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| <b><u>Decision Ref:</u></b>             | 2020-0428  |
| <b><u>Sector:</u></b>                   | Banking  |
| <b><u>Product / Service:</u></b>        | Tracker Mortgage                                 |
| <b><u>Conduct(s) complained of:</u></b> | Failure to offer a tracker rate at point of sale |
| <b><u>Outcome:</u></b>                  | Rejected   |

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

**Background**

The complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan account is secured on the Complainants' private dwelling house.

The loan amount was €81,000 and the term was 15 years. The **Offer of Advance** which was signed on **20 March 2003** outlined that the interest rate applicable to the loan was "*Discounted [the Provider's] Variable Home Loan Rate*" from the date of drawdown until **30 April 2004**, with the Provider's Variable Home Loan Rate applying thereafter.

**The Complainants' Case**

The Complainants submit that they drew down a mortgage loan account with the Provider on **23 July 2003** in the amount of €81,000 and detail that the mortgage loan account should have been on a "*...tracker mortgage from day 1*".

The Complainants detail that they issued a letter to the Provider in **September 2009** and the interest rate "*dropped significantly*" following this letter whereas before it was much higher. The Complainants detail that that in **September 2009**, they requested to switch the mortgage account to a tracker variable rate of ECB + 0.95%, which was applied by the Provider.

The Complainants submit that they should have been given a tracker rate for the mortgage account from inception in in **2003**. They submit that they were never offered the option of a tracker interest rate until they requested it in **September 2009**.

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

The Provider details that the Complainants were issued an **Offer of Advance** dated **01 May 2003** which clearly confirmed that their mortgage was to draw down on a "*Discounted [Provider] Variable Home Loan Rate*" of 3.15%, which was a discount of 0.85% on the Provider's standard variable rate. The Provider outlines that it only provided information to customers in relation to what interest rates were available and its staff were not authorised and did not provide advice to customers as to what interest rate options to select. The Provider details that it offered tracker interest rate products from **October 2001**.

The Provider outlines that the discounted variable rate was to apply to the mortgage account until **April 2004** with the Provider's Variable Home Loan Rate applying thereafter as per the Special Conditions of the Offer of Advance. The Provider refers to **General Condition 2** of the Offer of Advance. It outlines that this condition set out information as to the nature of the Provider's Variable Home Loan Rate and specifically that it could be amended by the Provider at any time. The Provider detailed that its Variable Home Loan Rate and its Standard Variable Rate "*... are one and the same*" which is a rate that can be amended by the Provider at any time.

The Provider details that a tracker interest rate is linked to the European Central Bank (ECB) base rate and so will only rise and fall in line with movements in the ECB base rate. It states that the ECB base rate cannot be changed by the Provider and there was no reference to a tracker rate in the Offer of Advance.

The Provider submits that the Complainants accepted and signed the Offer of Advance on **29 May 2003** confirming that they accepted the terms and conditions of the offer. The Provider details the Complainants drew down the mortgage loan account in **July 2003**.

The Provider details that at the date of the expiry of the discounted variable rate period in **April 2004**, it wrote to the Complainants outlining that the interest rate on their mortgage loan account would change to the Provider's Standard Variable Rate. The Provider outlines that this letter also informed the Complainants of other interest rate options available to them which included the Standard Variable Rate, fixed interest rates and the "*...Flexible Mortgage which tracked the European Central Bank base rate*".

The Provider details that this letter enclosed a “*Flexible Transfer Form*” should the Complainants wished to have applied a tracker interest rate and a “*Fixed Rate Mortgages form*” should the Complainants wished to have availed of a fixed interest rate.

The Provider submits that it did not receive a response to this letter and wrote to the Complainants on **18 May 2004** outlining that as it had not received a response, the Complainants’ mortgage loan account had been transferred to the Provider’s standard variable rate of 3.50% effective from **01 May 2004**. The Provider details that the Letter of Advance made no reference to a tracker interest rate and did not state that a tracker interest rate would be made available to the Complainants on the expiry of the discounted rate period. The Provider further outlines that it never offered a tracker interest rate as a default rate upon the expiry of an initial discounted interest rate period and in **April 2004** the default rate was the Provider’s standard variable rate, and therefore there was no entitlement to a tracker interest rate. The Provider details that that it does not consider that the Complainants could have had any reasonable expectation of defaulting to a tracker interest rate at the end of the fixed rate period in April 2004.

The Provider further outlines that on **07 September 2006**, the Complainants signed and completed a **Flexible Mortgage Transfer form** applying a tracker interest rate of 0.95% to their mortgage loan account.

The Provider details that the mortgage loan account remained on the tracker interest rate of ECB + 0.95% from **September 2006** to **August 2018** when the mortgage loan account was redeemed.

### **The Complaint for Adjudication**

The conduct complained of is that the Provider incorrectly failed to offer the Complainants a tracker rate from the inception of the mortgage account ending **6888(01)** in **July 2003**.

### **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 30 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.

The Complainants applied for a mortgage by completing and signing a **Home Loan Application Form** on **20 March 2003**. **Part F** of the application form is headed "*Your Mortgage Requirements*" and notes the repayment period as 15 years, however the amount of loan section is blank. The type of mortgage selected is "*Repayment*". The application form states that "*If you choose a fixed interest rate mortgage please specify the fixed period required*". The answer box after this statement is blank.

The Provider issued an **Offer of Advance** dated **01 May 2003** to the Complainants which detailed as follows;

|                                       |                          |
|---------------------------------------|--------------------------|
| <i>"1. Amount of Credit Advanced:</i> | <i>81,000.00 Eur</i>     |
| <i>2. Period of agreement:</i>        | <i>15 years 0 months</i> |
| <i>...</i>                            |                          |
| <i>Interest Rate:</i>                 | <i>3.1500%</i>           |
| <i>....</i>                           |                          |

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

The **Special Conditions** attached to the **Offer of Advance** detail as follows;

*"...*

*The interest rate as quoted represents a reduction of 0.85% on the present [Provider] Variable Home Loan Rate.*

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*The [Provider] Variable Home Loan Rate less 0.85% will apply from initial date of drawdown of your mortgage until 30 April 2004 after which time your interest rate will revert to the then [Provider] Variable Home Loan Rate."*

**Condition 2** of the **General Conditions** attached to the **Offer of Advance** details as follows;

"...

*The monthly repayments will vary if changes in the Home Loan Interest Rate occur. Variations in [Provider] Home Loan Rate may occur at any time and notice of each variation will be published at least once in a national daily newspaper..."*

**Condition 4 (a)** of the **General Conditions** attached to the **Offer of Advance** details as follows;

*"Before the Advance is drawn down the following requirements must be complied with:*

.....

*The mortgage which must be on the Bank's standard form must be a first legal mortgage and will secure the following:- (i) The advance together with interest thereon at the Home Loan Interest Rate (varying) and..."*

The Complainants signed the **Acceptance and Authority** attached to the **Offer of Advance** on **20 March 2003**, in the presence of their solicitor, on the following terms;

*"1. I/We the undersigned accept the within Offer of Advance on the terms and conditions set out above and overleaf and in the Bank's standard form of Mortgage..."*

It is clear from the **Offer of Advance** that the Provider offered the Complainants a discounted variable interest rate of 3.15% for a period from the initial drawdown until **March 2004**, after which the interest rate would revert to the Provider's "*Variable Home Loan Rate*". Whilst I note that there is no mention as to what the Provider's variable interest rate would be in the loan documentation, the **Offer of Advance** clearly sets out the nature of the variable rate to be one which may be increased or decreased by the Provider at any time. The Offer of Advance does not contain any reference to the ECB rate.

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The particulars of the **Offer of Advance** including the applicable interest rate, were accepted by the Complainants by signing the **Acceptance and Authority** which was also signed and witnessed by the Complainants' solicitor who, by doing so, confirmed that she had explained the nature and contents of the Offer of Advance to the Complainants.

The Complainants are of the view that they had the right to be offered a tracker interest rate for this mortgage loan when it was drawn down. It is important for the Complainants to understand that there is no reference whatsoever to a tracker rate of interest in the loan documentation that issued to them and which was accepted by them. The Complainants were offered a variable rate which could be increased or decreased by the Provider at any time.

I understand that tracker interest rate products were available from the Provider in **2003** when the Complainants applied for a mortgage loan as tracker products became available for selection from the Provider in **2001**. Therefore, I accept that the Provider was in a position to offer the Complainants a tracker interest rate option during the mortgage loan application process in **2003**. However, the particulars of the **Offer of Advance** to include the applicable interest rate, were accepted by the Complainants by signing the **Acceptance**. If it was the case that the Complainants were of the view that the variable interest rate offered to them by way of the **Offer of Advance** was not suitable for them, then the Complainants could have decided not to accept the **Offer of Advance** and instead seek an alternative rate with the Provider or indeed another lender. However there is no evidence that the Complainants did so. The Complainants were under no obligation to accept the **Offer of Advance**.

Having considered the mortgage loan documentation in respect of the mortgage loan account, I do not accept that the Provider incorrectly failed to offer the Complainants a tracker rate option at the inception of the mortgage loan account. There was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on the mortgage loan account at any time. I note that the Provider subsequently offered the Complainants a tracker interest rate in **September 2006**. There was no contractual obligation on the Provider to do so. The Complainants accepted the offer by signing the **Flexible Mortgage Transfer form** to apply a tracker interest rate of 0.95% to their mortgage loan account on **07 September 2006**. A tracker interest rate of ECB + 0.95% applied to the mortgage loan until **August 2018** when the mortgage loan account was redeemed as the term of the loan had expired.

Despite having no entitlement to a tracker mortgage interest rate, the Complainants were transferred to a tracker mortgage rate of ECB + 0.95% in September 2006 for the lifetime of the mortgage, therefore, 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**

24 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.