



<u>Decision Ref:</u>	2020-0272
<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 two mortgage loan accounts (ending **6316/1** and **6316/2**) held by the Complainants with the Provider.

The loan amount of mortgage account ending **6316/1** is €94,000 and the term of the loan is 21 years and 7 months. The Letter of Offer signed on **19 April 2006** detailed that the interest rate applicable was “*3.45% Variable*”. Mortgage account ending **6316/1** was secured on the Complainants’ principal private residence

The loan amount of mortgage account ending **6316/2** is €106,000 and the term of the loan is 25 years. The Letter of Offer signed on **5 May 2006** detailed that the interest rate applicable was “*2.89 Fixed For 12 Months*”. Mortgage account ending **6316/2** was secured on a residential investment property.

The Complainants’ Case

The Complainants had an existing mortgage loan account ending **6316/1** with the Provider which was drawn down in **2002** and secured on their primary residence.

The Complainants say that they applied for “a home loan top up of €94k and a RIP [Residential Investment Property] loan of €106k” via a broker in **September 2005** by completing one joint mortgage application form in respect of both loans. They outline, “It was our understanding and it is clear from the application form that we selected the tracker option for both loans. This was subsequently changed to a discounted variable rate without our knowledge ... Somewhere between the broker and [the Provider] this change was made.” They state that “The application form shows that on page 3 the tracker rate option was selected but this was subsequently scribbled out, [and] the variable rate option selected”.

The Complainants submit “The Consumer Protection Code States: **A regulated entity must endeavour to have the consumer certify the accuracy of the information it has provided to the regulated entity.** In our case we should have been requested to complete a new application form as the bank should not have proceeded with an application form which was ambiguous (i.e. tracker selected and then changed on the form to discounted variable) or should have contacted us directly for clarification. [Complainants’ emphasis]”

The Complainants further detail that “The Code also states: **A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.** It is stated in one section of the application form that [the Provider] are providing variable, fixed and tracker options however in the small print it states that the rates can be changed at the discretion of the lender and you do not explain the rates available on page 3. This method of presentation on the application form disguises, diminishes and obscures vital information from a consumer perspective. [Complainants’ emphasis]”

The Complainants have queried “whether this application form was designed in an ambiguous manner in order to entrap customers into such contracts”.

The Complainants’ application was approved by the Provider as follows;

- A Letter of Offer dated **5 October 2005** provided for a top up loan of €94,000 on the existing mortgage loan account ending **6316/1**. The interest rate applicable was a variable rate of 3.45%.
- A Letter of Offer dated **25 October 2005** provided for a loan amount of €106,000 on a new mortgage loan account ending **6316/2**. The interest rate applicable was a 12-month fixed interest rate of 2.89%.

The Complainants submit that “It was our understanding that when we took out our mortgages with the bank that a rate that followed the ECB rate was to be applied to our accounts”. They detail that “When we signed the mortgage documents we understood that

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the terms “lenders prevailing rate” and “applicable interest rate” meant that the interest rates charged by [the Provider] prevailed on and were applicable to the ECB rate and that any fluctuations in the ECB rate would impact on the rate of interest applied.” They say that they have sought clarity from the Provider as to the meaning of the terms “Lenders prevailing rate” and “applicable interest rate” and have not received a satisfactory explanation.

The Complainants say that *“these mortgage contracts were deliberately worded in such a manner as to be vague, ambiguous and lacking in clarity in order to mislead us as consumers and to allow [the Provider] the opportunity not to pass on interest rate reductions if it so wishes and to vary the interest rates at will. If we were aware at the time that this was to be the case we would not have signed these mortgage documents and would have sought further clarification on the matter at that time.”*

The Complainants submit that the wording of the **Loan General Conditions** in the loan offers does not comply with the **Consumer Protection Code** or with the **European Communities (Unfair Terms in Commercial Contracts) Regulations**, which provides that contract terms must be written in plain intelligible language.

The Complainants also refer to letters they received from the Provider on **11 September 2006** and **16 April 2007** which state that the interest rate on their mortgage loan account ending **6316/1** was being increased *“In response to ECB increases”*. They say that *“this shows that the interest rates applied to our account by [the Provider] did relate to the ECB rate”*. They submit that *“it appears that the bank continued to apply interest rate increases to us as ECB rates increased but did not apply subsequent reductions in ECB rates to our account”*.

The Complainants are seeking *“that the terms in our mortgage contract be amended, that we are compensated for the financial burden placed upon us due to the unfair terms and that we are charged a fair interest rate.”*

The Provider’s Case

The Provider submits that the Complainants have two mortgages with the Provider as follows;

- Mortgage account ending **6316/1** is secured on the Complainants’ private dwelling home and operates on the Provider’s standard variable rate.
- Mortgage account ending **6316/2** is secured on a residential investment property and operates on the Provider’s standard variable rate.

The Provider states that a variable interest rate was selected in the original mortgage application form submitted by the Complainants in **2002** for mortgage account ending **6316/1**. It details that this application form had a variable interest rate option and a fixed interest rate option to choose from at that time. It outlines that tracker interest rates were not offered by the Provider in **2002**.

The Provider states that the Loan Offer dated **30 April 2002** for account ending **6316/1** stipulated that the applicable interest rate was a variable interest rate of 3.99%. It relies on **General Condition 5** and **Special Condition 145** in support of this. The loan amount was €125,000 and the term of the loan was 25 years. The Provider states that the Letter of Offer was accepted and signed by the Complainants on **3 May 2002**.

The Provider details that the loan drew down in **May 2002** on a discounted variable rate of 3.90% for a period of 1 year, as requested by the Complainants. It states that the Complainants were informed by letter dated **15 May 2002** that at the end of the discounted period the prevailing variable rate would apply, which the Complainants acknowledged by signing the letter in the presence of their solicitor. The Provider says that the letter made no reference to, nor does it indicate in any way that the prevailing variable rate will be linked to, or a guaranteed margin above, the ECB rate. The Provider details that in **May 2003** the discounted variable rate rolled to the standard variable rate.

The Provider states that in the joint application form for the top up loan (account ending **6316/1**) and the residential investment property purchase (account ending **6316/2**) submitted by the Complainants in **September 2005**, the tracker rate option on the form *"was selected and subsequently deleted in favour of the variable rate option"*. The Provider submits that in any event, even if the Complainants had selected the tracker rate option on the application form, *"this is not sufficient to establish a contractual entitlement"* as the mortgage application form cannot be construed as a Letter of Offer and the Complainants signed the **Declaration section** of the application form to that effect on **22 September 2005**.

The Provider details that it did not offer tracker rates for residential investment loans that were under €250,000 at the time the Complainants applied for the loan in **2005**. It further details that it had no tracker rate available for top-up facilities at that time on the basis that tracker rates *"were primarily a new business interest rate offering (subject to criteria) and the Bank treated top-up loans as additional advances to existing business customers."* The Provider relies on its **Rate Matrices** from **September 2005** in support of this. The Provider submits that its policy was to notify brokers of the interest rates available for New Business applications through the issue of communications and the provision of Rate Matrices on an ongoing basis. It states that prior to the Complainants' application being

submitted in **September 2005**, the Provider had issued **New Business Rates** dated **6 September 2005** to brokers.

The Provider also relies on an email it received from the Complainants' broker in relation to mortgage account ending **631/2**, in response to a written request from the Provider, which stated that *"Client requires 1 year fixed, 25 year term, 5 year interest only option also required"*.

The Provider states that the application form is only *"one step in the loan application and drawdown process"*. It details that when the Provider produces a Letter of Offer, one copy is provided to the applicants, one to their financial adviser/broker and one to their legal adviser. It outlines that the applicants also receive a cover letter *"which calls their attention to the General and Special Loan Conditions and asks them [sic] to refer to their Broker with any queries"*. The Provider says that any query the Complainants had regarding the rate should have been queried with their broker who in turn could have queried this with the Provider. It states that the Complainants retained the option at all times *"not to proceed with the finance as offered"*. It states that instead, the Complainants accepted the Letter of Offer for both loans and signed to acknowledge that they had read and been advised upon the full details of the offers.

The Provider details that the Letter of Offer dated **5 October 2005** for mortgage account ending **6316/1** stipulated that the applicable interest rate was a variable interest rate of 3.45%. It relies on **General Condition 5** in support of this. It states that the Letter of Offer was signed by the Complainants on **19 April 2006** in the presence of their solicitor. It states that when this top-up facility drew down in **June 2006** the applicable homeloan standard variable rate had increased to 3.95%.

The Provider details that the Letter of Offer dated **25 October 2005** for account ending **6316/1** stipulated that the applicable interest rate was 2.89% fixed for 12 months. It relies on **General Condition 5** and **General Condition 7** in support of this. It states that the Letter of Offer was signed by the Complainants on **5 May 2006** in the presence of their solicitor. It states that when this facility drew down in **June 2006** the residential investment property 12-month fixed rate had increased to 3.89% and the Complainants were advised of this by letter dated **8 June 2006**.

The Provider details that by letter dated **16 May 2007** it wrote to the Complainants advising them that they would shortly roll to the standard variable rate on account ending **6316/2**. The Provider submits that the loan moved from the fixed rate of 3.89% to the residential investment property standard variable rate of 5.34% on **5 June 2007**.

The Provider submits that the Complainants' Letters of Offer "*made no reference to the ECB rate nor that the prevailing variable rate referenced would track the ECB rate or any other quoted rate*" and therefore the Complainants "*could not have been under the impression that the variable rate referenced was a tracker rate*". The Provider submits that if the Complainants had any queries in this regard they should have referred these to their broker or solicitor.

The Provider states that the term "*standard variable rate*" is not defined in the Complainants' mortgage loan documentation. It states that the term was a widely used term and one that denoted the ordinary, usual variable rate of interest that was offered by the Provider at the time. It states that there was no indication that the Provider was referring to an interest rate that would track another rate of interest, without any margin, or at all. The Provider states that the "*applicable interest rate*" is the interest rate for the relevant category of loan at a point in time i.e. in the case of these two loans either the fixed rate, discounted variable rate or standard variable rate for the relevant category of loan (homeloan or investment property). It states that the "*prevailing variable rate*" is the standard variable rate for the relevant category of loan.

The Provider states that it is satisfied that the terms "*standard variable rate*", "*prevailing variable rate*" and "*applicable interest rate*" for the Complainants' mortgage accounts were sufficiently clear in their ordinary meaning and 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 rate. It states that if a tracker interest rate had applied this would have been clearly indicated in the **Special Conditions** to the Letter of Offer. The Provider outlines that the terms attaching to the loan offers were "*clearly and prominently displayed*" and the Complainants were advised to seek independent advice from their solicitor prior to accepting the terms.

The Provider details that its Pricing Committee sets pricing on all of its products including its variable mortgage products. It states that in pricing variable mortgage products it considers a variety of factors including cost of funding, operational costs and the prevailing market competitive environment including credit risk. It states that such decisions are commercial decisions for the Provider.

With regard to the rate change notification letters referenced by the Complainants, the Provider confirms that it had increased its rates in consideration of the recent increases in ECB rates. It states that this does not suggest that the interest rate applicable to the Complainants' loan accounts tracked the ECB rates, but rather was a factor taken into account when adjusting interest rates. The Provider states that the Complainants' submission demonstrates their awareness that the Provider's standard variable rate increased at times when the ECB rate had not and therefore that the applicable interest

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rate did not track the ECB rate. It states in addition that the letter dated **16 April 2007** refers to a press notice in **March 2007** which clearly set out the tracker rate and variable rates applicable at that time. It states that the letter of **16 April 2007** detailed that the applicable interest rate was 5.20% and it is clear from the press release that this is the variable rate applicable to homeloan accounts.

The Provider states that the Complainants' mortgage loans drew down in **May 2002** and **June 2006** respectively, prior to the introduction of the **Consumer Protection Code 2006**. Notwithstanding this the Provider states that it is satisfied it has complied with the Consumer Protection Code in relation to its loan documentation and its mortgage application forms do not give any commitment to reduce a particular product in line with other product reductions.

The Provider states that the **European Communities (Unfair Terms in Consumer Contracts) Regulations 1995** ("the UTRS") only apply to contracts where one of the parties is a consumer. It submits that the Complainants are consumers in relation to account ending **6316/1**, the purpose of which was to purchase a principal dwelling house, but not in relation to account ending **6316/2**, the purpose of which was to purchase a buy-to-let property. The Provider asserts that the relevant interest rate clauses in the disputed loan agreements are plain and intelligible. It details that pursuant to **Section 128(2)** of the **Consumer Credit Act 1995** the Letters of Offer all contain the warning that the payment rates on the loan may be adjusted by the lender from time to time and it is clear from this that the rate of interest would vary during the term of the loan as the lender amended its current rate from time to time.

The Provider submits that its obligation is to act in accordance with its contractual relationship with the Complainants. It states that the mortgage terms and conditions place no obligation on the Provider to price the Complainants' variable rate in line with ECB rates. The Provider states it is satisfied that it gave no legitimate expectation to the Complainants that the interest rate would fluctuate in line with ECB rates.

The Complaint for Adjudication

The complaint for adjudication is the Provider failed to apply a tracker interest rate to the Complainants' mortgage loan accounts ending **6316/1** and **6316/2** from **June 2006**.

Decision

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

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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 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.

I note the applications for both mortgage loans were 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.

The issue to be determined is whether the Provider ought to have applied a tracker interest rate to the Complainants' mortgage loan accounts from inception. In order to determine this complaint, it is necessary to review and set out the relevant provisions of

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the Complainants' mortgage loan documentation and details of certain interactions between the Complainants and the Provider between **2002**, when the Complainants submitted their original mortgage loan application for mortgage account ending **6316/1**, and **2006** when the additional facilities under mortgage accounts ending **6316/1** and **6316/2** were drawn down.

I note that the Complainants originally applied for a mortgage of €125,000 by way of **mortgage application form** signed by the Complainants on **29 March 2002**. In the section titled *"Your mortgage type, rate & term details"*, in response to the question *"Please tick your choice of interest rate"* the *"Variable"* option is selected. I note that the other option available was *"Fixed"*.

I accept that the Complainants could not have been offered a tracker interest rate during the mortgage loan application process which took place in **March 2002**, in circumstances where a tracker interest rate option was not yet available from the Provider. In any event it does not appear to me that this is a matter that is in dispute between the parties.

The Provider issued a Loan Offer dated **30 April 2002** to the Complainants for mortgage loan account ending **6316/1**, which details as follows;

<i>"Amount of Credit Advanced</i>	<i>€125,000.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>25 – 0</i>
...	
<i>Type of Advance</i>	<i>Annuity Homeloan</i>
<i>Interest Rate</i>	<i>3.99%</i> <i>Variable"</i>

Special Condition 145 of the **Special Conditions** details as follows;

"The Interest Rate specified on the Particulars of Advance represents a discount of 0.71% on our variable rate. This discount applies for a period of 6 months from the date of drawdown. At the end of this discount period the interest rate shall revert to the Lenders prevailing variable rate."

General Condition 5 of the **Loan General Conditions** details 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. While this interest rate prevails the advance and interest (in the case of Principal

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and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant's Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate. ..."

The **Loan General Conditions** also detail as follows;

"WARNING:

...

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

The **Form of Acceptance** was signed by the Complainants on **3 May 2002** on the following conditions;

"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 solicitor(s)."

The Provider wrote to the Complainants by letter dated **15 May 2002** as follows;

"Our Letter of Loan Offer dated 30th April 2002 is hereby amended as follows.

The Lender acknowledges the clients request for a 20 year term on the 12 months discount variable rate of 3.90%

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...

Condition 145 now reads as follow:

The Interest Rate specified on the Particulars of Advance represents a discount of 0.80% on our variable rate. This discount applies for a period of 12 months from the date of drawdown. At the end of this discount period the interest rate shall revert to the Lenders prevailing variable rate.

Save as hereby varied, the terms of the Letter of Offer dated 30th April 2002 are confirmed"

I note the Complainants signed this letter on **16 May 2002**, witnessed by their solicitor.

It is clear to me that the **Letter of Approval** and the **Letter of Amendment** envisaged a variable interest rate loan, which was discounted by 0.80% for the first 12 months and thereafter a the loan would revert to the Provider's prevailing variable rate. The variable rate in the Complainants' mortgage loan documentation was a variable rate which could be adjusted by the Provider. The variable rate made no reference to varying in accordance with variations in the ECB refinancing rate. The Complainants accepted the Provider's offer by signing the **Form of Acceptance** on **3 May 2002**.

The **Rate History** document furnished in evidence shows that the mortgage loan account was drawn down on the discounted variable rate of 3.90% in **May 2002** and defaulted to the interest rate of 3.95% in **May 2003**.

I have considered the **Application Form** that was signed by the Complainants on **22 September 2005**. In the section titled "**Your mortgage type rate & term details**" in response to the question "**Amount of total loan required**", "**€106,000 (RIP Loan) + €94,000 (Home Loan Top-Up) Flexi option included**" was written. In response to the question "**Please tick your choice of interest rate**" the "**Variable**" option was ticked with the word "**Discounted**" written above it. The other options available were Fixed or Tracker. It appears that the Tracker option was also ticked and subsequently crossed out. The words "**Interest Only**" were written in response to the question "**Mortgage term**".

I note that the Complainants signed the mortgage application form on **22 September 2005** on the following conditions;

"I/We hereby declare and acknowledge;

(a) *This form must not be construed as an offer on behalf of [the Provider]*

...

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- (g) *The rate of interest will be that which [the Provider] is charging on that date on which the loan cheque is issued and subsequently the rate may vary within the terms of the mortgage.*
- (h) *The rate of interest applicable to the loan may be varied at any time at the discretion of [the Provider], provided however that the applicant will be notified of the change in interest rates at the earliest opportunity.*
- (i) *If a fixed rate is requested the interest rate will be the fixed rate available on the day the loan cheque issues. For costs associated with early repayment of a fixed loan please revert to the Consumer Credit Act 1995 notice within this form.*
...”

It is clear that in **September 2005**, the Complainants were seeking an additional advance of funds from the Provider which would be secured against the Complainants’ private dwelling house and a separate advance which was required to purchase a residential investment property. I note that Complainants availed of the services of a third party broker during the application stage of the mortgage loan application.

The Complainants have submitted that *“it was our understanding and it is clear from the application form that we selected the tracker option for both loans”*. The Complainants submit that the application form was changed without their knowledge, that *“somewhere between the broker and [the Provider] this change was made”* and the Provider *“did not inform us of this change/ambiguity in the application form which took place after the form had been completed and [the Provider] should not have proceeded with our mortgage application without contacting us directly for clarification when it appeared that there had been a change to the application form. [Complainants’ emphasis]”*

It is unclear from the evidence who crossed out the tracker interest rate option that was selected on the mortgage application form. However, in the circumstances of this particular complaint it is not necessary to determine this matter.

It is important for the Complainants to be aware that, regardless of the interest rate that was selected as their preference on the mortgage application form, the Provider was under no obligation to offer them any particular interest rate, or indeed any mortgage loan, in **2005**. It was a matter for the Provider to decide having considered the mortgage application, firstly, if it was willing to offer the Complainants any borrowings at the time and secondly, how those offers would be structured. In order for the Complainants to have a contractual right to a tracker interest rate on their mortgage loans that right would need to have been specifically outlined in the mortgage loan contract that was signed by the parties. A loan application is not a mortgage loan contract. The **Application Form** specifically outlined that the *“form must not be construed as an offer on behalf of [the*

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Provider]" and the Complainants signed the Application Form on **22 September 2005**, acknowledging this. In circumstances where the Complainants were engaging with a broker with respect to the mortgage loan application, I do not accept that there was any requirement for the Provider to communicate directly with the Complainants at that time in relation to the Application Form or the interest rate options for the two loans.

A copy of the Provider **Homeloan New Business Rates** effective from **6 September 2005** has been provided in evidence, which outlines the following interest rates;

- | | |
|---------------------------------------|-------|
| • Variable | 3.45% |
| • Discount Variable (12 months) | 2.69% |
| • Discount Variable (24 months) | 2.99% |
| • Tracker <75% LTV, Over €300k | 2.95% |
| • Tracker <92% LTV, Over 150k - €250k | 3.25% |
| • Tracker <92% LTV, Over €250k | 3.10% |
| • Tracker <92% LTV, Less 150k | 3.40% |
| • 1 year fixed | 2.69% |
| • 2 year fixed | 3.45% |
| • 3 year fixed | 3.49% |
| • 5 year fixed | 3.79% |

The Complainants were seeking a home loan mortgage on account ending **6316/1**. Even if the Complainants did request a tracker interest rate for that mortgage loan account in **2005**, the Provider has detailed that it did not offer tracker interest rates on top-up mortgage loans as the tracker interest rate was "*primarily a new business interest rate offering (subject to criteria)*" and the Provider treated top-up loans as "*additional advances to existing business customers*". The Provider has not submitted any underlying evidence of the criteria it refers to. In any event I accept that it is within the Provider's discretion to set eligibility criteria for particular interest rate products. Furthermore the fact that tracker interest rate options were available generally as part of the Provider's suite of products for home loan mortgages, did not obligate the Provider to offer the Complainants a tracker interest rate on mortgage account ending **6316/1**.

I have also been provided with a copy of the Provider's **Residential Investment Property New Business Rates**, effective from **6 September 2005**, which outlines the following interest rates;

- | | |
|---------------------|-------|
| • Variable | 3.59% |
| • 1 year fixed <80% | 2.89% |
| • 1 year fixed >80% | 3.09% |

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- 2 year fixed 3.55%
- 3 year fixed 3.99%
- 5 year fixed 3.99%
- >€250k, LTV <80% 3.25%
- >€250k, LTV >80% 3.35%
- >€500k, LTV <80% 3.10%

The Complainants were seeking a residential investment property loan under mortgage account ending **6316/2**. The evidence shows that tracker interest rates were not an available interest rate option on residential investment property loans under €250,000 in September 2005. The Complainants were seeking a residential investment property mortgage loan for €106,000, which was below the €250,000 threshold set by the Provider. I accept that it was within the Provider's commercial discretion to set eligibility requirements for the tracker interest rate product.

The Provider has also submitted in evidence a screenshot of an undated email from the Complainants' broker to the Provider. The broker's email appears to be sent in response to an email from the Provider dated **24 October 2005**, the subject matter of which is

"Approval in Principle Letter – Broker ref- XX6316/2".

The broker's email to the Provider details as follows;

"Client requires 1 year fixed, 25 year term, 5 year interest only option also"

It therefore appears that the Complainants' broker requested a one year fixed interest rate for their mortgage loan account ending **6316/2** in **October 2005** and the application for that loan proceeded on that basis.

The Complainants have alleged that the Provider breached the **Consumer Protection Code 2006** in its dealings with the Complainants at this time. The Complainants' mortgage loan accounts ending **6316/1** and **6316/2** were applied for prior to the introduction of the **Consumer Protection Code 2006** (the "**CPC 2006**") which was fully effective by **01 July 2007**. That being said, there is no evidence that the Provider acted in a misleading manner or in a manner that lacked transparency towards the Complainants when they applied for the mortgage loans in **September 2005**.

I have set out the particulars of both Letters of Offer issued in **October 2005** in turn below.

Mortgage loan account ending 6316/1

The **Letter of Offer** dated **5 October 2005** for mortgage loan account ending **6316/1** details as follows;

<i>"Amount of Credit Advanced</i>	<i>€94,000.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>21 – 7</i>
...	
<i>Type of Advance</i>	<i>Flexi Interest Only</i>
<i>Interest Rate</i>	<i>3.45% Variable"</i>

Special Condition 70 details as follows;

*"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** details 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. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant's Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate.
..."*

The **Loan General Conditions** also detail as follows;

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

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The **Form of Acceptance** was signed by the Complainants on **19 April 2006** on the following conditions;

“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 solicitor(s).”

It is clear to me that the **Letter of Approval** envisaged a variable interest rate loan which could be adjusted by the Provider. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate. Rather it was stated to be one which could be adjusted by the Provider from time to time. There was no basis for the Complainants to reasonably expect that the term “*variable rate*” would relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the Letter of Approval.

If the Complainants did not want to pursue this option because they were unhappy with the interest rate applicable to the mortgage, they could have declined to accept the Provider’s offer, or they could have sought clarification from their broker about the type of variable rate applicable to the mortgage. Instead the Complainants accepted the Provider’s offer by signing the **Form of Acceptance** on **19 April 2006**.

I note from the **Rate History** document furnished in evidence that the mortgage loan account drew down on the standard variable rate of 3.95% in **June 2006**. This variance in the drawdown rate is provided for in **General Condition 5** which detailed that the variable rate of 3.45% “*may vary before the advance is drawn down and will be subject to variation throughout the term*”.

A letter from the Provider to the Complainants dated **11 September 2006** details as follows;

/Cont’d...

“Ref: XX6316/1

...

As announced by [the Provider] in the press on the 17th August 2006, your revised interest rate is 4.45% (typical APR 4.54%) with effect from 17th August 2006. This was in response to the ECB increase on 3rd August 2006.

...

Please find enclosed a list of our competitive fixed rate options. Should you wish to avail of one of these rates please complete the form and return to our Customer Services Department.”

The enclosed list of fixed rate options has not been provided in evidence. Notwithstanding this it does not appear from the evidence that the Complainants responded to this letter to avail of a fixed rate option. The **‘Rate History’** document furnished in evidence indicates that the mortgage loan account switched to the increased revised interest rate of 4.45% in **September 2006**.

The Provider has furnished a copy of its **Customer Notice** from **March 2007** which details as follows;

“Customer Notice

[The Provider] advises its customers that the following mortgage lending interest rates are effective as and from Thursday 15th March 2007.

Tracker Mortgages

The interest rate for Tracker Mortgages is ECB rate 3.75% plus the margin agreed in your Mortgage Contract.

...

Customer Notice

[The Provider] advises its customers that the following mortgage lending rates are effective as and from Thursday 22nd March 2007.

		<i>Rate</i>	<i>APR</i>
Mortgages	<i>Homeloan Variable Rate</i>	<i>5.20%</i>	<i>5.32%</i>
	<i>Investment Variable Rate</i>	<i>5.34%</i>	<i>5.47%”</i>

I have been furnished with a copy of a letter from the Provider to the Complainants dated **16 April 2007**, which details as follows;

/Cont’d...

“Ref: XX6316/1

...

As announced by [the Provider] in the press on the 21st March 2007, your revised interest rate is 5.20% (typical APR 5.32%) with effect from 22nd March 2007. This was in response to the ECB increase on 8th March 2007.

...

Please find enclosed a list of our competitive fixed rate options. Should you wish to avail of one of these rates please complete the form and return to our Customer Services Department.”

Again the enclosed list of fixed rate options has not been provided in evidence; however it does not appear from the evidence that the Complainants responded to this letter to avail of a fixed rate option. The **‘Rate History’** document furnished in evidence indicates that interest rate on the mortgage account increased to 5.20% in **April 2007**.

The Provider wrote to the Complainants by letter dated **11 June 2008**, as follows;

“We wish to confirm as announced by [the Provider] in the press on the 24th May 2008, the standard variable rate has been increased by 0.20% and your revised interest rate is 5.65% (typical apr 5.8%) with effect from 1st June 2008. On the 1st July 2008 your repayment will be €971.10.”

The **‘Rate History’** document furnished in evidence indicates that the mortgage loan account switched to the revised interest rate of 5.65% in **June 2008**.

I accept that the content of the Provider’s letters to the Complainants dated **11 September 2006** and **16 April 2007** respectively, may have created some confusion as to how the variable rate applicable to the Complainants’ mortgage loan was set by the Provider and that the ECB rate had an effect on the Provider’s variable rate. However that does not mean that the interest rate applicable to the Complainants’ mortgage loan was a tracker interest rate loan, which was guaranteed to track the ECB rate at a set margin above the ECB rate. It is clear from the Complainants’ mortgage loan documentation that there was no contractual or other entitlement to a tracker interest rate with respect to mortgage account ending **6316/1** at any point in time.

Mortgage loan account ending 6316/2

The **Letter of Offer** dated **25 October 2005** for mortgage account ending **6316/2** details as follows;

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<i>“Amount of Credit Advanced</i>	<i>€106,000.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>25 – 0</i>
...	
<i>Type of Advance</i>	<i>FLEXI RESLET ANNUITY</i>
<i>Interest Rate</i>	<i>2.89</i>
	<i>Fixed For 12 Months”</i>

General Condition 5 of the **Loan General Conditions** details 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. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant’s Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate. ...”

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

“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. 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 x (No. of unexpired months of fixed term period/12)* Break Funding Cost is calculated 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*

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rate applicable to the Advance in order to comply with any reserve asset management 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 as follows;

“WARNING:

...

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

The **Form of Acceptance** was signed by the Complainants on **5 May 2006** on the following conditions;

“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;*

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

The Provider wrote to the Complainants’ broker by letter dated **8 June 2006** as follows;

“We refer to the above and in particular to the fixed condition of our Letter of Offer dated the 25th October 2005 prior to negotiating the loan cheque, we would be most obliged if you could advise the Borrower(s) that their fixed rate has changed to 3.89%”

It is clear to me that the Letter of Offer envisaged that the interest rate applicable to the mortgage loan would be an interest rate of 2.89% fixed for a period of 12 months. I note that the 12-month fixed interest rate of 2.89% had increased to 3.89% by the time the loan

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was drawn down in **June 2006**. This variation in the drawdown rate was provided for in **General Condition 7**.

General Condition 7 of the **Loan General Conditions** also outlined that the Provider's "prevailing" variable rate would apply at the end of the fixed interest rate period. The variable rate 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. As set out above, if the Complainants did not want to pursue this option because they were unhappy with the interest rate applicable to the mortgage, they could have declined to accept the Provider's offer, or they could have sought clarification from their broker about the type of variable rate that would be applicable to the mortgage at the end of the fixed interest rate period. Instead the Complainants accepted the Provider's offer by signing the **Form of Acceptance** on **5 May 2006**.

The Provider wrote to the Complainants by letter dated **16 May 2007** and detailed as follows;

"The fixed rate or discount period on your mortgage is coming to an end shortly which means that your rate will change to our current standard variable rate for the 1st July 2007 repayment. This will change the amount of your monthly mortgage repayment.

Given the current environment of rising interest rates many customers are choosing to fix their interest rate to allow peace of mind.

I am enclosed a 'Fixed Rate Instruction Form' listing all the fixed rates you can choose from. To complete please the appropriate rate, sign the form and return to us by Thursday 21st June 2007."

Again, the enclosed list of fixed rate options has not been provided in evidence; however it does not appear from the evidence that the Complainants responded to this letter to avail of a fixed rate option.

The '**Rate History**' document furnished in evidence indicates that the mortgage loan account switched to the residential investment property standard variable rate of 5.34% in **June 2007**. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the expiry of the one year fixed interest rate in **May 2007**.

The Provider wrote to the Complainants by letter dated **11 June 2008**, as follows;

/Cont'd...

“We wish to confirm as announced by [the Provider] in the press on the 24th May 2008, the standard variable rate has been increased by 0.20% and your revised interest rate is 5.79% (typical apr 5.95%) with effect from 1st June 2008. On the 1st July 2008 your repayment will be €511.53.”

The **'Rate History'** document furnished in evidence indicates that the standard variable interest rate on the mortgage loan account increased to 5.79% in **June 2008**.

I note that the Complainants have submitted that *“Due to the wording in these mortgage contracts we are put in a position whereby we are paying exorbitantly high interest rates when compared to other mortgage products. We are not in a position to change banks due to our previous arrears situation (which was not of our making) despite the fact that we are now back on full repayments.”*

It is important for the Complainant to be aware that in signing the **Loan Offer Letters** and the **Form of Acceptances** on **May 3 2002**, **19 April 2006** and **05 May 2006** respectively, the Complainants were binding themselves to the terms and conditions of the mortgage loans which included making the appropriate monthly repayments to discharge the mortgage loans.

I note from the evidence that the Complainants entered into the following alternative repayment arrangements on the mortgage loan account ending **6316/1**;

- The Complainants signed and accepted a Letter of Variation on **8 May 2008** to apply a 12 month period of interest only payments to the mortgage account.
- The Complainants signed and accepted a Letter of Variation on **1 October 2014** to capitalise the arrears of €1,146.53 on the mortgage account.

The Complainants entered into the following alternative repayment arrangements on the mortgage loan account ending **6316/2**;

- The Complainants signed and accepted a Letter of Variation on **1 March 2013** to apply a 6 month period of interest only repayments to the mortgage account effective from **January 2013**.
- The Complainants signed and accepted a Letter of Variation on **1 October 2014** to apply a 6 month period of interest only repayments to the mortgage account.
- The Complainants signed and accepted a Letter of Variation on **26 July 2014** to capitalise the arrears of €6,426.99 on the mortgage account.

The evidence shows that the Provider engaged with the Complainants between **2008** and **2014** in relation to the arrears on the accounts and agreed alternative repayment

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arrangements with the Complainants. As set out above I do not accept that there was any obligation, contractual or otherwise, on the Provider to offer a tracker rate to the Complainants on their mortgage loan account at any stage. Therefore it does not appear to me that the arrears on the mortgage accounts were linked to the incorrect interest rates being applied to the mortgage loan accounts, as the evidence does not support the Complainants' asserted entitlement to a tracker interest rate on the mortgage loans. The Complainants themselves have submitted *"The reason we lapsed into arrears is, as you know, due to wage cuts which were implemented in order to bail out the banking sector"*.

The Complainants submit that the **Loan Offer Letters** dated **5 October 2005** (mortgage account ending **6316/1**) and **25 October 2005** (mortgage account ending **6316/2**) are unclear as to the interest rate applicable. The Complainants refer to the phrases *"lenders prevailing rate"* and *"applicable interest rate"* within the terms and conditions of the mortgage loans and submit that they are not in compliance with the **Consumer Protection Act 2007** and the **EC (Unfair Terms in Consumer Contracts) Regulations 1995**.

The Complainants appear to be taking these phrases out of context. The reference to *"applicable interest rate"* is contained in the following sentence:

"The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate."

It is clear that the *"applicable interest rate"* in this context is the interest rate applicable to the mortgage loan.

The term *"lenders prevailing rate"* does not appear in either mortgage loan, rather the following appears in **General Condition 7** of the **Loan General Conditions** to mortgage account ending **6316/2**:

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

As outlined above, the variable rate 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 submitted an application to the Provider through a broker, having selected a preference for a tracker interest rate. The Provider made an offer of two mortgage loans to the Complainants, one on a fixed rate for 12 months reverting to the Provider's prevailing variable rate and the other on a variable interest rate. The variable interest rates in respect of both mortgage loans were not tracker interest rates and I find there was no ambiguity in this respect. The Complainants accepted both mortgage loan

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contracts. The Complainants do not have a contractual or other entitlement tracker interest rates on either mortgage loan accounts **6316/1** and **6316/2**.

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**

11 August 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.