



<b><u>Decision Ref:</u></b>	2019-0288
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

##### **Background**

This complaint relates to one of the mortgage loan accounts held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' Principal Private Residence.

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

The Complainants accepted a Loan Offer Letter from the Provider on 24 August 2004. The interest rate applicable was a "2 YEAR DISCOUNT VARIABLE" at a rate of 3.13%. On expiry of the two year discounted period, in October 2006, the Complainants accepted and signed a Letter of Authority/Acknowledgement opting to fix the interest rate on the mortgage account at a rate of 4.54% for a period of two years.

When the two year fixed interest rate period expired in October 2008, the Complainants accepted and signed a Letter of Authority/ Acknowledgement, choosing to fix the interest rate on the account for a further five years at a rate of 4.9%.

The Complainants submit that prior to the expiry of the discounted variable interest rate period in October 2006 and the fixed interest rate period in October 2008, interest rate options forms issued to them which did not include the option of a tracker interest rate. The

Complainants submit that the discounted variable interest rate period expired at a time when the Provider was offering tracker interest rate products, between 01 January 2004 and 26 September 2008, and as such, they feel that they should have been offered a tracker rate in October 2006. They further submit that a tracker option should have been offered to them in October 2008, as their other two mortgage loan accounts were operating on a tracker interest rate at the time.

The Complainants submit that they contacted a manager employed by the Provider to discuss their interest rate options in 2008. They submit that the manager informed them that *“the five (5) year fixed rate at 4.9% was VERY attractive”* and consequently, the Complainants decided to opt for the five year fixed rate of 4.9%.

The Complainants say that the interest rates began to decrease one month after taking the *“[manager’s] advice”* and they attempted to break from the fixed rate period. The Complainants submit that they were informed by the Provider that in order to do so, a discontinuance fee would be incurred and financially, they were not in a position to pay this. In this regard they say that they should have received more help from the Provider to remove themselves from the *“awful fixed rate”*.

The complaint is that the Provider failed to offer the Complainants a tracker interest rate on their mortgage loan account on the expiry of the discounted variable interest rate period in **October 2006** and again on the expiry of the fixed interest rate period in **October 2008**. They also complain that they were incorrectly advised by the Provider to enter into a further fixed rate period for five years in **October 2008**.

The Complainants are seeking the following;

- (a) Compensation for having to pay excess interest over a 5 year period from 2008 to 2013, and for the resulting stress and worry during that period. They submit that they have paid in excess of €25,000 as a result of the advice they received from the Provider.
- (b) To recoup the excess monies they have paid.

### **The Provider’s Case**

The Provider submits that the Complainants’ mortgage loan documentation did not state that a tracker interest rate would be available to the Complainants on expiry of the discounted interest rate period, or that a tracker interest rate would be made available to them at a later point in time or at any time. The Provider submits the letter of loan offer was clear in confirming that the mortgage loan account was operating on a discounted variable rate, not a tracker interest rate, nor did it specify that such a rate would be made available to the Complainants at any time in the future.

The Provider submits that there was no reference to a tracker interest rate in the letter of loan offer accepted by the Complainants in August 2004, or in the Letter of Authority/Acknowledgement completed and signed by the Complainants in October 2006. The Provider submits that such a reference would have been necessary for a tracker interest rate to apply.

The Provider submits that it is satisfied that the rate instruction forms issued to the Complainants in 2006 and 2008 were sufficiently clear and transparent as to the Complainants' entitlements with respect to interest rate offerings on their mortgage loan agreement. It submits that when the Complainants opted to fix the interest rate on their mortgage loan account in both October 2006 and October 2008, the Letters of Authority/Acknowledgement accepted and signed by the Complainants contained all the relevant information, including what interest rate would be applicable on expiry of the fixed interest rate periods. In this regard, the Provider makes reference to the fixed rate mortgage condition contained in the Letters of Authority/Acknowledgement, which reads as follows;

*"TRANSFER FROM FIXED RATE TO VARIABLE RATE AT THE END OF FIXED NOTICE*

*On the expiry of the fixed term I/we may, by prior notice in writing to the Company, opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the Company. Where such an option is not available or I/ We fail to exercise the option if available, the interest rate applicable will be a rate of interest which may be increased or reduced by the Company from time to time and at any time in line with market interest rates (the variable rate)."*

The Provider submits that the term "variable rate" as described in the Complainants' mortgage loan documentation is the Provider's standard variable rate. It said that the documentation has been reviewed in full in accordance with the Tracker Mortgage Examination framework and it is clear that this "variable rate" was a standard variable rate. The Provider is therefore satisfied that the term "standard variable rate" is clearly described within the Complainants' mortgage loan documentation.

The Provider indicates that the standard variable rate is a variable rate which can be increased or reduced by the Provider from time to time, at any point in time. The Provider further indicates that, by comparison, a tracker rate is linked to the European Central Bank (ECB) base rate and therefore an interest rate linked to the ECB rate will only increase or decrease in line with movements in the ECB base rate, which cannot be determined by the Provider. The Provider submits that there was no reference to a tracker interest rate in "either of the Letter of Authority/Acknowledgement forms and that such a reference would have been necessary for a tracker interest rate to apply".

The Provider submits that although it was offering tracker interest rate products from 01 January 2004 until 26 September 2008, during which period the discounted variable interest period expired on the Complainants' mortgage account, the Provider was under no obligation to offer all mortgage types, including tracker interest rates, to all customers.

The Provider notes that in section 8a of the Complainants' mortgage loan application from July 2004, the Complainants were requested to choose the rate type which they sought to be the basis of their mortgage loan account. The Complainants were given a variety of options to select, including a "Tracker Variable" option. The Provider notes that the Complainants did not select the tracker option, but instead ticked the "Variable" and "Discount" rate types.

The Provider disagrees that the Complainants should have been offered a tracker interest rate on their mortgage loan account in October 2008 simply because their other two mortgage accounts were operating on a tracker interest rate at the time. In this regard it states that each of the Complainants' mortgage loan accounts were completely separate borrowings, issued on different terms and conditions. They say that the fact that Complainants' other mortgage loan accounts which were on a tracker interest rate in October 2008 did not entitle the Complainants to avail of such a rate on their mortgage loan account which is the subject of this complaint.

The Provider details that tracker interest rate products were withdrawn from the market by the Provider in September 2008 and therefore were not available for selection in October 2008 when the fixed interest rate period expired on the Complainants' mortgage loan account. The Provider submits it did not have any specific policy with respect to tracker interest rate offerings to customers between 2006 and their withdrawal in September 2008.

In relation to the Complainants' submission that the Provider's employee advised them that the five year fixed rate option was "very attractive", the Provider submits that it is satisfied that the staff member did not provide the Complainants with such advice. It states that its staff were trained to provide information in relation to various interest rate options that were available when such information was sought, however, the ultimate decision as to what interest rate option best suited their individual circumstances, rested with the Complainants.

The Provider further submits that any comment that an interest rate option may have been "very attractive" did not constitute advice, nor could it reasonably be deemed to be advice.

The Provider submits that the Complainants' mortgage loan account was deemed not impacted by the Tracker Mortgage Examination based on the fact that the account drew down on a "discounted variable rate of 3.13%" and was to default to a variable interest rate

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thereafter, as outlined in the letter of loan offer dated 19 August 2004. The Provider further submits that following the expiry of the discounted interest rate period, the Complainants availed of a fixed interest rate for two separate periods and on each occasion, they completed and signed a Letter of Authority/Acknowledgement which the Provider says contained all relevant information including what would transpire at the end of each fixed rate period.

### **The Complaint for Adjudication**

The conduct complained of is as follows;

- (a) the Provider failed to offer the Complainants a tracker interest rate on their mortgage loan account on the expiry of the discounted variable interest rate period in **October 2006** and the fixed interest rate period in **October 2008**, and
- (b) the Complainants were incorrectly advised by the Provider to enter into a further fixed rate period for five years in **October 2008**.

### **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 do 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 are sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 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.

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In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The issues to be determined are whether the Complainants should have been offered a tracker interest rate on their mortgage loan account on expiry of the discounted variable interest rate period in **October 2006** and the fixed interest rate period in **October 2008**. It must also be determined whether the Complainants were incorrectly advised to enter into a further fixed rate period for five years in October 2008.

In order to ascertain if the Provider did incorrectly fail to offer the Complainants a tracker interest rate on their mortgage loan account in October 2006 and October 2008, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. In order to ascertain if the Complainants were wrongly advised, resulting in them being overcharged in interest, it is also relevant to set out the interactions with the Complainants in October 2008 when the Letter of Authority/Acknowledgement was signed.

I note the Loan Offer Letter signed by the Complainants on 24 August 2004 details as follows;

*Loan Type: STANDARD ANNUITY*

...

*Interest Type: 2 YEAR DISCOUNT VARIABLE*

I note that the Specific Loan Offer Conditions detail as follows;

*"The 2yr discount rate quoted is 0.4% less than the prevailing variable interest rate and is subject to variation in accordance with mortgage terms. The interest rate will revert to the appropriate variable interest rate 24 months after issue of the loan cheque. If the account falls more than two repayments in arrears during the discount period, the interest rate will automatically revert to the full variable interest rate and the discount rate will not be available to the Borrower thereafter."*

It is clear to me that the loan offer letter envisaged a two year discounted variable rate at 0.4% less than the prevailing variable interest rate and thereafter a variable rate applying to the Complainants' mortgage loan.

I note that the Complainants' mortgage loan documentation, signed and accepted on 24 August 2004, to include the Specific Loan Offer Conditions and the Standard Mortgage General Terms & Conditions does not contain a specific definition of "variable rate".

While I am of the view that the Provider could have included a specific definition of "variable rate" in the mortgage loan documentation, there was no reason for the Complainants to

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reasonably expect that the term “*variable rate*” related to a tracker interest rate, given that their account drew down on a standard variable rate. In any event, it does not appear that there was confusion on the part of the Complainants at any point in time as to the definition of the term as set out in their mortgage loan documentation. In this regard, it is also noted that in Section 8a of the mortgage loan application, the Complainants were given the option to apply for a “*Tracker Variable*” interest rate, however, they instead opted to apply for a “*Variable*” and “*Discount*” rate. The Provider says that the Complainants availed of the services of a third party Broker during the application stages of their mortgage loan application and as such, they are not in a position to confirm or comment on any advice given to the Complainants by the Broker at that time. It is important to note that this complaint is maintained against the Provider Bank, not the Broker. On the basis of the information provided by the Complainants in their application, it seems clear to me that it was not their intention to draw down the mortgage loan account on a tracker interest rate rather they chose a discounted variable rate and that is what they were subsequently offered by the Provider.

The Complainants assert that they were entitled to a tracker interest rate at the end of the discounted variable rate period in 2006, given that the Provider was offering tracker rates to customers from January 2004 until September 2008. In this regard, the Provider says that there was no obligation on the Provider to offer all mortgage types, including tracker interest rates, to the Complainants in October 2006. As set out above, it is clear that, on expiry of the discounted variable interest rate period the loan would revert to the “*appropriate variable rate*”. As such, the Provider was under no contractual obligation to offer the Complainants a tracker interest rate on their mortgage loan account in October 2006. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers at the time, did not create an obligation (contractual or otherwise) on the Provider to offer a tracker rate to the Complainants on their mortgage loan account.

On expiry of the discounted variable interest rate period, the Complainants converted the mortgage loan account to a fixed rate of 4.54% for a period of 2 years in October 2006 and thereafter, a fixed rate of 4.9% was applied to the account for a further five year period. The Letters of Authority/Acknowledgement signed by the Complainants on 17 October 2006 and 13 October 2008 are clear and transparent as to the Complainants’ entitlements with respect to interest rate offerings on expiry of the fixed interest rate periods.

I note that the Complainants accepted and signed the Letters of Authority/Acknowledgement on 17 October 2006 and 13 October 2008. These state as follows;

*“I/We acknowledge the following Fixed Rate Mortgage conditions: ...*

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3. TRANSFER FROM FIXED RATE TO VARIABLE RATE AT THE END OF THE FIXED NOTICE

*On the expiry of the fixed term I/we may, by prior notice in writing to the Company, opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the Company. Where such an option is not available or I/We fail to exercise the option if available, the interest rate applicable will be a rate of interest which may be increased or reduced by the Company from time to time and at any time in line with market interest rates (the variable rate)."*

I further note that section 14 of the Standard Mortgage General Terms and Conditions accepted by the Complainants on 24 August 2004 details as follows;

**"Interest Rate**

.....

(b) *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 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 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."***  
**[my emphasis]**

I accept that the Provider clearly set out in both the Standard Mortgage General Terms and Conditions and Letters of Authority/Acknowledgement what would happen with respect to the interest rate on the mortgage loan account on cessation of the fixed interest rate periods in 2006 and 2008, that is, the Complainants may choose a further fixed rate, if such an option is available and where such an option is not made available, or in circumstances where the Complainants fail to exercise the option, the applicable rate will be the Provider's standard variable rate. The standard variable rate in this case was clearly set out to be one which may be increased or decreased by the Provider at any time, as opposed to a tracker variable rate, which would fluctuate in accordance with the European Central Bank base rate.

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I note that tracker mortgages had been withdrawn from sale by the Provider from September 2008 and therefore the Complainants could not have been offered a tracker interest rate when the fixed rate expired in October 2008. Furthermore, the Complainants had no contractual entitlement to a tracker interest rate to be applied to the mortgage loan account when the fixed interest rate period concluded in October 2008.

A further argument made by the Complainants is that they should have been offered a tracker interest rate in October 2008 on the mortgage loan account that is the subject of this complaint on basis that at that time their other two mortgage accounts were operating on a tracker interest rate. The documentary evidence shows that each mortgage loan account is separate and subject to different terms and conditions and therefore, the fact that their other accounts were operating on a tracker rate, did not give the Complainants an entitlement to such a rate for the account which is the subject of this complaint. The Complainants' mortgage loan, which is the subject of this complaint, was accepted by them on the following terms;

*"I/We acknowledge receipt of the General Terms and 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 undertake to complete the Mortgage Deed as soon as possible."*

There is no provision in the Loan Offer, the Specific Loan Offer Conditions or the General Terms and Conditions to link the Complainants' mortgage loan account which is the subject of this complaint to the Complainants' other mortgage loans, such that would mean that they share the same terms and conditions in relation to the applicable interest rates.

The Complainants submit that they tried to negotiate moving from the fixed interest rate entered into in 2008, however, they were informed by the Provider that a discontinuance fee would be incurred. The Complainants submit that they were not in a position to pay this fee and they should have received more assistance from the Provider to help them terminate the fixed interest period early.

I note that Section 14 of the Standard Mortgage General Terms and Conditions details as follows;

*"(b) (iii) Where, during a Fixed Rate Period, [the Provider] accepts:*

*(A) early redemption of the loan in full,*

*(B) a Lump Sum Repayment, or*

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*(C) the conversion of a fixed interest rate loan to a variable interest rate loan (or other fixed interest rate loan)*

*the Borrower must pay to [the Provider] a sum equal to the higher of (i) zero or (ii) a sum to be calculated in accordance with the following formula:*

*(Redeemed Amount x (R-R1) x Time) divided by 365."*

I further note that the Letter of Authority/Acknowledgement signed and accepted by the Complainants in October 2008 states as follows;

*"DISCONTINUANCE FEE*

*In the event that I/we wish to transfer my/our mortgage from the fixed rate to a variable rate, prior to the expiry of the fixed term, or in the event of early redemption of the fixed rate mortgage (or part thereof) additional interest will be the equivalent of a sum equal to six months interest, calculated at the fixed rates applicable prior to the transfer or redemption on the balance of the loan outstanding at the date of the transfer or the date of redemption or part redemption whichever is applicable."*

In light of the information provided in both the Standard Mortgage Terms and Conditions and the Letters of Authority/Acknowledgement in 2008, I cannot accept that the Provider was under any obligation to provide more assistance to terminate the fixed interest period early. I accept that the Provider was sufficiently clear as to the fee, which would apply.

The Complainants have submitted that they "called" the Provider after receiving the interest rate sheet. The Complainants submit that they opted for the five year fixed interest rate of 4.9% on the basis of "advice" received from a manager employed by the Provider. They say he informed them that the five year fixed option was "very attractive". They say that after the "meeting" with the Provider the first-named complainant "was talking to my accountant and he told me I should not have fixed my mortgage at that time as Interest rates will be falling/reducing over the coming months and years"

This office requested recordings/transcripts of the telephone conversation(s) that took place in or around October 2008. I note that the Provider submits that it "do[es] not hold any recording/transcript of telephone conversations" with the Complainants, or their Broker, that took place in or around October 2008. No explanation for this has been provided. In this respect it is noted that the Complainants' themselves make reference to a "call" and then to a "meeting", so there may be some confusion as to whether this interaction took place by phone or in person. Nonetheless I do not think that how this interaction took place is of substance.

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The Provider submits that any comment that an interest rate option may have been “*very attractive*” did not constitute advice, nor could it reasonably be deemed to be advice. It states that its staff were not authorised to provide advice to customers but they were trained to provide information in relation to various interest rate options that were available.

I note that the 5 year interest rate option chosen by the Complainants was the lowest fixed rate option available to them at that point in time. I do not accept that labelling an interest rate as “*very attractive*” amounts to advice to choose that rate. The decision as to what interest rate best suited the Complainants, rested with the Complainants. If the Complainants were unsure of the options available to them or the consequences of those options, they could have elected to secure independent advice in advance of selecting an option. It would appear that the Complainants sought said advice after they had chosen their fixed rate.

For the reasons set out above, I do not uphold the 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**

15 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.**