



<u>Decision Ref:</u>	2020-0394
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

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

The complaint relates to one of the mortgage loan accounts held by the Complainants with the Provider. The mortgage loan (account ending **3073**) that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €100,000 and the term of the loan was 15 years. The Loan Offer Letter accepted by the Complainants on **8 July 2008** detailed that the loan type was an "Equity Release Variable Rate Secured Personal Loan".

The mortgage loan account was redeemed in full on **18 May 2015**.

The Complainants' Case

The Complainants' primary mortgage loan account ending **5583** was issued in **April 2003** on a variable interest rate of 3.70%. A tracker rate of 4.80% (ECB + 0.80%) was applied to the mortgage loan account in **July 2007** at the Complainants' request.

The Complainants submit that they sought and secured an equity release mortgage loan under account ending **3073** in **June 2008**. They outline that they sought the mortgage loan account "during the period when Tracker Mortgages were still a product being offered by

[the Provider] but was informed when I signed / drew down the loan that this product was no longer on offer / available."

The Complainants detail that they *"can't see anything in the [Provider's Final Response Letter] that would exclude me from being offered the Tracker rate instead of the substantially more expensive Variable rate of circa 4-5%"* on the top up mortgage account ending **3073**.

The Complainants submit they are *"seeking a refund of monies overpaid by me during the period of the mortgage"*.

The Provider's Case

The Provider submits that the Complainants drew down mortgage loan account ending **5583** from the Provider on **07 April 2003**, in the amount of €146,019.87 which was secured with a legal mortgage on the Complainants' property.

The Provider details that on **09 June 2008** the Complainants completed an application for an additional credit facility secured on the same property, mortgage loan account ending **3073** (the mortgage loan account the subject of this complaint), in the amount of €100,000 through the Complainants' chosen Broker. The Provider details that the *"completed application form signed by the Complainants requested a standard variable rate"*.

The Provider outlines that the Complainants' mortgage loan application was made on their behalf by their broker and it had *"no direct involvement with the Complainants when negotiating the terms of the loan."* The Provider submits that it has *"no record of the broker having requested a tracker rate during the application process"* and in any event, it states that *"Any request for a tracker rate in respect of the loan account would have been refused"*. The Provider submits that the Complainants *"were not offered a tracker interest rate on their mortgage loan account ending 3073 from inception in June 2008 as a tracker interest rate was not available in respect of an equity release loan at that time or at any other time."*

The Provider outlines that it assessed the Complainants' application in light of their principal mortgage account ending **5583** and the affordability of the additional loan sought and considered that the variable interest rate product offered to the Complainants was *"suitable"*.

The Provider details that it issued a Letter of Approval dated **24 June 2008** for mortgage loan account ending **3073**, an equity release loan, repayable over 15 years on a variable

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interest rate. The Provider outlines that the Complainants accepted this Letter of Offer on **08 July 2008**.

The Provider outlines that the equity release product was designed to enable customers to borrow for reasons other than commercial purposes, using the equity in their homes as collateral. It details that the interest rates on its equity release loans are based on mortgage rates which are *“typically lower than the Bank’s other personal loan rates.”* The Provider further states that the only interest rates that the Provider had offered on equity release loans was either a standard variable rate or a fixed rate.

The Provider details that while tracker interest rates were available to new and existing customers when the Complainants submitted their mortgage application in **June 2008**, it states that when it introduced tracker rates in **early 2004** it made a decision not to make a tracker interest rate available for certain types of loans, including equity release loans, for *“commercial reasons”*.

The Provider notes that its *“published interest rates and its dedicated broker website were available to the Complainants’ broker and provided details of all the Bank’s available lending products at that time.”* It submits that the interest rates available for equity release loans at the date of application were its product variable rate, 2 and 3 year fixed rate options and a secured personal loan variable rate. The Provider states that it sets its interest rates at its *“absolute discretion and such decisions are commercial in nature.”*

The Provider details that from **5 October 2011** *“the Complainants commenced making overpayments to the mortgage which resulted in a credit balance of €2,250 on 30 September 2014.”* The Provider states that the Complainants made a lodgement of €20,000 to the account on **17 October 2014** and they instructed the Provider to reduce the outstanding balance by the credit amount of €22,250. The Provider outlines that it processed the Complainants’ instruction on **20 October 2014** which reduced the outstanding balance due on the account to €44,654.20.

The Provider details that two further lodgements were made to the mortgage loan account in **January 2015** which brought the credit balance to €39,822.49, at which point the outstanding balance due on the account was €42,895.88. The Provider states that it *“did not receive any instruction from the Complainants in relation to the lodgements made to the account in January 2015”* and the mortgage *“continued to bill each month and the Credit remained sitting in the mortgage account until there was enough to balance to redeem the loan.”*

The Provider notes that mortgage loan account ending **3073** auto redeemed in full in the amount of €39,908.56 on **18 May 2015**.

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The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly refused the Complainants a tracker rate for their top up mortgage loan account ending **3073** from inception in **2008**.

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 12 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.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third party Broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the Broker which will be investigated and dealt with in this Decision.

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The Complainants were informed of the parameters of the investigation by this office, by letter, which outlined as follows;

“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”

Therefore, the conduct of the third party Broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainants’ mortgage loan. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2008**.

It is clear that, in **June 2008**, the Complainants were seeking a further advance of funds from the Provider and that advance of funds would be secured against the equity in the Complainants’ private dwelling house. I have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants’ Broker during the application stage in relation to interest rate options. Notwithstanding this it is important for the Complainants to be aware that the Provider was under no obligation to offer them any mortgage or any particular type of mortgage in **2008**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowing at the time and secondly, how that offer would be structured.

I have considered the **Application for Credit** that was signed by the Complainants on **9 June 2008**, which details as follows;

“details of mortgage required

purchase price/value of property

€ 350,000

amount of loan required

€ 100,000

mortgage type

ANNUITY

repayment term required

15 yrs”

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A **Letter of Approval** dated **24 June 2008** was issued to the Complainants' Broker, which 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>€310,000.00</i>
<i>Loan Amount</i>	<i>€100,000.00</i>
<i>Interest Rate:</i>	<i>5.69%</i>
<i>Term:</i>	<i>15 year(s)"</i>

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

"3. Please note the equity release loan conditions contained in the general mortgage loan approval conditions

...

8. This additional loan will be secured by way of an extension of the Bank's legal mortgage over the security referred to in the letter of offer and no separate mortgage deed is required to be executed in respect of this additional loan."

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the **Conditions relating to "[Name of Product]" Equity Release Loans**. 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** 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."

I note that the information document in relation to the **Housing Loans under Consumer Credit Act 1995** on the reverse side of each page of the **Letter of Approval** outlines as follows;

"VARIABLE RATE LOANS

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

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The **Acceptance of Offer of an Additional Loan** which was signed by the Complainants on **8 July 2008**, states as follows;

“1. I accept the above offer of an additional loan under the terms and conditions set out in:

- (i) The Letter of Approval;*
- (ii) The General Mortgage Loan Approval Conditions sent to me with the above Letter of Approval; and*
- (iii) The mortgage conditions applying to the existing loan, as amended by the General Mortgage Loan Approval Conditions.*

...

5. I confirm that I have received/have had the opportunity to receive independent legal advice before accepting this offer of additional loan.”

The equity release mortgage loan was drawn down by the Complainants on **23 July 2008**.

It is clear that the Letter of Approval envisaged a variable interest rate loan which could be adjusted by the Provider. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. If the Complainants did not want to pursue this option because they were unhappy with the interest rate applicable to the equity release mortgage, they could have decided not to accept the Provider’s offer of the equity release product. Instead the Complainants accepted the Provider’s offer by signing the **Acceptance of Offer of an Additional Loan** on **8 July 2008**.

The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which is noted as being *“effective from the start of business on the 3rd June 2008”*.

This document outlines as follows;

<i>“Equity Release / Secured Personal Loans</i>	<i>RATE</i>	<i>APR</i>
<i>[Product name] Variable Rate</i>	<i>5.69%</i>	<i>5.8%</i>
<i>Fixed Interest [product name] options above (APR may vary)*</i>		
<i>Secured Personal Loan Variable Rate</i>	<i>7.19%</i>	<i>7.4%”</i>

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The **Equity Release Brochure** confirms that the standard variable interest rate and fixed interest rates were the only interest rate options available with respect to this product. A copy of the Brochure has been provided in evidence and states as follows;

“How do I get access to my funds?

This will depend on the type of loan rate you choose – a standard variable rate or a fixed rate.

...

How do I repay what I borrow?

Standard variable-rate [product name]

...

Having a standard variable-rate [product name] means that your interest rate can go up or down.

With a standard variable-rate [product name], the good news is that your repayments are based only on the amount you have withdrawn.

...

Fixed-rate [product name]

With a fixed-rate [product name], you can have peace of mind in knowing that your [product name] repayment will stay the same for a fixed period of time. We offer a choice of fixed-term rates from two to five or 10 years.”

It is not in dispute between the parties that the Complainants were seeking a further advance of funds of €100,000 from the Provider. It is important for the Complainants to be aware that the Provider was under no obligation to offer them any loan or any particular type of loan in **June 2008**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowing at the time and secondly, how that offer would be structured.

It is clear from the Provider's **Lending Interest Rates** document that tracker interest rates were not an interest rate option for an equity release loan product available from the Provider in **June 2008** when the Complainants were seeking a loan from the Provider.

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The Provider made the commercial decision not to include a tracker interest rate offering on their equity release product. In this regard, I accept that the Provider operates as a business and is entitled to set interest rate options for products at its discretion. The Provider was not offering tracker interest rates on equity release products in **June 2008** or at any other time. This was a commercial decision which I cannot interfere with as the Provider was legitimately entitled to make such a decision.

Having regard to the evidence, I accept that the Provider did not offer tracker interest rates on equity release products at that time, or any other point in time, and therefore the Provider was not under any obligation to offer the Complainants a tracker interest rate option on the equity release product option.

A recording of a telephone call between the First Complainant and the Provider on **13 January 2017** has been provided in evidence. I have considered the content of the call and note that the Complainants' complaint is that the Provider failed to offer them all interest rate options available when they applied for their mortgage loan in **June 2008**. During the telephone call, the Complainant stated that he had received a letter from the Provider on that day which outlined that tracker rates were available until **August 2008**.

It appears that the Complainant was referring to the Provider's Final Response Letter issued to the Complainants on **12 January 2017** with respect to both their primary mortgage loan account ending **5583** and their equity release loan account ending **3073**. A copy of the letter has been submitted by the Complainants and I note that in relation to the primary mortgage account, the Provider details as follows;

"... I can confirm that from [mid] 2004 up until [mid] 2008 existing Mortgage account holders of [the Provider] (who were eligible) could contact our Business Retention Unit and request to switch their Mortgage account to a Tracker rate. Our records show that you chose to avail of this option on your Mortgage account, [ending 5583] in July 2007."

In response to this complaint, the Provider has summarised its policy with respect to tracker interest rates as follows;

- *"... [from 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 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 letters issued to a customer in the month prior to the date of maturity of the fixed rate period. In the absence of a customer selection, the tracker rate was applied to the mortgage. The Bank also provided in options letters issued from [mid] 2006 that, in default of selection of one of the offered options, the loan would default to the tracker rate of interest on maturity of the fixed rate period.

- *The Bank ceased offering new tracker rate loans [in mid] 2008. It also ceased offering a switch to a tracker rate from another variable rate on that date.*
- *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.*
- *After [mid] 2009, the Bank continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to a tracker rate.”*

The Provider submits that it “made a commercial decision not to include Tracker rates as an option in its product suite for Equity Release Loans”. The Provider’s decision not to extend its policy above to equity release type mortgages was a commercial decision the Provider was entitled to make.

I note from the **mortgage loan statements** that the Complainants’ mortgage loan account was redeemed in full on **18 May 2015**.

I have not been provided with any evidence that the Complainants had a contractual or other entitlement to a tracker interest rate on mortgage loan account ending **3073**. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants. The Provider was not offering tracker interest rates on equity release products. In light of all the foregoing, I accept that there was no obligation on the Provider to offer the Complainants a tracker rate for their equity release mortgage loan in **June 2008**.

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

3 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

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