



<b><u>Decision Ref:</u></b>	2019-0410
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

##### **Background**

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

##### **The Complainants' Case**

The Complainants were issued with a letter of loan approval dated **29 June 2006** for €430,000 over a 35 year period. The mortgage had an initial two year fixed interest rate at 4.39%. The Complainants drew down the mortgage loan on **4 September 2006**.

The Complainants submit that they received a letter from the Provider when the initial two year fixed rate was due to expire on **4 September 2008**. The Complainants submit that they were offered other fixed rates and tracker rates at that time. The Complainants submit that *"the rate for tracker was high at [the] time so we signed a 5 year fixed."*

The Complainants submit that when the five year fixed interest rate period expired in **2013**, they were not given the option of a tracker interest rate. They submit that they enquired as to why a tracker interest rate option was not offered to them in **2013** and the Provider informed them that it did not apply to them.

The Complainants submit that they were both 22 years old when they originally took out the mortgage and didn't really understand fixed rates and tracker interest rates. The Complainants submit that they were told they had a "*deadline to sign forms*" which made them "*nervous to sign*" but they did so "*without getting any financial advice*". The Complainants submit that they are now "*33 and we do not have much paid off our mortgage*". The Complainants submit that the Provider is offering them a split mortgage at 4.3% which is high and they are "*struggling*" to pay the mortgage back.

The conduct complained of is that the Provider failed to offer the Complainants a tracker interest rate on their mortgage following expiry of their 5 year fixed rate in **September 2013**.

The Complainants are seeking that their mortgage be "*rescheduled*" over 30 years again at "*a better rate which people are paying now*".

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

The Provider submits that the application for the mortgage facility was made through the Complainants' chosen Broker. The Provider states that it did not have any direct contact with the Complainants when they were negotiating the terms of the mortgage loan. The Provider contends that any issue with respect to "*financial advice*" is a matter between the Complainants and the Broker.

The Provider issued a Letter of Approval and accompanying documents to the Complainants on **29 June 2006** which contained details of the Provider's offer of a mortgage loan. The Provider states that it offered the Complainants a 35 year mortgage at a rate of interest that was fixed (4.39%) for an initial period of two years. The Complainants drew down the mortgage loan on **04 September 2006**.

The Provider's records indicate that the Letter of Approval did not contain an entitlement to a tracker mortgage at the end of the fixed rate period or any time during the term of the loan. 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 Loan Offer was accepted by the Complainants with the benefit of legal advice and they acknowledged with their signatures dated **10 July 2006** that their Solicitor had fully explained the Terms and Conditions of the loan to them.

The Provider submits that the initial fixed interest rate period was due to expire on **04 September 2008** and states that prior to that date it issued an options form to the

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Complainants with a list of the “*then current available interest rates*”, which included a standard variable rate option, fixed rate options and a tracker variable rate of 5.93% (ECB + 1.68%). The Provider’s records indicate that the Complainants signed and returned the form dated **01 September 2008**, opting for a 5 year fixed rate of 5.99%.

The Provider submits that a tracker interest rate was offered as an option to the Complainants in **August 2008**, as at the time a tracker interest rate was one of the interest rate options being available from the Provider to customers expiring from fixed rates. It states that it did so “*as a matter of policy at the time*” but that the Provider was not contractually obliged to do so. It states that it did include a warning in its cover letter to the Complainants to consider their options “carefully” and that if the Complainants chose a fixed interest rate a tracker interest rate option “may” not be made available at the end of the fixed interest rate period.

The Provider’s records indicate that the Complainants signed and returned the form dated **01 September 2008**, opting for a 5 year fixed rate of 5.99%.

The Provider stated that as of **mid-2009**, the Provider ceased offering a tracker interest rate option to customers maturing from fixed rates and discount rates unless there was a contractual entitlement to a tracker interest rate.

The Provider submits that the 5 year fixed interest rate period was due to expire on **04 September 2013**. It states that it wrote to the Complainants on **02 August 2013** and outlined their options which included a variable rate and fixed rates for 2 and 5 years. The Provider contends that the Complainants did not have a contractual entitlement to a tracker interest rate, so that option was not included in the options form at the time.

The Provider submits that the Complainants did not return the options form and as a result the account was changed by the Provider to the LTV variable rate of 4.34% from **04 September 2013**. The Provider submits that the 4.5% LTV variable rate applied to the Complainants’ mortgage loan account from **10 June 2014** and the MVR>90% LTV rate of 4.3% applied to the Complainants’ mortgage loan account from **21 November 2017**.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainants the option of a tracker interest rate on their mortgage loan account following the expiry of the five year fixed interest rate period in **September 2013**.

## 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 **08 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.

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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 do not disclose a conflict of fact

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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 Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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 issue to be determined is whether the Provider failed to offer the Complainants a tracker interest rate on the expiry of the fixed rate period in **September 2013**.

In order to ascertain this, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation and to set out the interactions with the Complainants between **2006** and **2013**.

The **Letter of Approval** dated **29 June 2006** details that the "Loan Type" is a "2 Year Fixed Rate Home Loan" with an interest rate of 4.39%. 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 **10 July 2006**. 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 two-year fixed rate of 4.39% 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.

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I have not been furnished with any evidence that the Complainants were given a “*deadline*” by the Provider to sign the Letter of Approval, as the Complainants have stated. The Complainants have also stated that they signed without getting any “*financial advice*”. It appears that the Complainants in seeking the mortgage loan from the Provider had engaged with a broker. The Complainants had also engaged with a solicitor at the time and accepted the **Letter of Offer** having confirmed that the Loan Offer had been explained to them by their solicitor. If the Complainants did not fully understand or were not happy with the terms of the Letter of Offer dated **29 June 2006**, including the type of interest rate, or if they wanted to seek further advice, the Complainants could have decided to seek further advice or not to accept the offer made by the Provider. Instead the Complainants signed the **Acceptance of Loan Offer** on **10 July 2006** and proceeded to draw down the mortgage loan on **04 September 2006**.

The Provider states that it issued an **options letter and options form** to the Complainants prior to the expiry of the two year fixed rate period in or around **August 2008**. The Provider has not furnished a copy of the actual letter that issued to the Complainants at this time, rather it has submitted a copy of a “*template options letter*”.

It is disappointing that the Provider has failed to furnish a copy of the options letter that actually issued to the Complainants. Furthermore it is disappointing that the Provider has failed to offer any explanation to this office as to why it does not hold a copy of this letter in its records.

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from 01 July 2007) 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.*

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*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.”*

The Complainants’ mortgage loan was incepted for a term of **35 years** commencing from **September 2006** and the options letter purportedly issued in **August 2008**. It is understood that the mortgage account remains presently active with the Provider. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. However it is unclear to me, in the absence of any explanation from the Provider, why a copy of this letter has not been retained by the Provider.

However, it is not in dispute between the parties that the **options letter** issued to the Complainants in or around August 2008, in the same form as the template letter provided in evidence to this office. This letter also enclosed an **options form**, which has been provided in evidence.

The template letter which has been supplied in evidence details as follows;

*“I am writing to remind you that the current rate option on your mortgage account will end on **DATE**.*

*Please find attached the current options available to you.*

*We recommend that you consider your options carefully before making your selection. If you chose a fixed rate, then at the end of the fixed rate period we will send you a list of the product options available to you which may or may not include a tracker option. Our rates at that time could be higher or lower than our current rates depending on market factors and as a consequence you may incur higher interest over the term of the loan.*

*If we do not receive a written instruction from you in relation to the above on or before the **DATE**, the interest rate on your mortgage will be the tracker variable rate.”*

The **options form** outlined as follows;

*“Current options available*

*You may only select one option.*

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Account number: XXXXXXXXX

		Monthly Repayment EUR
Tracker variable rate	- Currently 5.93%	2416.31
<i>(ECB + maximum 1.6800%)*</i>		
Standard variable rate	- Currently 5.94%	2419.08
2 year fixed rate	- Currently 6.35%	2533.63
5 year fixed rate	- Currently 5.99%	2432.93
7 year fixed rate	- Currently 6.10%	2463.52
10 year fixed rate	- Currently 6.10%	2463.52

....

- Please note if you chose a fixed rate, the standard fixed-rate conditions will apply (see over the page)
- \*The interest rate that applies to this Tracker Mortgage Loan will never be more than 1.6800% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans."

The reverse side of the **options form** outlined as follows with respect to fixed interest rate loans;

#### **"Fixed Rate Loans**

Whenever (i) repayment of a loan in full or in part is made or (ii) with the agreement of [the Provider], the loan is switched to a variable rate loan or other fixed rate loan, before expiry of the Fixed Rate Period (hereinafter called the "Early Termination"), the applicant shall, in addition to all other sums payable as a condition of and at the time of the Early Termination, pay a sum equal to [the Provider's] estimate of the loss (if any) arising from the Early Termination. In the calculation of the said loss, [the Provider] shall endeavour to apply in so far it is fair and practicable the formula  $C = (I - S) \times R \times (M - T)$  where C is the charge to compensate for the loss (if greater than 0), I is the swap/market fixed interest rate for the term of the Fixed Rate Period at the date of its commencement, S is the swap/market interest rate for the remaining fixed period, R is the amount of the Fixed Rate loan balance paid or switched at the date of Early Termination, M is the Fixed Rate Period and T is the time expired of the Fixed Rate Period at the date of Early Termination."

The reverse side of the **options form** outlined as follows with respect to tracker mortgage loans;

#### **"Tracker Mortgage Loans**

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1. *The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinance Rate (“the ECB Rate”) plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.*
2. *The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.*
3. *If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.*
4. *If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate.”*

The Complainants selected the 5 year fixed rate option and signed the **options form on 01 September 2008**. The fixed rate was applied to the mortgage loan on **04 September 2008**.

I note the Complainants state they chose the fixed interest rate because *“the rate for tracker was high at the [the] time”*.

The Provider wrote to the Complainants by letter dated **02 August 2013** in relation to the expiry of the fixed interest rate period on **04 September 2013**. That letter enclosed a current options form which included, a LTV Variable Rate of 4.34%, a 2 year fixed rate of 7.25% and a 5 year fixed rate of 8.75%. The Complainants did not select an interest rate and the mortgage loan was amended to the LTV Variable Rate of 4.34% on **04 September 2013**.

The Complainants take issue with the fact that they were not given the option of a tracker interest rate on the expiry of the fixed interest rate period in **September 2013**, in circumstances where the Complainants had been offered a tracker interest rate on the expiry of the earlier fixed interest rate period in **September 2008**.

The Provider has informed this office that it does not hold a 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 [...]*

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*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."*

It is clear from the above, that the Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account. The Provider as a matter of policy, offered the Complainants a tracker interest rate of 5.93% (ECB + 1.68%) on the expiry of the fixed interest rate period in **September 2008**. The Complainants however did not chose to apply the tracker interest rate option at that time. Instead they opted for a fixed rate. The **options letter** made it clear that the options were the "*current options available*" and the letter that accompanied the options letter made it clear that the Complainants should consider their options "*carefully*" before making a selection. The letter further outlined that if the Complainants chose a fixed rate period that the product options available at the end of that period "*may or may not include a tracker option*".

I accept that it was made clear to the Complainants that they may not be given the option of a tracker interest rate again by the Provider. Indeed I note that the Complainants themselves acknowledge that the "*rate for [the] tracker was high at the time so we signed a 5 year fixed rate.*" It is clear to me that the Complainants made their interest rate selection in **September 2008** having been informed that the tracker interest rate option might not be made available to them again.

By the time the fixed interest rate period expired in **September 2013**, the Provider was no longer offering the option of a tracker interest rate on the expiry of fixed interest rate periods as a matter of policy. The Complainants did not have a contractual entitlement to a tracker interest rate on their mortgage loan account and as such there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account at the time. In accordance with **General Condition 5.4** in the **General Mortgage Loan Approval Conditions** the "*option*" of converting the loan to a variable rate loan was given to the Complainants.

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For the reasons set out above, I do not propose to 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**

2 December 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.