in respect of their mortgage loan account. However, the Complainants were seeking to agree an alternative repayment arrangement with the Provider on a mortgage loan that was not secured on their principal private residence. The Provider made an offer of an alternative repayment arrangement to the Complainants to make interest only payments for 24 months on the condition that a BTL variable interest rate of 2.20% would apply to mortgage loan account ending **4597**. While I accept that the Complainants were in a difficult position, it was nonetheless a matter for the Complainants to decide whether or not to accept the arrangement proposed by the Provider. I note that the Complainants were not in arrears on either of their mortgage loan accounts when they entered into the **AAMLO**.

**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; 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*

/Cont’d...

- 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."*

I am satisfied that the appropriate information and warnings as stipulated in **provision 6.9** of the **Consumer Protection Code 2012** were contained in **AAMLO**. The mortgage loan was not a private dwelling house mortgage loan.

The reality of the situation at that time in **early 2014** was that the Complainants were concerned that they were not able to service the repayments required within the original terms of their mortgage loan under mortgage loan account ending **4597**. The Complainants therefore sought a further interest only repayment period in respect of the mortgage loan account in an effort to avoid entering arrears on their mortgage loan account.

I acknowledge that the Provider made an administrative error in relation to mortgage loan account ending **4272** by setting up the mortgage loan on capital and interest repayments as opposed to facilitating an interest only repayment period for the first 7 years of the term of the mortgage loan as had been agreed between the parties in the Credit Agreement. The evidence shows that this error went unnoticed by both the Provider and the Complainants until the Complainants sought forbearance from the Provider in respect of their second mortgage loan account ending **4597**. In this regard, the Complainants submit that the Provider failed to take account of the "*overpayments*" on mortgage loan account ending **4272** from **2007** to **2014**, when the Complainants sought an alternative repayment arrangement from the Provider in **2014** in respect of mortgage loan account ending **4597**.

However, the evidence shows that the Provider requested the Complainants to complete a **SFS** in order to carry out a detailed review of the Complainants' overall financial position when assessing mortgage loan account ending **4597** for forbearance. In this regard,

/Cont'd...



Provider's **internal records** from **February 2014** show that the Provider considered the Complainants' affordability and repayment history on both mortgage loan accounts when assessing their eligibility for an alternative repayment arrangement on mortgage loan account ending **4597**. The Provider's **internal notes**, as detailed above, show that the Provider fully took account of the fact that the Complainants had made capital and interest repayments on mortgage loan account ending **4272** from **2007** to **2014** and that both mortgage loan accounts had not fallen into arrears. I am satisfied that the Complainants' repayment history across both mortgage loan accounts, the fact that there were no arrears on either mortgage loan account and the Complainants' repayment capacity and affordability on both mortgage loan accounts were factors that were considered by the Provider and part of the reason that the Complainants were offered an alternative repayment arrangement on mortgage loan account ending **4597**.

**General Condition 4(d)** of the **Mortgage Loan Offer Letter** dated **30 March 2007** stipulates that the Provider 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*". 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 relevant codes and 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 an option to amend the interest rate on their mortgage loan accounts.

The Provider was willing to accede to the Complainants' request to provide a 24-month interest only repayment period in respect of mortgage loan account ending **4597** 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 Complainants to this effect in the form of the **AAMLO**, 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 Complainants signed the **AAMLO** on **15 April 2014** confirming that they had sought independent legal and financial advice in relation to the contents of the **AAMLO** and that they understood that they were moving off a tracker interest rate to a BTL variable interest rate and would not be contractually entitled to revert to a tracker interest rate in the future.

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

/Cont'd...

## 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**

14 July 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,

/Cont'd...

(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.

