



<u>Decision Ref:</u>	2020-0333
<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 Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants held two mortgage loan accounts with the Provider, as follows:

- **Mortgage loan account ending 4613**
The Complainants signed and accepted a loan offer for mortgage loan account ending **4613** with the Provider on **30 March 2001**. The loan amount for mortgage loan account was IR£50,000 and the term of the loan was 17 years. The Letter of Approval outlined the Loan Type as a “*1 Year Fixed Rate Home Loan*”. Mortgage loan account ending **4631** was drawn down on **11 April 2001**, and was redeemed on **25 August 2017**.
- **Mortgage loan account ending 4430**
The Complainants signed and accepted a loan offer for loan account ending **4430**, on **14 March 2005**. The loan amount for the loan account was €40,000 and the term of the loan was 13 years. The Letter of Approval outlined the Loan Type as an “*Equity Release Variable Rate Secured Personal Loan*”. Loan account ending **4430** was drawn down on **29 March 2005**, and was redeemed on **25 August 2017**

This complaint is in relation to mortgage loan account ending **4430**.

The Complainants' Case

The Complainants outline that mortgage loan account ending **4613** was “*taken out*” in 2001 and was a “*tracker mortgage*”. The Complainants detail that in or around **March 2005**, they approached the Provider and sought a ‘top up’ on mortgage loan account ending **4613**. The Complainants submit that they requested €28,000, but the Provider suggested that they apply for €40,000 as they had a low loan to value ratio. The Complainants outline that they were “*...approved for €40,000*”.

The Complainants detail that mortgage loan account ending **4613** remained on a tracker interest rate, but the ‘top up’ portion was placed on a variable interest rate of 3.55%. The Complainants contend that as this was not a new mortgage but a ‘top up’ on their existing mortgage loan account ending **4613**, the ‘top up’ mortgage loan account should have had the same terms and conditions applicable to mortgage loan account ending **4613** – which included a tracker interest rate.

The Complainants outline that they completed the repayments on both mortgage loan accounts in **August 2017** and requested the title deeds from the Provider. The Complainants detail that they received a letter from the Provider regarding the title deeds, and this letter only referenced mortgage loan account ending **4613** and there was no mention of “*...the second mortgage or “top up” i.e. only ever one mortgage*”.

The Complainants are seeking a refund of the difference in interest charged over the period from **2005** to **2017** between the tracker and the variable rate on mortgage account ending **4430**.

The Provider's Case

The Provider submits that the Complainants held two loan accounts with the Provider, as follows;

1. Mortgage loan account ending 4613

The Provider submits that the Complainants signed and accepted a loan offer for mortgage loan account ending **4613** with the Provider on **30 March 2001**. The loan amount for mortgage loan account was IR€50,000 and the term of the loan was 17 years. The Letter of Approval outlined the Loan Type as a “*1 Year Fixed Rate Home Loan*” and the interest rate was initially 4.94%, with a variable interest rate applying thereafter. Mortgage loan account ending **4631** was drawn down on **11 April 2001**, and was redeemed **25 August 2017**.

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2. Loan account ending **4430** (the loan account the subject of this complaint)

The Provider details that equity release loans were included in its products from **2002** and tracker interest rates were launched on **15 January 2004**. The Provider outlines that it made a commercial decision not to include tracker interest rates for equity release products, and only offered variable and fixed interest rates for equity release loans.

The Provider submits that the Complainants completed an application form dated **08 March 2005** in respect of an Equity Release Variable Rate Secured Personal Loan in the sum of €40,000.

The Provider details that it issued a Letter of Approval to the Complainants dated **10 March 2005** in the amount of €40,000 on a variable interest rate of 3.55%. The Provider outlines that it did not offer the Complainants a tracker interest rate on loan account ending **4430** because it was an equity release loan, because the Provider had made a commercial decision in 2004 not to include tracker interest rates for its equity release loans.

The Provider details that mortgage loan account ending **4430** was drawn down by the Complainants in various amounts from **2005** until **2009** for various personal purposes. The Provider submits that the Complainants *"can have been in no doubt from the time of their obtaining their secured personal equity release loan in 2005 that they were operating two separate loan accounts each with its own distinct features."* The Provider details that there is no reference to mortgage loan account ending **4613** within the documentation as they were two separate and distinct loan accounts.

The Provider outlines that the documentation relating to mortgage loan account ending **4430** is sufficiently clear and transparent as regards the Complainants' entitlement to a tracker interest rate. The Provider details the documentation makes no reference to a tracker interest rate and did not contain any contractual entitlement to a tracker interest rate. The Provider reiterates that tracker interest rates did not apply to any equity release loan account provided by it.

The Provider details that the documentation relating to loan account ending **4430** *"clearly provides that the loan is a variable rate loan"* and notes that the European Standardised Information Sheet which accompanied the Letter of Approval states that the interest rate may be varied from time to time by the Provider. The Provider submits that it also states that the Complainants also had an option to apply for a fixed rate period (if available) but otherwise the interest rate would remain a variable rate.

The Provider details that mortgage loan account ending **4430** is “*separate and distinct*” from mortgage loan account ending **4613** which issued in 2001. The Provider outlines that the security for both loan accounts was a fixed charge over the same property, but they were both distinct loan types with mortgage loan account ending **4613** being a home loan for the purchase of a home and mortgage loan account ending **4430** being an equity release secured personal loan for expenditure at the discretion of the Complainants. The Provider goes on to detail that both loans were taken out four years apart “*...with different amounts, interest rates and repayment periods. They also involved separate applications, loan approval letters and letters of acceptance*”. The Provider submits that bank statements issued separately in respect of each account.

The Provider outlines that following the redemption of both mortgage loan accounts **4613** and **4430** on **25 August 2017**, it wrote to the Complainants on **03 October 2017** informing them that they were required to give the Provider their written authority and a fee of €35.00 in order to release the title deeds. The Provider submits that on **18 October 2017**, it received the Complainants written authority and redemption fee, and on **01 November 2017** the title deeds were sent to the Complainants by registered post. The Provider outlines that it is clear that the two mortgage loan accounts were the subject of correspondence relating to the redemption of two loans and the vacating of a single mortgage which secured the two loans.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to place loan account ending **4430** on a tracker interest rate from inception in **March 2005**.

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

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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 14 September 2020, outlining my preliminary determination 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, I set out below my final determination.

In order to determine this complaint it is necessary to review and set out the relevant provisions of the Complainants' loan documentation in relation to both mortgage loan account ending **4613** and **4430**, as well as the interactions between the Complainants and the Provider between **2001** and **2005** when the Complainants applied for and drew down both of the mortgage loan accounts.

Mortgage loan account ending 4613

The **Letter of Approval** dated **25 March 2001** details as follows;

“Loan Type: 1 Year Fixed Rate Home Loan

...

<i>Purchase Price / Estimated Value:</i>	<i>IRE£175,000.00</i>
<i>Amount of Loan:</i>	<i>IRE£50,000.00</i>
<i>Interest Rate:</i>	<i>4.94%</i>
<i>Term of Loan:</i>	<i>17 Years</i>
<i>Monthly Instalment:</i>	<i>IRE£362.72”</i>

Condition A of the **Special Conditions** detailed as follows:

“Special Conditions

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- A. *GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 “CONDITIONS RELATING TO FIXED RATE LOANS” APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE.”*

Condition 5 of the General Mortgage Loan Approval Conditions detailed as follows;

“5. CONDITIONS RELATING TO FIXED RATE LOANS

- 5.1 *The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be charged at intervals of less than one year.*
- 5.2 *The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
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- 5.4 *Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee.”*

The **General Mortgage Loan Approval Conditions** also outline:

“IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

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

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **30 March 2001**. The Acceptance of Loan Offer states as follows:

- “.. I/we the undersigned accept the within offer on the terms and conditions set out in*
- i. Letter of Approval*
 - ii. The General Mortgage Loan Approval Conditions*
 - iii. [the Provider’s] Mortgage Conditions.*

copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.

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My/our Solicitor has fully explained the said terms and conditions to me/us.”

It is clear that the Letter of Approval envisaged a one-year fixed rate of 4.94% and thereafter the option of a variable rate. The variable rate in this case was a variable rate which could be adjusted by the Provider.

As tracker interest rates were not part of the Provider’s suite of products in **2001**, it was not possible for the mortgage loan documentation which issued at that time to include a contractual entitlement to a tracker interest rate. It is unclear to me why the Complainants are of the view that mortgage loan account ending **4613** was operating on a tracker interest rate from inception when the terms and conditions did not provide for a tracker rate. Further it appears that tracker interest rates were not part of the Provider’s product options at the time the mortgage loan was applied for.

The Provider offered the Complainants a mortgage loan commencing on a fixed rate, which was accepted by the Complainants, having acknowledged that the terms and conditions of the mortgage loan were explained to them. The evidence shows that this mortgage loan account was redeemed on **17 August 2017**.

Mortgage loan account ending 4430

An **Application for Credit** was signed by the Complainants on **08 March 2005**, which detailed as follows;

“2. Details of Mortgage Required

Type of Loan:

<i>Amount of Loan required</i>	<i>EUR 40,000.00</i>
<i>Purchase price/Value of property</i>	<i>EUR 340,000.00</i>
<i>Loan type</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
<i>Repayment Term required</i>	<i>13 Years”</i>

The Provider’s **Lending Interest Rates** document, stated to be effective from the start of business on **02 March 2005**, outlined as follows;

“Lending Interest Rates

...

<i>Equity Release / Secured Personal Loans</i>	<i>Rate</i>	<i>APR</i>
<i>[Name of Product] Variable Rate</i>	<i>3.55%</i>	<i>3.6%</i>

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<i>Secured Personal Loan Variable Rate</i>	<i>5.05%</i>	<i>5.2%</i>
<i>Secured Personal Loan 1 Year Fixed Rate</i>	<i>5.10%</i>	<i>5.2%</i>
<i>Secured Personal Loan 5 Year Fixed Rate</i>	<i>5.94%</i>	<i>6.1%</i>
<i>Secured Personal Loan 10 Year Fixed Rate</i>	<i>6.85%</i>	<i>7.1%</i>

The **Letter of Approval** dated **10 March 2005** details as follows;

<i>Loan Type:</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
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<i>"Purchase Price/Estimated Value:</i>	<i>EUR 340,000.00</i>
<i>Loan Amount</i>	<i>EUR 40,000.00</i>
<i>Interest Rate:</i>	<i>3.55%</i>
<i>Term:</i>	<i>13 year(s)"</i>

The **Special Conditions** to the Letter of Approval detail as follows;

"C. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGAE LOAN APPROVAL CONDITIONS."

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the **Conditions relating to "[Name of Product]" Equity Release Loans** and details the following regarding the calculation of interest:

"....

11.4 For the purposes of the calculation of interest, the daily balance of the [Name of Product] Equity Release Loan shall be reduced by the then credit balance (if any) in the Holding Account. The credit balance in the Holding Account shall be reduced by the amount of withdrawals on the date of the withdrawal irrespective of when the withdrawal cheque is cashed. No interest will be payable to the Applicant on the balance held in the Holding Account."

However, there was no specific condition in the **Conditions relating to "[Name of Product]" Equity Release Loans** in relation to the interest rate applicable to the loan.

The **General Mortgage Loan Approval Conditions** outlined;

"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:

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

The **Acceptance of Loan Approval** was signed by the Complainants on **14 March 2005**.

The Acceptance of Loan Offer states as follows:

*“1. I/we the undersigned accept the within offer on the terms and conditions set out
in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval Condition*
- iii. [the Provider’s] Mortgage Conditions.”*

It is clear from the Letter of Approval that the loan was an equity release mortgage loan which was on a variable interest rate loan which could be adjusted by the Provider.

If the Complainants did not want to pursue this option because they were unhappy with taking out a new mortgage loan secured on their property or the rate applicable to the equity release mortgage, they could have declined to accept the Provider’s offer. Instead the Complainants accepted the Provider’s offer by signing the **Acceptance of Loan Approval** on **14 March 2005**.

The Complainants contend that in **March 2005**, they sought a ‘top loan’ to mortgage loan account ending **4613** and on the basis that mortgage loan account ending **4613** was on a tracker interest rate, the Provider should have “placed” loan account ending **4430** on the same terms and conditions as mortgage loan account ending **4613**, which included the option of tracker interest rate.

It is important for the Complainants to understand, that they were at the time seeking additional lending from the Provider, secured against the equity in the Complainant’s property. There was no obligation on the Provider to offer them the sum that they sought to borrow or to structure the lending arrangement as an addition to their existing home loan, as the Complainants have suggested. The new loan that the Complainants applied for was clearly that, a new equity release loan.

It is clear from the loan documentation that mortgage loan account ending **4430** was an entirely separate loan to mortgage loan account ending **4613** – so whether or not mortgage loan account ending **4613** had a tracker interest rate applied to it at any time is irrelevant to the interest rate applicable to mortgage loan account ending **4430**.

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The Complainants applied for an equity release loan on a variable rate and that is what they were offered by the Provider. The evidence shows that the choice to take out the mortgage loans on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

I understand that the Provider did not offer tracker interest rates on equity release products. In this regard I accept that the Provider operates as a business and is entitled to offer products and set interest rate options at its absolute discretion. The Provider was not offering tracker interest rates on equity release products in **March 2005** or at any other time. It is clear from the **Lending Interest Rates** set out above that the interest rates available for equity release loans were variable or fixed rates.

The Provider was not under any obligation to offer the Complainants a tracker interest rate option on the equity release mortgage loan in **March 2005**, or at any other time. The two mortgage loans held by the Complainants with the Provider were clearly separate mortgage loans, which were subject to the individual terms and conditions attached to those loans.

For the reasons set out above, 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**

6 October 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.

