



<u>Decision Ref:</u>	2021-0462
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

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

The Mortgage Loan Offer Letter dated **5 December 2006** outlined the loan type as a "Repayment" loan. The interest rate applicable to the mortgage loan account was a fixed rate of 4.85% for a period of 60 months with a tracker interest rate of ECB + 1.25% to apply thereafter. The loan amount was €190,000 and the term of the loan was 25 years.

The Complainants drew down the mortgage loan on **8 February 2007**.

The Complainants' Case

The Complainants submit that in **2009** the first named Complainant was working two days per week "*as work was drying up*" and he became unemployed in **2010**. The Complainants detail that they telephoned the Provider in **2009** to try and change the interest rate on their mortgage loan account from a fixed interest rate of 4.850% to a tracker rate of interest.

The Complainants contend that they were informed by the Provider that they would be required to pay a fee of €15,000 to convert to a tracker interest rate. The Complainants submit that the interest rates started to fall shortly after that, and they rang the Provider *“to get out of the fixed rate”*. The Complainants outline that they were informed that it would cost €15,000 to do this however they could not afford that and they *“struggled on and done without holidays etc to keep [their] heads above water”*.

The Complainants submit that they were not permitted to go back to a tracker interest rate without having *“to pay a hefty penalty”* and *“they remained on the fixed rate because of the penalty.”* The Complainants submit that they were under a lot of *“stress”* to meet their mortgage repayments and that it was *“upsetting”* to be informed in **2012** that they *“had a tracker all the time”*. They assert that they have overpaid approximately €20,000 to €25,000 in interest on their mortgage loan account.

The Complainants detail that on the expiry of the fixed interest rate period in **February 2012** they were given the option of a tracker interest rate which they opted for as *“the rate of interest is much lower.”*

The Complainants are seeking €15,000 for the *“pain [and] suffering”* caused as a result of being unable to apply a tracker interest rate to their mortgage account in **2009**.

The Provider’s Case

The Provider outlines that the Complainants drew down a mortgage loan of €190,000.00 on **8 February 2007** for a term of 20 years on a fixed interest rate of 4.85% for a period of 60 months and thereafter moving to a tracker interest rate, pursuant to the terms of **Mortgage Loan Offer Letter** dated **5 December 2006**.

The Provider submits that the **Mortgage Loan Offer Letter** dated **5 December 2006** is *“clear and unambiguous”* with respect to the Complainants’ interest rate entitlements. The Provider refers to **Special Condition 4(a)(ii)** which sets out that a tracker interest rate of ECB + 1.25% would apply to the mortgage loan on the expiry of the initial five-year fixed interest rate period.

With respect to the breakage fee quotation requested from the Complainants in **2009**, the Provider submits that due to the lapse of time, it *“does not hold any explicit records of interactions between itself and the Complainants”* in this regard. However, the Provider notes from its internal records that a calculation of the breakage fee on the mortgage loan account was generated on **11 November 2009**.

The Provider outlines a quotation of €10,352.00 was provided to the Complainants and it states that the amount was calculated based on the formula set out in **General Condition 7(c)** of the Complainants' mortgage loan agreement. The Provider asserts that this was the highest breakage fee quotation provided to the Complainants in **2009** and outlines that it has *"no records that a breakage fee of €15,000 was quoted to the Complainants at an unspecified date in 2009."*

The Provider submits that **General Condition 7(c)** *"clearly sets out the circumstances in which a breakage fee may arise"* which includes a situation where early repayment is made in whole or in part, or conversion to a variable interest rate or other fixed rate within the initial fixed rate period. The Provider outlines that the content of the condition is reiterated in the **Consumer Credit Act Notices** section of the **Mortgage Loan Offer Letter** dated **5 December 2006**, under the bold heading **"Early Repayment"**.

The Provider submits that **General Condition 7(c)** is not a *"penalty clause"*, but rather a provision, agreed to by the Complainants, to reimburse the Provider in the event of a customer's decision to break from a fixed rate.

The Provider notes that the Complainants engaged the services of a broker when submitting their mortgage loan application. The Provider submits that *"if the Complainants were unsure of the operation of their mortgage loan account at drawdown and thereafter, they should have sought the advice of their Mortgage Broker or their solicitor."* The Provider states that it does not believe that the *"Offer Letter can be construed in any way other than giving the Complainants' an entitlement to a tracker rate further to the expiry of a fixed rate period."*

The Provider submits that it is *"unreasonable"* for the Complainants to assert that they have overpaid approximately €20,000 to €25,000 in interest on their mortgage loan account. The Provider states that the repayments required on the account are in accordance with the terms and conditions of the **Mortgage Loan Offer Letter** which the Complainants accepted and signed on **19 January 2007**.

With respect to the Complainants' submission that they endured *"pain [and] suffering"* as a result of the Provider's alleged failure on their mortgage loan account, the Provider states that *"there would likely have been other factors outside of the conduct complained that would likely to have led to the Complainants' financial difficulties as described."* The Provider notes that the first named Complainant had reduced working hours in **2009** and became unemployed in **2010** which it submits *"would have likely had an effect on the Complainants' ability to service the mortgage loan repayments."*

The Provider asserts that it would be *“unfair”* for this office to award compensation for *“pain [and] suffering”* in circumstances where *“the Provider acted fully in accordance with the terms and conditions as agreed between the Provider and Complainants contained in the Offer Letter.”*

The Provider submits that the Complainants’ mortgage loan account *“did not accrue any arrears around this time, nor did arrears appear on the mortgage loan account”*. It states that it has *“no record of the Complainants approaching it to advise that they were suffering financial difficulties at the time.”* The Provider details the mortgage loan account repayments were being serviced in full and it has no record of receiving any forbearance requests from the Complainants. The Provider notes that since the tracker interest rate was applied to the mortgage loan in **February 2012**, the Complainants have been making overpayments on the account. It further notes that the Complainants have made lump sum repayments which, together with the monthly overpayments, have accelerated the loan redemption.

The Provider notes that if the Complainants continue with the current level of overpayments, *“the mortgage loan account should be mature by the end of 2021, 11 years ahead of schedule.”* The Provider submits that if the Complainants were under the financial pressure as alleged, they would not have been in a position to make the lump sum repayments or maintain higher repayments than required.

The Complaint for Adjudication

The complaint for adjudication is that the Complainants were wrongfully required to pay a breakout fee in **2009** in order to end the fixed rate and convert their mortgage loan account to a tracker interest rate.

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 9 November 2021, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation. It is also relevant to set out the interactions between the Complainants and the Provider in **2009** when the Complainants approached the Provider to change their interest rate prior to the expiry of the fixed interest rate period.

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 **3 June 2020**, which outlined as follows:

"In the interests of clarity, the complaint that [the Complainants] are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the Broker referred to above 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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The Provider issued a **Mortgage Loan Offer** dated **5 December 2006** to the Complainants which details as follows:

***“Part 1 – The Statutory Loan Details
Important Information as at 05 December 2006***

1. Amount of Credit advanced:		€190,000.00
2. Period of Agreement:		25 Years
3. Number of Repayment Instalments	Instalment Type	4. Amount of each Instalment
60	Fixed at 4.850%	€1,092.03
240	Variable at 4.500%	€1,060.34”

...

Part 2 – The Additional Loan Details

11. Type of Loan:	Repayment
12. Interest Rate:	4.850% Fixed

...

Part 4 – The Special Conditions (may be continued on following page)

This Loan is subject to the following special conditions (the “Special Conditions”) which, unless stated to the contrary, must be complied with in full to the Lender’s satisfaction before the Loan, or any part of it, can be drawn down:

(a) The following Special Conditions apply to the Loan:

...

(ii) The interest rate applicable to the loan is a fixed rate and is fixed for the period set out in Part 1 of this Offer Letter. At the end of the fixed rate period the Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice then in either case, in accordance with general condition 7(b) of the Offer Letter, the interest rate applicable to the Loan will be a variable interest rate.

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The variable interest rate may vary upwards or downwards. The interest rate shall be no more than 1.25% above the European Central Bank Main Refinancing Operations Minimum Rate ("Repo Rate") for the term of the Loan. Variation in interest rates shall be implemented by the lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate in accordance with General Condition 6(b) of this Offer letter. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.

...

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

The relevant sections of the **General Conditions** attached to the **Mortgage Loan Offer** detail as follows:

"6. Variable Interest Rates

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

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7. Fixed Interest Rates

- a) *The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. **The fixed rate of Interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of draw down.***
- b) *The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that choice, then in either case the interest rate applicable to the Loan will be a variable interest rate.*
- c) *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower will be liable to pay a sum to be calculated in accordance with the following formula: $(\text{Amount} \times (R - R1) \times \text{Time})$ divided by 36500 and for the purposes of this formula, the variables are defined as follows: "Amount" means the average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term allowing for scheduled repayments; in the case of an endowment loan, this will equal the full amount of the early repayment or conversion. "R" means the cost of funds for the Lender for the fixed rate period as incorporated in the existing interest rate applying to the Loan. "R1" means the interest rate available to the Lender for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period. "Time" means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period."*

I note that that the paragraph at **General Condition 7(c)** as quoted above is reproduced under the heading '**Early Repayment**' of the **Consumer Credit Act Notices** section of the **Mortgage Loan Offer**.

The **Acceptance and Consents** section of the **Mortgage Loan Offer Letter** was signed by the Complainants on **19 January 2007**, which details as follows:

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

It is clear to me that the **Mortgage Loan Offer Letter** envisaged a fixed interest rate of 4.85% for the first 60 months from the date of drawdown, with a tracker interest rate of ECB + 1.25% applying thereafter. The Complainants signed and accepted the **Mortgage Loan Offer Letter**, having confirmed that they fully understood the terms and conditions set out in the loan offer. I note from the **mortgage loan account statements** furnished in evidence that the mortgage loan was drawn down on **9 February 2009** on a fixed interest rate of 4.99%.

The Complainants submit that they approached the Provider in **2009** to switch their mortgage loan account from a fixed interest rate to a tracker interest rate. The Provider has outlined that owing to the lapse in time, it does not hold any record of any communications with the Complainants in relation to their request to switch the interest rate on their mortgage loan account.

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.”

It is disappointing to note that the Provider does not hold any records of any interactions between the parties in relation to the request made to break from the fixed interest rate period at that point in time. The Provider has however, supplied a screenshot of its internal system noting redemption figures in evidence to this office. It appears from the screenshot that the Complainants were in contact with the Provider in **2009** and **2010** with respect to breaking from the five-year fixed interest rate applying to their mortgage loan. It is unclear whether the Complainants made a number of requests however from their submissions it would appear that there is no dispute that a request was made in and around **2009**.

The Complainants submit that they received a quotation of €15,000 from the Provider, however they were unable to afford to pay the fee to break away from the fixed interest rate.

The relevant notes from the Provider’s internal system outline as follows:

“Redemption Date	Redemption Fees	Average Volume	Effective Funding Cost
2009/04/17	9,796.00	174,686.17	4.21000
2009/04/20	9,768.00	174,686.17	4.21000
2009/04/22	9,509.00	174,686.17	4.21000
2009/04/24	9,412.00	174,686.17	4.21000
2009/11/11	10,352.00	173,653.06	4.21000
2010/05/10	9,610.00	171,279.44	4.21000
2010/08/03	7,762.00	171,341.26	4.21000”

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I have not been provided with any evidence that the Complainants were provided with a breakage fee quotation of €15,000 to exit from the fixed interest rate at any point in time. Based on the Provider's internal records, I accept that the highest fee quotation provided to the Complainants was €10,352 on **11 November 2009**.

The Complainants take issue with the fact that they were required to pay a breakage fee when they sought to apply a tracker interest rate to their mortgage loan account in **2009**. I note that **General Condition 7(c)** and the **'Early Repayment'** section under the **Consumer Credit Act Notices** of the Complainants' mortgage loan agreement, as quoted above, clearly details that a breakage fee would apply in circumstances where the Complainants wished to break out of a fixed interest rate period. One of the circumstances outlined is where the Complainants sought a *"conversion to a variable interest rate, or other fixed rate within the initial fixed rate period"*.

I note **General Condition 7(c)** further outlines that the formula to calculate the fee is:

$$(Amount \times (R - R1) \times Time) \text{ divided by } 36500$$

I note that the variables of the formula are defined as follows:

- *"Amount"* = Average balance of the amount repaid early or converted from the date of repayment or conversion to the end of the fixed rate term
- *"R"* = the cost of funds for the Provider for the fixed rate period as incorporated in the existing interest rate applying to the Loan.
- *"R1"* = the interest rate available to the Provider for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period
- *"Time"* = the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period

When applying the relevant figures from **11 November 2009** to the breakage fee formula above, the Provider outlines that the calculation is as follows:

$$(\text{€}173,653.06 \times (4.21\% - 1.55\%) \times 818) / 365 = \text{€}10,352.00$$

There is no evidence to suggest that the Complainants were requested to pay a penalty fee of €15,000. Further, no evidence has been provided to support the assertion that they were wrongfully requested to pay a breakage fee on foot of their request to switch from a fixed interest rate to a tracker interest rate in **2009** in circumstances where the terms and

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conditions of the **Mortgage Loan Offer Letter**, to which the Complainants agreed to, clearly outlined that a breakage fee would be incurred by the Complainants should they wish to convert their mortgage loan to a variable interest rate. The Complainants were free to choose to pay the breakage fee and change the applicable interest rate on their mortgage loan account or decline to pay the breakage fee and remain on a fixed interest rate until **2012** when their mortgage loan was due to convert to a tracker interest rate. I note that the Complainants decided on the latter.

The Provider issued a **Mortgage Form of Authorisation** to the Complainants prior to the expiry of the five-year fixed interest rate in **February 2012**, which set out the following interest rate options:

<i>"TRACKER VARIABLE ECB + 1.25%</i>	<i>2.250%</i>
<i>Existing Variable LTV Rate PDH</i>	<i>3.850%</i>
<i>2 Year Fixed (PDH)</i>	<i>4.950%</i>
<i>3 Year Fixed (PDH)</i>	<i>5.450%</i>
<i>5 Year Fixed (PDH)</i>	<i>6.050%"</i>

I note that the Complainants signed and accepted the **Mortgage Form of Authorisation** on **3 February 2012** opting for the tracker interest rate of ECB + 1.25% which was applied to their account on **8 February 2012**. The tracker rate offered by the Provider was in line with the terms and conditions of the **Mortgage Loan Offer Letter**. I note from the mortgage loan account statements submitted in evidence, that the Complainants' mortgage loan account has remained on a tracker interest rate of ECB + 1.25% since **8 February 2012**.

The Complainants submit that it was "*upsetting*" to realise in **2012** that they "*had a tracker all the time*". In this regard it is important to highlight that the Complainants' contractual entitlement to a tracker interest rate on the expiry of the five-year fixed rate period was clearly detailed in **Special Condition 4 (a) (ii)** of the Mortgage Loan Offer Letter. By accepting and signing the Mortgage Loan Offer on **19 January 2007**, the Complainants confirmed that they fully understood the terms and conditions contained in the **Mortgage Loan Offer Letter**. The Complainants were on notice that their mortgage loan account was due to convert to a tracker rate of interest in **2012**.

The Complainants have alluded to the financial difficulty that they experienced from **2009** in their submissions to this office. While I acknowledge that the Complainants may have experienced financial difficulties during this period in circumstances where the first named Complainant was on reduced working hours and subsequently became unemployed, I do not believe that the Provider can be held responsible for any financial difficulties because it acted within the terms and conditions set out in the **Mortgage Loan Offer Letter** which the Complainants acknowledged and agreed to be bound by on **19 January 2007**.

I note that in its formal response to this complaint dated **13 February 2020**, the Provider acknowledged that in circumstances where the fixed interest rate period was broken and the appropriate fee was paid, the Complainants were entitled to be offered a tracker interest rate, however "*conflicting information was provided in its Final Response Letter*". The Provider's Final Response Letter issued to the Complainants on **13 March 2017** incorrectly stated that the Complainants "*were not entitled to switch to the Tracker variable rate prior to the 8th of February 2012.*"

The Provider apologised for "*any confusion*" which may have been caused to the Complainants and offered them a sum of €500.00 as a gesture of goodwill in light of its error. It is unclear to me whether the Complainants have accepted the Provider's offer, however I understand this offer remains open to the Complainants to accept.

In light of the foregoing, 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

1 December 2021

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Pursuant to *Section 62 of the Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,
and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.