



<u>Decision Ref:</u>	2021-0488
<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 that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €200,000 and the term of the loan was 25 years. The **Mortgage Loan Offer Letter** dated **11 August 2004** provided for a fixed interest rate of 2.75% for the first 12 months of the term of the loan with a variable interest rate of 3.6% to apply thereafter.

The Complainants' Case

The Complainants submit that they took out a mortgage loan account ending **6214** with the Provider in **2004** on a fixed interest rate, which rolled to a variable rate in **2006**. The Complainants state that the Provider informed them that it would "*send out an offer letter in 2006 for a tracker mortgage*". The Complainants state that they never received a letter offering a tracker mortgage. The Complainants submit that they would "*have taken the offer as it was a much better rate.*" The Complainants assert that they spoke to the manager of the Provider's branch and "*rang time and time again*" but "*to no avail*".

The Complainants submit that they took out a top-up mortgage loan with the Provider in **2005**. The Complainants explain that they were offered a tracker mortgage, which they accepted. The Complainants state that they asked the Provider about a tracker mortgage for mortgage loan account ending **6214** but to no avail. The Complainants maintain that this has caused them *“extreme stress and anxiety.”*

The Complainants contend that they got into difficulty with their mortgage loan and had to make interest only repayments. The Complainants state that they spoke with the Provider in **2015** and were offered a *“payment of €635 ish”* as repayment on their mortgage. The Complainants state that they informed the Provider that they were currently paying €957.00 and at that point the *“conversation stopped”*. The Complainants maintain that they were informed that the *“offer letter would be cancelled”* and that it was a *“technical/clerical error”*.

The Complainants maintain that they were *“suitable candidate[s] back in 2006”* for a tracker mortgage and question why they did not get a tracker mortgage from the Provider. The Complainants state that they are *“only looking for what we were entitled to”*. The Complainants assert that they are at their *“wits end”* and would like this to be resolved. The Complainants state that they feel that the Provider *“wrongfully denied”* them a tracker mortgage. The Complainants submit that the *“gap between the cost of a tracker mortgage & a variable rate mortgage can be anything up to €12,500 per year for the last 10 years??”* The Complainants assert that this is *“unjust and unfair”*.

The Complainants submit that they called and visited the Provider who was *“not at all co-operative”* and treated the Complainants *“very badly”* which caused the Complainants *“stress”* and *“financial worry and bad health”*.

The Complainants are seeking the following:

- (a) A tracker interest rate to be applied to mortgage loan account ending **6214** for the remainder of the term of the mortgage; and
- (b) A refund of overpaid interest from in or around **2006** to date.

The Provider’s Case

The Provider outlines that the Complainants drew down mortgage loan account ending **6214** in the amount of €200,000 on **2 November 2004** for a term of 25 years. The Provider details that the interest rate was a fixed rate of 2.75% for a period of 12 months *“after which the interest rate would move to a standard variable interest rate.”*

The Provider submits that the Complainants signed and accepted the **Mortgage Loan Offer Letter** on **19 August 2004**. The Provider maintains that the Complainants received "*independent legal advice*" prior to signing the **Mortgage Loan Offer Letter**.

The Provider asserts that **General Condition 6(a)** and **General Condition 7(b)** of the **Mortgage Loan Offer Letter** "*clearly and unequivocally state that the Provider has the sole discretion upon expiry of the fixed rate period, to provide a further fixed rate period, a choice of rates and if either of these is not selected, then the mortgage will revert to a variable rate.*" The Provider submits that a variable rate is defined in **General Condition 6(a)** and "*it is clear that it does not include a tracker rate of interest*".

The Provider submits that the Complainants were "*on notice of the fact that a variable interest rate that could be amended at the Provider's discretion, rather than a tracker interest rate, would apply to the mortgage loan account in default of an alternative interest rate being offered*".

The Provider states that it issued a **Product Review Notice** to the Complainants on **3 October 2005** in which the Provider offered several interest rate options upon the expiration of the fixed rate period on **2 November 2005**. The Provider maintains that if the Complainants did not choose an interest rate, "*the mortgage loan account will move to an interest rate determined by the Offer Letter*". The Provider asserts that a tracker rate option was included in the **Product Review Notice**, but the Complainants chose a one-year fixed rate of 3.29% and signed and accepted a **Mortgage Form of Authorisation** in **October 2005**.

The Provider submits that there "*is no ambiguity, lack of clarity or vagueness contained in the October 2005 MFA, when read in conjunction with the Offer Letter, concerning the rate which the Complainants mortgage loan account would revert to upon expiry.*"

The Provider states that a further **Product Review Notice** was issued to the Complainants on **5 October 2006**. The Provider maintains that a tracker interest rate was included as a rate option. However, the Provider states that the Complainants did not return the **Mortgage Form of Authorisation** attached to the **Product Review Notice** and so the "*mortgage loan account moved to the standard variable rate on 6 November 2006*" as per **General Condition 7(b)**.

The Provider submits that, following a request from the Complainants to change their interest rate, a letter issued from the Provider to the Complainants dated **29 November 2006** detailing a "*suite of interest rate options*" for the Complainants to choose from. The Provider outlines that the Complainants elected to remain on the standard variable rate until **29 March 2010**.

The Provider submits that the Complainants signed a further **Mortgage Form of Authorisation** on **18 March 2010** to convert the mortgage loan account to a fixed interest rate of 3.6% for three years.

The Provider submits that on **5 March 2013**, the Complainants signed a third **Mortgage Form of Authorisation - Application to Pay Reduced Payment** dated **6 December 2012** to pay reduced repayments of €880.00 per month for 6 months in accordance with an alternative repayment arrangement.

The Provider explains that on **2 April 2013**, after the three-year fixed interest rate period expired, the mortgage loan account reverted to a standard variable rate as per the **Mortgage Loan Offer**.

The Provider refutes the Complainants' assertion that they were "*wrongfully denied*" a tracker rate of interest. The Provider asserts that it has no record of receiving a specific request for a tracker interest rate from the Complainants. The Provider states that the Complainants were offered a tracker interest rate in the **October 2005 Mortgage Form of Authorisation** and that the **Product Review Notice of October and November 2006** also included tracker rate options. The Provider states that it does not hold any records of discussions with the Complainants due to a "*lapse of time*". However, the Provider relies on the two **Product Review Notices** as evidence that offers of tracker interest rates were made to the Complainants.

The Provider submits that tracker interest rates were withdrawn from the market in **late 2008** and, as such, the Complainants "*could have elected to move to a tracker rate of interest at any point until [late] 2008.*"

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate on their mortgage loan account ending **6214** in **2005** and **2006**, despite repeated requests to do so.

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 16 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 the complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation and to consider certain interactions between the Provider and the Complainants in **2005** and **2006**.

The Provider issued a **Mortgage Loan Offer Letter** dated **11 August 2004** to the Complainants which details as follows:

“ ...

PART 1 – THE STATUTORY LOAN DETAILS
IMPORTANT INFORMATION AS AT 11 August 2004

- | | |
|------------------------------------|------------------------|
| 1. Amount of Credit Advance | €200,000 |
| 2. Period of Agreement | 25 Years |
| 3. Number of Repayment Instalments | <i>Instalment Type</i> |
| 12 | Fixed at 2.750% |
| 288 | Variable at 3.600% |

...

PART 2 – THE ADDITIONAL LOAN DETAILS

/Cont'd...

- | | |
|--------------------|--------------|
| 11. Type of Loan: | Repayment |
| 12. Interest Rate: | 2.750% Fixed |
| ... | |

I note that there is a warning on **page 2** of the **Mortgage Loan Offer Letter** which reads as follows:

“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.”

General Condition 6 of Part 5- The General Conditions of the Mortgage Loan Offer Letter details 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) above, 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).”*

General Condition 7 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter details as follows:

“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.*

/Cont’d...

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 applicable to the Loan will be a variable interest rate."*

The **Consumer Credit Act Notices** section on **page 5** of the **Mortgage Loan Offer Letter** details as follows:

"If your mortgage loan is at any time at a variable rate, please note:
THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."

The Complainants signed the **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer Letter** on **19 August 2004** on the following terms:

"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."

As such, I am satisfied that the Complainants accepted the **Mortgage Loan Offer Letter**, having confirmed that that they read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer Letter** dated **11 August 2004**.

I note from the **mortgage loan statements** provided in evidence that the Complainant's mortgage loan account was drawn down from **2 November 2004** in stages, as follows:

Date	Drawdown Amount
2 November 2004	€50,000
23 November 2004	€40,000

2 February 2005	€40,000
7 February 2005	€40,000
7 June 2005	€20,000
16 September 2005	€10,000

It is clear to me that the **Mortgage Loan Offer Letter** envisaged that a fixed interest rate of 2.75% would apply to the mortgage loan for a period of 12 months with a variable interest rate to apply thereafter if the Complainants did not select from any other interest rate on offer by the Provider. The nature of the variable interest rate was one that could be adjusted by the Provider at any time.

There is no reference in the **Mortgage Loan Offer Letter** to a tracker interest rate applying to the Complainants' mortgage loan account. In order for the Complainants to have a contractual right to a tracker interest rate on the mortgage loan at inception or at the end of the initial fixed interest rate period, 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 set out in writing in the **Mortgage Loan Offer Letter** which was signed by the Complainants on **19 August 2004**.

Prior to the expiry of the initial fixed interest rate period, the Complainants completed a **Mortgage Form of Authorisation** on **26 October 2005**, which details as follows:

“...

I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate (Please Note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the Lender. See full conditions overleaf.)

Selected Rate	Description	Rate
<input type="checkbox"/>	HOMELoAN VARIABLE RATE	3.600%
<input type="checkbox"/>	2 YEAR FIXED	3.390%
<input type="checkbox"/>	3 YEAR FIXED RATE	3.490%
<input type="checkbox"/>	5 YEAR FIXED RATE	3.850%

/Cont'd...

<input type="checkbox"/>	10 Year Fixed	4.490%
<input checked="" type="checkbox"/>	1 Year Fixed	3.290%
<input type="checkbox"/>	TRACKER VARIABLE ECB+1.30%	3.300%

..."

The **Consumer Credit Act Notices** section on **page 2** of the **Mortgage Form of Authorisation** details as follows:

"If your mortgage is at any time at a variable rate, please note: THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."

The **Acknowledgement and Agreement** section on **page 2** of the **Mortgage Form of Authorisation** details as follows:

*"I acknowledge that following the acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/ varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. **I acknowledge and agree that:** -*

- 1. If I have applied to convert to a fixed rate loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing interest rate.*
- 2. 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 shall pay a funding fee to be calculated in accordance with the formula set out above under "Early Repayment".*
- 3. If I have applied to convert to a tracker variable rate, agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the Loan. Any variation in interest rate 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.*

/Cont'd...

Notification shall be given to the Borrower of any variation in interest rates either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper.

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.

4. *If I have applied to convert to a Home Loan Variable rate the payment rate on the Loan may be adjusted by the Lender from time to time.*
5. *Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged.”*

I note that the Provider offered the Complainants the option of a variable interest rate or a further fixed interest rate, in line with terms and conditions of the **Mortgage Loan Offer Letter** dated **11 August 2004**. Having considered the mortgage loan documentation, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the initial fixed interest rate period in **2005** however the Provider, in line with its own commercial discretion and policy at the time, offered the Complainants the option of a tracker interest rate on the mortgage loan. In this regard, I accept that the **Mortgage Form of Authorisation** signed by the Complainants on **26 October 2005** contained sufficient detail about the available tracker interest rate, such that the Complainants could have made an informed decision as to which interest rate to choose at the time or made further enquiries if they were in doubt. The Complainants ultimately decided not to apply a tracker interest rate and instead, chose to apply a further one-year fixed interest rate to their mortgage loan account in **2005**. The mortgage loan account statements submitted in evidence show that a fixed interest rate of 3.29% was applied to the Complainants' mortgage loan account on **4 November 2005** on foot of their request in the **Mortgage Form of Authorisation**.

Prior to the expiry of the further fixed interest rate period in **2006**, the Provider submits that it issued a **Product Review Notice** to the Complainants on **5 October 2006**. The Provider explains that it is unable to produce a copy of the exact **Product Review Notice** that issued to the Complainants in evidence. However, the Provider has submitted a screenshot of its internal system in evidence showing the “*letter history*” in relation to the Complainants' mortgage loan account. The internal notes show that a “*Product Review Notice*” issued on **5 October 2006**. The Provider has submitted a “*proxy*” **Product Review Notice** that issued to customers who were coming to the end of a fixed interest rate period at the same time as the Complainants. The Provider has not submitted any explanation as to why it does not hold an exact copy of this letter issued to the Complainants.

Provision 49 of the **Consumer Protection Code 2006** governs retention of records and was not effective until **01 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 “*proxy*” **Product Review Notice** submitted in evidence by the Provider outlines the following interest rate options:

<i>Description</i>	<i>Rate</i>
<i>HOMELoAN VARIABLE RATE</i>	<i>4.440%</i>
<i>5 YEAR FIXED RATE</i>	<i>4.890%</i>
<i>10 Year Fixed</i>	<i>5.190%</i>
<i>1 YEAR FIXED</i>	<i>4.750%</i>
<i>2 YEAR FIXED RATE</i>	<i>4.790%</i>
<i>3 YEAR FIXED RATE</i>	<i>4.790%</i>
<i>TRACKER VARIABLE ECB + 1.25%</i>	<i>4.250%</i>

In circumstances where the Complainants did not select a further fixed interest rate or a tracker interest rate, the Complainants’ mortgage loan account switched to a variable interest rate of 4.64% on **6 November 2006**, in line with the terms and conditions of the **Mortgage Loan Offer Letter** dated **11 August 2004**.

It appears the Complainants subsequently made a request to change their mortgage product on foot of which the Provider issued a further **Product Review Notice** dated **29 November 2006** to the Complainants, which details as follows:

“... ”

Further to your request to change your current mortgage product, I am very pleased to offer you the following range of attractive options: -

<i>Description</i>	<i>Rate</i>	<i>Projected Standard Repayment</i>
<i>HOMELoAN VARIABLE RATE</i>	<i>4.640%</i>	<i>€1,122.64</i>
<i>TRACKER VARIABLE ECB + 1.25%</i>	<i>4.500%</i>	<i>€1,107.82</i>
<i>1 Year Fixed</i>	<i>4.750%</i>	<i>€1,134.36</i>
<i>2 YEAR FIXED</i>	<i>4.790%</i>	<i>€1,138.64</i>
<i>3 YEAR FIXED RATE</i>	<i>4.790%</i>	<i>€1,138.64</i>
<i>5 YEAR FIXED RATE</i>	<i>4.850%</i>	<i>€1,145.07</i>
<i>10 Year Fixed - do not use</i>	<i>5.150%</i>	<i>€1,177.49</i>

/Cont’d...

*To avail of your selected option, please **tick** the relevant rate on the enclosed Mortgage Form of Authorisation. Please **sign and date this form** and return it to us at "Freepost" [Redacted] before 13/12/2006. Unfortunately, we cannot hold the above choice of rates open after this date.*

If you would like to discuss the above option(s) further, please do not hesitate to contact me or any member of my branch team. I would be more than happy to discuss this with you.

If I do not hear from you by 13/12/2006, your current mortgage product and rate will continue to apply in accordance with your loan offer until we receive further instructions from you.

..."

It is clear to me that the Provider offered the Complainants the option to remain on a variable rate of interest or switch to a fixed interest rate or a tracker interest rate. In circumstances where the Provider did not receive a completed **Mortgage Form of Authorisation** from the Complainants, mortgage loan account ending **6214** remained on the standard variable interest rate. I have not been provided with any evidence to suggest that the Complainants did not receive the **Product Review Notices** dated **5 October 2006** and **29 November 2006**. In any event, the Complainants were free to contact the Provider at any stage to discuss the interest rate options available to them. While I note the Complainants state they contacted the Provider seeking a tracker mortgage rate, I have not been provided with any evidence that they did so.

In any event, even if the Complainants did contact the Provider seeking a tracker mortgage rate, the Provider was not obliged to apply such a rate.

Having considered the evidence before me, I note that there was no obligation on the Provider to offer the Complainants a tracker interest rate option in **2005** and **2006**, on the expiry of the respective fixed interest rate periods. It is important to note that the mortgage loan account ending **6214** is governed by the terms contained in **Mortgage Loan Offer Letter** dated **11 August 2004** which was signed by the Complainants. I am satisfied that the terms of the **Mortgage Loan Offer** dated **11 August 2004** were sufficiently clear in relation to what would occur at the end of a fixed interest rate period during the lifetime of the loan. In this regard, there was no contractual entitlement on the part of the Complainants to a tracker interest rate at any time during the term of the mortgage loan.

/Cont'd...

That said, the Provider, in accordance with its own policy at that time, offered the Complainants the option of a tracker interest rate in **2005** and again in **2006** however the Complainants chose not to select a tracker interest rate on either occasion. The Complainants appear to be of the view that they were “*wrongly denied*” a tracker interest rate however this is clearly not the case. The Complainants were offered a tracker interest rate of ECB +1.30% in **2005** and a tracker interest rate of ECB +1.25% in **2006**.

The Complainants did not accept the offer of a tracker interest rate in **2005** and instead opted for a further one-year fixed interest rate for and in **2006** chose to remain on the standard variable rate. The Complainants were ultimately free to accept the offer of a tracker interest rate in **2005** and **2006**, however they chose not to.

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 December 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,

/Cont'd...

**(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.

