



<u>Decision Ref:</u>	2021-0070
<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 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

Background

This complaint relates to two mortgage loan accounts which were held by the Complainant with the Provider. The mortgage loans which are the subject of the complaint were secured on the Complainant's residential investment properties.

The loan amount for mortgage loan account ending **5677** was €150,000 and the term was 25 years. The Letter of Approval in respect of mortgage loan account ending **5677** which was signed on **16 August 2007** outlined the Loan Type as *"Two Year Fixed Residential Investment Loan"*.

The loan amount for mortgage loan account ending **5686** was €150,000 and the term was 25 years. The Letter of Approval in respect of mortgage loan account ending **5686** which was signed on **16 August 2007** outlined the Loan Type as *"Two Year Fixed Residential Investment Loan"*. The mortgage loan account was redeemed on **25 September 2008**.

The Complainant's Case

The Complainant submits that he took out two mortgage loans on a two year fixed interest rate with the Provider in **2007**. He states *"I was not offered the option of a tracker mortgage at this time."* He states that he did not *"opt"* for two year fixed residential

investment mortgage loans as the Provider has submitted, rather, *“this is what I was given”*.

The Complainant submits that *“Four mortgages were offered by [the Provider] within a few days in 2007, two to my cousin [Name redacted] and two to me [Name redacted]. All four were for the same amount and same housing development. [The Complainant’s cousin] was offered tracker mortgages and I was not. The same adviser [Name redacted] dealt with all four.”*

The Complainant submits that both he and his cousin, who were business partners at that time, had met with the Provider’s mortgage advisor at the same meeting in **July 2007**. He states that his complaint *“is in relation to the advice given by [the Provider’s advisor] and the fact that [his cousin] was offered a low Tracker rate and I was offered a 2-year fixed rate followed by a much higher Tracker rate.”*

The Complainant outlines that the loans were *“introduced and arranged by [the Broker]*. He states that a *“fee of £500 per loan was paid by us to [the Broker] who advised us that this was to be paid to ensure that we would get the loans approved by [the Provider] and that this would be arranged by [named Provider’s representative], acting on behalf of [the Provider]. [The Broker] advised us that he had arranged several loans with [the Provider branch] in the same way through [named Provider representative] in [Provider branch]. Both [the Complainant’s cousin] and I had meetings in [the Provider] branch to arrange these mortgages with [named Provider representative]”*.

The Complainant further states that *“[the Provider] seem to indicate that applications were received directly by solicitors. This is not correct. [The Complainant’s solicitor] do not act as a lending agent or introducer for [the Provider]. As with all mortgages, solicitors are involved but not at the introduction stage. The introduction was made by [the Broker]. How else did [the Complainant’s cousin] and I end up arranging loans with a bank and branch in [Location] that we had no dealings with in the past”*.

He further details that *“In the meetings with [named Provider’s representative] in [Provider branch], [the Complainant’s cousin] and I were only offered one loan option each for each of our loans. We accepted as we needed to borrow the money. No range of options was offered to either of us and no evidence of this has been provided by [the Provider] in their response”*.

The Complainant queries *“Why were we offered two different products when we were applying for the same loans in the same development for the same amount on an interest only basis?”* He also asks *“Why did we pay an introductory fee for the advice given and I received a product that was less suitable for me than [his cousin]?”*

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The Complainant submits that as a result of not being offered a tracker interest rate for the mortgage loans in **2007**, *“My average monthly payments were €580 per month whereas [his cousin’s] average monthly payments were approx. €300 per month.”*

The Complainant submits that he was offered a tracker interest rate on the expiry of the initial 2 year fixed interest rate period, however the rate *“was not the same as [his cousin’s] – it was 4% higher than the ECB rate.”*

The Complainant details that *“Due to the high interest rate and payments I was making and the difficulty in renting property at the time and low rental income, I subsequently lost both of these properties. I suffered a lot of stress and financial loss as a result. I believe if I had been offered a tracker mortgage for these properties, I would have been able to maintain them and avoided financial loss and stress.”*

The Complainant states that he does not believe that the Provider has provided an *“accurate reflection of events and have also denied the introduction of these loans”*. He further states *“I can prove that they offered my business partner a different option at the same time for two properties [sic] in the same development with the same value. Not many people are in a position to do this. I have provided evidence that my then business partner was offered a tracker rate and I was not. [The Provider] can review both customer records and see that this is the case but they are avoiding the link because [sic] it proves this point.”*

The Complainant is seeking a refund for the overpayment and *“financial compensation for not being offered a tracker”*.

The Provider’s Case

The Provider submits that the Complainant was not offered a tracker interest rate on the mortgage loan accounts from inception in **July 2007** because for each loan, he opted to apply for a two year fixed rate repayable on an interest only basis and this option was offered to him in respect of each loan. It states that the Complainant did not apply for a tracker interest rate from inception.

The Provider states that *“During a loan application process, it is normal practice that all available loan products are discussed with our customers. This allows customers the opportunity to examine various products and options and ultimately choose a Mortgage product and interest rate suitable to their needs. The decision as to which product and rate option to choose is for the customer alone to make based on his/her personal circumstances.”*

The Provider submits that its records indicate that there was no broker involved in the application for the Complainant's mortgage loans as suggested by the Complainant, rather its records outline that the Complainant's solicitor *"submitted the applications for credit on behalf of the Complainant"*. The Provider submits that it has *"no record of an introductory fee in which the Complainant claims he paid for advice nor do we have any information as to who was the recipient of this fee. The Bank cannot comment on why the Complainant was required to pay an introductory fee as the Bank does not hold any information with regard to same."*

The Provider states that its records suggest that **5 July 2007** may have been the first date of contact between the Provider and the Complainant. It states that its records appear to show that it was arranged that the Provider would forward an application for credit to the Complainant and that *"the Complainant was considering interest rates in respect of which he was going to revert to the Bank"*.

The Provider submits that its lending interest rates published on **2 July 2007** show the various loan types and rate types available at the time when the Complainant submitted the signed **Application for Credit** to the Provider on **9 July 2007**. It states that tracker interest rates were on offer to new and existing customers when the Complainant submitted his loan applications in **July 2007**. The Provider details that at that point in time a new customer who was considering a tracker interest rate could apply for either a tracker rate to be applied to the mortgage loan from its inception, or a tracker rate which would be applied on the expiry of a fixed rate or a discounted interest rate period. The Provider notes that at the time of the Complainant's mortgage loan applications the ECB refinancing rate was 4.00% and it had been increasing since **early 2006** and continued to rise for some time following the Complainant's application.

The Provider submits that on **9 July 2007** the Complainant submitted Applications for Credit in respect of the accounts ending **5677** and **5686** respectively for two year fixed residential investment loans (interest only) in respect of the proposed purchase of rental properties. The Provider states that its internal notes dated **24 July 2007** outlined that the Complainant wished to apply for loans to allow him to purchase a rental properties.

The Provider details that on **8 August 2007** it issued two separate **Letters of Approval** to the Complainant for the mortgage loan accounts ending **5686** and **5677** respectively. It states that in each Letter of Approval the Complainant was offered the loan for which he had applied, in the amount of €150,000, at an interest-only fixed interest rate of 4.99% for the first 2 years of the loan. It details that each Letter of Approval included a contractual entitlement for a tracker rate to be offered or made available to the Complainant on the expiry of the 2 year fixed rate period, as detailed in **Special Condition F**.

The Provider submits that both loan offers were accepted by the Complainant, and in accepting the offers the Complainant confirmed that his solicitor had fully explained the terms and conditions of the loan to him. The proceeds of the loans were subsequently issued on **2 October 2007**.

The Provider submits that the product was suitable for the Complainant as he was purchasing two residential investment properties and he wanted to pay interest only initially. It states that he required the loans to fund part of the acquisition cost of each property and he met the eligibility criteria for this product, including a proven ability to repay the loans.

With respect to the Complainant's submissions in relation to his cousin's mortgage loan accounts, the Provider states that it would not discuss with a customer any other customer's financial details due to customer confidentiality. It submits that it is not *"appropriate, relevant or necessary"* for the Complainant to seek to rely on another customer's documentation in circumstances where there is no connection between the customers and their mortgage accounts. The Provider states it does not accept that the choice of a loan type made by another one of its customers is relevant to the choice of mortgage product made by the Complainant, as each individual customer *"makes a decision regarding a loan type and interest rate for which is to apply, based on the individual circumstances of that applicant."*

The Provider states that the Complainant could have rejected the Provider's offers in **2007** if he preferred to have a tracker rate for his loans from the outset, but he did not. It states that such rates were widely available in **2007** and were available from the Provider, however the Complainant instead applied for, was offered and accepted an initial fixed rate period followed by a tracker rate option.

The Provider outlines that the Complainant redeemed mortgage loan account ending **5685** on **25 September 2008** which was prior to the expiry of the initial two year fixed rate, and for that reason the Complainant was not offered a tracker interest rate on that account.

The Provider submits that prior to the expiry of the two year fixed rate period which applied to account ending **5677**, the Complainant wrote to the Provider in **May 2009** *"requesting to amend his interest rate to a variable rate."* The Provider details that it responded to the Complainant's request on **29 May 2009** and advised him that *"the Bank was not in a position to amend his account to a variable rate and also confirmed that if he were to break from his fixed interest rate, a fee would incur."*

With respect to mortgage loan account ending **5677**, the Provider states that it *“regrets that it cannot produce a copy of the letter and rate options form which were issued automatically”* to the Complainant twenty days before the fixed interest rate period expired in **October 2009**. It outlines that the reason for this is that *“it was not the practice of the Bank at that time to retain a copy of correspondence which was issued automatically by the system.”*

The Provider states that mortgage loan account ending **5677** defaulted to a tracker interest rate of 4.35% (ECB + 3.35%) in **October 2009** in accordance with **Special Condition F** of the Complainant’s mortgage loan agreement. The Provider submits that *“the tracker interest rate in respect of existing loans on and around mid-September 2009 when the fixed rate expiry options issued to the Complainant, was ECB+3.35%.”*

The Complaint for Adjudication

The complaint for adjudication is that the Provider wrongly failed to offer the Complainant the option of a tracker interest rate from the outset when he applied for his mortgage loan accounts ending **5677** and **5686** in **July 2007**.

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 Complainant was 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 22 February 2021, 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 that the Complainant has submitted that he engaged the services of a third party Broker during the application process for the mortgage loans. 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. The Complainant was 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 Complainant, does not form part of this investigation and decision for the reasons set out above.

The issue to be determined is whether the Provider failed to offer the Complainant the option of a tracker interest rate from the outset when he applied for his mortgage loans in **July 2007**. In order to determine this, it is necessary to review and set out the relevant provisions of the Complainant’s mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainant and the Provider in **2007**, when the mortgage loans were applied for and drawn down.

I note that the Provider’s internal note recorded on **5 July 2007** at **15:49:29PM** detailed as follows with respect to mortgage loan account ending **5686**;

“Sent out AFC to [Complainant]. He has to revert back to confirm rates and also provide statement showing balance of funds to purchase”

An identical diary entry was recorded in relation to mortgage loan account ending **5677** on **5 July 2007** at **15:53:17PM**.

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I have considered the **Applications for Credit** furnished in evidence in relation to each of the mortgage loan accounts, which detail as follows;

Mortgage loan account ending 5677	Mortgage loan account ending 5686
Section 2 of the Application for Credit was signed by the Complainant on 9 July 2007 and details as follows;	Section 2 of the Application for Credit was signed by the Complainant on 23 July 2007 and details as follows;
“Type of Loan: <i>Amount of Loan required</i> EUR <i>150,000.00</i> <i>Purchase price/Value of property</i> EUR <i>250,000.00</i> <i>Loan type</i> Two Year <i>Fixed Residential Investment Loan (Interest Only)</i> <i>Repayment Term required</i> 25 Years”	“Type of Loan: <i>Amount of Loan required</i> EUR <i>150,000.00</i> <i>Purchase price/Value of property</i> EUR <i>250,000.00</i> <i>Loan type</i> Two Year <i>Fixed Residential Investment Loan (Interest Only)</i> <i>Repayment Term required</i> 25 Years”

The Complainant’s solicitor issued a letter to the Provider on **16 July 2007** which outlined as follows;

**“Re: [The Complainant]
Property at [address of security property for account ending 5686]**

Dear Sir/Madam

In accordance with our mutual client’s instructions, please find enclosed a duly completed Application for Credit on behalf of [the Complainant].

For the avoidance of any doubt, we confirm that the balance of funds to purchase the property have already been paid.”

An identical letter was issued from the Complainant’s solicitor to the Provider dated **16 July 2007** in relation to mortgage loan account ending **5677**.

The evidence before me shows that the **Applications for Credit** were furnished to the Provider by the Complainant’s solicitor and not by a Broker.

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The Provider has submitted into evidence a copy of a published marketing document entitled **Lending Interest Rates**, which I understand were effective from **02 July 2007**.

The document outlines as follows;

“Repayment Home Loans

Rates applicable to New Home Loans

	RATE	APR
1 Year Discounted Tracker Rate LTV <80% loan <€500K	4.60%	4.9%
1 Year Discounted Tracker Rate LTV <80% loan €500K+	4.55%	4.8%
1 Year Discounted Tracker Rate LTV 80% - 95% loan <€500K	4.70%	5.2%
1 Year Discounted Tracker Rate LTV 80% - 95% loan €500K - €1M	4.70%	5.0%
1 Year Discounted Tracker Rate LTV <80% loan €1M+	4.55%	4.8%
Tracker Rate LTV 95%+ loan <€500K	5.10%	5.2%
Tracker Rate LTV 95%+ loan €500K+	4.90%	5.0%

...

Residential Investment Property Loans & Commercial Mortgages

Rates available on request.

The rate applicable to individual customers is determined in accordance with loan documentation.”

I note that tracker interest rates were on offer generally by the Provider when the Complainant applied for the mortgage loans in **July 2007**. The **Lending Interest Rates** document was published by the Provider at the time and it clearly outlined the types of interest rates that were available for different types of mortgage loans, including tracker rates. I note that the document did not set out the specific interest rates available for Residential Investment Property loans. Rather the document detailed that such rates were available *“on request”*.

The Complainant has submitted that *“Both [the Complainant’s cousin] and I had meetings in [the Provider] branch to arrange these mortgages with [named Provider representative]”*. Whilst I have no reason to doubt the Complainant’s recollection, no evidence has been provided to me of any discussions or dialogue between the Provider and the Complainant in the Provider’s branch at this time. The Provider has not submitted any explanation as to why such evidence has not been furnished other than

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to state that it is “satisfied that all staff who discuss the Bank’s mortgage products provide to each prospective loan applicant details of the currently available options”.

It appears from the Complainant’s submissions that he is of the view that if a tracker interest rate was discussed with him at that meeting, he would have proceeded to make applications for tracker interest rate loans from the outset. I am of the view that it was reasonable for the Complainant to believe that he was receiving advice from the Provider’s representative at that time. However, given that the representative was a person employed by the Provider and selling the Provider’s mortgage products, I am of the view that it was not reasonable for the Complainant to expect that any advice or information given to him was independent. If the Complainant wanted independent advice about rates available in the market or the market generally, the Complainant should have been aware that he could only get that advice from an independent third party advisor. In this regard the Complainant has submitted that he had engaged the services of a Broker.

Furthermore the fact that tracker interest rate options were available generally as part of the Provider’s suite of products at the time, did not oblige the Provider to offer the Complainants a tracker interest rate on this loan application. There is also nothing to suggest that if a request was submitted by the Complainant seeking the application of tracker interest rates to the mortgage loans that this would have resulted in the Provider acceding to those requests and issuing Letters of Offer on that basis. It is important for the Complainant to understand that, notwithstanding the fact that a tracker interest rate was offered by the Provider on his cousin’s mortgage loans, there was no obligation on the Provider, contractual or otherwise, to give the Complainant the option of a tracker interest rate on his mortgage loans when he made his applications to the Provider in **July 2007**.

If the Complainant wished to pursue the potential option of applying for two tracker interest rate mortgage loans at the time in **July 2007**, the Complainant could have indicated to the Provider that he had a preference for a tracker rate, as his cousin appears to have done. It does not appear however that the Complainant did so. The Complainant applied for two mortgage loans on a fixed interest rate and the Provider offered the Complainants a fixed rate, which was accepted by the Complainant, having acknowledged that the terms and conditions of the mortgage loans were explained to him.

I note that two **Letters of Approval** issued to the Complainant on **8 August 2007** in respect of each mortgage loan account. Both Letters of Approval detailed as follows;

“Loan Type:	<i>Two Year Fixed Residential Investment Loan (Interest Only)</i>
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Purchase Price / Estimated Value : € 200,000.00

Loan Amount : € 150,000.00

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Interest Rate : 4.99%

Term : 25 year(s)

...

Loan to Value (LTV) 75 %"

The **Special Conditions** to both Letters of Approval detail as follows;

"Special Conditions

...

F. GENERAL MORTGAGE LOAN APPROVAL CONDITION 5, RELATING TO FIXED RATE LOANS, APPLIES. THE RATE SPECIFIED MAY VARY BEFORE THE LOAN ISSUES. ON EXPIRY OF THE FIXED RATE PERIOD, WHERE THE APPLICANT OPTS FOR A TRACKER MORTGAGE INTEREST RATE, THE RATE APPLICABLE WILL BE DETERMINED BY:

(1) THE RATIO WHICH THE LOAN OUTSTANDING, ON EXPIRY OF THE FIXED RATE PERIOD, BEARS TO THE PROPERTY VALUATION WHEN THE LOAN WAS ORIGINALLY ADVANCED AND

(2) THE RATE TIER WHICH APPLIES ON EXPIRY OF THE FIXED RATE PERIOD TO THE ORIGINAL LOAN AMOUNT.

IN THE ABSENCE OF INSTRUCTIONS FROM THE APPLICANT ON EXPIRY OF THE FIXED RATE PERIOD, THE RATE WILL BE THE TRACKER MORTGAGE INTEREST RATE, DETERMINED BY REFERENCE TO (1) AND (2) ABOVE. THE TRACKER MORTGAGE INTEREST RATE MAY BE VARIED IN ACCORDANCE WITH VARIATIONS TO THE EUROPEAN CENTRAL BANK REFINANCING RATE."

General Condition 5 of the **General Mortgage Loan Approval Conditions** relating to both mortgage loan accounts outlines;

"CONDITIONS RELATING TO FIXED RATE LOANS

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.

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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** in respect of each mortgage loan account was signed by the Complainant and witnessed by a solicitor on **16 August 2007**. I note that each Acceptance of Loan Offer states as follows:

"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 Condition*
- 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.

...

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

It is clear to me that both Letters of Approval envisaged an initial two year fixed interest rate of 4.99% and thereafter a tracker interest rate which would be determined by reference to two factors, being the ratio that the loan balance on the expiry of the fixed interest rate period bears to the property valuation at the point of inception of the mortgage loan, and the rate tier that applies on the expiry of the fixed rate period to the original loan amount. There was no contractual or other obligation on the Provider to offer the Complainant a specific tracker interest rate and margin on the expiry of the two year fixed interest rate period.

The Complainant accepted both Letters of Approval having confirmed that the Loan Offers had been explained to him by his solicitor in **August 2007**. If the Complainant was not happy with the terms of the Letters of Offer, including the type of interest rate that would apply either from inception or on expiry of the fixed interest rate periods, the Complainant could have decided not to accept the offers made by the Provider.

The Complainant has submitted copies of two **Applications for Credit** signed by his cousin on **7 July 2007**, which both provide for a Loan Type of "*Tracker (LTV <80% / <500K) Int Only RIP*". He has also submitted extracts from mortgage loan agreements between the Provider and his cousin in which the Loan Type was "*Tracker (LTV <80% / <500K) Int Only RIP*" and the terms and conditions of the loans provided for a tracker interest rate of 4.80%. I do not propose to consider the content of this documentation in this decision. The terms and conditions provided for in loan offers issued by the Provider to other customers, are not relevant, insofar as they do not relate to the Complainant's loan offers.

The Provider was free to exercise its commercial discretion in making a loan offer to the Complainant providing for such terms and conditions that it considered appropriate; equally, it was open to the Complainant to decline that offer if he was dissatisfied that the terms and conditions did not provide for a tracker interest rate from the date of drawdown or if he was dissatisfied with the interest rate that would apply at the end of the initial fixed interest rate period. The Complainant signed the mortgage loan having confirmed that his solicitor had "*fully explained*" the terms and conditions of the mortgage loan to him.

The Provider has submitted that mortgage loan account ending **5685** was redeemed by the Complainant on **25 September 2008**, prior to the expiry of the initial two year fixed rate

which applied to the account. I have not been provided with supporting evidence in this regard, nonetheless it does not appear to be disputed that this is what occurred.

Had the Complainant's mortgage loan account ending **5685** reached the maturity of the two year fixed interest rate period in **October 2009** it appears that the Provider would have then offered the Complainant a tracker interest rate, in accordance with **Special Condition F** of the loan offer. **Special Condition F** details that at the end of the fixed interest rate period, a tracker interest rate would be applied to the Complainant's mortgage loans which would be determined by the ratio that the loan balance on the expiry of the fixed interest rate period bears to the property valuation at the point of inception of the mortgage loan, and the rate tier that applies on the expiry of the fixed rate period to the original loan amount. However in the context of the Complainant's mortgage loan account ending **5685** this is not relevant, as the Complainant redeemed the mortgage loan prior to the maturity of the fixed interest rate period.

I note that the Complainant wrote to the Provider by letter dated **May 2009** which detailed as follows;

"Re: Mortgage account number: [ending] 5677

...

I took out the above mortgage in October 2007 and at the time, I also took out another mortgage which has been repaid. The mortgage was effected in [Provider branch] through a broker [Name redacted]. My business partner, [Name redacted] also took out two mortgages at the time (account numbers [XXXXXXXX] and [XXXXXXXX]) through the same broker and for some reason, my mortgages were taken out as fixed rate and [Name redacted]'s taken out as variable rate mortgages. All should have been effected as variable rate mortgages and were not.

I recently contacted [the Broker] and he advised that I could switch to a variable rate without any penalty. I would be obliged if you would amend this immediately. I would also appreciate an explanation as to why my two mortgages were taken out as fixed rate mortgages in the first place."

I note from the evidence that the Provider responded to the Complainant by letter dated **29 May 2009** which outlines as follows;

"Re: Mortgage Account Number – [ending 5677]

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I refer to your recent correspondence in relation to the above numbered mortgage account.

Please find enclosed a copy of the loan approval which indicates that this account was to be issued on a 2 year fixed rate and we would therefore not be in a position to amend this to a variable rate.

Please also find enclosed a letter explaining the fee should you wish to come out of this fixed rate prior to the expiry date of 02 October 2009.

I trust this clarifies the situation and should you have any further queries, please do not hesitate to contact [the Provider's customer service] on [the Provider's telephone number]. "

The Provider has submitted that approximately 20 days prior to the expiry of the fixed rate period in **October 2009** it issued a letter and interest rate options form to the Complainant. It is disappointing that a copy of the letter and rate options form that purportedly issued to the Complainant have not been furnished in evidence to this office. The Provider has submitted that the reason for this is that it was not practice of the Provider in **2009** to retain copies of correspondence which were automatically issued by its system.

Provision 49 of the Consumer Protection Code 2006 (which was fully effective from **01 July 2007**) outlines as follows;

"A regulated entity must maintain up-to-date consumer records containing at least the following

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

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Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible."

The Complainant's mortgage loan was incepted for a term of **25 years** commencing from **October 2007** and the letter and options form purportedly issued in or around **October 2009**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. No evidence has been submitted to this office to show that the mortgage account has been redeemed. It is therefore unclear to me why the Provider failed to retain a copy of the documentation.

The Provider has supplied a copy of a template letter and form which it submits are "*substantially similar*" to the letter and form issued to the Complainant. The template letter provided to this office states as follows;

"I am writing to remind you that the current rate option on your mortgage account will end on [expiry of fixed rate date].

Please find attached the current options available to you.

...

If we do not receive a written instruction from you in relation to the above on or before the [expiry of fixed rate date], the interest rate on your mortgage will be the Tracker Variable Rate."*

The interest rate options letter enclosed with the template letter sets out the following interest rates;

		<i>"Monthly Repayment EUR</i>
- Tracker Variable Rate*	<i>Currently: 4.3500%</i>	<i>554.28</i>
- LTV Variable Rate **	<i>Currently: 5.4500%</i>	<i>689.79</i>
- 2 Year Fixed Rate	<i>Currently: 5.3500%</i>	<i>677.47</i>
- 5 Year Fixed Rate	<i>Currently: 5.8500%</i>	<i>739.07"</i>

I note from the Complainant's **mortgage loan statement** in relation to account ending **5677** that the tracker interest rate of 4.35% was applied to the mortgage loan on **2 October 2009**.

/Cont'd...

The Complainant has submitted the tracker interest rate of 4.35% (ECB + 3.35%) applied to his mortgage loan account at that time *“was not the same as [his cousin’s] – it was 4% higher than the ECB rate.”*

It is important for the Complainant to understand that he was not entitled to the *“same”* tracker interest rate as his cousin, or any other customer of the Provider, on the expiry of the fixed interest rate period on the mortgage loans. As outlined above **Special Condition F** details that at the end of the fixed interest rate period, a tracker interest rate would be applied to the Complainant’s mortgage loans which would be determined by the ratio that the loan balance on the expiry of the fixed interest rate period bears to the property valuation at the point of inception of the mortgage loan, and the rate tier that applies on the expiry of the fixed rate period to the original loan amount.

It appears that a tracker interest rate of 4.35% (ECB + 3.35%) was applied to the Complainant’s mortgage loan at the end of the fixed interest rate period in accordance with **Special Condition F**. Having considered the Complainant’s mortgage loan documentation, I am of the view that there was no contractual entitlement to a particular tracker interest rate or to a particular margin in **October 2009**. It is important for the Complainant to understand that his mortgage loans are governed by the Letters of Approval and terms and conditions attaching to the Letters of Approval that were issued to him, none of which contain a contractual entitlement to a particular tracker interest rate and margin.

It is important for the Complainant to understand that the fact that the Complainant’s cousin, or any other customer of the Provider, had a tracker interest rate applied to their mortgage loans held with the Provider did not in any way create an obligation on the Provider to offer the Complainant a tracker interest rate on his mortgage loans with the Provider. The evidence shows that the choice to take out the mortgage loans on the terms and conditions offered by the Provider was a choice that was freely made by the Complainant.

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

22 March 2021

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.