



<u>Decision Ref:</u>	2019-0402
<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>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

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

The Complainant's Case

The Complainant accepted a loan offer from the Provider on **30 March 2005**. The interest rate applicable was fixed for one year at 2.74%. The Complainant drew down the mortgage loan on **20 April 2005**.

The Complainant submits that at the end of the initial fixed interest rate period he did not receive any correspondence from the Provider in relation to available interest rate options. He submits that he should have been offered the option of a tracker interest rate at the end of the initial fixed interest rate period in **April 2006**.

The Complainant rejects the Provider's submission that, prior to the expiry of the fixed rate period in **April 2006**, it issued correspondence to him setting out the interest rate options available for the mortgage loan. He submits that he has retained a copy of all correspondence associated with his mortgage since its drawdown in **April 2005** and he

never received any such correspondence in **April 2006**. He submits that when he asked the Provider for a copy of the rate options letter purportedly sent to him in **April 2006**, it said that it had not retained a copy of the letter. He submits *"I still have no evidence of this letter they said they sent me."* The Complainant submits that *"I strongly feel the bank knew this was all ahead of them and that's why they offered a MVR to me! and maybe many more like me! in 2015"*

The Complainant submits that he telephoned the Provider on **28 November 2017** to query whether he was entitled to a tracker interest rate for his mortgage loan. He submits that he was informed by the Provider's representative that *"it looked like I had defaulted on a Tracker Mortgage rate on expiry of my 1st year fixed rate term in April '06."* The Complainant submits *"I feel like [the Provider's representative] definitely seen something on the screen which told him I had defaulted [to a tracker rate] otherwise he wouldn't have said that I'm sure"*.

The Complainant submits that the Provider subsequently informed him in its final response letter dated **27 February 2018**, that the Provider's agent had erroneously informed him during the telephone call on **28 November 2017** that the mortgage had defaulted to a tracker rate in April 2006 and that the mortgage had in fact defaulted to the standard variable rate at that time.

The Complainant submits *"I honestly feel like because I come from a non educated background, the bank is [saying] ah well we made a mistake and deal with it."*

The Provider's Case

The Provider submits that it issued a Letter of Approval to the Complainant on **16 September 2004** for a mortgage for €135,000 repayable over a 25 year term with a 1 year fixed rate. The Provider submits that the loan offer was accepted by the Complainant with the benefit of legal advice, on **30 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 the initial fixed rate period was due to expire on **20 April 2006**. It submits that prior to this expiry date, the Provider automatically issued a letter to the

tracker rate on his mortgage account. It submits that the Complainant advised the Provider on this telephone call that he had been in discussions with his solicitor and that he felt his mortgage should be on a tracker rate of interest. The Provider submits that its agent reviewed the loan documentation and advised the Complainant that any discussions regarding interest rate offering during the mortgage application process should be referred to his chosen Broker. It submits that the agent then reviewed the rate changes on the account, in particular, the rate of 3.85% which was applied on the expiry of the initial one year fixed rate period. It submits that the agent advised the Complainant that it appeared that the rate of 3.85% was the Provider's tracker interest rate at that time, however in order to fully confirm this fact, the agent would need to log a complaint for the matter to be investigated. It submits that a complaint was logged immediately for investigation, and a Final Response letter was issued on **27 February 2018**.

The Provider submits that, as stated in its Final Response letter, the agent *"incorrectly assumed"* that the rate of 3.85% applied to the account on **20 April 2006** was a tracker rate. It submits that this *"was an unfortunate human error, due to the agent's incorrect assumption that the default rate of 3.85% in April 2006 was the Bank's tracker rate, when in fact it was the Bank's Standard Variable Rate."*

The Provider submits that on expiry of the initial one year fixed rate of interest on **20 April 2006**, the Complainant's mortgage loan account defaulted to the Provider's standard variable rate of 3.85%. The Provider submits that the Complainant's mortgage loan account has never been on a tracker interest rate from the date of drawdown to date.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant a tracker interest rate on his mortgage loan on the expiry of the initial first year fixed interest rate period in **April 2006**.

Decision

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

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

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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 **07 November 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 Complainant should have been offered a tracker interest rate on his mortgage loan account on expiry of the fixed interest rate period in April 2006.

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 **April 2006**, 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 prior to the expiry of the fixed rate period in **April 2006**.

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The **Letter of Approval** dated **16 September 2004** details that the “*Loan Type*” is a “*1 Year Fixed Rate Home Loan*” with an interest rate of 2.74%. 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;

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*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 **30 March 2005**. 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
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."*

The Provider has submitted that in or around **April 2006** it "*automatically*" issued a letter to the Complainant to "*remind him of the expiry of the fixed rate period and to inform him of the rate options available for selection*". The Provider has submitted that this letter "*detailed a list of rate options, including a variable rate (default rate) option.*" I am disappointed to note that a copy of the letter that purportedly issued to the Complainant in or around **April 2006**, has not been furnished in evidence to this office. The Provider has submitted as follows;

"The Bank has not retained a copy of the rate options letter as sent. The letter was a systems generated letter. The Bank has found no evidence that the system did not operate or failed to operate correctly during the period when the letter was issued to the Complainant."

The Provider has not offered any reason for not furnishing this office with a copy of that letter. It appears that the Provider is indicating that that it only retained copies of correspondence received and it did not retain copies of "*systems generated*" letters issued at the time.

The Complainant takes issue with the Provider's failure to retain a copy of this letter and believes that he did not receive this letter. It is not central to the matter at issue whether the letter was received by the Complainant or not, as the Provider has outlined that any letter that issued did not contain a tracker interest rate offering. Consequently, it is not in dispute between the parties that the Complainant was not offered a tracker rate on his mortgage loan account in or around **April 2006**. The issue to be determined is whether he should have been offered a tracker on his mortgage loan account in or around **April 2006**

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It is clear to me that the Letter of Approval envisaged a one-year fixed rate of 2.74% 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. 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. There was no contractual or other obligation on the Provider to offer the Complainant a tracker interest rate on the expiry of the one year fixed interest rate period in **April 2006**.

I note that on the expiry of the one year fixed interest rate period on **20 April 2006** the Complainant's mortgage loan account automatically defaulted to the Provider's standard variable rate of 3.85%.

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

"...[in mid] 2006, the Bank introduced a policy 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 at maturity. From that date, until [later in] 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 the 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 [it] 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 apply Tracker rates to maturing loans where customers had a contractual right to same."

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The expiry of the Complainant's fixed interest rate term on his mortgage loan account in **April 2006**, pre-dated the Provider introducing the policy that it would offer a tracker interest rate to customers on the expiry of the fixed interest rate, where mortgage holders had no contractual right to a tracker interest rate. This policy was not introduced until **mid-2006** and ceased in **mid-2009**. There was a further revision of the Provider's policy later in **2006**, whereby a tracker interest rate became a default rate where fixed interest rates were expiring on mortgage loans, even though there was no contractual obligation on the Provider to do so. The expiry of the Complainant's fixed interest rate period pre-dated these policy introductions and as such the Complainant could not have been offered a tracker interest rate under that policy in **April 2006**.

The Complainant's mortgage loan was on a variable interest rate at the time. Having considered the Complainant's mortgage loan documentation, I find the Complainant did not have any contractual entitlement to switch his mortgage loan account from the variable rate to a tracker rate at any stage. There was no obligation on the Provider to contact the Complainant at any stage to offer a tracker interest rate to the Complainant on the mortgage loan. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers, did not create an obligation (contractual or otherwise) on the Provider to offer a tracker rate to the Complainant on the mortgage loan account. Nonetheless, if the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, the Complainant could have contacted the Provider at the time. It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainant to apply a tracker interest rate to the mortgage loan. It was entirely within the Provider's rights not to accede to that request, if it was made.

With regard to the telephone conversation between the Provider's agent and the Complainant on **28 November 2017**. I have considered the content of that telephone call, a recording of which has been provided in evidence to this office. It appears that some confusion may have been caused, as the Provider's agent indicated to the Complainant that it "*looks like*" his mortgage loan account "*may*" have "*automatically reverted*" to a tracker interest rate at the end of the fixed interest rate period. The Provider's representative goes on to outline to the Complainant that a complaint has to be "*logged*" in order for the matter to be investigated. However the representative outlined that the investigation would involve the Provider "*Looking through the special terms of [the Complainant's] account to see if you were ever on [a tracker], if we ever offered [a tracker].*" I note that the Provider's representative then outlined that "*just from scanning back through it I can't specifically see that the product itself was a tracker. That's why I have to log it*". I accept that the information in relation to it "*looking like*" the mortgage loan "*automatically reverted*" to a tracker interest rate at the end of the fixed interest rate

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period in **April 2006** was an error on the part of the Provider's representative. However I am of the view that given the manner in which the conversation progressed, the Provider's representative was clear that this was not the Provider's final response on the issue, but rather that the matter had to be investigated as he could not see that the product was a "tracker" product. In any event the Complainant's query regarding the tracker rate was logged as a formal complaint by the representative and subsequently investigated by the Provider. I note that the error was then corrected in the Provider's Final Response letter to the Complainant dated **27 February 2018**.

Having considered the documentation furnished in evidence to this office, it is clear that the Complainant did not have any contractual or other entitlement to switch to the tracker rate at the end of the initial one year fixed rate period, and the mortgage loan account defaulted to the standard variable rate at that time in accordance with the terms of the loan.

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**

29 November 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.