



<b><u>Decision Ref:</u></b>	2019-0322
<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 at point of sale 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 two mortgage loan sub-accounts held by the Complainant with the Provider. The mortgage loan accounts which are the subject of this complaint are both secured on the same Buy to Let (BTL) property held by the Complainant. The applications for both mortgage loans were made by the Complainant through a third party Broker and submitted to the Provider.

**The Complainant's Case**

The Complainant applied for a mortgage loan through a Broker in October/November 2003. The Complainant accepted a mortgage loan offer from the Provider on **7 January 2004** for his mortgage loan account ending **(01)**. The interest rate applicable was fixed for 12 months at 2.74%. The Complainant submits that he was not offered a tracker interest rate, or informed that a tracker interest rate was an option, when he applied for the mortgage loan account ending **(01)** in **2003**.

The Complainant submits that when the fixed interest rate periods on mortgage loan account ending **(01)** expired, in **January 2005** and **January 2007** respectively, he was not

offered the option of a tracker interest rate by the Provider. He submits that he was only offered fixed or variable interest rates. He submits that the Provider was offering tracker interest rate products between **01 January 2004** and **26 September 2008**, and as such, he feels that he should have been offered a tracker rate at the end of the fixed interest rate periods in January 2005 and January 2007.

The Complainant accepted a top-up mortgage loan offer from the Provider on **21 February 2005** for his mortgage loan account ending **(02)**. The interest rate applicable was a variable interest rate of 3.53%. The Complainant submits that *"the same conditions applied"* to the top-up mortgage loan account as to mortgage loan account ending **(01)**. The Complainant submits that he was not offered a tracker interest rate, or informed by the Provider that a tracker interest rate was an option when he applied for the mortgage loan account ending **(02)** in 2005.

The Complainant submits that the Provider placed him at *"a serious disadvantage"* by failing to present him with all of the interest rate options available to him for the mortgage loans. He submits that, by failing to furnish him with all of the information regarding his interest rate options in relation to the mortgage loan accounts, the Provider did not comply with its duty of care to him as a customer. The Complainant submits that he did not expect the Provider to give advice to him in relation to the most suitable interest rates, but to ensure, at a minimum, that he was aware of all of the interest rate options available, to enable him to independently make an informed choice regarding interest rates. He submits that the Provider was *"prepared to enter into agreements which quite possibly may not have been suitable for prospective customers and therefore ignored any duty of care to prospective customers."*

The Complainant submits that the agreement in place between the Provider and the Broker should ensure that all prospective customers are provided with full details of the Provider's interest rate products. He submits that by not ensuring this, the Provider displayed a lack of duty of care to its prospective customers.

The Complainant submits that he should be entitled to renegotiate his mortgage loan agreements with the Provider, or be given alternative options, if other interest rate options should have been made available to him, or subsequently became available after the mortgage loan agreements were entered into.

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

The Provider submits that the Complainant's two mortgage loan accounts "*were completely separate borrowings which were issued on different terms and conditions*" and that each mortgage loan account "*followed a different mortgage journey*".

With respect to mortgage loan account ending **(01)**, the Provider submits that tracker interest rates were available from the Provider from **01 January 2004** until **26 September 2008**, meaning that tracker interest rate products were not available at the time of the Complainant's mortgage loan application in **November 2003**.

The Provider submits that the Complainant was not entitled to a tracker interest rate on mortgage loan account ending **(01)** upon the expiry of the fixed interest rate periods in **January 2005** or **January 2007**, as the mortgage loan offer clearly stated that the account would roll to a variable interest rate. The Provider submits that the mortgage loan offer contained no reference to a tracker interest rate at a future date, and such a reference would have been necessary for a tracker interest rate to apply.

The Provider submits that it furnished information to customers on request, in relation to the various interest rate options that may have been available at the time of the request. The Provider submits that its staff were not authorised to provide advice to customers as to what interest rate to select and the decision as to what interest rate to select rested solely with the customer based on what suited their individual circumstances.

With regard to mortgage loan account ending **(02)**, the Provider submits that while tracker interest rate products were available at the time of the Complainant's application in **2005**, the mortgage loan offer clearly stated that the Complainant's account would issue on a variable interest rate and did not specify that a tracker interest rate would be available to the Complainant at a future date.

The Provider submits that during the application stages for both mortgage loan accounts, the customer chose to avail of the services of a third party Broker. The Provider submits that in accordance with its agreement with Brokers, the Provider was prohibited from contacting Broker customers directly until such time as the customer's mortgage funds were drawn down. It submits that the agreement specified that the ownership of communicating all aspects and developments pertaining to the loan was the sole responsibility of the Broker. The Provider submits that therefore, it is not in a position to comment on any information given to the customer by his Broker during the application stage of his mortgage loan accounts, and in particular, the information provided regarding the loan type and rate options available.

/Cont'd...

The Provider further submits that no advice or recommendation regarding the products or suitability of the products was given to the Complainant by the Provider. The Provider submits that its role was merely as the “*provider of the product*”. It submits that suitability requirements for mortgages were introduced in the Consumer Protection Code 2006, which entered into force on **1 July 2007**. It submits that there was no legal or regulatory requirement in 2003 and 2005 for “*a suitability statement to be completed to ensure that the products were suitable for the customer. All lending by the [Provider] was subject to lending criteria and relevant terms and conditions. We are satisfied that the products selected by the customer (via his Broker) were suitable to meet his requirements as indicated at those times.*”

The Provider submits that it did not fail in its duty of care to the Complainant in any way and that it is satisfied that it provided the Complainant with all the relevant and required information regarding his mortgage loan accounts and the available interest rate options in relation to his mortgage loan accounts at all stages throughout his mortgage journey.

The Provider submits that there was no obligation on it to renegotiate the loan offers or to provide the Complainant with alternative options. The Provider submits that a customer can seek to renegotiate an agreement with the Provider, but the existing agreement would remain in place until and unless it expired or was replaced by an alternative agreement agreed by both parties, subject to lending criteria, eligibility and terms and conditions.

### **The Complaint for Adjudication**

The conduct complained of is that the Provider did not offer or inform the Complainant about the option of a tracker interest rate for the mortgage loan accounts ending **(01)** and **(02)** at any stage, to include the following dates;

- (a) when he applied for mortgage loan account ending **(01)** in **December 2003**,
- (b) when he applied for mortgage loan account ending **(02)** in **January 2005**, and
- (c) when the fixed rate periods in relation to mortgage loan account ending **(01)** expired in **January 2005** and **January 2007** respectively.

### **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

/Cont’d...

response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 30 August 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Before dealing with the substance of the complaint, I note the applications for both mortgage loans were 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.

The issue to be determined is whether the Complainant should have been offered a tracker interest rate on his mortgage loan accounts during the application processes for mortgage loan account ending **(01)** in **2003** and mortgage loan account ending **(02)** in **2005**. It must also be determined whether the Complainant should have been offered a tracker interest rate when the fixed interest rate periods on mortgage loan account ending **(01)** expired in **January 2005** and **January 2007** respectively.

/Cont'd...

In order to ascertain if the Provider did incorrectly fail to offer the Complainant a tracker interest rate on his mortgage loan accounts ending **(01)** and **(02)**, it is relevant to consider the interactions with the Complainant during both mortgage loan application processes in 2003 and 2005 respectively, and also when the fixed interest rate periods on mortgage loan account ending **(01)** expired in 2005 and 2007. It is also necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation. I will deal with each mortgage loan account in turn.

### ***Mortgage loan account ending (01)***

I note that the Complainant applied for a mortgage for €138,000 by way of mortgage application form. The application form which has been submitted in evidence comprises of two parts. The first part, although unbranded, appears to be the Broker application form and was signed by the Complainant on 10 October 2003. The second part is Provider branded and titled "*Mortgage Application Insert*" and was signed by the Complainant on 07 November 2003. The Broker section of the application form details;

*"Your mortgage application is divided into two parts. The first part of your mortgage application captures information about you, the applicant. The second part gives important information about the mortgages offered by a given lender, including statutory warnings."*

I note in the Broker part of the application form in Section G: Details of the Mortgage Required the Complainant in response to the question "*Type of loan required?*" selected the "*Variable*" option. I note that other options available were Fixed, Tracker, Split, Discounted Variable and Other.

The Provider submits that tracker interest rates were available from the Provider from **01 January 2004** until **26 September 2008**. I accept that the Complainant could not have been offered a tracker interest rate with the Provider for this mortgage loan account during the mortgage loan application process, which took place between October and November 2003. I note that the Broker's application form outlined the types of interest rate options available generally from a range of Providers and the Complainant selected a variable option and it appears the application with the Provider proceeded on that basis. The Provider was under no obligation to offer the Complainant a tracker interest rate on the mortgage loan at the time the Letter of Offer issued. As the Complainant had not sought one and had ticked the box for a variable rate.

It appears that the Broker issued the Loan Offer Letter dated 09 December 2003 to Complainant. The Letter of Offer outlined that the loan type as an "*Annuity*" with the



interest type as “Fixed for 12 months”. I further note that Condition 10 of the Mortgage General Terms and Conditions details as follows;

**“Interest Rate**

...

*(b) In the case of a fixed interest rate loan 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 applicant(s) on the expiry of the fixed term, 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].*

*Where such option is not available or, if available, the applicant(s) fail to exercise the option, the **interest rate applicable will be a rate of interest which may be increased or decreased by [the Provider] from time to time and at any time (the variable interest rate)**, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower.” [my emphasis]*

The Complainant signed this Letter of Offer on **07 January 2004** on the following terms;

*“I/We acknowledge receipt of the General & Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, Terms and Conditions explained to us by our solicitor and I/We fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. We undertake to complete the Mortgage Deed as soon as possible.”*

It is clear from the above that, on expiry of the fixed interest rate period on mortgage loan account ending **(01)**, 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 rate in this case was clearly set to be one which may be increased or decreased by the Provider at any time. It made no reference to a tracker or the ECB rate. The Complainant accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to him by his solicitor and he understood the Loan Offer. If the Complainant was not happy with the terms of the Letter of Offer, including the type of interest rate, the Complainant could have decided not to accept the offer made by the Provider.

I note that the Complainant also submits that Provider should have provided him with a tracker interest rate option on mortgage loan account ending **(01)** became available before

/Cont’d...

the Letter of Offer was signed on **07 January 2004**. The Complainant submits that the loan offer could have been "*renegotiated*" if this option was made available to him. There is no obligation on a Provider to advise applicants for mortgage loans of amendments to interest rate offerings in their suite of products, whilst an application is being considered by the Provider or after a Letter of Offer issues to an applicant. As detailed above, it was a matter for the Complainant to decide whether he was willing to accept the terms of the Letter of Offer, when the offer was made. If the Complainant was dissatisfied with the interest rate option made available to him, he could have decided not to accept the offer.

I note the Provider issued a letter to the Complainant dated 19 January 2005 in relation to the expiry of the fixed interest rate period on **19 January 2005**. The Complainant was offered a selection of fixed interest rates, and a variable interest rate. The Complainant signed a Letter of Authority/Acknowledgement on **21 January 2005** electing for a two year fixed interest rate of 3.89%.

I note that the Provider then issued a letter to the Complainant dated **23 January 2007**, in relation to the expiry of the fixed interest rate period on **02 February 2007**. The Complainant was offered a selection of fixed interest rates, and a variable interest rate. The Complainant signed a Letter of Authority/Acknowledgement on **01 February 2007** electing for a two year fixed interest rate of 4.54%.

The Complainant submits that when the subsequent fixed interest rate periods on mortgage loan account ending **(01)** were due to expire in **January 2005** and **January 2007** respectively, he was only offered fixed or variable interest rates by the Provider. The Provider submits that while tracker interest rate products were available when the fixed interest rate periods expired in 2005 and 2007 respectively, the mortgage loan offer dated **9 December 2003**, did not state that a tracker interest rate would be available to the Complainant on the expiry of the fixed interest rate period or that a tracker interest rate would be made available to him at a later date.

I have considered the Terms and Conditions of the Complainant's mortgage loan account and Condition 10 of the Mortgage General Terms and Conditions clearly set out what would happen with respect to the interest rate on the mortgage loan account on the expiry of the fixed interest rate periods. That is, the Complainant 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 Complainant failed to exercise the option, the applicable rate would be the Provider's variable rate. The Provider acted in accordance with Condition 10 of the Mortgage General Terms and Conditions in **2005** and **2007**, in its offering to the Complainant when those fixed interest rate periods expired. There was no contractual obligation on the Provider to offer the Complainant a tracker interest rate on mortgage loan account ending **(01)** when the fixed interest rate periods expired.

/Cont'd...



I note that the Provider's letter to the Complainant dated **23 January 2007**, details as follows;

*"Should you have any specific queries in relation to refixing your mortgage, or the availability of **tracker variable rate options**, please contact us at....". [my emphasis]*

Although there was no contractual or other obligation on the Provider to do so, it appears that the Provider indicated to the Complainant about the availability of tracker variable rate in its letter of **23 January 2007**. If the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan at the time, the Complainant could have contacted the Provider at the time. 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 Complainant on his mortgage loan account.

#### ***Mortgage loan account ending (02)***

I note that the Complainant applied for a further mortgage of €20,000 in December 2004.

As with the application form for mortgage loan account ending **(01)**, there are two parts to the application. The first part, although unbranded, appears to be the Broker application form and was signed by the Complainant on **13 December 2004**. The second part is Provider branded application form called "Mortgage Application Insert" which was signed by the Complainant on **10 January 2005**.

The additional information section of the Broker part of the application form details "*this is a top-up on original loan of €138,000*". I note in the Broker part of the application form in Section G: Details of the Mortgage Required, in response to the question "*Type of loan required?*" the Complainant again selected the "*Variable*" option. I note that other options available were Fixed, Tracker, and Split. Discounted Variable and Other.

It appears that the Broker issued the Loan Offer Letter dated **21 January 2005** to Complainant. The Letter of Offer outlined that the loan type as a "*Standard Annuity*" with the interest type as "*Variable*".

The Complainant signed this Letter of Offer on **21 February 2005** on the following terms;

*"I/We acknowledge receipt of the General & Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, Terms and Conditions explained to us by our solicitor and I/We fully understand them. I/We hereby accept the Loan Offer on the*

/Cont'd...

*terms and conditions specified. We undertake to complete the Mortgage Deed as soon as possible."*

I note that tracker interest rates were on offer generally by the Provider when the Complainant applied for the mortgage loan account ending **(02)** in 2005. The Complainant availed of the services of a third party Broker during the application stage of the mortgage loan application. I again note that the Broker's application form outlined the types of interest rate options available, generally on mortgage loans, including the tracker rate and the Complainant again selected a preference for a variable option for the top-up loan.

In circumstances where the Complainant was engaging with a Broker with respect to the mortgage loan application, I accept that there was no requirement for the Provider to communicate directly to the Complainant at that time. Furthermore the fact that tracker interest rate options were available generally as part of the Provider's suite of products at the time, did not obligate the Provider to offer the Complainant a tracker interest rate on this top-up loan application or indeed any product option. In this case, the Complainant applied for a mortgage loan on a variable interest rate and the Provider offered the Complainant a variable interest rate, which was accepted by the Complainant, having acknowledged that the terms and conditions of the mortgage loan were explained to him.

It appears that the Complainant requested information on fixed interest rate options on mortgage loan account ending **(02)** in August 2008. The Provider issued a letter dated **8 August 2008**, which outlined a three year fixed interest rate option. The letter also outlined;

*"Should you have any specific queries in relation to re-fixing your mortgage, or the availability of tracker variable rate options, please contact us at..."*

I note that this was included in the letter despite the Provider having no contractual or other duty or obligation to offer the Complainant a tracker interest rate on his mortgage loan account ending **(02)**. 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 Complainant on his mortgage loan account. Nonetheless, if the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan at the time, the Complainant could have contacted the Provider at the time. The Complainant however did not do so. The Complainant did not return a fixed rate instruction at the time and mortgage loan account ending **(02)** remained on a variable rate of interest.

For the reasons set out above, I do not uphold the complaint.

/Cont'd...

## **Conclusion**

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

**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**

09 October 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.**