



<u>Decision Ref:</u>	2020-0391
<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
<u>Outcome:</u>	Rejected

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

The Complainants hold two mortgage loan accounts with the Provider. Both mortgage loans are secured on the Complainants' Principal Private Residence.

- Mortgage loan account ending **1915**
The loan amount was €120,000 and the term of the loan was 25 years. The particulars of the Loan Offer dated **15 October 2002** detailed that the loan type was a "1 Year Fixed Rate Home Loan". Prior to drawdown the mortgage loan was amended to a one year discounted variable rate of 3.7%.
- Mortgage loan account ending **3410**
The loan amount was €20,000 and the term of the loan was 24 years. The particulars of the Loan Offer dated **27 January 2004** detailed that the loan type was a "Further Advance Variable Rate". A tracker interest rate of 4.80% (ECB + 0.80%) was applied to this loan from **12 October 2007**.

This complaint relates to a mortgage loan account ending **1915**.

The Complainants' Case

The Complainants' mortgage loan account ending **1915** was drawn down on **16 December 2002** subject to a one year discounted variable rate of 3.7%.

In **January 2004**, the Complainants sought and secured a top up loan of €20,000 (mortgage loan account ending **3410**), which was also issued on a 1 year discounted variable rate.

The Complainants submit that they received a rate options letter from the Provider in **December 2006**. The Complainants state that a tracker rate was not offered in this letter and "*so [the Complainants] selected what looked like the best rate according to [the] letter.*" The Complainants chose a five-year fixed rate. They submit that they "*thought both mortgages were changed*" to this interest rate, but it only applied to mortgage loan account ending **1915**.

The Complainants detail that in **October 2007**, they met with an employee of the Provider in their local Branch and the Complainants "*were told we could get a tracker rate for our top up and would also [get] the tracker for main mortgage if we had asked in branch*" in **December 2006**.

The Complainants submit that they "*couldn't afford the buyout from the fixed rate so they told us we would get tracker rate when the 5yr term was up.*" A tracker rate of ECB + 0.80% was subsequently applied to the Complainants' top up loan under mortgage loan account ending **3410** and mortgage loan account ending **1915** remained on its fixed rate.

The Complainants outline that on the expiry of the five year fixed rate in **December 2011** on mortgage loan account ending **1915**, they "*were told that tracker rates were no longer available*".

The Complainants are seeking that a tracker interest rate be applied to mortgage loan account ending **1915**, and either reimbursement of overpaid interest or a reduction of the amount outstanding on mortgage loan account ending **1915**.

The Provider's Case

The Provider states that it issued a **Letter of Approval** to the Complainants on **15 October 2002** for the loan amount of €120,000. It details that the initial rate of interest was fixed at 4.30% for the first year and the loan was repayable over 35 years. The Provider states that the terms and conditions of the **Letter of Approval** were accepted by the Complainants with the benefit of independent legal advice on **18 October 2002**.

The Provider submits that prior to drawdown of mortgage loan account ending **1915** the interest rate applicable to the mortgage loan account changed to a one year discounted variable rate of 3.7%.

The Provider outlines that the Complainants *“had no contractual entitlement to be offered a tracker rate at any time during the lifetime of loan account ending 1915”*. The Provider submits that this is due to the fact that the mortgage loan agreement *“predated the launch of the [Provider’s] tracker mortgages in January 2004.”*

The Provider details on the expiry of this discounted period in **December 2004**, the standard variable rate of 3.55% began to apply to the Complainants’ mortgage loan account ending **1915**. The standard variable rate applied until the Provider received the Complainants’ request to apply the five year fixed rate of 4.85% to the mortgage loan account ending **1915** on **13 December 2006**. The Provider outlines that the rate options letter and form provided to the Complainants in **December 2006** related to mortgage loan account ending **1915** only.

The Provider submits that *“if any customer had contacted the Provider in or around December 2006 with a request to be switched from an existing variable rate to a [tracker] rate, the Provider generally facilitated such a request.”* The Provider details that the Complainants did not make this request and instead requested the five year fixed rate.

The Provider submits that it only has records of the Complainants’ request for a tracker rate in **October 2007** in respect of their mortgage loan account ending **3410**. The Provider details that it applied the tracker rate to mortgage loan account ending **3410** in **October 2007** as requested. The Provider states that the Complainants chose to remain on the five year fixed rate in **October 2007**.

The Provider submits that it does not accept the Complainants’ submission that the Provider’s employees advised the Complainants that they would have a tracker rate on the expiry of the fixed rate in respect of mortgage loan account ending **1915**. The Provider details that its employees were equipped to *“provide information on the rates available at the time but would not be in a position to discuss what rates would be available in the future.”*

The Provider outlines that it issued the Complainants a rate options letter and rate instructions form prior to the expiry of the fixed rate in **November 2011**. The Provider submits that the letter stated that where they did not receive a response, the LTV variable rate of 5.80% would be applied to the account on **13 December 2011**. The Provider relies on **Special Condition A** in the **Letter of Approval** and **Condition 5** of the **General Mortgage**

Loan Approval Conditions which details that on the expiry of the fixed rate, the Complainants were entitled to be offered a variable rate option.

The Provider submits that from **30 June 2006** to **31 August 2009** it offered tracker rates to customers who did not have a contractual entitlement to a tracker rate option on the expiry of the fixed rates. This policy had been withdrawn prior to the expiry of the Complainants' fixed rate in **November 2011**. The Provider details that it was not contractually obliged to offer the Complainants a tracker rate on the expiration of their fixed rate.

The Provider submits that the Final Response Letter dated **06 October 2015** contains "*an inaccurate and incomplete summary*" with respect to its policy on tracker interest rate offerings. It details that from **mid-2004**, the Provider acceded to requests from customers to switch from an existing rate applying to their account to a tracker rate. However this option was withdrawn in **July 2008**, after which an account could no longer be switched to a tracker rate except in the case of fixed rate maturity. The Provider has offered the Complainants a gesture of €250 in respect of the "*service error*" associated with its Final Response Letter.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainants the option of a tracker interest rate on their mortgage loan account ending **1915** in **December 2006** and on the expiry of the five year fixed rate period in **December 2011**.

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

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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 9 October 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' mortgage loan documentation with respect to mortgage loan account ending **1915**. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **December 2006** and **November 2011**.

A **Letter of Approval** dated **15 October 2002** was issued to the Complainants which details as follows;

<i>“Loan Type:</i>	<i>1 Year Fixed Rate Home Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>€138,000.00</i>
<i>Loan Amount:</i>	<i>€120,000.00</i>
<i>Interest Rate:</i>	<i>4.30%</i>
<i>Term:</i>	<i>25 year(s)“</i>

Special Condition A to the **Letter of Approval** detail as follows;

“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.”

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

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- “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 changed 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.
- 5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:
- (a) a sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed Rate Period, or
 - (b) a sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate Period of the loan, or part thereof, being repaid.
- 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 RATES 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 **18 October 2002**. The Acceptance of Loan Offer states as follows:

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"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 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.

...

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

The Complainants have submitted into evidence an unnamed, undated and unsigned document that has various conditions outlined in the document. This document outlines as follows:

"Condition 0582

A. THE INTEREST RATE APPLICABLE TO THIS LOAN WILL FOR A PERIOD OF 12 MONTHS FROM THE DATE OF THE ISSUE OF THE LOAN BE CHARGED AT A RATE OF 1% BELOW THE VARIABLE RATE NORMALLY APPLICABLE TO LOANS OF THIS TYPE. THIS CURRENTLY EQUATES TO THE INTEREST RATE SHOWN ABOVE."

It appears from the parties' submissions that prior to drawdown of the mortgage loan the interest rate was amended to a discounted variable rate of 3.7%. The mortgage loan was drawn down on **16 December 2002**. There does not appear to have been any provision within the mortgage loan documentation as to the type of interest rate to apply to the mortgage loan on the expiry of the 12 month discounted period. I understand that a variable interest rate was applied from **16 December 2003**. This is not in dispute between the parties.

The Provider submits that the Complainants requested a five year fixed rate of 4.85% to be applied to their mortgage loan account on **13 December 2006**. The Complainants submit that they were issued a rate options letter which did not include a tracker rate option. The Complainants submit that they had understood that their request for a fixed rate would apply to both mortgage loan accounts ending **1915** and **3410**. The Provider submits that this was only in relation to mortgage loan accounts ending **1915**.

As part of the investigation of this complaint, this office requested the Provider to furnish this office with a copy of all correspondence or documentation in relation to interest rate

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offerings and all instructions issued by the Complainants to change the interest rates to be applied to both mortgage loan account ending **1915** and **3410**.

The Provider responded as follows:

“On the Bank’s mortgage processing system, I have noted the following events which affected the account in 2006 and which generated automated updates to the Complainants on each occasion:

- *30 June 2006 – An automatic rate change occurred on the mortgage account when the variable rate changed to 4.10%.*
- *09 August 2006 – An automatic rate change occurred on the mortgage account when the variable rate changed to 4.25%. 12 October 2006 – An automatic rate change occurred on the mortgage when the variable rate changed to 4.60%.*
- *13 December 2006 – Following the Complainants’ request a fixed rate of 4.85% was manually applied to the mortgage account. This was a five year fixed rate.*

As each of these events was a rate change, the Bank’s automated processing system issued a rate change letter which confirms details of the new interest rate and rate type. As each rate change caused a consequent monthly payment amount change, the system also issued a separate payment change letter which informed the Complainants of the new payment amount in advance of the billing date. The Bank does not hold an image of these letters issued to the Complainants in 2006 as the Bank did not image such correspondence.

With regards to the switch to a fixed rate in December 2006, which was based on a request of the Complainants, the Bank is not in a position to produce a copy. The Bank normally retains an image of a request to change a loan to a fixed rate. The Bank has tried to locate the Complainants’ instruction. However, regrettably, the Bank cannot locate the Complainants’ request.”

It is most disappointing that the Provider has not retained a copy of the above mentioned correspondence and documents issued by the Provider to the Complainants, nor has the Provider retained a copy of the instruction document completed by the Complainants in **December 2006**, instructing that a fixed interest rate be applied to their mortgage loan account ending **1915**. However in any event, it appears that it is not in dispute between the parties that an offer was not made to the Complainants at that time to apply a tracker interest rate to the Complainants’ mortgage loan account ending **1915**.

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It is important for the Complainants to understand that there was no contractual right to a tracker interest rate in the Complainants' mortgage loan documentation. In these circumstances, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the mortgage loan at the time in **December 2006**. The Provider has summarised its policy with respect to tracker interest rate offerings as follows;

"From around [mid] 2004 existing customers who requested a switch to a tracker rate were generally facilitated in this respect."

The Complainants did not request to switch to a tracker interest rate on their mortgage loan account ending **1915** in **December 2006**. Whilst I am disappointed by the lack of documentation provided, it is clear that the Provider was not obliged to offer the Complainants a tracker interest rate on mortgage loan account ending **1915** at this time.

The Complainants did however request to switch mortgage loan account ending **3410** to a tracker interest rate in **October 2007** and the Provider acceded to that request and a tracker interest rate of 4.80% (ECB + 0.80%) was applied to that mortgage loan on **12 October 2007**.

The Complainants submit that they also requested that a tracker interest rate be applied to mortgage loan account ending **1915** at that time but they *"couldn't afford the buyout from the fixed rate so they told us we would get tracker rate when the 5yr term was up."* Neither party to this complaint has furnished any contemporaneous evidence of this meeting that took place with the Provider in **October 2007**. The Provider submits that it has no record of any conversations with the Complainants with respect to mortgage account ending **1915** at the time.

I have no reason to doubt the Complainants' version of events but I must accept that the Complainants were in a fixed interest rate period and made the decision not to break out of that fixed interest rate period at that time. I also accept that the Provider's agent could not know what interest rates would be available at the end of that fixed interest rate period.

I understand that at this time it was the Provider's policy to offer tracker interest rates on the expiry of fixed interest rate periods, where there was no contractual entitlement to a tracker interest rate. In this respect, the Provider has summarised its policy as follows;

"... [in mid] 2006, the Bank introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest although their loan contract did not specify an entitlement to be offered a tracker

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rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a Tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period.

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While the Bank commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008 (it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.”

It is not necessary to determine this dispute as to any conversation that took place in **October 2007**, as the entitlement to interest rates is governed by the written terms and conditions of the Complainants’ mortgage loan. **General Condition 5.4** is clear, that at the end of each fixed interest rate period the Provider and the Complainant shall each have the option to convert to a variable rate loan agreement. The variable rate in this case made no reference to a tracker or the ECB rate, rather it was a variable rate which could be adjusted by the Provider.

The Provider issued the Complainants a rate options letter on **23 November 2011** prior to the expiry of the fixed rate which detailed the following options;

<i>“Option</i>		<i>Monthly Repayment</i>
<i>LTV Variable Rate**</i>	<i>Currently 5.80%</i>	<i>733.19</i>
<i>2 Year Fixed Rate</i>	<i>Currently 7.25%</i>	<i>807.96</i>
<i>5 Year Fixed Rate</i>	<i>Currently 8.75%</i>	<i>889.27”</i>

In accordance with **General Condition 5.4**, a variable interest rate option was made available to the Complainants. By this time, the Provider had ceased offering tracker interest rates as a matter of policy, where there was no contractual entitlement to a tracker interest rate.

I note the Provider submits that the Final Response Letter dated **06 October 2015** contains “*an inaccurate and incomplete summary*” with respect to its policy on tracker interest rate offerings. This inaccuracy was identified by the Provider when questioned about its policy and the content of the Final Response Letter during the investigation of this complaint by this office. I note Provider offered a gesture of €250.00 to the Complainants due to the error in that letter. While I am of the view that the Provider should ensure accuracy in its communications, I accept that errors can occur and understand that it remains open to the

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Complainants to accept the gesture of €250.00. I consider it to be a reasonable offer in the circumstances.

The Complainants did not have a contractual or other entitlement to a tracker interest rate on the mortgage loan ending **1915** at any point in time. The Complainants requested a tracker interest rate on mortgage account ending **3410** in **October 2007** and the Provider acceded to that request and applied a tracker interest rate of 4.80% (ECB + 0.80%) at that time.

For the reasons outlined 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**

2 November 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

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(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

