



<u>Decision Ref:</u>	2019-0403
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale 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 Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling house.

The Complainants' Case

The Complainants applied for a mortgage loan with the Provider in **November 2004**. The Complainants accepted a Letter of Approval dated **14 December 2004** by signing an Acceptance of Loan Offer on **26 January 2005**. The particulars of the mortgage loan offer detailed that the interest rate applicable was a one year fixed interest rate of 2.74%. The Complainants submit that they were not offered a tracker interest rate when they applied for the mortgage loan in 2004. They state that they have since learned that the Provider was offering tracker mortgages to new customers from **early 2004**.

The Complainants submit that when the 1 year fixed interest rate was due to expire in **April 2006**, they were not offered the option of a tracker interest rate. They submit that they allowed the mortgage loan account to automatically default to a variable rate at the end of

the fixed rate period, because the Provider advised them that the variable rate at that time *“was a better rate than fixing for a further period”*.

The Complainants submit that they have since learned that from **mid-2006**, the Provider started to apply the tracker interest rate to customers' mortgage loan accounts as the default rate on the expiry of fixed or discounted periods. They submit that the Provider did not contact them at this time to inform them that tracker interest rates were available. The Complainants further submit that in **April 2007**, their mortgage loan account had been operating on the variable rate for one year. They submit that the Provider did not contact them at this point to inform them that tracker interest rates were available.

The Complainants submit that at no time from when tracker mortgages were launched by the Provider in early 2004 to when it ceased offering tracker rates in mid 2009 were they *“as customers”* of the Provider *“ever contacted by or offered the tracker rates as an option for mortgage repayments”*.

The Complainants submit that *“we were only 24 years old when we took out our Mortgage and it is profoundly disheartening to know that a company we put out faith in to guide us and help us make the best choices have turned and stated that they did nothing wrong. They did not act in our interests at any time. They neglected to offer us they [sic] all / best options for our Mortgage and that practice of bad faith banking is shocking and immensely disappointing.”*

The Complainants are seeking for their mortgage *“to be put onto the tracker rate we were never offered and every and all excess interest paid by us since the issuing of the Mortgage be amended and repaid to us.”*

The Provider's Case

The Provider submits that the Complainants submitted a loan application form dated **12 November 2004** for a mortgage loan in the amount of €218,000.00 repayable over a period of 35 years. The Provider submits that the Complainants requested to have a fixed rate of interest of 2.74% applied to the loan account during the first year of the loan. The Provider states that the Complainants did not apply for a tracker interest rate loan.

The Provider submits that when it is approached by loan applicants, all current interest rates of the Provider are discussed with them. The Provider states that the decision as to which interest rate to choose is for the customer(s) alone to make on the basis of their personal circumstances.

The Provider submits that when the Complainants approached the Provider, all available rate options would have been discussed with them and the Complainants chose to apply for a 1 year fixed rate home loan. The Provider submits that it introduced tracker interest rates for new home mortgage business in **early 2004**. The Provider submits that it was offering new home loan customers a tracker mortgage rate when the Complainants submitted their mortgage loan application to the Provider in **November 2004**. The Provider submits that it does not accept that it did not include a tracker mortgage rate in its discussions with the Complainants in 2004 during their loan application process. The Provider submits that for new home loans up to €249,000, the 1 year fixed rate being offered was 2.74% and the tracker rate being offered was 3.40%, during the period up to **12 November 2004** when the Complainants completed their application form.

The Provider states that a Letter of Approval was issued to the Complainants on **14 December 2004** in respect of the mortgage loan which they had applied for, a 1 Year Fixed Rate Home Loan. The Provider submits that the Letter of Approval did not include an entitlement to a tracker rate at the end of the fixed rate period, or at any time during the mortgage term. It submits that the loan offer was accepted by the Complainants, with the benefit of independent legal advice, on **26 January 2005**. The Provider submits that the Complainants were informed that at the end of the initial fixed rate period of 1 year, they could opt for a further fixed term (if available) or move to a variable rate. The Provider relies on **Special Condition A** of the Complainants' **Letter of Approval** and **Condition 5** of the **General Mortgage Loan Approval Conditions** to support this.

The Provider submits that the Complainants' fixed rate period expired on **18 April 2006** and the rate of interest applying to the mortgage loan account changed to a variable rate of 3.85%. The Provider submits that in a letter issued in or around 20 days prior to that date, the Provider offered a range of interest rates to the Complainants from which to select in respect of the period following the expiry of the fixed rate. It submits that these options did not include a tracker interest rate at that time, as it had not commenced including a tracker interest rate in rate options letters issued to customers whose fixed rate period was expiring. The Provider submits that it was not until later in 2006 that it commenced issuing fixed rate expiry options which included a tracker rate option to customers whose contract did not include an entitlement to a tracker rate option.

The Provider submits that it has no record of the Complainants having enquired about alternative interest rates at any time after the expiry of their fixed rate period. The Provider says that its interest rates were published in branches, on its website and in national press. They were also available, on enquiry in branches and by telephone through its mortgage helpline.

The Complaints for Adjudication

The complaints for adjudication are;

- (a) The Provider failed to offer the Complainants the option of a tracker interest rate when they applied for the mortgage loan in **November 2004**;
- (b) The Provider failed to offer the Complainants the option of a tracker rate at the end of the initial fixed rate period in **April 2006**, or at any other stage, prior to the withdrawal of the tracker rate offering in **mid-2009**.

Decision

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

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

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally 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 23 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.

Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

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The first issue to be determined is whether the Provider failed to offer the Complainants the option of a tracker interest rate when they applied for the mortgage loan in November 2004

The Complainants applied for a mortgage for €218,000 in **November 2004** by way of **Application for Credit**. I note **Section 2** of the **Application for Credit** which was signed by the Complainants on 12 November 2004 details as follows;

“Type of Loan:

<i>Amount of Loan required</i>	<i>EUR 218,000.00</i>
<i>Purchase price/Value of property</i>	<i>EUR 237,000.00</i>
<i>Loan type</i>	<i>1 Year Fixed Rate Home Loan</i>
<i>Repayment Term required</i>	<i>35 Years”</i>

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being *“effective from the start of business on the 20 July 2004”*.

This document outlines as follows;

<i>“Rates applicable to new Home Loans</i>	<i>Rate</i>	<i>APR</i>
<i>1 Year Discounted Variable Rate</i>	<i>2.69%</i>	<i>3.5%</i>
<i>1 Year Discounted Variable Rate (when borrowing <50% of the property value)</i>	<i>2.49%</i>	<i>3.5%</i>
<i>1 Year Fixed Rate</i>	<i>2.74%</i>	<i>3.5%</i>
<i>2 Year Fixed Rate</i>	<i>3.55%</i>	<i>3.6%</i>
<i>Tracker Mortgage (Home Loan and Residential Investment Property)</i>		
<i>Loan Amount €150,000 - €249,999</i>	<i>3.40%</i>	<i>3.5%</i>
<i>Loan Amount of €250,000 or more</i>	<i>3.10%</i>	<i>3.1%”</i>

I note that tracker interest rates were on offer generally by the Provider when the Complainants applied for the mortgage loan in **November 2004**. There is a dispute between the parties as to whether a tracker interest rate was discussed between the parties as a potential option at the time the **Application for Credit** was made by the Complainants in November 2004. There is no documentary or other evidence available from either party that shows the specific discussions that took place between the Provider and the Complainants about the interest rates that were generally available at that time.

It appears from the Complainants’ submissions that the Complainants are of the view that if a tracker interest rate was discussed with them at that time, that the Complainants would

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have proceeded to make an application for a tracker interest rate loan. In this regard, I note that the **Lending Interest Rates** document was published by the Provider at the time and it clearly outlined the types of interest rates that were available for new loans, including discounted variable rates, fixed rates and tracker rates. I note that the one year fixed interest rate of 2.74%, which was the Complainants' selected preference in the Application for Credit, was a lower rate than the tracker rate of 3.40% that would have been on offer at that time. I also note that fixed and variable type rates are different in nature. An applicant for a mortgage loan would seek a fixed interest rate if that person had a preference for their mortgage repayments to be fixed and certain for a specified period of time. Whereas if an applicant is willing to take the risk of mortgage repayments varying, possibly monthly and potentially upwards, such an applicant would elect to apply for variable type loan. In the case of the Complainants' application, they chose the fixed rate, even over the lower discounted variable rate. In the circumstances, it is difficult to accept the Complainants argument that if a tracker interest rate, which was higher than the fixed interest rate on offer, was discussed with them at that time that the Complainants would have proceeded to make an application for a tracker interest rate loan. Furthermore, there is nothing to say that if an application was submitted by the Complainants seeking the application of a tracker interest rate loan that the application would have resulted in the Provider acceding to that application request and issuing a Letter of Offer on that basis.

Furthermore it appears to me that in circumstances where **the Lending Interest Rates** document which was published by the Provider, in its branches, on its website and in the national press, that the Complainants could have accessed that document and appraised themselves of the interest rate options available generally by the Provider before proceeding with any application for a mortgage loan with the Provider.

If the Complainants wished to pursue the potential option of applying for a tracker interest rate mortgage loan at the time in **November 2004**, the Complainants could have indicated to the Provider that they had a preference for a tracker rate on the Application for Credit form. The Complainants however did not do so. The Complainants applied for a mortgage loan on a fixed interest rate and the Provider offered the Complainants a fixed rate, which was accepted by the Complainants, having acknowledged that the terms and conditions of the mortgage loan were explained to them.

The second issue to be determined is whether the Provider failed to offer the Complainants the option of a tracker rate at the end of the initial fixed rate period in April 2006, or at any other stage, prior to the withdrawal of the tracker rate offering in mid-2009.

The Complainants' mortgage loan was drawn down on the one year fixed interest rate in April 2005. When the initial one year fixed interest rate period expired in April 2006, the Complainants' mortgage loan account defaulted to a variable rate of 3.85%. The Provider has submitted that approximately 20 days before the two year fixed rate period was due to expire, on 18 April 2006, it issued a letter to the Complainants containing the then available rate options, which did not include a tracker rate option. I am disappointed to note that a copy of this letter has not been furnished in evidence, even though this correspondence was requested from the Provider. The Provider has not offered any reason for not furnishing this office with a copy of that letter. In any event, both of the parties agree that the Complainants were not offered a tracker rate in or around April 2006.

The Letter of Approval dated 14 December 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:

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- (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 **26 January 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."

It is clear to me that the Letter of Approval envisaged a one year fixed rate of 2.74% and thereafter a variable rate. The variable rate in this case made no reference to a tracker or the ECB rate. The variable rate, in the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the ECB refinancing rate, rather it

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was a variable rate which could be adjusted by the Provider. The Complainants accepted the Letter of Approval having confirmed that the Loan Offer had been explained to them by their solicitor in **January 2005**. If the Complainants were not happy with the terms of the Letter of Offer, including the type of interest rate, the Complainants 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 Complainants a tracker interest rate on the expiry of the one year fixed interest rate period in **April 2006**.

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 although their loan contract did not specify an entitlement to be offered a tracker rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a Tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period. Between [...] 2006 and [...] 2006 while the options letter included the offer of a tracker interest rate, 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, in the absence of a customer selection the tracker interest rate was applied to the mortgage as the default interest rate.

While the Bank commenced the withdrawal of its tracker mortgage interest rate offering 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."

The expiry of the Complainants' fixed interest rate term on their 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 to 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 Complainants submit that there was a positive obligation on the

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Provider to actively contact the Complainants to offer them a tracker interest rate on their mortgage loan during the period from **2006** to **2009**.

The Complainants mortgage loan was on a variable interest rate at the time. Having considered the Complainants' mortgage loan documentation, I find the Complainants did not have any contractual entitlement to switch their mortgage loan account from the variable rate to a tracker rate at any stage. There was no obligation on the Provider to contact the Complainants at any stage to offer a tracker interest rate to the Complainants on their 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 Complainants on their mortgage loan account. Nonetheless, if the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, the Complainants 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 Complainants 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.

The Complainants however did not contact the Provider at any time while the Provider was offering tracker interest rates to seek to apply a tracker interest rate to the mortgage loan, even though there was no underlying contractual right to a tracker interest rate.

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

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

15 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.