



<u>Decision Ref:</u>	2022-0019
<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 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 first Complainant's principal private residence.

The loan amount was for €224,000 and the term of the loan was 35 years. The **Mortgage Loan Offer Letter** dated **17 October 2006** provided for a fixed interest rate of 4.250% for a period of 3 years which would thereafter revert to a standard variable rate.

This mortgage loan account was redeemed in full on **14 October 2019**, following the sale of the mortgaged property.

The Complainants' Case

The Complainants submit that they took out a mortgage loan with the Provider in **2007** on a fixed interest rate.

The Complainants assert that although they "*did not opt for a tracker mortgage*" when applying for their mortgage, they "*understood prior to signing the contract that this offer of a tracker mortgage would be part of the suite of offer at the end of [their] fixed rate mortgage in 2010*".

They contend that the Provider *“amended the terms of the contract arbitrarily”*. The Complainants state that they have been on fixed rates ever since which has resulted in higher mortgage repayments compared to a tracker rate.

The Complainants submit that in **2016**, the Provider announced *“that people who were denied a tracker mortgage subsequent to the signing of contract would be compensated”*. The Complainants submit that they were advised by a representative of the Provider that *“the option to switch to a Tracker could be activated at the end of the fixed term”*.

The Complainants outline that on the expiry of the fixed interest rate period, they were not offered a tracker interest rate. The Complainants assert that *“there was an obligation”* on the Provider *“to offer [them] such a switch which they did not do”*. The Complainants contend that the Provider is *“legally and morally”* obligated to honour their contract. The Complainants submit that the Provider *“must deliver on [their] contractual rights in this matter”*. The Complainants assert that the offer from the Provider in **2007** *“included a tracker rate, which was withdrawn”* by the Provider in **2010** and they state that this is *“clearly a breach of contract.”*

The Complainants contend that the Provider *“acted illegally by altering the initial contract to [the Provider’s] advantage”*. The Complainants assert that they clearly had the option of a tracker interest rate in their mortgage loan agreement and *“an agreement cannot be altered by one party to the detriment of the other unilaterally”*. The Complainants submit that they entered the contract with the Provider *“in good faith”* and that they have *“been adversely affected by removal of tracker rate option in 2010”*. The Complainants outline that they sold the mortgaged property the subject of the mortgage loan in **2019**.

The Complainants are seeking the following:

- (a) Compensation for the difference in tracker interest rates and the fixed interest rates on mortgage loan account ending **8399** from **2010** to present; and
- (b) Compensation for estimated future losses on mortgage loan account ending **8399**.

The Provider’s Case

The Provider details that the Complainants drew down mortgage loan account ending **8399** under the **Mortgage Loan Offer Letter** dated **17 October 2006**, which was accepted and signed by the Complainants on **27 October 2006**.

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The Provider details that the **Mortgage Loan Offer Letter** provided for a fixed rate of interest of 4.25% for 3 years, with a standard variable rate of interest to apply thereafter.

The Provider contends that there was no contractual entitlement to a tracker interest rate on the expiry of the fixed interest rate period.

The Provider outlines that its internal notes indicate that at the time of the loan application, the Complainants sought to *“apply for Low Start option on 3 yr fixed.”* The Provider submits that it is of the view that *“it sought to deal with the Complainants’ application in the best interest of the customer”* in circumstances where the second Complainant was not a first-time buyer. The Provider submits that it was open to the Complainants to seek to draw down their mortgage loan on a tracker rate of interest if they wished to do so however *“the Complainants chose to apply for and draw down on a fixed rate for 3 years, due to expire in December 2010, having received independent legal advice.”*

The Provider submits that it withdrew tracker interest rates as a product in **late 2008** and from that point onwards, existing customers could only avail of a tracker rate where they had a contractual entitlement to one. The Provider asserts that *“[t]he Complainants’ Offer Letter did not entitle them to a tracker rate”*. The Provider outlines that **General Condition 7(b)** of the **Mortgage Loan Offer Letter** provides 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 states that pursuant to **General Condition 6(a)**, *“the variable rate is described as varying “at the Society’s discretion upwards or downwards””*. The Provider asserts that General Condition 6(a) and 7(b) are *“clear, concise and comprehensible”*.

The Provider submits that before the expiry of the 3-year fixed rate period, it issued the Complainants with a **Mortgage Form of Authorisation** (“MFA”) in **November 2010**, offering them a choice of rates to apply at the end of the fixed rate period. The Provider states that it did not offer the Complainants the option of a tracker interest rate as the product had been withdrawn at that point. The Provider refers to **Condition 4.4** of the **MFA** which confirms that no change to the Mortgage Loan Offer Letter would occur *“other than the switch to the fixed rate of interest for the defining period”*. The Provider states that the Complainants signed the **MFA** on **19 November 2010** and opted to apply a 2-year fixed interest rate of 3.75% to their mortgage loan account.

The Provider contends that on reviewing its records, it *“can find no evidence of a meeting between the Complainants and a representative of the Provider in which the Complainants were advised that they would be offered the option of a tracker interest rate.”* The Provider states that the advice that a *“TRACKER could be activated at the end of the fixed term”* would represent correct and accurate advice in **November 2006**, however it refutes that the advice could constitute a contractual agreement between the Provider and the Complainant.

The Provider maintains that it has not altered the terms of the contract *“other than through expressly stated amendments agreed in writing in the form of MFAs”*.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate upon the expiry of the fixed interest rate period in or around **December 2010**.

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 25 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.

At the outset, I note that the Complainants submit that other customers of the Provider who were *“denied a tracker mortgage subsequent to the signing of contract would be compensated”* as announced by the Provider in **2016**.

I do not intend to take this submission into consideration on the basis that the terms and conditions offered by the Provider to its other customers, are not relevant to the determination of this particular complaint. Each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that other customers of the Provider may have been compensated subsequent to **2016** has no bearing on the Complainants’ entitlement to any compensation or entitlement to a tracker interest rate.

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 details of certain interactions between the Provider and the Complainants between **2006** and **2010**.

The Provider has furnished a copy of screenshots from its internal system which records the **mortgage loan application notes** as follows:

“Cust would like to apply for Low Start option on 3yr fixed”

I have reviewed the mortgage loan application notes in full and it is clear from the notes that no formal commitment was given by the Provider to the Complainants at the time of application, that a tracker interest rate would be applied following the expiry of the fixed interest rate period.

On foot of the Complainants’ application for a mortgage loan with the Provider, the Provider issued a **Mortgage Loan Offer Letter** dated **17 October 2006** to the Complainants, which details as follows:

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**“PART 1 – THE STATUTORY LOAN DETAILS
IMPORTANT INFORMATION AS AT 17 October 2006**

1. Amount of Credit advanced:	€224,000.00
2. Period of Agreement:	35 Years
3. Number of Repayment Instalments	4. Amount of each Instalment
<u>Instalments</u>	<u>Instalment Type</u>
36	Fixed at 4.250%
384	Variable at 4.640%

...

PART 2 - THE ADDITIONAL LOAN DETAILS

11. Type of Loan:	Repayment
12. Interest Rate:	4.250% Fixed”

It also provides:

“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** to the **Mortgage Loan Offer Letter** 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. [emphasis added]**
- 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.*

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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).*

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."*

The **Consumer Credit Act Notices** section of the **Mortgage Loan Offer Letter** detail 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 **Acceptance and Consents** section of the **Mortgage Loan Offer Letter** was signed by the Complainants on **27 October 2006**, which states as follows:

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

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It is clear from the above that the **Mortgage Loan Offer Letter** envisaged a fixed interest rate of 4.25% for the first three years of the term of the loan with a variable interest rate to apply thereafter, or a further fixed interest rate at the Provider's discretion. The **Mortgage Loan Offer Letter** clearly sets out the nature of the variable rate to be one which may be increased or decreased by the Provider at any time. In addition, the **Mortgage Loan Offer Letter** does not contain any reference to tracker variable interest rate that varies in accordance with the ECB main refinancing rate.

The Complainants signed and accepted the **Mortgage Loan Offer Letter** on **27 October 2006**, 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 in full on **04 December 2007** on a fixed interest rate of 4.250%.

The Complainants appear to submit that they understood, prior to signing the **Mortgage Loan Offer Letter**, that they would be offered a tracker rate of interest on the expiry of the fixed rate period in **2010**. I have not been provided with any evidence from either party in relation to any discussions that may have taken place regarding tracker interest rate options being applied at the end of the fixed interest rate period.

Based on the terms and conditions of the mortgage loan documentation, there is no evidence to support the Complainants' contention that they could have reasonably expected that a tracker interest rate would be offered to them on the expiry of the fixed rate period. In order for the Complainants to have a contractual entitlement to a tracker interest rate, it would have to be provided for specifically in the **Mortgage Loan Offer Letter**.

Prior to the expiry of the initial fixed interest rate period, the Provider issued a **Mortgage Form of Authorisation** ("MFA") to the Complainants, dated **4 November 2010**, which set out the following available interest rate options:

<i>"Description</i>	<i>Rate</i>
<i>Existing Variable LTV Rate PDH</i>	<i>3.450%</i>
<i>2 Year Fixed (PDH)</i>	<i>3.750%</i>
<i>3 Year Fixed (PDH)</i>	<i>4.200%</i>
<i>5 Year Fixed (PDH)</i>	<i>5.000%</i>

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The **Acknowledgement and Agreement** section on the reverse side of the **MFA** details as follows:

“PLEASE READ CAREFULLY BEFORE YOU SIGN THIS FORM.

By signing and returning his from properly completed you acknowledge and agree that:-

1. The terms and conditions of your Mortgage Loan Offer Letter are amended and varied by this form.

...

4. If the selected rate is a fixed rate:-

4.1. the selected rate shall apply for the period stated for it in Section B;

4.2. you acknowledge and agree that we may suffer a loss and you may have to pay us the compensation described in Section D under the heading “Early Repayment or Ending a Fixed Rate Early” if you repay the Loan or part of it early, change the selected rate before the end of the fixed rate period or if the Loan becomes repayable by you following your default;

4.3. at the end of the fixed rate period, we shall have sole discretion whether to provide you with any future fixed rate or not. If we do not provide you with a further fixed rate or if we offer you a choice of interest rates at the end of the fixed rate period and you do not exercise that choice, then we will charge interest at a variable rate of interest selected by us;

4.4. the General Conditions in your Mortgage Loan Offer Letter concerning fixed rates of interest will continue to operate.”

The Complainants accepted and signed this **MFA** on **19 November 2010** and selected a further two-year fixed interest rate of 3.75% to be applied to the mortgage loan. I note from the **mortgage loan account statements** that a fixed interest rate of 3.7% was applied to the mortgage loan account on **06 December 2010**. I note that the mortgage loan account was redeemed on **14 October 2019** following the sale of the mortgaged property the subject of the mortgage loan.

Having considered the Complainants’ mortgage loan documentation and the evidence submitted to this office, it is clear to me that the Complainants did not have a contractual or any other entitlement to a tracker interest rate on their mortgage loan account at the end of the fixed interest rate period in **December 2010**.

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In accordance with the terms and condition of the **Mortgage Loan Offer Letter**, the Complainants were entitled to be offered a variable interest rate or a further fixed interest rate, if available.

The section that I have emphasised above in **General Condition 6**, when taken together with the warning in the **Consumer Credit Act Notices** section of the **Mortgage Loan Offer Letter**, outlines a variable rate to be one which may be adjusted by the Provider at any time. Consequently, there was no real basis for the Complainants to reasonably expect the term "*variable rate*" to relate to a tracker interest rate, given that there is no reference whatsoever to a tracker rate or the ECB refinancing rate in the Complainants' mortgage loan documentation.

In any event, I have not been provided with any evidence to suggest that the Complainants requested that the Provider apply a tracker interest rate to their mortgage loan at any point in time either before or after they drew down the mortgage. It should be noted that the Provider was not under any obligation, contractual or otherwise, to offer the Complainants a tracker interest rate to on their mortgage loan account at any stage during the term of the loan. Where the Provider offered tracker interest rates to new or existing customers, it did so in line with its own commercial discretion at that time.

On the expiry of the Complainants' fixed interest rate period in **December 2010**, the Provider had already withdrawn its tracker interest rate offering to customers, other than for those customers who had already acquired a contractual entitlement to a tracker interest rate.

The Complainants did not have any entitlement, contractual or otherwise, to a tracker interest rate on their mortgage loan account or indeed on the expiry of the fixed interest rate period in **December 2010**. The Provider offered the Complainants the option of a fixed interest rate or a LTV variable rate in line with **General Condition 7** of the **Mortgage Loan Offer Letter**. Therefore, the evidence does not support that Complainants' assertion that the Provider "*altered*" the terms of the mortgage loan agreement arbitrarily. Rather, it is clear to me that the Provider adhered to the terms and conditions of the mortgage loan agreement.

If the Complainants were not satisfied with the terms on which their mortgage loan was offered, the Complainants were free to either accept or reject the offer of a mortgage loan from the Provider. However, the Complainants, of their own volition, accepted the loan offer on the terms stipulated in the **Mortgage Loan Offer Letter** and are therefore bound by such terms.

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If the Complainants had wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, they could have done so at any time prior to the Provider's withdrawal of such rates from its mortgage product offering in **late 2008**. It would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan.

For the reasons set out 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**

10 January 2022

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.