



<b><u>Decision Ref:</u></b>	2020-0390
<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>	Partially upheld

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

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainant's private dwelling house, which was a self-build property.

The mortgage loan is for an amount of €210,000 and the term of the loan is 35 years. The particulars of the mortgage loan offer signed by the Complainant on **17 June 2008** detailed that the interest rate applicable was "*Fixed at 4.850%*" for 24 months/2 years. The interest rate applicable to the Complainant's mortgage loan account since in or around **August 2010** is ECB + 1.35%.

**The Complainant's Case**

The Complainant outlines that the Provider issued a **Mortgage Loan Offer Letter** dated **12 June 2008** for the amount of €210,000 repayable over a term of 35 years subject to an initial two year fixed interest rate period of 4.85%. The Complainant details that on the expiry of the two year fixed interest rate period, a tracker interest rate of ECB + 1.35% was applied to the mortgage loan account. The Complainant submits that the purpose of the loan was to finance the construction of a self-build property.

The Complainant submits that it was agreed with the Provider that the mortgage loan would be drawn down in staged payments.

He details that the first stage payment of €95,000 was drawn down in **August 2008** in two separate payments made up of €30,000 (drawn down on **7 August 2008**) and €65,000 (drawn down on **11 August 2008**).

The Complainant explains that he used an amount of €78,040 from the first stage payment to discharge a loan from another Provider in accordance with the special conditions attaching to the Loan Offer. The Complainant notes that the purpose of the loan granted by the other Provider was *“used to fund the construction of a shed not the construction of the dwelling house in question”*. He details that only €16,960 of the first stage payment was used to fund the construction of his private dwelling house in **2008**.

The Complainant submits that he applied for the release of the second stage payment in **August 2010** in the amount of €38,000 which was duly drawn down. The Complainant subsequently requested the release of the final stage payment for the remaining amount of €77,000 on **16 March 2011**. The Complainant submits that the Provider *“refused this final draw down”* on the basis that the Complainant *“did not have the capacity to make the final repayment.”* The Complainant contends however that his *“financial circumstances...did not change in this period”*. The Complainant further notes that in fact the Provider *“simultaneously...extended further finance to him”* in **March 2011, September 2013** and again in **April 2014** in the form of various other loans.

The Complainant details that his income of €59,000 in **2008**, as quoted by the Provider, was *“a projected income only.”* He states that he does not accept the Provider’s submission that his income decreased to €22,000 in **2011** from €40,000 in **2010**. The Complainant is of the view that the Provider moved the *“goalposts”* in terms of how it calculated *“allowable income”* in **2010** and **2011**. The Complainant submits that he *“has consistently drawn a weekly payment of €500 from his company account i.e. €26,000 every year.”* He further details that this is a *“net payment”* and *“if he were a PAYE worker employed by a third party, his [g]ross [w]age would be around €38k per year.”* The Complainant contends that the Provider *“accepted that this equated to a higher income if [he] were a PAYE employee in 2010, yet have changed their minds in 2011”*.

The Complainant submits that he and his accountant met with representatives of the Provider on *“numerous occasions to try ascertain why the Bank were not willing to make the final draw down.”* He outlines that his accountant submitted his accounts to the Provider and *“believes that [the Complainant did] have the financial capacity to make the repayments.”*

/Cont’d...

The Complainant also details that he met the Provider with his father, *“who has substantial financial assets, who agreed to guarantee the third drawdown”*.

The Complainant submits that following this meeting, he *“received a blank loan application with no cover letter, only post-its for signatures”*. The Complainant states that he queried this with his accountant who in turn received a letter from the Provider referring to a proposed new variable loan over a 20 year period.

The Complainant explains that the new mortgage documents also included his father as a co-borrower *“as the Bank requested that he be placed on the mortgage also”*. The Complainant submits that there was no *“letter of offer attached to these documents and as a result neither [the Complainant] nor his father signed them.”*

The Complainant details that he and his accountant subsequently met with the Provider again to query *“how the Bank believed that he could not afford to pay a mortgage over 35 years on a tracker rate @ 1.35% yet he could afford to pay a variable mortgage on a variable loan of 4.5% over a 20 year period.”* The Complainant submits that his accountant sent letters to the Provider on **9 December 2011** seeking an explanation for this.

The Complainant submits that despite the Provider stating that he did not have the capacity to *“repay the final draw down on [the] tracker rate”*, the Provider granted him a loan on **25 March 2011** *“being the higher purchase of a van”*. The Complainant states that this loan was in the amount of €13,000 subject to an interest rate of 9.13% repayable over a 4 year term. He details that this amounted to a monthly repayment of €322.

The Complainant submits that his accountant sent a letter to the Provider on **17 December 2012** querying the Provider’s assertion that the Complainant could not meet the mortgage loan repayments subject to the terms of the original mortgage. The Complainant details that he did not receive a response from the Provider.

The Complainant submits that the Provider granted him a further a personal loan in **September 2013** in the amount of €15,500 subject to an interest rate of 6.74% repayable over a term of 5 years. He details that this amounted to a monthly repayment of €492.

The Complainant details that he contacted the Provider again in **January 2014** *“seeking the final stage payment on his home loan”* while noting that he met with different representatives from the Provider’s branch and had *“been given varied reasons each time for why the loan cannot be drawn down including, [his] income is not high enough; [his] income cannot support an increased loan payment and the length of time taken to build is too long”*.

/Cont’d...

The Complainant outlines that the Provider granted him another personal loan in **April 2014** in the amount of €15,500 subject to an interest rate of 6.74% over a term of 3 years. He details that this amounted to a monthly repayment of €476.49. The Complainant submits that all three loans granted to him *“increased [his] repayments by €1,294.00 per month. However [the Provider] justified their refusal on [his] incapacity to pay.”*

The Complainant states that he had indicated to the Provider that the final draw down of the mortgage loan *“would have only cost an additional €250.00 approximately per month versus a loan repayment of €1,294.00 having been extended to [him] thereafter”*. The Complainant acknowledges that while some of these loans were drawn down by his business, he submits that he acted as personal guarantor on all business loans. The Complainant contends that *“the financial background of the Complainant is the same as the financial background of the business.”*

The Complainant submits that he instructed his solicitors at the time to write to the Provider on **7 April 2014, 16 April 2014, 8 May 2014** and **22 May 2014** to seek reasons as to why the final stage payment was being refused however the Complainant maintain that his solicitors received no response from the Provider. The Complainant contends that he has exhausted every avenue with the Provider in an effort to draw down the remaining balance of his loan.

The Complainant submits that he and his accountant met with representatives of the Provider again on **17 June 2014** to query *“why the final draw down was not being released”*. The Complainant states that during the meeting his accountant advised that *“if the [Provider’s] stress test was at 5% [the Complainant] could easily meet the loan repayments.”* He outlines that the Provider informed him that the stress test was at 2%.

The Complainant states that his quantity surveyor issued a detailed estimate of the costs of finishing the construction of the self-build property which was sent to the Provider on **15 July 2014** with another request for the drawdown of the final stage payment.

The Complainant submits that his solicitor wrote to the Provider on **6 August 2014** requesting the final stage payment and the Provider responded in **October 2014** *“stating that the application for further draw down was declined”*. The Complainant submits that he also queried why the Provider agreed to issue him with three term loans *“in the intervening period but would not allow the final draw down of the mortgage”*. The Complainant states that he *“put it to the Bank that it was due to the fact that it was a tracker loan and not a variable loan and this is why [the Provider] would not release the final draw down.”* He details that the Provider *“denied this, however, no satisfactory answer was received.”* The Complainant states that he was unsatisfied with the Provider’s

/Cont’d...

overall response and submitted a formal complaint to the Provider by way of letter dated **10 January 2015**.

The Complainant outlines that he *“has been making a life policy repayment on the mortgage to cover €250,000. This payment is in the sum of €78.97 per month and has been paid since the 9<sup>th</sup> of July 2009”*.

The Complainant states that *“this life policy payment as required by [the Provider] is now €77,000 greater than the amount of the loan which was sanctioned”*.

The Complainant is of the view that his former solicitors cannot comply with their undertaking to the Provider as *“they are unable to obtain an Engineer’s Certificate of Compliance with planning permission and building regulations due to the fact that property has not been completed”*. The Complainant submits that this is *“wholly unfair”* as the Provider has registered a charge over his property, is preventing him from completing the property and *“if it cannot be completed, will decrease in value.”*

The Complainant submits that he *“was left with no other alternative but to seek financial assistance from other financial institutions.”* The Complainant was subsequently granted a loan from another Provider in the amount of €27,500 in **2016** and three separate loans from another Provider amounting to monthly repayments of €920.

The Complainant submits that he *“is now living in a family home which is unfinished”*. He further outlines that he is now married and living in the property with his spouse and his first child. The Complainant outlines that *“no works have been done upstairs on the property”* and *“temporary stairs along with many works to be completed downstairs.”* He submits that this matter has *“created extreme distress and upset for [the Complainant] and his young family.”* He also states that he has been *“unable to comply with his [p]lanning [p]ermission and lost the value of many warranties on materials.”* He further details that he *“has not been in a position to develop his business and obtain credit as usual”* as a result of the Provider’s refusal to allow the drawdown of the final stage payment.

The Complainant wants the Provider to drawdown the remaining stage payment of his mortgage as per the **Mortgage Loan Offer Letter** dated **12 June 2008**.

### **The Provider’s Case**

The Provider submits that the Complainant’s mortgage loan was approved for the amount of €210,000 subject to an initial two year fixed interest rate of 4.85% followed by a tracker interest rate of ECB + 1.35%.

/Cont’d...

The Provider explains that €78,040 of the total loan amount was to be used to repay an existing loan with another Provider which was used to fund construction to date (up to in or around **June 2008**) and the remaining €131,960 was to be used to fund the completion of the build. In circumstances where the Complainant's property was to be a self-build, the Provider states that it was agreed that the mortgage loan would be drawn down in stages. The Provider notes that the Complainant signed and accepted the **Loan Offer Letter** on **17 June 2008** and in doing so, he agreed to be bound by the terms and conditions noted therein.

In accordance with the terms and conditions of the **Loan Offer Letter**, the Provider details that it *"required a life policy to be in place that was sufficient to repay the whole of the loan (in the Complainant's case €210,000) prior to draw down of the mortgage loan facility"*. In this regard, the Provider relies on **General Condition 2(a)** and **General Condition 3(a)** of the **General Conditions** of the **Loan Offer Letter**. It details that *"it was open to the Complainant to approach the Bank if he wished to have the required level of life cover reviewed."* The Provider details that there is no record of any request by the Complainant in respect of this.

The Provider details that the first stage payment of €30,000 was drawn down on **7 August 2008** and the second stage payment of €65,000 was drawn down on **11 August 2008**. The Provider outlines that the Complainant *"did not request any further stage drawdowns for some 25 months later in September 2010"*. The Provider submits that due to the *"significant passage of time"* it requested *"up to date financial information and it emerged that there were some significant changes to the Complainant's financial situation."* The Provider submits however that the Complainant indicated that *"he would only require €50,000 to complete the property in totality"* in **September 2010**. The Provider submits that on assessing the situation it *"agreed to release €38,000 and retain the final amount of €12,000 pending final inspection and receipt of Certificate of Compliance from the Complainant's Architect confirming completion of the property."*

The Provider rejects *"the Complainant's allegation that any action by the Bank prevented the completion of the works."* The Provider submits that the drawdown of the Complainant's mortgage did not proceed as per **General Condition 9(c)** of the **Loan Offer Letter** which states that the mortgage loan must be drawn down within 3 months of the date of the **Loan Offer Letter**. However, the Provider submits that it had *"agreed as an exception to extend the timeframe of drawdown"* in **September 2010** on the basis of an

/Cont'd...

assessment of the Complainant's financial circumstances and his instruction that this would be the final drawdown necessary to complete the construction of the property.

The Provider details that the Complainant requested the remaining amount of €77,000 to be drawn down in **March 2011** in order to complete the construction of the property. The Provider explains that its *"Credit Department again assessed the Complainant's financial circumstances"* and *"a decision was made to refuse to advance the remaining balance of the mortgage loan"*. The Provider outlines that there *"were again significant material changes in the Complainant's financial circumstances whereby his income decreased from €59,000 in 2008, to €40,000 in 2010, and a projected income of €22,000 in 2011."* The Provider submits that based on the updated information provided by the Complainant, it was *"not satisfied that there was adequate repayment capacity now evident and for this reason the requested drawdown of further funds was declined at that juncture."*

*This was a commercial decision by the Bank based on strict credit policy."* The Provider is of the view that it was *"fully entitled to make a commercial decision based on the Complainant's significant change in financial circumstances"* and the Provider relies on **General Condition 9(b)** of the **Loan Offer Letter** in this regard.

The Provider submits that it *"attempted to assist the Complainant with an alternative option of a potential new mortgage application with a third party for the remaining amount required to complete the property, however the Complainant did not avail of this opportunity to submit an application as was suggested"* and therefore no formal offer ever issued to him. The Provider states that *"as the offer of Mortgage Tracker rates were withdrawn by the Bank in October 2008, such a rate would not have been an available option on a new mortgage application for the Complainant and a choice of the prevailing rates at the time would have applied had an application been submitted and approved."*

In response to the Complainant's response as to why the Provider granted three personal loans to him during **2011** to **2014** when the Provider was of the view that the Complainant lacked the financial capacity to repay his mortgage loan, the Provider submits as follows;

- It approved a Business Hire Purchase agreement on **16 March 2011** for the amount of €13,000 for the purchase of a commercial vehicle. The Provider outlines that the facility granted *"was a secured Business Hire Purchase Facility, which carries different risk characteristics to other facility types."* It details that it *"applies specific credit assessment criteria based on the credit policies applicable to this product."* It outlines that the risk on this product was deemed acceptable and was approved in line with the Provider's lending policy.

- It approved two business loans in respect of the Complainant's business. The first business loan was in the amount of €25,000 and was drawn down on **12 September 2013**. The second business loan was in the amount of €15,500 and was drawn down **03 April 2014**.

The Provider explains that those loans *"were drawn down in the Business name and were not personal loans."* The Provider details that *"all applications for credit are assessed on their own merits according to a strict set of credit criteria."* The Provider submits that it *"is entitled to make a commercial decision based on its rigorous assessment methods."*

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider wrongfully and/or unfairly refused to accede to the Complainant's request for the release of the final stage payment of his mortgage loan from **March 2011**.

### **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 8 October 2020, outlining my preliminary determination 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

/Cont'd...

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, I set out below my final determination.

In order to determine whether the Provider acted wrongfully and/or unfairly in refusing to accede to the Complainant's request for the release of the final stage payment of his mortgage loan from **March 2011**, it is necessary to review the details of the Complainant's mortgage application as well as set out the relevant provisions of the Complainant's mortgage loan documentation and to also consider certain interactions between the Provider and the Complainant between **2011** and **2014** in relation to the Complainant's request to drawdown the final payment on his mortgage loan.

Prior to the Provider issuing a loan offer to the Complainant, a number of internal mails were exchanged between a mortgage adviser of the Provider's branch and the Provider's credit department in relation to the Complainant's income for the purposes of assessing his suitability for a mortgage loan. I consider it important to review such internal mails to provide a background as to the Provider's assessment of the Complainant's financial circumstances at the time of issuing a loan offer in **June 2008**.

The mortgage adviser of the Provider's branch prepared a background document in relation to the Complainant's mortgage loan application. The following is detailed under the section headed "*Proposition*";

*"SOME YEARS BACK, [COMPLAINANT] WAS GIFTED A SITE BY HIS FATHER, VALUE CURRENTLY E100K APPROX.*

*AS BUSINESS WAS STARTING UP AND STORAGE WAS REQUIRED, [COMPLAINANT] BUILT A GARAGE ON HIS SITE, BUT AT THE SAME TIME WAS GRANTED APPROVAL TO BUILD HIS HOUSE THEREON.*

*GARAGE WAS BUILT FIRST AS THE NEED WAS GREATER, AND THIS WAS FINANCED BY [A LOAN FROM ANOTHER PROVIDER] ....*

*HOUSE IS APPROX 2000 SQ FT. COST TO COMPLETE IS GIVEN AS E140K OR E70/SQ FT, WHICH WOULD BE REASONABLE IN THE AREA.*

*WE SHOULD BEAR IN MIND THAT SOME SITE WORKS FENCING/ROADWAY ETC HAS ALREADY BEEN DONE AT THE TIME OF GARAGE CONSTRUCTION.*

/Cont'd...

*IN ADDITION [COMPLAINANT] HAS BEGUN WORK ON THE HOUSE, AND HAS FOUNDATIONS IN UP TO SUB FLOOR. APPROX E15K HAS BEEN INPUT FROM OWN RESOURCES.*

*BORROWING REQUIREMENT E220K OVER 20 YEARS [...]"*

The Provider's internal records show that an internal mail was sent to what appears to be the mortgage adviser of the Provider's branch on **16 May 2008**, which details as follows;

*"Please note that the current Completion Date is 01/06/2008 (10 working days) and our records indicate that not all conditions have been met.*

*Please use [name of Provider's system] to examine all outstanding requirements.*

*If the current Completion Date is inaccurate, please amend this using the function available on [name of Provider's system] under "Request -> Data Changed at Source."*

The above internal mail indicates that the "Completion Date" is **01 June 2008**. However, it is unclear as to what date the "Completion Date" refers to. It appears that while a loan offer was sanctioned, a letter of loan offer had not yet issued at that time.

The mortgage adviser of the Provider's branch sent an internal mail to the Provider's credit department on **09 June 2008** noting the following;

*"I NOW HAVE A NUMBER OF PAYSLEIPS RELATING TO 2007 SHOWING AVERAGE GROSS INCOME E39K ANNUALISED AN AVERAGE OF E750 PER WEEK.*

*SINCE JANUARY 2003, WHEN THE LIMITED COMPANY HAS SET UP IS THE TIME THAT I WOULD SAY THE APPLICANT HAS ACTUALLY BEEN PROPERLY SELF EMPLOYED. THE ACCOUNTANT HAS SENT IN ACCOUNTS FOR THE PERIOD JANUARY TO APRIL 2008. SHOWING [NET PROFIT] E24K. WHICH WHEN ANNUALISED EQUATES TO E72K PER ANNUM. TAKING THESE IN CONJUNCTION WITH [NAME OF COMPLAINANT'S EMPLOYER] LETTER SUGGESTING E50K - E60K WORTH OF WORK GOING FORWARD, I BELIEVE THAT WE CAN TAKE THESE FIGURES AS ACCURATE.*

*WHILE I ACKNOWLEDGE THAT THE [INFORMATION] WE ARE RECEIVING HERE HAS UP TO NOW BEEN SOMEWHAT CONFUSED. I BELIEVE THAT WE HAVE FINALLY GOTTEN TO "THE NUB" OF THINGS NOW.*

/Cont'd...

*FURTHERMORE, I STILL BELIEVE THAT WE HAVE HERE A CASE WORTH SUPPORTING. [ANOTHER NAMED PROVIDER] [ACCOUNTS] LOOK ACCEPTABLE TO ME. WE HAVE SIGHT OF PAYSLEIPS WITH AVERAGE, OR POSSIBLY CONSERVATIVE INCOME E39K, WE HAVE "POINT IN TIME" [ACCOUNTS] SHOWING ANNUALISED INCOME E72K AND THE [NAME OF COMPLAINANT'S EMPLOYER] LETTER."*

A document titled "**Rationale for Application**" which I understand was generated from the application details inputted by the mortgage adviser in the Provider's branch suggests that a loan amount of €220,000 was originally sanctioned on **6 May 2008** and **8 May 2008** but was later withdrawn by the Provider's credit department as per the following entry on **12 June 2008** at **13:32:02**;

*"Income advised 59.4k however now transpires app[licant] only [self-employed] from Jan 08 not Jan 07 as advised- was paye until Jan08 @38k [per annum]- not prepared to rely on 4 months figures here where app[licant] earned circa 40k – based on paye 40k- multi is 105 material- NDI satis as cab exclude car repays 197pm based on expen[s]es in aacc so NDI in order but this is now score decline pool 7 @1:15*

*Not happy to stand over offer now based on income left voicemail for [mortgage adviser] to revert*

*Decision: Refer for offer Withdrawal"*

The Provider's credit department responded to the mortgage adviser of the Provider's branch on **12 June 2008** noting the following;

*"Cannot rely on 4 months figures here to substantiate 60k income [Complainant] has no history of earning at this level based on p[ayslips] received. I can just about make it work on multi/ndi [net disposable income] based on 40k but it is credit scoring decline now [based] on the scaled back income and I am not happy to override a sc[o]re decli[ne] here [as] it is a very high risk indicator. Could you [please] call to discuss."*

It appears from the entry later that afternoon on **12 June 2008** that the mortgage adviser contacted the Provider's credit department as the entry details as follows;

*"Appeal form [mortgage adviser]-app[licant] has 30 k work completed on prop[erty] has bought a lot of materials and 210k will secure the business [...]  
Happy that this is workable based on lower income worst case scenario- new offer  
Decision: Offer Sanctioned Amount: 210,000"*

/Cont'd...

It is evident from this exchange between the Complainant's mortgage adviser of the Provider's branch and the Provider's credit department that this project was not a typical or straightforward mortgage application or self-build project as in or around €30,000 worth of work had already been completed which brought the construction up to sub level prior to the Complainant applying for a mortgage loan from the Provider.

In addition, the site had been gifted to the Complainant by his father and a large amount of the building equipment and material had already been obtained. The mortgage adviser also indicated that the roadway to the property had already been constructed at the time the Complainant built a commercial building on the property when his business was starting up, prior to the Complainant's application for this mortgage loan.

I understand from the above exchange that the Provider's credit department expressed concern to the Complainant's mortgage adviser about the Complainant's net disposable income during the application process. The Complainant's mortgage adviser who is ultimately an employee of the Provider appears to have been almost advocating on the behalf of the Complainant as part of the loan approval process. It is unclear whether the Complainant's mortgage adviser relayed the Provider's concerns regarding his affordability directly to the Complainant.

Nevertheless, the Provider appears to have been ultimately satisfied to sanction a loan for the amount of €210,000 as an internal mail subsequently issued from the Provider's credit department later that afternoon on **12 June 2008** noting the following;

*"Subject: Credit Decision  
....  
Subject: Offer Issued  
Date: 12/06/2008  
Application No: [ending 3548]  
Applicant(s): [Complainant's name]  
Amount: €210,000"*

The Provider issued a **Mortgage Loan Offer Letter** to the Complainant dated **12 June 2008** which provided for an advance of €210,000 over a term of 35 years.

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

<i>"1. Amount of Credit Advanced:</i>	<i>€210,000</i>		
<i>2. Period of Agreement:</i>	<i>35 Years</i>		
<i>3. Number of</i>		<i>4. Amount</i>	

/Cont'd...

<u>Repayment Instalments</u>	<u>Instalment Type</u>	<u>of each Instalment</u>
24	Fixed at 4.850%	€1,037.24
396	Variable at 5.350%	€1,101.33”

**Part 2- Additional Loan Details** of the **Loan Offer Letter** sets out the following;

- “11. Type of Loan: Repayment  
12. Interest Rate: 4.850% Fixed  
13. Property to be Mortgaged (the “Property”):  
[Address of property]  
14. Purchase Price of Property: €240,000”*

**Part 3 – Conditions Precedent** of the **Loan offer Letter** details as follows;

***“The following conditions (the “Conditions Precedent”) must be complied with in full to the Lender’s satisfaction before the Loan can proceed.***

***(a) The following Conditions Precedent apply to the Loan:***

- (i) Supervising Architect/Engineer/Building Surveyor to complete the enclosed letter of supervision. No responsibility whatsoever is implied or accepted or warranty given by the Lender for the value or condition of the Property by reason of such report.*
- (ii) A valuation ( including a photograph) of the Property for mortgage purposes (see Clause2(c) of Part 5 – The General Conditions) showing the valuation in an amount of not less than EUR240,000 and which must be on terms acceptable to the Lender. A final inspection will be required for properties under construction/undergoing significant repair. The Lender may raise further conditions after receipt of the valuation [...]*
- (iii) Your last three months’ personal and business current account statements from [name of other Provider] confirming an acceptable profile of operation to satisfaction of the Lender.*
- (iv) A copy of your passport or driving licence and a recent (ESB/Telephone/Gas) is required in order to comply with the terms of the Criminal Justice Act 1994.”*

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

/Cont’d...

***“The Loan is subject to the following special conditions (the “Special Conditions”) which, unless stated to the contrary, must be complied with in full to the Lender’s satisfaction before the Loan, or any part of it, can be drawn down:***

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

*(i) The following special condition concerning interest shall apply:-1. The interest rate applicable to the Loan is a fixed rate and is fixed for the period set out in Part 1 of this Offer Letter. At the end of the fixed rate period the Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, the interest rate applicable to the Loan will be a tracker variable interest rate, this may vary upwards or downwards and the following will apply: (a) The interest rate applicable to the Loan shall be 1.35% (the “Margin”) above the European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo Rate”) for the term of the loan, unless the circumstances set out in paragraph b) below apply.*

*b) In the event that the Repo Rate is certified by the Lender to be inappropriate as the base funding rate for the Loan by reason of the prevailing conditions on the market for inter-bank lending, or for any other reason, the interest rate on the Loan payable by the Borrower shall be the Margin above the 1 month Euro Inter Bank Offered Rate (EURIBOR) or such other funding rate as may be appropriate for such time as the Lender shall determine to be appropriate. c) Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer Letter. d) For so long only as the interest rate is the Margin above the Repo Rate, variations in the interest rates shall be implemented by the Lender not later than close of business on the 5<sup>th</sup> working day following a change in the Repo Rate.*

*(ii) The Loan will issue in stages in line with the approved Architect’s/Engineer’s/Surveyor’s Report and the following conditions apply: (a) Title to the Property must pass to the Borrower on the first stage payment (b) To draw down each stage, the Borrower’s Solicitor is required to furnish the Lender with their Cheque Requisition form, AND a Property Report Certificate (from an*

*/Cont’d...*

*Architect/ Engineer/ Surveyor acceptable to the Lender). (c) The final 5% of the loan will be retained until the Lender has been furnished and is satisfied with its Property Report Certificate from the supervising Architect/Engineer/ Surveyor AND a final valuation from a valuer acceptable to the Lender.  
[....]*

- (iv) The Borrower's Solicitor must provide the Lender with an unconditional undertaking, prior to draw down, to discharge the Borrower's existing loan facilities with [another Provider] Eur78,040.*

*Please note: If there is any conflict between a General Condition and a Special Condition, the terms of the Special Condition shall prevail."*

**General Condition 9 of Part 5 – The General Conditions of the Loan Offer Letter** details as follows;

***"9. Draw Down***

- (a) All and any Special Conditions (in Part 4) must be complied with in full to the Lender's satisfaction prior to draw down of the Loan. It is the responsibility of the Borrower and the Borrower's agents to ensure that all Conditions are complied with.*
- (b) The Borrower shall notify the Lender of any change in the Borrower's personal or financial circumstances prior to draw down of the Loan. Without limiting its ordinary meaning 'financial circumstances' shall include actual or threatened redundancy or other matter which would in the Lender's opinion be likely to reduce the Borrower's repayment capacity. In the event of any change in financial or personal circumstances or in the event of the Lender becoming aware of any mis-statement in the Borrower's application for the Loan, the Lender may refuse to allow the Loan to be drawn down and withdraw this Offer Letter.*
- (c) All and any Conditions Precedent (in Part 3) must be complied with in full to the Lender's satisfaction within two months from the date hereof. The Loan must be drawn down within 3 months from the date hereof. The Lender may, at its absolute discretion, extend either or both periods.*
- (d) If the Loan is to be drawn down in stages, pending draw down in full, the "Loan", for the purposes of this Offer Letter shall mean so much of the Loan as has been drawn down at any time and the monthly payment of principal and interest (or in the case of an endowment loan, interest only) shall be of such amounts as having regard only to the amount of the Loan which has been*

/Cont'd...

*drawn down at that time, as the Lender at its absolute discretion shall stipulate provided always that this is without prejudice to the Borrower's solicitor's obligation to stamp and register the security documents referenced in clause 2(a) for the full amount of the Loan.*

*Each stage shall only be drawn down on foot of an architect's certificate or that of some other suitably qualified person in the Lender's prescribed form or in such manner as shall be specified by the Lender in the Special Conditions."*

The Complainant signed the **Borrower's Acceptance and Consents** section of the **Loan Offer Letter** on **17 June 2008** on the following terms;

*"1. 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 signed the **Loan Offer Letter** on **17 June 2008** to say that he had read and fully understood the Loan Offer Letter and the terms and conditions contained therein.

A two year fixed interest rate of 4.85% was applied to the mortgage loan account on inception. In accordance with **Part 4 -Special Condition (a) (i)**, on expiry of the two year fixed interest rate in **August 2010**, the Provider had the discretion to offer the Complainant another fixed interest rate and/or another choice of interest rate, and if the Complainant chose not to select either option, the interest rate would default to a tracker variable interest rate of ECB + 1.35%.

The term "*draw down*" is not clearly and specifically defined in the Loan Offer Letter and a question arises as to whether "*draw down of the Loan*" in this case means the drawdown of the first stage payment, the drawdown of the last stage payment or the drawdown of the entire loan, that is the collective draw down of each stage payment. **General Condition 9 (d)** provides that if the loan is to be drawn down in stages, as is the case in respect of the mortgage loan that is the subject of this complaint, then the term "*Loan*" means that amount of the loan that has already been drawn down and the monthly payment of principal and interest equates to an amount as having regard only to the amount of the entire loan which has already been drawn down. It is not clear how this definition of the term "*Loan*" applies to **Condition 9 (b)** which relates to something that is required "*prior to the drawdown of the Loan*". However **General Condition 1** also defines "*Loan*" as "*the mortgage loan described in this Mortgage Loan Offer Letter ("Offer Letter") the details of*

which are set out in Parts 1 to 5 inclusive". It is my view therefore that "prior to the drawdown of the Loan" means prior to the drawdown of any part of the loan.

This view is reinforced by **Part-4 Special Conditions** attaching to the Loan Offer Letter which details that the Complainant must comply with certain conditions to the Provider's satisfaction "*before the Loan, or any part of it, can be drawn down*".

As outlined above, **Special Condition, Part 4(a)** provides that the "Loan will issue in stages in line with the approved Architect's/Engineer's/ Surveyor's Report". **Special Condition Part 4(a) (ii)** goes on to specify how each stage is to be drawn down. **Special Condition Part 4(a) (ii) (b)** requires a **Cheque Requisition form** and a **Property Report Certificate** to be furnished to the Provider in order "*to drawdown each stage.*" Further, **General Condition 9(d)** provides that each stage of the loan can only be drawn down on foot of an architect's certificate or that of some other suitably qualified person in the Provider's "*prescribed form*" or in such a manner as specified by the Provider in the Special Conditions as outlined above. I have been provided with a copy of the Provider's **Property Report Certificate** (being in the Provider's prescribed form) which is required to be signed by an engineer.

I will consider the Provider's property report certificates in detail later in my decision, however, I note that the property report certificate refers to "*First...Interim ....Final*" with respect to applying for the release of funds at each stage of the self-build. In the absence of the Complainant or this office having been furnished with a specific schedule from the Provider outlining the stage payments and the amount of each stage payment, it is not clear if the Provider's property report certificate envisaged that there would be a number of interim stage payments or only three stage payments. It is disappointing that this is not clearly set out in the Loan Offer itself.

In light of the above consideration of the terms "*loan*" and "*draw down*", I am of the view that reference to "*draw down*" in the Loan Offer must be in regard to stage drawdowns in line with **Special Condition 4 (a) (ii)** as it clearly makes reference to issuing the loan in stages and how a borrower is to go about drawing down each stage.

**General Condition 9 (b)** requires the Complainant to inform the Provider of any change in his personal or financial circumstances prior to draw down of the loan and moreover the Provider can refuse to allow the loan to be drawn down and withdraw the Loan Offer. In circumstances where I am of the view that "*draw down*" in this case refers to the drawdown of each stage payment, I am of the understanding that **General Condition 9 (b)** would therefore indicate that the Complainant was obliged to notify the Provider of any changes to his financial or personal circumstances that would likely reduce his repayment capacity when applying for the release of any part of the loan, that is when applying for

/Cont'd...

each stage payment. **General Condition 9 (b)** also details that the Provider may refuse to allow the loan to be drawn down and withdraw the offer letter if repayment capacity was reduced. While I acknowledge that “*drawn down*” is not clearly defined, given the loan in this case is to be drawn down in stages, I am of the view that **General Condition 9 (b)** gives the Provider the discretion to refuse to draw down any of the stage payments of the entire loan in the event of a change in the Complainant’s financial or personal circumstances.

**General Condition 9 (c)** states that the mortgage loan must be drawn down within three months of the date of the Loan Offer, that is before on or around **12 September 2008** subject to the Provider extending this period at its discretion. It is unclear as to whether the mortgage loan must be drawn down in full within three months of the date of the Loan Offer or whether the first stage payment must be drawn down within those three months. If it was the case that the entire mortgage loan must be drawn down within three months then a question arises as to why the Provider did not specify this in the Special Conditions by inserting the words “*in full*”. Moreover, I consider the time period of three months to draw down all stage payments for a self-build project to be totally unrealistic. I would have expected the Provider to have given the Complainant a period of between at least 12-18 months to draw down all stage payments for a self-build project. While I appreciate that the self- build project at the centre of this complaint was not a typical self-build project, in that, the Complainant had already completed substantial work on the property and its environs prior to applying for the mortgage loan, it is my view that three months was not a reasonable time within which to expect the Complainant to drawn down the entire loan. It is most unreasonable that the Provider did not provide the Complainant with a schedule of stage payments specifying when exactly each stage payment ought to be drawn down.

The Complainant’s solicitor sent a letter dated **08 July 2008** to the Provider requesting that the Provider forward a “*cheque for the first stage payment in the sum of €30,000*”, being within three months of the date of the Loan Offer Letter. The Complainant’s solicitor, in compliance with **Special Condition a (ii) (b)** of the Loan Offer Letter, enclosed a **Property Report Certificate** dated **04 July 2008** signed by an engineer and a **Cheque Requisition Form** dated **07 July 2008** with the letter dated **08 July 2008**. The **Property Report Certificate** dated **04 July 2008** noted the following;

“ ...  
*First*             *Interim*             *Final*           

...  
*Total costs to complete:*            €110,000

....  
*Site Value:*            €75,000  
*Value of Work to Date:*            €30,000”

/Cont’d...

This was the Provider's prescribed form and as noted above, there is an option to be selected which refers to First, Interim and Final. This clearly refers to the different stages of drawdown, as agreed in the Loan Offer. I note that the "First" box is ticked.

The Complainant's solicitor completed and signed the Provider's **Cheque Requisition Form** on **07 July 2008**. The **Cheque Requisition Form** noted the following as regards the stage payments;

"STAGE PAYMENTS REQUESTS (IF APPLICABLE) First  Interim  Final  "

I note that the "First" box is ticked on the **Cheque Requisition Form**.

The amount of €30,000, reflecting the value of the work to date, was drawn down on **08 August 2008** as detailed in the Complainant's mortgage statements. This amount was clearly drawn down within three months of the date of the Loan Offer.

The Provider appears to have sent an internal mail to the Complainant's mortgage adviser in the Provider's branch on **08 July 2008**, detailing as follows;

"Completion Date on this application has expired. Date has now been set to 10/02/2009.

Please revise Completion Date on [Provider's system]."

The Provider's internal notes show that a similar internal mail was sent on **25 July 2008**, which details as follows;

"...

Please note that the current Completion Date is 25/08/2008 and our records indicate that not all conditions have been met.

Please use [Provider's system] to examine all outstanding requirements.

If the current Completion Date is inaccurate, please amend this [...]"

As highlighted above, it is unclear as to what the "Completion Date" refers to. It seems likely that the reference to "Completion Date" here means the date within which "[a]ll and any Conditions Precedent (in Part 3) must be complied with in full to the Provider's satisfaction". In accordance with **General Condition 9 (c)** as outlined above, the conditions precedent (as outlined in detail above) must be complied within two months of the date of the Loan Offer, that is before on or around **12 August 2008**. It appears that this date was

/Cont'd...

ultimately extended to **10 February 2009**, which is seven months after the signing of the Loan Offer. In accordance with **General Condition 9 (c)**, the Provider had discretion to extend the time period of two months.

The Complainant's solicitor subsequently sent a letter to the Provider dated **06 August 2008** (again being within three months of the date of the Loan Offer Letter) requesting a second stage payment of €65,000 in order to discharge a loan from another Provider in accordance with **Special Condition a (vi)** of the **Loan Offer Letter**. The letter dated **06 August 2008** notes as follows;

".....

*We have had an attendance on [name of business/mortgage advisor] of [name of Provider's branch] and he has confirmed to us that you have indicated that it will be possible to withdraw a further €65,000 on the basis of the value of the site. This will enable us to discharge the liability to [another Provider] in full....."*

The Complainant's solicitor enclosed a **Cheque Requisition Form** dated **06 August 2008** with the letter. The Complainant's solicitor does not appear to have completed the "Stage Payments Requests" section of the **Cheque Requisition Form** by ticking "First", "Interim" or "Final" however the "Subsequent Stage Payments" section was completed wherein the Complainant's solicitor ticked the box noting that "Site Title in applicants name or papers lodged for registration". The "First Stage Payment only" section and "Final Stage Payment" sections were not completed by the Complainant's solicitor.

The amount of €65,000 was drawn down on **12 August 2008** as detailed in the Complainant's mortgage statements. It is clear from the above that the first and the second stage payments were drawn down within the first three months of the date of the Loan Offer.

I understand that the initial two year fixed interest rate on the Complainant's mortgage loan account expired in or around **August 2010**. I have not been provided with a copy of any correspondence that issued from the Provider to the Complainant on expiry of the two year fixed interest rate. I note from a letter dated **7 April 2014** from the Complainant's solicitor to the Provider that the Provider issued a letter dated **8 July 2010** to the Complainant to let him know that the initial fixed rate would expire on **7 August 2010** "and gave him five options in accordance with the original Letter of Loan Offer and indicated that if the Bank did not hear from him by the 7<sup>th</sup> August 2010 his home loan would in accordance with his letter of loan offer automatically move to the Variable Tracker 1.35% referred to above and the loan proceeded on this basis". I note that it is not in dispute

/Cont'd...

between the parties that the interest rate defaulted to a tracker rate variable of ECB + 1.35% since **August 2010** and has remained on that rate since.

The Complainant's solicitor sent a letter to the Provider dated **03 August 2010**, some 26 months after the date of the Loan Offer Letter, noting the following;

*"[...]We refer to previous correspondence herein and enclose you herewith copy of letter dated the 30<sup>th</sup> ult. Received from our client's Engineer together with the original Certificate referred to therein and we await further drawdown in the sum of €50,000".*

The **Property Report Certificate** dated **27 July 2010** and signed by the Complainant's engineer notes the following;

*"[...]*

- *Some works are still outstanding-  
Specify works completed to wallplate*

<i>Total costs to complete</i>	<i>€50,000</i>
--------------------------------	----------------
- *Site Value: €90,000*
- *Value of work to date: €80,000*

*[...]"*

I note that there is a tick beside "*First*" under the stage payment section which appears to be an error on the part of the Complainant's engineer as the first stage payment had already been applied for in **July 2008**.

The Complainant's solicitor sent a **Cheque Requisition Form** dated **01 August 2010** to the Provider on **11 August 2010** wherein the Complainant's solicitor ticked the box beside "*Interim*" under the heading "*Stage Payments Request*".

The Provider's internal mail to the mortgage advisor of the Provider's branch dated **17 August 2010**, details as follows;

*"We have received a cheque requisition form and an engineer's property report cert in order to draw down the next stage. However it has been 2 yrs since a cheque was drawn. Before we make a decision on whether to proceed we will need a full credit review done on the applicant and also an explanation on why the build is taking this long. What stage is the property at now and it states that only €50k is required to*

/Cont'd...

*complete yet there was still 115k left to draw. Please revert when you met with the customer."*

The internal mail dated **23 August 2010** from the Complainant's mortgage adviser of the Provider's branch to the Provider's credit department, details as follows;

*"I have sent up the [updated] set of accounts & confirmation that [Complainant's] tax affairs are [updated] and details of borrowings. The reason that the house is taking so long is that he was in no rush to complete the house as he is living with his parents rent free. He has put in 30k of his own funds & needs 50k to roof the house & install windows. He advised me that he is owed favours from a number of trades men & reckons that he will get the house plastered & wired free of charge. He is self employed but most of his work is through [name of company] see [account number] re payment from [name of company] re work done".*

The Provider's credit department replied by internal mail dated **24 August 2010** as follows;

*"Hi [employee of the Provider], from Accounts received to 12/09 repayment capacity would not exist, drawing of only 17k.*

*However note turnover appears to be up considerably for first 5 months of this year and excellent account operation.*

*Can you advise the following*

- *What does customer project his gross and net profit for 2010 at*
- *Will 50k completely complete property and will Cert of Compliance and final inspection be available with retention here."*

The mortgage adviser of the Provider's branch replied by internal mail dated **31 August 2010** as follows;

*"Customer is confident that 50k will be his final drawdown, he said that he will use approx. 15k of his own funds to complete property. Please advise next step to drawdown the 50k."*

The Provider's credit department replied by internal mail dated **01 September 2010** as follows;

/Cont'd...

*“If 50k is all he requires then we will need to ensure we get a final inspection and a cert of compliance in order to close the account and perfect our security. Therefore I would suggest only allowing draw down of 30k and retaining 20k until he can produce these documents”.*

The mortgage adviser of the Provider’s branch responded to the Provider’s credit department by internal mail on **01 September 2010** noting the following;

*“[Complainant] has invested well over 30k of his own funds into this house so far. He will not be able to complete the house on the next 30k & has only about 5k of his own funds left for the house. What are his options as the final 20k won’t be released until final valuation is complete?”*

The Provider’s credit department responded on **02 September 2010** noting the following;

*“With self builds there is always a level of retention held back pending a final inspection and cert of compliance. As per the terms of this offer and retention was 5% of the loan amount i.e. Eur 10.5k. This would be the minimum retention we could hold. Please advise.”*

The Provider details that the Loan Offer Letter allowed the Provider to retain 5% of the mortgage subject to receipt of a final valuation in respect of the property and a Property Report Certificate. This is clearly provided for in **Special Condition (a) (ii)(c)** of the Loan Offer Letter as outlined above.

The mortgage adviser of the Provider’s branch subsequently sent an internal mail to the Provider’s credit department on the same day asking whether it was possible *“to drawdown 38k now & hold back 12k on receipt of the final valuation”*.

The Provider’s internal mail from the Provider’s credit department to the mortgage adviser of the Provider’s branch dated **06 September 2010** details that the Provider agreed to draw down €38,000 with the additional €12,000 to be drawn down on receipt of the final valuation in accordance with **Special Condition (a) (ii) (c)**. It is reasonable to conclude from the exchange of internal mails between the Provider and the Complainant’s mortgage adviser of the local branch of the Provider that €50,000 (made up of €38,000 to be drawn down straight away and €12,000 to be retained pending final inspection and certificate of compliance from the Complainant’s architect) was the final stage drawdown and the amount required to ultimately complete the build by roofing and installing windows.

/Cont’d...

The Complainant's solicitor sent a letter to the Provider on **21 September 2010**, detailing as follows;

*"We refer to previous correspondence herein culminating with our letter of the 11<sup>th</sup> of August 2010 to which we have not received any response.*

*Our client has now been in contact with us stating that you will not issue a cheque for €50,000 until all work has been completed and therefore, at the present time we are to requisition €38,000 on his behalf. Accordingly, we confirm that it will suffice to forward €38,000 at this point in time."*

The mortgage statements submitted in evidence show that €38,000 was drawn down on **24 September 2010**. I understand that the Complainant intended to draw down €12,000 upon submitting the final valuation and Property Report Certificate to the Provider. I note from the Provider's internal mail of **04 October 2010** that the Provider received a new **Property Report Certificate** showing the value of works completed as "38k" however the report that the Provider received on **27 July 2010** showed the value of work up to that date as being €80,000.

The Complainant's solicitor sent a letter to the Provider dated **04 March 2011** enclosing a **Cheque Requisition Form** together with a **Property Report Certificate** from the Complainant's engineer. The Cheque Requisition Form submitted at the time does not appear to be signed by the Complainant's solicitor nor does it state the amount of stage payment required.

The Complainant's solicitor sent a further letter dated **08 March 2011** to the Provider requesting that €50,000 be drawn down on the Complainant's mortgage loan account.

The Provider's internal mail system shows a mail dated **16 March 2011** which details as follows;

*"We have been asked to issue more funds on this application. The original offer issued in June 2008 & drawdowns took place in 7/2008, 11/2008, 9/2009.*

*Before any further funds can issue please advise:*

- 1) Up to date financial circumstances of customer supported by relevant documents income, outgoing, assets, liab[ilities], tax position.*
- 2) Explain reason why this property is taking so long to be constructed-it is now 2.5 years from original drawdown."*

/Cont'd...

I note that the above internal mail suggests that previous drawdowns took place in **July 2008, November 2008** and **September 2009**. I understand that "11/2008" in the above internal mail is a typographical error as the second drawdown took place in **August 2008** as opposed to **November 2008**.

I understand that "9/2009" in the above internal mail is a typographical error as the final drawdown took place in **September 2010** as opposed to **September 2009**.

The Provider's internal mail system shows a further mail dated **16 March 2011** which details as follows;

*"No further [draw]down to take place until Credit have reassessed this case-see email to branch of today's date seeking up to date financial details".*

The mortgage adviser of the Provider's branch sent an internal mail to the Provider's credit department on **22 March 2011**, noting the following;

*"The reason that the house is taking so long is that [the Complainant] is doing most of the work himself & was in no particular hurry to finish it.*

*The last drawdown was sept 2010*

*His personal [account] [account number] is operating very well grade 2m as is his Business [account] [account number]*

*A set of projected [accounts] for 2010 were sent to Mortgages sept 2010.*

*He works for [name of company] at present & receives approx. 4k per[month] credited to his business [account].*

*I will ask customer for the 2010 set of accounts."*

The Complainant subsequently issued the Provider a letter dated **14 April 2011** enclosing a **Cheque Requisition Form** dated **14 April 2011** and a **Property Report Certificate** dated **13 April 2011**. The **Property Report Certificate** dated **13 April 2011** and signed by the Complainant's engineer notes the following;

*"[...]*

- *Some works are still outstanding-*

/Cont'd...

- |                                 |                 |
|---------------------------------|-----------------|
| <i>Total costs to complete</i>  | <i>€45,000</i>  |
| • <i>Site Value:</i>            | <i>€90,000</i>  |
| • <i>Value of work to date:</i> | <i>€110,000</i> |

*[...]*”

The **Cheque Requisition Form** dated **14 April 2011** requests a stage payment in the amount of €35,000 as soon as possible from the Provider. I note that the Complainant’s solicitor ticked the box beside “*Interim*” on the **Cheque Requisition Form** under the heading “*Stage Payment Requests*”.

The mortgage adviser of the Provider’s branch sent an internal mail to the Provider’s credit department on **14 April 2011** noting the following;

*“I have sent accounts for 2010 today in the post. They show a net profit for e256. with Directors Remuneration e15586. Spoke with [Complainant] yest[erday] regarding his change in figures, don’t think he is too sure of what his figures are as now he says he will need the full e210k to finish off the house. I will be talking with his Architect tomo[rrow] in relation to up to date figure on property. I will keep you updated.”*

The Provider’s internal mail dated **19 April 2011** details as follows;

*“Income has reduced from 40k to 15k?? We have an issue with repayment capacity you need to address this first? We could not allow any more funds to issue when income has reduced so much?*

*After that architect would need to give a full breakdown as to what stage property is currently at and what is left to be done and full breakdown in costings.”*

On **3 June 2011**, the mortgage adviser of the Provider’s branch sent an internal mail to the Provider’s credit department as follows;

*“As you can see from recent mails there’s been an issue regarding income, engineer’s reports etc. I’ve recently met with the customer, his engineer and I’ve spoken to the accountant. Hopefully I’ve clarified some recent queries. I’ll send the most recent accounts emailed to me by the accountant (currently not certified, but will be when required), an [updated] property report cert and written confirmation from the engineer regarding the associated costs for completion in the bag today.  
[...]*

/Cont’d...

*One of the reasons there has been such a delay in completing the build is that [Complainant] has been so busy. While he has been completing much of the work himself he has been unable to take a lot of time from work to complete the house. Not ideal as he's admitted but he's genuinely trying to keep the company momentum going with good contracts and at the same time balance out the house build.*

*The engineer has provided for breakdown costs for completion totalling e77k and has indicated this on the report. The original drawdown of e65k was for the site. In Aug '08 e30k was drawn down and in Aug' 10 a further 38 k. [Complainant] has input in excess of e30k of his own funds to the build. The final e77k is required to complete subject to the usual requirements.*

*[Complainant] admits his figures were "out" last August/Sept when he advised us that e50k would be sufficient to complete the build.*

*I would be grateful if you would assess when you receive the docs and revert to me for any further info."*

The Provider's internal mail dated **13 June 2011** details as follows;

*"Max income we can allow here is 22,275 this is leaving ndi [net disposable income] at 573 v 1200 67% exception?*

*You have not established any repayment capacity here I cannot support at this level of an exception. When approved his income was EUR 59,400?"*

*What stage is the property at architect has only given us a breakdown of works to complete?*

*You mention funds drawn for site however the site was gifted? So we are not been given the full picture here?*

*Really not sure what we can do at this stage with no repayment capacity and application so out of date he may need to look at new application-equity release for the remaining funds if he has a partner to go on mortgage who has repayment capacity? Please advise?"*

It is clear from the above that the Provider's credit department raised concerns in relation to the reduced income of the Complainant following an assessment of his accounts and financial information. It also appears that the Complainant was not accurate in terms of providing information in relation to what stage the build was at and how monies were

/Cont'd...

being used to complete the build. The Provider had been informed by the Complainant in **September 2010** that €50,000 was all that was required to install a roof and windows in order to complete the build.

It appears that the Complainant had discussions with his mortgage adviser in the Provider's branch on foot of which the Provider's branch issued a letter dated **02 September 2011** to the Complainant detailing as follows;

*"I refer to our recent discussions regarding your [Provider] mortgage and as you are aware we have been working to try to accommodate your request to draw down further funds from your mortgage.*

*I've previously outlined the difficulties that [the Provider] have with the ongoing position and in particular, your request to draw down further funds.*

*At the time of your original application approval in May 2008 your income details were calculated at circa €55k. Unfortunately in the current climate this income has been greatly reduced and now stands at approximately €27k these figures were taken from your most recent accounts. (provided to us on request)*

***This clearly reduces repayment capacity and based on income multiples substantially reduces your current mortgage entitlement to circa €110k.***

*Under Section 9 ("Draw Down") of your Loan Offer Letter you will note that*

*(b) The Borrower shall notify the Lender of any change in the Borrower's personal or financial circumstances prior to draw down of the loan. Without limiting its ordinary meaning "financial circumstances" shall include actual or threatened redundancy or other matter which would in the Lender's opinion be likely to reduce the Borrower's repayment capacity. In the event of any change in financial or personal circumstances the Lender may refuse to allow the Loan to be drawn down and withdraw this Offer Letter.*

*In August 2010 you had applied for a stage drawdown in order to complete the property. At that time you had advised the Bank that €50,000 would be sufficient to complete the property and would be your final drawdown. The funds were approved subject to the usual final drawdown conditions i.e. €38k was released*

/Cont'd...

*with the final €12k to be drawn on provision of a Final Valuation. Confirmation of Fully Comprehensive Fire cover etc.*

*Subsequently you reverted advising us that a further €65k would be required thus increasing your mortgage to €210k (original approval) – which for the reasons outlined above was no longer available.*

*The Banks mortgage department have also expressed concern over the time taken to complete the build. While I acknowledge that you are self-employed and as such you have commitments that need to be attended to, the length of time taken to complete the build has only contributed to the situation which may not have arisen had the property been completed at an earlier stage.*

***We have suggested alternative options for you in order to support your case. There was one particular option that you were open to explore and an application was issued to you on July 25<sup>th</sup> for completion. Until such time that we have explored either this or an alternative option the Bank are unable to release further funds.***

*I can understand the frustration that this may cause and I would welcome further discussions with you so that we can proceed. Please do not hesitate to contact me at this office". (my emphasis)*

The above evidence clearly demonstrates that the Provider considered the Complainant's request and formed the conclusion that it was not in a position to accede to the Complainant's request to draw down further funds in **March 2011** due to a material change in his financial circumstances. In particular, I note that following an assessment of the Complainant's financial information at the time in accordance with the Provider's affordability assessment criteria, the Provider concluded that the Complainant's income had reduced from approximately €55,000 to approximately €27,000 since the time the loan has first sanctioned in **June 2008**. I consider this to be a significant reduction in income on the part of the Complainant which warranted a review on the part of the Provider of the Complainant's affordability to service the loan already drawn down and assess whether the Complainant was in a position to afford increased monthly repayments if further funds were released.

I further note that the Provider took issue with the fact that this request for the release of further funds was made 33 months after the inception of the loan in **June 2008**. However, it is important for the Provider to appreciate that the Loan Offer does not specifically put a time limit on the drawdown of the final stage payment. As discussed in earlier paragraphs,

/Cont'd...

despite **General Condition 9 (c)** stating that “*the loan must be drawn down within three months*” from the date of the Loan Offer it is unclear as to whether this means that the entire loan amount in full must be drawn down within three months or whether the first stage payment ought to be drawn down within those three months.

I accept that a request for the release of further funds some 32 months after the drawdown of the first stage payment and after having agreed with the Provider that the final drawdown had already taken place in **September 2010** was somewhat out of the ordinary and not in line with previous discussions that had taken place between the Complainant, his mortgage adviser of the Provider’s branch and the Provider’s credit department.

However, I believe these circumstances could have been avoided if the Provider had set out clearly what its requests for drawdown were. In the circumstances, I note that the Provider invited the Complainant to consider whether he could make a new joint mortgage loan application with another party to increase his repayment capacity for the further amount of monies required to be released. The above letter suggests that a new application was issued to the Complainant on **25 July 2011** however I have not been furnished with documentation in respect of a new mortgage loan application. The Provider has indicated in its submissions that it does not hold “*a copy of the blank mortgage application which was handed to the Complainant on 25 July 2011*”. It is disappointing that the Provider has not retained a copy of the correspondence that issued to the Complainant on **25 July 2011**. However the Complainant’s solicitor’s letter of **7 April 2014** suggests that the Complainant did receive “*these new mortgage documents*” with an “*undated Compliment Slip with a suggestion that he and his father should sign an application for a new Mortgage*”. The Complainant was not agreeable to this course of action as the “*new mortgage*” being offered “*would have a higher interest rate and a shorter term*”.

The evidence shows that the Complainant again approached the Provider about drawing down more funds under the mortgage loan in **May 2012**. The mortgage adviser in the Provider’s branch sent an internal mail dated **29 May 2012**, to the Provider’s credit department noting the following;

*“[Complainant] wants to drawdown more funds in order to finish his house, because his income has reduced since the mortgage was sanctioned, his income now is approx. 27k [per annum] customers father [Complainant’s father’s name] will go as a guarantor on the mortgage.*”

/Cont’d...

*[Complainant's father] is a retired farmer, [age ...], he still farms on a smaller scale, his income is 35k per annum, incl the [old age pension] & his farm entitlements. [Complainant's father] has significant savings also. Please advise if it is possible for [Complainant's father] to go guarantor on the mortgage."*

The mortgage adviser in the Provider's branch states the following in a signed statement dated **8 August 2015**;

*"[Complainant] called me in May/June 2012 looking to draw-down more funds. As his income had dropped significantly & due to the time frame between each draw down, he was advised that we could not establish repayment capacity, [Complainant] was advised that a potential alternative would be to get another party with repayment capacity to go on a joint mortgage application with him. I advised [Complainant] that a Tracker rate would not be available on any new application (the offer of tracker interest rate products were removed by the Bank in 2008). W[e] never received a joint mortgage application for processing. [Complainant] was unhappy that a tracker rate would not apply to any potential new application, however it was reiterated to him that this was in fact the case (as the tracker interest rate products were removed by the Bank in October 2008)."*

I note that despite the Provider's refusal to draw down further funds in **2011**, the Complainant approached the Provider again in **May 2012** to request the release of funds. It was the Complainant himself who put forth the proposal to include his father as guarantor through his mortgage adviser. At the time, the Complainant's father was still working part time as a farmer and his annual income was €35,000 whereas the Complainant's income was €22,000. The Complainant's father also had substantial savings.

As the Loan Offer Letter was an existing contract between the Complainant and the Provider, I accept that this would involve a significant alteration to the fundamental terms and conditions of the Loan Offer Letter dated **12 June 2008**. The above evidence shows that the Provider instead offered the Complainant an alternative option to submit a new joint mortgage application with his father which would be subject to a higher interest rate. A question arises as to why the Provider would consider it acceptable to grant a joint equity release to the Complainant and his father at a higher interest rate to his original loan. While this may be a matter within the Provider's commercial discretion, it has not offered any reason as to why it felt the loan with a higher interest rate was more suitable. I have not been provided with any evidence to suggest that the Complainant pursued the option of applying for a new mortgage on a joint basis with his father.

/Cont'd...

The Complainant's accountant sent a letter dated **09 December 2012** to the Complainant's mortgage adviser of the Provider's branch, which details as follows;

*"As you know, [the Complainant] has a tracker mortgage with [the Provider] for a property which is partially completed in [property location].*

*At present, [the Provider] has refused to issue the final drawdown of the loan, which would enable the house to be completed.*

*Recently, you met with [the Complainant] and his father, with regard to his father acting as guarantor for the final drawdown, due [to] his significant personal assets. Unfortunately, this has not yet proceeded as [the Provider] wishes to show this as a new loan, as opposed to drawdown of an existing loan.*

*What we would appreciate at this stage is:*

- 1. A written explanation of the reasons that [the Provider] is refusing to issue the drawdown of the existing mortgage, so that we may evaluate and respond to these issues.*
- 2. Full details of the proposed loan to be guaranteed by his father, with detail in relation to the interest rate applicable, and the difference in relation to the tracker rate available on the existing facility.*

*It has been brought to our attention by yourself and your predecessor that [the Complainant's] income was a factor in the non issuance of the drawdown. I wish to reiterate that [the Complainant] is drawing approximately €26,000 from his company in the form of a weekly direct debit of €500. For tax purposes, this figure is split between his wage and expenses, and is the most tax efficient method extracting funds from his company.*

*Obviously, if his income is an issue for the bank, it would make sense to issue the loan via his existing tracker mortgage, as repayments would be less than a standard loan.*

*As the interest relief applicable to mortgages will not apply to draw downs after the 31 December 2012, you will appreciate that this is a matter of urgency for [the Complainant].*

/Cont'd...

*It would also, it appears to me, be of no interest for the bank to have security for a loan consisting of an unfinished house. It would be in everyone's interest to find a reasonable solution to enable the house to be completed.*

*To that end, [the Complainant] also wishes to discuss the possibility of drawing a loan through his company for approx. €30,000 for the time being."*

The mortgage adviser of the Provider's branch responded to the Complainant's accountant by way of an undated letter, which details as follows;

*"With regard to your letter dated the 09/12/2012 in relation to the above mentioned, please find attached a letter sent to [Complainant] on the 02/09/2011 which outline the reasons why we are unable to drawdown further funds on mortgage account [ending 6548].*

*The details of the proposed loan with [the Complainant] & his father are as follows: €65,000 over 20 years.*

*Interest rate of 4.5% variable.*

*The interest rate on the existing mortgage is a tracker rate of 2.1% variable, the new loan is 4.5% variable.*

*Please note this proposed loan is subject to an application being submitted & assessed. In relation to [the Complainant] drawing down a loan through his company please get [the Complainant] to contact me so that we can arrange to meet in order to submit an application."*

The Provider has stated in its submissions that the Complainant did not avail of the opportunity to submit a new joint mortgage application as suggested and therefore a formal offer never issued to the Complainant in this regard. I have not been provided with any evidence by either of the parties to suggest otherwise.

The Complainant's solicitor sent a letter to this Office dated **7 April 2015** which makes reference to a letter sent by the Complainant's accountant to the Provider dated **17 December 2012**. The Complainant submits that no response was received to this letter. A copy of the letter dated **17 December 2012** has been submitted by the Provider in evidence and details as follows;

*"Thank you for your letter which I received today in relation to my queries.*

/Cont'd...

*The main point which I feel should be addressed in relation to the proposed new loan, is in relation to the difference between the existing tracker and the new variable term.*

*If the income of [the Complainant] is an issue, why is the bank proposing that the balance of the loan be given at a higher interest rate over a shorter term than that of the existing loan? This is a key question that we require an answer to.*

*I find it hard to understand the logic behind this thinking. On his current income [the Complainant] could quite comfortably afford the additional repayments required to fund his mortgage repayments. Assuming they [..] were approximately €1000 per month, this would leave him with an income of €15,000 per annum, just under €300 per week.*

*[.....]*

*The rejection of [the Complainant's] drawdown on the basis of the reduction in his income seems utterly flawed to me. As I previously stated, it makes no sense for the bank to hold a loan over an incomplete property.*

*Finally, your point in relation to the mortgage department[s] concern over the length of time taken to complete the build seems unjustifiable. [Complainant] is working full time and is attempting to get the best possible deals in relation to work done on his house. He was not aware that the bank considered there was a time limit that he had to work towards. In my own experience of building, the process can be a long term affair, taking a number of years depending on individual concerned.*

*You might answer and supply the following:*

- 1. If the income of [Complainant] is an issue, why is the Bank proposing that the balance of the loan be given at a higher interest rate over a shorter term than that of the existing loan?*

*/Cont'd...*

2. *Please supply an analysis of the difference between the repayments that would be made if the drawdown were released under the existing tracker and the proposed variable loan.*

The Provider has been asked by this Office to comment as to why the above letter was not responded to. The Provider submits that *"a response issued to [Complainant's accountant] in December 2012 (letter undated)"*.

Following a consideration of the exchange of correspondence between the Complainant's accountant and the Provider, I am of the view that the undated letter from the Provider to the Complainant's accountant was a response to the letter dated **9 December 2012** from the Complainant's accountant as opposed to being a response to the letter dated **17 December 2012**. I have not been provided with a copy of the Provider's response, to the letter from the Complainant's accountant dated **17 December 2012**. Therefore, I accept that no response was provided which is disappointing.

The next substantive exchange of correspondence occurred in **2014**. In a letter dated **7 April 2015** to this office, the Complainant's solicitor indicates that the Complainant wrote directly to the Provider in **January 2014** *"seeking the final stage payment on his home loan and seeking reasons as to why the loan was being refused"*. The Complainant's solicitor contends that the Complainant did not receive a response to this letter and subsequently requested his solicitor, at the time, to engage with the Provider. I have only been provided with a letter dated **10 January 2014** from the Complainant to the Provider however the date of receipt stamp suggests that this letter was received by the Provider on **14 January 2015**. The Complainant's solicitor later refers to a letter dated **10 January 2015**, a copy of which I have not been provided with. It appears that the letter dated **10 January 2014** should have read **10 January 2015** which I understand was responded to by the Provider.

In any event, the Complainant's solicitor sent a letter dated **7 April 2014** to the Provider's branch noting that it *"was entirely disingenuous of the Bank to attempt to justify refusing to allow [the Complainant draw down the balance of his mortgage on the grounds of alleged change in financial circumstances]"* and requested *"immediate confirmation"* that the balance of the Complainant's loan would be released. In circumstances where the Complainant's solicitor did not receive a response, I understand that follow up letters dated **16 April 2014**, **8 May 2014** and **22 May 2014** were sent to the Provider's branch. I note that the Provider, in its submissions, has apologised to the Complainant for any inconvenience caused as a result of correspondence to the Provider's branch not being responded to. I note that reference to this correspondence was only made in the Complainant's solicitor's letter to this Office dated **7 April 2015** and so the Provider was

/Cont'd...

not afforded the opportunity to address this issue in its **Final Response Letter** dated **24 February 2015**. The Provider has offered the Complainant €500 as a gesture of goodwill. It is unclear as to whether the Complainant has accepted this offer.

The Complainant has indicated that a meeting took place between him, his accountant and the mortgage adviser of the Provider's branch on **17 June 2014** to query why the final draw down was not being released. The Provider has not furnished this Office with any records/notes from this meeting. It is disappointing that I have not been provided with any contemporaneous notes from any meeting(s) between **June** and **August 2014**.

However, based on the correspondence from both parties, I do not think that there is a dispute that a meeting did take place between **June** and **August 2014** and the parties appear to be in agreement as to what was discussed at the meetings.

Further, I note from the undated signed statement by the mortgage adviser in question that he refers to a meeting which took place in **August 2014** between the Complainant and his accountant wherein he advised the Complainant and his accountant that the main issue was the significant reduction in the Complainant's income. I understand from the signed statement that the Complainant's accountant "*advised that this wasn't his true income & the accounts were showing the minimum in order to reduce his tax.*"

I understand that during the meeting with the Provider, the Complainant questioned why the Provider granted him three short term loans in the intervening period from **2011** to **2014** despite stating that the Complainant did not have the capacity to repay the final drawdown on the tracker interest rate applicable to his mortgage loan account.

The Complainant entered into a Business Hire Purchase Agreement with the Provider for a finance amount of €13,000 in respect of the hire purchase of a commercial vehicle repayable over a term of 48 months/4 years. The Complainant signed and accepted the Business Hire Purchase Agreement on **25 March 2011**. A copy of the Business Hire Purchase Agreement has been submitted in evidence by the Provider and it would appear that this was drawn down by the Complainant in a personal capacity. The Provider contends that this was a secured Business Higher Purchase Facility which carries different risk characteristics compared to other loan/facility types. The Provider submits that "*the risk on this facility was deemed acceptable*" to the Provider and was approved in line with the Provider's lending policy. I accept that the Provider can apply different credit assessment criteria and credit policies to different products and that ultimately the Provider has commercial discretion to make a commercial decision to make a loan offer on foot of its assessment methods.

/Cont'd...

I note that the Provider also advanced two business loans to the Complainant's business as set out below;

- The Provider issued a letter of approval dated **12 September 2013** to the Complainant in respect of a term loan for the amount of €25,000 subject to a variable rate of 6.74% repayable over 60 months/5 years. This loan was drawn down in a business capacity. The Complainant signed a letter of guarantee in the amount of €28,000.
- The Provider issued a letter of approval dated **03 April 2014** to the Complainant in respect of a term loan for the amount of €15,500 subject to a variable rate of 6.74% repayable over 36 months/3 years. This loan was drawn down in a business capacity. The Complainant signed a letter of guarantee in the amount of €42,000.

Whilst I accept that the Complainant acted as a personal guarantor in respect the above two term loans, the term loans were drawn down by the Complainant's business. Given that the Provider accepted the Complainant as personal guarantor to both short term loans it follows that the Provider was satisfied that the Complainant demonstrated a repayment capacity. That said, while the Provider's approval of these two short term loans illustrates that it accepted the Complainant had the repayment capacity at that point in time, it did not necessarily indicate that he had the capacity to meet long-term mortgage repayments of a mortgage amount of €210,000. That said, I can understand the Complainant's frustration that he could secure a more expensive finance from the Provider for short-term loans but not a long-term less expensive finance to complete his home.

The Provider's solicitor at the time sent a further letter dated **15 July 2014**, which appears to have been sent on foot of the meeting that took place in **June 2014**, enclosing a copy of a professional estimate from a building surveyor outlining the amount required to complete the property build. The estimate showed that a sum of €77,500 was required. A question arises as to why in **2010** the Complainant, was of the view that €50,000 was all that was needed to complete the build. The letter states that the Complainant "*is entitled to the balance of his Tracker Mortgage and it is not acceptable that the Bank should attempt to renege on paying out the balance of his Tracker Mortgage.*" The letter also pointed out that the Complainant's accountant strongly disagreed with the mortgage adviser of the Provider's branch position that the Complainant's "*company accounts and income would not support a loan in today's climate*".

The mortgage adviser of the Provider's branch sent an internal mail to the Provider's credit department on **06 August 2014** noting that the Complainant had once again requested "*to drawdown the balance of his existing mortgage which has a tracker rate*". The Provider's credit department replied by way of internal mail on **08 August 2014**, as follows;

/Cont'd...

*“As per previous notes, a new application is required to assess for any further advance given the timeframe involved.*

*We will not be in a position to apply a tracker product in this regard and any new facility will be subject to current rates available.*

*Should you wish to discuss this further do not hesitate to contact me.”*

The above suggests that the Provider maintained its position from **March 2011** by refusing to accede to the Complainant’s request to draw down the final stage payment of his mortgage loan. However, the Provider appears to have still invited the Complainant to make a new mortgage application for additional borrowings at a higher rate.

The Complainant argues that he has been paying for a mortgage protection assurance policy which was calculated on the basis of the original loan amount, that is €210,000, and not the amount that was ultimately drawn down. **General Condition 2 (a)** of the Loan Offer Letter states as follows;

*“2. Security and Valuation*

*(a) The “Lender’s Security” is: (i) a first legal charge over the Property described in Part 2; (ii) the legal assignment of a mortgage protection policy for the term of the Loan, which will repay the whole of the Loan if the Borrower dies before the Loan is repaid (the “Life Policy”)*

Further, **General Condition 3 (a)** provides as follows;

*“3. Insurance and Assurance Policies*

*(a) Prior to draw down of the Loan the Lender must be furnished with evidence that the Borrower has effected the Life Policy (or Endowment Policy as appropriate). The Borrower must pay all premiums on the Life Policy (or Endowment Policy, as appropriate) when due and must maintain the Life Policy (or Endowment Policy, as appropriate) in full force and effect until all money owing to the Lender in connection with the Loan has been repaid in full. The original Life Policy (or Endowment Policy, as appropriate) must be furnished to the Lender prior to the draw down of the Loan. Where the Lender, at its absolute discretion and strictly where permitted by law, agrees to waive the requirement to effect the Life Policy in respect of the Borrower (or any one or more of them) a disclaimer in*

/Cont’d...

*the Lender's standard form must be completed and furnished to the Lender prior to draw down of the Loan."*

It is clear from the **General Conditions** of the Loan Offer Letter, which were accepted by the Complainant, that the Complainant was contractually required to put in place a life policy that was sufficient to repay the entire amount of the loan (i.e. €210,000) prior to the drawdown of the mortgage facility. I understand that the Provider was furnished with details of the Complainant's life policy in advance of the first drawdown on the Complainant's mortgage loan account in **August 2008**.

I understand that the Complainant could have requested an amendment to his life policy when he was notified that the Provider was not in a position to draw down the entire loan amount contained in the Loan Offer Letter. In this instance, I have not been provided with any evidence to suggest that the Complainant approached the Provider to amend his life policy to reflect the mortgage loan amount actually drawn down to date.

It is important for the Complainant to be aware that he requested the release of what both parties understood to be the final drawdown payment in **August/September 2010**. However the Complainant subsequently decided that he required the release of further funds to complete his self- build project in **2011** and again in **2014**, some 3 and 6 years after the loan was originally sanctioned. Given that this loan was to issue in stages and as far as the Provider was concerned all three stages had been drawn down by **2010**, I consider it reasonable on the part of the Provider to assess the repayment capacity of the Complainant given the time that had elapsed since the original sanction of the loan. The Complainant accepts himself that his income had significantly reduced in **2011** and that was a factor in him requesting the drawdown of further funds from the Provider. The Complainant in fact requested the drawdown of the remaining loan amount being €77,000 in **2011** and again in **2014** when he had already agreed that €50,000 was all that was required to complete the build in **2010**.

I am of the view that in accordance with **General Condition 9 (b)**, the Provider was entitled to refuse to allow any stage of the loan to be drawn down if it considered that a change in the Complainant's financial circumstances would reduce his repayment capacity. Further, **Chapter 2** of the **Consumer Protection Code 2006** requires the Provider to assess suitability of products and **Chapter 5** of the **Consumer Protection Code 2012** obliges the Provider to assess affordability and suitability in advance of "*offering, recommending, arranging or providing a credit product*". It does not appear to me that the Provider acted in an unreasonable manner in refusing the drawdown of further monies in respect of mortgage account ending **3548** given the change in the Complainant's financial circumstances since the inception of the loan and the length of time that had passed since the drawdown of the first stage payment.

/Cont'd...

If the Complainant wishes to apply for borrowings in the amount equivalent to the final drawdown sum, the Complainant is required to make a new mortgage application be it in his sole name or on a joint basis with another party. While I accept, as outlined above, that the Provider was entitled to refuse to release the remaining amount of the loan monies some 3 to 6 years after the drawn down of the first stage payment because of the lack of affordability on the part of the Complainant, there is no doubt that this refusal on the part of the Provider caused much inconvenience to the Complainant as he essentially was unable to complete construction on the mortgaged property.

I note that the Complainant ultimately had to take out a loan with another Provider in **2016** in the amount of €27,500 together with three separate loans from another Provider. I further note that it appears that the Provider never released the €12,000 which equates to the 5% of what was viewed as the final draw down amount of €38,000.

I understand that the Provider did not release this amount as it did not receive a satisfactory Property Report Certificate from the supervising engineer/architect/surveyor nor did it receive an acceptable valuation from a valuer.

While the Complainant must take responsibility for the situation as it developed in terms of the delays in completing the house and was unfortunate in that his income reduced, I have no doubt that better clarity and communication by the Provider could have reduced much of the confusion and inconvenience caused to the Complainant.

Having regard to all the evidence and the circumstances of this complaint, it is my view that the Provider failed to outline the method and timing of the stage payments or any time limit on the drawdown of the mortgage in a clear and concise manner. **Chapter 2** of the **Consumer Protection Code 2006** provides that 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. This method of presentation must not disguise, diminish or obscure important information.*" I am of the view that if the Complainant was provided with a clear schedule of payments setting out the basis on which loan payments would be advanced by the Provider from the outset together with any time limits applying, the Complainant could have made a fully informed decision with respect to the drawing down the mortgage loan. Much of the difficulties and confusion in this matter have arisen because of this lack of clarity. That being said, the Provider, in its commercial discretion, was entitled to refuse to release the remaining amount of the loan monies in circumstances where it had concern with respect to the affordability of the mortgage loan.

/Cont'd...

For the reasons outlined in this Decision, I partially uphold this complaint and direct that the Provider pay the Complainant a sum of €6,000 in compensation.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €6,000 to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** 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**

2 November 2020

/Cont'd...

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.

