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| <b><u>Decision Ref:</u></b>             | 2022-0302  |
| <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 at point of sale |
| <b><u>Outcome:</u></b>                  | Rejected   |

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

#### **Background**

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

The loan amount was €150,000.00 and the term of the loan was 30 years. The **Letter of Approval** dated **17 September 2008** details that the interest rate applicable to the loan was a one-year discounted variable interest rate of 5.75% for the first 12 months of the loan.

#### **The Complainant's Case**

The Complainant details that, following a separation from his former partner, he "*applied for a top up of an existing mortgage*" in **2006**. The Complainant outlines that "[t]his was a tracker product" however, as his separation was not finalised until **2008**, the loan application had expired, and he had to reapply.

The Complainant states that his loan application dated **20 June 2008** "*clearly outlines the product as being a discounted tracker*". The Complainant submits that his subsequent loan application was successful in **2008** and he received the paperwork confirming this from the

Provider on **17 September 2008**, at which stage he went to his solicitor to sign the paperwork.

The Complainant outlines that in **February 2009**, he received a telephone call from an employee of the Provider *“to say [his] loan approval would expire and [he] would lose the tracker”* if he did not draw down the loan, *“at which point [the Complainant] went ahead and completed the transaction”*.

The Complainant details that shortly after his repayments commenced, he *“realised that [his] account was not actually on a tracker”* interest rate and so he contacted the Provider to *“query the account”*. The Complainant states that he made further contact with the Provider in **June 2009** and was informed that the interest on his loan account was calculated at the Provider’s standard variable interest rate and the reference to a *“Tracker”* in the Statement of Suitability was an error. The Complainant states that he wrote again to the Provider *“to query the issue and have received copies of all correspondence to which [he is] unsatisfied”*.

The Complainant notes that the Provider acknowledges that there *“is an information error within the statement of suitability”*, which was issued to the Complainant in conjunction with his loan documentation. The Complainant submits that the Provider has said that the Statement of Suitability *“quoted the incorrect Mortgage product under the proposal heading on page 1”*. The Complainant asserts that he does *“not work in finance nor [does he] have any expertise in calculating mortgages”* and that he *“merely signed the paperwork”* in front of him, which described his mortgage product as a *“Tracker – A variable interest rate that is linked to ECB rates”*. The Complainant contends that all of the documentation *“went on to describe the product as the variable rate which [he] assumed to be the tracker product”*. Further, the Complainant contends that the Provider’s description of a tracker interest rate in the Statement of Suitability *“along with the application for a tracker mortgage was misleading”* and the Complainant accepted the contract *“based on the [Provider’s] own error”*.

The Complainant asserts that although he obtained independent legal advice, in circumstances where the Provider’s *“own definition of a tracker”* was described as *“being variable in the statement of suitability”*, he *“was not fazed by the fact that the word “variable” was subsequently used”* in the mortgage loan agreement. The Complainant states that he believed that the term *“variable”* was referring to the tracker interest rate as proposed by the Provider in the Statement of Suitability.

The Complainant states that the Provider *“say[s] there was an error in their statement of suitability, however this “error” has cost [him] tens of thousands of euros”*. The Complainant contends that the Provider *“should be accountable if [its] paperwork mis-sold [him] a mortgage product”*. The Complainant details that as his existing mortgages were

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on tracker interest rates and two subsequent applications were for tracker interest rates, the Complainant “*had no reason to know the letter accompanying the [Provider’s] Letter of Offer was an error on the [Provider’s] behalf*”. The Complainant contends that the Provider’s error in the Statement of Suitability “*is not just a typographical error and cannot be classified as such*”.

The Complainant also notes that his dispute with the Provider in this regard “*predates any media attention surrounding the tracker scandal*”.

The Complainant further asserts that he has “*difficulty in understanding how [the Provider] has acted in accordance*” with the Consumer Protection Code 2006. In addition, the Complainant submits that the Provider has misled him and has given him a different mortgage product to that which he had applied for.

The Complainant is seeking the application of a tracker interest rate to his mortgage loan account and a refund of overpaid capital and interest from **February 2009**.

#### **The Provider’s Case**

The Provider outlines that the Complainant made an application for a new mortgage loan in the sum of €150,000.00 on **28 March 2006**, to be secured by his principal private residence, which had been the subject of a previous mortgage loan with the Provider since **1999**.

The Provider submits that the Complainant selected a “*1 Year Special Discount Tracker (ECB+Max 0.49%)*” when completing his mortgage loan application. The Provider notes that the Complainant’s application was approved by the Provider “*but the Complainant did not proceed to completion of the new mortgage loan and the loan offer expired*”.

The Provider details that the Complainant “*made a further application for a similar new mortgage loan on or about 28 April 2008*”.

The Provider outlines that it issued a loan offer to the Complainant on **17 September 2008** in the amount of €150,000.00. The Provider submits that the rate of interest offered was a “*Discount Variable Rate*” of 5.75% which applied for the first year of the loan, after which a variable rate of interest would apply. The Provider states that it “*did not offer the Complainant a tracker rate*”. The Provider details that the Complainant accepted this loan offer on **11 December 2008**, with the benefit of independent legal advice.

The Provider submits that this loan was drawn down by the Complainant on **24 February 2009** and in accordance with the terms and conditions of the loan contract, “*a variable*

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*rate was applied to the loan at drawdown*", rather than a tracker interest rate. Further, the Provider submits that as it had withdrawn tracker interest rates for new loan applications from **mid-2008**, the interest rates available on the date of the issuing of the Complainant's Letter of Approval did not include tracker interest rates.

The Provider outlines that the Statement of Suitability which issued to the Complainant *"very clearly stated that the selected loan type was the 1 Year Discount Variable"* interest rate. The Provider notes however that in one section *"in error, there is a reference to a "Tracker – A variable interest rate that is linked to ECB rates"*". The Provider states that it apologises for this error. The Provider asserts however that a *"Letter of Suitability is not part of a legally binding contract"* and that the mistake in the Statement of Suitability was a *"result of human error"*.

The Provider outlines that the Letter of Approval, which was its *"contractual loan offer"* did not refer to a tracker rate of interest and instead offered the Complainant *"a variable rate home loan with a discount variable rate of 5.75% for the first year of the loan"*. The Provider asserts that the interest rate provided for in the Letter of Approval *"clearly was not a tracker rate"*. The Provider re-iterates that the *"suitability Letter is not part of the loan agreement between the Complainant and the Bank"* and the *"incorrect description in the Proposal section of the Suitability Letter did not have an impact on the terms and conditions of the Complainant's mortgage loan"*. The Provider, in its formal response to this Office dated **12 September 2019**, offered the Complainant a goodwill payment in the amount of €250.00 in respect of this error. The Provider later offered to increase the goodwill payment to €1,000.00 in its submission of **3 January 2020** to this Office.

The Provider details that the Complainant accepted the Letter of Approval in the presence of his solicitor on **11 December 2008**, thereby confirming that his solicitor had fully explained the terms and conditions of the loan offer to him. The Provider asserts that the terms and conditions offered to and accepted by the Complainant *"clearly described in detail"* the rates of interest applicable to the loan offered, which was a discount variable rate for the first year from the date of draw down and thereafter *"such rate as might be selected from the options provided to the Complainant or such default variable rate as the [Provider] would apply in the absence of selection"*.

With regard to the Complainant's submission that he assumed that the term *"variable rate"* in the mortgage documentation referred to a tracker variable rate, given the definition of a *"Tracker"* as stated in the Statement of Suitability, the Provider asserts that it *"does not accept that any reasonable assumption was made by the Complainant as described by the Complainant in this submission"*. The Provider contends that the Complainant *"did not or could not reasonably have understood the references in the loan*

*contract to be references to a tracker rate, notwithstanding the [Provider's] error in the Statement of Suitability".*

The Provider further submits that there *"is no reference whatsoever to a tracker rate and/or to a rate which was based on the ECB rate, in the Letter of Approval dated 17 September 2008"*.

The Provider submits that it *"is satisfied that the term "variable rate" in the Complainants' mortgage loan account was sufficiently clear and transparent in its meaning"*. Further, the Provider states that it is satisfied that the terms *"variable"* and *"tracker"* are *"clearly distinguished"* in the Complainant's mortgage loan documentation.

In relation to the Complainant's submission that the Provider's branch manager contacted him in **February 2009** to inform him that if the loan offer expired, he would *"lose the tracker"*, the Provider asserts that as the mortgage loan account was progressing to completion in **February 2009**, *"there was no reason for a telephone call from the branch manager in February 2009 regarding expiry of the offer made by the [Provider]"*.

With regard to the Complainant's submission that tracker interest rates were still available to existing customers when the Complainant raised the issue with the Provider in **June 2009**, the Provider states that in **June 2009**, the only tracker interest rates available to existing customers *"were maturity interest rate options provided to certain customers whose accounts were maturing from a fixed rate period"*.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider incorrectly failed to apply a tracker interest rate to the Complainant's mortgage loan account in **February 2009**.

### **Decision**

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

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

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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 **09 August 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.

Following the issue of the Preliminary Decision, the Complainant made a further submission, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made a further submission.

Having considered the Complainant's additional submission and all of the submissions and evidence furnished to this Office by the parties, I set out below my final determination.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Provider and the Complainant between **2006** and **2009**.

The Complainant completed an **Application for Credit** dated **28 March 2006**, seeking a mortgage loan in the sum of €150,000.00 repayable over a term of 20 years, on a "1 Year Special Discount Tracker (ECB + MAX 0.49%)" rate of interest.

The Complainant completed a subsequent **Application for Credit** which was undated, however the Provider states that this application was completed in or around **28 April 2006**. This **Application for Credit** provides as follows:

***"2. Details of Mortgage Required***

***Type of Loan:***

...

*Amount of Loan required*                      €150,000.00

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|   |   |
|---|---|
| <i>Purchase price/value of Property</i> | <i>€350,000.00</i>                                  |
| <i>Loan type</i>                        | <i>Disc Tracker (LTV&lt;=60%/&lt;200K) HomeLoan</i> |
| <i>Repayment Term required</i>          | <i>40 Years"</i>                                    |

It is clear from the above **Application for Credit** that the Complainant applied for a mortgage loan in the sum of €150,000.00 repayable over a term of 40 years, with a discounted tracker interest rate to apply to the loan. However, the submissions on file indicate that the Complainant did not proceed any further with that loan application at that time in **2006**. It does not appear from the documentary evidence supplied that the Complainant submitted any additional applications for credit other than those completed in **2006**.

The Provider's **Lending Interest Rates** document, which was effective from the start of business on **22 March 2006**, indicates that the following interest rates were available at the time of the Complainant's original loan application.

| <b><i>"Repayment Home Loans</i></b>   | <b><i>Rate</i></b> | <b><i>APR</i></b> |
|---|--------------------|-------------------|
| <i>Variable Rate</i>  | <i>3.85%</i>       | <i>3.9%</i>       |
| <i>1 Year Fixed Rate</i>  | <i>3.90%</i>       | <i>3.9%</i>       |
| <i>2 Year Fixed Rate</i>  | <i>3.99%</i>       | <i>4.0%</i>       |
| <i>3 Year Fixed Rate</i>  | <i>4.29%</i>       | <i>4.1%</i>       |
| <i>4 Year Fixed Rate</i>  | <i>4.29%</i>       | <i>4.1%</i>       |
| <i>5 Year Fixed Rate</i>  | <i>4.29%</i>       | <i>4.1%</i>       |
| <i>7 Year Fixed Rate</i>  | <i>4.55%</i>       | <i>4.4%</i>       |
| <i>10 Year Fixed Rate</i>   | <i>4.70%</i>       | <i>4.6%</i>       |
| <b><i>Rates applicable to new Home Loans</i></b>                                      |                    |                   |
| <i>1 Year Discounted Variable Rate</i>  | <i>3.19%</i>       | <i>3.8%</i>       |
| <i>1 Year Discounted Variable Rate (when borrowing &lt;50% of the property value)</i> | <i>2.99%</i>       | <i>3.8%</i>       |
| <i>2 Year Discounted Variable Rate</i>  | <i>3.49%</i>       | <i>3.7%</i>       |
| <i>1 Year Fixed Rate</i>  | <i>3.45%</i>       | <i>3.9%</i>       |
| <i>2 Year Fixed Rate</i>  | <i>3.84%</i>       | <i>3.9%</i>       |
| <i>3 Year Fixed Rate</i>  | <i>4.19%</i>       | <i>4.0%</i>       |
| <b><i>Tracker Mortgage (Home Loan and Residential Investment Property)</i></b>        |                    |                   |
| <i>Loan Amount €150,000 - €249,999</i>  | <i>3.75%</i>       | <i>3.8%</i>       |
| <i>Loan Amount of €250,000 - €749,999</i>   | <i>3.60%</i>       | <i>3.7%</i>       |
| <i>Loan Amount of €750,000 or more</i>  | <i>3.40%</i>       | <i>3.5%"</i>      |

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It appears that the Complainant approached the Provider in **2008** with a view to progressing the loan application.

The Provider's **Lending Interest Rates** document, which was effective from the start of business on **5 August 2008**, indicates that the following interest rates were available at that time:

***"Repayment Home Loans***

***Rates applicable to New Home Loans***

|   | <b><i>RATE</i></b> | <b><i>APR</i></b> |
|---|--------------------|-------------------|
| <i>1 year Discounted Variable LTV &lt;80%</i> | <i>5.75%</i>       | <i>6.0%</i>       |
| <i>1 year Discounted Variable LTV &gt;80%</i> | <i>5.85%</i>       | <i>6.1%</i>       |

***Rates applicable to New and Existing Home Loans***

|                               |              |             |
|-------------------------------|--------------|-------------|
| <i>Standard Variable Rate</i> | <i>5.94%</i> | <i>6.1%</i> |
| <i>2 Year Fixed Rate</i>      | <i>6.35%</i> | <i>6.2%</i> |
| <i>5 Year Fixed Rate</i>      | <i>5.99%</i> | <i>6.1%</i> |
| <i>7 Year Fixed Rate</i>      | <i>6.10%</i> | <i>6.2%</i> |
| <i>10 Year Fixed Rate</i>     | <i>6.10%</i> | <i>6.2%</i> |

***LTV Variable maturity rates applicable to Existing Home Loan post 14/07/08***

|                                  | <b><i>RATE</i></b> | <b><i>APR</i></b> |
|----------------------------------|--------------------|-------------------|
| <i>Variable Rate LTV &lt;80%</i> | <i>5.80%</i>       | <i>6.0%</i>       |
| <i>Variable Rate LTV &gt;80%</i> | <i>5.90%</i>       | <i>6.1%</i>       |

***LTV Tracker maturity rates applicable to Existing Home Loan post 05/08/08***

|                                 | <b><i>RATE</i></b> | <b><i>APR</i></b> |
|---------------------------------|--------------------|-------------------|
| <i>Tracker Rate LTV &lt;80%</i> | <i>5.93%</i>       | <i>6.1%</i>       |
| <i>Tracker Rate LTV &gt;80%</i> | <i>5.93%</i>       | <i>6.1%</i>       |

It appears that tracker mortgages were no longer available in respect of new home loan applications in **August 2008**. The Provider was offering LTV discounted variable interest rates, fixed interest rates and a standard variable interest rate at this time.

The Provider issued a letter to the Complainant dated **17 September 2008**, which details as follows:

*"Dear [Complainant]*

*The following outlines our proposal based on the information you have given us regarding your personal circumstances, financial needs and plans. The loan*

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preferences and options you have chosen are also listed, as at September 17th, 2008.

**Proposal**

We propose the following:

*Tracker – A variable interest rate that is linked to ECB rates.*

**Mortgage details agreed**

You have selected a loan type from a range which we are prepared to offer you based on your needs and circumstances. You have chosen a repayment term and flexible options (where relevant) to achieve a repayment amount best suited to your needs and preferences. Details are as follows:

- Amount of loan required €150,000.00
- Property price/value €0.00/€350,000.00
- Loan Purpose Refinance/Restructure
- Loan Type 1yr Disc Variable (<=80% LTV) Home Loan
- Repayment term required 30 Years

.....

*Please review the information in this letter and ensure the mortgage features and details best suit your requirements and wishes, given the advice from [Provider] staff and the information you provided. You should take the necessary time to consider and query any information provided to you in relation to your loan application..."*

It appears that this **Statement of Suitability** is a source of contention between the parties. In this regard, it is of particular importance to note that this **Statement of Suitability** contains what the Provider has described as an "error", namely, the reference to the proposed mortgage product being "Tracker – A variable interest rate that is linked to ECB rates". The Provider states that it proposed to offer a discounted variable interest rate to the Complainant as opposed to a tracker interest rate. The Provider has acknowledged that the **Statement of Suitability** "quoted the incorrect Mortgage product under the proposal heading on page 1". However, the Complainant maintains that by virtue of the reference to the "Tracker" mortgage product in the **Statement of Suitability**, he assumed that the "variable rate" contained in the subsequent mortgage loan documentation, namely the Letter of Approval, equated to the "tracker product".

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The Provider issued a **Letter of Approval** dated **17 September 2008** to the Complainant, which details as follows:

“ ...

|                  |   |
|------------------|---|
| <i>Loan Type</i> | <i>1yr Disc Variable (&lt;=80% LTV) Home Loan</i> |
|------------------|---|

*Purchase Price / Estimated Value :* €350,000.00  
*Loan Amount :* €150,000.00  
*Interest Rate :* 5.75%  
*Term :* 30 year(s)

... ”

**IMPORTANT INFORMATION AS AT September 17<sup>th</sup>, 2008**

- 1. Amount of credit advanced* €150,000
- 2. Period of Agreement* 30 years(s)
- 3. Number of Repayment Instalments* 360
- 4. Amount of each Instalment* €875.36
- 5. Total Amount Repayable* €316,742.91

... ”

I note that the **Letter of Approval** also sets out the following:

“ ...

**VARIABLE RATE LOANS**

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

**Special Condition 7** of the **Letter of Approval** provides as follows:

“ ...

- 7. The interest rate specified in the Letter of Approval is a discounted LTV variable rate and will apply for a period of 12 months from the date of the advance (“the Discount Period”) but may be varied within the Discount Period (and /or at any time prior to drawdown of the advance) without regard to variations in [the Provider] standard variable rate or the European Central Bank Refinancing Rate. On expiry of the Discount Period, the interest rate will be such rate as may be selected by the Applicant(s) from [the Provider] interest rates then offered by*

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*[the Provider] to the Applicant(s) for selection by the Applicant(s) or such variable interest rate (which may be a tracker variable rate) as will apply in the absence of such selection.*

8. *That the total borrowings with [the Provider] [mortgage loan account ending 6173] be discharged from the proceeds of [the Provider's] advance."*

The relevant sections of the **General Mortgage Loan Approval Conditions** provide as follows:

*"...  
**IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:  
"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE  
ADJUSTED BY THE LENDER FROM TIME TO TIME"  
..."***

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **11 December 2008**. This **Acceptance of Loan Offer** states as follows:

*"1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. [the Provider's] Mortgage Conditions.*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

4. *My/our Solicitor has fully explained the said terms and conditions to me/us.  
..."*

The **mortgage loan account statement** submitted in evidence shows that the mortgage loan was drawn down on **24 February 2009**. While not immediately evident from the **mortgage loan account statement**, the Provider explains that the prevailing one-year discounted variable LTV<80% interest rate was 3.5% when the Complainant's mortgage loan was drawn down on **24 February 2009**.

The Complainant details that soon after his repayments commenced, he "*realised that [his] account was not actually on a tracker*" interest rate and so he contacted the Provider

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to “*query the account*”. The **mortgage loan account statement** shows that the discounted variable interest rate had decreased from 3.5% to 2.5% by **05 June 2009**.

In response to the Complainant’s query, the Provider issued a letter to the Complainant dated **19 June 2009**, which states as follows:

*“I refer to query you raised regarding the above mortgage account and wish to confirm that your loan approval issued on the 17<sup>th</sup> September 2008 Loan Type 1 yr Disc Variable (<=80% LTV) Home Loan. I enclose herewith a copy of the Letter of Approval which you accepted. I also refer to Quotation given to you setting out the details of the quote.”*

Prior to expiry of the one-year discounted interest rate period in **February 2010**, the Provider appears to have issued a letter to the Complainant which outlined the various interest rate options available at that time from which the Complainant could select one to be applied to the mortgage loan account.

The Provider has supplied a redacted copy of a letter in evidence which states that “*If we do not receive a written instruction from you in relation to the above on or before the [redacted date] the interest rate on your mortgage will be the LTV Variable Rate \*\*.*” The Provider has not supplied a copy of the then current options available to the Complainant however the **mortgage loan account statement** submitted in evidence shows that the mortgage loan account switched to an interest rate of 3.55% on **24 February 2010**. The Provider explains that this was the default LTV variable interest rate that was available at the time.

The Complainant is of the view that the Provider should have applied a tracker interest rate to his mortgage loan account at the inception of the mortgage loan in **February 2009**. The Complainant maintains that he entered the mortgage loan agreement with the Provider based on the **Statement of Suitability** which detailed the proposed loan preference as a “*Tracker*”.

This Office notes that the **Statement of Suitability** contained a reference to “*Tracker – A variable interest rate that is linked to ECB rates*”. This Office further notes the **Statement of Suitability** also details that the Loan Type is “*1yr Disc Variable (<=80% LTV) Home Loan*”. While I appreciate that the reference to “*Tracker*” in the **Statement of Suitability** may have caused some confusion on the part of the Complainant, it is important to note that the **Statement of Suitability** does not form the basis of the Complainant’s contractual relationship with the Provider. The Complainant’s mortgage loan agreement with the Provider is governed by the **Letter of Approval** dated **17 September 2008** which issued on the same day as the **Statement of Suitability**.

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The **Letter of Approval** dated **17 September 2008** provided for a discounted variable interest rate for the first 12 months of the term of the loan. The description of the discounted variable interest rate in the **Letter of Approval** to be applied at draw down, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable interest rate which could be adjusted at the discretion of the Provider. In fact, **Special Condition 7** specifically states that the applicable interest rate may be varied without regard to variations in ECB main refinancing rate, whereas a tracker mortgage interest rate by its very nature comprises the ECB main refinancing rate and a percentage margin set by the Provider. Therefore, the **Letter of Approval** dated **17 September 2008** did not envisage that a tracker interest rate “*that is linked to ECB rates*” would apply to the Complainant’s mortgage loan at the inception of the mortgage loan.

In order for the Complainant to have a contractual right to a tracker interest rate at the inception of the loan in **February 2009** or at any stage during the term of the loan, that right would need to be specifically provided for in the Complainant’s mortgage loan documentation. However, no such right was set out in writing in the **Letter of Approval** dated **17 September 2008**. While **Special Condition 7** provided that on expiry of the discount period and in the absence of selection of an alternative available interest rate by the Complainant, a variable interest rate will apply “*which may be a tracker variable rate*”, this did not confer a contractual entitlement to a tracker interest rate on the Complainant’s loan. Equally, the reference to “*Tracker*” in the **Statement of Suitability** did not confer a contractual entitlement to a tracker interest rate on the Complainant.

Having considered the mortgage loan documentation in its entirety, it is clear that the Complainant did not have a contractual or other entitlement to a tracker interest rate at drawdown or at any time during the term of the mortgage loan. The **Letter of Approval** dated **17 September 2008** was unequivocally clear in relation to the Complainant’s entitlement to a discounted variable interest rate for the first 12 months of the term of the loan. The Complainant submits that he obtained independent legal advice in relation to his mortgage loan documentation, and he signed the **Acceptance of Loan Offer** section of the **Letter of Approval** on **11 December 2008**, noting that his solicitor had fully explained the terms and conditions of the mortgage loan agreement to him, which include the particulars of the applicable interest rate at draw down of the loan.

The Complainant’s representative in his post-Preliminary Decision submission dated **12 August 2022** outlines that “*he held a tracker mortgage with the Banks at ECB plus 0.95% which disappeared when he had to buy out his former partner, and I don’t see that, as reasonable, fair, or applying any of the Directions of the CPC 2006.*” The Complainant was seeking a new mortgage loan with the Provider in his own name. While the Complainant

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may have held a tracker interest rate on the previously held joint facility, there was no obligation on the Provider to offer a tracker interest rate on the new mortgage facility.

Nevertheless, while I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainant's mortgage loan in **February 2009**, I am also of the view that the information provided in the Complainant in the **Statement of Suitability** was somewhat confusing in that reference was made to a "Tracker" when it should not have been.

The standards expected of the Provider in all its dealings with the Complainant are set out in **Chapter 1** of the **Consumer Protection Code 2006**, which came into force on **1 August 2006**, and provides that:

*"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers"*

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainant. Whilst I accept that typographical errors can occur and in this circumstance that error did not affect the Complainant's underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought the error in the **Statement of Suitability** to the Complainant's attention. The Provider has also acknowledged its failing in this regard and has offered the Complainant a goodwill payment of €1,000.00 considering the error contained in the **Statement of Suitability**. It appears that the Complainant has not accepted this goodwill offer however it is understood that this offer remains open to the Complainant to accept at any time.

In light of all the foregoing and on the basis that the Provider was under no regulatory or contractual obligation to offer the Complainant a tracker interest rate in **February 2009**, I consider the Provider's offer of €1,000.00 to be a reasonable attempt to resolve this complaint and therefore I do not uphold this complaint.

In this regard, the Complainant's representative, in his post-Preliminary Decision submission dated **12 August 2022**, states that he *"does not agree with your definition of reasonability and resolution in this case when one considers the financial implications on both parties. It makes the €1,000 offered, given the implications of the cost difference as inappropriate"*.

The Complainants' representative further states that the Complainant is *"alarmed at the decision but very reluctantly wants it closed"*, he notes that the Complainant *"has asked that there is no further delay and proceed with the issuing of the legally binding decision"*

/Cont'd...



and further notes that the Complainant “*seeks to receive the payment from the Provider as soon as possible*”.

It appears that the Complainant now wishes to accept the Provider’s goodwill payment of €1,000.00. In circumstances where I do not uphold this complaint, I cannot make any directions as to how this goodwill payment is to be made to the Complainant. It will be a matter for the Complainant to contact the Provider directly to accept the payment and agree payment terms.

### **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**

31 August 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.

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**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.