



<u>Decision Ref:</u>	2020-0289
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The loan amount was €295,000 and the term of the loan was 35 years. The particulars of the mortgage loan offer accepted by the Complainant on **30 June 2008** detailed that the loan type was a "5Y Fixed Rate 5.04% until 30/06/13 95% Capital and Interest".

The Complainant's Case

The Complainant details that he received a **Loan Offer Letter** dated **11 June 2008** from the Provider which made provision for a tracker interest rate of ECB + 1.15%. He states that he subsequently decided instead to opt for a five year fixed interest rate for the mortgage loan from inception. He was issued a new **Loan Offer Letter** dated **23 June 2008** which made provision for a five year fixed interest rate of 5.04% and he signed the **Loan Acceptance** on **30 June 2008**.

The Complainant says that he decided to draw down the mortgage on the five year fixed interest rate "...in the belief that I would revert to the tracker rate @ the end of the fixed

rate period. I was never informed otherwise.” He states that “...it was incumbent on the Provider in those circumstances to point out clearly to the Complainant that by choosing to fix for an initial five year period that he would also lose any entitlement to the previously offered tracker interest rate.”

The Complainant submits that on the expiry of the five year fixed interest rate period in **June 2013**, he “...was not provided with the opportunity of returning to my tracker rate. I enquired from my local branch about my tracker rate and advised that it was no longer possible to obtain the previously applied tracker rate.”

The Complainant has identified the “key issues that arise in this dispute” as follows;

- The Provider’s reliance on **General Condition 14(c)(ii)** of the **Standard Mortgage General Terms and Conditions**;
- The Provider’s contention that the description of the loan in the signed **Loan Acceptance** as a “Tracker Mortgage” was a typographical error; and
- The “applicable legal principles”.

i) The Standard Mortgage General Terms and Conditions

The Complainant submits that the Provider contends that the **Standard Mortgage General Terms and Conditions** formed part of the **Loan Offer** that issued to him on **23 June 2008**, however the Complainant asserts that he did not receive these conditions. He outlines that the set of **Standard Mortgage General Terms and Conditions** furnished by the Provider to this office “was ‘Generated at Fri Jun 27.10.13.51 2008’”, however the **Loan Offer** was issued to him four days prior on **23 June 2008**. He states that this proves that these conditions did not form part of the **Loan Offer** issued on **23 June 2008**. The Complainant does not accept the Provider’s submission that it issued the **Standard Mortgage General Terms and Conditions** to him in the form of a supplemental booklet. He says that in any event it is “extremely doubtful that it would have been received by [the Complainant] prior to his signing the Loan Acceptance on 30 June 2008”.

The Complainant further states that the **Standard Mortgage General Terms and Conditions** are not referred to anywhere in the loan documentation that was provided to him, including in particular **paragraph 1** of the **Loan Acceptance** document, and therefore do not form part of the loan agreement.

The Complainant states that the Provider is relying on **Condition 14(c)(ii)** of the **General Terms and Conditions** in its response to his complaint, however he says that the set of **General Terms and Conditions** he received in **2008** contains **Conditions 1 to 8** only. He submits “either I was not provided with complete loan offer documentation in 2008 or the bank was referring to Terms and Conditions in their 2015 reply letter that was not

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applicable in 2008. Either way the lack of clarity and ambiguous nature of the documentation pertaining to my mortgage should be accounted for."

The Complainant further states that the **Loan Offer** furnished by the Provider to this office *"is different from the letter of loan offer that was actually received by the Complainant"* in **June 2008** as it *"does not include the blank page headed "Specific Loan Offer Conditions" which was contained in the documentation received by the Complainant."*

ii) "Typographical error" in the Loan Acceptance document

The Complainant states that **paragraph 2** of the **Loan Acceptance** that he signed on **30 June 2008** clearly states that the loan is a *"Tracker Mortgage"*. He states that, accordingly, the applicable provision of the **Standard Mortgage Terms and Conditions** would have been **General Condition 14(b)** and not **14(c)** as the Provider contends. He submits that the Provider *"cannot argue that the reference to a Tracker Mortgage is an isolated one and that there is no reference elsewhere to the applicable interest rate when there is a clear reference in General Condition 14(b) to the fact that a tracker variable interest rate will apply."*

The Complainant states that the Provider is *"now just passing off the declaration of a tracker mortgage on the loan acceptance letter as a mere typographical error"*. He outlines that the reference in the **Loan Acceptance** to a *"Tracker Mortgage"* was *"entirely consistent with the Complainant's understanding, both then and now, that he was taking out a tracker loan with an initial fixed rate period."*

iii) Applicable Legal Principles

The Complainant submits that the Provider contends that the **Standard General Mortgage Terms and Conditions** were incorporated into the loan agreement. He states however that in circumstances where the **Standard Mortgage General Terms and Conditions** *"never formed part of the agreement between the Complainant and the Provider, were not provided to the Complainant and were not referred to at any point in the loan documentation that was actually provided to the Complainant, then General Condition 14(c)(ii) was not incorporated into the contract. The only terms and conditions that the Complainant agreed to be bound by were those referred to in paragraph 1 of the loan acceptance sheet, i.e. the Special Loan Offer Conditions and the General Terms and Conditions that were "attached to the Loan Offer.""*

The Complainant details that even if the **Standard Mortgage General Terms and Conditions** were accepted as being incorporated into the contract, **General Condition 14(b)** of the **Standard Mortgage General Terms and Conditions** would be the applicable

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provision, because of the reference to a “Tracker Mortgage” in the **Loan Acceptance** document.

The Complainant states that the Provider contends that the description of the loan as a “Tracker Mortgage” in the **Loan Acceptance** is a typographical error. He says that the Provider cannot now seek to avoid its contractual obligations on the basis of its own unilateral mistake. He says that “*it would be deeply unfair if the Provider were permitted to alter the fundamental nature of the agreement on the basis of its own unilateral error.*”

The Complainant further seeks to rely on the contractual principle of *contra proferentum*. He submits that, as stated by Brett MR in **Burton v English ((1833) 12 QBD 218 at 220)**, “*the general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made.*” The Complainant submits that his primary contention is that there is no ambiguity in the loan agreement if the agreement is limited to the terms and conditions actually attached to the **Loan Offer**. He states that the possibility of ambiguity only arises if the Provider’s contention that the **Standard Mortgage General Terms and Conditions** are incorporated into the agreement is accepted. The Complainant does not accept that the absence of any details in respect of the applicable ECB base rate or the margin is indicative that it was not a tracker mortgage where “*there was also no reference in any documentation to what the standard variable interest rate would be.*”

The Complainant submits that the Provider has not complied with **Section 5 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995**. He further states that the Provider has failed to comply with a number of the provisions of the **Consumer Protection Code 2006**, in particular **General Principles 1, 2, 3, 6 and 8**. He further states that the Provider has breached its obligations in relation to the provision of information to the customer.

The Complainant is seeking the following;

- a) For the loan to immediately be converted to the tracker rate; and
- b) For all excess interest charged by the Provider from **2013** to be repaid “*and such repayment should also include interest that the Complainant could have earned on the excess amounts taken by the Provider*” ; and
- c) Additional general compensation “*to reflect the significant time, expense, distress and inconvenience*” caused by the Provider’s “*mismanagement*” of the Complainant’s account.

The Provider's Case

The Provider submits that the Complainant applied for a mortgage loan in the amount of €295,000 by completing and signing a **General Mortgage Application Form on 26 May 2008**. It states that it issued the Complainant with a **Loan Offer** dated **11 June 2008** which provided for a loan amount of €295,000 repayable over a term of 35 years, with a tracker interest rate of ECB + 1.15% to run for the term of the loan. The Provider submits that this **Loan Offer** was not accepted or signed by the Complainant as prior to the drawdown of his mortgage loan, the Complainant opted for a five year fixed interest rate.

The Provider details that in light of this it issued the Complainant with a new **Loan Offer** dated **23 June 2008** which "*superseded and cancelled*" the **Loan Offer** of **11 June 2008**. It states that the new **Loan Offer** outlined that the interest rate pertaining to the loan was a fixed interest rate of 5.04% fixed for five years until **30 June 2013**. The Provider states that the Complainant signed and accepted the **Loan Offer** dated **23 June 2008** on **30 June 2008** in the presence of his solicitor and the mortgage loan drew down on **8 July 2008** on the fixed interest rate of 5.04% in line with the **Loan Offer**.

The Provider details that the **Loan Offer** clearly confirmed that the mortgage loan was to draw down on a fixed interest rate as opposed to a tracker interest rate, and did not contain any specific condition outlining that a tracker interest rate would be made available to the Complainant when the initial fixed rate period ended, or at any future date. It states that such a reference or specific condition would have been necessary for a tracker interest rate to apply. The Provider states that on expiry of the fixed interest rate period the Complainant could choose a further fixed rate or a variable interest rate. It relies on **General Condition 14(c)(ii)** of the **Standard Mortgage Terms and Conditions** in support of this.

The Provider states that the variable interest rate as described in the **Standard Mortgage General Terms and Conditions** was the Provider's standard variable rate, which was a variable rate which could be increased or reduced by the Provider at any time. It states that by comparison a tracker interest rate was linked to the European Central Bank (ECB) base rate and so would only rise and fall in line with movements in the ECB base rate. The Provider also states that at no point did it offer a fixed interest rate product which defaulted to a tracker interest rate product at the end of the fixed interest rate period.

The Provider states that interest rate products were subject to change, and therefore confirmation, either verbal or written, guaranteeing the availability of a specific interest rate product, e.g. a tracker interest rate, at a future date, was not and could not have been provided to the Complainant in **June 2008** when he accepted the **Loan Offer** dated **23 June 2008**.

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The Provider states that the Complainant was not offered a tracker interest rate on his mortgage account following the expiry of the fixed interest rate period in **June 2013**, as the signed **Loan Offer** confirmed that the default rate on expiry of the fixed interest rate period was the standard variable rate. It states that there was no contractual or other obligation on the Provider to offer the Complainant a tracker interest rate on his mortgage loan when the fixed interest rate period expired in **2013**. It states that in addition, tracker interest rates had been withdrawn from the market by the Provider in late **2008** and were therefore not available for selection from that date onwards.

The Provider details that, prior to the expiry of the fixed rate period, it furnished the Complainant with a **Product Expiry Letter** dated **12 June 2013** advising him of the expiry date of the fixed rate period and confirming that the mortgage account would default to the Provider's standard variable rate and outlining the alternative interest rate products available at that time, both fixed and variable. It states that it did not receive a response to this letter and therefore the mortgage account rolled onto the standard variable rate on **30 June 2013** in line with the Complainant's loan agreement.

The Provider states that the Complainant's Loan Offer dated **23 June 2008** was comprised of the **General Terms and Conditions**, the Provider's **Standard Mortgage General Terms and Conditions** and the **Loan Offer Acceptance**. It states that **General Condition 14(c)(ii)** is contained within the Provider's **Standard Mortgage General Terms and Conditions** which accompanied the **Loan Offer**. The Provider states that by signing the **Loan Offer Acceptance** on **30 June 2008**, the Complainant confirmed that he had all documents explained to him by his solicitor, that he understood these and that he accepted the **Loan Offer** on the terms and conditions specified therein.

The Provider does not accept that the Complainant did not receive a copy of the **Standard Mortgage General Terms and Conditions**. The Provider details that the **Standard Mortgage General Terms and Conditions** were issued as a booklet which was supplemental to, and formed part of the Complainant's **Loan Offer**. The Provider states that it is "*confident*" that this booklet was issued to the Complainant's solicitor. It details that the **Standard Mortgage General Terms and Conditions** cover page confirms that the conditions are "*Effective from 01/06/2008*" and therefore did not post-date the Complainant's **Loan Offer**. It states that the generation date of **27 June 2008** merely reflects when this particular booklet was generated from its system.

The Provider submits that **General Condition 14(b)** of the **Standard Mortgage General Terms and Conditions** outlined the conditions that applied to a tracker mortgage and were not applicable to the Complainant's mortgage loan as he drew down his mortgage loan on a fixed interest rate and not a tracker interest rate.

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The Provider acknowledges that the **Loan Offer Acceptance** “*erroneously*” referred to “*Tracker Mortgage*”. The Provider submits that the purpose of this paragraph was for the Complainant to acknowledge that he fully understood the specific nature of the mortgage, that the debt owed was secured on the mortgaged property and must be repaid in full before the title deeds would be returned or the security released. The Provider outlines that the reference to “*Tracker Mortgage*” was a typographical error and that this “*incorrect reference was not capable of transforming the entire basis of the loan to a tracker interest rate when there was no reference to a tracker*” in other documentation evidencing the agreement and there was also no reference within any documentation to the ECB base rate or the margin above that rate at which a tracker interest rate would be charged to the mortgage loan. The Provider states that the typographical error does not create ambiguity in interpreting the loan agreement in circumstances where the loan type on the second page of the **Loan Offer** and **General Condition 14(c)(ii)** clearly outline what applies to the loan agreement.

The Provider states that it is satisfied that the *contra proferentum* rule does not apply in this instance as the wording of the loan documentation in the Complainant’s case is sufficiently clear and there is no ambiguity.

The Provider does not accept that it has breached any of its obligations under the **Consumer Protection Code 2006** or the **EC (Unfair Terms in Consumer Contracts) Regulations 1995**. It states that it is satisfied that throughout his mortgage journey the Complainant was provided with all the relevant and required information regarding his mortgage account in order for him to make informed decisions.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainant a tracker interest rate for his mortgage loan account at the end of a five year fixed interest rate period in **June 2013**.

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.

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	<i>Capital and Interest</i>
<i>Loan Amount</i>	:€295,000.00
<i>Interest Rate</i>	:5.15%
<i>Interest Type</i>	:Variable
<i>Term</i>	:35 years”

This **Loan Offer Letter** was not signed or accepted by the Complainant. There is no documentary evidence of the discussions that took place between **11 June 2008** and **23 June 2008**, however the Complainant submits that he “*decided*” that he wanted a fixed interest rate on his mortgage loan. It was on this basis that the new **Loan Offer Letter** dated **23 June 2008** was issued to the Complainant.

The subsequent **Loan Offer Letter** dated **23 June 2008** details as follows;

<i>“Loan Type</i>	<i>:5Y Fixed Rate 5.04% until 30/06/13 95%</i>
	<i>Capital and Interest</i>
<i>Loan Amount</i>	:€295,000.00
<i>Interest Rate</i>	:5.04%
<i>Interest Type</i>	:Fixed
<i>Term</i>	:35 years”

It details in the **Important Information** section as follows;

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

Two sets of General Terms and Conditions have been furnished in evidence by the Provider: The **General Terms and Conditions** and the **Standard Mortgage General Terms and Conditions**.

The set titled **Standard Mortgage General Terms and Conditions** are stated to be effective from “01/06/2008” and detail as follows;

“1. Introduction

(a) These General Mortgage Terms and Conditions apply in all circumstances to the Lender’s Standard Mortgage/Tracker Mortgage. These General Terms and Conditions are supplemental to and form part of the Loan Offer which comprises Specific Loan Offer Conditions and General Terms and Conditions.

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In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply.”

The **Standard Mortgage General Terms and Conditions** are supplemental to the **General Terms and Conditions** comprised in the Complainant’s **Loan Offer** dated **23 June 2008**.

Condition 14 of the **Standard Mortgage General Terms and Conditions** details as follows;

“14. Interest Rate

- (a) *Subject to Sub-Clause 14(b), all Loans are subject to the Bank’s Mortgage Rate at the date the Loan is drawdown [sic].*
- (b) *In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:*
- (i) *The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank (“ECB”) rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement.*
 - (ii) *There will be no reduction in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.*
- (c) *In the case of a fixed interest rate of mortgage, the following conditions will apply;*
- (i) *The rate of interest applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer.*
 - (ii) *The Borrower upon expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender, or if available, where the borrower fails to exercise the option, **the interest rate applicable will be a variable interest rate which may be increased or decreased by the Lender at any time** and in this respect the decision of the Lender will be final and conclusively binding on the Borrower”. **[My emphasis]***

The **Loan Acceptance** was signed by the Complainant on **30 June 2008** and outlines as follows;

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1. *I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.*
2. *I/We fully understand and accept the specific nature of this Purchase Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.
..."*

The Complainant submits that his understanding was that the mortgage loan would move onto a tracker interest rate at the end of the fixed interest rate period. The Complainant relies on the terms of the initial **Loan Offer Letter** which offered the Complainant a mortgage loan on a tracker interest rate of ECB + 1.15%. The Complainant submits that the Provider should have pointed out to the Complainant that he was “*loosing*” the “*entitlement to the previously offered tracker interest rate.*” Firstly, I must point out that the Complainant did not accept this offer. He therefore did not have an entitlement to a tracker mortgage on foot of that **Loan Offer**. Secondly, in order for the Complainant to have a contractual right to a tracker interest rate on the mortgage loan which he did accept at the end of the fixed interest rate period, that right would need to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However no such right was set out in writing in the **Loan Offer** dated **23 June 2008**, which was signed by the Complainant on **30 June 2008**. It is important for the Complainant to understand that the terms of a mortgage loan are governed by the terms contained in the **Loan Offer** which is signed by the parties, and not by reference to a previous offer, which was rejected by the Complainant. Once the Complainant rejected that **Loan Offer**, it no longer had any standing and placed no obligation on either party. There is no reasonable basis on which the Complainant could expect that the offer of a tracker interest rate that was contained in a **Loan Offer Letter** that was not accepted by him, would somehow transfer into the new mortgage loan contract. The Complainant did not accept and draw down the earlier **Loan Offer Letter** and consequently did not have any “*entitlement*” to that rate as he has suggested.

The Complainant has submitted that he did not receive a copy of the **Standard Mortgage General Terms and Conditions** and that these conditions are noted as “*Generated at Fri Jun 27.10.13.51 2008*”, however the **Loan Offer** was issued to him four days prior on **23 June 2008**. He states that this proves that these conditions did not form part of the **Loan Offer** issued on **23 June 2008**. The Complainant refers to the **European Communities**

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(Unfair Terms in Consumer Contracts) Regulations 1995 (as amended) (the “regulations”) and argues that, as he did not receive the **Standard Mortgage General Terms and Conditions**, the terms of those conditions are unfair under the regulations. The Provider details that the **Standard Mortgage General Terms and Conditions** were issued as a booklet which was supplemental to and formed part of the Complainant’s **Loan Offer**. The Provider states that it is “*confident*” that this booklet was issued to the Complainant’s solicitor.

On the basis of the evidence before me it is not possible to determine whether the **Standard Mortgage General Terms and Conditions** were received by the Complainant. However it is not material to the complaint at hand to determine whether the **Standard Mortgage General Terms and Conditions** were received by the Complainant or not. The Complainant argues that the conditions were not received and therefore do not apply to his mortgage loan agreement. It is important for the Complainant to be aware that if it is the case that the **Standard Mortgage General Terms and Conditions** were not received and thus do not apply to the Complainant’s mortgage loan, then this would mean that the Complainant’s mortgage loan would have been silent as to the rate applicable at the end of the fixed interest rate period that expired on **30 June 2013**. In these circumstances it would be a matter of commercial discretion for the Provider as to the interest rate that it wished to offer the Complainant at the time the fixed interest rate period ended. The fact that there might be no condition in the mortgage loan as to the rate applicable at the end of the fixed interest rate period does not and could not mean that the Complainant is entitled to a tracker interest rate of ECB + 1.15%, at the end of the fixed interest rate period as contained in the earlier **Loan Offer Letter** dated **11 June 2008**, which was not accepted by the Complainant.

For the avoidance of any doubt I am not making any determination in this particular matter as to whether the **Standard Mortgage General Terms and Conditions** were received by the Complainant and incorporated into his mortgage loan.

I note that there is a reference to “*Tracker Mortgage*” in the **Loan Acceptance**, as quoted above. In the circumstances, I accept that the reference to “*Tracker Mortgage*” in the **Loan Acceptance** was a “*typographical error*” on the part of the Provider.

Whilst this error on the part of the Provider is entirely unsatisfactory, it is my view that it would not be reasonable to conclude that this single reference to the term “*Tracker Mortgage*” in the **Loan Acceptance** section of the Complainant’s mortgage loan documentation could have led the Complainant to reasonably form the understanding that the loan would move to a tracker interest rate at the end of the fixed interest rate period. This is particularly so given the context and location in which this error appears. The sentence that contains this erroneous reference to “*Tracker Mortgage*” is in relation to

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potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainant understood this had to be repaid before the deeds of the property could be released and returned. This sentence was clearly not in relation to the interest rate applicable at the end of the initial fixed interest rate period.

The Complainant's representative states as follows in its post Preliminary Decision submission dated **30 July 2020**;

"[The Complainant's] case has always been that his mortgage journey was such that he applied for a tracker mortgage. He then asked to fix that mortgage for a period, in the expectation that, on the expiration of the fixed rate period he would revert to his tracker, which, he understood, was the purpose of requirement for the notation of tracker mortgage on his loan documentation".

Having considered the mortgage loan documentation in its entirety, it is my view that the Complainant did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed rate period which applied from **June 2008** to **30 June 2013**. If the Complainant was of the view that the **Loan Offer** dated **23 June 2008** was ambiguous as to the type of interest rate that the loan would roll over to at the end of the fixed interest rate period, the Complainant could have decided not to accept the offer made by the Provider or sought to clarify the interest rate that would apply at the end of the fixed interest rate period. Instead, the Complainant, having rejected the previous offer of a mortgage loan on a tracker rate, signed the **Loan Acceptance** on **30 June 2008** in the presence of his solicitor and confirmed that he accepted the **Offer of Advance** on the terms and conditions set out therein.

The Complainant's representative states as follows in its post Preliminary Decision submission dated **30 July 2020**;

"We also agree with your offices that, if [the Complainant] was unclear with the terms of the loan offer [he] should have sought independent legal advice, however, we dispute and deny that such advi[c]e was necessary or required as [the Complainant's] journey, understanding and belief was exactly as set out above and per the complaint file already filed herein. At no stage or anywhere was it specifically outlined or set out to [the Complainant] that, at the end of his fixed term, would he not revert to a tracker rate mortgage. No information was furnished to the contrary. Was the onus not on [the Provider] to be clear and unambiguous in what the position was or would be?"

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It is important for the Complainant to understand that there was no contractual obligation on the part of the Provider to offer the Complainant a tracker interest rate on the expiry of the fixed interest rate period. Whilst the Provider did not detail specifically that a tracker rate would not be applied to his mortgage loan account on the expiry of the fixed rate period, there was equally no provision included in the **Loan Offer** dated **23 June 2008** advising the Complainant that a tracker rate would apply to the mortgage loan account on the expiry of the fixed rate. As outlined above, any contractual right to a tracker interest rate on the mortgage loan at the end of the fixed interest rate period, would need to have been specifically outlined and set out in writing in the **Loan Offer** dated **23 June 2008**. If the Complainant wished to seek clarification on the interest rate that was to be applied to the mortgage loan account, he could have contacted the Provider.

Whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainant's mortgage loan account at the end of the fixed interest rate period in **June 2013**, I am also of the view that the information provided to the Complainant in the **Loan Acceptance** was somewhat confusing. The **Consumer Protection Code 2006**, outlines that;

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

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainant. Whilst I accept that "*typographical*" errors can occur and in this circumstance that error did not affect the Complainant's underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought this "*typographical*" error to the Complainant's attention and highlighted how the error occurred, in advance of the Complainant making his complaint to this office. The Provider in its post Preliminary Decision submission dated **20 July 2020** appears to take issue with my position in respect of this matter.

The Provider states as follows in its post Preliminary Decision submission dated **20 July 2020**;

"We would like to respectfully point out that the customer's complaint was received by the bank on 04 April 2018 and we issued our Final Response letter to the customer on 16 October 2018 i.e. before the customer raised the complaint with your office on 22 October 2018. In our response to the customer on 16 October we addressed the 'typographical' error and highlighted how this error occurred, in advance of the Complainant making his complaint to your office. We believe that we acted with due

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skill, care and diligence in accordance with the General Principles of the Consumer Protection Code for the following reasons:

- (i) We articulated our understanding of the complaint at the outset to ensure that there was no misunderstanding between [Provider] and the customer;*
- (ii) We clearly explained to the customer that he drew down on a fixed rate mortgage at the outset;*
- (iii) We outlined fully our explanation of the ‘typographical’ error contained within the Loan Acceptance Form within the Final Response Letter (see attached);*
- (iv) We further explained to the customer that this typographical error, when considered in conjunction with the mortgage documentation in its entirety, did not constitute or provide any entitlement to have a tracker interest rate applied to the customer’s mortgage account. We believe that this response brought the typographical error to the complainant’s attention and highlighted how the error occurred, in advance of the complainant making his complaint to your office...”*

The Provider further details as follows in its post Preliminary Decision submission dated **20 July 2020**;

“...The error in the document was fully addressed and explained by the bank to the Complainant in a clear and transparent manner prior to the complaint being referred to the FSPO. In the circumstances the paragraph set out above from the FSPO’s preliminary decision incorrectly implies that the bank did not address the issue prior to the complaint being made to the FSPO...The conclusion reached by the FSPO is simply mistaken in fact and should be overturned.”

The Complainant’s representative states as follows in its post Preliminary Decision submission dated **30 July 2020** in response to the Provider’s submission;

“Addressing the content of the reply of [the Provider], it is inexplicable, unbelievable and untenable to adduce, believe or comprehend that a Bank with multi-layered regulation and legal review would have caused to occur a “typographical” error. Had this been a once off document and carrying little legal weight or expectation then perhaps that might be believable or palatable, however, clearly that could not be the case herein.”

The Complainant’s representative further details in its post Preliminary Decision submission dated **30 July 2020**, that it is *“simply outrageous that [the Provider] would attempt to avoid obligation by reference to or reliance on what they now term as an excuse*

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in terms of a “typographical error. To allege that the documentation should have been “clear to” [the Complainant] where it was not even clear to the Bank, their regulation or legal department is absurd.”

For the avoidance of doubt, although the typographical error did not affect the Complainant’s underlying contractual entitlements, I am of the view that the Provider should have been proactive in advising the Complainant of the typographical error after the **Loan Offer** issued in **June 2008** and certainly prior to the Complainant having to raise this issue and submit a complaint to the Provider some 10 years later in **2018**. This typographical error occurred in **June 2008** and it was the Complainant who had to approach the Provider in **April 2018** to seek clarification as to the reason for the inclusion of a reference to a “*tracker mortgage*” in the **Loan Acceptance** section of the **Loan Offer**. It is disappointing and entirely unsatisfactory that the Provider failed to address this typographical error of its own accord in the intervening 10 year period.

The Complainant’s representative also details in its post Preliminary Decision submission dated **30 July 2020**:

“without prejudice to anything else hereinbefore set out, we refer you to your office’s decision (2019 – 0380) where that party was awarded €2500 for a typographical error alone? Whereas, here, our Clients journey was significantly clearer as regards, request, requirements and expectations communicated and understood and in fact set out in documentation exchanged.”

It is important for the Complainant to be aware that each decision is decided on its own merits and when I make a direction under **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017** I have regard to the individual circumstances of a particular complaint. Whilst it may be the case that the Complainant would like more compensation I am of the view that a compensatory sum of €1,250 is an appropriate direction in these circumstances.

For the reasons set out in this decision, I partially uphold the complaint. To mark the Provider’s shortcomings under the **Consumer Protection Code 2006**, I direct that the Provider pay to the Complainant a sum of €1,250 compensation.

Conclusion

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

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I direct, pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, that the Respondent Provider pay to the Complainant a sum of €1,250 compensation 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

31 August 2020

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—
 - (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,and
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.