



<u>Decision Ref:</u>	2020-0248
<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>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants' private dwelling home.

The particulars of the loan offer letter detailed that the loan amount was €360,000 and the term was 30 years. The mortgage loan account was drawn down on an interest rate of 3.79% fixed for 5 years.

The Complainants' Case

The Complainants submit that they "took out" a mortgage with the Provider in **September 2005**. They detail that the "agreed" loan offer was a tracker mortgage interest rate of 3.5%, but close to drawdown they were offered a 5 year fixed interest rate at 3.79% under the "same loan agreement (i.e. Flexible mortgage tracking ECB rate with a margin which is fixed for the life of the Home Loan term. The margin is ECB plus 1.15%)".

When the fixed rate period was due to end in **July 2010**, the Complainants outline that they received a rate options letter from the Provider offering them certain fixed and variable rate options. The letter detailed that the Provider's standard variable rate of

3.85% was the “*default option*”. The Complainants submit that they were not offered the option to “*revert*” to the tracker interest rate of ECB + 1.15% which they believe they should have been. The Complainants detail that they did not realise the Provider’s “*error*” at the time and opted for a 3 year fixed rate of 4.3%.

The Complainants submit that there was a “*lack of clarity on what the definition of the default Variable Home Loan Rate [was]*”. The Complainants detail that this became the standard variable rate but there was no reference to the standard variable in the original loan documentation. The Complainants outline that “*while it may have been known to the Providers the difference in the variable rate settings, it was not clear from a customer perspective*”. They detail that “*there is no reason why the fixed rate would not default to a competitive market tracker rate as the initial draft offer agreement quoted the tracker as a base rate.*”

The Complainants outline that, after the additional 3 year fixed term expired, they reviewed all previous material “*to see what happened to our tracker and realised that it had been omitted from the rate sheet in July 2010.*” The Complainants outline that they contacted the Provider in **2013** to ask why they had not been offered the tracker rate in **2010**. They submit that an employee of the Provider told them that they could have availed of the tracker rate if they had “*spotted the error*” in **2010**, but because the Complainants had elected for a further fixed interest rate period they were no longer entitled to the tracker interest rate. The Complainants outline that the Provider is now citing the information that they were told in **2013**, as being “*inaccurate*”, however at the time the three bank personnel thought the tracker rate should have been the “*default*” rate in **2010**.

The Complainants detail that they feel “*stressed, out of pocket & let down*” by the Provider. They outline:

“Given the movement in interest rate in recent years and the size of our mortgage, the interest differential is substantial and we feel disappointed that we have been overpaying on our mortgage over the last 3 years and that the current default variable rate is 4.6% when it should be 1.65% (ECB 0.5% plus 1.15%).”

The Complainants are seeking to be reimbursed for the interest they have overpaid on the mortgage loan account, which they have calculated in **November 2017** to amount to €53,325.00.

The Provider's Case

The Provider submits that in **July 2004** the Complainants applied for a repayment mortgage in the amount of €360,000 and during the application stage, the Complainants availed of the services of a third party broker. The Provider details that in accordance with the Provider's agreement with the broker "*[the Provider] was prohibited from contacting broker customers directly, until such a time as the customers' mortgage funds were drawn down.*" The Provider submits that on that basis it is not in a position to confirm or comment on any information given to the Complainants by their broker during the application stage of their mortgage, and in particular the information provided regarding the loan type and rate options available.

The Provider submits that it issued the Complainants and their broker an **Offer of Advance** dated **18 August 2004** which provided for a mortgage in the amount of €360,000 over the term of 30 years based on a tracker interest rate of ECB base rate + 1.15%. The Provider outlines that this **Offer of Advance** expired on **18 December 2004**, in circumstances where the Complainants failed to draw down the mortgage funds within a 3 month period as required by **condition 5** of the **General Conditions** of that mortgage loan.

The Provider details that it subsequently issued a further **Offer of Advance** dated **29 August 2005** to the Complainants and their broker. The Provider submits that this **Offer of Advance** was in the amount of €360,000 for a term of 30 years commencing on a fixed interest rate of 3.75% up to **31 July 2010** and that the Complainants signed and accepted the **Offer of Advance** dated **13 September 2005**.

The Provider submits that what would transpire at the end of the fixed interest rate period was clearly outlined in the **Special Conditions** and **General Condition 2** of the Complainants' **Offer of Advance** set out information as to the nature of the Provider's Home Loan Rate and specifically that the rate can be amended at any time. The Provider submits that a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will only rise and fall in line with movements in the ECB base rate, which cannot be changed by the Provider. The Provider details that the Complainants' **Offer of Advance** did not contain any special condition specifying that a tracker interest rate would be made available to them on expiry of the fixed interest rate period, or at any future date and that such a reference would have been necessary for a tracker interest rate to apply. The Provider submits that it "*does not consider that the customers could have formed any reasonable expectation of defaulting to a tracker interest rate at the end of the initial fixed rate period that the customers' mortgage drew down on.*"

The Provider details that, prior to the expiry of the fixed interest rate, it issued the Complainants with an **options letter** dated **15 July 2010**. The Provider states that the letter

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advised them that the mortgage loan would “*automatically roll to the Standard Variable Rate*” of 3.85%. The Provider “*acknowledges*” that the Complainants’ **Offer of Advance** does not contain the term “*standard variable rate*” and outlines that the Provider’s variable home loan rate and the standard variable rate are the same. The Provider details that both rates can be amended at any time. The Provider submits that the letter also outlined alternative interest rate products available to the Complainants at the time. The Provider details that a tracker interest rate was not a product type that was available in **July 2010**, as they had been withdrawn by the Provider in **2008**.

The Provider details that the Complainants chose an interest rate of 4.30% fixed until **30 June 2013** by completing and signing the **Rate Change Letter of Authority Form** in **July 2010**.

The Provider details that its records show that the Second Complainant contacted the Provider by telephone on **2 July 2013** regarding the interest rate on the mortgage. The Provider outlines that it does not have a transcript or recording of the call but there is a note of the call on the Provider’s mortgage system. The Provider submits that it has reviewed the system notes and believes there “*appears to be some confusion*” in relation to understanding the Second Complainant’s query. The Provider “*apologises that it fell short in terms of clarifying*” to the Second Complainant, at that time, that a default tracker interest rate did not apply to their mortgage. The Provider details that the Complainants subsequently made a complaint and the Provider responded to the complaint and offered the Complainants a gesture of goodwill in the amount of €120 in “*recognition of any costs and inconvenience experienced in raising their complaint*”.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate of ECB + 1.15% on their mortgage loan account on the expiry of the fixed interest rate period in **July 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 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 **01 July 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 Complainants 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 Complainants were 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 Complainants, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage application, the two loan offers that were issued by the Provider to the Complainants and interactions between the Complainants and the Provider from **2004 to 2013**.

The Complainants applied for a mortgage loan through a third party broker. An **Application Form** which is broker branded has been submitted in evidence. In the **“Type of Loan Required”** section, in response to the question **“Type of loan”** none of the options were selected. Those options were split, fixed, variable and tracker.

In the **“Additional Information”** section of the application it was outlined **“would be interested in variable / fixed mix”**.

The **“Declarations and Signatures”** section of the **Application Form** details as follows:

“I/We declare and agree that:

...

- 5. The rate of interest will be that which the Bank/Building Society is charging on the date on which the loan cheque is drawn down and subsequently the rate may vary within the terms of the Mortgage Deed.*

The Complainants signed the **Application Form** in the **“Declarations and Signatures”** section on **10 July 2004**.

The **Offer of Advance** dated **18 August 2004** details as follows;

- “1. Amount of Credit Advanced: 360,000.00*
- 2. Period of agreement: 30 years 0 months*
- ...*
- Interest rate: 3.1500%”*

The **Special Conditions** of the **Offer of Advance** detail as follows;

“The rate of the [Provider] Flexible Mortgage tracks ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 1.15%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged.”

General Condition 5 of the **Offer of Advance** details as follows;

*“5. Drawdown of Home Loan: The advance must be drawn down within the following periods: (a) Where the property is an existing dwelling, **not later than three months from the date of offer** (b) If the property is in the course of erection, not later than six months from the date of the offer”.**[My emphasis]***

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The Complainants signed the **Offer of Advance** on **25 August 2004**. However the mortgage loan funds were not drawn down by the Complainants under the **Offer of Advance** dated **18 August 2004**. In these circumstances the Complainants did not comply with **General Condition 5** of that **Offer of Advance**.

There is no evidence of any communications between the Complainants and the Provider between **August 2004** and **August 2005**. The Complainants submit that they “*decided to fix it for the first 5 years*”. Consequently, it appears that by **August 2005** the Complainants had made the decision to take out a fixed interest rate mortgage loan at that time. For the avoidance of any doubt there is no evidence that the Provider engaged with the Complainants directly at any time between **July 2004** and **August 2005** with respect to interest rate options. The evidence shows that the Complainants had engaged the services of the third party broker with respect to their mortgage loan application.

The Complainants were issued with a second **Offer of Advance** dated **29 August 2005**, which details as follows;

“[The Provider] is pleased to offer you an advance as detailed below subject to the Special Condition(s) and the General Condition contained in this document.

- 1. Amount of Credit Advanced: 360,000.00
- 2. Period of agreement: 30 years 0 months
- ...
- Interest rate: 3.7900%

...
WARNING

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

The **Special Conditions** detail as follows;

*“The [Provider] Home Loan fixed rate of interest applicable at the date of this letter is 3.7900% per annum and this rate will apply until 31 July 2010. **At the end of the fixed rate period the loan will automatically revert to the [Provider’s] Variable Home Loan Rate** and [the Provider] may offer to continue the Advance at a Fixed Rate of Interest for such a period and at such a rate as it may decide. In the event the Applicant electing to accept such an offer (if any), he/she must do so in writing, and the agreement must be signed by all parties to the mortgage advance. If no such offer is made by [the Provider] or if an offer is made by [the Provider] and not*

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accepted by the Applicant(s) the [the Provider's] Variable Home Loan Rate shall apply from 1 August 2010 and thereafter but otherwise in accordance General Condition 2 of the [Provider's] General Conditions relating to Advances by [the Provider] House Mortgages Section enclosed herewith, which varies the Interest Rate, and the mortgage conditions incorporated in the mortgage, and the said General Conditions relating to the Advances shall be construed accordingly. " [my emphasis]

General Condition 2 of the **General Conditions relating to Home Loan Advances** details as follows;

*"Interest is calculated on the balance outstanding on the home loan at the close of business each day from the date of release of the advance monies until the home loan is repaid. Interest so calculated is charged on the last day of the calend[a]r month in which release of funds takes place and on the last day of each calend[a]r month thereafter until the home loan is repaid. Interest charged to the home loan is included in the outstanding balance on which interest is calculated. The outstanding balance on which interest is calculated will include any overdue repayments and other sums outstanding. Overdue repayments and other sums outstanding will be included in the outstanding balance from the date on which they are debited to the home loan account until the date on which they are discharged. If redemption of the home loan takes place mid month the amount required to redeem the loan will include interest from the first day of the month in which redemption takes place to the date of redemption. **The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [the Provider] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper.** Interest is calculated on a compound basis.*

Drawdown date of your mortgage will be the date on which the advance monies are issued. If drawdown date is before the date on which direct debits are raised in any given month the first repayment will be on the 1st of the month following the month in which drawdown takes place and will be interest only on the amount drawdown from the date of drawdown until month end. This repayment will be in addition to the number of repayment instalments shown on the schedule of important information. If drawdown date is after the date on which direct debits are raised in any given month interest will be charged on the last day of the month on the amount drawn down from the date of drawdown until month end. This interest will be added to your first normal repayment on the 1st of the month following the month which follows the month in which drawdown takes place. In this case the total number of repayments will be as shown under the number of repayment instalments in the schedule of important information.

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APR calculation assumes that drawdown of the loan will take place on the 15th of the month following the month in which the Offer of Advance issues” [my emphasis]

The Complainants signed the **Acceptance and Authority** on **13 September 2005** on the following terms:

“I/We the undersigned accept the within Offer of Advance on the terms and conditions set out above and overleaf and in [the Provider’s] standard form of Mortgage”.

The Complainants’ signatures were witnessed by their solicitor on the basis that “*the nature and contents hereof*” had been explained to the Complainants.

The documentary evidence shows that the second **Offer of Advance** dated **29 August 2005**, envisaged that a fixed interest rate of 3.79% would apply to the loan until **31 July 2010** and at the end of the fixed interest rate period, the Provider “*may*” offer a further fixed interest rate period for a period and rate that the Provider may decide. If no such offer was made, or if an offer was made and it was not accepted, then the Variable Home Loan Rate would apply. This was set out in the **Special Condition** to the mortgage loan and also **General Condition 2** of the **General Conditions relating to Home Loan Advances**.

I note that **General Condition 2**, as quoted above, is somewhat lengthy and deals with a number of other matters related to the mortgage loan aside from the nature of the Variable Home Loan Interest Rate which was applicable to the mortgage loan. The section that I have emphasised above in **General Condition 2**, when taken together with the warning in the **Important Information** section of the **Offer of Advance**, outlines the **Home Loan Interest Rate** to be one which may be adjusted by the Provider at any time. There is no mention in the second **Offer of Advance** dated **29 August 2005** about the application of a tracker interest rate to the Complainants’ mortgage loan, as was contained in the previous **Offer of Advance** dated **18 August 2004**.

In order for the Complainants to have a contractual right to a tracker interest rate on their mortgage loan at the end of the fixed interest rate period, that right would need to have been specifically outlined in the mortgage loan documentation, that was signed, accepted and ultimately drawn down by the Complainants. However no such right was set out in writing in the **Offer of Advance** dated **29 August 2005**, which was signed by the Complainants on **13 September 2005**.

I do not accept the Complainants’ submission that the **Offer of Advance** dated **18 August 2004** and the second **Offer of Advance** dated **29 August 2005** were the “*same loan*”

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agreement". The offer of a tracker interest rate of ECB + 1.15% as contained in the **Offer of Advance** dated **18 August 2004** expired when the Complainants did not comply with **General Condition 5** of that mortgage loan and draw down the loan within the required 3 months. It is important for the Complainants to be aware that the terms of their mortgage loan is governed by the terms contained in the **Offer of Advance** which is signed and drawn down by the parties, and not by reference to a previous offer, which was subsequently superseded. The first **Offer of Advance** had no relevance to the parties and placed no obligation on either party when it lapsed. The **Offer of Advance** dated **29 August 2005** was specifically outlined to be "*subject to the Special Condition(s) and the General Condition contained in this document*".

The Complainants submit that there was a "*lack of clarity*" on what the definition of a "*Variable Home Loan Rate*" is and there was "*confusion surrounding the terminology*" As outlined above, **General Condition 2**, when taken together with the warning in the **Important Information** section of the **Offer of Advance**, outlines the **Variable Home Loan Interest Rate** to be one which may be adjusted by the Provider at any time. I note that in contrast, the initial **Offer of Advance** which issued to the Complainants on **18 August 2004** outlined the interest rate product to be the "*[Provider] Flexible Mortgage*" which "*tracks the ECB rate with a margin which is fixed for the life of the Home Loan term*". The margin was then stated to be 1.15%. I do not accept the Complainants' submission that there was ambiguity or a lack of clarity about the nature of the "*Variable Home Loan Rate*". There was no basis for the Complainants to reasonably expect the term "*Variable Home Loan Rate*" to relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the Offer of Advance which was accepted and drawn down by the Complainants.

If the Complainants were of the view that the **Offer of Advance** dated **29 August 2005** was ambiguous as to the type of interest rate that the loan would roll over to at the end of the fixed interest rate period, the Complainants could have decided not to accept the offer made by the Provider and sought that an amendment be made to the **Special Conditions** of the **Offer of Advance** to the effect that the loan would default to the "*[Provider] Flexible Mortgage*" which "*tracks the ECB rate with a margin which is fixed for the life of the Home Loan term*". Instead the Complainants signed the **Acceptance and Authority** on **13 September 2005** in the presence of their solicitor and confirmed that they accepted the **Offer of Advance** on the terms and conditions set out therein.

The Provider issued a letter to the Complainants dated **15 July 2010** advising them that the fixed rate period was coming to an end and that;

"Any borrowings you have on this fixed rate will automatically roll to the Standard Variable Rate (APR 3.9%) of 3.85%."

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I understand that the standard variable rate is the same as the “*Variable Home Loan Rate*”, that is a rate that can be adjusted by the Provider. The Provider should have used the same terminology as contained in the Complainants’ mortgage loan documentation when referring to rate choices and options in subsequent correspondence with the Complainants. This would avoid confusion as to interest rate options (contractual or otherwise) being offered by the Provider. I note that the letter of **15 July 2010** also detailed a number of residential fixed rate options, discounted variable rates and flexible variable rate options.

The Complainants returned the **Rate Change Letter of Authority** selecting the “*Residential Fixed until 30/06/2013 (APR 4.1%) reverting to Standard Variable*” of 4.30%. The **Rate Change Letter of Authority** contained a handwritten note as follows;

“We enclose cheque of €10,000 to be paid against capital balance as at 31st July. Therefore, balance of €316k approx. to be fixed for 3 years. Please forward new repayment schedule and statements.”

The Mortgage Loan statements that have been furnished in evidence show the capital payment of €10,000 being applied to the mortgage loan on **27 July 2010** and the rate change to 4.3% on **01 August 2010**. This was in accordance with the Complainants’ instructions.

The Complainants contacted the Provider on **2 July 2013**. The file note of the telephone conversation details as follows;

“cd 015,ms called to query why she was not offered her default rate when she signed up for three year fix. I advised this would have been her default tracker and would not be on the rate sheet. Ms not happy about this and will submit a letter to CHC, I provided address.”

The Complainants take issue with the information given by the Provider to the Second Complainant at this time in **July 2013**. As outlined above, the Complainants did not have an entitlement to a tracker interest rate at the end of the fixed interest rate period that expired on **31 July 2010**. The Provider acknowledged its error and apologised to the Complainants when this issue was raised with the Provider in its **final response letter** dated **20 August 2013**. I understand that the Provider deposited a goodwill gesture of €120 to the Complainants’ bank account at that time.

The Complainants were offered a tracker interest rate in the **Offer of Advance** dated **18 August 2004** but they did not draw down that mortgage loan within the 3 month period

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provided in the terms and conditions of that **Offer of Advance**. The subsequent **Offer of Advance** dated **29 August 2005**, which was accepted by the Complainants and the funds were drawn down under, did not provide for an entitlement to a tracker interest rate of ECB + 1.15% at the end of the fixed interest rate period which expired on **31 July 2010**.

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

23 July 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.