



<u>Decision Ref:</u>	2021-0397
<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**

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 principal private residence.

The loan amount was €294,400 repayable over a term of 30 years. The **Loan Offer Letter** which was signed by the Complainants on **03 July 2008** outlined that the interest rate applicable to the loan was a 3-year fixed rate of 5.05% from the date of drawdown until **30 June 2011**, with the Provider's variable interest rate to apply thereafter.

The Complainants' Case

The Complainants submit that they completed a mortgage loan application form with the Provider on **31 March 2008**. The Complainants note that they selected the tracker interest rate option when completing the application form.

The Complainants detail that the Provider issued a **Loan Offer Letter** dated **18 June 2008** to their solicitor. The Complainants contend that this **Loan Offer Letter** outlined that the loan type was a "[product name] Tracker ECB + 1.35%".

The Complainants assert that the Provider subsequently contacted their solicitor to inform her that the loan offer was “void”. The Complainants further assert that they contacted an employee of the Provider who confirmed that there was “an error on [the Provider’s] part and this offer was void”.

The Complainants contend that they were verbally informed by an employee of the Provider that tracker interest rates were “phased out” in **2007** and that they were “advised” by an employee of the Provider to instead apply a fixed interest rate to their mortgage, as the tracker interest rate option was no longer available. The Complainants note that they “decided that this was the best option at the time” for them “given the fact that the tracker mortgage was no longer an option”.

The Complainants submit that their solicitor subsequently received an amended **Loan Offer Letter** from the Provider dated **19 June 2008**. The Complainants note that this letter detailed that the interest rate applicable to the loan was a 3-year fixed interest rate of 5.05% until **20 June 2011**. The Complainants note that on the expiry of the 3-year fixed interest rate period, the mortgage loan switched to the Provider’s standard variable rate.

The Complainants submit that they “struggled” to meet their mortgage loan repayments in **2012**, as they had only one income and a new baby. The Complainants explain that the Provider agreed to reduce their repayments from **October 2012** to **March 2013**, however, the Complainants note that on the expiry of this reduced period, they returned to paying a mortgage with a “huge interest rate”.

The Complainants submit that they were “shocked” to discover that the Provider was offering tracker interest rates until **late 2008**. The Complainants assert that they were “deceitfully cheated out of the right to a tracker mortgage”. The Complainants further submit that the fixed rate mortgage “negatively impacted” them “throughout the course of the mortgage”.

The Provider’s Case

The Provider notes that the Complainants approached the Provider in **March 2008** seeking ‘Approval in Principle’ for “an intended house purchase”.

The Provider submits that the Complainants signed and completed a mortgage application form on **31 March 2008**. The Provider notes that the Complainants also completed a **First Time Buyer Mortgage Suitability Statement** which was signed by the Complainants on **31 March 2008**.

The Provider suggests that it “[i]t is important to note that this mortgage application form was incomplete and did not specify either a) the Loan Amount or b) the property address of [the Complainants’] proposed purchase”. The Provider submits that this form was completed by the Complainants for “the sole purpose of seeking Approval in Principle” and that no offer could have been issued on foot of this incomplete application form.

The Provider noted that it provided the Complainants with approval in principle for a loan in the amount of €320,000, repayable over a term of 30 years, “subject to terms and conditions for a house purchase and unconditional contracts being in place for the sale of the existing home”.

The Provider details that on **13 June 2008**, the Provider “received an internal memo” from one of the Provider’s branches, on behalf of the Complainants, which confirmed the precise property for which the Complainants required the mortgage and the required loan amount of €294,400 on a fixed interest rate of 5.09% for 2 years.

The Provider submits that on **17 June 2008**, it received another internal memo from the Provider’s branch, on behalf of the Complainants, confirming the property to be mortgaged and the required loan amount of €294,400 for a term of 30 years “on the same 2 year fixed rate of 5.09%”.

The Provider submits that it subsequently issued a **Loan Offer Letter** to the Complainants dated **18 June 2008**, which provided for a mortgage loan “in the amount of €294,400 over a term of 30 years based on a Tracker Interest Rate of ECB + 1.35%”.

The Provider further submits that it issued a revised **Loan Offer Letter** to the Complainants on **19 June 2008**. The Provider notes that this revised **Loan Offer Letter** provided for a mortgage in the sum of €294,000, repayable over a term of 30 years “based on a 3 Year Fixed Interest Rate of 5.05%” until **30 June 2011**, and thereafter converting to the Provider’s variable rate.

The Provider states that “a second mortgage application form” dated **16 June 2008** was “signed by [the Complainants] with the intended security address duly completed” and the form was forwarded to the completions team.

The Provider asserts that on **02 July 2008**, an internal memo was sent from the Provider’s “completions team” to the Complainants’ local branch, which noted that the application form sent by the Complainants “although original does not have the property being mortgage filled in on it”. The Provider submits that this memo also states that this application was not acceptable and a fully completed application was required prior to drawdown.

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The Provider notes that on **03 July 2008**, the Complainants signed and accepted the revised **Loan Offer Letter** dated **19 June 2008**. The Provider asserts that this loan document constitutes the Complainants' loan agreement with the Provider.

The Provider contends that the **Loan Offer Letter**, which was signed by the Complainants on **03 July 2008**, *“did not provide [the Complainants] with a contractual entitlement or guarantee that their mortgage loan would draw down on a tracker interest rate or that the tracker interest rate would be available to [the Complainants] at any time during their mortgage journey”*. In addition, the Provider notes that there was *“no reference”* to a tracker interest rate contained in the Complainants mortgage loan documentation and such a reference would have been necessary for a tracker interest rate to be applied.

The Provider asserts that the Complainants were provided with sufficient information throughout the application process to allow them to make an informed decision in respect of the interest rate applicable to their mortgage loan.

The Provider contends that it *“holds no records of any interactions either verbal or written regarding the alleged voiding of the mortgage Loan Offer Letter dated 18 June 2008”*. The Provider asserts that this Loan Offer was not accepted by the Complainants, and as a result it did not create a loan agreement.

The Provider states that *“no advice or recommendation regarding products or the suitability of products and mortgage loan interest rates would have been provided”* by the Provider.

The Provider submits that it is satisfied that the Complainants' mortgage loan documentation was *“sufficiently clear and transparent with respect to [the Complainants'] interest rate entitlements”*.

Further, the Provider has asserts that it *“rejects absolutely any suggestion that it engaged in any form of deceit or lies at any time”* during its relationship with the Complainants.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider incorrectly advised the Complainants that tracker interest rates were no longer available in **March/April 2008**; and

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- (b) The Provider failed to allow the Complainants to draw down the mortgage loan on a tracker interest rate in **June 2008** by advising the Complainants' solicitor that the tracker interest rate loan offer was void.

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 8 October 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 set out and review the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainants and the Provider in **2008**.

The Complainants completed and signed a **General Mortgage Application Form** on **31 March 2008**. It should be noted from the outset that this application form did not contain details of either the loan amount required or the property to be mortgaged. The application form noted that the Complainants required a mortgage for a term of 30 years.

The Provider suggests that sections of this application form were left blank as the “sole purpose” of completing this form was for the Complainants to obtain mortgage approval in principle.

The Complainants also completed a **First Time Buyer Mortgage Suitability Statement** on **31 March 2008**.

This document provides as follows:

“Having discussed all [the Provider] mortgage options available to you, you have chosen to avail of our First Time Buyer Mortgage. The various rate and repayment options were also discussed with you and you have chosen the option below based on your requirements. This option has also been confirmed as affordable by us”.

There were four options available on this form, which are as follows: “Fixed Rate”, “Variable Rate”, “Tracker Variable Rate” and “Interest Only”. It should be noted that the interest rate option selected by the Complainants was a “Tracker Variable Rate” which provided as follows:

“You wish to have a variable rate which is based on the European Central Bank base rate plus a fixed percentage. You would also like to have the flexibility of making additional repayments to your mortgage and to be able to take repayment breaks without any penalties”.

The Provider’s internal memo dated **12 June 2008** states as follows:

“[..]Amount now required is €294,400...I attach details as requested to formally approve.

...

- 1. P60 required for [First Complainant] confirming previous employment.*
- 2. Property address – [address redacted] – new house*
- 3. Rate 2 year fixed 5.09%*

Please now formally approve.”

It appears that the Complainants completed a second **General Mortgage Application Form** which was signed on **16 June 2008** as the Complainants had not previously included details of the loan amount required or the property to be mortgaged.

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This application form set out that the Complainants were seeking a loan in the amount of €294,400, repayable over a term of 30 years. It should be noted that this application form also detailed the property which the Complainants sought to mortgage.

The Provider's internal email dated **17 June 2008** details as follows:

"Case AIP'd in April and final doc sent 11th June to scanning at 2 year fixed 5.09%. I note rate changed and we had until Thursday to issue at old rate but given this was on the system since April please revert to [redacted] if there is an issue.

Amount required €294400 over 30 years, property address [redacted]

All other details were completed on app."

The Provider issued a letter to the Complainants, dated **18 June 2008**, furnishing the Complainants with a copy of their **Loan Offer Letter** and notifying the Complainants that the original had been sent to their solicitor. The cover letter dated **18 June 2008** details as follows:

"To ensure the smooth issue of your cheque the loan conditions attached must be complied with. Please note that your loan cheque can only be issued after all such conditions have been complied with".

The **Loan Offer Letter** dated **18 June 2008** details as follows:

<i>"Loan Type</i>	<i>: [product name] Tracker ECB + 1.35% 80-95% Capital and Interest</i>
<i>Loan Amount:</i>	<i>€294,400.00</i>
<i>Interest Rate</i>	<i>5.35%</i>
<i>Interest Type</i>	<i>Variable</i>
<i>Term</i>	<i>30 years"</i>

The **Special Conditions** contained in the **Loan Offer Letter** state as follows:

"One copy of the Offer of Advance to be signed by all the applications and witnessed by the acting Solicitor this item to be returned to this office prior to release of the mortgage monies.

The rate of [the Provider] Flexible Mortgage tracks the ECB rate with a margin which is fixed for the life of the home loan term. The margin for this home loan is ECB rate plus 1.35%”.

Condition 13(b) of the **Standard Mortgage General Terms and Conditions** attaching to the **Loan Offer Letter** states as follows:

“The Lender reserves the right to withdraw the Loan Offer or vary the terms thereof including reducing the amount of the Loan if the Borrower fails to comply with the requirements of the Lender within the time frame specified by the Lender or if in the option of the Lender there is any material change in circumstances in relation to the Borrower before the drawdown of the Loan.”

The **Loan Offer Letter** dated **18 June 2008** clearly provided for a tracker interest rate of ECB +1.35%. I have not been provided with any evidence to suggest that this loan offer was accepted by the Complainants and subsequently drawn down.

The Provider subsequently issued a further **Loan Offer Letter** to the Complainants dated **19 June 2008**, which details as follows:

<i>“Loan Type</i>	<i>: 3Y Fixed Rate 5.05% until 30/06/11 95% Capital and Interest</i>
<i>Loan Amount</i>	<i>: €294,000.00</i>
<i>Interest Rate</i>	<i>: 5.05%</i>
<i>Interest Type</i>	<i>: Fixed</i>
<i>Term</i>	<i>: 30 years”</i>

The **Specific Loan Offer Conditions** contained in the **Loan Offer Letter** provide as follows:

“One copy of the offer of Advance to be signed by all applicants and witnessed by the acting Solicitor this item to be returned to this office prior to release of the mortgage monies.”

Condition 14(c) of the **Standard Mortgage General Terms and Conditions** attaching to the **Loan Offer Letter** states as follows:

“In the case of a fixed interest rate mortgage, the following conditions will apply:

- (i) The rate of interest applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer;*

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- (ii) *The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender or if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable interest rate which may be increased or decreased by the Lender at any time, and in this respect, the decision of the Lender will be final and conclusively binding on the Borrower.”*

The **Loan Acceptance** section of the **Loan Offer Letter** states as follows:

“1. I/We acknowledge receipt of the General Terms and conditions and Specific Conditions attached to the Loan Offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified. I/We undertake to complete the Mortgage Deed as soon as possible.

2. I/We fully understand and accept the specific nature of this Purchase Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.”

This **Loan Acceptance** was signed and accepted by the Complainants on **03 July 2008**.

I note that there is a reference to “Tracker Mortgage” in the second paragraph of the **Loan Acceptance**, as quoted above. This appears to be an error on the part of the Provider as the sentence that contains this erroneous reference to “Tracker Mortgage” is in relation to potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainants understood this had to be repaid before the deeds of the property could be released and returned. This sentence was clearly not in relation to the interest rate applicable at the end of the initial fixed interest rate period. Whilst this error on the part of the Provider is entirely unsatisfactory, I am satisfied that the particulars of the **Loan Offer Letter** dated **19 June 2008** are sufficiently clear as to the type of mortgage offered to the Complainants and confirm that the Complainants were offered a mortgage loan on a fixed interest rate as opposed to a tracker rate.

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However, whilst I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainants' mortgage loan account, I am also of the view that the information provided to the Complainants in the **Loan Acceptance** was somewhat confusing.

The standards expected of the Provider in all its dealings with the Complainants are set out in the **Consumer Protection Code 2006** which provides that:

"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers"

Whilst I accept that errors can occur and in this circumstance that error did not affect the Complainants' underlying contractual entitlements, I am of the view that the Provider should have brought this typographical error to the Complainants' attention.

The Complainants ultimately drew down mortgage loan account ending **8503** on **15 July 2008**.

It is clear to me that the loan offer envisaged that a 3 -year fixed interest rate of 5.05% would apply to the Complainants' mortgage loan account until **30 June 2011**. It is clear from **Condition 14 (c)** that, on the expiry of the fixed interest rate period on the Complainants' mortgage loan account, a variable interest rate would apply, or a further fixed rate if it was made available by the Provider and selected by the Complainants. The variable interest rate set out in **Condition 14 (c)** was clearly one which may be increased or decreased by the Provider at any time. **Condition 14 (c)** does not mention the application of a tracker interest rate to the Complainants' mortgage loan.

I note that the Complainants subsequently entered a reduced payment arrangement period with the Provider for 6 months from **September 2009** to **February 2010**. The Complainants were informed of the impact of this temporary arrangement by way of letter dated **28 August 2009** which details as follows:

"It is important you are aware of the impact of this temporary arrangement, which is outlined below:

- *Your agreed reduced repayment is less than the amount required to meet your monthly mortgage, hence the arrears balance and the cost of credit will continue to increase until such time as this shortfall is fully addressed.*
- *Your normal monthly repayment at the end of this arrangement will be greater than it is now.*

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- *As you are falling behind on normal repayments this may impact on your credit rating.*
- ***You may need to need to [sic] consider the adequacy of your existing life assurance cover.***

All other terms and conditions of your loan agreement will remain in full force and effect.”

It is clear to be me that the Complainants' monthly repayments would increase on the expiry of any reduced repayment period.

Prior to the expiry of the 3-year fixed interest rate period, the Provider issued a letter to the Complainants dated **15 June 2011** enclosing a **Rate Change Letter of Authority**. The letter dated **15 June 2011** states as follows:

*“The fixed rate period on your mortgage is coming to an end on **30/06/2011**, so now its time to start thinking about your next mortgage deal. Any borrowings you have on this fixed rate will automatically roll to the **Standard Variable Rate Default Option (APR 5.1%)**. Your monthly repayment on this rate is included in the table overleaf.*

*Alternatively you might choose a new variable or fixed rate. To help you make an informed decision the table below outlines the advantages and disadvantages of the default Standard Variable Rate compared to other variable and fixed rate mortgages.
.....”*

The Complainants were offered a further 2-year fixed interest rate of 5.65%, a 3-year fixed interest rate of 5.95%, discounted variable interest rates from 4.60% to 4.85% and the default option of a standard variable rate of 5.1%.

The letter dated **15 June 2011** also details as follows:

“If you choose one of the interest rate options above, other than your Default option, please complete the enclosed Letter of Authority and return it to us within 10 days of the date on this letter. We will then move your existing Mortgage to the option chosen.”

The **Rate Change Letter of Authority** form dated **15 June 2011** listed the interest rate options outlined above, however I note that the Complainants did not sign this form and therefore chose not to select an alternative interest rate option on offer by the Provider at the end of the fixed interest rate period. In circumstances where the Complainants did not opt for a fixed interest rate or a discounted variable interest rate, the mortgage loan account defaulted to the Provider's standard variable on **01 July 2011**.

I note that the Complainants subsequently entered a reduced payment arrangement period with the Provider for 6 months from **October 2012** to **March 2013**.

The Complainants appear to submit that they were advised by the Provider's employee to apply for a fixed interest rate as opposed to a tracker interest rate as tracker interest rates were being withdrawn from the market. I note that tracker interest rate products were available from the Provider from **late 2001** until **late 2008**. Therefore, it appears to me that tracker interest rates were still being offered by the Provider when the Complainants applied for their mortgage loan. I note that the Provider in fact offered the Complainants a tracker interest rate in the **Loan Offer Letter** dated **18 June 2008** that issued to them. However, the Complainants instead signed and accepted the **Loan Offer Letter** dated **19 June 2008** which provided for a fixed interest rate. It is the **Loan Offer Letter** dated **19 June 2008** that therefore formed the contractual basis of the loan agreement between the two parties.

I have not been provided with any evidence as to any interactions, either verbal or written, between the Provider and the Complainants' solicitor wherein the Provider purportedly told the Complainants' solicitor that the **Loan Offer Letter** dated **18 June 2008** was void. It appears to me that the Complainants were free to accept this loan offer with a tracker interest rate should they have so wished, however, instead they chose to accept the loan offer which provided for a 3-year fixed interest rate.

While I am of the view that it was reasonable for the Complainants to believe that they did receive advice from the Provider's representative in **2008**, it is important to note that the representative was a person employed by the Provider and selling the Provider's mortgage products therefore I am of the view that there was no reason for the Complainants to expect that any advice or information given to them by the Provider was independent. If the Complainants wanted independent advice about rates available in the market or the market generally, the Complainants could only get that advice from an independent third-party advisor. I note that the Complainants appear to have been engaging with their solicitor in or around this time. In any event, it is difficult to understand how it would have been of benefit to the Provider's representative to seek to dissuade the Complainants from applying for a tracker rate of interest.

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It is important to note that the Complainants' mortgage loan is governed by the **Loan Offer Letter** dated **19 June 2008** and terms and conditions attaching to that loan offer, none of which contain a contractual entitlement to a tracker interest rate. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider in **2008** was a choice that was freely made by the Complainants. If the Complainants were not satisfied with the terms on which the Provider offered the mortgage loan, the Complainants could have decided not to sign and accept the mortgage loan offer and ultimately draw down the loan or indeed they could have explored interest rate options with another mortgage provider. However, the Complainants did not do so and instead accepted the terms and conditions of the **Loan Offer Letter** dated **19 June 2008** which provided for a 3-year fixed interest rate.

As I mentioned above, there were failures on the part of the Provider regarding the typographical error by reference to a "*tracker mortgage*" in the Complainants' **Loan Acceptance** document. While this particular issue does not specifically form part of the Complainants' complaint with this office, the Provider offered the Complainants a goodwill payment of €1,250 in respect of this matter and acknowledged that this typographical error may have caused "*confusion*" for them. By way of email to this office dated **30 June 2021**, the Complainants declined to accept the Provider's goodwill offer and requested this office to proceed with the determination of their complaint. I note that this offer remains open to the Complainants to accept at any time.

For the reasons set out in this Decision, on the basis that the Complainants had no entitlement to a tracker mortgage interest rate, I consider the offer of €1,250 to be a reasonable attempt by the Provider to deal with the typographical error. Therefore, 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

2 November 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.