



<u>Decision Ref:</u>	2020-0150
<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 Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	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 is secured on the Complainant's private dwelling house.

The loan amount was €193,200 and the term was 35 years. The **Loan Offer** which was signed on **5 May 2005** outlined the interest rate type as "*Variable*".

The mortgage loan was taken out in **2005** with another named Provider, which is described by the Provider as a "*brand*" of the Provider. In **2010**, the Provider with which the loan was taken out "*merged*" with the Provider.

The Complainant's Case

The Complainant's original Loan Offer issued in **December 2003** and expired in circumstances where the Complainant did not draw down the mortgage loan within the timeframe specified in the terms and conditions of the Loan Offer.

The Complainant requested to have the Loan Offer reissued in **March 2005**. She states that at that time the Provider *“told me to write a note asking to reinstate my loan as it has expired. The bank should have given me a new application or loan offer because there was now an option of a tracker mortgage which I would have taken.”* She submits that she requested a tracker interest rate at this time and her request was declined. She further details that *“I asked the manager dealing with my mortgage if I could have a tracker mortgage and she told me that I was not entitled to one.”*

The Complainant further submits that she should have been offered the option of a tracker interest rate at the time her mortgage loan account was transferred from the original Provider to the respondent Provider in **2010**.

The Complainant outlines that she has *“had to pay interest only for a number of years because I could not pay my full mortgage as it was so high. This caused me a lot of stress and anxiety at the time and I had meetings with the bank regarding this and they were very unhelpful. I am now paying my full mortgage be it around €960 per month and I can barely manage it myself.”*

The Complainant wants the Provider *“...to put me on a tracker mortgage and repay any monies that may be owed to me.”*

The Provider’s Case

The Provider submits that the Complainant initially applied for her mortgage on **26 November 2003**, prior to the introduction of tracker interest rate products by the Provider, and the Provider submits that this meant that the Provider could not have offered the Complainant a tracker interest rate when she applied for the mortgage. It details that it issued the Complainant a **Letter of Loan Offer** dated **09 December 2003** which provided for a loan of €193,200 over a term of 30 years based on a variable interest rate and also outlined that a guarantor of the loan was required. The Provider outlines that **General Condition 9** provided that the Offer would lapse if the mortgage was not drawn down within a period of three months. The Provider submits that the Complainant’s mortgage did not draw down within the timeframe outlined and that Letter of Offer expired.

The Provider states that on **16 March 2005**, the Complainant wrote to it to request that her Loan Offer be reissued. The Provider submits that on **8 April 2005** it received a further letter from the Complainant to request that the term of the mortgage be extended from 30 to 35 years, but this letter made no reference to the interest rate on the mortgage. The Provider details that it is unable to find any evidence to support the Complainant’s assertion that she requested a tracker interest rate to be applied to the mortgage loan from inception. The Provider submits that in **2005**, it had a condition that in order to avail of a tracker interest

/Cont’d...

rate, a customer was required to have a minimum loan amount of €250,000. The Provider outlines that the mortgage loan requested by the Complainant was for €193,200.00, which was below this minimum loan amount, meaning that this specific tracker interest rate product could not have been offered to the Complainant in **2005**.

The Provider states that on **13 April 2005** it issued a new **Letter of Loan Offer** to the Complainant in the amount of €193,200 over a term of 35 years based on a variable interest rate and also outlined that a guarantor was required for the mortgage. The Provider submits that the **Loan Offer** confirmed that the mortgage was to draw down on a variable interest rate, and did not contain any reference to a tracker interest rate. It details that such a reference would have been necessary for a tracker interest rate to apply. The Provider details that the Complainant signed and accepted the Letter of Loan Offer on **5 May 2005**, and in doing so confirmed that the Loan Offer had been explained to her by a solicitor and she fully understood the terms and conditions of the loan.

The Provider submits that the Complainant applied for the mortgage in **November 2003** and ultimately drew it down in **June 2005**, which was prior to the introduction of suitability requirements for mortgages which were introduced in the **Consumer Protection Code 2006 (the "CPC 2006")** which entered into force on **01 July 2007**. It states that *"this meant that there was no legal or regulatory requirements when the customer applied for her mortgage in 2003, or when the customer drew down her mortgage in 2005, to ensure that products were suitable for customers."* Notwithstanding this the Provider states that it is *"satisfied that the available interest rate options and relevant information would have been supplied to the customer and that the customer's mortgage drew down in line with the application that the customer made to the Bank and as outlined in the loan agreement provided to the customer and signed in acceptance by her."* The Provider submits that its staff were not authorised to provide advice or recommendations to customers as to what interest rate option to select, but were trained to provide information in relation to the various interest rate options that were available when such information was requested.

The Provider submits that in late **2010**, the Provider with which the loan was drawn down merged with the Provider against which the complaint is made. The Provider details that while the existing customers of the first Provider transferred to the Provider's operating model under the single brand, there was no detriment or changes to the terms and conditions of the Complainant's mortgage. The Provider details that the Complainant was sent a letter outlining the changes that would arise due to the transfer of accounts as well as detailing the different aspects of the merger.

The Provider submits that at the time of the “re-brand” in **2010**, tracker interest rate products were not available either under the Provider’s brand or the former Provider’s brand, having been withdrawn in the case of both brands in **2008**. The Provider states that *“it was not the case that by virtue of the fact [the first Provider] was being re-branded in 2010 under [the Provider] that the customer would have been automatically offered or transferred to a tracker interest rate.”*

The Provider details that tracker interest rates were not available as an option to select for existing customers in **2010** unless there was a contractual entitlement to a tracker interest rate for existing customers, which was not the case for the Complainant. The Provider submits that some existing customers who had drawn down mortgage loans with the former Provider prior to the re-brand in **2010**, may have selected a fixed rate option that defaulted to a tracker rate at a point in the future, however, this did not apply in the Complainant’s case.

The Provider submits that the Complainant began experiencing repayment difficulties in **September 2006**, when she missed a mortgage repayment. It details that while it attempted to liaise with the Complainant in relation to the arrears, it was informed in **December 2006** that the Complainant had moved abroad for one year. The Provider details that the arrears were brought up to date in **March 2007**, at which point the Provider submits it was informed that the Complainant would be returning from abroad shortly. It states that in **November 2007**, the Complainant’s mortgage had entered into arrears again and the Provider issued her with an arrears statement. In **January 2008**, the Provider submits it was informed that the Complainant would be returning from abroad in 2 weeks, however, in **April 2008**, the Provider submits that it was again informed that the Complainant was still abroad and would contact the Provider on her return. It details that in **November 2008** and **December 2008** it issued the Complainant with further arrears statements as the arrears on her mortgage loan continued to accrue.

The Provider details that in **March 2009** the Complainant met with the Provider in order to make a repayment arrangement in respect of the arrears, however it does not hold any records or minutes relating to this meeting other than a note on its mortgage system. The Provider submits that a “step up” arrangement of €150 per month to clear the arrears was made with the Complainant and these payments were received between **May 2009** and **March 2010**, and the arrears were cleared in **July 2010**. It states that from **June 2010** to **January 2016** the Complainant availed of various forbearance arrangements, including two periods of interest only and various reduced repayment arrangements. The Provider submits that during this period, the Complainant informed the Provider that she was unemployed and was availing of Social Welfare payments in respect of her mortgage. The Provider contends that based on the above, it is of the belief that the Complainant was not

/Cont’d...

in a position to maintain her normal monthly repayments on her mortgage due to her employment status.

The Provider disagrees with the Complainant's submission that it was unhelpful when she met with the Provider to discuss her repayment difficulties. The Provider submits that as outlined above, it has provided her with assistance in relation to her mortgage repayments by completing the Welfare Supplement Assistance payments form and also providing her with alternative repayment solutions.

The Complaints for Adjudication

The complaints for adjudication are;

- a) The Provider refused the Complainant's request for a tracker interest rate for the mortgage loan in **2005**; and
- b) The Provider did not offer the Complainant a tracker interest rate when the mortgage loan was transferred to it in **2010**.

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 April 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

/Cont'd...

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 first issue to be determined is whether the Provider acted incorrectly by refusing the Complainant's request for a tracker interest rate on her mortgage loan in 2005.

I note that the Complainant applied for a mortgage of €193,200 by way of **mortgage application form** signed by the Complainant on **26 November 2003**. I note that in **Section 8a: Loan Details**, the Complainant in response to the question "*Rate Type*" selected the "*Variable*" option. I note that other options available were Fixed and Discount.

I accept that the Complainant could not have been offered a tracker interest rate during the mortgage loan application process, which took place in **November 2003** in circumstances where, a tracker interest rate option was not yet available from the Provider until **early 2004**.

I note from the application form that the Complainant selected a variable option and it appears the application with the Provider proceeded on that basis. A **Loan Offer Letter** dated **09 December 2003** was issued to the Complainant, however this loan offer lapsed in circumstances where it was not drawn down by the Complainant within 3 months of the date of the loan offer.

The Complainant wrote to the Provider on **16 March 2005** as follows;

*"Pleas[e] Reissue Loan Offer
As Previous One Has Expired
Many Thanks"*

The Complainant wrote to the Provider again on **08 April 2005** as follows;

"I would like to change my loan request from 30 years to 35 years."

I note that at the time the Complainant contacted the Provider to request that the Provider "*reissue*" the loan offer in **March/April 2005**, tracker interest rate products were on offer from the Provider since **early 2004**. I have been provided in evidence with a document called the Provider's **Tracker Mortgage Terms & Conditions, effective from 12 January 2004**.

/Cont'd...

Condition 40 details as follows;

“Minimum Loan Amount

In order for a customer to avail of the Tracker Mortgage product, the loan amount sought must be equal to or greater than €250,000.”

The Complainant has submitted that she requested a tracker interest rate for the mortgage loan from the Provider in **2005** and this request was refused and she was informed that she was “*not entitled*” to a tracker rate. There is no evidence that the Complainant made any such request. The only recorded requests from the Complainant at the time were to re-issue the loan and to change the term of the loan. There was no obligation on the Provider to request that the Complainant complete a new application in **2005** as the Complainant has submitted. In any event, even if the Complainant did request a tracker interest rate or complete a new application in **2005**, the documentary evidence shows that the Complainant was not eligible for a tracker interest rate as the mortgage loan amount she was seeking did not meet the minimum requirements to be eligible for a tracker interest rate mortgage product in accordance with the Provider’s **Tracker Mortgage Terms & Conditions**. It was within the Provider’s commercial discretion to set the eligibility requirements for the tracker interest rate product.

The Provider issued a **Loan Offer Letter** dated **13 April 2005** which detailed as follows;

<i>“Loan Type:</i>	<i>STANDARD ANNUITY</i>
<i>Loan Amount:</i>	<i>€193,200.00</i>
<i>Interest Rate:</i>	<i>3.53%</i>
<i>Interest Type:</i>	<i>VARIABLE</i>
<i>Term:</i>	<i>35 year(s)”</i>

The **Important Information** section of the Loan Offer Letter details:

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

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

“Interest Rate

(a) Subject to subsection (b), all loans are subject to the prevailing interest rate at the date the loan is drawn down. Subsequently, the interest rate may vary in accordance with the terms and conditions of the Loan Offer.”

/Cont’d...

The Complainant signed the **Loan Acceptance** on **05 May 2005** on the following terms;

“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.”

The Complainant applied for a mortgage loan on a variable interest rate and the Provider offered the Complainant a variable interest rate, which was accepted by the Complainant, having acknowledged that the terms and conditions of the mortgage loan were explained to her by her solicitor. The variable rate in this case was clearly set to be one which may be increased or decreased by the Provider at any time. It made no reference to a tracker or the ECB rate. If it was the case that the Complainant was of the view that the variable interest rate loan was not suitable for her, then the Complainant could have decided not to sign and draw down the loan and instead seek an alternative rate with the Provider or another lender. However there is no evidence that the Complainant did so.

The second issue to be determined is whether the Provider wrongly failed to offer the Complainant the option of a tracker interest rate when her mortgage loan account was transferred to the Provider in 2010.

I note from the evidence that the original Provider of the Complainant’s mortgage loan merged with the Provider in late **2010**.

I note that the Provider has indicated that it no longer holds a copy of the specific letter that issued to the Complainant informing her of the change and highlighting specific aspects of the merger. It has furnished a generic version of this letter, which details as follows;

“As we promised to keep you updated on [the first Provider’s] merger with [the Provider], we’d now like to give you specific details of the next stages in the process.

The merger will take place over the weekend of [date] and is scheduled to be completed on [date].

...”

/Cont’d...

The Provider has also furnished a copy of the **information leaflet** which it states was provided in its “*branch network*”, which details as follows;

“Mortgages

...

If you have a mortgage with [the original Provider], your payments will continue as normal.”

I note that the Complainant has disputed the receipt of the letter referred to above. It is disappointing that the Provider did not keep a copy of the letter that was issued to the Complainant. While it is not clear to me whether or not the Complainant received the particular letter referred to above, it is not material to the issues under consideration in this complaint, whether or not the Complainant received this particular letter.

There is no evidence before me which suggests that the terms and conditions of the Complainant’s mortgage loan were affected in any way by the transfer in **2010**. The Complainant has submitted that she was “*advised*” that she should have been offered a tracker interest rate on the mortgage loan at the time of transfer in **2010**. The Complainant has not submitted any documentary evidence of this advice that she was purportedly given, nor has she indicated the basis on which the advisor formed the conclusion that she should have been offered a tracker interest rate in 2010. Tracker interest rates had been withdrawn by the Provider at the time of the transfer of the mortgage loan and the Complainant did not have any contractual entitlement to a tracker interest rate on the mortgage loan account in **2010** or at any stage either before, at or after the transfer. There is no basis, contractual or otherwise, on which the Complainant can claim an entitlement to a tracker interest rate on her mortgage loan in **2010**.

I note that the Complainant has also submitted that she “*had to pay interest only on my mortgage for a number of years because I could not pay my full mortgage as it was so high. This has caused me a lot of stress and anxiety at the time and I had meetings with the bank regarding this and they were very unhelpful. I am now paying my full mortgage be it around €960 per month and I can barely manage it myself*”.

It is important for the Complainant to be aware that in signing the **Loan Offer Letter** and the **Loan Acceptance** on **05 May 2005**, the Complainant was binding herself to the terms and conditions of the mortgage loan which included making the appropriate monthly repayments to discharge the mortgage loan. From the evidence submitted, it appears that the Complainant first went into arrears in **September 2006**, having missed the monthly repayment of €915.79. It is understood the Complainant had relocated abroad by **December 2006**, when the Provider was seeking to make contact with her with respect to the missed repayments. The evidence shows that those arrears were cleared in March 2007. In

/Cont’d...

November 2007, the Complainant again entered into arrears on the mortgage loan. It appears that the Complainant was still abroad at this time and that the Provider was only ultimately able to meet with the Complainant in **March 2009**, by which time arrears on the mortgage loan had continued to accrue. Between **May 2009** and **March 2010**, the Complainant made increased repayments to clear the arrears.

The Complainant entered into a number of forbearance arrangements with the Provider as follows:

- **June 2010** – Reduced repayment arrangement for one year;
- **June 2011** – Interest only repayment for one year; and
- **March 2012** – Interest only repayments for one year.

The Provider has submitted extracts from its **mortgage system notes** of conversations and meetings that took place throughout **2013** with the Complainant, these notes record amongst other things, that the Complainant was *“aggressive on the phone”*, that the Complainant was *“abusive from the start of the conversation”* and *“customer angry and tone of conversation aggressive at times”*. I have not been provided in evidence with the audio recordings of these telephone calls and as such, I cannot comment on the Complainant’s tone throughout her engagements with the Provider. I note that in **2013**, the Provider agreed on two occasions to extend the Complainant’s reduced repayment arrangement. Further extensions to the reduced repayment arrangement were agreed in **July 2014**, **February 2015** and **July 2015**.

The **mortgage system notes**, from **13 August 2015**, record as follows:

“customer didnt want to speak, told me to f off and hung up.”

The Provider, in **September 2015**, agreed a further reduced repayment arrangement with the Complainant. It is understood that the Complainant has not entered into any further forbearance arrangements since **January 2016**, and since then has made the required monthly repayments.

There is no evidence that the Provider was in any way *“unhelpful”* towards the Complainant between **September 2006** when the mortgage loan account first went into arrears and **January 2016**, when the last forbearance arrangement expired. The evidence shows that the Provider engaged with the Complainant and sought that the Complainant complete the required **Standard Financial Statements**, throughout this period in order to ascertain the Complainant’s affordability to meet repayments on the mortgage loan. The evidence in the form of the **mortgage system notes** shows that the Complainant indicated to the Provider that she thought this to be *“intrusive”*. It is important for the Complainant to be aware that in circumstances where the Complainant was not meeting the monthly repayments required

/Cont’d...

under the mortgage loan contract, it was necessary for the Provider to collect all material information in relation to the Complainant's financial position to ascertain the suitability of alternative repayment arrangements to address the mortgage repayments and the arrears. The evidence shows that the Provider engaged with the Complainant between **September 2006** and **January 2016** to agree alternative repayment arrangements with the Complainant.

To conclude, there was no obligation, contractual or otherwise, on the Provider to offer a tracker interest rate to the Complainant on her mortgage loan account in **2005** or in **2010**.

For the reasons outlined 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

30 April 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.