



<u>Decision Ref:</u>	2019-0374
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The Complainant's Case

The Complainant accepted a Loan Offer from the Provider on **23 February 2004**. The interest rate applicable was fixed for 1 year at 2.75%. On the expiry of the initial fixed rate period in **February 2005**, the Complainant opted to apply a further 2 year fixed rate of 3.74% to the mortgage loan account.

The Complainant received a letter from the Provider dated **06 March 2007** detailing a number of fixed interest rate options available to him when the 2 year fixed rate period expired. The Complainant submits that the Provider confirmed to him by letter dated **9 March 2007** that "*in accordance with the terms of*" his loan, the rate of interest on the mortgage loan account had been amended to a tracker rate of 4.75% (ECB + 1.25%).

On **9 March 2007** the Complainant completed the fixed rate options form in which he selected a further fixed interest rate for the mortgage loan account. The Complainant

submits that the Provider confirmed to him by letter dated **13 March 2007** that the rate of interest applicable to the mortgage loan account had been switched from the tracker rate to a fixed rate for three years at 5.10%. He submits *“My understanding, from that letter, is that I would then be put back to my tracker. At no point did [the Provider] inform me that I was in danger of losing my tracker rate under the terms of the loan.”*

The Complainant submits that when the three year fixed interest rate period on the mortgage loan account expired in **February 2010**, he was not offered the option of a tracker interest rate by the Provider. He submits that he was only offered fixed rates or a Loan to Value (‘LTV’) variable interest rate. The mortgage loan account automatically defaulted to the LTV variable rate in **March 2010** in the absence of a signed instruction from the Complainant.

The Complainant is seeking that the tracker rate is *“re-instated”* to his mortgage loan account and that he is *“re-imbursed, if entitled”*.

The Provider’s Case

The Provider submits that in **February 2004** the Complainant signed an acceptance of the Loan Offer with the benefit of legal advice from his solicitor, who witnessed the Complainant’s Acceptance of Loan Offer. The Provider submits that the Loan Offer provided for a First Time Buyer Mortgage in the amount of €184,000.00 at a 1 year fixed rate of 2.75% for a term of 30 years. The Provider submits that on **11 March 2004**, the Complainant’s mortgage loan account drew down for the amount of €184,000.00 at the prevailing 1 year fixed rate of 2.54%, which was due to expire on **11 March 2005**.

The Provider submits that the Loan Offer did not contain a contractual entitlement to a tracker rate at the end of the initial fixed rate period, or at any subsequent time during the term of the loan, but provided that, at the end of a fixed rate period, the Provider or the Complainant could select a variable rate to be applied. The Provider relies on **Special Condition A** of the Complainant’s **Letter of Approval** and **Condition 5** of the **General Mortgage Loan Approval Conditions** to support this.

The Provider submits that on or around **20 February 2005**, it sent an options letter and form to the Complainant containing a list of fixed rate options and a variable rate option. The Provider submits that the Complainant signed the options form on **22 February 2005** and opted for a 2 year fixed rate of 3.74% which was applied to the Complainant’s mortgage loan account on **11 March 2005**.

The Provider submits that as the fixed rate period was due to expire on **11 March 2007**, it issued a letter to the Complainant approximately 20 days before the expiry date containing

the currently available rate options, which included a tracker rate of 4.75% (ECB + 1.25%). The Provider states that this letter explained that *"if the Complainant did not make a selection, the [Provider] would apply the current tracker option of 4.75% (ECB + 1.25%)"*. The Provider submits that the rate options letter was not returned by the Complainant and when the Complainant's 2 year fixed rate expired on **9 March 2007** it automatically *"defaulted"* on this day to the tracker rate of 4.75% (ECB + 1.25%) and this was confirmed to the Complainant in a letter dated **9 March 2007**.

The Provider submits that this was based on its policy effective during this period. It submits that with effect from **30 June 2006**, the Provider had been offering tracker rates to existing customers who did not have a contractual entitlement to such an option on expiry of a fixed rate period. It submits that in the absence of a customer selection or returned options letter prior to expiry of a fixed rate period, a tracker variable rate was applied as a default interest rate from **September 2006**. The Provider submits that it was not contractually obliged to offer this tracker rate, but did so at the time as a commercial decision. It submits that this *"initiative was taken against the backdrop of the competitive mortgage market at the time"*.

The Provider submits that on or around **6 March 2007**, it received a request from the Complainant for a list of current fixed rate options. It submits that on **6 March 2007**, in response to this request, the Provider issued a list of fixed rate options to the Complainant. The Provider submits that on **09 March 2007** the Complainant completed and returned the fixed rate options form which had been provided to him, selecting a 3 year fixed rate of 5.10%, which was applied to the account on **12 March 2007**. It submits that on **13 March 2007** it wrote to the Complainant to confirm that it had switched the rate in accordance with his instruction.

The Provider submits that the three year fixed period was due to expire on **12 March 2010**. It submits that on **19 February 2010** it issued a rate options letter to the Complainant, which listed the available rate options at that time, which included fixed rate options and the LTV variable rate option. It submits that the letter advised that in the absence of an instruction received on or before **12 March 2010** the account would default to the variable rate.

The Provider submits that it had ceased offering tracker rates to new business customers in **mid-2008**, and ceased offering tracker rate options to customers maturing from fixed and discount rate periods from **mid-2009** (with the exception of customers who had a contractual right to be offered a tracker rate). Therefore it submits that a tracker interest rate was not included in the **2010** options offered to the Complainant as the Provider was no longer offering tracker interest rates in options letters issued to customers whose fixed rate period was due to mature and who did not have a contractual right to be offered a

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tracker rate. The Provider submits that the Complainant was not offered a tracker interest rate on his mortgage loan account on expiry of the fixed interest rate period in 2010, because he did not have a contractual entitlement to be offered a tracker rate option. It submits that, unlike in **2007**, when the Complainant did receive a tracker rate option, in **2010** the Provider was no longer offering a tracker rate option to customers who did not have a contractual entitlement to be offered a tracker rate.

The Provider states that as it did not receive the Complainant's completed rate option form by the expiry date of **12 March 2010**, the interest rate on the Complainant's mortgage loan account defaulted to the LTV variable rate of 4.15% on that date.

The Complaint for Adjudication

The complaint is that the Provider failed to offer the Complainant a tracker interest rate on the expiry of the fixed rate period in **March 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 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 Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 21 October 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, the final determination of this office is set out below.

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.

The issue to be determined is whether the Provider failed to offer the Complainant a tracker interest rate on the expiry of the fixed rate period in **March 2010**.

In order to ascertain if the Provider did apply an incorrect interest rate to the Complainant’s mortgage at the end of the fixed rate period in March 2010, it is necessary to review and set out the relevant provisions of the Complainant’s loan documentation. It is also relevant to set out the interactions with the Complainant in March 2007 when the rate options form was issued and signed.

The **Letter of Approval** dated 13 February 2004 details that the “*Loan Type*” is a “*1 Year Fixed Rate Home Loan*” with an interest rate of 2.75%. The **Special Conditions** to the Letter of Approval detail as follows;

“Special Conditions

- A. *General Mortgage Loan Approval condition 5 “conditions relating to Fixed Rate loans” applies in this case. The interest rate specified above may vary before the date of completion of the mortgage.”*

General Condition 5 of the **General Mortgage Loan Approval Conditions** outline;

“CONDITIONS RELATING TO FIXED RATE LOANS

5.1 *The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*

5.2 *The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*

5.3 *Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of, and at the time of such repayment, pay whichever is the lesser of the following two sums:*

- (a) A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*
- (b) A sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum to that being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.*

5.4 *Notwithstanding Clause 5.1, [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."*

The **General Mortgage Loan Approval Conditions** also outline;

IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

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

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **23 February 2004**. I note that the Acceptance of Loan Offer states as follows:

"1. I/we the undersigned accept the within offer on the terms and conditions set out in

i. Letter of Approval

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ii. *the General Mortgage Loan Approval Condition*

iii. *[the Provider's] Mortgage Conditions.*

copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.

...

4. *My/our Solicitor has fully explained the said terms and conditions to me/us."*

It is clear to me that the Letter of Approval envisaged a one-year fixed rate of 2.75% and thereafter the option of a variable rate. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. 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.

I note that on the expiry of the one year fixed interest rate period the Complainant completed a rate options form dated **22 February 2005** in which he selected a further two year fixed rate of 3.74%.

The Provider has submitted that approximately 20 days before the two year fixed rate period was due to expire on **11 March 2007**, it issued a letter to the Complainant containing the currently available rate options including a tracker rate option of 4.75% (ECB + 1.25%). The Provider has submitted that it "*explained in the covering letter that if the Complainant did not make a selection, [the Provider] would apply the current tracker option of 4.75% (ECB + 1.25%)*" to the mortgage loan account.

I am very disappointed to note that a copy of the letter that purportedly issued to the Complainant in **February 2007** has not been furnished in evidence to this office. The Provider has submitted as follows;

"At the time, the Bank retained copies of all customer letters received. However on this occasion, the options letter was not returned by the customer, and the account defaulted as indicated, to the tracker on 09 March 2007."

I am of the view that the Provider has not offered any adequate reason for failing to hold a copy of the letter that purportedly issued to the Complainant in **February 2007**. It appears that the Provider is indicating that it only retained copies of correspondence received, but did not retain copies of letters issued at the time.

If correspondence issues by the Provider to a mortgage holder during the term of a loan and that loan remains active with the Provider, the Provider should retain that documentation on file for six years from the date the relationship with the mortgage

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holder ends. In this regard, **provision 49 of the Consumer Protection Code 2006 (“CPC 2006”)** and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows;

“A regulated entity must maintain up-to-date consumer records containing at least the following

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”

In this regard, the Complainant’s mortgage loan was incepted for a term of **30 years** commencing from **February 2004** and the letter purportedly issued in **February 2007**. It is understood that the mortgage loan remains presently active with the Provider. I note that the **CPC 2006**, was published by the Financial Regulator in August 2006. In this regard, the Provider was required to have fully implemented the CPC 2006 by **01 July 2007**. In the circumstances, it appears to me that Provider should have been aware in **February 2007** of the requirement to maintain records and retain the correspondence with the Complainant at the time. As Chapter 2 of the CPC 2006, was not fully effective in February 2007, I cannot make a finding that the Provider has failed to maintain consumer records in compliance with the Consumer Protection Code. Nonetheless I am disappointed about the failure by the Provider to maintain a copy of this letter.

In any event, it does not appear to be in dispute between the parties that a letter did issue and was received by the Complainant in **February 2007**. It appears that the Complainant then made contact with the Provider on or around **06 March 2007** requesting a list of current fixed interest rate options. Again, I have not been provided with any evidence of that contact, but it does not appear to be in dispute between the parties that the Complainant made contact with the Provider at that time.

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The Provider issued a letter to the Complainant dated **6 March 2007**, a copy of which has been provided in evidence, which details as follows;

"Thank you for contacting the Mortgage Servicing Team in relation to the above Mortgage account.

I am attaching a list of our current fixed rate options as requested."

The Provider wrote to the Complainant on **9 March 2007** stating as follows;

*"I refer to previous correspondence and wish to advise you that **in accordance with the terms of your loan**, the rate of interest has been amended to a tracker rate currently 4.750% (ECB + max 1.250%)." [My emphasis]*

It is understood that the Provider received the signed fixed options form that had issued to the Complainant with the letter of 6 March 2007, on **9 March 2007**. The Complainant elected to apply a 3 year fixed interest rate of 5.10%. The rate options form details as follows;

"If you choose a fixed rate, the standard fixed rate conditions will apply."

The Provider wrote to the Complainant on **13 March 2007**, detailing as follows;

"I acknowledge receipt of your acceptance of [the Provider's] loan offer and confirm that the rate of interest applicable to your loan account has been switched from a tracker rate to a fixed rate for 3 year(s) at 5.100%."

On the basis of the above it appears that the tracker rate of 4.75% (ECB + 1.25%) was applied to the Complainant's mortgage loan account from **9 March 2007** to **13 March 2007**. The Complainant submits that he was not informed by the Provider when he opted to apply the 3 year fixed interest rate to his mortgage loan account in March 2007, that he *"was in danger of losing [his] tracker rate under the terms of the loan"*.

While the Provider has informed this office that it does not hold an individual policy document in relation to its tracker rate offering in **2007**, it has summarised its policy as follows;

- *"...[In mid] 2006, the Bank introduced a policy of offering a tracker rate of interest to existing customers who were maturing from a period of a fixed rate of interest and whose contract did not specify an entitlement to be*

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offered a tracker rate at maturity. From that date, until [mid] 2009, the Bank's rate options letter sent automatically to such customers prior to expiry of a fixed rate period included a tracker variable rate. This initiative was taken against the backdrop of the competitive mortgage market at that time. Between [...] 2006 and [...] 2006, while the options listed in the options letter included the offer of a tracker interest rate, the letter stated that, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [mid] 2006 until [mid] 2009, options letters stated that, in the absence of a customer selection, the listed tracker variable rate was the rate which would be applied to the mortgage as the default interest rate.

- *While the Bank commenced the withdrawal of its tracker mortgage interest rate offerings in [mid] 2008, the Bank continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.*
- *After [mid] 2009, the Bank continued to offer and / or to apply tracker interest rates to maturing fixed rate loans where customers had a contractual right to a tracker interest rate."*

Having considered the mortgage loan documentation, it is my view that that the Complainant did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period which applied from **March 2005 to March 2007**. It appears that the Provider, in line with its own policy at the time, defaulted the Complainant's mortgage loan to a tracker interest rate of 4.75% (ECB + 1.25%). The Complainant however opted to move from that tracker interest rate and apply a fixed interest rate to his mortgage loan at the time.

I am of the view that the content of the Provider's letter to the Complainant dated **9 March 2007**, may have created some confusion on the Complainant's part in relation to his contractual entitlement to a tracker rate on his mortgage loan. This letter stated that "*in accordance with the terms of your loan, the rate of interest has been amended to a tracker rate*". This statement contradicts the Provider's submission that the application of the tracker rate to the Complainant's mortgage loan account in March 2007, resulted not from any contractual entitlement to a tracker rate but from the Provider's policy at that time of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest and whose contract did not specify an entitlement to be offered a tracker rate. Notwithstanding this error on the Provider's part, it is clear to me from the Complainant's mortgage loan documentation that there was no contractual entitlement to a tracker rate. Therefore I must conclude that this letter does not in and of

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itself have the effect of fundamentally altering the terms of the Complainant's mortgage loan, so as to entitle the Complainant to a tracker interest rate on the mortgage loan.

There was no obligation on the Provider to offer the Complainant a tracker interest rate on his mortgage loan in **March 2010** when the fixed interest rate period ended. The fixed rate options form completed by the Complainant on **9 March 2007**, provided that the "standard fixed rate conditions" would apply. The standard fixed rate conditions are set out in **General Mortgage Loan Approval Condition 5** "conditions relating to Fixed Rate loans" which provides for an option to apply a variable rate at the end of the fixed rate period. I note that tracker mortgages had been withdrawn from the Provider's offering for customers maturing from fixed and discounted periods from mid 2009 and therefore the Complainant could not have been offered a tracker interest rate on the basis of the Provider's policy when his fixed rate expired in **March 2010**. Furthermore, the Complainant 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 **March 2010**.

With respect to the letter that the Provider issued to the Complainant in **9 March 2007**, I am very disappointed that the Provider did not accurately represent the position with respect to the application of the tracker interest rate to the Complainant at that time. It is clear that this confused the Complainant as to his entitlement to that tracker rate at a later point in time. The "terms of the loan" did not provide for the entitlement to a tracker interest rate so it is unclear why the Provider represented this position to the Complainant in that letter. The Provider should have made it clear that the tracker interest rate had been applied by virtue of the Provider's policy at that time and that the policy was susceptible to change.

The **General Principles in Chapter 1 of the CPC 2006**, which were in effect from **01 August 2006**, outline as follows;

"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

...

(2) acts with due skill, care and diligence in the best interests of its customers"

...

(6) makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer".

I am of the view that the Provider did not act in accordance with Provision 2 and 6 of **Chapter 1 of the CPC 2006** in **March 2007**. The Provider did not act with due skill, care and diligence and nor did it disclose relevant material information to the Complainant. I am of the view that this is a serious falling short of the standard expected of the Provider with

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respect to the information given by the Provider to the Complainant at that time. It is important that all information furnished by the Provider to the Complainant is clear and accurate.

Having regard to all of the above, I am of the view that this complaint is partially upheld.

As set out above the Complainant had no contractual or other entitlement to a tracker rate of interest on his mortgage loan account in March 2010. For this reason, I do not uphold this aspect of the complaint.

To mark the Provider's shortcomings in relation to the information furnished by the Provider to the Complainant in the letter dated **09 March 2007** I direct that the Provider pay to the Complainants a sum of €3,000 compensation.

Conclusion

- My Decision is that this complaint is partially upheld pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €3,000, to an account of the Complainants choosing, within a period of 35 days of the nomination of account details by the Complainants 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**

13 November 2019

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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.

