



<b><u>Decision Ref:</u></b>	2020-0317
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

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

##### **Background**

This complaint relates to three mortgage loan accounts held by the Complainants with the Provider, as follows;

- The loan amount for mortgage loan account ending **141** was IR£79,650 and the term of the loan was for 20 years. The Offer of Advance which was signed by the Complainants on **16 November 2000**, outlined the interest rate type as the Provider's "*Variable Home Loan Rate*". The term of the loan was subsequently extended in **2004**.
- The loan amount for mortgage loan account ending **008** was €100,000 and the term of the loan was for 25 years. The Offer of Additional Advance which was signed by the Complainants on **27 July 2004**, outlined the interest rate type as a "[*Provider*] *Flexible Mortgage*" which tracks the ECB rate with a margin of 0.85% which is "*fixed for the life of the loan*".
- The loan amount for mortgage loan account ending **076** was €20,000 and the term of the loan was for 25 years. The Offer of Additional Advance which was signed by the Complainants on **12 May 2005**, outlined the interest rate as 3.5%

The mortgage loan accounts that are the subject of this complaint are all secured on the Complainants' private dwelling house.

### **The Complainants' Case**

The Complainants submit that the Provider failed to offer them a tracker interest rate on two of their mortgage accounts ending **141** and **076**. The Complainants outline as follows with respect to each account;

#### **1. Mortgage Loan Account ending 141**

The Complainants detail that they drew down mortgage loan account ending **141** in **2000** for a sum of £79,650.00 and that the original life of the mortgage was 20 years. The Complainants submit that the term of this loan was extended to **2029** without them requesting any term extension in **2004**. The Complainants outline that a variable rate has applied to this loan since its inception.

#### **2. Mortgage loan account ending 008**

The Complainants detail that this loan was for €100,000 and was drawn down at various points: **September 2004, October 2004, January 2005** and twice in **February 2005**. The Complainants outline that the term of the loan was 25 years and a tracker rate of ECB base rate + 0.85% margin has applied to this loan from the outset.

#### **3. Mortgage loan account ending 076**

The Complainants outline that mortgage sub account ending **076** was drawn down in **June 2005** for the amount of €20,000 and was subject to a standard variable rate over a term of 25 years.

The Complainants submit that they were denied a right or an option of a tracker interest rate on mortgage loan accounts ending **076** and **141**. The Complainants submit that *"[i]f [the Complainants] had been offered same we would have accepted it as we had done with [mortgage loan account ending 008] in September 2004."* The Complainants submit that they *"were not advised of the options available"*.

The Complainants submit that the mortgage loan term applicable to the mortgage loan account ending **141** was *"extended (not at our request) to 2029 when we applied for [mortgage loan account ending 008]"*. The Complainants submit that they do not accept

the Provider's submission that the Complainants had implicitly agreed to the extension through ticking this option on their mortgage loan acceptance.

The Complainants submit that they were given an option to a) coincide with the remaining term (of your existing borrowing) or b) select a repayment period. The Complainants submit that *"what [the Complainants] ticked on this form related specifically to [the loan being applied for]."*

The Complainants submit that the Provider appears to view *"all three sub accounts as one when it relates to coinciding the end date of the mortgages but views them as completely independent of each other in terms of rates offered/applied."* Furthermore the Complainants submit that if that was the case then *"the same rate should have been offered/applied to all"*.

The Complainants are seeking that a tracker rate is applied to their mortgage sub accounts ending **141** and **076**.

### **The Provider's Case**

The Provider submits that the customers have one mortgage with the Provider which is split into three separate mortgage sub-accounts which are linked and are secured on the same property. It details however that each mortgage sub-account was issued at a different time and on different terms and conditions as detailed in the separate Offers of Advance and Offers of Additional Advance applicable to each mortgage sub-account. The Provider details as follows with respect to each mortgage sub-account:

#### **1. Mortgage Loan Account ending 141**

In **October 2000**, the Complainants applied for a mortgage in the amount of IR£79,650 over a term of 20 years and based on a variable interest rate of 5.13%. The Provider details that the mortgage application was signed by the Complainants on **04 October 2000** and at the time of the mortgage application, tracker interest rate products were not available.

The Provider outlines that on **24 November 2000** this mortgage loan was drawn down on a discounted variable home loan rate of 4.99% which was a discount of 1.14% on the Provider's standard variable rate which was 6.13%. The Provider submits that the discounted interest rate was to apply until **31 August 2001**, with the variable home loan rate to apply from that date onwards.

With respect to the extension of term on this mortgage loan account, the Provider submits that when the Complainants applied for a top up loan in **2004**, the Complainants requested that the Provider extend the term of their existing mortgage loan under account ending **141**.

The Provider outlines that details of the term extension were outlined in the special conditions of the Complainants' Offer of Additional Advance dated **22 July 2004**.

## **2. Mortgage loan account ending 008**

In **May 2004**, the Complainants applied to the Provider for a top-up mortgage in the amount of €100,000 over a term of 25 years on a tracker interest rate of ECB + 0.85%. The Provider outlines that this mortgage loan was drawn down in stage payments during **2004** and **2005**.

The Provider outlines that tracker interest rate products were available at the time of the Complainants' application for the top-up mortgage. The Provider details that the Provider's credit policy stipulated that tracker products were available in respect of borrowings in excess of €50,000.

## **3. Mortgage loan account ending 076**

In **2005**, the Complainants applied for a second top-up mortgage in the amount of €20,000 over a term of 25 years, based on a variable rate.

The Provider details that tracker interest rate products were available at the time of this application. However they were only available for borrowings in excess of €50,000. The Provider submits that for these reasons the tracker interest rate product was unavailable for selection by the Complainants. The Provider outlines that for residential mortgages and top-up mortgages of €50,000 or less, the only interest rate option available was the standard variable rate, which was 3.50% at the time.

The Provider details that the range of interest rate options available to customers was subject to credit criteria, eligibility and terms and conditions. The Provider outlines that it provided information to customers on request in relation to the various interest rate options that may have been available at the time of the request.

The Provider outlines that suitability requirements were introduced in the **Consumer Protection Code 2006** (the "**CPC 2006**") which entered into force on **01 July 2007**. The Provider outlines that at the time mortgage accounts ending **141** and **076** were applied for

/Cont'd...

there was no legal or regulatory requirement to ensure that products were suitable for customers, however the Provider states that it is satisfied that the mortgage sub-accounts drew down in line with the applications that were made by the Complainants in **2000** and **2005**.

### **The Complaints for Adjudication**

The complaints for adjudication are;

- a) The Provider failed to offer the Complainants a tracker interest rate on mortgage loan accounts ending **141** in **2000** and on mortgage account ending **076** in **2005**.
- b) The Provider extended the term of mortgage loan account ending **141** from 20 years to 25 years without the Complainants' consent in **2004**.

### **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 **31 August 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.

/Cont'd...

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to each of the Complainants' mortgage loan accounts. It is also necessary to consider the details of certain interactions between the Complainants and the Provider since the inception of the mortgage loans.

**Mortgage Loan Account ending 141**

The Complainants applied for a mortgage by completing and signing a **House Mortgage Application Form** on **04 October 2000**. **Part C** of the application form is headed "*Your Mortgage Requirements*" and notes the amount of the loan as £79,650 and the repayment period as 20 years. The type of mortgage selected is "*Repayment*". The application form states that "*[i]f you choose a fixed rate mortgage please specify the fixed period required*". The answer box after this statement contains the handwritten text "*5.13% var – 31/8/01 variable*".

The Provider issued an **Offer of Advance** dated **25 May 1999** to the Complainants which detailed as follows;

"1. Amount of Credit Advanced:	£79,650.00
2. Period of agreement:	20 years 0 months
...	
Interest Rate:	4.9900%
....	

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

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

"...  
The interest rate as quoted represents a reduction of 1.14% on the present [Provider] Variable Home Loan Rate. The [Provider] Variable Home Loan Rate less 1.14% will apply from initial drawdown of your mortgage until 31<sup>st</sup> August 2001 after which time your interest rate will revert to the then [Provider] Variable Home Loan Rate."

**Condition 2** of the **General Conditions** attached to the **Offer of Advance** details as follows;

“...  
The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [Provider] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper...”

**Condition 4 (a)** of the **General Conditions** attached to the **Offer of Advance** details as follows;

“Before the Advance is drawn down the following requirements must be complied with:

.....

The mortgage which must be on the Bank’s standard form must be a first legal mortgage and will secure the following: (i) The advance together with interest thereon at the Home Loan Interest Rate (varying) and...”

The Complainants signed the **Acceptance and Authority** attached to the **Offer of Advance** on **06 November 2000**, in the presence of their solicitor, on the following terms;

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

It is clear from the **Offer of Advance** that the Provider offered the Complainants a discounted variable interest rate of 4.99% for a period from the initial drawdown until **31 August 2001**, after which the interest rate would revert to the Provider’s “*Variable Home Loan Rate*”. Whilst I note that there is no mention as to what the Provider’s variable interest rate would be in the loan documentation, the **Offer of Advance** clearly sets out the nature of the variable rate to be one which may be increased or decreased by the Provider at any time. The Offer of Advance does not contain any reference to the ECB rate.

The particulars of the **Offer of Advance** including the applicable interest rate, were accepted by the Complainants by signing the **Acceptance and Authority** which was also signed and witnessed by the Complainants’ solicitor who, by doing so, confirmed that she had explained the nature and contents of the Offer of Advance to the Complainants.

The Complainants are of the view that they had the right to be offered a tracker interest rate for this mortgage loan when it was drawn down. It is important for the Complainants to understand that there is no reference whatsoever to a tracker rate of interest in the loan documentation that issued to them and which was accepted by them. The

/Cont’d...

Complainants were offered a variable rate which could be increased or decreased by the Provider at any time. This was the interest rate type that the Complainants had sought from the Provider in the **House Mortgage Application Form** which they signed on **04 October 2000**.

If it was the case that the Complainants were not satisfied with the interest rate that was offered by the Provider, the Complainants were under no obligation to accept the **Offer of Advance**. Moreover, I understand that tracker interest rate products were not available from the Provider in **2000** when the Complainants applied for a mortgage loan, tracker products only became available for selection from the Provider in **2001**. Therefore, I accept that the Provider was not in a position to offer the Complainants a tracker interest rate option during the mortgage loan application process in **2000** because such rates had not even been introduced at that time.

#### **Mortgage loan account ending 008**

The Complainants applied for additional borrowings in the amount of €100,000 by completing and signing a **Home Loan Application for Additional Mortgage Form** on **26 May 2004**.

**Part F** of the application for an additional mortgage is headed "*Home Loan Requested*" wherein the option of a repayment mortgage was selected. The "*Interest Option Required*" section of the application form offered a variable rate or a fixed rate for selection. The variable rate is selected. This section also queries as follows;

*"To coincide with remaining term*

*OR Repayment period if different"*

The following text appears in handwriting "*TOTAL MTG years 25*" under the "*Repayment period if different*" option.

The Provider issued an **Offer of Additional Advance** dated **22 July 2004** to the Complainants which detailed as follows;

<i>"1. Amount of Credit Advanced:</i>	<i>100,000 EUR</i>
<i>2. Period of agreement:</i>	<i>25 years 0 months</i>
<i>...</i>	
<i>Interest Rate:</i>	<i>2.8500%</i>
<i>...</i>	

/Cont'd...



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

The **Offer of Additional Advance** is stamped with "This offer supersedes that dated" and in handwritten text the date "13/06/04" is written.

I have not been provided in evidence with that earlier offer, however in circumstances where the Complainants signed and drew down the **Offer of Additional Advance** dated **22 July 2004** the earlier offer is not of relevance to this complaint.

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

*"The rate of the [Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for the Home Loan is ECB rate plus 0.85%. This margin is dependent on the amount borrowed and the value of the property to be mortgaged*

...

*The following items to be dealt with by [the Complainants]*

...

*Original term of existing mortgage [account number] to be extended to 25 yrs"*

The Complainants signed the **Acceptance** attached to the **Offer of Additional Advance** on **27 July 2004** on the following terms;

*"I/We the undersigned accept the within Offer of Additional Advance on the terms and conditions set out above and overleaf."*

The mortgage loan statements show that this mortgage loan has remained on the tracker interest rate of ECB + 0.85% since it was drawn down on **20 September 2004**.

There is no dispute between the parties in relation to the application of the tracker interest rate of ECB + 0.85% to this mortgage loan. Rather the Complainants take issue that the term of mortgage loan account ending **141** was extended to 25 years at this time. In this regard, the Complainants submit that this was not extended at their request.

The evidence shows that a request was made in the **Home Loan Application for Additional Mortgage Form** for the Complainants "total mortgage" to be for a 25 year term. The **Home Loan Application for Additional Mortgage Form** was signed on the following terms:

/Cont'd...

*“I/We hereby confirm that the information which I/we have provided above is true and correct and shall form the basis on which any mortgage offer is made.”*

It appears that it was on this basis that the Provider included the Special Condition in the **Offer of Additional Advance**, with respect to mortgage account ending **008** to change the term to the existing mortgage loan account ending **141**. The Complainants accepted the change of term by signing the **Acceptance** attached to the **Offer of Additional Advance** on **27 July 2004**. If it was the case that the Complainants were in fact requesting for the total mortgage, being the original mortgage together with the additional advance to be for a 25 year term and thus the Complainants did not want to agree to the extension of the term of mortgage account ending **141** at the time, they could have declined to sign the **Offer of Additional Advance**. However they did not do so. Rather they signed the **Acceptance** attached to the **Offer of Additional Advance** on **27 July 2004** which had the effect of the Complainants agreeing to the extension.

The Complainants have queried if the original terms of mortgage account ending **141** changed at all other than the length of term and on this basis suggest that the tracker interest rate should have been extended to mortgage loan account ending **141** at this time. The Special Conditions to the **Offer of Additional Advance** on mortgage account ending **008** did not make any other amendment to the original **Offer of Advance** with respect to mortgage loan account ending **141** which was signed on **06 November 2000**. The Complainants did not have a contractual entitlement to a tracker interest rate on mortgage loan account ending **141** at any time.

#### **Mortgage loan account ending 076**

The Complainants applied for additional borrowings in the amount of €20,000 by completing and signing a **Home Loan Application for Additional Mortgage Form** on **21 April 2005**.

**Part F** of the application for an additional mortgage is headed *“Home Loan Requested”* wherein the option of a repayment mortgage was selected. The *“Interest Option Required”* section of the application form offered a variable rate or a fixed rate for selection. The variable rate is selected. This section also queries as follows:

*“To coincide with remaining term*

*OR Repayment period if different”*

The Complainants selected the *“To coincide with remaining term”* option.

/Cont'd...

The Provider issued an **Offer of Additional Advance** dated **09 May 2005** to the Complainants which detailed as follows;

*"1. Amount of Credit Advanced: 20,000.00 Eur*  
*2. Period of agreement: 25 years 0 months*  
*...*  
*Interest Rate: 3.500%*

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

**Condition 2** of the **General Conditions** attached to the **Offer of Advance** details as follows;

*"...  
The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [Provider] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper..."*

The Complainants signed the **Acceptance** attached to the **Offer of Additional Advance** on **12 May 2005** on the following terms;

*"I/We the undersigned accept the within Offer of Additional Advance on the terms and conditions set out above and overleaf."*

It is clear from the **Offer of Additional Advance** that the Provider offered the Complainants a variable interest rate of 3.50%. The **Offer of Additional Advance** sets out the nature of the variable rate to be one which may be increased or decreased by the Provider at any time.

At the time the Complainants applied for the additional borrowings in **2001**, tracker interest rate products were on offer from the Provider. However, the Provider was not offering tracker interest rates on borrowings of less than €50,000. In these circumstances, it would appear that the Complainants were not eligible for a tracker interest rate on mortgage loan account ending **076**. The evidence shows that the Complainants sought a variable interest rate in the **Home Loan Application for Additional Mortgage Form** and the Provider offered the Complainants a variable interest rate for that mortgage loan.

/Cont'd...

The particulars of the **Offer of Additional Advance** to include the applicable interest rate, were accepted by the Complainants by signing the **Acceptance**.

If it was the case that the Complainants were of the view that the variable interest rate offered to them by way of the **Offer of Additional Advance** was not suitable for them, then the Complainants could have decided not to accept the **Offer of Additional Advance** and instead seek an alternative rate with the Provider or indeed another lender. However there is no evidence that the Complainant did so.

Having considered the mortgage loan documentation in respect of all mortgage loan accounts, I do not accept that the Provider incorrectly failed to offer the Complainants a tracker rate option at the inception of either mortgage loan account ending **141** or **076**. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on either mortgage loan account ending **141** or **076** at any time. Further, I do not accept that the Provider wrongfully extended the term on mortgage loan account ending **141** from 20 years to 25 years without the Complainants' consent in **2004**.

For the above reasons, I do not uphold this 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**

24 September 2020

/Cont'd...

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.