



<u>Decision Ref:</u>	2021-0409
<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 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 was secured on the Complainants' principal private residence.

The loan amount was €230,000 and the term of the loan was 35 years. The particulars of the mortgage loan offer accepted by the Complainants on **20 March 2005** detailed that the interest rate was "*Fixed For 12 months*".

The Complainants' Case

The Complainants note that they drew down on their mortgage loan account with the Provider in **June 2005** on a 1-year fixed rate of 3.95%.

The Complainants submit that at the end of the 1-year fixed interest rate period in **June 2006**, they were not offered the option of a tracker interest rate. The Complainants detail that their mortgage loan account rolled onto the Provider's standard variable rate in **June 2006**. The Complainants state that they subsequently opted for a 5-year fixed interest rate period on **30 April 2007**.

The Complainants submit that in **2010** they *“were in distress paying the mortgage”* as a result of the first Complainant taking a pay cut and the second Complainant being ill at this time. The Complainants state that they contacted the Provider in **2010** to discuss any steps they could take to alleviate their financial difficulties. The Complainants submit that the Provider offered them a 6-month interest only period.

The Complainants detail that the ECB rate in **2010** was 1% but that the option of converting to a tracker rate was not offered to them by the Provider.

The Complainants detail that the Provider’s failure to offer a tracker interest rate option meant that the first Complainant *“had to go to the UK to work just so [they] could meet the monthly repayments.”* The first Complainant details that this meant being away *“from [his] wife and two young kids”* and that this *“put enormous stress on [their] family life.”*

The Complainants explain that the mortgage loan account was redeemed on **27 July 2010** when they sold the mortgaged property. In this regard, the Complainants submit that because of the cost of the monthly repayments, they *“had to sell our dream home due to the financial pressure we were under”*. The Complainants maintain that *“If we were on a tracker this would not have happened.”*

The Complainants detail that when they redeemed the mortgage loan account, the redemption figure they received from the Provider in **July 2010** *“would have been less if we were offered a tracker previously”*.

The Complainants are seeking compensation and redress for the financial losses incurred.

The Provider’s Case

The Provider details that the Complainants were referred to it by a Broker and *“it was not the Banks practice to engage directly with the applicant with the exception of where documentation was required to be issued directly to the applicant”*.

The Provider details that its policy was *“to notify brokers of New Business interest rates available for New Business applications through the issue of Communicates and the provision of Rate Matrices on an ongoing basis.”*

The Provider details that at the time of the Complainants **June 2004** application the following rates were available:

Description	Rate %
<i>Discount Variable – 24 months</i>	2.99
<i>Discount Variable – 12 months</i>	2.69
<i>1 Year Fixed <= LTV 92%</i>	2.69
<i>2 Year Fixed <= LTV 92%</i>	3.55
<i>3 Year Fixed</i>	3.95
<i>5 Year Fixed</i>	4.45
<i>NB Track Up to 92% LTV < 250k</i>	3.40
<i>NB Tracker for all Loans >205k</i>	3.10

The Provider outlines the following timeline in respect to the Complainants' mortgage application and subsequent draw down:

- 02.06.2004 Outline of application sought from broker*
- 09.06.2004 Bank issued provisional approval to Broker*
- 16.06.2004 Bank received Application and supporting documentation from Broker*
- 20.12.2004 Bank received up to date supporting documentation from Broker*
- 11.01.2005 Letter of Loan Offer issued on a 12 month fixed rate basis 2.69% €220,000*
- 21.01.2005 Letter from Broker to Bank re changes required to the loan approval enclosing customers written confirmation of same*
- 24.01.2005 Approval in Principle issued for increased loan amount of €230,000*
- 31.01.2005 Amended Letter of Offer issued 12 month fixed rate basis 2.69% €230,000*
- 18.05.2005 Direct Debit Mandate & Letter of Indemnity received from Broker*
- 31.05.2005 Stage Payment Request from Broker to Bank*
- 02.06.2005 Original Life Policy Document received from Broker*
- 07.06.2005 Signed Acceptance of Offer received from Complainants Solicitor*
- 15.06.2005 [Provider] spoke with both the Broker and the Complainants Solicitor and received confirmation that this was a Homebond property*
- 22.06.2005 Initial Stage Payment issued"*

The Provider refers to **General Condition 7** of the Letter of Offer dated **31 January 2005** that issued to the Complainants which details clearly that the "*Lenders prevailing variable rate will apply*" on the expiry of the fixed interest rate period.

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The Provider submits that there “*was no reference to the variable rate referenced being linked in any way to the ECB rate and no commitment that the prevailing variable rate referenced would track the ECB rate or any other quoted rate.*”

The Provider details that on expiration of the Complainants’ fixed rate period in **June 2006** it “*had tracker rate products available for both new and existing customers, subject to criteria*”. The Provider submits that the Complainants “*drew down their mortgage on a fixed rate, rolling to the prevailing standard variable rate on expiry of the fixed rate period*” and that “*There was no default or contractual entitlement to a tracker rate at any time.*” The Provider submits that there was no reference to the variable rate “*being linked to the ECB rate*” and there was “*no commitment that the prevailing variable rate referenced would track the ECB rate or any other quoted rate.*”

The Provider details that it issued a letter to the Complainants on **1 July 2006** to notify them that the fixed rate period had ended and the new repayment amount of €1,010.16 but it “*had no contact from the Complainants in response to this notification.*”

The Provider details that the Complainants were notified of increases in the standard variable rate applicable to their account in **July 2006, September 2006** and **December 2006**, before the Complainants opted to apply a 5-year fixed interest rate in **April 2007**.

The Provider details that the following interest rate changes were applied to the Complainants’ mortgage account as follows:

06/06/2006	2.69%	3.95%	Fixed rate expiry, move to standard variable rate
02/07/2006	3.95%	4.20%	standard variable rate change
03/09/2006	4.20%	4.45%	standard variable rate change
29/10/2006	4.45%	4.70%	standard variable rate change
31/12/2006	4.70%	4.95%	standard variable rate change
02/04/2007	4.95%	5.20%	standard variable rate change
04/05/2007	5.20%	5.09%	Move to 5 year fixed rate

The Provider submits that tracker interest rates were withdrawn “*on a phased basis*” in **mid-2008**.

The Provider details that it provided redemption figures to the Complainants for the mortgage loan account in **September 2009** and **June 2010**. The Provider states that it understood that the property was being sold. The Provider notes that the mortgage was subsequently redeemed in full on **27 July 2010**.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider incorrectly failed to offer the Complainants a tracker interest rate on the expiry of the fixed rate period in **June 2006**; and
- (b) The Provider incorrectly failed to offer the Complainants a tracker interest rate at any stage during the mortgage loan agreement.

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 14 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.

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Before dealing with the substance of the complaint, I note 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 **15 November 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.”

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 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 **2006**.

An **Application Form** was completed by the Complainants on **1 June 2004** with a third-party broker. The Complainants were given a choice of a variable, fixed, discount or fixed rate term under the *“Mortgage type, rate and term details”* section of the loan application. It does not appear that the Complainants selected a choice of interest rate on the application form. In circumstances where the Complainants were engaging with a broker with respect to their mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainants at that time in relation to the completion of the application form or to discuss their preferred interest rate option.

An initial **Letter of Offer** dated **11 January 2005** issued to the Complainants for an amount of €220,000 repayable over a term of 30 years on a 12-month fixed interest rate of 2.69%. It appears that the address detailed in the initial Letter of Offer dated **11 January 2005** was incorrect with resulted in the Complainants’ broker issuing a letter to the Provider dated **19 January 2005** as follows:

“I refer to the above approval and wish to confirm that I have been advised by the applicant that the actual address of the site they have purchased and intend to build on is [redacted address] and not [other redacted address] as stated in the offer letter and original valuation report.

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In light of this I have a new valuation report completed showing the correct address.

I am attaching a letter from [agents] to this effect and as can be seen from the same, they have a further three requests:

1. Change of solicitor details

They wish to change their solicitor details to [solicitor address]

2. Change term of mortgage to 35 years. (He is [age] end of month and she is [age] in [month])

3. Increase loan amount from €220,000 to €230,000. They underestimated the original amount they required by €10,000, but the new amount will still only give a LTV of 87%.

As can be seen from the attaching loan calculator, they also qualify for this increased amount.

I would be grateful if you would facilitate their request and amend the loan offer as outlined above.”

The Provider issued a letter dated **24 January 2005** to the Complainants’ broker as follows:

“Dear [redacted]

Thank you for your recent application in relation to homeloans facilities for the above client(s). We are delighted to advise that facilities of up to €230,000.00 will be considered subject to:

1. Satisfactory valuation report carried out by an [Provider] panel valuer

- We require the following information from the valuer? [1] Monthly rent attainable [2] Site value so we can condition for a 70% release on same*

On receipt of the above, we will then be in a position to fully assess your client’s requirements and hope to be in a position to issue you a Letter of Loan Approval.

We would like to thank you for choosing [Provider] for your client’s requirements and look forward to receiving the above information.”

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I note that the **Letter of Offer** dated **11 January 2005** was not signed and accepted by the Complainants.

The Provider subsequently issued an **Amended Letter of Offer** dated **31 January 2005** to the Complainants.

The **Particulars of Advance** contained in the **Amended Letter of Offer** details as follows:

“IMPORTANT INFORMATION AS AT 31st January 2007

<i>Amount of Credit Advanced</i>	<i>€230,000.00</i>
<i>Period of Agreement (Years – Months)</i>	<i>35 – 0</i>
<i>...”</i>	

The **Additional Particulars of Advance** detailed:

<i>“</i>	
<i>... Type of Advance</i>	<i>ANNUITY HOMELOAN</i>
<i>Interest Rate</i>	<i>2.69</i>
	<i>Fixed For</i>
	<i>12 months”</i>

General Condition 5 of the **Loan General Conditions** 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 the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate. ...”

General Condition 7 of the **Loan General Conditions** details as follows:

“The rate of interest applicable to this loan will be fixed for 12 months from date of drawdown.

The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant (s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply.”

General Condition 17 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** also detail as follows:

“WARNING:

...

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

The **Special Conditions** attaching to the **Amended Letter of Offer** dated **31 January 2005** detail as follows:

“The Advance will be released in stage payments on receipt of satisfactory Architects Certificates in the attached form (up to a maximum of 100% at each stage and a maximum of 3 stages and final stage). The final payment of €5000 will be released on receipt of a satisfactory Certificate of Compliance and Valuer’s Report.”

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The **Form of Acceptance** was signed by the Complainants on **20 March 2005** on the following terms:

“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).”

The mortgage loan statements provided in evidence indicate that the mortgage loan was advanced in stages. I note that €156,000 was advanced on **23 June 2005** and a further €74,000 was advanced on **8 November 2005**.

It is clear to me that the **Amended Letter of Offer** envisaged a fixed interest rate of 2.69% 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 by the Provider.

I acknowledge that tracker interest rates, where the interest rate varies in line with the rate set by the European Central Bank, were on offer, subject to certain qualifying criteria, by the Provider at the time the Complainants applied for their mortgage loan with the Provider. However, the **Amended Letter of Offer** dated **31 January 2005** did not contain an offer of a tracker interest rate or an expectation that a tracker interest rate would apply either at the time of drawdown or at any time during the term of the mortgage loan.

I am of the view that in order for the Complainants to have a contractual right to a tracker interest rate either on drawdown or on expiry of the fixed interest rate period, that right would need to be specifically provided for in the Complainants’ mortgage loan documentation. However, no such right was set out in writing in the **Amended Letter of Offer** dated **31 January 2005**, which was accepted and signed by the Complainants on **20 March 2005**.

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Following the expiration of the Complainants' fixed rate period on **6 June 2006**, the interest rate on the Complainants' mortgage loan account switched to a standard variable rate of 3.95% in line with **General Condition 7** of the **Loan General Conditions**. The Provider states that it issued an "automated system notification letter" to the Complainants to confirm that the fixed rate term had ended and to notify the Complainants of the revised repayment of €1,010.16 from **01 July 2006**. It is disappointing that the Provider has not provided a copy of this letter in evidence. **Provision 49** of the **Consumer Protection Code 2006** governs retention of records and was not effective until **1 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to retain records, there was no breach of the **Consumer Protection Code 2006**. The Provider notes that it did not receive a response to this letter from the Complainants.

The Provider details that the following standard variable rate were applied to the Complainants' mortgage loan account from **July 2006 to April 2007**:

02/07/2006	3.95%
03/09/2006	4.20%
29/10/2006	4.45%
31/12/2006	4.70%
02/04/2007	4.95%

The Complainants completed and signed a **Fixed Rate Instructions form** on **24 April 2007**, where they selected a 5-year fixed interest rate of 5.09% as follows:

"I/We hereby instruct [the Provider] to fix the interest rate on my/our homeloan account for a period of (please mark with an X the appropriate box below)

- Fixed until 1st April 2008 at 5.09% (5.31% Typical APR)*
- Fixed until 1st April 2009 at 5.09% (5.30% Typical APR)*
- Fixed until 1st April 2010 at 5.09% (5.29% Typical APR)*
- Fixed until 1st April 2012 at 5.09% (5.27% Typical APR)*

In accordance with the terms set out below. I/We hereby agree once a letter is issued by [the Provider] to me/us, confirming that the interest rate on my/our Home Loan account had been fixed for the period requested by me/us then the terms below shall be binding on me/us for the fixed period in addition to the terms and conditions of my/our mortgage.

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Terms

*Fixed rate repayments from **1st May 2007** for the term as indicated above, thereafter reverting to the company's standard variable rate. In order to provide this facility [the Provider] has entered commitments to fund same. If, during the fixed rate period, the Applicant redeems in whole or in part or converts the loan into a variable interest rate or to another fixed rate loan, on that date, (the redemption date) a "break funding fee" will be payable to the Lender. The break funding fee will be calculated by reference to the wholesale cost then prevailing for the unexpired portion of the fixed rate period and the wholesale rate prevailing at the date of drawdown. If, at redemption date or switching date the wholesale rate prevailing is higher than the wholesale rate at drawdown no break funding fee arises. If however, the wholesale rate is lower a break funding fee will be chargeable.*

...

WE RECOMMEND THAT YOU SEEK INDEPENDENT LEGAL ADVICE IN CONNECTION WITH THIS MATTER"

The Provider issued correspondence to the Complainants on **28 May 2007** confirming that a fixed interest rate had been applied to the mortgage loan account as follows:

"Dear [Complainants]

I am writing in relation to your recent request to fix your mortgage account.

Your mortgage interest rate is fixed at 5.09% until 1st May 2012.

Your monthly repayment will be €1,167.99 from 1st June 2007."

The Provider details that the fixed interest rate of 5.09% was applied to the mortgage loan account on **4 May 2007**.

It appears that the Complainants requested a 6-month interest only period in **2010**.

An **Income and Expenditure Form** has been submitted in evidence which details that the reason for financial distress is "[Second Complainant] is out of work due to illness and [First Complainant] has taken a pay cut. They are seeking 6 months interest only."

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A letter issued from the Provider to the Complainants dated **21 January 2010**, detailing that an interest only period would be applied as follows:

"Dear [Complainants]

Further to your recent request we have approved interest Only for 6 months on your mortgage account effective from 1st March 2010.

Your Interest Only period will end on 2nd August 2010 at which stage a letter will issue informing you of your revised monthly repayment. As the term of your mortgage is not extended your Homeloan will still be repaid within the agreed term of the mortgage and your repayments will be automatically recalculated at the end of the Interest Only period and your monthly repayments will increase.

Please ensure we are in receipt of the enclosed instruction signed by all parties, no later than Monday 25th January 2010 so that we can process the Interest Only on your mortgage account.

We are enclosing a copy of the information recorded by [the Provider] based on our recent conversation with you, should any of this be recorded inaccurately please do not hesitate to contact us."

The mortgage loan statements provided in evidence indicate that a 'Break Funding Fee' of €10,938.96 was applied to the mortgage loan account and the mortgage loan was redeemed on **27 July 2010**.

The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider in the **Amended Letter of Offer** dated **31 January 2005** was a choice that was freely made by the Complainants. It was open to the Complainants to decline that offer if they were dissatisfied that the terms and conditions did not provide for a tracker interest rate from the date of drawdown or if they were dissatisfied with the interest rate that would apply at the end of the initial fixed interest rate period. The Complainants signed the **Amended Letter of Offer** having confirmed that their solicitor had advised them on the terms and conditions of the mortgage loan.

Having considered the Complainants' mortgage loan documentation, I am of the view that there was no contractual or other entitlement to a tracker interest rate on the part of the Complainants when the fixed interest rate period expired in **June 2006** or at any other time during the term of the loan.

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If the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan account at any stage before tracker interest rates were withdrawn by the Provider in **mid-2008**, the Complainants could have contacted the Provider. However, I have not been provided with any evidence to suggest that the Complainants contacted the Provider to explore alternative interest rates. Even if the Complainants had contacted the Provider, it would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan.

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**

8 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.