



<u>Decision Ref:</u>	2021-0403
<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 “*top-up*” mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainants’ private dwelling house.

The loan amount was €65,000 and the term of the loan was 25 years. The Loan Offer Letter accepted by the Complainants on **12 October 2006** provided for a variable interest rate of 4.45% and detailed the loan type as an “*ANNUITY HOMELOAN*”.

The Complainants’ Case

The Complainants submit that they obtained a “*top-up*” mortgage loan from the Provider in **September 2006**. They detail that their primary mortgage loan account was on a tracker interest rate at the time. The Complainants state that they “*thought the top up loan would be on the same rate.*”

The Complainants submit that “*a few months later [they] received a statement and [the mortgage loan] was on a variable rate.*” They outline that they contacted the Provider and were “*informed that [they] had signed the loan agreement and there was nothing [they] could do.*”

The Complainants maintain that they *“contacted [the Provider] several times over the years to complain but [the Provider] refused to put the portion of the loan on the same rate as the rest of the Mortgage.”* The Complainants submit that they contacted the Provider in **2007** and in the intervening years, up until they made a formal complaint in **February 2018** and *“questioned why this portion of [their] mortgage was not on the Tracker rate.”*

The Complainants contend that they *“cannot understand why in all of the phone conversations with [the Provider] they did not offer or inform”* them that they could change this portion of the mortgage.

The Complainants are seeking *“the portion of [their] Mortgage that was put on a variable to be put on a Tracker Mortgage.”*

The Provider’s Case

The Provider details that it received an application for a top-up mortgage in or around **1 September 2006** from the Complainants’ broker. The Provider outlines that no rate type was selected therefore it *“contacted the Complainants broker by email on 5th September 2006 and asked for confirmation of the interest rate being applied for”*. The Provider submits that the Complainants’ broker *“confirmed the interest rate choice as “variable”*.

The Provider details that it issued a **Loan Offer** dated **12 October 2006** on a variable rate, as requested by the Complainants’ broker. The loan offer was signed and accepted by the Complainants on **16 October 2006** and witnessed by their solicitor. The Provider refers to the **Form of Acceptance** in that regard. The Provider submits that the Complainants *“had the benefit of advices from both their Broker and Solicitor in relation to the letter of offer.”*

The Provider submits that as the top-up mortgage loan was introduced to it by the Complainants’ broker, *“any discussion around the interest rate options available were a matter between the Complainants and their broker and we would not be aware of the interest rate options discussed.”* The Provider details that it *“was not acting in an advisory capacity and the suitability of the top-up loan terms were a matter between the Complainant and the broker he had selected to act as his mortgage intermediary in this matter.”*

The Provider does not accept the Complainants submission that they contacted the Provider a few months after the loan offer was signed and accepted. The Provider submits that it *“has no record of any such communication.”*

The Provider submits that *“in fact a further top up application was received on 20th March 2007, some 4 months after the subject of top-up loan had issued, and no tracker rate preference was indicated in this form either.”*

The Provider details that its letter issued in **October 2007** to the Complainants *“did not include interest rate options, rather it confirmed the detailed position of the Complainants’ loan account following an amendment to interest only repayments at the Complainants’ request.”* It submits that the letter detailed each individual loan portion including the applicable interest rate to each portion. The Provider asserts that it received no query from the Complainants in relation to the rate of 5.45% that applied to the mortgage loan account the subject of this complaint.

The Provider outlines that the Complainants applied for and received a number of advances prior to the application for the top-up mortgage loan which were subject to a variety of interest rates. The Provider submits that the Complainants *“were therefore clearly fully aware of the types of interest rates applicable to their loan account and the differing types of interest rates generally.”*

The Provider outlines that the Complainants’ broker sent a Tracker Rate Instruction form dated **15 March 2005** to the Provider to apply a tracker interest rate to the original mortgage loan. The Provider submits that the Complainants were fully aware of the interest rates applicable to the earlier loan advances and had sought *“on two occasions to amend the interest rates on those advances by completing a Tracker Instruction Form in 2005, but completed no such form after the loan advance in 2006.”* The Provider submits therefore that the Complainants were *“clearly aware of the differing type of rate applicable and how they might go about applying to amend same, if they so wished and the Bank would have had no reason not to facilitate this as had happened previously.”*

The Provider contends that as the Complainants never requested a tracker rate to be applied to the top-up mortgage, they *“were therefore not further informed as to the availability of tracker rates or otherwise at that time.”*

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to place the Complainants’ top-up mortgage loan on a tracker rate of interest in **September 2006**.

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 12 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.

Before dealing with the substance of the complaint, I note that the application for the mortgage loan was submitted by the Complainants to the Provider through a third-party broker. As this complaint is made against the respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this office, by letter dated **27 September 2019**, which outlined as follows:

"In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint."

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Therefore, the conduct of the third-party broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

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 set out and consider any interactions between the Complainants and the Provider in **2006** when the Complainants applied for a top-up mortgage loan.

I have considered the **Top-Up Application Form** which was signed by the Complainants on **31 August 2006**. The interest rate options available under the "Please tick your choice of interest rate" section was "variable", "fixed" or "tracker". I note that the Complainants did not select any of the interest rate options.

The Provider has submitted an email exchange with the third-party broker in evidence. An email dated **5 September 2006** from the Provider to the third-party broker states as follows:

"Solicitor and rate will have to be confirmed. All other relevant conditions will be satisfied on the new deal [mortgage loan account ending 504/3]."

The responding internal email is only partially available however it states as follows:

"same solicitor as current prop [name of solicitor], rate is variable."

The evidence demonstrates therefore that the Complainants, through their Broker, instructed that a variable interest rate was to apply to the top-up mortgage loan.

In circumstances where the Complainants were engaging with a broker in relation to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainants during the application stage. It is important to note that the Provider was under no obligation to offer the Complainants any mortgage or any particular type of mortgage in **2006**. 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.

On foot of the Complainants' **Top-Up Application**, the Provider issued a **Top-Up Letter of Offer** dated **6 September 2006** to the Complainants which details as follows:

<i>"1. Amount of credit advanced</i>	<i>€65,000.00</i>
<i>2. Period of Agreement (Years – Months)</i>	<i>19 – 2</i>

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3. Number of Repayment Instalments	230
4. Amount of Each Instalment	€420.55
...	
19. Interest Rate	4.45 Variable.”

General Condition 16 of the **Loan General Conditions** details as follows:

“THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED.....”

The **Loan General Conditions** further state:

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

The Complainants signed and accepted this top-up loan offer on **18 September 2006** and confirmed the following:

“I/We the undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender's General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender's standard Form of Mortgage;*
- (vi) the Assignment of Life Policy;*

copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s).”

I note that the Complainants signed and accepted the **Top-Up Letter of Offer** however, this Top-Up mortgage was not drawn down by the Complainants. I have not been provided with any explanation why the loan was not drawn down however I note from the internal **Underwriting Notes** submitted by the Provider that a note was entered on **11 October 2006** which states *“Amend term to 25yrs”*.

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The Provider subsequently issued a **Top- Up Amended Letter of Offer** to the Complainants dated **12 October 2006** which details as follows:

<i>"1. Amount of credit advanced</i>	<i>€65,000.00</i>
<i>2. Period of Agreement (Years – Months)</i>	<i>25 – 0</i>
<i>3. Number of Repayment Instalments</i>	<i>300</i>
<i>4. Amount of Each Instalment</i>	<i>€359.45</i>
<i>...</i>	
<i>19. Interest Rate</i>	<i>4.45</i> <i>Variable."</i>

The **Special Conditions** attaching to **Loan Offer** detail as follows

"This Letter of Offer replaces the Letter of Offer dated 12/10/2006 which is hereby cancelled".

It would appear to me that this is an error in the Special Conditions of the mortgage loan documentation and the Special Conditions ought to refer to the previous Letter of Offer that issued on **6 September 2006**, as detailed above. I have only been provided with one loan offer dated **12 October 2006**.

General Condition 5 of the **Loan General Conditions** which accompanied the **Top-Up Amended Letter of Offer** dated **12 October 2006** details as follows:

"The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant's Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with fluctuations in the applicable interest rate."

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General Condition 16 of the **Loan General Conditions** details as follows:

“THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED.”

The **Loan General Conditions** further state:

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

The Complainants signed and accepted the **Top- Up Amended Letter of Offer** on **16 October 2006** on the following terms:

“I/We the undersigned, accept the offer of an advance made to me/us by [the Broker] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender's General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender's standard Form of Mortgage;*
- (vi) the Assignment of Life Policy;*

copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s).”

The top-up mortgage loan was drawn down on **6 November 2006**.

It is clear to me that the **Top-Up Amended Letter of Offer** envisaged that a variable interest rate would apply to the Complainants' top-up mortgage loan account for the duration of the loan. The nature of the variable rate in the Complainants' mortgage loan documentation made no reference to varying in accordance with variations in the European Central Bank refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the **Top-Up Amended Letter of Offer** on those terms, having been advised by their solicitor.

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I note from the internal notes furnished in evidence by the Provider that the Complainants contacted the Provider to query the interest rate in **2007** however, the Complainants had already signed and accepted the loan offer in which case a legally binding agreement was in effect between the parties. If the Complainants were unhappy with the interest rate applicable to the top-up loan, they could have decided not to accept the Provider's **Top-Up Amended Letter of Offer** dated **12 October 2006**. Instead, the Complainants accepted the Provider's offer by signing and accepting it on **16 October 2006**.

While I acknowledge that tracker interest rates were available from the Provider when the Complainants applied for the top-up mortgage loan through a third-party broker, there was no obligation on the Provider to offer the Complainants a tracker rate for their top-up mortgage loan in **October 2006**. I am of the view that in order for the Complainant to have a contractual right to a tracker interest rate either on drawdown or during the lifetime of the loan, that right would need to be specifically provided for in the Complainants' mortgage loan documentation. However, no such right provided for in the **Top-Up Amended Letter of Offer** dated **12 October 2006**, which was signed by the Complainants on **16 October 2006**.

Furthermore, it is important to highlight that each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that the Complainants' primary mortgage loan and top-up mortgage loan were secured on the same property does not entitle the Complainants to the same interest rates on both mortgage loan accounts. The Complainants' two mortgage loan accounts were drawn down at two different points in time (**2005** and **2006**), they commenced on different interest rates, and were subject to different terms and conditions. The evidence shows that the choice to take out the top-up mortgage loan on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants. It was open to the Complainants to approach the Provider prior to accepting the loan offer to request a tracker rate however the Complainants did not do so and instead sought and accepted, and ultimately drew down the top-up mortgage loan on a variable interest rate, with no entitlement to convert to a tracker rate.

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.

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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

4 November 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.