



<u>Decision Ref:</u>	2019-0405
<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 submit that they drew down their mortgage loan with the Provider in **2004**. They submit that they were not offered a tracker interest rate when they applied for the mortgage loan.

The Complainants submit that the repayments "*were fixed for the first 3 years*". The Complainants state that "*around 2007/2008*" they contacted the Provider to discuss the interest rate options available to them. They submit that they attended a meeting at the Provider's branch. They outline that at this meeting they expressed their interest in availing of a tracker interest rate. They say that their request for a tracker rate was "*brushed under the carpet*" and the Provider's representative told them that they were "*better off not being on one [a tracker mortgage]*". They submit that there was no explanation given by the Provider's representative as to why they were "*better off*" not being on a tracker rate and they were not offered a comparison quote.

The Complainants submit that they had arranged to discuss their interest rate options with the Provider's Branch Manager, however, he never showed up for the meeting. They submit that it is bad practice for a Manager to treat customers in such a manner.

The Complainants have queried why the Provider has not retained a record of any meetings which took place between themselves and the Provider in relation to their mortgage loan. They submit that they are not in a position to furnish proof that this meeting took place.

The Complainants submit that they want a tracker rate applied to their mortgage loan account, and its application backdated either to November 2004, when they drew down the mortgage; or to 2007/2008 when the Provider refused their request for the tracker interest rate.

The Provider's Case

The Provider submits that the Complainants completed a loan application form on **4 November 2003** where they opted to apply for a one year fixed interest rate home loan. It submits that at the time the Complainants submitted their loan application, the Provider was offering the following interest rate options to new customers:

- *"1 year discounted variable rate of 2.69%*
- *1 year discounted variable rate (when borrowing <50% of the property value) of 2.49%*
- *1 year fixed rate of 2.75%*
- *2 year fixed rate of 3.80%."*

The Provider submits that the Complainants' application pre-dated the Provider's launch of tracker rates in **early 2004**. It submits that when it launched its tracker interest rate offering in **2004**, there were two tracker interest rates available, respectively, to loans where the loan amount was equal to or exceeded €150,000 but was less than €250,000, and loans where the loan amount was equal to or exceeded €250,000. It submits that no tracker rate was available for loans of less than €150,000.

The Provider submits that on **15 December 2003** it issued a Letter of Approval to the Complainants offering them a 1 year fixed rate of 2.74%. The loan amount was €84,000. The Provider submits that this offer was accepted by the Complainants, with the benefit of independent legal advice, on **16 February 2004**.

The Provider submits that the loan was drawn down and the proceeds of the mortgage account were issued on **10 November 2004**. It submits that the proceeds were returned by the Complainants' solicitor as they were not in a position to complete the purchase in November 2004 as they had proposed. The Provider submits that the Complainants requested a moratorium on their repayments for a period of 3 months at that time so that the purchase could be completed. Repayments on the mortgage loan commenced in **March 2005**. It submits that the interest rate at that time for a 1 year fixed rate was 2.74% which was applied to the account and remained in place for 12 months expiring on **21 February 2006**.

The Provider submits that there are no default rates or specified contractual interest rates in respect of the applicable rate at the date of expiry of the initial fixed rate period. It submits that instead, the Complainants or the Provider could apply a variable rate at the end of the fixed rate period. 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 in the European Standardised Information Sheet which accompanied the Letter of Approval, the Provider informed the Complainants that they would receive, on expiry of the fixed rate period, options of fixed rates (if available) and a variable rate. It submits that in accordance with the conditions above, the Complainants' mortgage loan account was on a fixed rate of interest of 2.74% from **21 February 2005** to **21 February 2006**.

The Provider submits that a variable rate option and a number of fixed rate options were available for application to the Complainants' mortgage loan account on **21 February 2006**. It submits that on that date, in the absence of instruction from the Complainants, the Provider applied the variable rate of 3.70% to the mortgage loan account.

The Provider submits that the Complainants have given insufficient detail in respect of their claim regarding discussions with the Provider in "2007/2008". It submits that prior to **mid-2008**, a tracker interest rate option was among the rate options offered to existing customers who were enquiring about changing the rate of interest applying to their mortgage loan account. It submits that when a customer enquired about changing the rate of interest applying to their account, all available rate options were provided to them. It submits that there is no reason to "assume" that the Complainants were not offered a tracker rate option if they made an enquiry regarding interest rate options prior to the Provider's withdrawal of tracker rates in **mid-2008**.

The Provider submits that at any meeting of the Provider with a customer concerning interest rate options available to the customer, it is standard Provider practice to outline and discuss all available options, however the decision as to which interest rate option to select is for the customer alone to make. The Provider submits that it "does not accept"

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that in 2007/2008 there was a discussion between the Provider and the Complainants in which a tracker mortgage was “brushed under the carpet as alleged or at all”. It submits that the Complainants have not provided a date range of such meeting and the Provider has contacted the branch and there is no record on file of the Complainants attending a meeting at that time. It submits that the Branch Manager had been contacted and he has confirmed due to the passage of time he does not recall exactly what occurred at that time. However the Provider submits that its representative has stated that he would never put forward an opinion or suggest a preference for an interest rate and any conversation would have centred on the provision of information to allow the Complainants make their own decision.

The Provider submits that it can find “no evidence of any arrangement” by the Complainants to meet with a manager, whether following a meeting in their local branch or otherwise. The Provider submits that its “personnel apply professional standards” to all dealings with customers and its staff do not fail to turn up at arranged meetings with customers.

The Complaints for Adjudication

The complaints for adjudication are;

- (a) The Provider has failed to offer the Complainants a tracker interest rate on their mortgage loan when they drew down the mortgage loan in **2004**; and
- (b) The Provider failed to offer the Complainants a tracker interest rate on their mortgage loan when they requested a tracker interest rate in **2007/2008**.

Decision

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

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

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished 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.

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 Complainants 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 Complainants were 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 Complainants, does not form part of this investigation and decision for the reasons set out above.

The first issue to be determined is whether the Provider failed to offer the Complainants a tracker interest rate on their mortgage loan when they drew down the mortgage loan in 2004.

The Complainants applied for a mortgage loan by way of **Loan Application** which was signed by the Complainants on **4 November 2003**. The Loan Application was submitted through a third party Mortgage Broker. In the “*Mortgage Details*” section of the Application Form, in response to the question “*Type of Rate*” the Complainants selected the “*Fixed*” rate for a term of “*1 year*”. The other option available, which was not selected by the Complainants, was a variable rate.

The Provider issued a **Letter of Approval** dated **15 December 2003** to the Complainants. The Letter of Approval outlined that the “*Loan Type*” was 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:

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“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 Complainants and witnessed by a solicitor on **16 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*
 - 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 the Complainants’ mortgage loan documentation, 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 Complainants accepted the Letter of Offer having confirmed that the Loan Offer had been explained to them by their solicitor in **February 2004**.

The Complainants had applied for a one year fixed interest rate mortgage loan and that was the offer that the Provider made to the Complainants. A tracker interest rate did not form part of the Provider’s suite of products at the time the Complainants submitted their application and were issued with the Letter of Approval on the basis of that application in **late 2003**. There was no obligation on the Provider to offer the Complainants a tracker interest rate on the mortgage loan at that time.

I note from the correspondence and file notes that have been submitted in evidence that the mortgage loan repayments did not commence until **21 March 2005**. It appears that the reason for this was that the purchase could not be completed until February 2005, in the interim the cheque had been requisitioned and returned by the Complainants’ solicitor in **November 2004**. The Provider agreed to a three month moratorium on the mortgage in November 2004, and the one year fixed interest rate period commenced in February 2005. There was no obligation on the Provider to revise the offer that had been made in **December 2003** at this time. If the Complainants were not happy with the fixed interest rate on offer by the Provider in the Letter of Offer dated **15 December 2003**, the Complainants were under no obligation to sign the Loan Acceptance in **February 2004** and thereafter draw down the mortgage loan in **November 2004**.

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I note that the Complainants have asserted that their mortgage loan was on a fixed interest rate for the first three years. The documentary evidence on the file does not support this. The mortgage loan was clearly on a one year fixed interest rate commencing in **February 2005**. Perhaps some confusion has arisen on the part of the Complainants owing to the elapse of time between signing the mortgage loan in **February 2004**, and the fact that the payments on that mortgage loan did not actually commence for over 12 months.

It appears that the Complainants' mortgage loan defaulted to a variable rate of 3.7% on **21 February 2006** and has remained on a variable interest rate since. This is not in dispute between the parties.

The second issue to be determined is whether the Provider failed to offer the Complainants a tracker interest rate on their mortgage loan when they requested a tracker interest rate in 2007/2008.

I have considered the Provider's explanation of its policy in respect of its tracker interest rate offering on the maturity of fixed rate periods. It has detailed 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."

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The Complainants have stated that in “2007/2008” they attended a meeting at the Provider’s branch, during which they expressed an interest in applying a tracker rate to their mortgage loan account and were advised by the Provider that they were “*better off not being on one*”.

Neither the Provider nor the Complainants have submitted any documentary evidence to show that this meeting took place at all or as described by the Complainants. As such, I am unable to comment further on the alleged meeting in the absence of any contemporaneous notes or other documentation demonstrating that this meeting took place or the date on which it allegedly took place.

Notwithstanding what may have been communicated to the Complainants by the Provider at any alleged meeting in 2007/2008, that there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account at any stage between 2007 and 2008. 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 accede to any request, if made, by the Complainants to apply a tracker interest rate to the Complainants’ mortgage loan. I note that the Provider did not have any policy on offering tracker interest rates to customers, on demand, where there was no contractual right to a tracker interest rate in the underlying mortgage loan documentation.

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. Consequently it was a matter of commercial discretion for the Provider as to whether it wished to accede to any 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 such a request, if it was made.

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

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected, on the grounds prescribed in **Section 60(2)**

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.