



<u>Decision Ref:</u>	2021-0561
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

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

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 €151,800 and the term of the loan was 20 years. The particulars of the Mortgage Loan Offer Letter dated **19 April 2002** provided for a 12-month discounted variable interest rate of 3.690%, with the Provider's standard variable interest rate to apply thereafter.

The Complainants' Case

The Complainants outline that they applied for a mortgage loan with the Provider in **April 2002**. During a meeting with a mortgage advisor of the Provider, the Complainants submit that they "*requested to opt for a tracker mortgage type*" loan. The Complainants detail that the Provider's mortgage advisor completed all the forms on their behalf and referred to the "*mortgage type as a 'tracker variable' mortgage*".

The Complainants submit that when they received the offer letter dated **19 April 2002**, they signed it with the understanding that they were opting for a "*tracker mortgage type*". The Complainants detail that the loan offer referred to "*variable as the loan type*". The

Complainants note that they obtained an “*extension mortgage*” in the sum of €68,000 in **May 2015**.

The Complainants submit that while looking at a mortgage loan account statement a number of years later, they “*observed that the rate seemed much higher than those being mentioned in the media*”. The Complainants submit that when they contacted the Provider to query this, the Provider informed them that the mortgage loan account was never on a tracker interest rate. The Complainants contend that the Provider has made no reference to the verbal agreement that was made between them and the mortgage advisor to opt for a tracker mortgage.

The Complainants assert that the Provider’s mortgage advisor led them to believe that they “*were getting a tracker mortgage by using misleading language and filling out the mortgage application forms incorrectly on our behalf*”.

The Complainants are seeking the following:

- a) A tracker interest rate be applied to the mortgage loan account and also to their “*extension*” mortgage loan account drawn down in **May 2015**;
- b) Repayment of all monies overpaid on their mortgage loan account due to the “*incorrect rate*”; and
- c) “*Appropriate*” compensation.

The Provider’s Case

The Provider outlines that the Complainants signed and accepted a Mortgage Loan Offer Letter dated **19 April 2002** on **26 June 2002** for a loan in the amount of €151,800 for a term of 20 years. The Provider submits that the interest rate was a standard variable rate which was discounted by 1.05% for a period of 12 months from drawdown. The Provider details that thereafter, the mortgage loan account moved to a standard variable rate of 4.74%. The Provider submits that there was no contractual entitlement to a tracker rate contained in the Mortgage Loan Offer Letter.

The Provider details that by way of a Mortgage Form of Authorisation signed and accepted by the Complainants on **23 July 2018**, the mortgage loan account moved to a 2-year fixed interest rate of 3%.

The Provider submits that a tracker rate of interest was available to the Complainants as part of a range of interest rates during the application process in **2002**. The Provider

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outlines that the Complainants chose to apply for a standard variable interest rate that was discounted for the first 12 months.

The Provider submits that at the time of the loan application, the Complainants had the benefit of independent legal advice. The Provider notes that the Complainants' legal representatives were in the correct position to advise the Complainants if they had any queries in relation to the interest rate applicable to the mortgage loan account. The Provider further submits that it "*reasonably understood*" that the Complainants understood and accepted all terms and conditions of the Mortgage Loan Offer Letter, including those related to the interest rate, as evidenced by their signing of the loan offer.

The Provider maintains that there is no evidence to suggest that the Complainants' requested a "*tracker mortgage type*" rate at draw down of the loan, other than the Complainants' recollection of a conversation that purportedly happened 18 years ago. The Provider submits that it introduced tracker interest rates in **mid-2001** and tracker interest rates were available to its customers until **late 2008**, when they were withdrawn from the market by the Provider. The Provider submits that "*it was at all times open*" to the Complainants to approach the Provider with a request to reissue the Mortgage Loan Offer Letter with a tracker rate of interest between the application stage and the drawdown of the mortgage loan. However, the Provider further submits that the Complainants did not make any such request.

The Provider outlines that it offers a range of available options to a customer seeking to make a mortgage loan application. The Provider submits that it will discuss the advantages and disadvantages of each product, but it is not the purpose of the Provider to advise on the particular merits of a product as it relates to a customer's financial position at the time. The Provider maintains that it is for the customer to make the decision as to what the most suitable interest rate product is for them at the time.

The Provider submits that it is "*entirely satisfied*" that the Mortgage Loan Offer Letter was sufficiently clear and unambiguous in stating that the Complainants had no entitlement to a tracker rate of interest, but rather a standard variable rate.

The Complaint for Adjudication

The complaint for adjudication is that in or around **April 2002**, the Provider failed to advise the Complainants adequately or at all that the interest rate applicable to the mortgage loan account was a variable interest rate, and not a tracker interest rate.

Decision

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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 29 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' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2002**.

On foot of receipt of the Complainants' mortgage loan application, the Provider issued a letter to the Complainant's dated **19 April 2002** detailing as follows:

"I am delighted to let you know that the Bank has approved your mortgage application. This approval is subject to the terms and conditions in the enclosed Mortgage Loan Offer ("Offer Letter").

I have also enclosed some documentation that needs to be completed and returned to us. This documentation will help you comply with some of the conditions detailed

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in your Offer Letter. These are called 'Conditions Precedent', and can be found in Part 3 of your Offer Letter. These are also some 'General' and 'Special Conditions' applying to your loan and these can be found in Parts 4 and 5 of you Offer Letter."

The above letter enclosed a **Mortgage Loan Offer Letter** dated **19 April 2002**. **Part 1 – The Statutory Loan Details** of the **Mortgage Loan Offer Letter** dated **19 April 2002** sets out the following:

<i>"1. Amount of credit advanced:</i>	<i>€151,800</i>
<i>2. Period of Agreement:</i>	<i>20 Years</i>
<i>3. Number of</i>	<i>4. Amount</i>
<i>Repayment Instalment</i>	<i>of each</i>
<i><u>Instalments</u> <u>Type</u></i>	<i><u>Instalments</u></i>
<i>12 Variable at 3.690%</i>	<i>€894.38</i>
<i>228 Variable at 4.740%</i>	<i>€974.87"</i>

Part 2 –The Additional Details of the **Mortgage Loan Offer Letter** details as follows:

"11. Type of Loan: Repayment
12. Interest Rate: 3.690% Variable"

Part 4 – The Special Conditions of the **Mortgage Loan Offer Letter** details as follows:

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

...

(iii) The interest rate applicable to the loan has been discounted by 1.05% per annum on the amount of the loan for the period of 12 months from the date of drawdown of the loan. At the end of the said discount period the reduction shall cease and the interest rate applicable to the loan shall revert to the then prevailing Home Loan variable rate".

The notice at the end of the page containing **Part 4 – The Special Conditions** outlines 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 details as follows:

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“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).”*

The **Borrower’s Acceptance and Consents** section of the **Mortgage Loan Offer Letter** was accepted and signed by the Complainants on **26 June 2002** 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.”

The Complainants accepted the **Mortgage Loan Offer Letter**, having confirmed that they had read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer Letter** dated **19 April 2002**. The **mortgage loan account statements** submitted in evidence show that mortgage loan account ending **1956** was drawn down on a phased basis, with €90,170.00 drawn down on **12 August 2002**, €36,030.00 drawn down on **19 December 2002**, €15,397.00 drawn down on **12 March 2003** and €10,203.00 drawn down on **31 July 2003**.

It is clear to me that the **Mortgage Loan Offer Letter** envisaged a discounted variable interest rate of 3.690% to apply for the first 12 months of the term of the loan and a standard variable rate of interest to apply thereafter.

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The variable rate, in the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the European Central Bank main refinancing rate, rather it was a variable rate which could be adjusted at the Provider's discretion. The Complainants accepted the **Mortgage Loan Offer Letter** on those terms.

The mortgage loan account statements submitted in evidence show that the applicable interest rate on the mortgage loan account changed to a rate of 3.6% on the expiry of the discounted variable interest rate period on **12 August 2003**.

The Complainants in their submissions state that they obtained an "extension" mortgage loan in **2015**. However, I have not been provided with any evidence to indicate that an extension was obtained by the Complainants in respect of mortgage loan account ending **1956** or evidence that a new mortgage loan was drawn down by the Complainants with the Provider in **2015**. In **October 2015**, the Complainants' mortgage loan account was on the Provider's standard variable interest rate of 4.34%. It appears that the Complainants enquired as to changing their current mortgage rate at the time with the Provider. On foot of this request, the Provider issued a "Hopper Letter" dated **16 October 2015** which details as follows:

"Dear [Complainants],

Further to your request to change your current mortgage rate, I am pleased to offer you the following range of attractive options. Your current rate is HOMELOAN STD VARIABLE RATE, 4.340% and your current repayment is €935.75. The following table sets out the choice of rate available to you...

Description	Rate	*Estimated Standard Repayment
1 Year Fixed <=60% LTV	3.600%	€909.45
2 Year Fixed LTV <=60%	3.600%	€909.45
3 Year Fixed LTV <=60%	3.600%	€909.45
5 Year Fixed LTV <=60%	3.800%	€915.51

...

A description of our different product types and examples of the advantages and disadvantages follow. Some product types which we describe may not be available to you".

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The letter outlined the advantages and disadvantages of a “Tracker Variable Rate”, “Variable Loan to Value Rate”, and a “Fixed Rate”. I have not been provided with any evidence to indicate that the Complainants completed the **Mortgage Form Authorisation** enclosed with the letter dated **16 October 2015** therefore the Complainants’ mortgage loan account remained on the Provider’s standard variable interest rate of 4.34%.

It appears that the Complainants made a further request to change the applicable interest rate on their mortgage loan account in **July 2018**. On foot of this request, the Provider issued a “Hopper Letter” dated **11 July 2018** which details as follows:

“Dear [Complainants],

Further to your request to change your current mortgage rate, I am pleased to offer you the following range of attractive options. Your current rate is HOMELOAN STD VARIABLE RATE, 4.340% and your current repayment is €935.75. The following table sets out the choice of rate available to you...

Description	Rate	*Estimated Standard Repayment
VARIABLE LTV <=60%	3.900%	€919.22
1 Year Fixed <=60% LTV	3.000%	€902.36
2 Year Fixed LTV <=60%	3.000%	€902.36
3 Year Fixed LTV <=60%	3.000%	€902.36

...

A description of our different product types and examples of the advantages and disadvantages follow. Some product types which we describe may not be available to you”.

The letter outlined the advantages and disadvantages of a “Tracker Variable Rate”, “Variable Loan to Value Rate”, and a “Fixed Rate”.

The Complainants completed the **Mortgage Form of Authorisation** that was enclosed with the above letter and by doing so, opted to switch their mortgage loan account to a “2 Year Fixed LTV <+60%” rate of 3%. The Complainants signed the **Acknowledgement and Agreement** section of the **Mortgage Form of Authorisation on 23 July 2018** noting that the Provider shall have sole discretion to provide a further fixed interest rate at the end of the fixed interest rate period or apply a variable rate of interest in the absence of selection of an alternative rate offered by the Provider.

I note from the **mortgage loan account statements** submitted in evidence that a fixed interest rate was applied to the mortgage loan account on **26 July 2018**.

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The Complainants submit that they “*requested to opt for a tracker mortgage type*”. There has been no evidence provided that shows the Complainants requested a tracker interest rate. The Complainants in their submissions also state that a tracker interest rate was agreed with the mortgage advisor at a meeting which took place in **April 2002**. I have been provided with screenshots of the contemporaneous records of the Complainants’ mortgage loan application however there does not appear to be any details regarding a discussion in relation to tracker interest rates. In any event, it is important to note that it is the **Mortgage Loan Offer Letter** dated **19 April 2002** that forms the basis of the mortgage loan agreement between the parties as opposed to any verbal discussion that might have taken place.

It is clear that the variable interest rate offered to the Complainants was one that could be varied by the Provider, as outlined in **General Condition 6** of the **Mortgage Loan Offer Letter** dated **19 April 2002**. If the Complainants were of the view that the nature of the interest rate provided for in the **Mortgage Loan Offer** dated **19 April 2002** was not suitable for them, the Complainants could have decided not to accept the offer made by the Provider or sought to have a different interest rate applied. If Complainants wanted independent advice about interest rates available in the market or the term of the loan offer, it was a matter for the Complainants to get that advice from an independent third-party advisor such as their solicitor or a financial advisor as opposed to a mortgage advisor employed by the Provider. The Complainants signed and accepted the **Mortgage Loan Offer** on **26 June 2002**, acknowledging that they fully understood the terms and conditions attaching to the loan offer, to include the applicable interest rate.

Furthermore, although tracker interest rates were on offer generally by the Provider as part of its suite of products when the Complainants applied for a mortgage loan in **2002**, there was no obligation on the Provider to offer a tracker interest rate to the Complainants at that time or indeed at any time during the term of the loan. I accept that the **Mortgage Loan Offer Letter** dated **19 April 2002** did not contain a contractual entitlement to a tracker interest rate or an expectation that a tracker interest rate would apply either at the time of drawdown or at any time during the term of the mortgage loan. In order for the Complainants to have a contractual right to a tracker interest rate on expiry of the discounted standard variable interest rate period, that right would need to be specifically provided for in the Complainants’ mortgage loan documentation. However, no such right was set out in writing in the **Mortgage Loan Offer Letter** dated **19 April 2002**, which was signed by the Complainants on **26 June 2002**.

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

22 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,
 - (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.