



<u>Decision Ref:</u>	2020-0123
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

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

Background

The complaint relates to one of the mortgage loan accounts held by the Complainants with the Provider. The mortgage loan (account ending **7887**) that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €76,000 and the term of the loan was 20 years. The Loan Offer Letter accepted by the Complainants on **1 June 2006** detailed that the loan type was an "Equity Release Variable Rate Secured Personal Loan".

The Complainants' Case

The Complainants' principal mortgage loan (account ending **6951**) with the Provider was drawn down in **June 2005** on a one-year fixed interest rate. The Complainants submit that they opted to apply a tracker interest rate of ECB + 1.10% to this mortgage loan in **July 2006**.

The Complainants submit that in **February 2006** they sought additional finance by way of an equity release mortgage loan. They submit that the Provider failed to offer them a tracker interest rate when they applied for the equity release loan. They state that they were only offered a variable interest rate for this mortgage loan, and had they been offered a tracker interest rate they "would have already cleared off the balance owed".

The Complainants submit that they have reviewed the terms and conditions of the mortgage loan agreement for account ending **7887** and they cannot see any reference therein as to why a tracker interest rate cannot be applied to an equity release mortgage loan.

The Complainants submit that they are *“still none the wiser as to why [they weren’t] offered a tracker at any stage in relation to [their] account”*. They have queried the basis on which the Provider made its *“commercial decision”* not to make a tracker rate available on equity release loans. They submit that the equity release product *“was advertised as a variable rate mortgage account with interest applied at the standard variable mortgage rate. Surely this constitutes as a conflict of interest by the Bank? How can one variable rate mortgage be differentiated from another variable rate mortgage?”*

The Complainants submit that they find it *“ironic”* that the Provider has referred to their mortgage loan account ending **7887** as *“The Equity Release Loan Account”* given that the equity release product was advertised as a *“Mortgage Account”* and is referred to as a *“home loan/mortgage account”* throughout their mortgage loan documentation.

The Complainants submit that their *“consumer protection rights were not adhered to”* by the Provider and they believe the Provider is in breach of the Consumer Protection Code.

They further submit that the alleged failure on their mortgage account has caused them *“serious distress and concern”*.

The Provider’s Case

The Provider submits that the Complainants have two mortgage loans with the Provider, as follows;

(1) Mortgage loan account ending 6951

The Provider submits that it issued the Complainants a Letter of Approval for a 1 Year Fixed Rate Home Loan on **28 June 2005** in respect of their primary mortgage account ending **6951**. It details that the loan was for €350,000 at an initial fixed rate of 2.74% over a 35 year term and was secured on the Complainants’ primary residence.

The Provider states that the Complainants wrote to the Provider on **3 July 2006** and requested that this account be transferred to a tracker rate. It states that on the expiry of the one-year fixed interest rate on **14 July 2006**, the rate of interest on the account was changed to a variable rate of 4.10% and was subsequently amended to a tracker interest rate of 3.85% (ECB + 1.10%) from **19 July 2006** following receipt of the Complainants’ letter.

The Provider states that the Complainants contacted the Provider to request a list of the available rate options in **March 2007** and the Provider issued a letter enclosing a rate options form to the Complainants on **5 March 2007**. It states that the interest rate on the account was amended to a tracker rate of 4.55% (ECB + 0.80%) on **1 May 2007**.

The Provider submits that it did not offer the Complainants tracker rate options in **2006** and **2007** for mortgage account ending **6951** on the basis of any contractual entitlement of the Complainants, as they never had a contractual entitlement to be offered a tracker rate at any time in respect of this account. It states that the tracker rate options offered in **2006** and **2007**, resulted from the Provider's policy between **2006** and **2009** of including a tracker rate option in options letters even if the customer's contract did not contain a tracker entitlement.

(2) Mortgage loan account ending 7887

The Provider submits that the Complainants sought an additional loan in **February 2006** "*for the purpose of redeeming existing loans with another institution*".

The Provider states that it had introduced an equity release variable rate lending product in **2002**. The Provider details that this predates the point in time when the Provider began offering tracker interest rates to its customers in **January 2004**. It submits that when it introduced tracker rates it made a "*commercial decision*" not to make a tracker interest rate available on existing or future equity release loans. It states that therefore, there is and was no basis upon which the Complainants would be offered a tracker rate option in respect of the equity release loan.

The Provider outlines that the equity release product was designed to enable customers to borrow for reasons other than commercial purposes, using the equity in their homes as collateral. It details that the interest rates on its equity release loans are based on mortgage rates which are typically lower than the Provider's other personal loan rates. 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.

The Provider submits that during any loan application discussions "*all current available interest rates relevant to their requirement are discussed with customers. This allows customers the opportunity to examine options and ultimately choose a product suitable to their needs.*" It states that in **2006** the interest rate options available in respect of equity release loans were variable rates and fixed rates for 1, 5, and 10 year terms.

The Provider details that on **19 February 2006** the Complainants signed an Application for Credit for an "*Equity Release Variable Rate Secured Personal Loan*", and a Letter of Approval in the amount of €44,000 issued to the Complainants on **10 March 2006**, however, the funds

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were not drawn down as the loan amount required was subsequently increased from €44,000 to €76,000.

The Provider submits that a further Letter of Approval issued to the Complainants on **31 May 2006** in the amount of €76,000, which the Complainants accepted and signed on **1 June 2006**, confirming that they accepted the Provider's offer of an additional loan on the terms and conditions set out in the Letter of Approval and the General Mortgage Loan Approval Conditions and the Provider Mortgage Conditions. The Provider submits that in signing the Acceptance of Offer the Complainants confirmed that *"they had obtained or had been given the opportunity to obtain independent legal advice prior to accepting the offer of this additional loan."*

The Provider states that in its Final Response Letter to the Complainants of **24 January 2018**, it *"mistakenly referred to a Letter of Approval of 10 March 2006 for a loan of €44,000 (which was not drawn down) instead of a Letter of Approval of 31 May 2006 for €76,000 (which was drawn down)."* The Provider has apologised for any confusion this may have caused and offered the Complainants a sum of €250.00 as a *"gesture of goodwill"* in recognition of this error, which the Complainants have accepted.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate for their equity release mortgage 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

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 **3 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.

This issue to be determined is whether the Provider failed to offer the Complainants a tracker interest rate on their equity release mortgage loan in **February 2006**. In order to determine this, it is necessary to review and set out the relevant documentation relating to the Complainants' mortgage loan. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2006**.

It is clear that, in **February 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 have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants during the application stage in relation to interest rate options. Notwithstanding this, it is important for the Complainants to be aware that the Provider was under no obligation to offer them any mortgage or any particular type of mortgage in **2006**. 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.

I have considered the **Application for Credit** that was signed by the Complainants on **19 February 2006**, which details as follows;

"2. Details of Mortgage Required

Type of Loan:

<i>Amount of Loan required</i>	<i>EUR 44,000.00</i>
<i>Purchase price/Value of property</i>	<i>EUR 466,000.00</i>
<i>Loan type</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
<i>Repayment Term required</i>	<i>30 20 Years"</i>

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The Provider issued a **Letter of Approval** to the Complainants on **10 March 2006** for an *“Equity Release Variable Rate Secured Personal Loan”* in the amount of €44,000 at a variable interest rate of 3.70%. However I note that the loan funds were never drawn down, in circumstances where, the required loan amount was subsequently increased from €44,000 to €76,000. This is not a matter that is in dispute between the parties.

A further **Letter of Approval** dated **31 May 2006** was issued to the Complainants, which details as follows;

<i>Loan Type:</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
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<i>“Purchase Price/Estimated Value:</i>	<i>EUR 466,000.00</i>
<i>Loan Amount</i>	<i>EUR 76,000.00</i>
<i>Interest Rate:</i>	<i>3.85%</i>
<i>Term:</i>	<i>20 year(s)”</i>

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

“C. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGE LOAN APPROVAL CONDITIONS.”

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the **Conditions relating to “[Name of Product]” Equity Release Loans**. There was no specific condition in the **Conditions relating to “[Name of Product]” Equity Release Loans** in relation to the interest rate applicable to the loan.

The **General Mortgage Loan Approval Conditions** 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.”*

I note that the information document in relation to the **Housing Loans under Consumer Credit Act 1995** on the reverse side of each page of the **Letter of Approval** outlines as follows;

“VARIABLE RATE LOANS

“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.””

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The **Acceptance of Offer of an Additional Loan** which was signed by the Complainants on **1 June 2006**, states as follows;

- “1. I/We the undersigned accept the above offer of an additional loan on the terms and conditions set out in*
- (i) The Letter of Approval;*
 - (ii) The General Mortgage Loan Approval Conditions*
 - (iii) The [Provider’s] Mortgage Conditions*
- ...*
- 4. 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 equity release mortgage loan was drawn down by the Complainants on **16 June 2006**.

It is clear that the Letter of Approval envisaged a variable interest rate loan which could be adjusted by the Provider. 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. If the Complainants did not want to pursue this option because they were unhappy with the interest rate applicable to the equity release mortgage, they could have decided not to accept the Provider’s offer of the equity release product. Instead the Complainants accepted the Provider’s offer by signing the **Acceptance of Offer of an Additional Loan** on **1 June 2006**.

The Complainants make reference to and have submitted in evidence advertisements/press excerpts from 2001/2002 in relation to the equity release mortgage product, which outline that the rate of interest applicable to those loans were variable rate loans and query how can one variable rate mortgage be “*differentiated*” from another. The variable interest rate applicable to the Complainants’ equity release mortgage loan was clearly outlined in the mortgage loan documentation to be a variable rate which could be adjusted by the Provider. I would also point out that many financial service providers offer different variable rate products.

The Complainants have queried the basis for the Provider’s “*commercial decision*” not to offer a tracker rate on the equity release product. In this regard, I accept that the Provider operates as a business and is entitled to set interest rate options for products at its absolute discretion. The Provider was not offering tracker interest rates on equity release products in **February 2006** or at any other time. The **Equity Release Brochure** confirms that the standard variable interest rate and fixed interest rates were the only interest rate options available with this product. Therefore the Provider was not under any obligation to offer the Complainants a tracker interest rate option on the equity release product option.

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The Complainants have submitted that their primary mortgage loan account ending **6951** was transferred to a tracker interest rate at their request in **2006**. It is important for the Complainants to understand that each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that both of the Complainants' mortgage loans were secured on the same property does not entitle the Complainants to the same interest rates on both mortgage loan accounts. Furthermore the fact that tracker interest rates were offered as a matter of policy on the Complainants' mortgage loan account ending **6951** did not entitle the Complainants to avail of that offering on the mortgage loan account ending **7887**. The Provider has summarised its policy as follows;

"... [from 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 letters issued to a customer in the month prior to the date of maturity of the fixed rate period."

The Provider made the decision not to extend this policy to equity release type mortgages. This was a commercial decision the Provider was entitled to make.

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 **7887**. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants. The Provider was not offering tracker interest rates on equity release products.

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

26 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.**