



<b><u>Decision Ref:</u></b>	2020-0077
<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 Refusal to move existing tracker to a new mortgage product
<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 Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on a residential investment property.

The loan amount was €360,000 and the term of the loan was 25 years. The particulars of the mortgage loan offer signed by the Complainant on **25 January 2008** detailed that the loan type was a “1 Yr Fixed (LTV > 80% / < 500K) Int Only RIP [Residential Investment Property]”.

**The Complainant’s Case**

The Complainant submits that she and a third party took out a joint mortgage (account ending **0705**) with the Provider on a two-year fixed interest rate in **2005**. The Complainant details that on the expiry of the two-year fixed interest rate period in **2007** the interest rate on the mortgage account ending **0705** was amended to a tracker rate of 5.10% (ECB + 1.10%).

The Complainant outlines that she took out a new mortgage (account ending **1680**) with the Provider in her sole name in **2008** secured on the same property, *“with the understanding”* that she would have *“the same”* tracker rate of ECB + 1.10% on the new mortgage account.

The Complainant outlines that an interest only fixed interest rate period applied to the mortgage loan account for the initial year of the mortgage term, *“but only did so under the agreement that I would come out of fixed rate on to the tracker that I was on previously.”*

The Complainant submits that when the initial fixed rate period expired in **January 2009**, *“a tracker was returned to me but the rate had gone up to [ECB plus] 2.35%. It was **never never** explained to me that my rate would change. A[t] this time I was very upset and made multiple calls to [the Provider] asking them to explain the jump in my tracker rate but was told many times that the bank could put up the tracker to whatever they deemed as appropriate.”* The interest only period also ended at this time and the repayments switched to capital and interest. The Complainant states that as a result her mortgage repayments *“increased by nearly 300 euro a month”* from **January 2009**.

The Complainant submits that *“I now realise from getting advice that this was completely illegal and if there was a chance that my tracker rate could have been changed then I should have been informed of this so I could make choices to keep my 1.1% rate. This was certainly not the case.”*

The Complainant states *“I am struggling to pay this massive mortgage on my own since I came off interest only in the opinion that I was going on the same mortgage rate as I had on my previous one and would never ever have gone ahead with a mortgage where repayments would cripple me so much.”*

The Complainant details that she does not understand how the Provider can *“mislead/misinform me and then blame the broker (who was most helpful and was the same one I used for both mortgages)”*.

The Complainant is seeking;

- a) To be *“placed back”* on the tracker interest rate of ECB + 1.10%; and
- b) To be *“reimbursed”* for the *“extra”* interest paid.

### **The Provider’s Case**

The Provider states that the Complainant engaged a broker when applying for the mortgage loan in her sole name in **November 2007**. It outlines that the application was for a residential investment property (RIP) loan refinance. The Provider submits that the application did not refer to any particular interest rate and its records show that on **05 December 2007** the

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broker requested a one year fixed interest rate and a term of 25 years for the mortgage. The Provider submits that the mortgage property was the subject of an existing mortgage (account ending **0705**) in favour of the Provider at the time. The Provider outlines that the mortgage account ending **0705** had been taken out by the Complainant and a third party in **2005**.

The Provider details that the Complainant's mortgage loan account ending **1680** drew down on **31 January 2008**. It states that the **Letter of Approval** dated **12 December 2007** outlined that a one-year fixed interest rate of 4.99% would apply, and at the end of the fixed period the interest rate applicable would be the Provider's then current tracker mortgage rate. The Provider relies on **Special Condition 9** of the Letter of Approval in support of this. It states that there is no provision in the Letter of Approval in respect of a tracker rate margin of 1.10%. It states that on **25 January 2008** the Complainant accepted the Letter of Approval and in doing so confirmed that her independent legal advisor had fully explained the terms and conditions to her.

The Provider outlines that it received a letter and cheque from the Complainant's solicitor on **5 February 2008** to redeem mortgage account ending **0705**.

The Provider submits that the Complainant did not have a contractual entitlement to a tracker interest rate of ECB + 1.10% on the expiry of the initial fixed interest rate period applicable to mortgage account ending **1680** in **January 2009**. The Provider submits that it issued the Complainant a **rate options letter and form** dated **09 January 2009**, which offered the Complainant a tracker rate of 4.85% (ECB + 2.35%), an LTV variable rate of 4.65% and fixed rate options for 2 and 5 year terms. It details that its letter informed the Complainant that in the absence of an instruction from her regarding her choice of interest rate, the tracker rate would be applied to the account by the Provider. It states that in the absence of any instructions the mortgage loan account defaulted to the tracker rate of 4.85% (ECB + 2.35%) on **30 January 2009**.

The Provider states that it introduced the tracker rate of ECB + 2.35% with effect from **20 December 2008**. It states that this was the tracker rate in **January 2009** in respect of Residential Investment Property mortgage loan accounts which switched from a fixed period to the Provider's then current tracker rate.

The Provider states that it was "*entitled to exercise its discretion and make a business decision to change its interest rate offerings based on a number of factors*". It submits that it is lawfully entitled to have regard to factors including "*the Bank's cost of funds*", "*the cost of credit risk associated with lending*" and "*the Bank's competitive position*" when setting interest rates and margins. It further states that there are a number of external factors which affect decisions around the pricing of mortgage products. It submits that as is well

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known, there was a significant level of turmoil in the Irish and international financial markets over the course of **2008** and **2009**, giving rise to serious funding difficulties for all banks, and as a result the cost of both wholesale funding and deposit funding increased significantly which increased the Provider's cost of funds. It outlines that this was further exacerbated by deteriorating economic conditions.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider acted incorrectly when the fixed rate period ended in **January 2009**, by placing the Complainant's mortgage loan account ending **1680** on a tracker rate with a margin of ECB + 2.35%.

### **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 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 **06 March 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.

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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.”*

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 acted incorrectly by applying the tracker margin of ECB + 2.35% to the Complainant’s mortgage loan account ending **1680** in **January 2009**, upon expiration of the one-year fixed interest rate period. In order to determine this complaint, it is necessary to review and set out the certain interactions between the Complainant and the Provider and to set out relevant provisions of the Complainant’s loan documentation.

The Broker signed a **Sight of Original Documentation Declaration** on **3 August 2007**, which detailed as follows;

*“Broker Name: [Broker Name]*

*...*

*Customer Name: Applicant 1: [Complainant Name]*

*...*

*A mortgage intermediary is obliged to submit this signed declaration to [the Provider] under the consumer protection code, confirming it has had sight of all original supporting documentation evidencing the customer’s identity and ability to repay.”*

I have considered the **Application Form** which was signed by the Complainant. In **Section 7: Mortgage Required**, the options available for “Rate Type” were Tracker, Fixed, Variable, Discount, Split and Other. I note that in response to the question “Rate Type” the Complainant did not select any of the options.

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The Provider has furnished in evidence an internal file note recorded on **5 December 2007 at 15:10PM**, which details as follows;

*"[Broker] to revert with rate and term and sols details"*

A further internal file note recorded on the same date at **16:21PM** details as follows;

*"25 years 1 yr fixed as per [Broker]"*

The Complainant outlines that when she applied for and drew down the mortgage loan account ending **1680** in her sole name in **2007** *"a tracker of 1.1% was agreed"*. The Complainant has stated that she was of the *"understanding"* that at the end of an initial interest only fixed interest rate period the mortgage loan account would switch to *"the tracker that [the Complainant] was on previously"*, being the tracker rate of ECB + 1.10% that had applied to the mortgage loan account ending **0705**. Mortgage account ending **0705** had been held by the Complainant and a third party and was due to be redeemed from the proceeds of the new mortgage being applied for by the Complainant in her sole name.

It appears from the evidence before me that all communications were made with the Complainant's broker with respect to her mortgage loan. The Complainant has not provided any evidence or offered any reason as to why she was of the *"understanding"* that a tracker interest rate had been agreed at this time with respect to the mortgage application for mortgage account ending **1680**. In any event, this understanding could not have been formed on the basis of a representation or communication from the Provider, in circumstances where, the evidence shows that the Provider and the Complainant did not have any direct communication at the time. I note the application form that the Complainant completed through the broker, outlined the types of interest rate options available, including the tracker rate, and the Complainant ultimately proceeded with an application for a mortgage loan commencing on a fixed rate option.

The Complainant has also submitted that the Provider should have *"informed"* her if there was a chance that her tracker rate could have been changed, so she could make *"choices to keep my 1.1% rate"*. In circumstances where the Complainant was engaging with a Broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainant during the application stage. The Complainant at the time was seeking to redeem mortgage account ending **0705**, which was held in her name and that of a third party and take out a new mortgage loan in her sole name. There was no obligation on the Provider to furnish information to the Complainant with respect to changes in tracker interest rates at the time. Either it was the case that the Complainant wished to remain subject to the joint mortgage (mortgage account ending **0705**) on the tracker interest rate of ECB + 1.1% or she wished to take out a new mortgage in her own name subject to the terms and conditions of a new mortgage and the rates options then

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available to her. The evidence shows that the Complainant proceeded with an application for a fixed rate mortgage loan with the Provider.

The Provider issued a **Letter of Approval** dated **05 December 2007** to the Complainant. I understand that the Complainant did not accept that Letter of Approval on the basis that there was no provision therein for an initial period of interest only repayments.

A second **Letter of Approval** dated **12 December 2007** was issued to the Complainant, which details as follows;

<b>"Loan Type:</b>	<b>1 Yr Fixed (LTV&gt;80%/ &lt;500K) Int Only RIP</b>
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<i>Purchase Price / Estimated Value:</i>	<b>€ 360,000.00</b>
<i>Loan Amount:</i>	<b>€ 304,000.00</b>
<i>Interest Rate:</i>	<b>4.99%</b>
<i>Term:</i>	<b>25 year(s)"</b>

The **Special Conditions** to the Letter of Approval detail as follows;

***"Special Conditions***

...

9. *On expiry of the fixed rate period and without affecting the entitlement of the Applicant to apply at any time to fix the rate for a further period (if available), the interest rate applicable to the Loan will be the **then current [Provider] Tracker Mortgage rate appropriate to the Loan as may be varied from time to time in accordance with variations to the European Central Bank refinancing rate ("the ECB rate")**. In the event of any variation of the ECB rate, the revised interest rate for the Loan will apply not later than 1 calendar month from the date provided by the ECB as the date provided by the ECB as the date on which the variation to the ECB rate will take effect."* **[My emphasis]**

...

15. *That the total borrowings with [the Provider] (a/c \*\*\*\*\*0705) be discharged from the proceeds of [the Provider's] advance."*

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **25 January 2008**. 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 conditions*

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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 interest rate and thereafter the option of the "then current" tracker mortgage interest rate. If the Complainant did not give any instructions as to any other rate, then the interest rate would be the tracker mortgage rate. The Complainant accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to her by her solicitor.

I note from the evidence that prior to the expiry of the one year fixed interest rate on **31 January 2009**, the Provider wrote to the Complainant to set out its current available interest rates on **09 January 2009**. The Provider's letter enclosing the **rate options form** detailed as follows;

*"I am writing to remind you that the current rate option on your mortgage account will end on 31/01/2009.*

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

*We recommend that you consider your options carefully before making your selection. If you choose 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 31/01/2009, the interest rate on you loan will be the tracker variable rate which currently stands at 4.85% (ECB+2.35%)\*.*

*We value your business highly at [the Provider] so if you have any questions regarding these options, please contact our dedicated mortgage team on [PHONE NUMBER]. They will be happy to help you."*



The **rate options form** detailed as follows;

*“Current options available:*

*You may only select one option.*

<i>--- Tracker variable rate (ECB + max 2.35%)*</i>	<i>Currently 4.85%</i>
<i>--- 2 year fixed rate</i>	<i>Currently 5.85%</i>
<i>--- 5 year fixed rate</i>	<i>Currently 5.85%</i>
<i>--- LTV Variable</i>	<i>Currently 4.65%</i>

*...*

*\*The interest rate that applies to this Tracker Mortgage Loan will never be more than 2.35% over the European Central Bank Refinancing Rate (the “ECB Rate”). See over the page for further details on Tracker Mortgage Loans.”*

Under the heading **“Tracker Mortgage Loans”** the reverse of the rate options form contained the following;

- 1. “The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing 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 Complainant did not return the **rate options form** with an interest rate selection to the Provider. The Provider applied the tracker rate of ECB + 2.35% to the mortgage loan on **31 January 2009**.

The Complainant takes issue with the application of the tracker interest rate of ECB + 2.35% to her mortgage loan on the expiry of the two year fixed rate period. She outlines that it had

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been “agreed” that the mortgage loan account would switch to the tracker interest rate of ECB + 1.10%.

I do not accept the Complainant’s submissions in this respect. The **Particulars of Mortgage Loan** set out that the rate applicable to the mortgage loan for the first year would be fixed at 4.99%. **Special Condition 9** sets out what options may be made available on the expiry of the fixed period. This condition gives the Complainant the option of switching to a fixed rate, if a fixed rate is available, otherwise the interest rate applicable is the “then current” tracker mortgage rate “appropriate to the loan”.

There was no guarantee in the Special Conditions or any other conditions applicable to the Complainant’s mortgage loan that a specific tracker mortgage margin would be made available to the Complainant at the end of the fixed period. **Special Condition 9** was clear in this respect. It is important for the Complainant to be aware that the Complainant’s mortgage loan is governed by the terms and conditions of her mortgage loan documentation. In these circumstances the terms and conditions of the loan were clear. There is no evidence that the Provider “mislead” the Complainant in this regard.

If the Complainant was not happy with the terms of the **Letter of Approval**, including the type of interest rate or the fact that the mortgage loan contract did not stipulate a specific tracker mortgage rate margin that would be applied at the end of the fixed period, the Complainant could have decided not to accept the offer made by the Provider. Instead the Complainant accepted the Provider’s offer by signing the **Acceptance of Loan Offer** on **25 January 2008**, and in doing so, confirmed that her solicitor had fully explained the terms and conditions of the mortgage loan to her.

The Provider has submitted into evidence a copy of an Internal Document titled **Rate Matrix – Existing Business**, which is noted as being effective from **02 January 2009**. This document outlines as follows;

<b>“Residential Investment Loans</b>	<b>Rate</b>
..	
<i>LTV Tracker Mortgage &lt; 80%</i>	<i>4.85%</i> ”

The evidence shows that the tracker interest rate that the Provider had available in **January 2009** of 4.85% (ECB + 2.35%) was the same tracker interest rate that was offered to the Complainant for her mortgage loan. In these circumstances, I accept that the Complainant was offered the option of “the then current [Provider] Tracker Mortgage appropriate to the Loan” on the expiry of the fixed interest rate period and in accordance with **Special Condition 9** this rate was applied in the absence of an alternative rate option being chosen

by the Complainant. I accept it was within the Provider's commercial discretion to set a rate of 4.85% (ECB + 2.35%) in **January 2009**.

In the interests of clarity there was no entitlement on the expiry of the fixed interest rate period in **January 2009** on mortgage account ending **1680** to the tracker interest rate of ECB + 1.10% that had applied to the joint mortgage loan account ending **0705** that was redeemed by the Complainant in **February 2008**. It is important for the Complainant to understand that each mortgage loan is governed by the terms and conditions applicable that particular mortgage loan. The fact that both mortgage loans were secured on the same property does not entitle the Complainant to the same interest rates on both accounts.

Having considered the Complainant's mortgage loan documentation, I find the Complainant had a contractual entitlement to "*the then current [Provider] Tracker Mortgage appropriate to the Loan*". The Provider offered the Complainant a tracker interest rate of ECB + 2.35% in **January 2009** and in the absence of instructions from the Complainant, the Provider, in line with **Special Condition 9**, applied the tracker mortgage rate of 4.85% (ECB + 2.35%). This was the tracker mortgage rate applicable at the time. I accept that this was clearly outlined in the Complainant's Letter of Approval.

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.

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**

31 March 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.