



<b><u>Decision Ref:</u></b>	2020-0214
<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**

#### **Background**

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan is secured on the Complainants' private dwelling house.

The loan amount was €265,000 and the term of the loan was 35 years. The particulars of the mortgage loan offer accepted by the Complainants on **14 May 2007** detailed that the loan type was a "2 Year Fixed New Business Home Loan".

#### **The Complainants' Case**

The Complainants' mortgage loan account was drawn down on **31 May 2007** subject to a two year fixed rate of 4.99%.

The Complainants submit that prior to the expiry of the fixed interest rate period on **31 May 2009**, they received a letter and rate options form from the Provider dated **8 May 2009**. The rate options form included a LTV variable rate of 3.40%, a tracker variable rate of 3.50% and fixed rate options for 2, 5, 7 and 10 year periods. The Complainants signed the rate options form on **22 May 2009** opting for the LTV variable rate of 3.40%.

The Complainants submit however that the Provider failed to explain to them the "repercussions" of not selecting the tracker rate in **May 2009**.

The Complainants state that the Provider also failed to advise them *“to talk to a financial adviser before making the decision on what interest rate to pick. We have been advised that no financial adviser would have advised us to go on any other rate other than the tracker rate.”* They state that *“to the lay person, interest rates are a complicated issue.”*

The Complainants submit that the Provider did not communicate the withdrawal of its tracker rate offering to them in **2009**.

The Complainants believe that the Provider has failed in its duty of care to them as customers and has behaved *“unethically”* towards them.

The Complainants are seeking the following;

- a) The tracker interest rate of ECB + 2.25% to be *“reinstated”* on their mortgage loan account;
- b) A refund of interest overpaid on the mortgage loan account since **2009**; and
- c) Compensation.

### **The Provider’s Case**

The Provider states that it issued a **Letter of Approval** to the Complainants on **19 February 2007** for the loan amount of €265,000. It details that the initial rate of interest was fixed at 4.75% for the first two years and the loan was repayable over 35 years. The Provider states that the terms and conditions of the Letter of Approval were accepted by the Complainants with the benefit of independent legal advice on **14 May 2007**.

The Provider details that the loan drew down on a fixed interest rate of 4.99%. The rate had increased because between the date the loan issued (**19 February 2007**) and the date of drawn down (**31 May 2007**), the fixed rate changed. In this regard, the Provider relies on **General Condition 5.2** of the **General Mortgage Loan Approval Conditions**.

The Provider submits that the Complainants did not have an entitlement to be offered a tracker rate *“in the future”* in their loan contract, rather they had an entitlement to be offered a tracker rate on the expiry of the fixed rate period on **31 May 2009**. It states that it offered the Complainants a tracker rate of interest on expiry of the fixed rate period in accordance with their contract. The Provider relies on **Special Condition 4** of the Complainants’ **Letter of Approval** and **General Condition 5** of the **General Mortgage Loan Approval Conditions** in support of this.

The Provider submits that prior to the expiry of the fixed rate period, it issued the Complainants a rate options letter and a rate instruction form on **08 May 2009**. It states that in its letter it reminded the Complainants that the two year fixed rate period was

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ending on **31 May 2009** and provided a list of current rates for selection, including the current tracker interest rate of 3.50% (ECB + 2.25%). The Provider submits that its letter clearly informed the Complainants that in the absence of an instruction from them regarding their choice of interest rate, the tracker rate would be applied to the account by the Provider on **31 May 2009**.

The Provider states that it is satisfied that the options letter and form were clear that only one option from the list of options "*currently available*" could be selected and submits that the Complainants were clearly aware that opting for the LTV variable interest rate, they were foregoing all other options listed in the form including, the tracker rate option. The Provider submits that the Complainants could not have reasonably expected that these options would be available at some stage in the future. The Provider details that the letter also clearly stated that the Complainants "*consider your options carefully before making your selection*" and that if the Complainants had any questions regarding options the Complainants could contact the Provider's "*dedicated mortgage team*".

The Provider states that it received a signed options form from the Complainants dated **22 May 2009** in which the LTV variable rate of 3.40% had been selected by the Complainants. It submits that it applied the Complainants' selected rate of interest to their mortgage loan account on **29 May 2009**.

The Provider rejects the Complainants' submission that the Provider has failed in its duty of care to the Complainants and has behaved in an unethical manner. It submits that the Complainants were clearly aware that in selecting the LTV variable rate option, they were foregoing all the other rate options including the tracker rate option.

### **The Complaints for Adjudication**

The complaints for adjudication are that the Provider failed to advise the Complainants of the consequences of not selecting the tracker interest rate, and also failed to advise the Complainants to seek financial advice before they selected an interest rate at the end of the fixed rate period in **May 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 Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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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 **24 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.

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

1. Letter from the Provider to this Office dated **14 February 2020**.
2. Letter from the Provider to this Office dated **18 March 2020**.

Copies of these additional submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this Office, by letter, which outlined as follows;

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

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Therefore, the conduct of the third party Broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

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

The **Letter of Approval** dated **19 February 2007** details as follows;

<i>“Loan Type:</i>	<i>2 Year Fixed New Business Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>€265,000.00</i>
<i>Loan Amount:</i>	<i>€265,000.00</i>
<i>Interest Rate:</i>	<i>4.75%</i>
<i>Term:</i>	<i>35 year(s)”</i>

**Special Condition 4** in the **Letter of Approval** details as follows;

*“General mortgage loan approval condition 5 “conditions relating to fixed rate loans” applies in this case. The interest rate specified above may vary before the date of issue of the loan. On expiry of the fixed rate period, and where the applicant chooses the option of a tracker mortgage interest rate, the interest rate applicable to the loan will be the tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period. In the absence of instructions from the applicant at the expiry of the fixed rate period, the interest rate for the loan will be the tracker mortgage rate applicable to the balance outstanding on the loan, at the date of expiry of the fixed rate period and as may be varied in accordance with variations to the European Central Bank refinancing rate.”*

**General Condition 5** of the **General Mortgage Loan Approval Conditions** details as follows;

- “5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified in the Letter of Approval and thereafter will not be changed at intervals of less than one year.*
  
- 5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*

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5.3 *Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:*

(a) *A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*

(b) *A sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.*

5.4 *Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."*

The **General Mortgage Loan Approval Conditions** also outline;

*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 Complainants and witnessed by a solicitor on **14 May 2007**. The 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."*

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The **European Standardised Information Sheet** with respect to the Complainants' mortgage loan account outlines on page 1, as follows:

*"This document does not constitute a legally binding offer.*

*The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.*

*The provision of information does not oblige the lender to grant credit."*

Page 2 of the **European Standardised Information Sheet** details as follows:

*Nominal Rate The interest rate is 4.75 percent*

*This rate is fixed for 2 year(s)*

*At the end of the fixed rate period you may exercise an option to contract for another fixed rate period (if available) or to move to the standard variable rate or to a Tracker Mortgage Rate. If a Tracker Mortgage Rate is chosen the loan will become a Tracker Mortgage Loan and the rate applicable will be the rate appropriate to the balance outstanding on the loan at the time of expiry of the fixed rate period as may be varied in accordance with variations to the ECB Rate. THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME (applies if a Standard Variable Rate or Tracker Rate is chosen)*

*The lock-in period for this product is the fixed rate term. However, this can be broken subject to payment of a redemption fee as described in the section on Early Repayment below.*

It is clear to me that the Letter of Approval envisaged a two year fixed interest rate and thereafter the option of a tracker mortgage interest rate. If the Complainants did not give any instructions as to any other rate, then the interest rate would be the tracker mortgage rate. The Complainants accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to them by their solicitor. The mortgage loan was drawn down on a fixed interest rate of 4.99%. **Special Condition 4** and **General Condition 5.2** allow for such a variation in the interest rate prior to draw down.

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I note from the evidence that prior to the expiry of the two year fixed rate period on **31 May 2009**, the Provider wrote to the Complainants to set out its current available interest rates on **08 May 2009**. The Provider's letter enclosing the **rate options form** details as follows;

*"I am writing to remind you that the current rate option on your mortgage account will end on 31 May 2009.*

*Please find attached the current options available to you.*

*We recommend that you consider your options carefully before making your selection. If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. Our rates at that time could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.*

*If we do not receive a written instruction from you in relation to the above on or before the 31 May 2009, the interest rate on your mortgage will be the Tracker Variable Rate\*.*

*We value your business highly at [the Provider] so if you have any questions regarding your options, please contact our dedicated mortgage team on [PHONE NUMBER]."*

The **rate options form** detailed as follows;

*"Current options available:*

*You may only select one option.*

*Account number: [XXX]*

		Monthly Repayment EUR
- Tracker Variable Rate*	- Currently 3.5000%	1103.38
- LTV Variable Rate **	- Currently 3.4000%	1088.62
- 2 year fixed rate	- Currently 5.2500%	1377.78
- 5 year fixed rate	- Currently 5.7500%	1461.37
- 7 year fixed rate	- Currently 6.1000%	1521.13
- 10 year fixed rate	- Currently 6.1000%	1521.13

....

- *Please note, if you chose a fixed rate, the standard fixed-rate conditions will apply (see over the page).*

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- *\*The interest rate that applies to this Tracker Mortgage Loan will never be more than 2.2500% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.*
- *\*\*In calculating your loan to value (“LTV”) ratio, we use the current loan balance and the most recent valuation on file for this mortgage.”*

The reverse of the rate options form contained the same text as **General Condition 5.3 of General Mortgage Loan Approval Conditions** (as extracted above) under the heading **“Fixed Rate Loans”**. Under the heading **“Variable Rate Loans”** the reverse side of the form outlined *“The payment rates on this housing loan may be adjusted by the lender from time to time.”*

Under the heading **“Tracker Mortgage Loans”** the reverse of the rate options form contained the following;

- “1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.*
- 2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.*
- 3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.*
- 4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate.”*

The Complainants did not opt to accept the tracker interest rate option and instead signed the **rate options form** on **22 May 2009** electing to apply the LTV variable rate of 3.40%. The Provider applied the interest rate requested by the Complainants to the mortgage loan account on **29 May 2009**.

The Complainants raise two issues with respect to their interactions with the Provider at this time. The first is that the Provider did not advise them of the *“repercussions”* of not choosing the tracker interest rate and the second is that the Provider did not advise them to seek independent financial advice in respect of their rate options in **May 2009**.

The reverse side of the options form which the Complainants signed on **22 May 2009**, contained detail about the tracker interest rate offering, such that the Complainants could have made an informed decision as to which interest rate to choose at the time. The Provider had set out in a clear and comprehensible manner that the interest rate applicable to a tracker mortgage loan is made up of *“the European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate”*. As such, the Complainants ought to have been aware that, in circumstances where they opted for the tracker interest rate or did not select another rate and allowed the mortgage loan to default to the tracker interest rate, the percentage of 2.25% above ECB base rate would not be exceeded during the term of the loan and the ECB base rate would fluctuate in accordance with the European Central Bank.

It would appear to me that the *“repercussions”* that the Complainants are referring to is the longer term comparison between an ECB tracker interest rate and other rate options, fixed and variable. It is a matter of fact that the ECB base rate ultimately began and continued to drop from **late 2008/early 2009** to **March 2016**, when it was reduced to 0%. There is no evidence that the Provider knew or could have known in **May 2009**, when the ECB base rate was 1.00%, that the ECB base interest rate was ultimately going to reduce to 0% some seven years later such that it could have advised the Complainants of the *“repercussions”* of not selecting the tracker interest rate that was offered to them by the Provider at that time.

There was no obligation on the Provider at that time to advise the Complainants to seek independent financial advice. I note that the Provider’s letter to the Complainants dated **8 May 2009** informed the Complainants to consider their options carefully before making their selection and invited them to contact the Provider if they had questions. The Complainants did not contact the Provider at the time. If the Complainants were not happy with the rate options outlined by the Provider in **May 2009**, or if they required clarification on those rate options, it was open to them to seek clarification from the Provider or to seek independent advice, if they were of the view that they needed such advice. They did not do so.

In the circumstances of this particular complaint I accept that the Provider offered the Complainants a *“tracker mortgage rate appropriate to the balance outstanding on the loan, at the date of the expiry of the fixed rate period”* in **May 2009** in accordance with **Special Condition 4** of their mortgage contract. The Complainants elected not to choose the tracker mortgage rate option at that time.

The Provider in its **Final Response Letter** to the Complainants dated **13 June 2018**, details as follows:

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*“From the 30th June, 2006, Tracker rates began to appear on the rate options letters issued to existing Mortgage customers of the Bank on expiry of the Fixed rate and Discounted rate period.*

*The Bank had ceased offering Tracker rates to new business customers as of the 14th July, 2008, and to customers (who did not have the guarantee of a tracker rate in their mortgage terms and conditions) maturing from Fixed rate and Discounted Rates as of the 31st August, 2009.”*

The **Summary of Complaint and Schedule of Questions** which issued by this office to the Provider on **25 March 2019** required the Provider to;

- “(a) Please provide a detailed explanation of the Provider’s policy with respect to tracker interest rate offerings as set out above.*
- (b) Please confirm whether the Provider communicated the withdrawal of tracker interest rates in August 2009 to the Complainants.”*

The Provider in its **Response to the Summary of Complaint, Schedule of Questions and Schedule of Evidence Required** dated **28 June 2019**, detailed as follows;

*“The tracker rate option which was discontinued [in mid] 2009 was a rate option provided to customers who did not have a contractual entitlement to a tracker rate on expiry of their fixed rate period or a discount tracker period. Customers with a contractual entitlement to be offered a tracker rate continued to be offered a tracker rate.*

*The date of expiry of the Complainant’s fixed rate period had expired before 31 August 2009. The Bank had provided the option of a tracker interest rate to the Complainants on expiry of their fixed rate period in May 2009 in accordance with the conditions of their mortgage contract, as explained in detail above. **There was no entitlement in the Complainant’s contract to avail of a tracker rate on any other date in the future. [my emphasis]”***

The Provider was also asked in the **Summary of Complaint and Schedule of Questions** which issued to the Provider on **25 March 2019**, as follows;

*“Is the Provider satisfied that the rate options letter dated 8 May 2009 and the rate instruction form clearly explained that by opting for the LTV variable interest rate, that the Complainants would lose their entitlement to avail of a tracker rate in the future? Please provide full detail in this respect.”*

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The Provider responded in its **Response to the Summary of Complaint, Schedule of Questions and Schedule of Evidence Required** dated **28 June 2019**, as follows;

*“The Bank is satisfied that the rate options letter dated 8 May 2009 and the rate instruction form clearly explained that only one option was available to the Complainant[s] and, therefore, that by opting for the LTV variable interest rate, **the Complainants no longer had an option of a tracker rate of interest at expiry of the fixed interest rate period in accordance with Special Condition 4 of their contract.***

*The Complainant[s] did not have in their loan contract an “entitlement to avail of a tracker rate in the future”. The Complainants had an entitlement to be offered a tracker rate of interest on the expiry of the fixed rate period. The Bank offered the Complainants the tracker rate of interest on the expiry of the fixed rate period in accordance with their contract. This is explained in more detail in the following paragraphs.....[my emphasis]”*

The Provider has outlined in its post Preliminary Decision submission dated **14 February 2020** as follows;

***“Outside the scope of the complaint***

*Furthermore, this is not an issue that arose in this complaint. The Complainants complained that their Bank did not explain the repercussions of not choosing a tracker rate in May 2009, and that the Bank failed to advise the Complainants to seek financial advice in May 2009. They did not assert that they should be offered a tracker interest rate upon the expiry of their current fixed interest rate period. As such, it is apparent from the Complainants’ complaint that their understanding of that relevant Special Condition was that it only conferred a right to be offered a tracker rate at the end of the two year fixed rate period. This is clear given that the substance of their complaint was that they should have received financial advice about the “repercussions” of not choosing a tracker rate at that time.*

*In any event, it is not appropriate [for the Ombudsman] to offer an interpretation of the contract in respect of circumstances that have not, and may never arise. The issue of whether the Complainants will be offered the option of a tracker rate at the expiry of a further fixed period has not arisen in the circumstances of this complaint. As such, the issue should not be included in the Legally Binding Decision, quite apart from the fact that there was no proper opportunity to make submission on this point during the decision-making process.”*

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The Provider in its second post Preliminary Decision submission dated **18 March 2020** further outlines;

*“We note that the Bank set out its position, in response to the Preliminary Decision, in the Bank’s Submissions and it does not intend to repeat the points made in that letter. In particular, the Bank provided further important points on the interpretation of the mortgage contract between the Bank and the Complainants, which were not sought in detail by the FSPO during the adjudication process.”*

In the interests of clarity and for the avoidance of any doubt, I am entitled and I believe obliged to address submissions made by a provider to this office in the course of the investigation of a complaint where I am of the view that the submissions made by the provider are inaccurate. The Provider in its post Preliminary Decision submission appears to suggest that I have gone beyond the scope of the complaint. I accept that the Complainants have not presently raised a complaint about their future entitlement to a tracker interest rate. However, the Provider has failed to acknowledge that in the course of investigating the complaint raised by the Complainants about the Provider’s alleged failure to advise them of the “*repercussions*” of not choosing a tracker interest rate on their mortgage loan in **May 2009**, it is necessary to establish what those “*repercussions*” are. The Complainants as part of their complaint, furnished this office with a copy of the letter which the Provider issued to the Complainants on **08 May 2009**, which outlined that “*If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option.*” In the course of investigating this complaint, this office raised a question with the Provider with respect to this letter. The Provider offered its view as to the Complainants’ contractual entitlement to a tracker rate in the future. As such I believe I am entitled and indeed obliged to address this matter in my decision. I would not be acting according to equity and good conscience, as I am obliged to do under **s12(11) of the Financial Services and Pensions Ombudsman Act 2017**, to not address a submission made by the Provider in the response to the complaint in circumstances where I believe those submissions to be incorrect.

Furthermore I note that the Provider suggests that it has not been given an opportunity to make submissions on the interpretation of **Special Condition 4** of the Complainants’ mortgage loan contract during the course of the decision making processes of this office. I do not accept that this is the case. As detailed above, the Provider made submissions with respect to **Special Condition 4** in its **Response to the Summary of Complaint, Schedule of Questions and Schedule of Evidence Required** dated **28 June 2019**. Further, my Preliminary Decision was issued to the parties on **24 January 2020** and the Provider was invited to make submissions with respect to an additional point of fact, an error of fact and/or an error of law. The Provider made two submissions by letter dated **14 February**

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**2020** and **18 March 2020**. The Provider detailed in the letter dated **14 February 2020** that it “*reserved the right*” to provide any further submissions “*regarding the proper construction and operation of Special Condition 4*”. I noted the Provider’s submission by letter dated **03 March 2020** and afforded the Provider a further opportunity to make any further submissions, as it considered to be appropriate. The Provider did so by way of letter dated **18 March 2020**. I am of the view that the Provider has been given ample opportunity during the investigation and adjudication of this complaint to make submissions on the construction of **Special Condition 4** of the Complainants’ mortgage loan.

For the purposes of completeness, I do not accept the Provider’s submission that it is “*apparent*” from the Complainants’ complaint that their “*understanding*” was that **Special Condition 4** “*was that it only conferred a right to be offered a tracker rate at the end of the two year fixed rate period*”. There is no evidence to support this assertion. The Complainants’ complaint must be taken in context. At the time the Complainants made a complaint to the Provider in **January 2018** and the Provider replied to the complaint in **June 2018**, the Complainants’ mortgage account was on a variable interest rate. The information that had been furnished by the Provider in its **Final Response Letter** to the Complainants is also relevant. The Provider had outlined as follows:

*“Prior to the expiry of the fixed rate period on 8<sup>th</sup> May, 2009, in accordance with the Bank procedure a letter was issued to you outlining the rate options (which included a tracker rate) available at that time. In the options letter the Bank recommended that you consider your options carefully before making your selection and that if you opted for a fixed rate, at the end of the fixed rate period the Bank would send you a listing of the products available to you at that time, which may or may not include a Tracker option.*

.....

*The Bank had ceased offering Tracker rates to new business customers as of [mid] 2008 and to customers (who did not have the guarantee of a tracker rate in their mortgage terms and condition) maturing from Fixed rate and Discounted Rates as of [mid] 2009”*

It appears that the Complainants did not elect to apply a further fixed interest rate of five years to their mortgage loan until **March 2019**.

I do not accept the Provider’s submission that **Special Condition 4** only relates to the expiry of the two year fixed interest rate period in **May 2009** and “[*t*]here was no

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entitlement in the Complainant's contract to avail of a tracker rate on any other date in the future".

The Provider has outlined in its post Preliminary Decision submissions dated **14 February 2020** as follows;

*"At page 9 – 10 of your Preliminary Decision, you have suggested that the phrase "expiry of the fixed rate period" is properly to be interpreted as applying to the expiry of any fixed rate period, and not simply the two-year fixed interest rate period set out in the Letter of Approval. Whilst your observations in this regard, refer to the Bank's own construction, rather than appearing to be based on any detailed consideration of the proper construction of this condition, for completeness and with respect, this is not a tenable approach to the interpretation of this contract.*

- (1) *.....Special Condition 4 set out what was to happen at the end of the two year fixed rate period, which was set out on the first page of the Letter of Approval and which was an inherent feature of the mortgage loan.*
- (2) *As regards the proper construction of Special Condition 4, the words "the fixed rate period" must be read in the context of the document of which they form part of, namely the Letter of Approval. It refers to "the fixed rate period" (emphasis added). There is only one fixed rate period referred to in the Letter of Approval in the contract, namely the two year period that is identified in the letter, where it states that the loan is a '2 Year Fixed New Business Loan'. Special Condition 4 clearly cross refers to the aspects of the mortgage loan referred to in the Letter of Approval. For example, it also refers to "...the interest specified above..." before then referring to what option is available to the customer at the end of "...the fixed rate period...". Neither the Special Condition, nor the Letter of Approval, refers to any other fixed rate period at any other point during the term of the mortgage loan. The two year fixed interest rate period applying at the commencement of the term of the mortgage loan is therefore clearly the fixed rate period to which Special Condition 4 relates.*
- (3) *While it is the Bank's position that the construction set out above is clear from the Letter of Approval, this position was also set out in the European Standardised Information Sheet (the "ESIS") that accompanied the loan offer in equally clear terms.....*

*[Extracts from the ESIS – The ESIS is quoted earlier in the decision]*

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*The phrase “the fixed rate period” means and can mean only the period of two years for which the rate is fixed as set out in the Letter of Approval. It is clearly contrasted with “another fixed rate period” and the two should not be conflated.*

- (4) *General Mortgage Loan Approval Condition 5, to which Special Condition 4 is expressly subject, is equally clear. It provides as follows:-*

*[Quote of General Condition 5.1 – This is quoted earlier in the decision]*

*The only fixed rate period to which General Condition 5 could refer is therefore the period specified in the Letter of Approval, namely the two-year fixed rate period.*

- (5) *While there is no inconsistency between the Special and General Conditions, for completeness you will be aware that Special Conditions, being specific to this particular loan, generally prevail over General Conditions which would also apply to other contracts. As noted above the terms of Special Condition 4 are clear, both in isolation and within the context of the Letter of Approval in which they are included.*

- (6) *The position was also made clear at the end of the fixed-rate period. The Bank wrote to the Complainants on 8 May 2009 reminding them that the interest rate option at the time was about to expire and setting out the interest rate options available. That letter specifically warned the Complainants that:-*

*“If you choose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. (underlined for emphasis)*

*The Complainants were thus aware that if they chose a fixed rate period in 2009 (i.e. a second fixed rate period), the list of available product options was not guaranteed into the future and might not include a tracker rate.”*

The Provider has also outlined in its post Preliminary Decision submissions dated **14 February 2020** as follows;

*“There is one principle of contractual interpretation of particular importance. As you are aware, the fundamental principle of contractual interpretation is that words must be given their natural and ordinary meaning, and every contract is to be construed with reference to the whole of its terms (1) Applying that principle, and*

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*having regard to the entire of the contract, the phrase “the fixed rate period” clearly means the two year fixed rate and nothing else.”*

*International Fina Services AG v Katrina Shipping Ltd [1995] 2 Llyod’s Rep 344, 350 is footnoted at (1).*

**Special Condition 4** outlines that “*On expiry of the fixed rate period*” the Complainants had a right to an option of a “*tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period*”. The Provider is of the view that the phrase “[*o*]n expiry of the fixed rate period” is clearly only referable to the 2 year fixed interest rate period that was set out in the Letter of Approval for the reasons set out above.

In order to arrive at a decision, it is necessary to consider the meaning of “[*o*]n expiry of the fixed rate period”.

The Supreme Court has recently confirmed that the proper approach to the construction of contractual documents is one of ‘text in context’; *Jackie Greene Construction Ltd v IBRC* [2019] IESC 2. This requires a court (or other adjudicative body) to consider the text used in the context of the circumstances in which the document concerned was produced, including the nature of the document itself.

In *Law Society v MIBI* [2017] IESC 31, para 5.3, the Supreme Court explained that:

*“the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.”*

Further, it has been held that in considering complaints, I am entitled to lean against a sophisticated construction of a key and significant term in a bank’s contract with its customer where the term is not expressed in plain language; *Irish Life and Permanent plc v Financial Services Ombudsman* [2012] IEHC 367 at para 43.

In *Jackie Greene Construction*, Clarke CJ indicated at para 8.1 that “*a first, and particularly important, aspect of the proper construction of*” the disputed part of an agreement is to identify the purpose behind that part. There appears to be a number of purposes behind **Special Condition 4**, as follows;

- To confirm that **General Mortgage Loan Approval Condition 5** “conditions relating to fixed rate loans” applies to the mortgage loan.
- To indicate that the interest rate of 4.75% may vary before the date of issue of the loan.
- To provide for the rate of interest that will apply to the loan agreement “*on the expiry of the fixed rate period*” in the event of the Complainants choosing the option of a tracker mortgage interest rate and in the “*absence of instructions from*” the Complainants.

The real dispute on the construction of **Special Condition 4** is whether the term “[o]n the expiry of the fixed rate period” is meant to: (a) clarify the interest rate to apply to the mortgage loan at the end of the initial 2 year fixed interest rate period only or (b) to clarify how **General Mortgage Loan Approval Condition 5** and **Special Condition 4** apply to the Complainants’ mortgage loan generally.

I accept the Provider’s submission that the Letter of Approval only referred to a 2 year fixed interest rate period. This was the fixed interest rate period on which the mortgage loan was to commence. However, the Provider has failed to accept and take into account that the period of the agreement, as set out in the Letter of Approval, was for a period of 35 years. The Provider has sought to link the application of **Special Condition 4** to the initial 2 year fixed interest rate period only, by reference to, the term “...*the interest specified above...*” as contained in **Special Condition 4**. It is my view that the Provider has taken the term “...*the interest specified above...*” out of context. I believe that when the whole sentence is considered, it is clear that the reference to the “*interest rate specified above*” is to outline that the fixed interest rate, as specified in the Letter of Approval, may vary before the date of issue of the loan. This is also in accordance with **General Condition 5.2**. This occurred on the Complainants’ mortgage loan and the loan drew down on a fixed interest rate of 4.99%, rather than the specific 4.75% rate outlined in the Letter of Approval on the basis of **Special Condition 4** and **General Condition 5.2**.

I do not accept the Provider’s submission that “[t]he only fixed rate period to which *General Condition 5* could refer is therefore the period specified in the Letter of Approval, namely the two-year fixed rate period.” In making this submission, the Provider has failed to take into account the terms contained in **General Condition 5**, which has been specifically outlined to “*apply*” by **Special Condition 4**. **General Condition 5.1** outlines that the interest rate applicable to the advance “*shall be*” fixed from the date of the advance for the period as specified in the Letter of Approval. In the Complainants’ case the period specified was the 2 year period. **General Condition 5.1** then continues “*and thereafter will not be changed at intervals of less than one year*”. The later part of **General Condition 5.1** appears to envisage further fixed rate periods which would not be less than 1 year in duration. **General Condition 5.4** then outlines that “*notwithstanding*” or in spite of

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**General Condition 5.1**, the Provider and the Complainants shall each have the option at the “*end of each fixed rate period*” to convert to a “*variable rate loan agreement*”. I accept that the variable rate loan as referred to in **General Condition 5.4** is a variable rate that may be adjusted by the Provider from time to time. For the avoidance of any doubt, I am not conflating a tracker interest rate with a variable interest rate. Rather I am of the view that taking **Special Condition 4** and **General Condition 5** together, those conditions are to be properly construed as giving the Complainants’ the option of a “*tracker mortgage rate appropriate to the balance outstanding on the loan*” “*on expiry of the fixed rate period*” regardless of when during the term of the loan the fixed interest rate period was applied to the mortgage loan.

In the alternative, I am of the view that **Special Condition 4** suffers from a degree of ambiguity, such that the doctrine *contra proferentem* means that those ambiguities are to be resolved against the party who structured the ambiguous clause (that is, against the Provider).

The Provider has also sought to rely on the **European Standardised Information Sheet (“ESIS”)** as an aid to the interpretation of the meaning of “*the fixed rate period*” as distinct from “*another fixed rate period*” as mentioned in the ESIS. As the Provider is aware the ESIS is non-binding and does not form part of the mortgage loan agreement. In these circumstances I do not accept that the singular reference to “*another fixed rate period*” can be taken to support the particular interpretation of “*on expiry of the fixed rate period*” in **Special Condition 4**, as has been advanced by the Provider. Further, if the Provider’s position is correct that there was no other fixed interest rate period envisaged for the 35 year term of the loan in the **Letter of Approval**, the **Special Conditions** or **General Condition 5**, then it is unclear why the ESIS would refer to “*another fixed rate period*”.

I am of the view that given the significant implications for the Complainants, if a key clause of this kind is to bear the sophisticated construction that it only related to the initial fixed interest rate period and that it did not apply to the expiry of any other fixed interest rate period at “*any other date in the future*”, it was the responsibility of the Provider to spell this out in plain language for the benefit of the Complainants. This could very simply have been done with the inclusion of the word “*initial*” or the words “*two year*” before the words “*fixed rate period*” in **Special Condition 4** or by outlining that **General Condition 5.4** applies with respect to the “*expiry*” of any second or subsequent fixed interest rate periods applicable to the mortgage loan. However **Special Condition 4** did not contain any such language to confine its application to the initial two year fixed interest rate period only.

**Chapter 2, Common Rules for all regulated entities of the Consumer Protection Code 2006 (CPC 2006)**, outlines as follows;

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*Provision of Information to the Consumer*

12. *A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.”*

I am of the view that **Special Condition 4** cannot be said to have clearly and comprehensibly communicated to the Complainants that it was intended to only apply to the initial two year fixed interest rate period of what is a 35 year mortgage, as has been advanced by the Provider. If it was intended, as the Provider has submitted it was, that **Special Condition 4** only guarantees a tracker entitlement on expiry of the initial fixed rate period and not on the expiry of subsequent fixed rate periods, this is something I would consider to be a “key item” which clearly was not “brought to the attention of the consumer” in the Special Condition, but, ought to have been.

The Provider has outlined in its post Preliminary Decision submissions dated **14 February 2020** as follows;

*“It is a misapplication of rule 12 of the Consumer Protection Code 2006 to use it as an aid to the Interpretation of a contract. Contracts must be interpreted according to the ordinary rules for their construction. Those rules do not vary according to whether a regulated entity that is a party to that contract has or has not complied with a provision of the 2006 Code.”*

While I accept that **Rule 12** of the **Consumer Protection Code 2006** cannot be utilised as a method of interpretation of a contract, I find the proposition put forward by the Provider that the Consumer Protection Code somehow does not apply to a mortgage contract to be very worrying. I believe, the contract, like all communications by a regulated financial service provider, must meet the requirements and standards set out in the Code which the Provider has failed to do.

Notwithstanding the above, the issue of whether the Complainants ought to have been entitled to the option of a tracker interest rate on the expiry of a further fixed rate period pursuant to **Special Condition 4**, has not arisen in the particular circumstances of the Complainants’ mortgage loan to date. I understand that the Complainants’ mortgage loan account remained on the LTV variable rate between **May 2009** and **March 2019**. It is clear that the **General Mortgage Loan Approval Conditions** do not provide for a contractual entitlement to any specific rate type in the event of a switch from the LTV variable rate. In **March 2019** the Complainants applied a five year fixed interest rate to the mortgage loan.

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It is my view that the contractual position I have outlined above with respect to **Special Condition 4** and **General Condition 5** will continue to apply for the term of the mortgage, provided the parties do not mutually agree to a variation of those mortgage loan conditions. For the avoidance of any doubt, I am not making a direction in relation to what should happen at the end of any future fixed rate period. In the event that the Complainants are dissatisfied with the conduct of the Provider at that stage, they will have the option of making a complaint.

Having considered the Complainants' mortgage loan documentation, I find the Complainants have a contractual entitlement to a "*tracker mortgage rate appropriate to the balance outstanding on the loan, at the date of the expiry of the fixed rate period*". The Provider offered the Complainants a "*tracker mortgage rate appropriate to the balance outstanding on the loan, at the date of the expiry of the fixed rate period*" in **May 2009** which, at that time, was a tracker interest rate of ECB + 2.25% and the Complainants chose not to accept it, and instead, chose to apply a variable interest rate to the mortgage loan at the time having been provided with sufficient information by the Provider with respect to the interest rate offerings, such that the Complainants could have made a fully informed decision about their interest rate options. The Complainants at the time elected for another interest rate option.

For the reasons outlined above I do not uphold this complaint.

### **Conclusion**

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

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



**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

30 June 2020

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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.

