



<b><u>Decision Ref:</u></b>	2020-0199
<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**

##### **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 was initially secured on the Complainant's private dwelling house. It appears that the Complainant no longer resides in this property.

The loan amount was €254,840 and the term of the loan was 35 years. The particulars of the Loan Offer dated **14 August 2007** detailed that the loan type was a "Fixed Rate 5.25% until 30/09/10".

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

The Complainant submits that when she applied for her mortgage loan in **2007**, the Provider offered her the choice of "a fixed rate or a variable rate which would be linked to the European Central Bank rate". She outlines that, "As there was no significant difference between the rates it was suggested that the fixed rate might be the best option as it would eliminate the possibility of rises in her repayments during the fixed rate term. She was advised that at the end of the fixed term she would either be offered a new fixed rate or the variable tracker rate at that time."

The Complainant accepted a loan offer from the Provider on **17 August 2007** for her mortgage loan account. The interest rate applicable was fixed for a period of three years at 5.25%.

The Complainant submits that when the fixed interest rate period expired in **October 2010**, *"...she was offered the various options available at that time and she believed that the bank had given her the tracker rate to which she was entitled. Sometime later she became aware that the rate she was being charged was significantly higher than that of a friend who had taken out a mortgage at the same time. She raised the matter with the bank and was told that she automatically reverted to the bank's **standard** variable rate when the fixed rate expired"*.

The Complainant states that *"...the Bank has chosen a specific definition of Variable Rate to meet its objectives. The bank's Standard Variable Rate is a variable rate but so too is a Tracker Rate and [the Complainant], a party not well versed in the subtleties of financial language and terminology, could not be expected to know the difference."*

The Complainant further details that her mortgage loan account was *"designated as a Tracker Mortgage as per the loan offer documentation"*. She rejects the Provider's submission that the reference to a *"Tracker Mortgage"* in the **Loan Acceptance** document is a typographical error. She states that *"...typically a typographical error will be an incorrect spelling or incorrect use of a word similar to the intended word but having a different meaning entirely. It is not acceptable to brush aside the term Tracker Mortgage as a typographical error in that context. It is outrageous to state that the Bank's written word was 'merely' an error."*

The Complainant states that *"the information given by the lender to [the Complainant] was ambiguous at best and the Bank wrongly denied her the Tracker Rate to which she was entitled."*

The Complainant is seeking;

- a) That the appropriate tracker rate be applied to the mortgage loan account since the date of expiry of the initial fixed interest rate period in **2010**;
- b) A refund of the interest overpaid on the mortgage loan account since **2010** which she anticipates would be in the amount of €70,000 to €80,000, and
- c) Compensation for the *"difficulties"* that the Provider has visited upon her and her family by the Provider's *"deliberate"* attempt to *"disadvantage"* her.

### **The Provider's Case**

The Provider outlines that during the application stages of her mortgage the Complainant chose to avail of the services of a third party broker, and therefore the Provider was prohibited from contacting the Complainant until her mortgage funds were fully drawn down and the mortgage account activated. The Provider states that the Complainant's mortgage drew down on **1 July 2007** and prior to this date it did not communicate or correspond with the Complainant directly and therefore it is not in a position to confirm or comment on any information given to the Complainant by her broker during the application stage of her mortgage.

The Provider states that the Complainant's mortgage loan account was drawn down on a fixed interest rate of 5.25% in line with the signed and accepted **Loan Offer** dated **14 August 2007**. The Provider details that the Loan Offer did not contain any specific condition specifying that a tracker interest rate would be made available to the customer when the initial fixed interest rate period ended, or on another future date. It submits that such a reference would have been necessary in order for a tracker rate to apply.

The Provider submits that **Condition 14(c)(ii)** of the **Standard Mortgage General Terms and Conditions**, clearly explains that on expiry of the fixed interest rate period the borrower may opt to choose a fixed interest rate for a further fixed rate period, and goes on to explain that in the event that no option was made available by the Provider, or if the borrower failed to exercise the option, the interest rate that would apply would *"be a variable interest rate which may be increased or decreased by the Lender at any time."*

The Provider submits that the variable interest rate as described in the Standard Mortgage General Terms and Conditions is the Provider's standard variable rate. It submits that this is a variable rate which can be increased or reduced by the Provider at any time. It submits that, by comparison, a tracker interest rate is linked to the European Central Bank (ECB) base rate and will only rise and fall in line with movements in the ECB base rate, which cannot be changed by the Provider.

The Provider details that the Complainant accepted and signed the **Loan Acceptance** on **17 August 2007**. The Provider submits that the Loan Acceptance document signed by the Complainant erroneously referred to the term *"Tracker Mortgage"*. It submits that the reference to a *"Tracker Mortgage"* in the Loan Acceptance has been considered by the Provider as part of the Tracker Mortgage Examination. It submits that the reference to the *"Tracker Mortgage"* was a typographical error. The Provider states that the purpose of the paragraph that the typographical error was contained in was for *"the customer to confirm that she fully understood the specific nature of the mortgage, that the debt owed to [the Provider] was secured on the mortgaged property and must be repaid in full before the title*

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*deeds will be returned or the security released.*” It submits that this incorrect reference to a tracker 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 the ECB Rate which interest would be charged to the customer.

The Provider states that the **European Standardised Information Sheet (“ESIS”)** which accompanied the Loan Offer described the interest rate applicable as *“Fixed and variable thereafter.”* The Provider refers to Point 3(ii) of this document, which outlines that a further fixed interest rate or a variable rate which could be increased or decreased by the Provider at any time, would apply on the expiry of the fixed rate. The Provider states that based on the ESIS, it does not consider that the Complainant could have formed any reasonable expectation of defaulting to a tracker rate at the end of the fixed interest rate period that expired in **2010**.

The Provider submits that prior to the expiry of the fixed interest rate period, it issued a **Product Expiry letter** to the Complainant on **13 September 2010**. It submits that this letter informed the Complainant of the impending expiry date of her fixed interest rate and also confirmed that the mortgage would default to the Provider’s standard variable rate when the fixed interest rate period expired. The letter also outlined the alternative interest rate products available at that time, both fixed and variable. The Provider submits that tracker interest rate products had been withdrawn from the market by the Provider in **mid-2008**, and therefore this interest rate product type was not included in the Product Expiry letter. The Provider submits that all interest rate products were subject to change and can be withdrawn by the Provider at any time and this is what happened in **2008**. It submits that the Provider’s decision to remove tracker interest rate products was a commercial decision which it was entitled to make.

The Provider outlines that on **30 September 2010** the Complainant completed and signed the Rate Change Letter of Authority form and selected a fixed rate of 4.20% *“fixed until 31/10/2012...reverting to Standard Variable”*.

The Provider states that it has never offered a fixed interest rate product that defaulted to tracker interest rate at the end of the fixed interest rate period. It states that, *“when all of the facts and information including all of the Complainant’s loan documentation is viewed as a whole (as we believe it should be) rather than relying and attempting to distort the meaning of one section within the documentation, then there is no ambiguity as to whether or not a tracker interest product should apply.”*

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainant the option of a tracker interest rate on her mortgage loan account on the expiry of the fixed interest rate period in **September 2010**.

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

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

1. Email from the Complainant to this Office on **23 March 2020**
2. E-mail from the Complainant to this Office on **16 April 2020**
3. Letter from the Provider to this Office dated **30 April 2020**

Copies of these additional submissions were exchanged between the parties.

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

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

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

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

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainant’s loan documentation. It is also necessary to set out the interactions between the Complainant and the Provider in **2010** prior to the expiry of the initial fixed rate period.

I have considered the **Application Form** which was signed by the Complainant on **9 March 2006**. I note in **Section G: Details of the Mortgage Required**, the options available for “*Type of loan required*” were Variable, Fixed, Tracker, Split, Discount Variable and Other. I note that in response to the question “*Type of loan required*” the Complainant did not select any of the options.

I note that in the Broker’s **Loan Offer Cover Sheet**, in response to the question “*Rate*” the Broker has written “*3 year*”. It then outlines “*specify if fixed, variable, tracker etc*”. The word “*fixed*” was circled. The bottom of the Loan Offer Cover Sheet outlines:

*“Please ensure that all information submitted above is correct and confirmed with the client prior to loan offer stage. A copy of this document will be forwarded to the Lender as confirmation.”*

I note that the Provider issued an **Approval in Principle** document to the Broker on **16 July 2007** which detailed as follows;

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<i>"Amount</i>	<i>€254,840</i>	<i>Term: 40 Years</i>
<i>Interest Rate</i>	<i>5.67%</i>	<i>Fixed until 30/09/2012"</i>
<i>DECISION:</i>	<i>Agreed Subject to the Usual Terms and Conditions"</i>	

In circumstances where the Complainant was engaging with a Broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainant during the application stage. The Complainant has stated that the Provider advised her during that time that the fixed interest rate option was the "best option" for her mortgage and that "at the end of the fixed term she would either be offered a new fixed rate or the variable tracker rate at that time."

The documentary evidence at the time of the application supports the Provider's position that the Provider did not have any direct communication with the Complainant and that all communications were made with the Complainant's broker with respect to her mortgage loan. In these circumstances, I do not accept the Complainant's submission that the Provider advised her at this time with respect to her interest rate options generally or with respect to the interest rate applicable at the end of the fixed interest rate period. I note the application form that the Complainant completed through the broker outlined the types of interest rate options available, including the tracker rate, and the Complainant proceeded with the application for a fixed rate option.

The Complainant's representative in the post Preliminary Decision submission dated **23 March 2020** details as follows:

*"Because the [Preliminary] decision has been in effect to deflect any culpability in the direction of the mortgage broker, I have advised [the Complainant] that she should endeavour to get a letter from that broker to support what she has claimed in her previous submissions, and detailing his recall of the discussions and dealings they had and the advice that he gave her at the time of mortgage application. She is confident that if same is accurate it will show that [the Provider] did communicate through him that the loan would revert to a tracker mortgage once the fixed term was up."*

The Complainant's representative in the post Preliminary Decision submission dated **16 April 2020** details as follows:

*"[The Complainant] has been endeavouring to consult with both the Broker and Solicitor who dealt with her at time of applying for the mortgage.*

*She has advised that the Broker, [Name] of the [provider name] is avoiding commitment in this matter. He says that at the time [provider name] was an agent of*

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*[other provider name] and that he would not have been the one who selected [the Provider] as the best lender to proceed with. [The Complainant] only ever dealt with [name] and was not aware of [other provider name] as being a separate entity. [Name] says that he has no files in the matter and that he has no recollection of the detail in the transaction. He is not in a position to confirm or deny if he was advising on tracker mortgages at the time or if he would have discussed a tracker mortgage with [the Complainant]."*

As detailed at the outset of this decision the conduct of the third party Broker engaged by the Complainant, does not form part of this investigation and decision. There is no evidence to support the Complainant's submission that the Provider advised her at the time of application for her mortgage loan with respect to her interest rate options generally or with respect to the interest rate applicable at the end of the fixed interest rate period.

It appears from the Complainant's submission that a tracker interest rate option was discussed with her at the time, however the Complainant decided to proceed with an application for a mortgage loan commencing on a fixed interest rate. By the Complainant's own submission "*there was no huge difference*" between the rates available at the time and she was "*anxious to ensure*" that her repayments did not rise above "*affordable levels*".

The Provider issued a **Loan Offer** dated **14 July 2007** which provided for a mortgage loan on a "*Fixed Rate 5.25% until 30/09/10 100%*" for a term of 40 years. This Loan Offer was not signed by the Complainant.

The Complainant signed a letter on **23 July 2007** which outlined as follows;

*"Please Amend My Letter of Offer to*

- 35 Year Term*
- 3 Year Fixed Rate"*

The Provider subsequently issued the **Loan Offer Letter** dated **14 August 2007**, which details as follows;

*"...*

<i>Loan Type</i>	<i>: Fixed Rate 5.25% until 30/09/10 100% Capital and Interest</i>
<i>Loan Amount</i>	<i>: €254,840.00</i>
<i>Interest Rate</i>	<i>: 5.25%</i>
<i>Interest Type</i>	<i>: Fixed</i>
<i>Term</i>	<i>: 35 years"</i>

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Two sets of 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 first set of Terms and Conditions are titled "*Standard Mortgage General Terms and Conditions*" and stated to be effective from "*01/06/2006*". The **Standard Mortgage General Terms and Conditions** 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. In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply."*

Therefore I accept that the Standard Mortgage General Terms and Conditions are supplemental to the Specific Loan Offer Conditions and the General Terms and Conditions comprised in the Complainant's Loan Offer dated **14 August 2007**.

**Condition 14** of the **Standard Mortgage General Terms & 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 drawn down.*

*(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 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 on the 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*

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*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”.*

**Page 1 of the European Standardised Information Sheet** details as follows;

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

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

...

**3. Interest Rate**

...  
*Interest rate: 5.25%*

*Interest Type: FIXED and variable thereafter*

...

*The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to [the Provider], opt to choose a further fixed rate of interest for a certain period if such an option is made available by [the Provider] and on terms and conditions as may be specified by [the Provider]. Where such an option is not made available by [the Provider] or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower.”*

The Complainant signed the **Loan Acceptance** on **17 August 2007** on the following terms;

*“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.*

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*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.”*  
[My emphasis]

It is clear that the **Loan Offer** envisaged that a fixed interest rate of 5.25% would apply to the mortgage until **30 September 2010** and on the expiry of the fixed interest rate period on the mortgage loan account, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainant. The variable interest rate set out in **Condition 14(c)** was clearly one which may be increased or decreased by the Provider at any time. **Condition 14 (c) of the General Terms and Conditions** does not mention the application of a tracker interest rate to the Complainant’s mortgage loan.

I note that the Provider has sought to rely on the **European Standardised Information Sheet** (the “**ESIS**”) that accompanied the **Loan Offer**, in support of its submission that the Complainant could not have formed any reasonable expectation of defaulting to a tracker interest rate at the end of the initial fixed interest rate period in **2010**. I accept that the **ESIS** outlined that once the fixed interest rate period ends then the repayments would be based on either a further fixed rate or a variable rate which may be increased or decreased by the Provider at any time. However as the Provider is no doubt aware, the **ESIS** does not form part of the Complainant’s mortgage loan contract and is for illustration purposes only. In this regard, I note that the document outlines that it “*does not constitute a legally binding offer*”.

The Complainant accepted the **Loan Offer** in the **Loan Acceptance**, having confirmed that the **Loan Offer** had been explained to her by her solicitor and she understood the **Loan Offer**. If the Complainant was not happy with the terms of the **Loan Offer**, including the terms with respect to the applicable interest rate, the Complainant could have decided not to accept the offer made by the Provider.

The Provider issued a letter to the Complainant dated **13 September 2010**, which outlined that the fixed rate period on the mortgage loan was coming to an end on **30 September 2010** and that “*Any borrowings you have on this fixed rate will automatically roll to the **Standard Variable Rate (APR 3.9%) of 3.85%**”.* The letter also detailed that the Complainant “*might choose a new variable rate or alternatively you could select a new fixed rate*”. The letter contained a list of fixed and variable rate options. The Complainant selected the option of a “*Residential Fixed until 31/10/2012*” of 4.2% and signed the **Rate Change Letter of Authority** on **30 September 2010**.

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The Complainant made reference in her complaint to her mortgage loan account “*reverting*” to a standard variable rate at this time. The evidence shows that the Complainant selected a further fixed interest rate period and the fixed interest rate of 4.2% was applied to the loan from **30 September 2010**.

The Complainant submits that she “*believed*” the rates she was offered in **September 2010** were the rates that she was entitled to, but has since discovered that her mortgage loan “*should have reverted to the appropriate tracker rate once the fixed rate matured*”.

In this regard the Complainant refers to the reference to “*Tracker Mortgage*” in the **Loan Acceptance**. Having considered the Complainant’s mortgage loan documentation in its entirety, it is clear that the mortgage loan was a fixed interest rate loan. A fixed interest rate loan was the type of loan that the Complainant had applied for in **2007**. If it was intended that the loan would be a Tracker Mortgage then, the Loan Offer conditions applicable to the loan would have contained details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14(b)**. However, there was no reference to a fixed margin or an ECB rate in the Complainant’s Loan Offer Letter.

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 a singular use of the word “*Tracker*” in the Complainant’s mortgage loan documentation where all other references were to fixed interest rates and variable interest rates, is sufficient to supersede the Specific Loan Offer Conditions and the General Terms and Conditions comprised in the Loan Offer. This is particularly so given the purpose of the sentence that contains this erroneous reference to “*Tracker Mortgage*”. It relates to the 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 clearly had no impact on or connection with the interest rate applicable at the end of the initial fixed interest rate period.

The Complainant’s representative in the post Preliminary Decision submission dated **16 April 2020** details as follows:

*“[The Provider] has stated that the reference to “Tracker Mortgage” in the Loan Acceptance was a typographical error, which point [the Complainant] has consistently rejected. Your office has accepted [the Complainant’s] view, describing it as an “entirely unsatisfactory error” on the part of the Provider.*

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*However, your office ultimately concluded that this "entirely unsatisfactory error" does not supersede the other conditions of the Loan Offer. [The Complainant] submits that this does not give enough analysis to the issue or how it came to be there and why the Provider should not be penalised. As it seems to be at least conceded that the Mortgage Contract contains a flaw, then the question arises as to whether it [is] a valid contract or is the provider to be allowed to enforce the contract in an 'a-la-carte fashion?*

*We would argue that this "entirely unsatisfactory error" is in the category of negligent misstatement, that a special relationship exists between [the Complainant] as the borrower and [the Provider] as the lending institution whereby [the Complainant] is owed a duty of care. This gave rise to liability in the tort of negligence in the case of Hedley Byrne v Heller (1964) AC 465, which has been accepted by the Irish legal system and has been extended into liability in contract.*

The Provider in the post Preliminary Decision submission dated **30 April 2020** details as follows:

*"The typographical error in the signature block of the Loan Offer did not constitute a negligent misstatement nor any form of statement that the Bank could reasonably have presumed the customer would rely on. It was not a statement of fact but clearly an error in the signing block of the Loan Offer which outlined the correct interest rate offered, the term for which such rate would be applied and what would occur at the end of that fixed period. Further, to constitute a negligent misstatement, the customer must have relied on this wording to their detriment, which did not occur. The loan drew down on the fixed interest rate specified in the offer and at the end of that fixed interest rate period the general loan conditions outlined what would occur.*

*...*

*In summary, an error of this nature in a signature block does not affect the validity of the contract. The Loan Offer clearly outlined the relevant interest rate to apply to the mortgage loan and the general loan conditions outlined what would occur at the end of that fixed interest rate period."*

I do not accept the Complainant's submissions. The analysis I have set out in this Decision clearly outlines why I reached the conclusion that the "typographical error" was not sufficient to supersede the Specific Loan Offer Conditions and the General Terms and Conditions comprised in the Loan Offer which clearly do not provide an entitlement to a tracker interest rate on the Complainant's mortgage loan at the end of the fixed interest rate period. I do not accept that the "typographical error" affects the validity of the Complainant's mortgage loan contract as the Complainant has suggested. Whilst it is not for this office to determine matters of liability in the law of tort, which are more appropriately

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determined by a Court of Law, I have determined the matter of the duty of care that is owed to the Complainant under the consumer protection framework applicable to the relationship between the Provider and the Complainant. I set out my view in relation to the application of the **Consumer Protection Code** below.

The Complainant's representative in the post Preliminary Decision submission dated **16 April 2020** also details as follows:

*"We would ask you to review this matter from legal perspective and to confirm that the reference to Tracker Mortgage was a material matter which did affirm to [the Complainant] that she had signed up to a Tracker Mortgage, notwithstanding other, ambiguous, references within the document. We would remind you that a reference to a variable rate is not distinct from a tracker rate, which is also a variable rate."*

As set out above, **Condition 14(c)** clearly outlines that a variable rate would apply to the Complainant's mortgage loan at the end of the fixed period and that variable rate was "one which may be increased or decreased by the Provider at any time". I again re-iterate that whilst a tracker interest rate has a variable component to it, in that the ECB rate can fluctuate, the variable interest rate as defined in the Complainant's mortgage loan did not contain any reference to the ECB rate, rather it was clearly defined as "one which may be increased or decreased by the Provider at any time". I do not accept that this definition of the variable rate was in any way ambiguous.

The Complainant's representative in the post Preliminary Decision submission dated **16 April 2020** also details as follows:

*"After an inordinate length of time, very significantly outside of the limits set by the Central Bank in its direction to lending institutions in December 2015, [the Provider] denied [the Complainant's] claim that she had been wrongly denied a Tracker Mortgage. [The Complainant] placed this matter in the hands of your office. Your office has consistently stated that in such cases it has to rely on the written word and its decisions have to be informed by the written word. It is that written word that [the Complainant] has been relying upon in order to prove her point and your decision to support the lender in this case flies in the face of precedent and justice."*

It is unclear what precedent the Complainant's representative is referring to in this submission. I have considered this complaint on its merits and on the basis of the submissions and evidence before me including 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 **August 2007 to September 2010**.

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Whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainant's mortgage loan account in **September 2010**, 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 her complaint to this office.

For the reasons set out above, I am of the view that this complaint is partially upheld. 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.

For the reasons set out above, I partially uphold this complaint.

### **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)**.

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**

22 May 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.