



<u>Decision Ref:</u>	2020-0350
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Errors in calculations
<u>Outcome:</u>	Rejected

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

The Complainants entered into two mortgage loan agreements with Entity A in **May 2004** and **June 2006 (Loan 1 and Loan 2; together, the Loans)**. Entity A merged with another entity in **July 2011** to form Entity B. The Complainants' loans were subsequently transferred by Entity B to the Provider, against which complaint is made (the Provider) in **June 2014**. Following a review of their Loans in **2016**, the Complainants discovered that interest was incorrectly applied to the Loans resulting in an overcharging of interest.

The Complainants' Case

The Complainants explain that at the beginning of **2016** they became aware of overcharging of interest rates amongst financial institutions. This prompted them to enquire into the amount of interest charged on their loan account as their loans has been transferred from Entity A to Entity B and then acquired by the Provider.

The Complainants contacted a financial services company to initiate an interest review process on **7 March 2016** and were advised of the information required from the Provider in order to conduct the review. Having encountered certain difficulties obtaining the relevant loan information from the Provider, the Complainants furnished this to the financial services company who carried out an audit on the Complainants' loan account. It is submitted that *"... as you will see there was a big discrepancy and monies were overcharged on both mortgages."* The Complainants advise, in relation to Tax Relief at Source (**TRS**), that *"... this was clarified with the revenue and controller general and all sorted."*

The Complainants informed the Provider of the outcome of the account audit and the Provider initiated a complaint. The Provider issued a response to the Complainants advising them that it was not upholding the complaint “... *and had various points mentioned in it.*” The Complainants forwarded a copy of the Provider’s response to the financial services company and “... *they subsequently got back in contact with me with a slightly revised statement but said [the Provider] still owed a substantial amount.*”

The Provider’s Case

The Loan

The Provider explains that it acquired the Loans on **10 June 2014**. The Provider refers to the loan offer letter dated **6 May 2004** in respect of Loan 1, General Condition 14 and Special Condition 91.4 regarding the charging of interest. The Provider explains that Special Condition 91.4 sets out Entity A’s right to convert Loan 1 to a variable rate product on the expiry of the fixed rate term. The Provider also refers to a letter of offer dated **31 May 2006**, insofar as it demonstrates the Complainants’ acceptance of the conversion of Loan 1 to an interest only facility.

The Provider submits that Special Condition 91.4.4 sets out Entity A’s right to convert Loan 1 from a fixed rate loan to a variable rate product at the end of the fixed term.

In respect of Loan 2, the Provider refers to General Condition 14 and Special Condition 60.7 set out in a loan offer letter dated **7 June 2006**. In respect of Special Condition 60.7, the Provider submits this serves to explain why the interest rate applied to Loan 1 changed from a home loan rate to a residential investment property and reinforces the fact that this occurred with the Complainants’ knowledge and consent.

The Provider submits the above clauses demonstrate the Complainants were informed of, and gave consent to, the conversion of their loan account to a residential investment property product. The Provider also observes that as the Complainants’ main grievance appears to be that the Loans were not charged interest in line with ECB rate movement, and states that there is no reference to ECB/tracker rates within any of the above mentioned originating documentation.

The Provider has also set out a table, in summary format, outlining the interest rates applied to the Loans between **2004** and **2016**. Regarding the above mentioned conversion to an interest only facility, the Provider advises that when the loan documentation was signed the interest rate was 4.23% variable but the prevailing rate changed to 4.48% between signing and completion.

Overcharging of Interest

The Provider refers to the documentation submitted by the financial services company which is relied on by the Complainants in support of their position that interest was incorrectly applied to the Loans.

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The Provider's understanding of the methodology applied is that the APR at drawdown has been used to calculate an *implied ECB rate* which has then been tracked against historical ECB movement and compared to the actual variable rates applied historically. It is submitted "*[t]his methodology has no foundation in fact, as no such rate was ever offered to the borrowers.*" The Loans were variable rate products and such products do not track the ECB rate.

The Provider remarks that no case has been made as to why an ECB rate should have been applied to either or both loans. There is no reference to ECB tracker rates in the original loan documentation, nor have the Complainants asserted that such a rate was ever offered or discussed.

The Provider has furnished a table outlining ECB interest rates over the past number of years which was obtained from the ECB website, and states that as no ECB tracker loan has ever been in place, it is impossible to speculate what tracker margin might have theoretically been offered to the Complainants.

Tax Relief at Source

It is the Provider's understanding that the Complainants' query regarding TRS was withdrawn. This was stated in the Complaint Form as follows: "*In relation to the tax relief at source this was clarified with the revenue and controller general and all sorted.*"

In general terms, the Provider does not calculate a borrower's TRS entitlement. Revenue supplies each financial services provider with details of a borrower's TRS entitlement which a financial services provider allocates on a monthly basis. The Provider states that it is a borrower's responsibility to ensure their personal information is up to date with Revenue. The Provider states that it allocated TRS to the Complainants in line with Revenue instructions.

The Provider explains that on **2 August 2016**, a complaint was logged based on the subject matter of this complaint and a Final Response letter was issued on **16 September 2016**.

The Complaint for Adjudication

The complaint is that the Provider overcharged interest on the Loans.

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.

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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 17 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.

The Loans

Loan 1

The Complainants signed a letter of loan offer dated **6 May 2004** on **13 May 2004**. The purpose of the loan was to fund the purchase of a principal private residence. The interest rate is stated as **"2.74% pa Fixed See Special Conditions."**

Special Condition 91.4 states:

"1) The interest rate applicable to this advance shall be fixed for 12 months from the date of completion of the mortgage and thereafter may not be changed at intervals of less than one year 2) The interest rate specified in this offer may vary on or before the date of completion of the mortgage (ie The date of mortgage advance) Alternatively this interest rate may be booked for a period of eight weeks from 06/05/2004 subject to payment of €126 97 non refundable booking fee. If the fixed rate is booked and the advance is not drawn down prior to or on 06/07/2004 the advance may be subject to a new fixed rate 3) If the loan is repaid in whole or in part within the fixed rate period or if this fixed rate agreement is terminated prior to maturity of the fixed rate period, the mortgager shall in addition pay a sum equal to six months interest calculated at the fixed rate on the principal sum of the loan 4).

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Notwithstanding clause 1 above [Entity A] shall have the absolute right at the end of each fixed rate period to convert to a non qualifier variable rate loan agreement. On the exercise of such an option the provisions relating to the fixed interest shall no longer apply."

The General Conditions state:

"12 Interest will accrue on your Account from the date the Loan Cheque is issued by [Entity A].

...

14. Where the interest rate quoted is variable, the initial rate of interest will be the current rate charged at the date the loan cheque is issued, subsequently the rate may vary within the terms of the mortgage. THE PAYMENTS RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME. ..."

Following a written request to convert Loan 1 to a residential investment loan, Entity A wrote to the Complainants on **31 May 2006** confirming their request for an interest only loan facility in respect of Loan 1 had been approved. This resulted in the classification of the loan as a residential investment, interest only loan. The interest rate for this facility was stated as 4.23%. Under the heading *Monthly Repayments* it is stated *"This may vary due to rate on term variation."* This was accepted by the Complainants on **1 June 2006**. The Provider wrote to the Complainant on **7 June 2006** confirming the conversion and advising that the interest rate had been adjusted to a 4.23% variable rate.

Loan 2

The Complainant entered into a further mortgage loan agreement set out in a letter of loan offer dated **7 June 2006**. This loan was offered on an interest only basis. The interest rate is stated as *"4.48% pa. Variable."* This was accepted by the Complainants on **10 June 2006**.

Special Condition 60.7 states:

"That existing mortgage a/c no: [Loan 1] had been converted to a Residential Investment Property and all appropriate interest rate adjustments and insurances are put in place, prior to release of loan cheque."

General Conditions 12 and 14, cited above in respect of Loan 1, are the same as those accepted as part of Loan 2.

Conversion to Home Loan Rate

The Complainants wrote to Entity A in **May 2009** requesting that the Loans be converted to a *Standard Variable Home Loan rate* with immediate effect as the Complainants were residing in the mortgaged property.

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Entity A wrote to the Complainants on **9 June 2009** outlining two conditions required by Entity A in order to comply with their request. The first was that the Loans would convert from interest only repayments to capital and interest repayments with overall monthly repayments of around €1,190.00. The second condition related to address verification.

Account Statements and Certificates of Interest

The Complainants furnished a number of documents relating to the Loans in **October 2016**. These include annual account statements, Certificates of Interest, and Notices of Interest Rate Variation.

Statements were issued by Entity A up to **2010**, Entity B issued statements in **2011, 2012** and **2013**, and the Provider issued statements from **2014**. These statements are similar in format and set out the interest rate charged to each loan. The statements issued by the Provider in **2015** and **2016** appear to have changed format but convey essentially the same information as prior statements. The earliest account statement and Notice of Interest Rate Variation date from **2005**. The Certificates of Interest set out the amount of interest charged during a particular year and the interest rates applied to the Loans. The Notices of Interest Rate Variation advise the Complainants of upward or downward movements in interest rates and the revised monthly repayments arising from the changes in interest rates.

The Complainants' Assessment

Three spreadsheets have been prepared by the company acting on behalf of the Complainants. These relate to suggested overcharging of interest on each of the Loans and the amount of TRS applied.

In respect of Loan 1, at the bottom of page 1, it is stated:

"From the above table [it] would appear that a fixed rate of interest was offered at 2.74% which in effect means that a spread of 0.74% over the base rate, the ECB of 2.00%.

The APR on offer was 3.53% which means the interest rate should be 3.48%.

As the ECB rate at the time of offer was 2.00% then the implied profit margin is 1.48%.

Giving a combined interest rate of 3.48% at inception."

At the bottom of page 4, the following conclusion is reached:

"It would appear from the above table, that had the bank followed the ECB and using the implied profit margin at inception in the loan offer letter of 1.48% above ECB and followed this methodology then the mortgage account balance and the interest charged thereon would be less, thereby causing the client a loss of €20,480.95 ..."

The basis for calculating the relevant interest rates are the same across all three spreadsheets. However, it is stated in respect of Loan 2 that interest was overcharged by €9,506.14. It is also stated on page 1 that there was "... a fixed rate of interest was offered at 4.48%." This is incorrect. The rate at which Loan 2 was offered was a variable rate of 4.48%.

The Complaint

The First Complainant forwarded the documentation prepared by the financial services company to the Provider on **2 August 2016**, stating that there were "... huge discrepancies between what was paid and what should actually have been paid on both mortgages."

The Provider issued a Final Response letter on **16 September 2016**. In this letter, the Provider explained:

"In November 2004, following receipt of your signed acceptance of the conditions set out in the Letter of Offer you were advanced €166,500. These funds were released in three stages 0 €90,000.00 on 24th November 2004, €33,250.00 on the 12th January 2005 and €43,250.00 on the 4th May 2005, where the monthly repayments were on a Capital and Interest basis.

In June 2006, following receipt of your signed acceptance, a further €105,000.00 was advanced to you at a variable rate of 4.48%. A condition of the advance was that the mortgage was to be converted from a Principal Private Residence ("PPR") Mortgage to a Residential Investment Property ("RIP") Mortgage and that the Contractual Monthly Instalments ("CMI") were to be on an Interest Only basis. The conversion was due to the fact that the purpose of the additional advance was to purchase a property in [location abroad]. ...

Following your request in June 2009, the loan account was converted from a RIP to a PPR and your CMI changed from Interest Only to Capital and Interest Repayments.

I would like to advise that the above mentioned loan account is on a variable rate and not a tracker mortgage. A Tracker Mortgage is the only type of mortgage which is linked to the European Central Bank ("ECB") base rate and any changes to this rate must be passes on by all Financial Institutions. In regards to Variable Rate Mortgages, I would like to advise that a financial institution can alter a variable rate that it is charging at any time without the ECB amending its interest rate. Alternatively, it is not compulsory for a financial institution to pass on an ECB rate change to Variable Rate Mortgages however it is common practice that the majority of these rate changes are passed on to the customer.

In view of the above, I am unable to uphold your complaint on the basis that the above loan account was at no point a Tracker Mortgage and that all interest rates applied to the account are correct with no overcharging ever having occurred."

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Further Submission

The Complainants delivered a further submission on **1 March 2020**, in response to the Provider's formal response. At paragraph 6 of this submission it is stated:

"To refer back to the company we employed to carry out the initial interest rate check they had the following observations about [the Provider's] Responses:

- *We are not saying that it is a tracker mortgage - we are stating that it is a variable rate mortgage, which also follows, not tracks, but follows the ECB.*
- *We are stating that [Entity A] followed ECB from inception, up until the crash in 2008. (So without exception for 4 years).*
- *After the crash, no Irish bank could get funding from anywhere but the ECB and the taxpayer.*
- *The clause in your contract in relation to interest rates are not clear and can mean anything and nothing, so this needs clarity from [the Provider].*
- *Where [the Provider] says that 'A Tracker Mortgage is the only type of mortgage which is linked to the ECB'*

This is incorrect and a false statement of fact.

A Tracker can be linked to any rate including Euribor etc.

Also a tracker means that a fixed margin over base rate is specified i.e. ECB +1.05% / Euribor +0.75% - it means that if the base rate (ECB) changes the fixed part (1.05%) never does.

This is what a tracker means."

Analysis

Loan 1 was entered into in **May 2004**. This was subject to a 1 year fixed interest rate. On the basis of the terms on which Loan 1 was accepted by the Complainants, in particular those which I have cited above, Entity A was entitled to convert this loan to a variable interest rate. This is what appears to have occurred and without evidence of any objection from the Complainants at the time.

Loan 1 was recast somewhat in **June 2006**. The effect of this, in terms of the interest rate, was that it would be subject to a variable interest rate. The Complainants were aware of and accepted these terms. It is important to note that the Complainants did not have to accept Entity A's offer if they were in anyway dissatisfied with the underlying terms. It is clear that Loan 1 was subject to a variable interest rate from **June 2006**.

In terms of Loan 2, this was entered into in **June 2006**. This loan was offered and accepted on the basis that it would be subject to a variable interest rate.

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At this juncture, I would note that the Complainants have not established that the rate of interest applied to the Loans was otherwise than in line with the terms on which these Loans were offered and accepted.

The point is made that the “... *clause in your contract in relation to interest rates are not clear and can mean anything and nothing, so this needs clarity ...*” The evidence does not support this contention. It was quite clear that Loan 1 would be subject to a fixed rate of interest for the first year from **June 2004** to **June 2005**. It appears that a variable rate of interest was then applied to Loan 1. However, this loan was recast in **June 2006** where it was expressly agreed that the loan would be subject to a variable interest rate.

The interest rate in respect of Loan 2 on the other hand was clear and unambiguous from the beginning in that it would be subject to a variable interest rate. Accordingly, I accept that interest was applied to the Loans in line with the relevant loan terms.

The Complainants have essentially premised their complaint on the fact that interest was overcharged on the Loans by comparing the interest rates applied to the Loans with prevailing ECB interest rates. Further to this, while acknowledging the Loans are subject to a variable rate, the Complainants advise their method of calculation “... *follows, not tracks, but follows the ECB ...*” The evidence does not support the claim that interest was overcharged on the Loans simply by reference to a methodology based on the ECB interest rate. It was never agreed nor stated in any loan documentation that interest was to be calculated by reference to the ECB rate. Accordingly, the Complainants were never contractually entitled to have interest charged in this way. In essence, the Complainants have offered an alternative way of calculating a variable interest rate charge and are now seeking to impose this.

Looking at the methodology adopted by the Complainants, a number of observations can be made. First, there is no contractual or legal justification/obligation for using an ECB rate. Second, an *Implied profit* is not provided for in the loan documentation and is premised on the use of an ECB rate. Third, it has not been established that any of the entities involved in the Loans imposed or charged this type of profit margin nor has it been related back to the loan documentation. Fourth, the Complainants do not know the precise profit margin used or how such a margin is actually assessed as part of the interest rate calculation. Fifth, it is stated the calculation *follows* the ECB rate. It is not stated how or to what extent it follows the ECB rate nor do the spreadsheets indicate how this *following* of the ECB rate affects the proposed interest rate. I consider the methodology adopted by the Complainants to be arbitrary, speculative, imprecise and not supported by any of the evidence or Terms and Conditions of the loans.

For the reasons set out in this Decision, I do not uphold this complaint.

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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**

9 October 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.