



<u>Decision Ref:</u>	2021-0201
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	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**

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

The loan amount was €215,000 and the term of the loan was 25 years. The Loan Offer Letter dated **25 July 2006** provided that the mortgage loan account would be drawn down on a 1-year fixed interest rate, with a variable interest rate to apply thereafter.

The mortgage loan account was redeemed in **December 2016**.

The Complainants' Case

The Complainant submits that they "*jointly*" contacted the Provider by way of letter dated **19 May 2008** to enquire about lower interest rate options for their separate mortgage loan accounts. They submit that this letter "*directly led to* [the Second Complainant] *being offered a tracker*" for her mortgage loan account in **July 2008**.

The Complainants submit that, shortly after the Second Complainant was offered a tracker interest rate in **July 2008**, the First Complainant was informed by the Provider over the phone that tracker interest rates "*were no longer being offered*".

The Complainants submit that at the time, the First Complainant “*put it down to bad luck that [she] had narrowly missed out on getting a Tracker as they were being phased out, but now [she] believe[s] that [she] should have been offered one in July 2008*”.

The Complainants submit that “*In short, [the First Complainant] did request a Tracker in 2008 and [the Provider branch] treated two people with in almost identical financial circumstances with a lack of parity*”.

The Complainants are seeking financial compensation for the First Complainant’s “*significant financial loss*” arising from interest overpaid on her mortgage loan account from **July 2008** to **December 2016** as a result of not being on a tracker interest rate.

The Provider’s Case

The Provider submits that a Mortgage Loan Offer dated **25 July 2005** providing for a mortgage loan of €215,000.00 over a term of 25 years, was signed and accepted by the First Complainant on 15 August 2005. It states that the Offer Letter provided for an initial fixed interest rate at 2.750% for the first 12 months, thereafter moving to a standard variable rate, which at the date of offer was 3.600%. The Provider states that pursuant to **General Condition 7(b)** of the Offer Letter, it has the sole discretion upon expiry of the fixed rate period to provide a further fixed rate period, or a choice of interest rates and if either of these is not selected, then the mortgage loan account will revert to a variable rate.

The Provider submits that its internal records show that it issued a **Product Review Notice** letter to the First Complainant on **14 August 2006** in advance of the expiry of the 1-year fixed rate period. The Provider submits that the **Mortgage Form of Authorisation** (“MFA”) attaching to the Product Review Notice was not signed and accepted by the First Complainant, and therefore the mortgage loan account rolled to a standard variable interest rate, then 4.44%, on **12 September 2006**. The Provider states that it remained on this rate until the mortgage loan account was redeemed in **December 2016**.

The Provider states that its internal records confirm that on **27 February 2008** the First Complainant “*requested and was approved for a tracker rate of interest*” of ECB + 0.95% (4.95%) and was advised that a Mortgage Form of Authorisation would issue in the post. It states that the First Complainant was given “*4/5 weeks*” to complete the MFA should she wish to accept the tracker rate, however it states that there is no evidence that she returned the MFA.

The Provider states that in the letter of **19 May 2008** the First Complainant acknowledged the Provider's offer of the tracker rate, although the offer was for a tracker rate of 4.95% and not 4.9% as stated in the letter.

The Provider states that the letter of **19 May 2008** goes on to state that the First Complainant and her spouse, being the Second Complainant, were seeking information relating to their respective accounts. It states that the First Complainant was seeking "a better deal on her mortgage" and "a good investment option for approx. €15,000 she has saved", in contrast with her spouse who was seeking "A better mortgage interest rate" and "either an equity release or a top-up on the [Property] mortgage of approx. €25,000.00".

The Provider submits that it is clear that the First Complainant's request "does not reflect a request for a "better mortgage interest rate" but rather a "better deal on her mortgage"". It states that there is no evidence that the First Complainant requested a tracker rate in **May 2008**, and it relies on "the clear terms and conditions" of the Offer Letter.

The Provider further submits that it is "entirely inappropriate for the Complainant to draw inferences from the aforementioned letter, which clearly relates to two separate contractual arrangements". It states that the mortgage loan accounts of the First Complainant and the Second Complainant referred to in their letter of **19 May 2008**, "are two distinct contracts which do not have inter/mutual reliance." The Provider submits in respect of the Second Complainant's mortgage loan account, which is not the subject of this complaint, that "it cannot comment on any other mortgage loan account which is not related to the subject matter of this complaint ... to undermine the legally binding contract with reference to other documents and/or correspondence would be contrary to the fundamental principles of a contract."

The Provider submits that despite mentioning a better rate of interest offered by another provider in the letter of **May 2008**, the First Complainant "did not switch her mortgage loan account to another financial services provider".

The Provider states that it "refutes the Complainant's assertions regarding a telephone conversation in July 2008, whereby a member of the Provider told the Complainant that tracker interest rates were no longer available." The Provider submits that it does not hold any records relating to this allegation and further notes that "whilst the Complainant alleges that she was refused a tracker rate of interest, the Complainant's wife did avail of a tracker rate of interest in July 2008. Therefore, if the Complainant knew that such a statement in July 2008 was incorrect and/or contradictory, there is no evidence that she raised any issue with the Provider before making the within complaint."

The Provider submits that *“the Complainant had been in regular contact with her relationship manager and was aware that the Provider had previously offered a tracker rate of interest.”* The Provider confirms that in **July 2008** a tracker rate of interest was available to all new and existing customers, until **late 2008** when the product was withdrawn by the Provider.

The Provider submits that the Complainant was further in contact with the Provider in **July, August and September 2008** *“with regard to her Life Cover Plan and there is no record or reference to any further requests or follow up by the Complainant requesting the Provider to reissue a MFA offering a tracker rate of interest, by telephone and/or in correspondence.”*

The Provider states that the First Complainant has not provided any evidence to suggest that a tracker rate was expressly requested to apply to the mortgage account at a particular point in time or at any point in the future, despite having been approved for a tracker rate of interest in **February 2008**.

The Provider submits that the First Complainant redeemed her mortgage loan with the Provider on **30 December 2016**.

The Complaint for Adjudication

The conduct complained of is that the Provider failed to offer the First Complainant a tracker interest rate on her mortgage loan account ending **9962** in or around **July 2008**.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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.

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A Preliminary Decision was issued to the parties on 26 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.

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 relevant provisions of the First Complainant's loan documentation, and to set out certain interactions between the First Complainant and the Provider relating to the mortgage loan account in **2008**.

I note that the **Mortgage Loan Offer** dated **25 July 2005** provided for a loan amount of €215,000, for a term of 25 years on an initial fixed interest rate of 2.750% for a period of 12 months.

Part 1 – The Statutory Loan Details of the Mortgage Loan Offer dated **25 July 2005** sets out the following:

“1.	<i>Amount of Credit Advanced</i>		€215,000
2.	<i>Period of Agreement</i>		25 years
3.	<i>Number of Repayment Instalments</i>	<i>Instalment Type</i>	4. <i>Amount of each Instalment</i>
	12	Fixed at 2.750%	€991.12
	288	Variable at 3.600%	€1,083.23”

Part 2 –The Additional Details of the Mortgage Loan Offer describes the loan type as “Repayment” and outlines that the interest rate is “2.750% Fixed”.

The notice at the end of the page containing **Part 4 –The Special Conditions** details as follows:

“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

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General Condition 1(d) of Part 5 – The General Conditions details as follows;

“ 1. Interpretation and General

- (d) *This Offer Letter replaces and supersedes all earlier versions of this Offer Letter”*

General Condition 6 of Part 5 – The General Conditions details as follows;

“6. Variable Interest Rates

- (a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender’s discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- (b) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month’s money at the Euro Inter Bank Offered Rate (EURIBOR).”*

General Condition 7 of Part 5 – The General Conditions details as follows;

“7. Fixed Interest Rates

...

- (b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest applicable to the Loan will be a variable interest rate.”*

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I note that the Complainant signed the **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer** dated **25 July 2005** on **15 August 2005** on the following terms:

"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."

The Complainant accepted the Mortgage Loan Offer, having confirmed that she had read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer** dated **15 August 2005**.

It is clear to me that the Loan Offer Letter envisaged a fixed interest rate of 2.75% for a period of 12 months with a variable interest rate applying thereafter. 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 at the discretion of the Provider. The First Complainant accepted the Letter of Offer, having confirmed that she had read and fully understood the Loan Offer.

I note from the **mortgage loan statements** provided in evidence that the First Complainant's mortgage loan account ending **9962** was drawn down on **13 September 2005**.

The Provider has submitted that prior to the expiry of the initial 12-month fixed interest rate period on the mortgage loan account it issued a **Product Notice Review letter** to the First Complainant. I am disappointed to note that a copy of the **Product Notice Review letter** purportedly issued by the Provider to the First Complainant on **14 August 2006** has not been provided in evidence to this office. The Provider has submitted that it does not hold a copy of this letter.

Provision 49 of the **Consumer Protection Code 2006** governs retention of records and was not effective until **01 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to retain records, there was no breach of the CPC 2006.

In any event it does not appear to be disputed between the parties that the mortgage loan account was switched to the Provider's standard variable rate on the expiry of the initial fixed interest rate period in **September 2006**. I note from the mortgage loan statements that the Complainant's mortgage loan account rolled to the interest rate of 4.44% on **12 September 2006**.

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Having considered the mortgage loan documentation, it is clear to me that the First Complainant did not have a contractual entitlement to a tracker interest rate at the end of the fixed rate period. The Complainant's mortgage loan account rolled to a variable rate in accordance with **General Condition 7(b)** of the Offer Letter. The variable rate, in the Complainants' mortgage loan documentation, 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.

I note that the Provider's **internal note** dated **27 February 2008** details:

"Pricing Unit have agreed ECB plus 0.95% for remaining term"

A further internal note dated **27 February 2008** states:

"advised customer [Provider department] have approved rate of 4.95 and mfa [...] would be sent out in the post"

The Provider's internal note dated **29 February 2008** details:

"We have received approval from [Provider department] for a discounted Tracker Rate. Please forward a Tracker mortgage form of authorisation to change the rate on the account. If you do not have one, let me know your email address and I can send you one."

I am disappointed to note that a copy of the **Mortgage Form of Authorisation** which purportedly issued to the First Complainant in or around **29 February 2008** offering her a tracker interest rate of 4.95% (ECB + 0.95%), has not been provided in evidence to this office. Nor has the Provider given any explanation for not providing this document in evidence.

I note that the First Complainant has stated that she did not receive the **Mortgage Form of Authorisation** at this time.

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;

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- 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.*

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 First Complainant's mortgage loan was incepted in **2005** for a term of **25 years** and the Provider purportedly issued the **Mortgage Form of Authorisation** to the Complainant in **February 2008**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It appears that the mortgage loan account with the Provider was redeemed in **December 2016**. It is therefore unclear to me why this documentation has not been furnished by the Provider. This is most disappointing.

In any event, it does not appear from the evidence before me that a tracker interest rate of 4.95% (ECB + 0.95%) was applied to the First Complainant's mortgage loan account at that time.

Whilst I am disappointed by the lack of documentation provided, it is clear that the Provider was not obliged to offer the First Complainant a tracker interest rate on the mortgage loan account in **February 2008**. It appears from the evidence before me that the Provider, in line with its own commercial discretion and policy at the time, was willing to offer the First Complainant the option of a tracker interest rate of ECB + 0.95%, then 4.95%, on the mortgage loan in **February 2008**. It is important for the First Complainant to understand that while tracker rate options may have been available as a product option from the Provider at the time, the First Complainant was not contractually entitled to be offered a tracker interest rate.

It does not appear that the First Complainant contacted the Provider again in relation to interest rate options for her mortgage loan account, until the Complainants jointly wrote to the Provider by letter dated **19 May 2008**, which detailed as follows:

“As [the First Complainant] mentioned to you a while ago over the phone, we have both been looking at our financial situation and we want to make a few improvements.

...

As you will be aware, [the First Complainant] has a mortgage on [property] and [the Second Complainant] has a mortgage on [property]. Each mortgage is over €200,000 and we are on the current variable rate of nearly 5.5%.

We know we can get a better rate than this. Some weeks ago, for example, [a third party Provider] offered a rate of 4.7% ... in January your own [department] division of [the Provider] offered us a rate of ECB plus .9% (4.9%). We were told [Provider branch] would send us out a Mortgage Form of Authority within a few days, but nothing happened, so we started to shop around.

As you can imagine, we don't want to have to change banks because we don't want to have to go to a lot of trouble. But, rather than throw good money after bad, we will go with the best offer and the best service if needs be.

[The First Complainant] is looking for two things:

- 1. A better deal on her mortgage;*
- 2. A good investment option for approx. €15,000 she has saved.*

[The Second Complainant] is looking for:

- 1. A better mortgage interest rate;*
- 2. Either an equity release or a top-up on the [Property] mortgage of approx. €25,000.*

...”

The Complainants have furnished in evidence a letter from the Provider to the Second Complainant dated **28 July 2008**. I note that in this letter the Provider offered the Second Complainant a tracker interest rate of ECB + 1.15% (5.4%) for her mortgage loan account.

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I note that the First Complainant has submitted that “*shortly afterwards*” she phoned the Provider to pursue the potential option of applying for a tracker interest rate and was informed that tracker interest rates were no longer available. Neither party to this complaint has furnished any contemporaneous evidence of any interactions that took place between the First Complainant and the Provider in or around **July 2008**. The Provider submits that it has no record of any conversations with the First Complainant with respect to her mortgage account at the time.

I have no reason to doubt the First Complainant’s version of events but I must accept that, notwithstanding the fact that a tracker interest rate was offered by the Provider on the Second Complainant’s mortgage loan in **July 2008**, there was no obligation on the Provider, contractual or otherwise, to give the First Complainant the option of a tracker interest rate on her mortgage loan at that time. 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 either of the Complainants a tracker interest rate in **2008**.

I note that the Provider has submitted that it withdrew its tracker interest rate offering in **late 2008**.

I am of the view that it is not necessary to determine this dispute as to any conversation that may have taken place in or around **July 2008**, as the entitlement to interest rates is governed by the written terms and conditions of the First Complainant’s mortgage loan. Having considered the First Complainant’s mortgage loan documentation, I am of the view that there was no contractual entitlement to a tracker interest rate in **February 2008, July 2008** or at any other time.

It is important for the Complainants to understand that the fact that the Second Complainant, had a tracker interest rate applied to her mortgage loan held with the Provider in or around **July 2008**, did not in any way create an obligation on the Provider to offer the First Complainant a tracker interest rate on her mortgage loan 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 First 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

21 June 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.