



<b><u>Decision Ref:</u></b>	2021-0171
<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**

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

The loan amount is €50,000 and the term of the loan is 21 years. The Letter of Approval accepted by the Complainants on **10 August 2004** detailed that the loan type was an *"Equity Release Variable Rate Secured Personal Loan"*.

**The Complainants' Case**

The Complainants submit that they held an existing mortgage loan with Provider since **2000** and applied for additional borrowings by way of *"mortgage equity release"* in **2004**. The Complainants explains that the purpose of the loan was for *"house improvements, [k]itchen, attic conversion (sic) etc"*.

The Complainants contend that during the application process in **2004** they requested a tracker interest rate for the mortgage loan account, but this was refused by the Provider. The Complainants submit that the Provider *"failed to tell [them] that tracker rates were available with them since [early] 2004"*.

The Complainants state that they always *"understood that equity release was a mortgage"* and not a *"personal loan"* and therefore *"should have been allowed the tracker rate"*.

The Complainants state that they did not obtain independent legal advice before accepting the *“mortgage equity release”*. They submit that when they attended one of the Provider’s branches to sign the loan documentation, a representative of the Provider *“brought us to their solicitor to witness signatures”*. They submit that *“[i]t was made clear on that day mortgage equity release would not happen unless we accepted that. In Hindsight we did this under duress”*. The Complainants further submit that they did not obtain independent advice on the basis that they *“naively believed bank would look after our interest”*.

The Complainants note that they had *“[a]t least [t]wo telephone conversations immediately after the monies”* were drawn down with the Provider to query why the additional monies did not form part of the Complainants’ original mortgage loan with the Provider. The Complainants state that *“the equity release was sold as an addition to first mortgage and when we saw we had two accounts we questioned this”* with the Provider *“who at the time said it was two mortgages”*.

The Complainants are seeking a refund of the mortgage interest they believe they have overpaid at the variable interest rate instead of the tracker interest rate.

### **The Provider’s Case**

The Provider explains that it issued a mortgage home loan to the Complainants on **30 November 2000** on a tracker interest rate of ECB+0.95% which was secured on their private dwelling house.

The Provider submits that the Complainants contacted the Provider in **2004** seeking to release €50,000 equity on their private dwelling house over a 21-year period. The Provider notes that the Complainants required the additional borrowings for a *“number of purposes”* to include clearing their existing *“term loan of €11,665 and the overdraft on their current account”* and *“the remaining funds would be used for home improvements”*.

The Provider explains that it determined that an equity release loan was *“suitable”* for the Complainants *“because, in 2000, they had provided a legal mortgage to the Bank which was already in place and could be used to secure their proposed total borrowing in 2004”*.

The Provider outlines that equity release loans are *“additional mortgage loans provided by the Bank to existing home loan customers of the Bank whose mortgaged property was available as security for the additional loan”*. It details that the interest rates on its equity release loans are based on mortgage rates which are *“typically lower than the other personal loan rates”*.

The Provider details that the introduction of equity release personal loans predated the Provider's introduction of tracker rate mortgage loans in **early 2004**. The Provider submits that when it introduced tracker interest lending in **2004**, it decided "*not to apply tracker rates to its equity release loans*". Therefore, it states that there was no basis upon which the Complainants could be offered a tracker rate option in respect of an equity release loan in **2004**. The Provider submits that the only interest rates that the Provider offered on equity release loans were standard variable rates, or, after **late 2006**, fixed rates.

The Provider states that it does not hold any record "*of a request from the Complainants in 2004 for a tracker interest rate mortgage*" but in any case, "*a tracker rate could not be provided to the Complainants as the Bank did not then or at any time offer an equity release loan with a tracker rate*".

The Provider submits that it was "*standard practice*" to "*discuss all available loan rates with customers when they were applying for a loan*". The Provider asserts that the Complainants "*decided*" to apply for an equity release loan and they themselves "*selected the variable rate of 3.55% which was the lowest equity release rate available*".

The Provider states that a Letter of Approval for an Equity Release Variable Rate Secured Loan was subsequently issued to the Complainants on **03 August 2004**. The Provider details that the loan offer was for a sum of €50,000 at a variable interest rate of 3.55% repayable over a period of 21 years. The Provider submits that the Complainants accepted the offer on **10 August 2004** and funds were subsequently drawn down on **23 August 2004**.

The Provider states that it is "*satisfied*" that the Complainants were provided with an opportunity to obtain independent legal advice prior to accepting the terms of the Letter of Approval. The Provider asserts that the Complainants "*confirmed this when they signed their acceptance of the Bank's offer on 10 August 2004*".

The Provider does "*not accept*" the Complainants' assertion that the Provider's solicitor "*witnessed their acceptance of the Loan Offer*" at the Provider's branch. The Provider submits that it holds no record of such an event and that "*[a] solicitor of the Bank did not witness the Complainants' signatures*". The Provider details that it spoke with the First Complainant on **10 August 2004** who confirmed that both Complainants would attend the Provider's branch the following day. The Provider states that it appears that the Complainants did so and "*they brought with them the acceptance which they had signed on the previous day*".

The Provider notes that on **11 August 2004**, *“the branch confirmed to the legal securities section of the Bank that the relevant documentation had been signed by the Complainants”* and that the relevant fee had been discharged in respect of registering the mortgage deed.

In relation to the Complainants’ request for records of the telephone calls that took place after the loan was drawn down, the Provider notes that the telephone recording system used at the time *“is no longer in use”*. The Provider explains that the *“historical telephony system was not set up with a searching capacity required for historical call retrieval requests made several years after the date of the call”* therefore *“[d]ue to the passage of time and technical difficulties”*, the Provider is not able to retrieve the requested calls.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate for their equity release mortgage loan in **2004**.

### **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 10 May 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.

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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 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 **2004**.

It is clear that in **June 2004**, 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, which was already held as security in relation to another mortgage loan held by the Complainants. I have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants 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 loan or any particular type of loan in **2004**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowings 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 **30 June 2004**, which details as follows;

***"2. Details of Mortgage Required***

***Type of Loan:***

*Amount of Loan required*

EUR 50,000.00

*Purchase price/Value of property*

EUR 350,000.00

*Loan type*

Equity Release Variable Rate Secured Personal Loa[n]

*Repayment Term Required*

21

Years"

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A **Letter of Approval** dated **03 August 2004** was subsequently issued by the Provider to the Complainants 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>EUR 320,000.00</i>
<i>Loan Amount:</i>	<i>EUR 50,000.00</i>
<i>Interest Rate:</i>	<i>3.55%</i>
<i>Term:</i>	<i>21 year(s)"</i>

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

*"C. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGE LOAN APPROVAL CONDITIONS.*

*...*

*F. THAT THE LOAN YOU HAVE WITH [redacted](A/C NO: [redacted]) BE CLEARED FROM THE PROCEEDS OF THE ADVANCE.*

*G. THAT THE EXISTING CREDIT LIMIT ON A/C NO: [redacted] BE CLEARED FROM THE PROCEEDS OF THE ADVANCE AND THE CREDIT LIMIT ON THEE ACCOUNT BE REMOVED."*

**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** also outline as follows;

*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 Offer of an Additional Loan** which was signed by the Complainants on **10 August 2004**, states as follows;

*"I/We the undersigned accept the within offer on the terms and conditions set out in:*

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- i. *Letter of Approval*
- ii. *the General Mortgage Loan Approval conditions*
- iii. *the [the Provider] Mortgage Conditions"*

The Provider has submitted **diary notes** from its internal system into evidence. The diary entries dated **10 August 2004** and **11 August 2004** read as follows;

<i>"Diary</i>	<i>11/08/2004</i>	<i>12:11:23</i>	<i>LEGAL DOCS SENT</i>
<i>Diary</i>	<i>10/08/2004</i>	<i>17:01:04</i>	<i>CLIENTS GOING TO SIGN LEGAL DOCS</i>
<i>Diary</i>	<i>10/08/2004</i>	<i>10:12:51</i>	<i>NO ANSWER"</i>

The Complainant appears to submit that a solicitor of the Provider witnessed their signatures to the **Acceptance of Offer of an Additional Loan**. In addition, the Provider suggests that the Complainants confirmed that they obtained independent legal advice "*when they signed their acceptance of the Bank's offer on 10 August 2004*". However, I note that the **Acceptance of Offer of an Additional Loan** was only signed by the Complainants on **10 August 2004**. The **Acceptance of Offer of an Additional Loan** submitted in evidence by the Provider does not contain any declaration on the part of the Complainants that they obtained or had been given the opportunity to obtain independent legal advice prior to accepting the offer of an additional loan. Consequently, the **Acceptance of Offer of an Additional Loan** is neither signed by a solicitor for the Provider nor does it state that the Complainants' signatures were witnessed by a solicitor. Therefore, the evidence does not support the Complainants' claim that their signatures were witnessed by the Provider's solicitor. It would appear to me that it was a matter for the Complainants to obtain independent legal advice before signing their acceptance of the loan offer should they have so wished. I am satisfied that the Complainants were afforded the opportunity to engage the services of a solicitor prior to accepting the loan offer given the **Letter of Approval** issued on **03 August 2004** and the Complainants signed their acceptance of the loan offer on **10 August 2004**.

I note from the image provided of the Provider's **Mortgage Processing System** screen that the equity release mortgage loan was drawn down by the Complainants on **23 August 2004**.

The Complainants appear to submit that they contacted the Provider shortly after their equity release mortgage loan was drawn down to query why they now had two mortgage loan accounts. However, the Complainants, by their own admission, state that the equity release mortgage loan was sold as an additional loan and "*life insurance had to be in place and taken out to ensure accept[a]nce also Mortgage protection policy*".

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It is clear to me that the Complainants were issued with a **Letter of Approval** with terms and conditions that made no reference to the Complainants' existing home loan that they held with the Provider at the time. While it is disappointing that the Provider no longer has access to its telephone recordings from **2004**, I am satisfied that the loan documentation that issued to the Complainants clearly set out that the equity release loan was a separate additional loan.

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 loan, 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 10 August 2004**.

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 28<sup>th</sup> June 2004*" and details as follows;

<b><i>"Equity Release / Secured Personal Loans</i></b>	<b><i>RATE</i></b>	<b><i>APR</i></b>
<i>[Product name] Variable Rate</i>	<i>3.55%</i>	<i>3.6%</i>
<i>Secured Personal Loan Variable Rate</i>	<i>5.05%</i>	<i>5.2%</i>
<i>Secured Personal Loan 1 Year Fixed Rate (for new business)</i>	<i>4.39%</i>	<i>4.9%</i>
<i>Secured Personal Loan 1 Year Fixed Rate (for existing business)</i>	<i>5.39%</i>	<i>5.3%</i>
<i>Secured Personal Loan 5 Year Fixed Rate</i>	<i>6.60%</i>	<i>6.8%</i>
<i>Secured Personal Loan 10 Year Fixed Rate</i>	<i>7.25%</i>	<i>7.5%</i>

This document shows that tracker interest rates were not an option for equity release products with the Provider when the Complainants applied for an equity release product in **2004**.

The Provider details its **policy** with regard to interest rate offerings on equity release loans as follows;

*"... the Bank made a commercial decision not to include Tracker rates as an option in its product suite for Equity Release Loans. Up to a certain point the only available interest rate on an Equity Release Loan was the variable rate.*

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*From [late 2006] customers could avail of 1, 2, 3, 4, 5, & 10 year fixed rate options on their Equity Release Loan.”*

It is clear from the **Lending Interest Rates** document and the Provider’s policy on equity release loans that tracker interest rates were never an interest rate option for this type of product. Standard variable interest rates and fixed interest rates were the only interest rate options ever available with respect to the equity release product. The Complainants appear to be of the view that given an equity release loan equates to a mortgage loan, they were entitled to be offered a tracker interest rate. While tracker interest rate options were available generally as part of the Provider’s larger suite of products at the time, the Provider made the decision not to include a tracker interest rate offering on their equity release product. This was a commercial decision the Provider was entitled to make.

I have been provided with no evidence that the Complainants had a contractual or other entitlement to a tracker interest rate on their mortgage loan account. 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.

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**

1 June 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.

