



<b><u>Decision Ref:</u></b>	2019-0224
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Refusal to move existing tracker to a new mortgage product
<b><u>Outcome:</u></b>	Rejected

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

##### **Background**

The complaint relates to a mortgage loan that the Complainants held with the Provider. The mortgage loan was secured on the Complainants' Principal Private Residence. The Complainants sold the mortgaged property and purchased a new property in 2012.

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

The Complainants accepted an Offer of Mortgage Loan dated **27 September 2007** with the Provider. The term of the mortgage loan was 11 years and the interest rate applicable was "*0.55% over ECB Main Refinancing Operation Rate*".

The Complainants submit that in or around November/December of 2012 they entered into negotiations with the Provider, as they had decided to sell the mortgaged property and purchase a new property.

The Complainants submit that the Provider failed to facilitate them by substituting the mortgaged property with the new property, and by consequence of the sale of their existing property and purchase of a new property, they had to redeem the mortgage loan and take out a mortgage loan with another Provider, which was not on a tracker interest rate.

The Complainants submit that their communications with the Provider in 2012, were "*totally unsatisfactory*". They submit that they were not given any option by the Provider other than to redeem the existing mortgage loan and pay all outstanding amounts. The Complainants

submit that, by consequence, they had no option but to seek a mortgage with another financial service provider, which was not a tracker mortgage and was at considerably higher interest terms.

The Complainants submit that the Provider failed to facilitate them by substituting the mortgaged property, which was the subject of their mortgage loan in December 2012 to their new property. They submit that as a result they have paid a higher variable rate of interest on their mortgage since December 2012, instead of the tracker rate of ECB + 0.55% which applied to the redeemed mortgage loan with the Provider.

The Complainants submit that they want the Provider to do the following;

- a) To reinstate their tracker interest rate mortgage, and
- b) To pay them compensation for the difference in interest they have paid on the redeemed tracker interest rate mortgage loan, and the variable interest rate mortgage loan they have held with another Provider since December 2012.

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

The Provider submits that the Complainants were issued with a mortgage loan offer dated **27 September 2007**, which provided for a tracker interest rate of 0.55% over the ECB Main Refinancing Operation Rate.

The Provider submits that it holds no record of advising the Complainants in 2012 that it was not possible to substitute the details of the property, which was the subject of the mortgage loan account.

The Provider submits that, notwithstanding this, it is not obliged to allow for any loan amendment, or amendments to the facility letters, for the purposes of substituting and/or exchanging the mortgages property offered as security for any individual mortgage. The Provider further submits that the substituting and/or exchange of security is only possible after the early redemption of one loan and the subsequent drawdown of another loan which then attaches to the newly proposed security

The Provider submits that it withdrew its tracker product in November 2008, and ceased to offer any products in December 2010, and therefore was not in a position to offer the Complainants any new mortgage in 2011 and/or 2012. The Provider further submits that if the Complainants had requested to change the property held as security after December 2010, that the Provider could only release its charge of the associated security once the monies due and owing were redeemed.

The Provider submits that it holds no records of any discussions with the Complainants in which they were informed that their only option was to redeem the mortgage and enter into a loan agreement with a new provider in order to purchase a new property. However, the Provider details that as it was not offering any mortgages/products subsequent to

/Cont'd...

December 2010, the only option available to the Complainants would have been to redeem the mortgage with the Provider and to seek out finance with a new provider.

The Provider submits that there were no terms and/or conditions in the Complainants' loan offer that would allow for the substitution and/or exchange of the property offered as security for the mortgage. The Provider refers to Section 4 of the terms and conditions, and states as follows;

*"You will grant to us, in security of the Loan and interest thereon a security over the Property in a form acceptable to us. The security will be way of a first Legal Mortgage (Mortgage). The actable security in this case was [the mortgaged property]"*.

The Provider submits that the Complainants contacted the Provider on 17 May 2011 and outlined their intention to make a lump sum payment and to amend the tracker rate associated with the mortgage. The Provider submits that the Complainants were given the contact number for the Provider's appointed servicing agent to discuss this matter. The Provider submits that on the same date the Complainants contacted the servicing agent and were quoted the approximate balance outstanding on the mortgage of €143,547. The Provider submits that on 19 May 2011 it received a full and final settlement offer from the Complainants to redeem the mortgage for €110,000. The Provider submits that the reason given by the Complainants for the reduced settlement offer was as follows;

*"given the current economic environment and the negative financial impact said tracker mortgages would have on financial institutes we would like to take this opportunity to make a case offer for full and final settlement on this account of €110,000."*

The Provider submits that it declined this offer. The Provider submits that the Complainants made subsequent full and final settlement offers of €120,000 and €125,000 respectively in July 2011, which were also declined by the Provider. The Provider submits that in their letter dated **20 July 2011**, the Complainants outlined their rationale for proposing to repay 89% of the outstanding balance, as follows;

*"Comparing the current interest rate of 1.8% with the rates available on the market and current discounts readily available from other financial institutes we feel this is an adequate settlement."*

The Provider submits in this respect that it was entitled to seek repayment in full of the outstanding monies due on the mortgage loan account and was therefore justified in declining the Complainants' settlement offers in 2011. The Provider submits that it is important to note that, from the evidence available, the offers made by the Complainants were based on the market conditions at that time and *"the current discounts readily available from other financial institutes"*.

The Provider submits that on **28 August 2012**, the Complainants' representative contacted it to request the title deeds for the Complainants' property which was the subject of the mortgage on accountable trust receipt. The Provider submits that it was informed that the

/Cont'd...

reason for this request was because the property had been placed on the market for sale. The Provider submits that the Complainants made a payment of €114,619.90 to redeem the mortgage in November 2012, and a refund was issued to the Complainants' representative for the surplus redemption funds of €58.83 in December 2012.

The Provider submits that under the terms of the loan offer dated **27 September 2007**, the mortgage type was a Capital and Interest Repayment Tracker Mortgage. It submits that if the Complainants had not chosen to redeem the mortgage offered before the agreed maturity date, the tracker interest rate on the mortgage would have reflected any amendments (increases or decreases) to the applicable tracker rate as set out by the European Central Bank until the proposed date of maturity, which was **20 November 2018**.

The Provider submits that it is satisfied that it has managed the Complainants' mortgage loan account in line with the contractual agreements signed by the Complainants.

The Provider submits that it was the Complainants' decision to redeem their mortgage loan account with the Provider and purchase another property. The Provider submits that it ceased offering all products in December 2010; therefore, a new mortgage was not available to the Complainants in 2011/2012 when they state that they were informed by the Provider that their only option was to redeem the mortgage and "*enter into a brand new non tracker mortgage agreement*".

### **The Complaint for Adjudication**

The conduct complained of is that the Provider failed to facilitate the Complainants to substitute the mortgaged property, which was the subject of their mortgage loan in November/December 2012.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

/Cont'd...

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 **20 June 2019**, 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.

**1 July.** The Complainants made a further submission which was exchanged with the Provider

**18 July.** The Provider stated it wished to make no further submissions.

Taking into account all of the evidence and submissions provided and following the consideration of the additional submission from the parties, I set out my final determination below.

The issue to be determined is whether the Provider failed to facilitate the Complainants in substituting the property on which their mortgage loan was secured in 2011/12.

In order to adjudicate on this complaint, it is necessary to review and set out relevant provisions of the Complainants' loan documentation and to consider the interactions between the Complainants and the Provider between May 2011 and December 2012.

I note that the Additional Conditions section of the Offer of Mortgage Loan dated **27 September 2007**, details as follows;

*"2.6 Additional Conditions*

*...*

*2 The Rate of Interest is linked to the European Central Bank Main Refinancing Operation Rule (the "ECB Rate") which fluctuates from time to time. In the event of an increase or decrease in the published European Base Rate \* we will require up to one months from the date of such increase or decrease to fully implement any amendment to our rate.*

***\*ECB means the European Central Bank main re-financing operations minimum bid rate."***

It is clear that the loan offer envisaged that the tracker interest rate applied to the Complainants' mortgage would reflect any amendments (increases or decreases) to the applicable tracker rate as set out by the European Central Bank until the proposed date of maturity on **20 November 2018**. It is clear from the evidence before me that if the Complainants had not opted to redeem the mortgage early, they would have been entitled to avail of the tracker interest rate until the term of the mortgage ended. It is not in dispute that this is the case.

/Cont'd...

It is clear from the evidence furnished that the mortgage loan agreement did not run to maturity. The Provider's log of the contact records shows that the Complainants made contact with the Provider on **17 May 2011**. The record details as follows;

*"MS CLD ABOUT MORTGAGE AND GAVE HER THE NUMBER FOR [THIRD PARTY SERVICING AGENT].  
SHE WAS WANTING TO MAKE A LARGE PAYMENT TO HER ACCOUNT AND CHANGE OFF A TRACKER MORTGAGE"*

The Complainants also wrote and/or called the Provider on **19 May 2011, 04 July 2011, 15 July 2011 and 20 July 2011** indicating that they wanted to settle the mortgage loan account and made a number of full and final settlement offers with respect to the balance outstanding. Of note in the letter of **19 May 2011**, the Complainants wrote;

*"We are now in a position to review our overall financial position. We are exploring various options, one of which would allow us to settle the above mortgage account which has a current balance of approx. €143,500.*

*Given the current economic environment and the negative financial impact said tracker mortgages have on financial institutes we would like to take this opportunity to make a cash offer for full and final settlement on this account of €110,000."*

I note that in the Complainants' letter to the Provider dated **11 July 2011** they stated as follows;

*"Comparing the current interest rate of 1.8% with the rates available on the market and current discounts readily available from other financial institutes we feel this is an adequate settlement."*

It is clear from the above that the Complainants were considering their options in 2011 and were considering settling the mortgage loan account as an option at the time. The above extract also suggests to me that in July 2011, the Complainants wanted to redeem their mortgage with the Provider in order to secure a mortgage from an alternative Provider. The Provider however did not accept any of the Complainants' offers. I accept that the Provider was entitled to seek repayment of the full amount of outstanding monies due on the mortgage loan account.

The next substantive communication recorded is between February 2012 and December 2012, when the Complainants' solicitor sought redemption figures and to take up the deeds on accountable trust receipt so that the secured property could be sold.

No evidence has been submitted to this office to suggest that throughout 2011 and 2012 that the Complainants specifically requested that the Provider substitute the mortgaged property, which was the subject of their mortgage loan. The Complainants submit that they;

*"were never given any other option but to redeem this mortgage with [the Provider] and pay all outstanding amounts.*

/Cont'd...

*We were never facilitated to simply change the property it related to.”*

The Provider has detailed that the Complainant was not offered the option of substituting the property the subject of the mortgage loan and the Provider has no record of advising the Complainants that this was not an option.

In addition, the Provider states that even if the Complainants had requested this, it was not possible to change the detail of the property, and that the Provider is not obliged to allow for any loan amendments, or amendments to facility letters, for the purposes of substituting and/ or exchanging the mortgaged property offered as security for any individual mortgage.

The Provider further submits that it ceased offering tracker mortgage rates in November 2008 and ceased offering any products in December 2010 and therefore were not in a position to offer any mortgage to the Complainants in 2011/2012.

I note the following provisions in the Provider’s Mortgages Terms & Conditions;

*“ 2 Early Repayment of The Loan*

*2.1 The Loan may be repaid earlier than a specified date in the Offer.”*

*“ 4 Security*

*You will grant to us, in security of the Loan and interest thereon, a security over the Property in a form acceptable to us. The Security will be by way of a first Legal Mortgage (Mortgage).”*

The particulars of offer of the Offer of Mortgage Loan outlines the address of the secured property under the heading *“Security Required”*.

It is clear from the above that the Offer of Mortgage Loan together with the terms and conditions provided for the specific security over the specific property (principal private residence) named in the Offer of Mortgage Loan. It is also clear that whilst there was a provision allowing for the early payment of the loan, there was no provision which entitled, either of the parties to the loan to *“amend”* the details of the property which secured the mortgage. For the avoidance of doubt, there was no provision allowing the Complainants to *“switch principal private residences whilst holding onto the tracker mortgage”*. Therefore, the property which formed the security for the loan could not simply be ‘switched’ or transferred to another property.

In this regard, I would highlight that it is usual banking practice, where a person seeks to sell the property, which is security for a mortgage loan that that mortgage loan is redeemed and the proceeds are used to discharge that mortgage loan. It is then at the discretion of the parties whether to seek to enter into a new mortgage loan agreement with respect to the purchase of any subsequent property.

/Cont’d...

I note that the Provider has submitted that it ceased to offer the tracker product in November 2008 and ceased to offer any mortgage products in December 2010. As such at the time that the Complainant sought to redeem the mortgage loan in December 2012, the Provider was not offering any new products to new or existing customers.

It was a matter for the Complainants to decide if they wished to sell the property and purchase an alternative property. In doing so they, as is the norm, would have to redeem the mortgage on the property they were selling and apply for a new mortgage. It was open to the Complainants to seek a new mortgage from any financial service provider. However, as the provider which is the subject of this complaint was no longer offering mortgages, or any financial services, it was not an option to get a new mortgage from the Provider.

For the avoidance of doubt, the Complainants could have remained on the 0.55% over ECB Main Refinancing Operations Rate had they not decided to sell the property and redeem the loan. It is clear from the Complainants' attempts to settle with the Provider that the Complainants were aware that they had a beneficial rate. This was particularly evident from their communication of **11 July 2011** where they sought a write down on the redemption figure on the basis of the, *"negative financial impact said tracker mortgages have on financial institutions. We would like to make a cash offer for full and final settlement of this account."*

I accept that there was no obligations on the Provider to facilitate (by way of agreeing to a request by the Complainants or by way of a positive obligation on the Provider to accept such an offer from or to make an offer to the Complainants) the substitution and/or exchange the security and/or *"switch properties"* for the mortgage either under the terms of the mortgage loan or otherwise.

I have been provided with no evidence that the Provider acted incorrectly in its management of the Complainants' mortgage loan account. Having considered the documentation provided in evidence by both the Complainants and the Provider, I accept that the Provider acted in accordance with the provisions of the loan offer dated 27 September 2007. I am of the view that the Complainants voluntarily chose to redeem their mortgage with the Provider in November 2012. I am satisfied that it was the Complainants' choice to sell their property which was the subject of the mortgage loan account with the Provider, and by doing so they opted to terminate their mortgage contract with the Provider.

In light of all the foregoing, I do not uphold this complaint.



**Conclusion**

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

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

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

31 July 2019

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.