



<b><u>Decision Ref:</u></b>	2020-0351
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Refusals (banking) Delayed or inadequate communication Failure to provide product/service information
<b><u>Outcome:</u></b>	Rejected

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

The Complainants are customers of the Provider and had two mortgage loan agreements with the Provider, one was subject to a tracker rate of interest and the other was subject to a standard variable rate of interest. The Complainants applied for a tracker portability loan through their broker (the **Broker**) in **May 2017** and entered into a tracker home loan (the **Tracker Loan**) and a 3 year fixed rate new business home loan (the **Home Loan**) with the Provider in **November 2017**. The Complainants sold their home and used the proceeds of sale together with the loan facilities advanced by the Provider to purchase a new property. The Complainants believe they are entitled to avail of the Provider's 2% cashback at drawn down offer in respect of the Home Loan. However, the Provider asserts this is not the case as the Home Loan is excluded on the basis that it constitutes *additional funds*.

**The Complainants' Case**

The Complainants explain that the borrowings in respect of their home are comprised of two loans: a tracker portability loan and a new business home loan.

The Complainants refer to an advertisement contained on the Provider's website in respect of a cashback offer of 2% on mortgage loans. It is accepted that the tracker portability loan is excluded from the cashback offer. However, the new business home loan is a 3 year fixed new business home loan, and the Complainants "... queried with [the Provider] why it is that this part of the loan is not eligible for the cashback offer."

In response to their complaint, the Provider "... cites that the 'offer is not available to tracker portability or negative equity customers (including any additional funds).'" The Complainants "... disagree that the provision of a new entity, which the bank itself has called a '3-year fixed new business home loan', can be regarded as 'additional funds'." The Complainants submit that the home loan should be eligible for the 2% cashback offer.

In resolution of this complaint, the Complainants are seeking *cashback* on their loan at 2% totalling €5,879.00.

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

The Provider explains that it issued letters of approval in relation to the Tracker Loan and the Home Loan on **27 November 2017**.

It is further explained that a Mortgage Mover by the Provider is a suite of products offered by the Provider which allows its customers to move home if they find themselves in negative equity or if they hold an existing Provider mortgage loan on a tracker interest rate. A Mortgage Mover consists of the Provider's negative equity mortgage products and its tracker portability products.

The Complainants are considered Mortgage Movers as they availed of the Provider's tracker portability product. This allows customers to move home and keep the tracker interest rate that applied to their existing mortgage loan account plus an additional margin of 1%.

The Complainants initially held two mortgage loan accounts with the Provider secured on a previous property. In **May 2017**, the Complainants applied for a tracker portability loan through their broker, the Broker. The Complainants wished to sell their previous property and purchase a new home.

The Provider advises that as part of the tracker portability terms, the Complainants' existing Tracker Variable Rate Home Loan and their existing Standard Variable Rate Home Loan were to be redeemed in full by the sale of the original property.

The Tracker Loan in the amount of €293,549.63 together with the remaining sales proceeds were to be used to purchase the new property. However, the Complainants also required additional funds to purchase the property. The Provider outlines that in accordance with the terms of the tracker portability product, these additional funds were drawn down by way of the Home Loan in the amount of €293,950.37. These were drawn down in **June 2018**.

The Provider refers to the application form signed by the Complainants on **11 May 2017** which is titled *Home Mover Application*. The Provider refers to certain sections of the application form and the Complainants' acknowledgement of the *Mortgage Product Brochure* which described the tracker portability product in detail. The Provider also refers to two Approval in Principal letters dated **11 August 2017** and **28 August 2017** respectively.

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The Provider submits that its Mortgage Mover product suite was widely advertised in the media and across its branch and broker network. The Provider states it is evident from the Broker's communications with it during the application process that the Complainants actively sought this product in order to move home and keep their tracker interest rate. Accordingly, the Provider states that it is satisfied the designation of the Mortgage Mover/Tracker Portability product was brought to the attention of the Complainants.

The Provider explains that it furnished all brokers with the relevant product brochures, promotional material and flyers both by email and through its broker website. The Provider is satisfied the Broker had adequate information in relation to the limitations of the cashback at drawdown offer. It submits that the onus was on the Broker to discuss the terms and conditions of the tracker portability product with the Complainants during the application process.

The Provider refers to its Mortgage Guide and a number of pages dealing with the cashback offer in particular pages 7 to 9 and 31. The Provider also refers to emails to its broker network dated **8 January 2016**, **18 January 2016** and **12 June 2017** in respect of the offer. The Provider remarks that communications from the Broker did not contain any reference to the cashback offer and states that at no time were the Complainants given an expectation that they were entitled to avail of the offer.

Referring to page 31 of the Mortgage Guide, the Provider advises that as the Home Loan is classified as additional funds, it is not eligible for the cashback offer and is correctly classified as additional funds as part of the tracker portability product. The Provider also refers to page 10 of the Home Movers Brochure in this regard.

### **The Complaint for Adjudication**

The complaint is that the Provider wrongfully and/or unreasonably deemed the Complainants' Home Loan ineligible for its 2% cashback at drawdown offer.

### **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.

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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.

### **Mortgage Guide**

Page 9 of the Mortgage Guide states:

***“Some important information on the mortgage that gives you more:***

*The 2% cashback at drawdown offer is not available to tracker portability or negative equity customers (including any additional funds), buy-to-let (BTL), equity release or home improvement mortgage loans or applicants who have drawn down any of their funds before 11 January 2016.”*

At page 31 of the Mortgage Guide, it is explained that:

***“Important Information for 2% Cashback at drawdown***

*The 2% Cashback at drawdown is paid on the amount of the mortgage advanced and will be paid to the loan applicant who has received a full Letter of Approval on or before 31 March 2018 ... 2% cashback at drawdown excludes tracker portability or negative equity customers (including any additional funds), buy-to-let (BTL), equity release or home improvement mortgage loans ...*

***The above information is not exhaustive and is therefore not to be read in place of the loan conditions contained in the special conditions of your Letter of Approval. Please read your loan conditions carefully and you may wish to obtain legal advice.”***

### **Home Movers Guide**

A Track Portability Mortgage is outlined at page 10:

### ***“What is Tracker Portability?”***

*Tracker Portability is our way of saying that you can move home and keep the tracker interest rate that applies to your primary mortgage plus an additional 1%. As you are aware, your tracker interest rate is made up of the ECB rate + lender’s margin. For Tracker Portability, the tracker interest rate that will be transferred will not include any adjustments that have been applied to the margin since the current tracker rate product was set up on the primary mortgage. ...*

### ***Track Portability with additional funds***

*If you want to trade up to a more expensive property and need additional funds to complete the purchase, these additional funds will be offered at new mortgage business rates. These newly borrowed funds are a separate loan and, together with your new Tracker Mortgage, will be known as a “Tracker Portability Mortgage”. ...”*

The Mortgage Movers Guide also recommends at page 27 that customers seek independent legal, financial and tax advice.

### ***Cashback Advertisement***

The Provider has furnished a copy of its cashback advertisement dated **24 August 2017**. This states:

*“2% cashback at drawdown will be paid on the amount of the mortgage advanced. Excludes tracker portability or negative equity customers (including any additional funds). ...”*

### ***The Broker***

It is not disputed that the Complainants’ Broker was part of the Provider’s broker network. The Provider has furnished two emails issued to its broker network in **January 2016** in respect of the 2% cashback offer. While these emails contain details of the Provider’s cashback incentive, they relate to customers who received full Letters of Approval prior to **30 June 2016**. However, the Complainants received their Letters of Approval in **November 2017**. In such circumstances, I do not consider these emails to be relevant to a determination of this complaint.

Notwithstanding this, the Provider wrote to its broker network on **12 June 2017**. This letter states:

### ***“2% Cashback Extension***

*[The Provider] is announcing that the 2% cashback offer has also been extended from the 30th June to 31st December 2017 for qualifying mortgages\*\*.*

*Please note that qualifying mortgage that have received a formal Loan Offer prior to December 31st 2017 will be eligible, however we no longer include a condition in relation to same in the special conditions on the Loan Offer.*

*\*\*The following loan types do not qualify for the 2% cashback promotion: Top-up loans, Tracker Portability loans, Buy to Let loans and Negative Equity loans.\*\**

### ***The Application Form and Approval in Principle***

A *Mortgage Application Form* and a *Home Mover Application* were completed by the Complainants and their Broker in **May 2017**. The Home Mover Application makes specific reference to the tracker portability. Approval in Principle issued in the respect of the Tracker Loan on **11 August 2017** and **28 August 2017** in respect of the Home Loan.

### ***Letters of Approval***

The Provider has furnished the Letters of Approval dated **27 November 2017** in respect of the Tracker Loan and the Home Loan. These appear to have been issued through the Broker. While each of these letters contain a section dealing with a monthly cashback offer, there is no reference to a cashback at drawdown offer. It was also a condition of each Letter of Approval that the Complainants' existing loans be discharged and in terms of the Tracker Loan, that a first fixed charged be created in favour of the Provider in respect of the new property.

### ***Acceptance of the Loans***

The Complainants signed an Acceptance of Loan Offer dated **18 January 2018** in respect of each loan. By signing these documents, the Complainants acknowledged and accepted, amongst other things, the Provider's General Mortgage Loan Approval Conditions, and the terms and conditions on which the loans were being offer were fully explained to them by their solicitors.

### ***Sample Condition***

The Provider has provided a sample of the type of *Special Condition* that would offer cashback at drawn down. This states:

*"Where the loan is drawn down, [the Provider] will pay a sum to the applicant equivalent to 2% of the loan amount. Such sum will be lodged to the applicant's account from which the mortgage repayment will be made and the lodgement will be made not later than 20 working days from the date of drawdown. In the event that the applicant wishes to redeem the loan in full at any time within the period of 5 years form the date of drawdown, the said sum of 2% of the original loan amount be become payable by the applicant to [the Provider] and accordingly will be added to the redemption amount which the Bank will require the applicant to pay in order to redeem the mortgage."*

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### ***The Complainants' Query***

The Complainants wrote to the Provider on **10 January 2019** querying why the Home Loan would not be eligible for the 2% cashback at drawn offer.

The Provider responded on **18 January 2019** advising the Complainants that *"... this mortgage is coded as a Mortgage Mover and this unfortunately does not qualify for the 2% lump sum incentive, as per the terms and conditions of this incentive."*

During a telephone conversation with the First Complainant on **28 January 2019** regarding the cashback incentive, a formal complaint was logged by the Provider's agent. The Provider issued a Final Response letter on **1 February 2019**. The letter essentially advised that as the Complainants' loan applications were made through their Broker, the Broker would have been aware of the terms and conditions surrounding the cashback offer. The Provider also directed the Complainants to the wording contained on page 9 of the Mortgage Guide.

### **Analysis**

Prior to their application for the Tracker Loan and the Home Loan (together, the **Loans**), the Complainants were existing customers of the Provider and had two mortgage loans with it, one of which was subject to a tracker rate of interest.

The evidence indicates that the Complainants wished to purchase a new home. They did this with the assistance of the Loans and the remaining proceeds from the sale of their original home after discharging their existing loans with the Provider.

As the Complainants were existing customers of the Provider and had an existing tracker loan, they were eligible, under the Provider's Mortgage Mover service, for a Tracker Portability loan. However, the Tracker Loan together with the surplus sales proceeds which totalled approximately €455,100 (€293,500 + €161,600) were insufficient to purchase their new home costing around €749,000. Accordingly, further finance was required. This was obtained in the form of the Home Loan.

The Provider's Mortgage Guide and the cashback advertisement exclude certain loan products from the offer. For the purposes of this complaint, the exclusions cover tracker portability customers, including any additional funds.

In terms of *additional funds*, the Mortgage Movers Guide states:

*"... If you want to trade up to a more expensive property and need additional funds to complete the purchase, these additional funds will be offered at new mortgage business rates. These newly borrowed funds are a separate loan and, together with your new Tracker Mortgage, will be known as a "Tracker Portability Mortgage".*

Thus, additional funds borrowed to finance the purchase of a property on top of a tracker portability loan are offered at *new mortgage business rates*. This was precisely the purpose of the Home Loan, and the manner in which it was offered by the Provider. Furthermore, while newly borrowed funds would be considered a separate loan, it is stated that any newly borrowed funds together with the new tracker loan would be known collectively as a *Tracker Portability Mortgage*.

Therefore, for the purposes of the Provider's Mortgage Mover service and the cashback offer, I accept that the Home Loan constitutes *additional funds*. Separately, I would also consider the Tracker Loan and the Home Loan to be collectively be known as a *Tracker Portability Mortgage* and as such, render the Complainants tracker portability customers.

The Mortgage Guide and the cashback at drawdown offer excludes tracker portability customers including *additional funds*. As the Complainants have a *Tracker Portability Mortgage* which comprises the Tracker Loan **and** the Home Loan, they are tracker portability customers and therefore, excluded from the cashback offer. I do not accept that it is possible to separate out the Loans into the Tracker Loan and the Home Loan for the purpose of the cashback offer which is what the Complainants appear to be attempting to do. Further to this, the Home Loan, in and of itself, would, as stated in the previous paragraph, be considered *additional funds* and, on that basis alone, would be excluded from the cashback at drawdown offer.


Accordingly, I accept that the Tracker Loan and the Home Loan are not eligible for the cashback at drawdown offer.

For the reasons set out in this Decision, 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**

9 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.

