



<u>Decision Ref:</u>	2021-0127
<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 a mortgage loan account held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling house.

The loan amount was €250,000 and the term of the loan was 12 years. The **Letter of Offer of Mortgage Loan** dated **1 October 2009** and accepted by the Complainant on **7 December 2009** detailed that the loan type was an *"Interest Only reverting to Annuity"*. The mortgage loan was drawn down on **21 December 2009** on a variable rate of 2.45%.

The Complainant's Case

The Complainant submits that in **2006** the Provider *"offered [him] a loan of €550k"*. The Complainant maintains that he had a *"committed offer from [the Provider] of a Tracker Mortgage"* for that amount. The Complainant explains that a booking deposit was paid and over the course of **November 2006** and **February 2007** his solicitor prepared contracts for signing and gathered the necessary documentation *"but delayed due to a request to the developer to sell a 2nd car park space which was pending"*. The Complainant notes that *"it was decided not to sign the documentation pending resolution of the car parking issue"*.

The Complainant details that he intended move into the property by **June 2007**. The Complainant states however that *“shortly thereafter [he] had second thoughts on the transaction in view of [his] perception of the deteriorating property market.”*

The Complainant submits that he was *“aware that if [he] signed the contract and bank documentation [he] would be obliged to complete the purchase of the property”*. The Complainant further submits that *“it later transpired that the developers, in the midst of the crash, were enforcing contracts on this apartment complex.”* The Complainant contends that he was lucky because he had not signed any contracts and could withdraw from the sale.

The Complainant details that the Provider was aware that *“due to [his] personal circumstances [he] would need to purchase a property shortly thereafter”*. The Complainant states however that *“due to the unstable property market it was not until early 2009 that it became safer to negotiate a purchase”* of a property. The Complainant states that he subsequently closed the sale of his private dwelling house in **late 2009** *“with the assistance of a reduced [Provider] loan of €250k”*.

The Complainant submits that, at the time, he *“needed to purchase a home as [his] retirement was imminent”*. The Complainant further submits that he *“couldn’t afford to insist that the bank agree to the Tracker rate on the loan”*. The Complainant notes that it was not until some years later that the *“Tracker scandal arose”* and on reflection, *“it soon became evident that he was a victim of the Tracker Mortgage Issue”*. The Complainant is of the view that the mortgage loan that he took out with the Provider in **2009** *“should have attracted a Tracker rate as originally agreed from the outset (2009 to date) rather than the standard variable”*.

The Complainant asserts that *“unfortunately, the bank reneged on what was clearly the correct thing to do and follow through on its offer on the original terms. Morally, this was the right thing to do and unfortunately the bank failed this test”*. The Complainant maintains that the Provider *“took advantage of legalistic approach to renege on the original tracker”*.

The Complainant is seeking:

- a) The Provider to apply a tracker rate of interest to his mortgage loan account applicable during the period of inception in **2009**; and
- b) A refund of overpaid interest from **December 2009** to present.

The Provider's Case

The Provider submits that the Complainant approached it in **2006** seeking a mortgage in the sum of €550,000. The Provider further submits that it issued a **Letter of Loan Offer** to the Complainant dated **6 November 2006**.

The Provider details that this **Letter of Loan Offer** contained a section on page one for the Complainant to sign and return to the Provider prior to **6 December 2006** if he wished to accept the offer on the terms and conditions as detailed therein. The Provider contends that it has *"no record of receiving a signed and accepted copy of the Letter of Offer from the Complainant, prior to the specified acceptance date of 6 December 2006"*.

The Provider states that **Appendix A** of the **Terms and Conditions of the Home Loan Offer** clearly details that the final date for acceptance of the loan was **6 December 2006** and the final date for drawdown of the loan was **6 May 2007**. The Provider submits that it is *"satisfied that the 2006 Letter of Offer and the Terms and Conditions attaching are clear and transparent."* The Provider further submits that the **Letter of Loan Offer** dated **6 November 2006** *"clearly set out the date by which the Complainant was required to sign his acceptance and return it in order to accept the terms of same."*

The Provider explains that in circumstances where the Complainant *"decided to defer"* the purchase of his private dwelling house *"this facility was not drawn down prior to 6 May 2007"*. The Provider contends that *"the Complainant did not accept the terms of the 2006 Letter of Offer, nor did he proceed to draw (sic.) down on or before the dates which were clearly outlined in the 2006 Letter of Offer"*. The Provider submits that the **Letter of Loan Offer** dated **6 November 2006** was not accepted by the Complainant prior to **6 December 2006** therefore that particular **Letter of Loan Offer** expired, and the terms of the loan offer were no longer available to the Complainant to accept after **6 December 2006**. The Provider details that the terms of the **Letter of Loan Offer** dated **6 November 2006** *"had expired both in terms of duration and subject matter."*

The Provider explains that the Complainant approached the Provider again in **September 2009** for a mortgage loan. The Provider submits that *"when the Complainant sought a new and different mortgage loan in 2009, the Bank assessed that wholly different application at that time in 2009"*. The Provider notes that when the Complainant applied for the loan application in **September 2009** *"the request was for an entirely different Mortgage Loan to purchase an entirely different and separate property"* to that of the loan application in **2006**. The Provider highlights that the amount proposed to be borrowed in **2006** was €550,000 whereas the amount sought in **2009** was €250,000.

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Accordingly, the Provider asserts that the “*key terms*” of what was sought by the Complainant in **2006** had fundamentally changed in **2009**.

The Provider states that it issued a **Letter of Loan Offer** dated **1 October 2009** to the Complainant “*which was formally accepted by the Complainant and witnessed by his solicitor on 7 December 2009*”. The Provider notes that “*despite being accepted over 30 days after the date of issue, the Bank decided to accept the late acceptance of the 2009 Letter of Offer*”.

The Provider details that when the **Letter of Loan Offer** dated **1 October 2009** was issued and when the loan was drawn down on **21 December 2009**, tracker interest rates were not available for new mortgages “*as the Bank had withdrawn the Tracker product from the market on 10 October 2008*”. The Provider therefore contends that “*the Complainant did not have an option of applying for a Tracker rate in 2009 nor does he have any contractual entitlement to a Tracker rate*”.

The Provider states that the **Letter of Loan Offer** dated **1 October 2009** and the **General Terms and Conditions** are clear and transparent in relation to the interest rate applying to the mortgage loan account. The Provider contends that the **Letter of Loan Offer** and the terms and conditions “*do not make any reference to the Complainant being offered*” a tracker interest rate and is satisfied that there is “*no entitlement to a Tracker Interest rate on this Mortgage Loan Account*”. The Provider maintains that it complied with all signed requests and instructions from the Complainant in relation to his mortgage loan account and the account operated in line with the **General Terms and Conditions** of the **Letter of Loan Offer** dated **1 October 2009** at all times.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to permit the Complainant to draw down his mortgage loan account on a tracker rate of interest in **December 2009**.

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.

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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 13 April 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.

In order to determine this complaint, 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 **2006** and **2009**.

The Complainant firstly approached the Provider to apply for a mortgage loan in **2006**. The Provider issued a **Letter of Loan Offer** dated **6 November 2006** to the Complainant which detailed as follows:

*"1. Amount of Credit Advanced: 550,000.00 Eur
2. Period of agreement: 20 years"*

The **Terms and Conditions** of the **Letter of Offer** dated **6 November 2006** are detailed at **Appendix A** of the Letter of Offer and state as follows:

"Interest: Interest will be calculated on a day to day basis at 0.95% above [Provider] Tracker Rate, fluctuating, charged and compounded quarterly in arrears and payable monthly in arrears.

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The Tracker rate will equal European Central Bank's refinancing operation Bid Rate. This Rate will change within 5 working days of the ECB rate change. (At present the rate is 4.10% per annum). Notwithstanding this the rate shall be set at a discounted rate (currently 0.42% above the Tracker Rate per annum) for 12 months from the date of drawdown. (At present the rate is 3.67% per annum) A.P.R.:4.26% per annum.

[...]

Acceptance And Drawdown:

The final date for acceptance of this Facility Letter shall be the 6th December 2006. The final date for drawdown of this Facility shall be 6th May 2007".

The terms of the **Letter of Loan Offer** dated **6 November 2006** provided for a 1-year discounted tracker interest rate of 3.67% (ECB + 0.42%) reverting to a Tracker Rate of 4.1% (ECB + 0.95%) for the remaining 19 years. However, I have not been furnished with any evidence to suggest that the Complainant signed, accepted and returned the signed **Letter of Loan Offer** to the Provider on or before **6 December 2006**. Moreover, it is clear that this loan was never drawn down. I note that the Complainant in fact has submitted that he decided to defer taking out a mortgage at that time due to the "*deteriorating property market*". It is important for the Complainant to understand that in circumstances where he did not accept the terms of the **Letter of Loan Offer** dated **6 November 2006**, that loan offer expired and therefore it was necessary for him to submit a fresh loan application if he so wished and for the Provider to thereafter issue a fresh **Letter of Loan Offer**.

The Complainant subsequently approached the Provider some three years later in **September 2009** and submitted a further mortgage loan application in the sum of €250,000 in respect of another property. The Provider issued a **Letter of Loan Offer** dated **1 October 2009** to the Complainant.

The particulars of loan offer are set out at **Part 1** of the **Letter of Loan Offer** dated **1 October 2009** and detail as follows:

"Offer Date: 01 October 2009
....
Mortgage Loan Amount: €250,000
Loan Term: 12 years/144 months"

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	<i>Term</i>	<i>Loan Type</i>	<i>Interest Rate Description</i>	<i>Published Rate</i>	<i>Adjustment*</i>	<i>Rate Applicable</i>	<i>Amount of Each Instalment</i>
1	5 Years	Variable Interest Only	<i>a PDH LO. LTV Var >50% <=80%</i>	2.45%	0%	2.45%	€510.79
2	7 Years	Variable Annuity	<i>a PDH LTV Var >50% <=80%</i>	2.45%	0%	2.45%	€3,241.45

Condition 3.6 of Part 4 of the General Conditions Terms and Conditions of Offer of Mortgage Loan attached to the **Letter of Loan Offer** detail as follows:

“3.6 LTV Variable Interest Rate Mortgage Loan

- 3.6.1 *LTV variable rate is available only where the property is or is intended to be the principal residence of the Customer. The applicable rate band will depend on the loan-to-value ratio ('LTV') of the amount of the mortgage loan relative to the value of the property set out in the Particulars of Offer of Mortgage Loan. The interest rate applicable at any time, will vary according to the prevailing LTV variable rates set by the Bank from time to time, subject to these conditions.*
- 3.6.2 *The Bank may adjust the LTV variable rate upwards if the Valuation Report values the property at less than the Property Price/Estimated Value shown in the Particulars of Offer of Mortgage Loan. The Bank will notify the Customers in writing of the new LTV variable rate.*
- 3.6.3 *The Customer may at any time convert a LTV variable rate to a fixed interest rate Mortgage Loan at the Bank's then prevailing rates appropriate to the Mortgage Loan. However, the Customer may not convert the LTV variable Rate directly or indirectly from one LTV variable rate to another LTV variable rate in order to avail of a lower LTV variable rate.”*

Part 5 -Statutory Notices of the **Letter of Loan Offer** dated **1 October 2009** details as follows:

“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME”

It is clear that the **Letter of Loan Offer** dated **1 October 2009** provided for a loan-to-value (“LTV”) variable interest rate mortgage loan at a variable interest rate of 2.45%. The **Letter of Loan Offer** also provided for an interest only repayment period for the first 5 years, after which the interest rate would convert to annuity payments for the remaining 7 years.

The **Letter of Loan Offer** dated **1 October 2009** does not contain any reference to the ECB rate. 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 Complainant did not want to pursue this option because he was unhappy with the interest rate applicable to the mortgage, he could have decided not to accept the Provider’s offer of a LTV variable interest rate mortgage loan. Instead, the Complainant accepted the Provider’s offer by signing **Part 7- Acceptance and Consent** of the **Letter of Loan Offer** on **7 December 2009**. The Complainant signed the **Acceptance and Consent** in the presence of his solicitor on the following terms:

“I/We accept the conditions of this Offer and agree to mortgage the property to the Lenders ad Security for the Mortgage Loan.

....

I/We hereby confirm that I/we have read the within Terms and Condition attaching to this Offer and acknowledge that I/we have received a copy thereof”

The Complainant subsequently drew down his mortgage loan on **21 December 2009** on a variable rate of 2.45%.

The Complainant appears to be of the view that he had an entitlement to a tracker rate of interest to be applied to his mortgage loan account when it was drawn down in **2009** because he had a “committed offer from [the Provider] of a Tracker Mortgage” in **2006**. It is important for the Complainant to be aware that **Letter of Loan Offer** dated **6 November 2006** and the **Letter of Loan Offer** dated **1 October 2009** are two entirely distinct and separate loan offers relating to different security, different loan amounts with separate and distinct terms and conditions applicable to each loan. It is difficult to understand how the Complainant has formed the view that just because he was offered a tracker interest rate on foot of a mortgage loan application in **2006**, which he did not accept, he was somehow automatically entitled to a tracker interest rate in **2009** on a completely different property for a different loan amount. There is no basis, legal, contractual or otherwise to support such a view.

The Provider submits that when the **Letter of Loan Offer** issued on **1 October 2009**, tracker interest rates were not available for new mortgage applicants as the Provider had withdrawn the tracker interest rate product from the market in **late 2008**. This was a commercial decision which I cannot interfere with as the Provider was legitimately entitled to make such a decision. If the Complainant wished to avail of the tracker interest rate offered in the **Letter Loan Offer** dated **6 November 2006**, he could have signed and accepted the terms of the loan and drawn down a mortgage at that time, however, he did not do so, for very valid reasons he has clearly articulated.

The Complainant ultimately signed and accepted the **Letter Loan Offer** dated **1 October 2009** which clearly indicates that the interest rate applicable to the mortgage loan was to be the Provider's LTV variable interest rate which could be increased or decreased by the Provider. There is no reference whatsoever to a tracker rate of interest in the loan documentation that issued to him in **October 2009** and which was accepted by him. If it was the case that the Complainant was of the view that the LTV variable interest rate mortgage product was not suitable for him, then the Complainant could have decided not to accept the loan offer and instead seek an alternative rate with the Provider or indeed another lender. However, there is no evidence that the Complainant did so. The Complainant was under no obligation to accept the **Letter Loan Offer** dated **1 October 2009**.

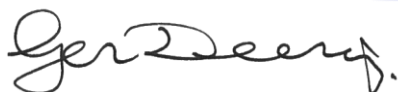
In light of all the foregoing, I accept that there was no obligation on the Provider to offer the Complainant a tracker interest rate option in respect of his mortgage loan in **2009**.

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

5 May 2021

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Pursuant to *Section 62 of the Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,
and

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

