



<b><u>Decision Ref:</u></b>	2019-0421
<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 at point of sale 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 an equity release mortgage loan account taken out 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 redeemed the mortgage loan on **21 July 2014**.

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

The Complainants drew down an equity release mortgage loan account ending **1323** for the amount of €95,000 in **September 2006**.

The Complainants submit that at that time, their original mortgage (account ending **0637**) was on a standard variable rate and they were offered to move this to a tracker rate. The Complainants state that they requested that both mortgages be treated as a single mortgage and that both be subject to the tracker rate. In this regard they state that they *"specifically asked for a single mortgage for an increased amount releasing some equity in my home on a tracker rate"*. The Complainants submit that they were *"being quoted a similar offer by [another Provider]"* of *"1% tracker rates"* along with *"contributions towards legal fees"*.

The Complainants submit that the Provider advised them that they “*were not entitled to apply for a tracker rate*” for the entire mortgage.

The Complainants submit that they were advised by a family member who had worked for the Provider that “*a tracker rate would and should have been available for my entire mortgage regardless of how or whether it was split.*”

The Complainants submit that approximately one month before the drawdown of the loan they made a call to the Provider to enquire if they could apply a tracker rate to the entirety of their mortgage loan with the Provider. The Complainants further submit;

*“I was told this couldn’t happen as the mortgages were about to be finalised and drawn down and I wouldn’t be able to change my mind at that point. I was also summarily advised on that same telesales call that a tracker rate wasn’t open to ‘me’ and I shouldn’t have been advised of the same.”*

The Complainants submit that the Provider told them that it did not offer tracker interest rates on the type of equity release loan that it offered to the Complainants. The Complainants further submit;

*“I’m 100% certain I could have been offered a 100% tracker mortgage of some sort I have to wonder if [the Provider] held back an option that was open to me such as a different mortgage or even to completely redo my mortgage by clearing the old one starting a new one.”*

A tracker rate of interest was offered to the Complainants on their primary mortgage account ending **0637** which they accepted. Their equity release account ending **1323** was on the Provider’s standard variable rate of interest.

The Complainants submit that the complaint relates to comments made during phone calls and the Provider states that it does not have any records of telephone calls. The Complainants submit that they are “*not sure as to whether [the Provider is] implying that I didn’t contact them at all via phone during this period or whether [the Provider] simply didn’t retain them....I can 100% state that I did have several conversations with them regarding rates over the phone*”.

The conduct complained of is that the Provider failed to offer the Complainants a tracker interest rate on their equity release mortgage loan ending **1323** in **2006**.

The Complainants are seeking for a tracker interest rate to be applied for their “*whole [mortgage] going forward at [the] agreed rate of 1.8% > ECB*” and a “*refund of deprived*

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*funds, interest & penalties*” from **2006** which the Complainants estimate are approximately €30,000.

### **The Provider’s Case**

The Provider submits that when the Complainants applied for an additional loan in **2006**, they already had an existing mortgage loan account with the Provider, the primary mortgage loan account ending **0637**.

The Provider states that its equity release product was designed to enable customers to release equity in their homes and allowed customers to draw down the funds as required. It submits that the introduction of tracker interest rates post-dated the introduction of their equity release product. The Provider states that it made a *“commercial decision not to apply tracker interest rates”* to its equity release product. The Provider further states that the only interest rates that the Provider had offered on equity release loans was either a standard variable rate or a fixed rate, if available.

The Provider states that the Complainants required an additional loan for personal expenditure in **2006**. The Provider submits that the purpose of the loan was to clear three existing personal loans, to clear the First Complainant’s parents’ mortgage and to provide an additional equity release of about €8,000 to carry out home improvements. It states that its equity release loan was the *“lowest interest rate personal loan then available in the [Provider’s range]”* which was based on *“available equity in their home which was already subject to a mortgage held by the [Provider]”*.

The Provider disagrees with the Complainants’ submissions that the Provider *“held back”* certain options available at that point in time. It states that *“It is not clear whether or not the [Provider] discussed with the Complainants in 2006 an option of redeeming the Home Loan, vacating the existing mortgage and commencing a new home loan. If it was discussed, the expense and delay involved in such a process would have been explained and is likely to have outweighed any advantage to the Complainants.”*

The Provider submits that the equity release loan application was submitted on **18 July 2006** and was approved by the Provider on **1 August 2006**. The equity release mortgage loan was subsequently drawn down on **5 September 2006** on a variable interest rate.

The Provider’s records indicate that the Complainants requested a tracker interest rate on their primary mortgage loan account ending **0637** on **07 September 2006**. It contends that it amended the interest rate on the primary mortgage loan account ending **0637** on **12 September 2006** from a variable interest rate (4.35%) to a tracker interest rate of 4.25%

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(ECB + 1.25%). The tracker interest rate on that account was subsequently reduced to a tracker interest rate of ECB + 1.1% on **20 September 2006**.

The Provider states that in **November 2007**, it noted that the Complainants had been offered a lower interest rate by a competing financial institution and that the Provider in response, offered to change the rates of interest on the primary mortgage loan and the equity release loan, as follows;

- primary mortgage loan account ending **0637**; tracker rate changed to 4.8% (ECB + 0.8%)
- equity release mortgage loan ending **1323** variable rate reduced to 4.85%

The Provider submits that *“due to a number of constraints, including technical limitations of the [Provider’s] historic telephone recording system which is no longer in use, and the passage of time, [the Provider] is not in a position to search in its historical tape archive for a telephone recording the date of which is unknown.”*

The Provider submits that it made a commercial decision not to include tracker rates on equity release loans and it is satisfied that the rates offered to the Complainants were correct.

### **The Complaint for Adjudication**

The conduct complained of that the Provider failed to offer the Complainants a tracker interest rate when they were applying for an equity release loan in **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 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

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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 **8 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.

The issue to be determined is whether the Provider failed to offer the Complainants a tracker interest rate when they were applying for an equity release loan in **2006**. In order to determine this, it is necessary to set out details of certain interactions between the Complainants and the Provider between **July** and **September 2006**. I am disappointed that the telephone recordings requested from the Provider have not been submitted in evidence. However I accept the Provider's submission that this has arisen because of technical constraints and the passage of time. I note that the First Complainant similarly has been unable to produce phone records and has outlined that he "*can not retrieve my call data from our servers as we cannot retain call data for that length of time*".

The Complainants were in contact with the Provider's Business Development and Retention Unit in **July 2006**. The note of the contact record dated **17 July 2006** details as follows;

- *"[First Complainant] was approached by [another Provider] to move his loans. In order to retain I came up with a plan which is as follows;*
- *I have offered him a fixed rate / or tracker rates on his existing loan, and will be issued soon.*
- *He wants to consider*

<i>A loan from his parents</i>	<i>€46,821</i>
<i>Carloan 1</i>	<i>€16,017</i>
<i>Carloan 2</i>	<i>€17,004</i>
<i>Personal Loan</i>	<i><u>€8,179</u></i>
	<i>€88,021</i>
- *He may want some extra for himself, his house is valued at €400k and his basic salary is €40+*

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- *He is only in his current role 2 months and on probation as a sales manager for [name] which I hope can be deemed as the same line of work (sales) as his previous position."*

The Provider's internal notes headed 'Diary Query Application' record various entries between **18 July 2006** and **01 September 2006**.

The entry from **18 July 2006** at **12:33** records as follows;

*"SENT IN FROM [name] IN RETENTION. CLEARING THEIR OWN MORTGAGE, HIS PARENTS MORTGAGE, AND THREE LOANS WITH [Provider's] FINANCE. BASED ON SALARIES TAKEN FROM THE PAYSLEIPS THEY QUALIFY FOR THE 280K THEY ARE LOOKING FOR WITH NETS OF 32%.*

*...*

*CLEARING HIS PARENTS MORTGAGE AS THEY GAVE HIM A LOAN OF 50K WHEN HE WAS BUYING HIS FIRST HOUSE AND HE HAS BEEN REPAYING SAME, PAYING OUT 2037PM AND WILL BE SAVING APPROX 800 PM BY DOING THIS REMORTGAGE ..."*

There were internal contacts between representatives of the Provider on **18 July 2006**. The first email was sent at **16:53**, as follows;

*"[The Complainants] came in this morning and are happy to go ahead with [the Provider], they are doing a tracker mortgage on a loan amount of 280k over 35yrs,"*

*During the interview process [the First Complainant] confirmed the following to me which I feel is to be dealt with by yourselves, following your conversation with him,*

- *The valuation fee is be[ing] paid by [the Provider]*
- *Solicitors fees are be[ing] paid by [the Provider], he was going to use [name] but his deeds ae still out with his solicitor as his mortgage only issued a year and a half ago, I have rang [name] to see can they still deal with him or does he have to go back to his original solicitor and I am awaiting confirmation of same before I confirm same to [the First Complainant]*
- *He is also looking for a reduction on the rate."*

The Provider's representative replied to the above email on **18 July 2006** by email at **17:37**, as follows;

*"Still a [Product title] but over 35 years probably a fixed rate, and once it issues well give his mortgage a tracker rate of 3.85% (1.1%)"*

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The internal notes headed 'Diary Query Application' entry from **19 July 2006** at **15:26** records as follows;

*"SPOKE TO [name] FROM RETENTION AND THIS COUPLE ARE NOW GOING WITH A [named product] FOR THE DIFF FROM THEIR MORTGAGE AND HE WILL GIVE THEM A RATE REDUCTION..COPY OF EMAIL ON FILE"*

The internal notes headed 'Diary Query Application' entry from **19 July 2006** at **15:44** records as follows;

*"FROM RETENTION CENTER. DOING A [Product title] TO CLEAR EXISTING LOANS X3 WITH [Financial Service Product] AND PARENTS MLS AND ALSO USING 8K FOR HOME IMP... ALREADY LOADED AS A HOME LOAN UNDER REF [Reference number] BUT NOW DOING A [Product title]."*

The **Letter of Approval** issued to the Complainants dated **11 August 2006** and details as follows;

"

<i>Loan Type:</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
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*Purchase Price/Estimated Value: EUR 400,000.00*

*Loan Amount EUR 95,000.00*

*Interest Rate: 4.35%*

*Term: 30 year(s)"*

The **Acceptance of Offer of an Additional Loan** was signed by the Complainants on **14 August 2006**, on the following terms;

*"I/We confirm that I/we have obtained or been given an opportunity to obtain independent legal advice prior to accepting this offer of an additional loan."*

The entry in the internal notes headed 'Diary Query Application' on **01 September 2006** at **10:18** records as follows;

*"[FIRST COMPLAINANT] RANG AND NOW DOES NOT WANT THE MORTGAGE REF [NUMBER] CLEARED AS HIS PARENTS WANT THE MONEY AND WILL PAY THE PREMIUMS THEMSELVES, WILL HAVE TO READJUST THE NETS AND GET [PROVIDER REPRESENTATIVE] TO LOOK AT SAME...AN AMENDED APPROVAL MAY HAVE TO BE ISSUED."*

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WITH THE LOAN NOT CLEARED THE NETS ARE TOO HIGH AT 43% AND THIS WOULD HAVE TO BE REFERRED TO RETAIL THE ONLY OTHER OPTION WOULD BE A PARTIAL REDEMPTION OF 15K OFF THE MORTGAGE TO REDUCE THE PAYMENTS TO 352PM AND [FIRST COMPLAINANT] COULD GET A CHQ OF 30K FOR HIS PARENTS...I SPOKE TO [PROVIDER REPRESENTATIVE] ON THIS AND HE WOULD BE HAPPY TO SIGN OFF ON THE 2ND OPTION.^^RANG [FIRST COMPLAINANT] TO EXPLAIN THE ABOVE, HE SPOKE TO HIS DAD AND HAS DECIDED TO GO WITH ORIGINAL CONDS ETC.^^ALL LOANS ON CONDS TO BE CLEARED.^^FILE CLEAR, CHQ SHOULD BE HERE BY TUES.^^

The equity release mortgage loan was drawn down by the Complainants on **05 September 2006**.

It appears from the Complainants' submissions that they are of the view that the Provider should have offered them a tracker interest rate on a "*single mortgage for an increased amount releasing some equity in [their] home*" in **2006**. At the time in **2006**, the Complainants had a mortgage loan with the Provider which was drawn down in **2004** for €190,000, on a fixed interest rate for 1 year, which had reverted to a standard variable rate.

From the documentary evidence, quoted above, it appears that a meeting took place between the Complainants and the Provider on **18 July 2006**. It appears that at this meeting the option of taking out a "*tracker mortgage on a loan amount of 280k over 35yrs*" was discussed with the Complainants and the Complainants were "*happy to go ahead*" with submitting an application for that option. The note records that there were a number of other matters to be discussed with the Business Retention Unit, including a "*reduction in rate*". It is unclear from the record, the exact interest rate that was discussed with the Complainants at that time, save that the interest rate type discussed was a tracker interest rate. It appears from the Provider's internal records that this was the application that was initially put up on the Provider's system on **18 July 2006** at **12:33**. The documentary evidence does not support the Complainants' submission that the Complainants were at this point in time "*denied*" the option of potentially pursuing a single mortgage loan on a tracker interest rate, as it appears that this is how the application was commenced. This option would have involved the Complainants redeeming the existing mortgage and commencing a new mortgage loan for the entire sum borrowed.

It appears that the Provider's Business Retention Unit was in contact with the Complainants with respect to the request for a "*reduction in rate*" later in the day on **18 July 2006** and it was subsequently agreed with the Complainants that the application would proceed as an application for an equity release mortgage for the difference in the funds sought, over and above the balance of their primary mortgage loan and that the

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Complainants would be given a “*tracker rate of 3.85% (1.1%)*” on the primary mortgage loan, once the new mortgage loan was drawn down.

It is clear that, in **2006**, the Complainants were seeking a further advance of funds from the Provider and that advance of funds would be secured against the equity in the Complainants’ private dwelling house. I note that when the primary mortgage loan was drawn down in **2004**, the property was valued at €285,000, whereas when the additional funds were sought in **2006** the property was valued at €400,000. Furthermore it is clear that at the time the Complainants were negotiating with the Provider with respect to the type of loan and rates applicable to the new mortgage loan and also in relation to their existing borrowings with the Provider. The Complainants submit that the line “*he is looking for a reduction in rate*” infers that they did push for “*better rates, which would be my normal approach to any purchasing negotiation.*”

It is important for the Complainants to be aware that the Provider was under no obligation to offer them any type of mortgage at the time. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowing at the time and secondly, how that offer would be structured.

In the course of the negotiation, it appears that the Provider then offered the Complainants the option of applying a tracker interest rate on their primary mortgage loan and a separate mortgage loan on an equity release product. The mortgage loan documentation issued to the Complainants on **11 August 2006** shows that it was envisaged that the loan for €95,000 was a separate mortgage loan on the equity release product on a variable rate. If the Complainants did not want to pursue this option as they were unhappy with the rate applicable to the equity release mortgage, the Complainants could have declined to accept the Provider’s offer of the equity release product. It appears from the Complainants submission that they had an offer from another Provider of a “*single mortgage for an increased amount*”, as such, the Complainants could also have considered the option of redeeming their mortgage loan with the Provider at that time and pursuing the offer from the other Provider, if they were unhappy with the Provider’s offering. Instead the Complainants accepted the Provider’s offer by signing the **Acceptance of Offer of an Additional Loan** on **14 August 2006**.

The Complainants submit that near to drawdown during a telephone conversation, the First Complainant was told that “*I wasn’t entitled to get a tracker on my full mortgage*”. As noted above, the recordings of telephone calls between the Complainants and the Provider have not been submitted in evidence. As such I am unable to comment on the exact content of the conversation that took place. Even if it was the case that the First Complainant requested in a telephone call that a tracker interest rate would be applied to the original borrowings and the proposed additional borrowings of €95,000 (which at that

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time were the subject of the **Acceptance of Offer of an Additional Loan** signed on **14 August 2006**, which had yet to be drawn down) there was no obligation on the Provider to accede to that request. The parties had already reached a signed agreement at that time with respect to the Complainants' request for additional borrowings. It had been agreed that the equity release product would apply to the new mortgage loan on a variable rate and a tracker interest rate would be applied to the existing primary mortgage loan.

The Complainants subsequently drew down the equity release mortgage loan on **05 September 2006**. The Provider then applied the agreed tracker interest rate (ECB + 1.1%) to the Complainants' primary mortgage loan on **20 September 2006**.

I have been provided with no evidence that the Complainants had a contractual or other entitlement to a tracker interest rate on mortgage loan account ending **1323**.

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

**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.