



<b><u>Decision Ref:</u></b>	2021-0412
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Tracker Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to offer a tracker rate throughout the life of the mortgage
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

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

The loan amount was €530,000.00 and the term of the loan was 35 years. The particulars of the Letter of Approval dated **29 January 2007** detailed that the loan type was a "2 Year Fixed Rate Home Loan".

The Provider transferred its interest in the mortgage loan account to a third-party provider on **4 February 2019**.

**The Complainants' Case**

The Complainants submit that they sought and secured a mortgage loan under account ending **8801** with the Provider in **2005** through a broker. They signed a Loan Offer dated **19 September 2005** for a "Tracker Mortgage (ECB + max 1.10%) Home Loan".

The Complainants submit that they "went directly" to one of Provider's branches in **2007** "without going through our broker" to obtain advice on consolidating their debts. They submit that the Provider advised them to "release some equity to consolidate our debt" and to fix the interest rate on their mortgage loan to "stop the rising ECB interest rate element".

The Complainants submit that consequently they opted to apply a two-year fixed rate to the mortgage loan account. They submit however that they made it clear to the Provider that their expectation was that they could revert to the tracker rate of ECB + 1.10% at the end of the fixed rate period and *“the branch Manager confirmed that would be the case”*.

The Complainants submit that in order to apply the fixed rate to their mortgage in **2007** they were required to *“replace”* the original mortgage loan account ending **8801** with a new mortgage loan account ending **7088**. They signed a loan offer dated **29 January 2007** for a *“2 Year Fixed Rate Home Loan”*.

The Complainants detail that at the end of the fixed rate period, they received a rate options letter dated **16 January 2009** from the Provider which included a tracker rate option of ECB + 2.25%. The Complainants submit that they had understood that the Special Conditions attached to their letter of offer guaranteed their entitlement to a tracker rate margin of ECB + 1.10%. They state that they understood the Special Conditions of mortgage loan account ending **7088** to mean that the ECB element of the tracker interest rate would be subject to change but not the margin element.

The Complainants submit that they attended one of the Provider’s branches on **30 January 2009** to request that their previous tracker rate of ECB + 1.10% be applied to mortgage loan account ending **7088**. They submit that the Provider told them that this was not possible, as the Special Conditions of the loan offer dated **29 January 2007** did not provide for this. They further submit that they were *“instructed”* by the Provider to sign the form confirming the selection of the tracker rate of ECB + 2.25% to the mortgage account.

The Complainants want the Provider to reinstate their original tracker rate of ECB + 1.10% on mortgage loan account ending **7088**, with effect from **February 2009**.

### **The Provider’s Case**

The Provider states that the Complainants’ original mortgage loan account ending **8801** was issued in **October 2005** for €420,000.00. It details that the loan offer signed by the Complainants in **2005** provided for a tracker interest rate of ECB + 1.10% in respect of mortgage account ending **8801**. This account was subsequently redeemed in **February 2007**.

The Provider submits that *“For their own personal reasons, the Complainants decided in 2007, when they were seeking a new higher loan amount of €530,000 that they were going to enter into a loan contract for a period of 35 years.”*

The Provider states that the Complainants *“were fully aware that they were ending an existing contract and entering into a new loan contract with new terms and conditions.”*

The Provider details that following an approach from the Complainants, it issued mortgage quotations to them *“highlighting the various products and interest rates available”* in **December 2006** and **January 2007**. It submits that *“At the time the Complainants were undecided whether to re-mortgage or take out an Equity Release loan.”* It submits that the Complainants’ intention *“was to re-mortgage their home and consolidate existing debts to ultimately reduce their monthly repayment commitments.”*

The Provider details that on **19 January 2007** the Complainants visited a branch of the Provider with *“relevant documentation for their application. The Complainants confirmed they had decided to proceed with a new loan. They confirmed the valuation of the property was €600,000 and that they were seeking a loan of €500,000. The Complainants wanted to clear their existing loans. They confirmed they had received a quotation from [third party Provider] for a 2 Year Fixed Rate loan of 4.25% and would refinance with [third party Provider] if this could not be matched.”* The Provider states that the Complainants *“did not, in 2007, opt to apply a fixed rate to an existing loan and retain their entitlement to an existing tracker rate of ECB+1.10%”*.

The Provider details that on **25 January 2007** it approved a reduced 2-year fixed rate of 4.54%, in circumstances where the 2-year fixed rate generally offered by it at that time was 4.75%. It further states that on **29 January 2007** the Complainants visited the Provider branch to request to increase their borrowings to €530,000, which was approved on the same day and an amended Letter of Approval was issued in the post.

The Provider submits that the Complainants’ mortgage loan account ending **7088** was drawn down on **6 February 2007** on an interest rate of 4.54% fixed for a period of two years which was due to expire on **6 February 2009**. The Provider details that the loan offer signed by the Complainants in respect of account ending **7088** *“referred to the applicability of an unspecified tracker rate at the end of a fixed rate period of two years”*.

The Provider submits that it *“has the right to introduce or withdraw products and interest rates at its discretion”* and therefore in **2007** it *“would not have been in a position to confirm or agree with the Complainants a particular tracker rate that would be available on expiry of their fixed rate in February 2009.”*

The Provider details that its tracker mortgage rate applicable to home loans in **February 2009** was ECB + 2.25%. The Provider states that the setting of the applicable tracker rate was “a business decision based on a number of factors” including;

*“(i) The Bank’s cost of funds which is influenced by wholesale borrowing rates and deposit interest rates;*

*(ii) The cost of credit risk associated with lending, operational costs (costs originating and servicing the product on an ongoing basis), the cost of capital (the economic cost of capital which must be held against the risk being taken on, in line with prudential regulations i.e. risk weighted assets), and;*

*(iii) The Bank’s competitive position”*

The Provider submits that it is “lawfully entitled to have regard to these factors when setting interest rates or margins.”

The Provider details that it ceased offering new tracker rate loans and tracker interest rate options to existing customers in **mid-2008**. The Provider states that while it “effectively withdrew” its tracker mortgage interest rate offerings **mid-2008** it “continued to offer and apply tracker interest rates to those loan accounts maturing from a fixed rate period for which there was a contractual right to a tracker rate on expiry of the fixed rate period.” The Provider submits that the tracker rate option available to home loan customers in and around **January 2009** was a tracker interest rate of ECB + 2.25%, excluding “those accounts with a particular tracker maturity rate specified in the special conditions of a Letter of Approval”.

The Provider submits that 20 days prior to the expiration of the fixed rate period in **February 2009** it issued a rate options letter to the Complainants which included the tracker interest rate of ECB + 2.25%. The Provider details that it received the Complainants’ instruction to apply a tracker rate of ECB + 2.25% to the mortgage account on **30 January 2009**. The Provider states that on expiration of the fixed rate period on **6 February 2009** a tracker interest rate of 4.75% (ECB + 2.25%) was applied to the mortgage loan account.

The Provider states that it does not accept that “the Complainants reasonably understood the Special Condition A of the Letter of Approval dated 29 January 2007 to mean that the ECB element of the rate would only be subject to change.”

The Provider states that the margin of 1.10% referred to by the Complainants is not specified in or relevant to the loan offered to the Complainants in **January 2007**. It states that the margin of ECB + 1.10% was specified in a separate loan contract regarding a separate loan acquired by the Complainants in **2005** which they chose to redeem in **2007**.

The Provider states that mortgage account ending **8801** *“was an earlier and separate loan facility to”* their mortgage account ending **7088**. It states in respect of both mortgage accounts ending **8801** and **7088**, that *“in 2005 and 2007 respectively, the Complainants had an opportunity to review the terms and conditions prior to accepting them. They did so on each occasion with the benefit of independent legal advice.”*

The Provider details that the Complainants’ mortgage loan account ending **7088** entered arrears on **6 October 2011**. The Provider submits that between **6 February 2012** and **28 January 2019** it issued multiple letters to the Complainants which informed them of the arrears and amounts due.

The Provider details that the Complainants’ mortgage loan account ending **7088** was sold to a third-party provider on **4 February 2019**, at which point the debit balance of the mortgage loan was €586,162.72.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider applied the incorrect tracker rate margin of ECB + 2.25% to the Complainants’ mortgage loan account ending **7088** in **January 2009**.

### **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.

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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 **15 September 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.

Following the issue of my Preliminary Decision, the Complainants made a further submission under cover of their e-mail to this office dated **05 October 2021**, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submission.

Having considered the Complainants' additional submission and all of the submissions and evidence furnished by both parties to this office, I set out below my final determination.

Before dealing with the substance of the complaint, I note the application for the mortgage loan account ending **8801** 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 **6 November 2018**, 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.

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In order to determine the complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2007** and **2009**.

At the outset, I consider it helpful to consider the provisions of the Complainants' original mortgage loan account ending **8801**, which is not the subject of this complaint. The Letter of Approval dated **19 September 2005** for mortgage loan account ending **8801** details as follows;

<b>Loan Type:</b>	<b>Tracker Mortgage (ECB + max 1.10%) – Home Loan</b>
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*"Purchase Price/Estimated Value: EUR 422,500.00  
Loan Amount: EUR 420,000.00  
Interest Rate: 3.10%  
Term: 35 year(s)"*

The **Special Conditions** to the **Letter of Approval** dated **19 September 2005** detail:

*"D. THE INTEREST RATE APPLICABLE TO THIS TRACKER MORTGAGE LOAN MAY BE VARIED FROM TIME TO TIME BY [the Provider] PROVIDED THE INTEREST RATE WILL NOT EXCEED 1.10% OVER THE EUROPEAN CENTRAL BANK REFINANCING RATE (THE "ECB RATE")*

*E. THE ECB RATE MAY BE VARIED FROM TIME TO TIME BY THE EUROPEAN CENTRAL BANK (THE "ECB"). IN THE EVENT OF ANY VARIATION OF THE ECB RATE, THE INTEREST RATE APPLICABLE TO THIS LOAN WILL BE NOT MORE THAN 1.10% OVER THE ECB RATE AS VARIED BY THE ECB AND THE REVISED INTEREST RATE FOR THE LOAN WILL APPLY NOT LATER ONE CALENDAR MONTH FROM THE DATE PROVIDED BY THE ECB AS THE DATE ON WHICH THE VARIATION TO THE ECB RATE WILL TAKE EFFECT.*

*F. IF, FOR WHATEVER REASON, AN EVENT OCCURS WHICH FUNDAMENTALLY AFFECTS THE USE OF THE ECB RATE AS A REFERENCE RATE FOR THIS LOAN, [the Provider], IN ITS SOLE DISCRETION, SHALL BE ENTITLED TO USE SUCH OTHER REFERENCE RATE OR OTHER METHOD OR BASIS OF CALCULATION AS IT DEEMS FAIR AND REASONABLE AND NOT WITHSTANDING THE USE OF SUCH OTHER REFERENCE RATE OR METHOD OR BASIS OF CALCULATION, THE RATE SO CALCULATED BY [the Provider] SHALL BE AND APPLY AS THE REFERENCE RATE APPLICABLE TO THIS LOAN IN PLACE OF THE ECB RATE.*

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G. THE INTEREST RATE AND MORTGAGE REPAYMENT INDICATED IN THE LETTER OF APPROVAL ARE BASED ON THE ECB RATE APPLICABLE AT THE DATE OF THE LETTER OF APPROVAL AND MAY CHANGE ON OR BEFORE DRAW DOWN.

H. PLEASE NOTE THAT WHERE THE APPLICANT SWITCHES THE RATE ON THIS LOAN TO A RATE WHICH IS FIXED FOR A CERTAIN PERIOD, THE APPLICANT MUST INFORM [the Provider], ON EXPIRY OF THE FIXED RATE PERIOD, WHETHER THE RATE ON THE LOAN IS TO SWITCH INTO A FURTHER FIXED RATE (IF AVAILABLE) OR WHETHER THE LOAN IS TO REVERT TO A TRACKER MORTGAGE LOAN AS DESCRIBED ABOVE. IN THE ABSENCE OF INSTRUCTIONS FROM THE APPLICANT AT THE EXPIRY OF THE FIXED RATE PERIOD, THE INTEREST RATE WILL SWITCH TO THE THEN CURRENT VARIABLE INTEREST RATE AND AS MAY BE VARIED FROM TIME TO TIME THEREAFTER.

I. WHERE MORE THAN ONE TRACKER MORTGAGE LOAN IS ADVANCED ON THE SECURITY, THE TRACKER MORTGAGE LOANS WILL NOT BE AGGREGATED FOR THE PURPOSES OF APPLYING A DIFFERENT RATE OVER THE ECB RATE. [Sic]"

An **Acceptance of Loan Offer** in respect of account ending **8801** was signed by the Complainants on **6 October 2005** on the following terms;

"1. I/we the undersigned accept the within offer on the terms and conditions set out in

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

copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.

...

4. My/our Solicitor has fully explained the said terms and conditions to me/us."

It is clear that the Complainants' **Letter of Approval** in respect of mortgage account ending **8801** dated **19 September 2005** provided for a tracker interest rate which "**WILL NOT EXCEED 1.10% OVER THE EUROPEAN CENTRAL BANK REFINANCING RATE**".

It appears from the evidence that in and around **December 2006**, the Complainants were seeking to refinance their borrowings.

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I note that the Provider's internal systems note dated **19 December 2006** details as follows;

*"PHONED [First Complainant] TODAY – HE IS STILL GATHERING UP DOCS TO PROCEED WITH THIS APPLICATION (AWAITING COMPLETION OF SALARY CERT) – ASKED [Provider's representative] ABOUT THIS ONE – SAID [First Complainant] AND PARTNER BOTH [occupations redacted] EARNING IN EXCESS OF 100K – UNSURE AS TO WHETHER TO REMORTGAGE OR ER."*

The Provider's internal systems dated **19 January 2007** details as follows;

*"[Complainants] CALLED TO BRANCH LATE THIS AFTERNOON WITH DOCUMENTS. DID NOT HAVE TIME TO COMPLETE ICB OR NET SHEETS. LOOKING TO REFINANCE MTG HOUSE VALUE 600K MTG 500K. WANT TO CLEAR LOANS. THEY HAVE GOT A 2YR FIXED RATE OF 4.25% FROM [third party Provider] AND WILL GO THERE IF WE CAN'T MATCH – EMAIL TO [Provider's representative] TO SEE IF WE CAN MATCH. TO REPLY [Provider's representative]. IF GOING AHEAD – WILL REFER TO WITH LOAN ACCOUNT STATEMENTS – THESE NEED TO BE CONDITIONS." [sic]*

The Provider has furnished in evidence a copy of a **Mortgage Quotation** dated **19 January 2007** which details the following interest rate options;

*"4.85% Variable Rate Home Loan  
...  
4.75% 2 Year Fixed Rate Home Loan  
...  
4.39% 1 Year Fixed Rate Home Loan  
...  
5.15% Equity Release 2 Year Fixed Rate SPL"*

The Provider's internal systems note dated **22 January 2007** details as follows;

*"CUSTOMERS WERE IN WITH [Provider's representative] FRIDAY EVENING, GOT A RATE OF 4.25 WITH [third party Provider] FOR 2 YR FIXED, SAID IF WE CAN MATCH REATE, [sic] THEY WILL GIVE US THE BUSINESS. [Provider's representative] EMAILED [Provider's representative] IN BUSINESS RETENTION TO SEE IF WE COULD MATCH RATE."*

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The Provider's internal systems note dated **25 January 2007** details as follows;

*"[Complainants] ARE EXISTING MORTGAGE ACCOUNT HOLDERS WITH [Provider account ending 8801] – OPERATED IN ORDER. ^^[First Complainant] IS EMPLOYED AS [occupation] SINCE [date] – EARNINGS PROPOSED AS PER SALARY CERT^[Second Complainant] IS EMPLOYED AS [occupation] SINCE [date] – EARNINGS PROPOSED AS PER SALARY CERT - ^BOTH WERE IN THE SAME LINE OF EMPLOYMENT PREVIOUSLY^^THEY ARE LOOKING TO REMORTGAGE THEIR PDH TO CONSOLIDATE DEBTS – MORTGAGE OF 500K – PROPERTY WORTH 600K^^THEY ARE CURRENTLY PAYING IN EXCESS OF 2K MONTHLY ON THE LOANS WHICH THE REDEEMING FROM THIS FACILITY AND THEIR EXISTING MTG REPAYMENT IS 1875.00, - THEIR NEW REPAYMENT WILL BE IN THE REGION OF 2444.00, A CONSIDERABLE SAVING FOR THEM PER MONTH^^RECOMMENDED..."*

The Provider's internal systems note dated **25 January 2007** details as follows;

*"HI [Provider's representative],^^Rate reduction approved by [location] Office to a 2 Year Fixed rate of 4.54%. Would you please amend the loan account, as we have to have it approved before Friday to qualify for this rate."*

The Provider's internal systems note dated **29 January 2007** states;

*"THE ABOVE FACILITY WAS APPROVED AT BRANCH LEVEL FOR 500K – THE CLIENTS HAVE REVERTED REQUESTING AN ADDITIONAL 30K – LOOKING FOR APPROVAL OF 530K ... APPROVAL REQUIRED URGENTLY AS LOAN NEEDS TO ISSUE BY 13/02/2007 TO AVAIL OF THE EXISTING 2 YEAR FIXED RATE^^THANKS..."*

*...*

*Loan Approved : EUR 530k^Property Value : EUR 600k^Loan To Value : 88%^^IN ADDITION TO STANDARD TERMS & CONDITIONS TERMS & CONDITIONS, THIS APPROVAL IS SUBJECT TO...^ 1. Payment by Internal S.O. / D.D., clean ICB, satisfactory valuation.^2. Branch to be satisfied that applicants meet criteria policy regarding non-national status^^ This approval is given on the back of the initial branch/system approval for e500k^ ... THIS IS OVERRIDE IS BEING GRANTED FOR ITEM(S) AS REQUESTED BY YOU TOGETHER WITH YOUR RECOMMENDATION. PLEASE ENSURE THAT THE REMAINDER OF THE FILE COMPLIES WITH CREDIT POLICY.^^Reason(s) for Approval :^This approval is given on the back of the initial branch/system approval for e500k".*

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The Complainants have submitted that during discussions at the Provider's branch in or around that time that the Provider advised them to fix the interest rate on their mortgage loan to "stop the rising ECB interest rate element". I have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants during the application stage in relation to interest rate options

It appears from the evidence before me that the Complainants approached the Provider in late **2006** to request to refinance their borrowings. Subsequently they asked if the Provider could match the offer of a fixed rate of 4.25% they had received from a third-party provider.

It appears from the Complainants' submissions that they are of the view that they would not have proceeded to apply for the new mortgage loan on a fixed interest rate in **2006/2007** if not for the advice they purportedly received from the Provider. I am of the view that it was reasonable for the Complainants to believe that they were receiving advice from the Provider at that time. However, I am of the view that it was not reasonable for the Complainants to expect that any advice or information given to them was independent. If the Complainants wanted independent advice about rates available in the market or the market generally, the Complainants should have been aware that they could only get that advice from an independent third-party advisor. In this regard I note that the Complainants had previously engaged the services of a broker when they applied for the original mortgage loan account ending **8801** in **2005**.

It is important for the Complainants to be aware that the Provider was under no obligation to offer them any mortgage or any particular type of mortgage in **2007**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants a loan/mortgage at the time and secondly, how that offer would be structured. It appears from the evidence that the Complainants requested a fixed interest rate and that is what the Provider offered them.

A **Letter of Approval** dated **29 January 2007** was issued to the Complainants for mortgage account ending **7708**, which details as follows;

<i>Loan Type:</i>	<i>2 Year Fixed Rate Home Loan</i>
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*"Purchase Price/Estimated Value: EUR 600,000.00*

*Loan Amount: EUR 530,000.00*

*Interest Rate: 4.54%*

*Term: 35 year(s)"*

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The **Special Conditions** to the **Letter of Approval** dated **29 January 2007** detail:

*“A. GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 “CONDITIONS RELATING TO THE FIXED RATE LOANS” APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF ISSUE OF THE LOAN. ON EXPIRY OF THE FIXED RATE PERIOD, AND WHERE THE APPLICANT CHOOSES THE OPTION OF A TRACKER MORTGAGE INTEREST RATE, THE INTEREST RATE APPLICABLE TO THE LOAN WILL BE THE TRACKER INTEREST RATE APPROPRIATE TO THE BALANCE OUTSTANDING ON THE LOAN AT THE DATE OF EXPIRY OF THE FIXED RATE PERIOD.*

*IN THE ABSENCE OF INSTRUCTIONS FROM THE APPLICANT AT THE EXPIRY OF THE FIXED RATE PERIOD, THE INTEREST RATE FOR THE LOAN WILL BE THE TRACKER MORTGAGE RATE APPLICABLE TO THE BALANCE OUTSTANDING ON THE LOAN, AT THE DATE OF EXPIRY OF THE FIXED RATE PERIOD AND AS MAY BE VARIED IN ACCORDANCE WITH VARIATIONS TO THE EUROPEAN CENTRAL BANK REFINANCING RATE.*

...

*E. SOLICITOR TO UNDERTAKE TO CLEAR THE FOLLOWING FACILITIES FROM THE PROCEEDS OF THIS ADVANCE:*

...

*[Provider’s] MORTGAGE ACCOUNT NO [ending 8801]*

*F. THE 2 YEAR FIXED RATE OF INTEREST OF 4.54% ON THIS FACILITY IS AVAILABLE PROVIDED THE FACILITY IS ISSUED IN FULL ON OR BEFORE 13TH FEBRUARY 2007. SHOULD THE FACILITY NOT BE ISSUED ON OR BEFORE THAT DATE THE RATE THAT WILL APPLY WILL BE 4.75%, SUBJECT TO FURTHER RATE CHANGES PRIOR TO DRAWDOWN.”*

The **General Mortgage Loan Approval Conditions** attaching to the Letter of Approval detail as follows;

**“1. STANDARD CONDIITONS RELATING TO ALL LOAN APPROVALS**

...

*1.10 Whenever the Directors of [the Provider] in their absolute discretion consider it desirable the interest rate payable under the advance may be varied.*

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## **5. CONDITIONS RELATING TO FIXED RATE LOANS**

5.1 *The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*

5.2 *The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*

...

5.4 *Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."*

The **General Mortgage Loan Approval Conditions** also outline:

*"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:*

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

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by a solicitor on **30 January 2007** on the following terms;

*"1. I/we the undersigned accept the within offer on the terms and conditions set out in*

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

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

...

*4. My/our Solicitor has fully explained the said terms and conditions to me/us."*

I note that the mortgage loan account ending **7708** was drawn down on **6 February 2007**.

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It is clear to me that the **Letter of Approval** envisaged a two-year fixed interest rate of 4.54%. **Special Condition A** of the **Special Conditions** outlines what was to occur after the expiration of the fixed interest rate period. It provides that on expiry of the fixed interest rate period the Complainants would be offered the *“tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period”*.

I further note that **Special Condition E** provided that the Complainants were to clear the existing mortgage loan account ending **8801** from the loan proceeds. It is clear from the loan documentation that the loan that the Complainants were offered by the Provider in **January 2007** was an entirely separate loan to the Complainants' original mortgage loan account ending **8801**. Therefore, I am of the view that whether or not a tracker interest rate of ECB + 1.10% applied to mortgage loan account ending **8801** is not relevant to the interest rate applicable to mortgage loan account ending **7708**.

It appears the Complainant's mortgage loan account ending **8801** was redeemed in **February 2007**.

In order for the Complainants to have a contractual right to a specific tracker interest rate margin of ECB + 1.10% on their mortgage loan account ending **7708** at the end of the fixed interest rate period in **2009** that right would need to have been specifically outlined in the mortgage loan documentation that was signed by the parties. However, no such right was contained in the **Letter of Approval** dated **29 January 2007** which was signed by the Complainants on **30 January 2007**. The Complainants accepted the **Letter of Approval** on **30 January 2007**, having confirmed that the terms and conditions of the Loan Offer had been explained to them by their solicitor.

If the Complainants did not want to pursue this option because they were unhappy that the **Letter of Approval** did not guarantee a specific tracker interest rate entitlement of ECB + 1.10% following the expiration of the fixed rate period in **2009**, they could have decided not to accept the Provider's mortgage loan offer. Instead, the Complainants accepted the Provider's offer by signing the **Acceptance of Loan Offer** on **30 January 2007**.

The Provider has submitted that it issued a **rate options letter** and **form** to the Complainants in **January 2009** prior to the expiry of the fixed rate period in **February 2009**. It is disappointing that a copy of the rate options letter that issued to the Complainants has not been furnished in evidence to this office, nor has the Provider provided any explanation as to why this letter has not been furnished.



**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;*
- 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 Complainants’ mortgage loan was incepted for a term of **35 years** commencing from **January 2007** and the rate options letter purportedly issued in **February 2009**. There is no indication that the mortgage has been redeemed or disposed of in any way. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It is therefore unclear to me, in the absence of any explanation, why this correspondence has not been furnished by the Provider. This is most disappointing.

Nonetheless it does not appear to be disputed between the parties that a **rate options letter** and **form** was issued to the Complainants in or around **January 2009**.

In any event, a copy of the **rate options form** which the Complainants signed on **30 January 2009** has been furnished in evidence and details as follows:

*“Current options available:  
You may only select one option.*

...

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			Monthly Repayment EUR
- Tracker variable rate	- Currently:	4.75%	2669.45
<i>(ECB + maximum 2.2500%)*</i>			
- LTV variable rate**	- Currently:	4.65%	2637.49
- 2 year fixed rate	- Currently;	5.75%	2999.00
- 5 year fixed rate	- Currently;	5.75%	2999.00
- 7 year fixed rate	- Currently;	6.10%	3118.38
- 10 year fixed rate	- Currently;	6.10%	3118.38
...			
<i>- Please note, if you choose a fixed rate, the standard fixed-rate conditions will apply (see over the page).</i>			
<i>- *The interest rate that applies to this Tracker Mortgage Loan will never be more than 2.2500% over the European Central Bank Refinancing Rate (the "ECB Rate"). See over the page for further details on Tracker Mortgage Loans.</i>			
<i>- **In calculating your loan to value ratio we use your current loan balance and the most recent valuation on file for this mortgage."</i>			

The reverse of the rate options form contained the same text as **General Condition 5.3 of General Mortgage Loan Approval Conditions** (as extracted above) under the heading "**Fixed Rate Loans**". Under the heading "**Tracker Mortgage Loans**" the reverse of the rate options form contained the following;

*"1. The interest rate applicable to Tracker Mortgage Loans is made up of the European Central Bank Refinancing Rate ("the ECB Rate") plus a percentage over the ECB Rate. The amount of the percentage over the ECB Rate will depend on the amount of the loan and that percentage will not be exceeded during the term of the loan.*

*2. The ECB rate may be increased or decreased from time to time by the European Central Bank (ECB). We will apply all increases or decreases within one month from the date announced by the ECB as the effective date.*

*3. If we cannot use the ECB Rate for this loan, we will use another reference rate or calculation that is fair and reasonable.*

*4. If more than one Tracker Mortgage Loan exists on the property, these loans cannot be added together to get a different interest rate over the ECB rate."*

/Cont'd...

The Complainants signed the form on **30 January 2009** selecting the tracker interest rate of 4.75% (ECB + 2.25%). The **mortgage loan statements** show that this rate was applied on **6 February 2009**.

The Complainants take issue with the application of the tracker interest rate of ECB + 2.25% to their mortgage loan on the expiry of the fixed rate period. They outline that they had understood that the mortgage loan account would switch to the tracker rate of ECB + 1.10%.

I cannot accept the Complainants' submissions in this respect. The **Letter of Approval** dated **29 January** set out that the rate applicable to the mortgage loan account ending **7708** for 2 years would be 4.54%. **Special Condition A** sets out that the interest rate applicable at the end of the fixed rate period would be the *"tracker mortgage rate appropriate to the balance outstanding on the loan at the date of expiry of the fixed rate period"*. There was no guarantee in the Special Conditions or any other conditions applicable to the Complainants' mortgage loan that a specific tracker mortgage margin would be made available to the Complainants at the end of the fixed period. It is important for the Complainants to be aware that the Complainants' mortgage loan is governed by the terms and conditions of their mortgage loan documentation signed by them in **2007**. In these circumstances the terms and conditions of the loan were clear. There is no evidence that the Provider agreed that a tracker interest rate of ECB + 1.10% would be applied to the Complainants' mortgage loan account ending **7708** upon the expiry of the fixed rate period. It was a matter for the Complainants to consider the terms and conditions of the **Letter of Approval**, to ensure that they were happy with the terms offered and that they aligned with any discussions that they had before signing the Letter of Approval. The Complainants accepted the **Letter of Approval** on **27 February 2008**, having confirmed that the terms and conditions of the Loan Offer had been explained to them by their solicitor.

If the Complainants were not happy with the terms of the **Letter of Approval**, including the type of interest rate or the fact that the mortgage loan contract did not stipulate a specific tracker mortgage rate margin that would be applied at the end of the fixed period, the Complainants could have decided not to accept the offer made by the Provider. Instead, the Complainants accepted the Provider's offer by signing the **Acceptance of Loan Offer** on **30 January 2007**, and in doing so, confirmed that their solicitor had fully explained the terms and conditions of the mortgage loan to them.

The Provider has submitted details of its policy with respect to tracker interest offerings to new and existing customers in evidence, as follows;

"...

/Cont'd...

- *After [mid] 2009, the Bank continued to offer and / or apply a tracker interest rates to maturing loans where customers had a contractual right to a tracker rate.*
- *The tracker rate options available on maturity of an existing fixed rate period in and around [early] 2009, apart from those accounts with a particular tracker maturity rate specified in the special conditions of the Letter of Approval, were a rate of ECB+2.25% for home loans and ECB+2.35% for residential investment property loans. From [mid] 2009 the margin increased to ECB + 3.25% & ECB + 3.35% respectively.”*

The Complainants were offered the “*then current*” tracker mortgage rate of 4.75% (ECB + 2.25%) in accordance with **Special Condition A**. It was within the Provider’s commercial discretion to set this rate.

The Complainants, in their post-Preliminary Decision submission dated **5 October 2021**, appear to interpret **Special Condition A** as meaning that “*only ECB refinancing rate will fluctuate while the spread/ margin for the provider remain at max 1.10% (ECB + max 1.10%)*”. The Complainants submit that the wording in the Special Condition is unclear as “*it can also be interpreted as ECB portion only would change, as it was the case that [they] are all aware of. Seem both components i.e. ECB refinancing rate and margin would change which we were not specifically clear about*”.

It is clear to me that there is no reference whatsoever to a specific margin of 1.10% in the Complainants’ mortgage loan documentation in respect of mortgage loan account ending **7708**, therefore the Complainants’ submission that “*it can be interpreted as the ECB portion only would change*” is unfounded where no margin was specified in the loan documentation. **Special Condition A** stipulates that at expiry of the fixed interest rate, the interest rate for the loan “*will be the tracker mortgage rate applicable to the balance outstanding on the loan*”, which at the time of the expiration of the fixed interest rate was ECB + 2.25%. The wording “*as may be varied in accordance with variations to the European Central Bank Refinancing Rate*” refers to the ECB interest rate element of the overall tracker interest rate of 4.75% (ECB + 2.25%), which can vary in accordance with the rates set by the European Central Bank.

Having considered the evidence before me, I do not accept that there is any basis on which the Complainants could reasonably have assumed that a tracker interest rate of ECB + 1.10% would be applied to the mortgage account at this time. In the interests of clarity, a tracker interest rate of ECB + 1.10% never applied to the mortgage account ending **7708**.

The Complainants have submitted that when they queried this in or around **January 2009**, the Provider “*instructed*” them to sign the options form selecting the tracker interest rate of ECB + 2.25%. Again, there is no documentary evidence on the file to support this. In any event, as outlined above there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate of ECB + 1.10% on the expiry of the fixed interest rate period in **February 2009** or at any other time.

The evidence shows that the Complainants sought a moratorium for three months by signing a **Payment Holiday Options Application Form on 26 October 2010**. In response to “*Reason for request*” the Complainants detailed “*Cashflow Purposes.*”

I note from the evidence that the Complainants’ mortgage loan account ending **7708** entered into arrears in **2011**. Correspondence between the Provider and the Complainant from **2011** to **2019** in relation to the arrears on the mortgage loan account has been submitted into evidence.

I note that the Provider transferred its interest in the Complainants’ mortgage loan account ending **7088** to a third-party provider on **4 February 2019**. In this regard I note that **Condition 6.7** of the Provider’s **Mortgage Conditions** provides that;

*“[the Provider] may at any time (without the consent of the Mortgagor) transfer the benefit of the Mortgage to any person”.*

I do not accept, based on the evidence available, that the Complainants had a contractual or other entitlement to a tracker interest rate of ECB + 1.10% on the expiry of the fixed interest rate period in **February 2009**, or indeed at any other stage during the term of the mortgage. The Complainants had a right to the “*then current [Provider] tracker mortgage rate ... appropriate to the loan*” on the expiry of the fixed interest rate period in **February 2009**. The Provider offered the Complainants the rate of ECB + 2.25%, which they accepted.

The two mortgage loan accounts ending **8801** and **7088** held by the Complainants with the Provider were two separate mortgage loans. Each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The evidence shows that mortgage loan account ending **8801** was drawn down by the Complainants in **2007** on the terms and conditions offered by the Provider. This was a choice that was freely made by the Complainants.

For the reasons outlined in this Decision, I do not uphold this complaint.

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**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**

9 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.**