



<u>Decision Ref:</u>	2020-0040
<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

Background

The complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan account which is the subject of the complaint was secured on a Buy-to-Let (“BTL”) property and land held by the Complainant.

The Mortgage Loan Offer Letter which was signed on **13 March 2006** outlined the Loan Type as “*Interest Combo*”. The Loan Amount was €225,000 and the term was 10 years.

An Agreement to Amend Mortgage Loan Offer Letter was signed on **20 January 2016** which extended the term of the loan to **14 December 2026**.

The Complainant’s Case

On **13 March 2006** the Complainant accepted and signed a Mortgage Loan Offer Letter from the Provider dated **27 February 2006**. The particulars of the mortgage loan offer detailed that the interest rate applicable was a tracker variable interest rate of ECB + maximum 1.15%.

On **20 January 2016** the Complainant accepted and signed an Agreement to Amend Mortgage Loan Offer Letter dated **24 December 2015** in relation to her mortgage loan account. This agreement amended the interest rate on the mortgage loan from a tracker rate (1.00% per annum at the time) to a BTL Variable rate (2.00% per annum at the time), extended the term of the loan until **14 December 2026** and capitalised the arrears on the mortgage loan. The Complainant also paid a lump sum of €60,000 off the mortgage loan balance under the terms of the Agreement to Amend Mortgage Loan Offer Letter.

The Complainant submits that, prior to accepting the Agreement to Amend Mortgage Loan Offer Letter in **January 2016**, she had been in discussions with the Provider during **2015** in relation to alternative options to address the arrears that had arisen on the mortgage loan account. She states that one option explored in **July 2015** was the sale of the property and land which was secured under the mortgage loan. She submits that the sale would have realised approximately €44,000. She submits *“had those sales taken place the bank was prepared to “retain the tracker rate on the residual balance””*.

The Complainant submits that, *“rather than sell the properties”* she proposed paying a larger sum of €60,000. She submits that this sum was the balance of her retirement fund. She states *“This was in fact €16k more than both the sales would have yielded”*. The Complainant states that having paid the larger sum of €60,000 off the mortgage loan, she felt that the balance on the mortgage account should have remained on a tracker rate, however *“the bank would not proceed further”* unless she agreed to the removal of the tracker interest rate from her mortgage loan account as part of the proposed arrangement. She submits that consequently, she felt *“forced”* to accept the Agreement to Amend Mortgage Loan Offer Letter that resulted in the loss of the tracker interest rate on the mortgage loan account in **2016**. She states that she accepted the terms of the Agreement to Amend Mortgage Loan Offer Letter in **January 2016** *“under duress”* and *“[she] stressed this at the time.”*

The Complainant submits *“I fail to understand the difference in the Bank allowing me retain the Tracker on the “residual balance” on the one hand if I sold the properties, and then penalised me by levying this additional 1% rate on the residual balance when in fact, I went the extra mile and paid an additional €16k than what was expected.”*

The Complainant submits that she is *“hurt, angry and extremely frustrated by the entire affair”*. She states that the *“lost opportunity of €60,000”* in **2016** *“deprived”* her of her retirement fund and her family life has been seriously affected as a result. She submits *“This is all down to the fact that I made the effort to save my property from being sold. It should also be noted that it was I who approached the bank and offered a solution – not the other way round.”*

The Complainant wants the following;

- i. The mortgage loan account to be restored to the tracker rate of interest.
- ii. A refund of interest overpaid since **January 2016**, which the Complainant estimated (in **November 2018**) to be approximately €1,000.00 or €350.00 per annum.
- iii. Compensation of €16,000.00, being the difference between the estimated proceeds of €44,000.00 from the sale of the properties in **July 2015**, and the lump sum of €60,000.00 that was ultimately paid by the Complainant.

The Provider's Case

The Provider submits that the Complainant entered into an agreement with the Provider by Mortgage Loan Offer Letter dated **27 February 2006**, whereby the Provider agreed to advance a mortgage loan facility to the Complainant in the sum of €225,000 for a term of 10 years. It states that the Complainant signed and accepted the Offer Letter on **13 March 2006** and the mortgage loan account was drawn down on **2 October 2006**.

The Provider details that **Part 4 – Special Condition (ix)** of the Offer Letter provided for a tracker interest rate whereby the interest rate would be no more than 1.15% above the European Central Bank Refinancing Operations Minimum Bid Rate (the “Repo Rate”) for the term of the loan. The Provider states that the mortgage loan account was subject to a tracker interest rate from the date of drawdown, until **January 2016**, at which point the mortgage loan account was amended to an investment standard variable rate, with the express consent of the Complainant.

The Provider submits that the Offer Letter, when executed, forms the contractual basis of the relationship between the Complainant and the Provider and imposes mutual obligations on each of the parties to the agreement. The Provider refers to **Part 5 of the General Conditions 4(a)** of the Offer Letter and states that in the absence of an Agreed Alternative Repayment Arrangement, the Complainant was required to maintain payments pursuant to the terms of the Offer Letter, which include the scheduled capital and interest repayments.

The Provider has submitted details of the arrears history on the Complainant's mortgage loan account, as follows;

- The Complainant's mortgage loan account first went into arrears in **October 2009**, and she entered into a 4 month interest only period by way of Mortgage Form of Authorisation (“MFA”) signed and accepted by the Complainant on **19 January 2010**. This was backdated to **October 2009** which brought the mortgage loan account out of arrears.
- The mortgage loan account then went into arrears in **February 2012** and remained in continuous arrears until **November 2012**. The Complainant accepted a 12 month interest only period by way of MFA signed and accepted by the Complainant on **12**

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March 2012. The arrangement was backdated to take account of the **March 2012** repayment and as a result, the mortgage loan account was no longer in arrears.

- The mortgage loan account went into arrears again in **January 2014** and remained in continuous arrears until **January 2016**.

The Provider has set out a detailed timeline of all of its interactions with the Complainant with respect to the arrears arising on the mortgage loan account between **2010** and **2016**. The Provider states that it was not obliged to enter into an arrangement as proposed by the Complainant and whilst it did consider the proposals put forth by the Complainant and her financial advisor, the proposals put forward by the Complainant were not sufficient to redeem the mortgage and were not sustainable and appropriate. It submits that the proposals requested debt forgiveness which was not within the Provider's policy. The Provider refers to its substantive engagement with the Complainant in relation to her arrears. The Provider submits that it issued all letters to the Complainant pursuant to its obligations under the **Consumer Protection Code 2012** (the "**CPC 2012**").

Between **August 2014** and **January 2016**, the Provider details the following proposals were made by the Complainant and considered by the Provider;

- In **August 2014**, the Complainant offered to sell a bond which was worth approximately €52,000 at that time, in full and final settlement of the mortgage loan. This proposal was deemed unacceptable and the Provider was instead willing to agree to the sale of the secured property, subject to a number of conditions. This offer was rejected by the Complainant.
- In **January 2015** the Complainant's advisor contacted the Provider seeking to apply for a 6 month reduced payment moratorium with a view to getting a split mortgage in five years. The Provider requested that a Standard Financial Statement ("SFS") be submitted.
- An SFS was submitted in **May 2015** which offered to encash a bond and apply the proceeds to the mortgage loan account in full and final settlement. The Provider found the Complainant's SFS to be deficient, in that deposits made to her business account were not accounted for in the statement and appeared to contradict her submission that she had no income. In the circumstances the Provider deemed the mortgage loan account to be unsustainable given the lack of clarity in the SFS and the Complainant's apparent lack of commitment to the mortgage loan account in that there had been no repayments in almost a year. The Provider wrote to the Complainant on **25 May 2015** to advise her that it had completed an assessment of her full circumstances and decided not to offer her an alternative repayment arrangement as her mortgage loan was not sustainable.
- The Complainant offered encashment of the bond in full and final settlement again in **July 2015**. The Complainant sought a meeting with representatives of the Provider where she proposed an offer to encash the bond in full and final settlement. The

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bond was now worth a little over €60,000 and the arrears on the mortgage loan were approximately €55,000. The Provider declined the offer for reasons not materially different to those offered in **August 2014** or **May 2015**. It told the Complainant it was not in a position to consider full and final settlement for any figure below the full outstanding balance.

- In **November 2015** the Complainant advised that she was hoping to lodge a sum of €60,000 to the mortgage account from family funds to clear the arrears. She was also seeking clarity on the implications of making a lump sum payment with the aim of reducing monthly repayments. The Provider advised her that if she was seeking to put an alternative repayment arrangement in place, monthly repayments must commence immediately.
- An Income and Expenditure form was received by the Provider on **30 November 2015**. The Provider details that it assessed the Complainant's request for forbearance, noting that the arrears were at €70,122 in **December 2015**, and despite the irregular repayment history of the Complainant and a limited repayment capacity, the Provider offered an alternative repayment arrangement to the Complainant.

The Provider submits that the **Agreement to Amend Mortgage Loan Offer Letter** offered to extend the term of the loan to **December 2026** on condition that a capital reduction payment of €60,000 was made to the mortgage loan account. This agreement was subject to the Provider's Buy-to-Let pricing policy. The Provider explained this to the Complainant, who expressed her dissatisfaction with losing the tracker rate. The Provider details that on **18 January 2016**, the Complainant contacted the Provider to request if the Provider would release additional security held under the mortgage loan account if she was to clear all arrears and resume capital and interest repayments. The Provider advised her by telephone on **19 January 2016** that it would agree to release the additional security of 1.5 acres of land once six consecutive repayments were made under the agreement. The Provider outlines that on **20 January 2016**, the Complainant lodged €60,000 to the mortgage loan account and signed and accepted the Provider's **Agreement to Amend Mortgage Loan Offer Letter** which changed the mortgage loan account from a tracker rate and amended other terms of the mortgage. The Provider capitalised the remaining arrears on the account on **26 January 2016**.

The Provider submits that the Complainant was well aware that the entitlement to a tracker interest rate would come to an end, as clearly stated, within the Agreement to Amend Mortgage Loan Offer Letter, signed and accepted by her on **20 January 2016**. It states that it made a reasonable offer to renegotiate terms upon the Complainant's request seeking a mortgage term extension until **2026**. The Provider details that the offer made was within the terms of its pricing policy and the effects of the interest rate change were explained in clear and unambiguous terms in the **Agreement to Amend Mortgage Loan Offer Letter** and

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the Provider states that it made no effort to conceal the interest rate change or the implications for the Complainant. The Provider points out that it has not breached any contract with the Complainant and acted fairly and reasonably in the circumstances, and accommodated the Complainant on a number of occasions by offering forbearance for a total of 41 months prior to the Complainant signing and accepting the **Agreement to Amend Mortgage Loan Offer Letter** on **20 January 2016**.

The Provider denies that the Complainant was “*forced*” or otherwise deprived of her free will when entering into the alternative repayment agreement with the Provider in January 2016. The Provider asserts that it was the Complainant’s own decision to accept the **Agreement to Amend Mortgage Loan Offer Letter**. It submits that the Complainant had sought financial advice and, by her own admission, understood the implications of the subsequent Loan Offer dated **24 December 2015**. It submits that as part of the renegotiation of terms, the agreement included the conversion of the interest rate to be charged on the loan from a tracker rate to a BTL variable rate. The Provider states that the terms and conditions of the Mortgage Loan Offers state that the Provider “*may at its absolute discretion and with the consent of the Borrower, vary any payment of the principle, interest or any other amount payable in respect of the loan*”. The Provider submits that the said term allows the Provider to exercise its commercial discretion when amending the loan terms in response to requests for a renegotiation of terms.

The Provider outlines that it is satisfied that it has acted fairly with respect to the offer of a new arrangement with the Complainant in **December 2015**, with reference to the CPC 2012. The Provider refers to Chapter 6 of the CPC 2012 and in particular **Provisions 6.9** and **6.10**. It further refers to Chapter 8 and in particular **Provision 8.3**. The Provider submits that the **Agreement to Amend Mortgage Loan Offer Letter** contained the requisite legal notices to include warnings, indicative comparisons and details of the advantages and disadvantages and afforded the Complainant 5 weeks to consider the Provider’s proposal.

The Provider states it is satisfied that it did not recklessly, negligently or deliberately mislead the Complainant as to the real or perceived advantages or disadvantages of any product or service, and it sought information from the Complainant relevant to the product requested (extension of the term and reduced repayments), and made a full disclosure to the Complainant of all relevant material information in a way that sought to inform the Complainant.

The Complaint for Adjudication

The complaint for adjudication is that the Provider acted inappropriately by removing the tracker rate of interest from the Complainant's mortgage loan account in **January 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 Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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

A Preliminary Decision was issued to the parties on **15 January 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

At the outset, it is important to point out the jurisdiction of this Office in complaints regarding arrears handling. This Office can investigate the procedures undertaken by the Provider regarding the arrears, in this matter under the **Consumer Protection Code 2012**, but will not investigate the details of any re-negotiation of the commercial terms of a mortgage which is a matter between the Provider and the Complainant, and does not involve this Office, as an impartial adjudicator of complaints. This Office will not interfere with the commercial discretion of a financial service provider, unless the conduct

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complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of **Section 60 (2) of the Financial Services and Pensions Ombudsman Act 2017**.

In order to ascertain if the Provider did act inappropriately it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation and to consider the interactions with the Complainant between **2015** and **2016** in relation to the arrears on the mortgage loan account and the possible alternative repayment arrangements proposed and offered.

The Provider issued a **Mortgage Loan Offer Letter** to the Complainant dated **27 February 2006**, which provided for an advance of €225,000 over a term of 10 years.

Part 1 – The Statutory Loan Details of the Loan Offer, sets out the following;

<i>3. Number of Repayment Instalments</i>	<i>Instalment Type</i>	<i>4. Amount of each Instalment</i>
3	Variable at 3.400%	€7,748.09
7	Variable at 3.400%	€36,717.55"

The Loan Offer outlines that the loan type is "Interest Combo" and the interest rate is "3.400% Variable".

The **Part 4 – The Special Conditions** of the **Mortgage Loan Offer Letter** details as follows;

...

(v) *for the purpose of General Condition 4(a) of this Offer Letter repayment of the Loan shall be by annual instalments in arrears by direct debit. General Condition 4 (a), (b), and (d) is hereby confirmed save as varied by this Special Condition. General Condition 4(c) shall not apply to the Loan.*

...

(viii) *The interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the Loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer Letter. In the event*

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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.”

- (ix) *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 1.15% 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.”*

General Condition 4 of Part 5 – The General Conditions details as follows;

“4. Repayment

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

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I note that the Complainant signed an **Acceptance of the Loan Offer** on **13 March 2006** on the following terms;

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

The Complainant accepted the Letter of Offer, having confirmed that she had read and fully understood the Loan Offer. I note that there are two special conditions which provide for two different margins above the ECB rate (ECB + 1.15% and ECB + 1.25%). It is unclear to me why this is the case, however, I understand that the lower tracker interest rate of ECB + 1.15% as provided for in special condition (ix) applied to the loan from when it was drawn down. I understand that the tracker interest rate applicable to the loan was amended in **October 2007** to ECB + 0.95%. Screenshots from the Provider's internal notes detail as follows *"Treasury have approved ECB plus 0.95% for term"*.

Arrears first started to accrue on the Complainant's mortgage loan account in **October 2009**. The evidence before me shows that the Complainant entered into a number of alternative repayment arrangements in respect of the mortgage loan account between **2009** and **2016**, as follows;

- Interest only for a period of four months in accordance with MFA dated **13 January 2010**, signed and accepted by the Complainant on **19 January 2010**;
- Interest only for a period of one month in accordance with MFA dated **1 February 2010**, signed and accepted by the Complainant on **9 February 2010**;
- Interest only for a period of 24 months in accordance with MFA dated **9 March 2010**, signed and accepted by the Complainant on **11 March 2010**;
- Interest only for a period of 12 months in accordance with MFA dated **5 March 2012**, signed and accepted by the Complainant on **12 March 2012**.

The mortgage loan account again fell into arrears on **14 January 2014**. Between **January and August 2014**, the Provider issued correspondence to the Complainant with respect to the arrears, including a letter calling in the debt.

The Complainant's representative submitted a completed **Standard Financial Statement** to the Provider under cover of letter dated **11 August 2014**. This letter detailed the following proposal;

1. *"[The Complainant] has invested a lot of money in paying the mortgage off to this level. She would not like to sell the property.*

2. *We would like to exchange the [Provider] bond attached ([policy number]) and use the net proceeds to pay down the mortgage [ending] 5708 in a final settlement on this case. The minimum proceeds will be €52,130, but the bond is currently worth €62,138."*

The Provider responded by letter dated **27 August 2014**, as follows;

"We're writing to you regarding your offer to lodge the sum of €52,000 which represents the proceeds from a [Provider bond]. This is not acceptable to the Bank as the Bank will require repayment of the full amount due on the mortgage account in accordance with the terms of your Mortgage Loan Offer Letter.

However, to facilitate the sale of the property, the Bank is willing to agree to the sale of the property on the following conditions:

1. *The Bank receives the sum of €52,000 which represents the proceeds of the Bond. The sum of €52,000 will be applied in full to the mortgage account and the Bank will then-*
2. *Apply a twelve month moratorium to the mortgage account to facilitate the sale of the Property.*
- ...
3. *Once the sale of the Property has completed the Bank will require receipt of the sale price of the Property in full. Please note that as the sale price may be insufficient to discharge the borrowings in full, you remain fully liable, under the Mortgage Loan Offer Letter, for the total debt outstanding and you will need to make arrangements to repay the outstanding balance."*

At that time the arrears on the account were €21,046.26 and the redemption balance on the mortgage loan account was €100,312.96.

Further letters issued to the Complainant with respect to the arrears between **September 2014** and **May 2015**, including two further Call in Debt letters and letters regarding the appointment of a receiver over the property.

On **6 May 2015** the Complainant wrote to the Provider, enclosing an SFS and outlined a further proposal as follows;

"As an investment towards a pension I have a [Provider] bond now worth €60,934.62. I am prepared to use this to pay down the mortgage in settlement of this case. This would appear to be a good offer in comparison to what the bank will realise from the sale of the property.

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The Sale of the property will only realise €20,000.00 as per recent sale of similar unit within the complex.”

This proposal is essentially the same as that detailed in the Complainant’s representative’s letter of **11 August 2014** which was rejected by the Provider; the only difference being an increase of approximately €9,000 in the value of the bond. I note that by **May 2015** the arrears on the account had increased to €45,781.02.

The **Standard Financial Statement** completed and signed by the Complainant on **6 May 2015**, details as follows;

<i>Gross Monthly Salary (before tax and any other deductions at source)</i>	<i>N.I.</i>
<i>Net Monthly Salary (after tax and any other deductions at source)</i>	<i>N.1</i>
...	
<i>Monthly Income from non-property assets (see F8)</i>	<i>372.67</i>
<i>Total Monthly Income</i>	<i>372.67</i>

The SFS further detailed as follows;

“At this stage I am broke. Everything I had envisaged as a pension for myself has gone completely pear shaped. All our savings have been used bailing out our kids who have [Provider] mortgages or paying down this particular mortgage. We have incurred huge cost due to the illness of [family members]. My working life is at an end and I just want this debt off my back. I would really value a settlement proposal. We are happy to keep any proposal confidential.”

The Provider declined the Complainant’s proposal by letter dated **25 May 2015** and declined to offer the Complainant any further alternative repayment arrangement. The Provider found the SFS submitted to be deficient as deposits made in the Complainants business account were not accounted for in the SFS and appeared to contradict the Complainant’s submission that she had no income. The business bank statements which have been provided in evidence support the Provider’s conclusions. I note as follows;

- The statement dated **1 April 2015** details outgoings totalling €3,324.06, and lodgements totalling €3,900.00, between **4 March 2015 and 31 March 2015**.
- The statement dated **27 February 2015** details outgoings totalling €4,058.15 and lodgements totalling €4,441.00 between **4 February 2015 and 27 February 2015**.

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Having regard to the above and the fact that no repayments had been made in over a year, the Provider deemed the Complainant's mortgage loan account to be unsustainable. The Internal system notes, that have been submitted, evidences the above assessment and conclusion reached by the Provider.

The Complainant wrote to the Provider by letter dated **14 July 2015** and outlined as follows;

"it should be noted that the €60,934.63 which I am now offering in final settlement will not be available to the bank along with the sale of both properties. My family will at all times have to come first and the needs of my [family members] will always take priority.

...

I would like to point out that this is a Tracker Mortgage and acceptance of this offer would save the bank from further loss, I find this whole transaction has crippled me financially along with breaking my business."

The Complainant requested a meeting with the Provider. The Provider has furnished a note of a meeting between the Provider and the Complainant which took place on **24 July 2015**, which details as follows;

"D. MEETING SUMMARY (within 24 hours of meeting taking place 1. Customer situation summary: [Complainant] no income, property í tax des, meeting requested via Workout case mgr, Arrears E55K. 2. Summary of discussion: [Complainant] gave written proposal of bond of E60934 as full and final settlement. I stated write down not an option. [Complainant] stated that value of property approx. E35K and that her offer of E60k is far greater than that. I stated [Complainant] will be liable for o/s bal and that [Complainant] does not have income to repay shortfall. [Complainant] is currently helping to care for her daughter who [suffered injury]"

It appears to me that the Complainant's proposal as submitted at the meeting on **24 July 2015** as outlined above, was the same proposal that was twice previously considered and declined by the Provider, that is, to use the proceeds of the bond to pay down the mortgage in full and final settlement. The Provider rejected the Complainant's proposal as a debt write down was not an option. The arrears on the mortgage loan account were approximately €55,000 in **July 2015**.

I accept that there was no obligation on the Provider to accept any of the proposals submitted by the Complainant in **August 2014, May 2015 or July 2015**, as it was entitled to seek repayment in full of the outstanding monies due on the mortgage loan account in accordance with the mortgage contract. In accordance with **General Condition 4(a)** the

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obligation was on the Complainant to maintain the repayments on the mortgage loan and the Complainant had not been doing so since **January 2014**.

Recordings of telephone conversations have been furnished in evidence. I have considered these audio recordings. I note that during the telephone call between the Provider's agent and the Complainant on **23 November 2015**, the Complainant indicated that she was willing to pay a lump sum of €60,000 on the mortgage balance "*with help from friends and family*". She queried what the repayments on the remaining balance would be. The Provider's agent suggested that the Complainant could look at extending the term to the maximum term available which would reduce the monthly repayments to approximately €375.00 per month. The Complainant queried what interest rate would apply and the Provider's agent replied that the "*same*" interest rate of "*1%*" would apply.

I note that further to this telephone call, on **25 November 2015** the Complainant emailed the Provider as follows;

"It is my proposal to pay €60,000 off the Mortgages Number [ending] 5708 and pay the remaining balance over a 10 year period based on the terms of the existing mortgage."

A telephone call took place between the Complainant and the Provider on **08 December 2015**. The Provider's representative was seeking clarifications with respect to certain information in order to be in a position to assess the Complainant's proposal. The Complainant queried during this call whether any revised repayment arrangement to extend the term of the loan would be on the same tracker interest rate as the original loan offer. The Provider's representative advised the Complainant that there would be a loading of 1% on the interest rate which was the Provider's policy with respect to Buy-to-Let properties.

The Provider subsequently issued an **Agreement to Amend Mortgage Loan Offer Letter** dated **24 December 2015** to the Complainant. I note that **Section A** of the form details as follows;

"SECTION A: WHAT THIS FORM DOES

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 1.000% 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 2.000% per annum.*

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Maturity Date of the Loan

This form changes the maturity date of the Loan to 14/12/2026

Arrears

If there are arrears on the Loan this form capitalises them. That means we will add the arrears to the principal amount of the Loan after you accept this form. We estimate the principal amount of the Loan will then be €101,453.89. Where arrears are being capitalised Clause B.3 does not apply.”

Section B of the form details as follows;

“SECTION B: FURTHER TERMS AND CONDITIONS OF THIS FORM

B.1 ANY COMMITMENT TO A TRACKER RATE ENDS

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 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 your Mortgage Loan Offer Letter or elsewhere as the ECB Main Refinancing Operations Minimum Bid Rate). A tracker rate follows or “tracks” movements in 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.*
- 7.2 This form does not change the maturity date of the Loan which will remain as provided for in the Mortgage Loan Offer Letter unless Section A says so (if it does say so, the term of the Loan is extended by the maturity date shown in Section A).*
- 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*

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interest in general, additional interest charges on overdue payments, variable interest rates and fixed interest rates.

7.4 *If there is a conflict between a term or condition in the Mortgage Loan Offer Letter and a term or condition in this form, the term and condition in this form will take priority.*

B.8 Special Conditions

...

Reduction of amount outstanding

The Borrower agrees to repay €60,000 (the “additional loan repayment”) against the amount owing under the Loan. The Borrower must pay the additional loan repayment in addition to (and not instead of) the Borrower’s regular loan repayments to be made under the Mortgage Loan Offer Letter as amended by this Form.

The Borrower agrees to comply with this condition, on or before, the Acceptance Date before the end of the Acceptance Period (i.e. five weeks from the date of this Form). The Borrower acknowledges and agreed that this condition must be completed in full to the Lender’s satisfaction before the alternative repayment arrangement can be implemented.”

B.10 About Your Acceptance of this Form

10.1 *You have five weeks from the date of this form shown on page 1 (the “Acceptance Period”) to consider it and to return it to us properly completed. ...”*

Section C of the form provides as follows;

**“SECTION C: LEGAL NOTICES
(PLEASE READ THESE CAREFULLY)**

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.

INDICATIVE COMPARISON OF THE COST OF YOUR LOAN AT ITS TRACKER INTEREST RATE TO THE COST OF YOUR LOAN AT THE RATE & ON THE TERMS OFFERED IN THIS FORM (Consumer Protection Code, Provision 6.9)

a) *We estimate you are now obliged to pay us monthly instalments of €10,192.84 each and that the total cost to you of the Loan would be €466.17. This estimate (i) is based on the tracker interest rate and the terms and*

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conditions that apply to the Loan before you accept this form; but (ii) assumes you pay instalments of principal and interest on a normal annuity basis (for example, this estimate takes no account of any alternative repayment arrangement we may have entered into with you before we sent you this form.)

- b) If you accept this form, we estimate you will be obliged to pay monthly instalments of €856.79 each. The total cost of the Loan would be €11,634.05. These estimates are based on the rate of interest and other terms (for example, your reduced payment obligations during the Agreed Period) provided for in this form. The increase in the cost of the Loan is because (i) the interest rate offered in this form is higher than your present tracker interest rate; and (ii) the Loan principal will not be repaid as quickly as set out in the initial version of your Mortgage Loan Offer Letter.
- c) Each estimate (i) assumes you met your payment obligations to us in full and in time; (ii) is indicative only, for example, the amounts you pay in regular instalments may differ because of future changes in interest rates; (iii) assumes you make 12 monthly payments each year even if you have another arrangement with us; and (iv) includes arrears, even if arrears are not being capitalised as part of this agreement.

The **Agreement to Amend Mortgage Loan Offer Letter** also contained a section entitled “Advantages and disadvantages of tracker and other rates (Consumer Protection Code, Provision 6.9)” which provided the advantages and disadvantages of a Tracker Variable Rate, A BTL Variable Rate and a Fixed Rate.

A telephone call took place between the parties on **7 January 2016**. I have considered the content of the telephone call, which has been provided in evidence and I have considered the Provider’s internal systems note of the same date. I accept that it is an accurate account of the conversation and it details as follows;

“[Name redacted] to [Complainant] she advised me she recd indept. fin. advice. She explained she was advised not to take the arrgmt as she would lose her tracker, I explained to her that she would still be on a tracker rate however there was a 1% loading.

...

I advised her this is more affordable for her and not to get bogged down in what her rate was if it was affordable and that she still has her tracker. Advised her if she is happy to go ahead to ensure she signed the independent financial advice box. NEXT STEP: Await return of forms”

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The Complainant emailed the Provider on **08 January 2016** and outlined as follows;

“your letter clearly states moving me from the present tracker rate of interest to a new rate of variable interest. (Page 1) It does not state that the new rate will be a tracker. Section A clearly states that the loa[n] will change from a tracker rate to a BTL Variable rate. This gives me no guarantee what so ever that this variable rate will not be exceeded.

We can move forward however, if the letter of offer is amended to reflect our telephone conversation accurately with existing tracker rate of 1% + 1%”

A further telephone call took place on **15 January 2016**. I have considered the audio recording of the Provider’s telephone call to the Complainant I accept that the Provider’s system note of the same date is an accurate reflection of this call and details as follows;

“[Name redacted] to [Complainant] advised her that her tracker rate will be gone if she signs up to forbearance advised her the only way she can keep her tracker is if she sells the property she will keep the tracker on the residual balance explained to her that she is being offered a BTL variable rate discounted against the Banks standard BTL variable rate at the equivalent of 1% above your current applicable rate. Explained there is no room for manoeuvre on this as any fb on a BTL has to agree with this policy. She explained whilst I suggested she obtain indp financial advice that if she feels this is the best decision for her and the most affordable then her arrears will be cleared and her icb amended. If unwilling to sign up to this Rvr will be appointed. (SECTION 23 PROP) She queried re lands offered as security if her children wanted to purchase those in years to come. As per [system] there is no security in place advised her I would check whats in place and come back to her Monday”

The evidence shows that the Complainant was given incorrect information by the Provider’s agent during the telephone calls on **08 December 2015** and **07 January 2016**. The Provider’s agent, apologised for the error, during a subsequent telephone call on **15 January 2016**. I note that the Provider’s agent clarified that the applicable interest rate would be the Provider’s BTL variable rate and advised the Complainant that it was her “choice” as to whether she wished to accept the **Agreement to Amend Mortgage Loan Offer Letter** and advised the Complainant not to get “bogged down” about the removal of the tracker rate. The Complainant advised the Provider that the advice that she had received was not to accept the removal of the tracker interest rate. The Complainant went on to ask about the possibility of releasing the additional security on the land that was held as security for the loan.

The Provider informed the Complainant during a telephone call on **19 January 2016** that her request to release the additional security would be granted subject to certain conditions.

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The Provider's internal system note of the same date accurately reflects this call and details as follows;

"approval from senior management [redacted] We will agree to release additional security of 1.5 acres of land only once the following conditions have been met, 1. borrower to make a capital reduction of e60k immediately. 2. 6 consecutive repayments at term extension level are to be made (This equates to e853pm pre capital reduction or e352pm post capital reduction) 3. Once capitalisation is being implemented and above 2 conditions have been met [name redacted] to email assessor to have additional security released. additional security is not to be released if any of the conditions outlined above is not adhered to."

The Complainant signed the **Acceptance of the Agreement to Amend Mortgage Loan Offer Letter** on **20 January 2016** 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."*

The Complainant signed and accepted the **Agreement to Amend Mortgage Loan Offer Letter**, having ticked both of the boxes to confirm that she had received independent legal advice and independent financial advice on the agreement and that she agreed to be bound by the terms and conditions of the agreement. If the Complainant was not happy with the terms of the **Agreement to Amend Mortgage Loan Offer Letter**, including the amendment to the interest rate, the Complainant could have decided not to accept the offer made by the Provider.

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Whilst I accept that incorrect information had initially been verbally given to the Complainant during the telephone calls on **08 December 2015** and **07 January 2016**, which is most disappointing, this had been clarified with the Complainant before she signed the **Agreement to Amend Mortgage Loan Offer Letter** on **20 January 2016**.

It is important for the Complainant to be aware that the Complainant at all times remained obliged to comply with the terms and conditions of the original **Mortgage Loan Offer Letter**, which was signed and accepted by her, that is, to make the repayments on the mortgage loan. At that time the agreement was entered into with the Complainant in **January 2016**, the Complainant had not made any repayments to the mortgage loan for two years since **January 2014** and the term of the 10 year mortgage loan was coming to a close in **October 2016**. Whilst I accept that the Complainant may have felt as she outlined during the call "*between a rock and a hard place*" there is no evidence that the Provider "*forced*" her or that any "*duress*" was placed on her to enter into the arrangement in **January 2016**. The Complainant was seeking to vary the terms of the loan by seeking an extension of 10 years on the loan. It was within the Provider's discretion to decide whether to accede to that request and in doing so, whether the Provider wished to introduce any different terms to the agreement. The Provider, in accordance with its Buy-to-let Pricing policy offered a Standard Variable Rate which was to start at 1% above the current tracker interest rate on the Complainant's mortgage loan. I note that the Complainant also negotiated with the Provider for the release of the security of a plot of land that was being held as additional security against the mortgage loan.

I accept that the Complainant did not want to give up the entitlement to the tracker interest rate of ECB + 0.95%, however the reality of the situation at that time in **January 2016**, was that the Complainant's entitlement to retain the tracker interest rate on the mortgage loan account was due to expire some 8 months later when the term of the loan was due to expire in **October 2016**. The Complainant was seeking to agree an alternative arrangement and it was a matter for her to decide whether to accept that arrangement on offer by the Provider.

Provision 8.3 of the CPC 2012, outlines as follows;

"Where an amount 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."

I have considered the significant volume of arrears correspondence that has been furnished to this office. I accept that in its engagements with the Complainant, the Provider complied with its obligations under **provision 8.3 of the CPC 2012** and sought to agree an approach with the Complainant to resolve the arrears.

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Provision 6.9 of the **CPC 2012**, outlines as follows;

“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 continue 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 **CPC 2012** were contained in the **Agreement to Amend Mortgage Loan Offer Letter**. The mortgage loan was not a Private Dwelling House mortgage loan.

Therefore I cannot accept that as has been alleged by the Complainant there was an inappropriate “removal” of a tracker rate of interest from the Complainant’s mortgage loan account by the Provider in **January 2016**. The Complainant was seeking a term extension to the mortgage loan in an effort to address the significant arrears that had arisen on the mortgage loan account (€70,122.22) and repay the capital (€101,453.89) that she was contractually obliged to pay to the Provider. The Provider was willing to accede to the request to extend the term of the loan by 10 years but only on the condition that a lump sum payment of €60,000 was made to the arrears on the mortgage loan and the Complainant agreed to change the interest rate applicable to the mortgage loan from a

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tracker interest rate of 1% (ECB + 0.95%) to a variable interest rate of 2%. The Provider issued an offer to the Complainant to this effect in the form of the **Agreement to Amend Mortgage Loan Offer Letter**, which contained the appropriate warnings under the *CPC 2012*, about moving from a tracker interest rate to a variable interest rate. The Complainant accepted the **Agreement to Amend Mortgage Loan Offer Letter** having confirmed that she had taken independent advice.

For the reasons outlined above, I do not propose to uphold the complaint.

Conclusion

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

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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

06 February 2020

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.