



<u>Decision Ref:</u>	2020-0268
<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 one of the two mortgage loan accounts held by the Complainants with the Provider.

The Complainants' mortgage loan account (ending **721/2**), that is the subject of this complaint, was secured on a residential investment property. The loan amount was €385,600 and the term was 30 years. The Letter of Offer dated **4 July 2007** outlined the loan type as a "FLEXI RESLET ANNUITY" on an interest rate of 5.24% "fixed for 60 months". There was a mortgage on this residential investment property with another provider before the Complainants took out this mortgage with the Provider, which is the subject of this complaint.

The Complainants also hold another mortgage loan account ending **721/1** with the Provider which is secured on the Complainants' principle private residence. Mortgage account ending **721/1** is not the subject of this complaint. The Complainants rely on the Provider's treatment of mortgage loan account ending **721/1** in support of their complaint in relation to mortgage loan account ending **721/2**.

The Complainants' Case

The Complainants have two mortgage loan accounts ending **721/1** and **721/2** with the Provider. They state that mortgage account ending **721/2**, which is the subject of this complaint, *“was taken out as an “investor tracker ECB + 1.10%” originally before transfer to [the Provider].”*

The Complainants submit that they had *“originally taken out both mortgages with [named third party provider] and was moved to [the respondent Provider] by [their] mortgage broker when [they] wished to fix the mortgage rate for five years”*. They state that *“Both of the mortgages which were transferred to [the Provider] had been tracker mortgages prior to transfer”*.

The Complainants say that the Provider *“incorrectly failed to apply a tracker rate”* to the two mortgage loan accounts when the five year fixed interest rate periods expired in **July 2012**.

The Complainants submit that following the expiry of the fixed rate periods in **2012**, they had *“multiple written and telephone communications”* with the Provider *“to obtain a reduced rate of interest on these accounts.”* They state that *“On multiple occasions [the Provider] failed to offer a similar variable interest rate to [those available to] new customers. I even called the local [Provider] branch manager ... to request a “new customer variable rate” on my home mortgage [ending] 721/1 to no avail.”*

The Complainants say that in **March 2018** the Provider acknowledged that an error had occurred on account ending **721/1**, in that, it failed to apply a tracker interest rate to the account after the five year fixed rate period expired. The Provider refunded the Complainants for the overpayment of interest, restored a tracker interest rate of ECB + 1.10% to the account, backdated to **July 2012** and paid compensation to the Complainants.

The Complainants assert that prior to this the Provider *“had been very explicit that both mortgages were similar”* in a letter to the Complainants in **September 2014**. They submit that the two mortgage loan accounts are now *“being treated differently”*, in that their mortgage account ending **721/2** *“is not subject to a tracker rate of interest after expiration of the fixed period.”*

The Complainants are seeking that a tracker interest rate be applied to mortgage account ending **721/2** and backdated to the date of expiry of the fixed rate period in **August 2012**.

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The Provider's Case

The Provider submits that the two mortgage accounts were drawn down at different points in time, however, the five-year fixed interest rate for mortgage account ending **721/1** was negotiated by the Complainants' broker at the same time as the Complainants' application for account ending **721/2** in **2007**.

The Provider submits that it did not deal directly with customers where a customer/broker relationship existed, so it would be a matter for the Complainants' broker to detail to them the differing rates that applied to the two mortgage loan accounts. It states that the **Rate Matrix** supplied by the Provider to brokers, demonstrates that the terms relevant to mortgage loan accounts may be different with respect to interest rate options for residential and residential investment business. It further states that in **June 2007** it "*placed a notice in the local press*" outlining a change in the Provider's variable rates, which were different for residential lending and residential investment lending.

The Provider has submitted an outline of the account timings and interest rate journeys of both of the mortgage loan accounts as follows:

- **Mortgage loan account ending 721/1**

The Provider details that this account was "*introduced*" to the Provider in **2004** by the Complainants' broker. It states that the Complainants' mortgage account ending **721/1** was drawn down in the amount of €358,000 in **May 2004** on a one-year fixed rate of 2.69% and switched to the standard variable rate thereafter.

The Provider submits that in **February 2005** a top up loan was taken out by the Complainants in the amount of €67,500 under the same mortgage account **721/1** on a tracker interest rate. The Provider details that a tracker rate of ECB + 1.10% (3.30%) was negotiated for and applied to mortgage account ending **721/1** in **July 2005**.

The Provider outlines that a **5 Year Fixed Rate Agreement** was applied to the entire mortgage under account ending **721/1** in **July 2007**. At the end of the fixed rate period in **July 2012**, the Provider's standard variable rate of 4.25% was applied to the account.

The Provider submits that account ending **721/1** was subsequently deemed impacted as part of the Tracker Mortgage Examination because the Provider found in its review that "*customers, who drew down on a fixed rate and moved to a tracker product, may have subsequently been confused about the impact of fixing their loan. It was considered reasonable that they may have expected to retain their tracker rate on expiry of the fixed rate period and not roll to the standard variable rate*". The Provider

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states that it returned mortgage account ending **721/1** to the tracker rate of ECB + 1.10% effective from the expiry date of the fixed rate period in **July 2012**.

- **Mortgage loan account ending 721/2**

The Provider states that this account was “*introduced*” to the Provider in **June 2007** by the Complainants’ broker. It details that mortgage account ending **721/2** was drawn down in **July 2007** on the five-year fixed interest rate of 5.24%. It states that the relevant contractual provision for the interest rate that would be applicable to this account on the expiry of the fixed period was **Loan General Condition 7** in the signed **Amended Letter of Offer** dated **4 July 2007**.

At the end of the five-year fixed rate in **July 2012**, the Provider states that the standard variable rate of 4.90% was applied to the account, which was its standard variable rate applicable for residential investment loans. The Provider submits that it always had a specific suite of interest rates available for residential lending and a specific suite of interest rates available for residential investment lending.

The Provider submits that it did not offer the Complainants a tracker interest rate on mortgage account ending **721/2** following the expiry of the fixed rate period in **2012**, because there was no default or contractual entitlement established which required it to do so. It states that furthermore, tracker interest rates were not available from the Provider after **mid-2008**.

The Provider submits that the term “*standard variable rate*” is not defined within the Complainants’ mortgage loan documentation for account ending **712/2**, however “*it is the case that the term was a widely used term and one that denoted the ordinary, usual, variable rate of interest that was offered by the Bank at the time.*” The Provider states that it is satisfied that this term was sufficiently clear and transparent in its meaning “*in so far as there is no reference to the variable rate referenced in the mortgage loan documentation being linked in any way to the ECB.*” The Provider states that in contrast, the **Tracker Rate Instruction Form** that was signed by the Complainants for account ending **712/1** in **2005** “*confirms the relationship between the tracker rate and ECB rate*”.

The Provider asserts that the Complainants demonstrated “*a clear understanding*” of the difference between a standard variable rate and a tracker interest rate in a letter to their broker dated **5 May 2005** regarding the account ending **721/1**, which detailed as follows;

“The above referenced mortgage is due to revert to the current Standard Variable Rate from the first of June. Can you please arrange for this mortgage to be transferred to a tracker mortgage.”

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The Provider states that, notwithstanding this “*demonstrated awareness*”, as part of the Tracker Mortgage Examination it afforded the Complainants “*the benefit of the doubt*” in relation to account ending **721/1** and returned the tracker rate to the account from the **July 2012** fixed rate expiry date.

The Provider details that the outcome of the Examination for the Complainants’ mortgage accounts ending **721/1** and **721/2** was different “*as the interest rate journeys for the two accounts were markedly different*”. It states that a tracker rate had previously applied to the account ending **721/1** from **2005** to **2007**, whereas a tracker mortgage rate never applied to mortgage account ending **721/2**, nor was there a contractual provision for the application of a tracker interest rate to mortgage account ending **721/2**.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to apply a tracker interest rate to the Complainants’ mortgage loan account ending **721/2** on the expiry of a five-year fixed interest rate period in **August 2012**.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 **16 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

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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.

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 Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished do not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished are sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

Before dealing with the substance of the complaint, I note the mortgage loan which is the subject of the complaint was applied for 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 the Complainants' complaint, it is necessary to review and set out the relevant provisions of both of the Complainants' mortgage loans (account ending **721/1** and **721/2**).

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I will deal with each mortgage loan account in turn below.

- **Mortgage loan account ending 721/1**

The Complainants have submitted that they had “originally taken out both mortgages ([ending] 721/1 & 721/2) with [a named third party provider]”. The evidence, as set out below, indicates that the Complainants applied for and drew down mortgage account ending **721/1** with the respondent Provider in **2004**.

Two Application Forms were completed and signed by the Complainants on **10 February 2004**. The Complainants’ broker wrote to the Provider on **10 February 2004**, as follows;

“Clients wish to purchase PDH in [County] for €390,000, they wish to borrow €358,000.

...

Please obtain approval

Term – 30 years

Rate – 1 yr fixed

Interest only – 3 yrs”

The **Letter of Offer** dated **24 March 2004** details as follows;

<i>“Amount of Credit Advanced:</i>	<i>€358,000.00</i>
<i>Period of agreement (Years – Months)</i>	<i>30 - 0</i>
<i>...</i>	
<i>Type of Advance</i>	<i>Flexi Annuity</i>
<i>Interest rate:</i>	<i>2.79%</i>
	<i>Fixed for 12 months”</i>

The **Special Conditions** relating to the mortgage loan detail as follows;

“62 The rate of interest applicable to this loan will be fixed for 12 months from date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor.

...

At the expiry of the fixed rate period the Lenders prevailing variable rate will apply.”

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The **Loan General Conditions** relating to the mortgage loan detail as follows;

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

The **Form of Acceptance** signed by the Complainants on **29 March 2004** outlines as follows;

“I/We the, undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Special Conditions (if any);*
- (iv) the Lender’s General Conditions for Home Loans;*
- (v) the Lender’s standard Form of Mortgage*
- (vi) the Assignment of Life Policy*

Copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitors(s)”

It is clear that the Letter of Offer envisaged a rate of 2.79% fixed for a period of 12 months, with the Provider’s prevailing variable rate to apply thereafter. 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. The Complainants accepted the Letter of Offer, having confirmed that they had been advised upon the terms and conditions by their solicitor.

A Provider branded Application Form was signed by the Complainants on **11 October 2004**. The Complainants’ broker wrote to the Provider by letter dated **5 November 2004** as follows;

“Clients wish to top up their existing [Provider] mortgage by €67,500 in order to complete home improvements.”

A **Letter of Offer** dated **24 November 2004** was issued to the Complainants which details as follows;

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<i>"Amount of Credit Advanced:</i>	<i>€67,500.00</i>
<i>Period of agreement (Years – Months)</i>	<i>29 - 6</i>
...	
<i>Type of Advance</i>	<i>Flexi Annuity</i>
<i>Interest rate:</i>	<i>3.45%</i>
	<i>Variable"</i>

The **Special Conditions** relating to the mortgage loan detail as follows;

"70 The Advance together with all prior and future advances will be secured by the Lender's Existing Mortgage granted by the Applicant(s) to the Lender."

General Condition 5 of the **Loan General Conditions** detail as follows:

"The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer.....However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term."

The **Loan General Conditions** relating to the mortgage loan also detail as follows;

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

The **Form of Acceptance** signed by the Complainants on **1 December 2004** outlines as follows;

"I/We the, undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Special Conditions (if any);*
- (iv) the Lender's General Conditions for Home Loans;*
- (v) the Lender's standard Form of Mortgage*
- (vi) the Assignment of Life Policy*

Copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitors(s)"

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The Letter of Offer envisaged a variable rate of 3.45%. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate. However it appears that this mortgage loan was drawn down on a tracker interest rate of ECB + 1.10% in **February 2005**. The basis on which this mortgage loan was drawn down two months after it was signed on a tracker interest rate of ECB + 1.10%, as opposed to the variable interest rate as outlined in the Letter of Offer is unclear. However it does not appear to be in dispute that the tracker rate of ECB + 1.1% was applied to the top up mortgage under mortgage account ending **721/1** from drawdown in **February 2005**.

On **5 May 2005** the Complainants wrote to their Broker in relation to account ending **721/1**, as follows;

“The above referenced mortgage is due to revert to the current Standard Variable Rate from the first of June. Can you please arrange for this mortgage to be transferred to a tracker mortgage.”

The Complainants signed a **Tracker Rate Instruction Form** on **18 July 2005** which was stamped received by the then Provider on **20 July 2005**. The form detailed as follows;

“I/We hereby instruct [the Provider] to amend the interest rate to track the European Central Bank (Ecb) Rate. The rate will be charged at a pre-agreed percentage above the ECB.

For information purposes this rate is currently 3.10% (Typical APR 3.14%) that is 1.10% above ECB.

‘The interest rate applicable to the loan identified is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than 1.10% above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“REFI rate”) for the term of the loan. Variation in interest rate shall be implemented by the Lender not later than close of business on the 30th day following a change in the REFI rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the borrower, or the first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time, the REFI rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the loan shall be the prevailing Home Loan Variable Rate.’

...”

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The Provider wrote to the Complainants by letter dated **27 July 2005**, detailing as follows;

"I wish to confirm that further to your request, we have switched your mortgage to a "Tracker Rate" mortgage. This is 1.10% above the European Central Bank rate for the term of your mortgage."

I understand from the evidence that the tracker interest rate of ECB + 1.10% was also applied to the €358,000 portion of the Complainants' mortgage loan under mortgage account ending **721/1** from **July 2005**.

The Provider has furnished in evidence an internal email sent on **29 June 2007**, which details as follows;

"5.24% 5yr fixed agreed on /1 & /2. Can you please organise the rate change on /2."

I note that the Complainants signed a **Fixed Rate Instruction Form** on **3 July 2007**, which details as follows;

"I/We hereby instruct [the Provider] to fix the interest rate on my/our homeloan account for a period of (please mark with an X the appropriate box below)

Fixed until 1st July 2012 at 5.24% (5.61% Typical APR)

✓

In accordance with the terms set out below. I/We hereby agree once a letter is issued by [the Provider] to me/us, confirming that the interest rate on my/our Home Loan account has been fixed for the period requested by me/us then in the terms below shall be binding on me/us for the fixed rate period in addition to the terms and conditions of my mortgage.

Terms

Fixed rate repayments from the 1st August 2007 for the term as indicated above thereafter reverting to the company's standard variable rate. In order to provide this facility [the Provider] has entered commitments to fund same. If, during the fixed rate period, the Applicant redeems in whole or in part or converts the loan into a variable interest rate or to another fixed rate loan, on that date, (the redemption date) a "break funding fee" will be payable to the Lender. The break funding fee will be calculated by reference to the wholesale cost then prevailing for the unexpired portion of the fixed rate period and the wholesale rate prevailing at the date of drawdown. If, at the redemption date or switching date

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the wholesale rate prevailing is higher than the wholesale rate at drawdown no break funding fee arises. If however, the wholesale rate is lower a break funding fee will be chargeable.

...

I/We have specified that I/we wish to amend certain of the terms of our mortgage with [the Provider]. I/We acknowledge that I/we have not received any advice from [the Provider] in respect of this change request. I/we do not wish to provide any further information in respect of my/our financial history and financial objectives to determine the suitability of these amendments for my/our purposes but wish to proceed with the amendment on an execution only basis."

The Provider's standard variable rate of 4.25% was applied to the mortgage account ending **721/1** in **July 2012** when the fixed interest rate period expired.

The Provider wrote to the Complainants on **3 July 2012**, as follows;

"An adjusted interest period has now expired on your mortgage account. Your repayment for 1st August 2012 will be €1,969.89 and is charged as follows;

Loan Type	Balance	Term	Interest		
Repayment	Fixed Rate				
	(€)	(Mths)	Rate	(€)	(Y/N)
FLEXI ANNUITY	261,960.55	263	4.25%	1,532.57	
N					
HOMELoAN					
FLEXI ANNUITY	58,185.81	263	4.25%	340.41	N
HOMELoAN					"

The Provider subsequently wrote to the Complainants on **22 March 2018**, detailing as follows;

"We should have applied a tracker rate to your account after your fixed rate period expired."

The Provider restored a tracker rate of ECB + 1.10% to the mortgage loan account ending **721/1** and backdated it to the date of the fixed rate expiry in **July 2012**.

The Provider also made an offer of redress and compensation to the Complainants in its letter of **22 March 2018**, as follows;

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1. Redress of €45,533.08 covering;
 - Total interest overpaid
 - Interest to reflect the time value of money
 2. Compensation of €4,553.31 for the Provider's failure
 3. Independent Professional Advice payment of €650.00.
- **Mortgage loan account ending 721/2**

The Complainants have submitted that this mortgage account was originally drawn down with a named third party provider as an "investor tracker ECB + 1.10%" mortgage before the "transfer" of the mortgage to the respondent Provider.

I note that a letter from the third party provider to the Complainants dated **19 May 2005** has been furnished in evidence, which details as follows;

"Your Mortgage Account Details

Mortgage Account Number: [ending] 6974

...

Account Information

Approved Loan Amount: €310,500.00

...

Interest Rate: 3.100%

Type of Rate: Investor Tracker ECB + 1.10%"

The Complainants' broker wrote to the respondent Provider on **14 June 2007**, as follows;

"Clients wish to remortgage an investment property they own in [Location].

...

There is currently a mortgage of approx €310K o/s on this property with [named third party provider]. They wish to remortgage for a better interest rate and to release equity for home improvements."

..."

I have considered the **Application Form** furnished in evidence, which was signed by the Complainants on an unspecified date and stamped by the Broker on **14 June 2007**. In **Section G: Details of Mortgage Required**, in response to the question "Purpose of mortgage" the Complainants have written "Equity release". The options available for "Type

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of loan required" were "Variable", "Fixed", "Discount Variable", "Other", "Tracker" and "Split". The Complainants have written "5" in the "Fixed for _____ Years" option.

The Provider's internal email sent on **29 June 2007**, referred to above, is also relevant to this mortgage loan account and details as follows;

"5.24% 5yr fixed agreed on /1 & /2. Can you please organise the rate change on /2."

A further internal email sent on **4 July 2007** details as follows;

"Will you re issue the loan offer on this with the ammended 5yr fixed as soon as possible"

It appears from the evidence before me that all communications were made with the Complainants' broker with respect to the mortgage loan application. I note the application form that the Complainants completed through the broker, outlined the types of interest rate options available, including the tracker rate. The evidence shows that the Complainants proceeded with an application for a mortgage loan commencing on a fixed rate option.

The **Amended Letter of Offer** dated **4 July 2007** details as follows;

<i>"Amount of Credit Advanced:</i>	<i>€385,000.00</i>
<i>Period of agreement (Years – Months)</i>	<i>30 - 0</i>
<i>...</i>	
<i>Type of Advance</i>	<i>FLEXI RESLET ANNUITY</i>
<i>Interest rate:</i>	<i>5.24%</i>
	<i>Fixed for 60 months"</i>

Condition 7 of the **Loan General Conditions** details as follows;

"The rate of interest applicable to this loan will be fixed for 60 months from the date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant (s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender. The break funding fee is calculated using the following formula: Mortgage Balance Outstanding x Break Funding Cost (No. of unexpired months of fixed term period/12)* Break Funding Cost is calculated*

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by subtracting the current fixed rate on offer for the remaining fixed term from the original fixed rate The Lender reserves the right to (A) cancel the arrangements for fixed interest rate payments if before the expiry of the fixed term the Applicant(s) account falls two or more months in arrears, or (B) vary the rate applicable to the Advance in order to comply with any reserve asset requirements imposed by any regulatory authority at any time. Any change in the applicable rate will be brought to the attention of the Applicant(s) within a reasonable period. At the expiry of the fixed rate period the Lenders prevailing variable rate will apply.”

The **Loan General Conditions** also detail;

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

The **Special Conditions** state as follows;

“1 The Applicant(s) existing mortgage must be redeemed on or prior to completion of the Advance.

...

5006 The Interest Rate specified in the Particulars of Advance represents a discount of 0.35%. This discount applies for a period of 12 months from the date of drawdown.

...

353 As of the date of this Letter of Offer, monthly payments of interest only for the first five years will vary in line with movements in the Lender’s Variable Rate prevailing from time to time. At the commencement of the sixth year monthly payments will revert to capital and interest.”

The **Form of Acceptance** signed by the Complainants on **5 July 2007**, outlines as follows;

“I/We the, undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender’s General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender’s standard Form of Mortgage;*
- (vi) the Assignment of Life Policy;*

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Copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitors(s)“

The Letter of Offer envisaged a fixed rate for a period of 60 months. In accordance with **Special Condition 5006**, the rate of 5.24% was a rate which was discounted by 0.35% and which applied for the first 12 months from drawdown. It appears from **Special Condition 353** that during the initial 5 year period the monthly payments were interest only with the mortgage loan reverting to capital and interest at the commencement of the sixth year. There is a reference to the interest rate during the interest only period varying in line with the Provider’s variable rate in **Special Condition 353**. This reference to the variance of the rate is somewhat confusing, in circumstances where the interest rate was fixed for the first five years. In any event, this condition is not in dispute between the parties. **General Condition 7** was clear that the Provider’s prevailing variable rate would apply at the end of the fixed interest rate period. 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. The Complainants accepted the Letter of Offer, and in doing so detailed that they had been advised upon the terms and conditions of the mortgage loan by their solicitor.

The Provider wrote to the Complainants on **3 July 2012**, as follows;

“An adjusted interest period has now expired on your mortgage account. Your repayment for 1st August 2012 will be €1,969.89 and is charged as follows;

Loan Type	Balance	Term	Interest	Repayment	Fixed
(€)	(Mths)	Rate	(€)		(Y/N)
FLEXI RESLET	340,930.92	301	4.90%	1,969.89	N
ANNUITY					

It appears from the submissions that the interest rate of 4.90% applied to mortgage loan account ending **721/2** from **July 2012** was the Provider’s standard variable rate

The Complainants submit that the Provider *“incorrectly failed”* to apply a tracker interest rate to the mortgage loan account on the expiration of the fixed period. The evidence does not support the Complainants’ submissions in this respect. As outlined above the Complainants did not have a contractual or other entitlement to a tracker interest rate on the mortgage loan account ending **721/2** and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the account at the end of the five year fixed interest rate period in **July 2012**. **General**

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Condition 7 sets out that the interest rate applicable at the expiry of the fixed rate period would be the “*Lenders prevailing variable rate*”. There was no indication in the Complainants’ mortgage loan documentation in relation to mortgage account ending **721/2** that the prevailing variable rate was a tracker interest rate.

If the Complainants were 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 that a tracker rate would be applied at the end of the fixed period, the Complainants could have decided not to accept the offer made by the Provider or sought clarification from their broker as to the interest rate that would apply at the end of the fixed period. Instead the Complainants accepted the Provider’s offer by signing the **Form of Acceptance** on **5 July 2007**.

The Complainants submit that they are entitled to a tracker interest rate on mortgage loan account ending **721/2**, because it was on a tracker interest rate prior to the application of the 5 year fixed interest rate to the mortgage loan. I note that the Complainants have submitted a letter from a third party provider dated **19 May 2005** in relation to a mortgage loan held by the Complainants with that Provider which was on a tracker interest rate of ECB + 1.10%. The Complainants redeemed this mortgage loan with the third party provider when they were taking out mortgage account ending **721/2** with the Provider as per **Special Condition 1** of the mortgage loan agreement. It is important for the Complainants to understand that each mortgage loan is governed by the terms and conditions applicable that particular mortgage loan. The fact that the property was the subject of a mortgage loan on a tracker interest rate with another provider, does not oblige the Respondent Provider to offer the Complainants that tracker rate at a later point in time. The mortgage loan that the Complainants took out with the Provider was a new mortgage loan, subject to the terms and condition of that mortgage loan contract. The Complainants’ entitlements under the mortgage loan with the third party provider ended when that loan was redeemed in **July 2007**.

I note from the evidence that following the expiry of the five-year fixed interest rate period in **July 2012**, the Complainants contacted the Provider on a number of occasions, including **January 2014** and **July 2014**, to query why the variable interest rate on both mortgage loan accounts was not varying in line with the ECB rate. The Complainants submit that they “*cannot understand if both loan 1 [account ending **721/1**] and loan 2 [account ending **721/2**] were originally tracker mortgages and subsequently moved to five year fixed loans how each would not be subject to the same terms i.e if [the Provider] was obliged to offer a tracker mortgage at the end of the fixed term for loan 1, why are they not obliged to do the same for loan 2?*” It is important for the Complainants to understand that each mortgage loan is governed by the terms and conditions applicable that particular mortgage loan. A tracker interest rate had been applied to mortgage loan account ending **721/1** from **2005**

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to **2007**. A **Tracker Rate Instruction Form** had been signed by the Complainants to apply the tracker rate of ECB + 1.1% to that mortgage loan. It was on that basis that the Provider reinstated a tracker interest rate to mortgage loan account ending **721/1** retrospectively from **July 2012**. The Provider has admitted its failure with respect to the application of a tracker interest rate on mortgage account ending **721/1** from **July 2012** and given redress and compensation to the Complainants for this failure. A tracker interest rate never applied to mortgage loan account ending **721/2** that the Complainants held with the Provider. As set out above the Complainants had no contractual or other entitlement to a tracker rate of interest on their mortgage loan account ending **721/2** at the end of the fixed rate period in **July 2012** or thereafter when the Complainants contacted the Provider seeking an interest rate reduction in line with the ECB rate in **2014**.

The Complainants do not have a contractual or other entitlement to a tracker interest rate on mortgage account ending **721/2**. Each of the Complainants' mortgage loans are governed by the terms and conditions applicable to that particular mortgage loan. The fact that the Provider has applied a tracker interest rate of ECB + 1.10% to mortgage account ending **721/1**, which is secured on their principal private residence as a result of the Tracker Mortgage Examination does not entitle the Complainants to a tracker interest rate on their separate mortgage loan, which is secured on their residential investment property.

For the reasons outlined, I do not uphold this 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.



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FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

11 August 2020

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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.

