



<u>Decision Ref:</u>	2020-0025
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Partially upheld

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

Background

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The loan amount was €279,500 and the term was 40 years. The Letter of Approval which was signed on **11 June 2007** outlined the Loan Type as *“Fixed Rate 4.95% until 31/08/12 100% Capital and Interest”*.

The Complainant’s Case

A Loan Offer Letter issued to the Complainant on **05 June 2007** which provided for a mortgage loan of 40 years commencing on a five year fixed interest rate. The Complainant submits that he entered into the mortgage loan on the *“understanding”* that he could move to a tracker interest rate at the end of the fixed interest rate period.

The Complainant outlines that he contacted the Provider in **July 2011** via telephone and he was advised that his mortgage loan account would move to a tracker interest rate on expiry of his fixed rate period. The Complainant states that he was informed in a later telephone call with the Provider that this was an error and his mortgage loan account would move to the standard variable rate instead.

The Complainant outlines that he went through the complaints procedure with the Provider and they “checked back on the phone conversations” and “admitted” that he was told that the mortgage loan would move to a tracker interest rate but this was a mistake. The Complainant outlines that the Provider apologised and sent him a bottle of wine as a gesture for his troubles. The Complainant queries this as “suspicious”.

The Complainant submits that the Provider seems “determine[d] to avoid any type of ethical responsibility.”

The complaint is that the Provider failed to offer the Complainant a tracker interest rate on his mortgage loan account on the expiry of the 5 year fixed interest rate period in **September 2012**.

The Complainant is seeking;

- (a) A tracker interest rate to be applied to his mortgage loan account; and
- (b) Redress and compensation for any interest overpaid while his mortgage loan account operated on the standard variable rate since expiration of the fixed rate period in September 2012.

The Provider’s Case

The Provider submits that during the application stage the Complainant chose to avail of the services of a third party mortgage broker and in accordance with their agreement with brokers, the Provider was prohibited from contacting broker customers directly, until the mortgage loan funds were drawn down. The Provider states that it cannot comment on any advice that the Complainant was given by the Broker at the application stage.

The Complainant’s mortgage loan account drew down on **3 July 2007** on a 5 year fixed rate of 5.67%. The letter of offer provides for a fixed rate of 4.95%, however, this rate was amended by the Provider prior to draw down to 5.67%. The Provider relies on the ‘Specific Loan Offer Conditions’ which allows it to vary the fixed rate prior to drawdown “in accordance with any variations in the fixed rate offered” by the Provider.

The Provider outlines that the default applicable to the Complainant’s fixed rate product was a Standard Variable Rate and as such there was no entitlement to default to a tracker interest rate on the expiry of the fixed interest rate period in **September 2012**. The Provider relies on **Section 14 (c)** of its **standard mortgage terms and conditions**. The Provider submits that the Standard Variable Rate is a “variable interest rate which may be increased or decreased by the Lender at any time” whereas a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will rise and fall in line with movements in the

ECB base rate only . The ECB base rate cannot be changed by the Provider. The Provider outlines that the Complainant confirmed that he had acknowledged receipt of the conditions applicable to the mortgage loan, that they had been explained to him by his solicitor and that he understood them. The Provider outlines that the conditions accepted by the Complainant were “clear” and “unambiguous” that the Complainant was not entitled to a tracker interest rate on his mortgage loan account.

The Provider acknowledges that the **Loan Offer Acceptance** “erroneously” referred to “Tracker Mortgage”. The Provider submits that the purpose of this paragraph was for the Complainant to acknowledge that he fully understood the specific nature of the mortgage, that the debt owed was secured on the mortgaged property and must be repaid in full before the title deeds will be returned or the security released. The Provider outlines that the reference to “Tracker Mortgage” was a typographical error and that this “incorrect reference was not capable of transforming the entire basis of the loan to a tracker interest rate when there was no reference to a tracker” in other documentation evidencing the agreement.

The Provider has apologised for the “incorrect information” given to the Complainant during the telephone conversation in **July 2011**, and that this error did not “override or supersede” the Complainant’s loan offer. The Provider outlines that it acknowledged in its letter to the Complainant of **08 July 2011**, that the Complainant had been incorrectly advised and issued him a gift pack as an apology.

The Provider states that it withdrew tracker interest rates from the market in **September 2008** and therefore a tracker interest rate did not form part of the available rates outlined in the product expiry letter dated **14 September 2012**. The Provider submits that its products never included a fixed interest rate which automatically defaulted to a tracker interest rate.

The Provider “refutes” the assertion that it is determined to avoid ethical responsibility and outlines that it identified that the Complainant was never entitled to a tracker interest rate based on a full review of his mortgage loan documentation and journey.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant a tracker interest rate on his mortgage loan account on the expiry of the 5 year fixed interest rate period in **September 2012**.

Decision

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

In arriving at my 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 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 Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **3 January 2020**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainant to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision. The Complainant was informed of the parameters of the investigation by this Office, by letter, which outlined as follows;

"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint."

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Therefore, the conduct of the third party Broker engaged by the Complainant, does not form part of this investigation and decision for the reasons set out above.

The issue to be determined is whether the Provider failed to offer the Complainant a tracker interest rate on his mortgage loan account on the expiry of the 5 year fixed interest rate period in **September 2012**. In order to adjudicate on this complaint it is necessary to review and set out the relevant provisions of the Complainant's loan documentation. It is also relevant to set out the interactions between the Complainant and the Provider between 2007 and 2012.

The Complainant applied for a mortgage loan through a third party Broker. It appears from the evidence that the third party Broker received the **Loan Offer Letter** dated **5 June 2007** from the Provider and issued it to the Complainant, together with a **Mortgage Approval Details** document.

The **Mortgage Approval Details** document is a third party Broker document which contains the Broker's branding. The document details as follows;

"We have summarised the details of your loan offer below. Please check the details and ensure they match your requirements and return the signed form to us.

Name(s) Complainant's name

New Property Address [Address]

Lender [Provider name] **Term** 40 yrs **Property** €279,500 **Loan Amount** €279,500

Loan Type Annuity L.T.V ≤80% ≥80% ✓ **Loan Category** First Time Buyer

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<i>Discounted Variable</i>		<i>Variable</i>		<i>Fixed</i>
<i>Variable Rate at present</i>	%		%	4.95% (5 yrs)
<i>Discounted by</i>	%	<i>Tracker</i>	%	
<i>Date Rate Expires</i>				
<i>N.B. Please note your rate is subject to availability on closing and should be confirmed with your solicitor</i>				

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NOTE:

SHOULD YOU WISH TO MAKE ANY CHANGES TO THIS OFFER, PLEASE RETURN THEM IN WRITING TO ME, AT YOUR EARLIEST CONVENIENCE. IT IS IMPERATIVE THAT I RECEIVE TWO WEEKS NOTICE OF CLOSURE, IN WRITING."

The **Loan Offer Letter** dated **05 June 2007** details as follows;

<i>Loan Type:</i>	<i>Fixed Rate 4.95% until 31/08/12 100% Capital and Interest</i>
<i>Loan Amount:</i>	<i>€279,500.00</i>
<i>Interest Rate:</i>	<i>4.95%</i>
<i>Interest Type:</i>	<i>Fixed</i>
<i>Term:</i>	<i>40 years</i>

The **Specific Loan Offer Conditions** detail as follows;

"The fixed rate quoted shall be subject to variation prior to drawdown in accordance with any variations in the fixed rate offered by the Company."

Two sets of General Terms and Conditions have been furnished in evidence by the Provider: The **General Terms and Conditions** and the **Standard Mortgage General Terms and Conditions**.

The set titled **Standard Mortgage General Terms and Conditions** are stated to be effective from "01/06/2008" detail as follows;

"1. Introduction

(a) These General Mortgage Terms and Conditions apply in all circumstances to the Lender's Standard Mortgage/Tracker Mortgage. These General Terms and Conditions are supplemental to and form part of the Loan Offer which comprises Specific Loan Offer Conditions and General Terms and Conditions. In the event of any conflict or inconsistency, the Specific Loan Offer Conditions shall apply."

Therefore I accept that the Standard Mortgage General Terms and Conditions are supplemental to the **Specific Loan Offer Conditions** and the **General Terms and Conditions** comprised in the Complainants' Loan Offer dated **05 June 2007**.

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Condition 14 of the **Standard Mortgage General Terms and Conditions** details as follows;

“14. Interest Rate

(a) Subject to Sub-Clause 14(b), all Loans are subject to the Bank’s Mortgage Rate at the date the Loan is drawn down.

(b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:

(i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the European Central Bank (“ECB”) rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement.

(ii) There will be no reduction in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.

(c) In the case of a fixed interest rate of mortgage, the following conditions will apply;

(i) The rate of interest applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer.

(ii) The Borrower upon expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender, or if available, where the borrower fails to exercise the option, the interest rate applicable will be a variable interest rate which may be increased or decreased by the Lender at any time and in this respect the decision of the Lender will be final and conclusively binding on the Borrower”.

The **Loan Acceptance** was signed by the Complainant on **11 June 2007** outlines as follows;

“I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

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I/We fully understand and accept the specific nature of this Purchase Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.”

The Complainant submits that his “*understanding*” was that the mortgage loan would move onto a tracker interest rate at the end of the fixed interest rate period. The Complainant has not informed this office how or why he formed this understanding. In this regard, I note that the Complainant’s mortgage loan was applied for through a third party mortgage Broker and the Provider did not have any direct interaction with the Complainant between the time that the mortgage loan application was made and the time that the mortgage loan was drawn down. As such it appears to me that this understanding could not have been formed on the basis of any verbal representations or assurances given by the Provider to the Complainant in advance of the Complainant entering into the mortgage loan contract by signing the Loan Acceptance on **11 June 2007** and drawing down the funds on **03 July 2007**. The Complainant was issued with the **Mortgage Approval Details** by the third party Broker which summarised the loan offer which was to commence on a five year fixed rate. This document did not make any reference to the rate applicable at the end of the fixed interest rate period.

I have also considered the Complainant’s mortgage loan documentation in its entirety and it appears to me that there was no reasonable basis for the Complainant to form the understanding that the mortgage loan would move to a tracker interest rate at the end of the initial 5 year fixed interest rate period. It is clear from **Condition 14 (c)** that, on the expiry of the fixed interest rate period on the mortgage loan account, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainant. The variable interest rate set out in Condition 14(c) was clearly one which may be increased or decreased by the Provider at any time. Condition 14 (c) does not mention the application of a tracker interest rate to the Complainant’s mortgage loan.

If it was intended that the loan would be a Tracker Mortgage then, the Loan Offer conditions applicable to the loan would have contained details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14(b)**. However, there was no reference to a fixed margin or an ECB rate in the Complainant’s Loan Offer Letter. Further there is no reference to a fixed interest rate period or the end of a fixed interest rate period, in Condition 14(b), rather the condition relates to the “*date of payment of the Loan*”.

I note that there is a reference to “*Tracker Mortgage*” in the **Loan Acceptance**, as quoted above. In the circumstances, I accept that the reference to “*Tracker Mortgage*” in the **Loan Acceptance** was a “*typographical error*” on the part of the Provider. Whilst this error on the

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part of the Provider is entirely unsatisfactory, it is my view that it would not be reasonable to conclude that this reference to the term "*Tracker Mortgage*" in the **Loan Acceptance** section of the Complainant's mortgage loan documentation could have led the Complainant to reasonably form the understanding that the loan would move to a tracker interest rate at the end of the fixed interest rate period. The sentence that contains this erroneous reference to "*Tracker Mortgage*" is in relation to potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainant understood this had to be repaid before the deeds of the property could be released and returned. This sentence was clearly not in relation to the interest rate applicable at the end of the initial fixed interest rate period.

Having considered the mortgage loan documentation in its entirety, it is my view that the Complainant did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed rate period which applied from **June 2007** to **31 August 2012**.

The Complainant also takes issue with a telephone call with the Provider on **08 July 2011** and the information given to him during the course of that call that the mortgage loan would move to a tracker interest rate at the end of the fixed interest rate period. This office requested a recording of the phone call between the Complainant and the Provider on 8 July 2011 as part of the investigation of this complaint. In response the Provider indicated "*we do not have a recording of the telephone call between the [Provider] and the [Complainant]*". It is disappointing that the Provider is unable to produce a copy of the recording of this phone call for consideration and furthermore that the Provider has not offered a full explanation for this. In this regard, I note that the recording was available to the Provider in December 2011, when it issued its final response letter to the Complainant when he initially raised a complaint to the Provider.

In any event the content of the telephone call is not in dispute between the parties and it is accepted that the Provider's representative did advise the Complainant that the mortgage loan would avail of a tracker rate at the end of the fixed interest rate period during the call on 08 July 2011. The Provider subsequently informed the Complainant during a further telephone call on **07 November 2011**, that the mortgage loan would avail of a standard variable rate at the end of the fixed interest rate and not a tracker interest rate. The Provider apologised for this and furnished the Complainant with a gift pack in 2011. The fact that the Provider's representative conveyed incorrect information, while regrettable and unfortunate, did not create an obligation (contractual or otherwise) on the Provider to offer a tracker rate to the Complainant on his mortgage loan account.

Whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainant's mortgage loan account at the end of the fixed interest rate period on **31 August 2012**, I am also of the view that the information provided to the Complainant in

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the **Loan Acceptance** was somewhat confusing. The **Consumer Protection Code 2006**, outlines that;

“A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers”

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainant. Whilst I accept that *“typographical”* errors can occur and in this circumstance that error did not affect the Complainant’s underlying contractual entitlements, I am of the view that the Provider should have been proactive and brought this *“typographical”* error to the Complainant’s attention and highlighted how the error occurred, in advance of the Complainant making his complaint to this office.

For the reasons set out above, I am of the view that this complaint is partially upheld. To mark the Provider’s shortcomings under the Consumer Protection Code 2006, I direct that the Provider pay to the Complainant a sum of €1,250 compensation.

For the reasons set out above, I propose to partially uphold the complaint.

Conclusion

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

I intend to direct that pursuant to **Section 60(4)(d)** of the **Financial Services and Pensions Ombudsman Act 2017** that the Provider pay the Complainants a sum of €1,250 compensation.

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**

27 January 2020

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.