



<u>Decision Ref:</u>	2022-0025
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage 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 which is the subject of this complaint is secured on the Complainants' private dwelling house.

The Complainants have two mortgage loan accounts with the Provider, as follows:

- **Mortgage loan account ending 8852**
The loan amount for mortgage loan account ending **8852** was €40,000 and the term of the loan was 240 months. The Letter of Approval dated **31 October 1997** detailed that the loan type was an Equity Release Variable Rate Secured Personal Loan. The Complainants drew down this mortgage on **14 January 1998**.
- **Mortgage loan account ending 3425**
The loan amount for mortgage loan account ending **3425** was €104,000 and the term of the loan was 14 years. The Letter of Approval dated **3 April 2006** detailed that the loan type was an "Equity Release Variable Rate Secured Personal Loan". The Complainants drew down this mortgage on **10 May 2006**.

The Complainants' Case

The Complainants submit that they had an existing mortgage loan account ending **8852** with the Provider. They state that in **2006** they were given an "additional loan" (mortgage loan account ending **3425**).

The Complainants detail that in **March 2006**, "when we negotiated a house equity release offer with [Provider employee] of [Provider branch], a potential breaking point for us was that [the Provider] wanted to treat the ... mortgage as a separate account, which was not in our best interests. [The Provider employee] correctly assured us that once we had drawn down the loan our request would be met, i.e. that the add on mortgage would be incorporated into the original loan. This was our right under consumer protection law. We have consistently and correctly argued that the ... mortgage is inextricably linked to our original mortgage [ending] 8852."

The Complainants state that they were "assured by the [Provider's] mortgage advisor that the additional loan would always have the same conditions, in terms of interest rate, as those that attached to the original loan." They submit that the Provider "applied shared conditions and the same interest rate" to the mortgage loan account ending **3425** that applied to account ending **8852**. They assert that from inception, there was "a de facto inextricable link between each loan element, subject to the same treatment, with the same conditions."

The Complainants further submit that a tracker rate option is included in the Provider's mortgage brochure from **2006** provided in evidence. They state that "if The Bank's intention was to exclude a tracker rate loan, it should have stated this exclusion and highlighted it, if it so wished and it certainly should not have included the option of a tracker rate."

The Complainants submit that the "Bank documentation defined element ending 3425 as a "Home Repayment Loan", in writing in 2006 and offered a tracker rate to equity loans in writing in 2006." They further state that the Letter of Approval for the mortgage account loan ending **3425** "did not contain an exclusion to entitlement to a tracker loan". The Complainants further state that the **European Standardised Information Sheet** described the loan as a "repayment home loan" and the Provider "never had grounds to refuse the application of a tracker rate" on their mortgage loan account ending **3425**. They submit that "the ESIS reinforced assurances we had sought at the outset that loan element 3425 was and remains a home loan mortgage. If it is, otherwise, false information issued by the bank caused us to enter a contract which was disastrously to our disadvantage and constitutes a breach of our consumer rights."

The Complainants further submit in relation to the drawdown of the mortgage loan account ending **3425** that *“Several calls and representations by us concerning The Bank’s commitment to follow up the delayed release of funds are referred to only once. Our instructions and insistence to credit our account for referral fees charged to us and occasioned by The Bank’s failure to issue the cheque in a timely manner, as agreed, translate to, “i have re-credited the fees interest on the o.d.” This statement is worse than disingenuous, it is tantamount to deceit as The Bank reneged on this commitment: an amount of €48.88 was credited to our account on 9th May 2006 but sums totalling €77.71 were re-levied on our account on 26th June 2006.”*

The Complainants submit that in **2008** *“As per entitlement under Consumer Protection legislation, we instructed the Bank to apply tracker rates to each inextricably linked element of our home loan accounts, [ending] 8852 and [ending] 3425. It is incorrect to describe these instructions as requests. In not retaining copies of our instructions the Bank is in breach of its obligations to us under the 2006 Consumer Protection Code and the Consumer Credit Act 1995. Lest there be any doubt, under Consumer Protection Law, we were always entitled to instruct the Bank to apply tracker rates to each element of our mortgage and the Bank was obligated to apply those rates.”*

The Complainants state however that *“the bank applied the tracker rate to the original loan only and when queried the bank undertook to apply the tracker rate to the additional loan at the end of the 2008 financial year.”*

The Complainants detail that in **2009** they again instructed the Provider to apply the tracker rate to the additional loan account ending **3425** as the Provider had previously *“undertaken”* to do. They state that the Provider *“refused point blank and informed [them] that there was no point in pursuing this matter.”* The Complainants state that the *“pressures of trying to hold down work while dealing with chronic illness prevented [them] from pursuing the matter with [the Provider] in 2009.”*

The Complainants maintain that *“Consumer Rights Protection Legislation was and continues to be denied to [them].”* They assert that *“the fact the bank did not at any time apply a tracker interest rate to equity release lending products is no justification for the denial of consumer rights”*. The Complainants state that they *“refute the Bank’s contention that it would have been explained to [them] in 2007/2008 that a tracker rate could not have been applied”* to their mortgage loan account ending **3425**.

The Complainants state that the First Complainant had a telephone call with the Provider on **5 November 2013**. They submit that *“The Bank transcriber manipulated its contents by omitting crucial tracts which vindicate the claim that [the Complainants’] rights under the Consumer Code 2006 were infringed.”*

They state that the First Complainant mentions the word “grievance” seven times and “It is striking that Agent, [employee of the Provider] fails to mention “grievance,” at all.” The Complainants submit that the **Consumer Protection Code 2006** states that “When a regulated entity receives a verbal complaint, it must offer the consumer the opportunity to have the complaint treated as a written complaint.” They state that at several points during the conversation the Provider’s employee “fails to provide an opportunity to have the complaint treated as a written complaint.” They further submit that the First Complainant asked the Provider’s employee what was “the best way of lodging this grievance” and “Instead of offering the complainant an opportunity to have the complaint treated as a verbal complaint, which he should have done, the agent answers, “You write...””. The Complainants state that “It is beyond disingenuous for the Bank to state that [the First Complainant] did not request to log the formal complaint in writing.”

The Complainants submit that on **13 November 2013**, they again “attempted to lodge a complaint with [a Provider employee] over the phone but [the Provider employee] “declined to log” their complaint over the phone, “insisting” that the Complainants had to write to the Provider. They further state that “Irrespective that [the First Complainant’s] focus was, for the most part, on amounts needed to clear the mortgage, the agent should have afforded him the opportunity to register the complaint.” They further state “This phone call must be taken in conjunction with the call made on 5th November 2013, it cannot be taken in isolation.”

The Complainants detail that “Due to illness and other circumstances, we were unable to re-engage with the Bank on the issue of our grievance until May 2014; by then due to the cost of illness the opportunity to clear the mortgage was gone.” The Complainants submit that on **13 May 2014** they again “attempted” to log their complaint by telephone with an employee of the Provider who again “refused to take [their] complaint” and advised the First Complainant “to get on to [the] customers relationship department.”

The Complainants further detail that the First Complainant was ill at the time and had “given up on trying to log a complaint over the telephone”.

The Complainants state that they received correspondence from the Provider in **March 2015** “which again turned down [their] instruction to apply a tracker rate on the additional loan retrospective to 2008/2009”.

The Complainants submit that the Provider has “infringed [their] rights under the Consumer Protection Code 2006 and under Directives of the European Parliament and Council”.

The Complainants are seeking the following:

- i. For the Provider to *“Immediately apply a tracker rate”* to their mortgage loan account ending **3425**; and
- ii. For the Provider to *“reimburse [them] with the difference between the variable interest rate charged and the tracker rate”*.

The Provider’s Case

The Provider states that the Complainants’ original mortgage loan account ending **8852** was drawn down in **January 1998** pursuant to the terms of a Letter of Approval dated **31 October 2007**. It details that the loan type was Variable Rate Annuity Home Loan, the loan amount was €40,000 and the term of the loan was 20 years.

The Provider outlines that from **2002**, it provided equity release loans to existing home mortgage customers using the available equity in their home as security. It explains that an equity release loan is an amount a customer can borrow which is based on the equity or value in their home. It details that in **2006** a customer could borrow a minimum amount up to a certain percentage of the then current market value of the property, less any amount they already owed on the property.

The Provider states that a repayment home loan is a loan the proceeds of which are applied for the acquisition of a home, and the collateral for which is a mortgage of the home, while an equity release loan is a loan the proceeds of which are used for any purpose save for a commercial or business purpose, and the collateral for which is equity in a property which is the subject of an existing mortgage.

The Provider details that the interest rates available in respect of equity release personal loans were variable and fixed rates and were similar to the Provider’s variable and fixed mortgage rates which were typically lower than other personal loan rates. The Provider details that when it introduced tracker rates for new business customers in **early 2004**, *“a commercial decision was made not to offer tracker rates to customers availing of Equity Release loans.”* It states that it has never offered tracker rates on equity release loans and that this was a commercial decision by the Provider and that the Provider reserves the right to introduce or withdraw a particular product or interest rate.

The Provider details that in **March 2006** the balance on the Complainants' existing mortgage loan account ending **8852** was €35,460.15 and the remaining term of the loan was 12 years. The Provider states that the value of the mortgaged property at that time was €450,000.

The Provider submits that on **16 March 2006**, the Complainants applied for an equity release additional loan for items of personal expenditure, including home improvements. The Provider states that it has no record of what was discussed with the Complainants in **2006** regarding the terms and conditions of the loan.

It details that on **3 April 2006**, it issued a Letter of Approval to the Complainants which provided for an Equity Release Variable Rate Secured Personal Loan. It details that the loan amount was €104,000, the term was 14 years, and the applicable interest rate was a variable interest rate of 3.85%. The Provider relies on **General Mortgage Loan Condition 7** which provided that the rate would vary from time to time at the Provider's discretion. The Provider details that the Complainants signed and accepted the Letter of Approval for mortgage loan account ending **3425** on **6 April 2006**.

The Provider states that the Letter of Approval for mortgage loan account ending **3425** did not contain an entitlement to a tracker mortgage at any time during the term of the loan. The Provider further states it *"did not contain any provision the effect of which was that the same terms and conditions would apply in respect of the additional loan as those which applied to the home loan provided to the Complainants in 1998."* It states that they were *"different loans, acquired for different purposes, with different terms and conditions"*. The Provider states that both loans had the same variable rate of interest of 3.85% in **April 2006**, but this *"did not amount to an assurance that the additional loan would always have the same conditions in terms of interest rate as those that attached to the original loan."*

The Provider submits that on **5 May 2006** it honoured a withdrawal in the form of a cheque in the amount of €28,000 from the Complainants' current account ending **8859** which resulted in their current account entering into an overdrawn balance of €28,867.30. It states that on **9 May 2006** a refund of charges was applied to the Complainants' current account in the amount of €48.88 and on **10 May 2006** the loan cheque comprising a partial drawdown of the Complainants' equity release loan in the amount of €54,000 was deposited to their account. The Provider states that the amount of €77.71 which the Complainants are referring to was applied to their account on **10 July 2006** under the description of *"Jun Quarterly Interest"*. The Provider states that due to the passage of time it is unable to confirm the computation of €48.88. It submits in this regard that it is willing to offer a goodwill gesture of €100.00.

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The Provider submits that it has no record of any contact from the Complainants in or around **March 2008** when they submit they requested a tracker interest rate for mortgage loan account ending **3425**. It details that on **27 March 2008**, the rate of interest on mortgage loan account ending **8852** was switched from a variable rate to a tracker rate of 4.95% (ECB + 0.95%).

The Provider states that *“As tracker interest rates have never at any time been applied by the Bank to equity release loans, any request by the Complainants to have a tracker rate of interest applied to account ending -3425 could not have been granted and this would have been explained by the Bank to the Complainants in response to any request to have the rate of interest on account -3425 changed to a tracker rate.”*

The Provider states that the Complainants *“did not have a contractual right to be offered a tracker rate of interest on either of their loan accounts in March 2008 or at any time.”* The Provider details that the Complainants’ mortgage loan account ending **8852** was switched from a variable rate to a tracker rate at the Complainants’ request in **2008** based on *“a policy of the Bank, during a period in 2004-2008, to accede to such switching requests in respect of certain loan types which were offered by the Bank with tracker rates from [early] 2004.”* The Provider states that the mortgage loan account ending **3425** was *“not one such loan type.”* It states that *“For the avoidance of doubt, the Complainants did not have any entitlement to require the Bank to switch account ending 8852 to a tracker rate.”*

The Provider states that it has *“no record of any complaint or attempted complaint from the Complainants by telephone in 2008 and 2009.”* In response to the Complainants’ submission that the Provider *“manipulated”* the call recordings of **November 2013** and **May 2014**, the Provider *“denies this emphatically”*. It submits that *“It is clear from listening to the recordings, however, that they are complete and that no elements have been erased.”*

The Provider further states that it *“rejects that its agents failed to deal correctly with [the First Complainant] in relation to his complaint.”* It submits that its agents were *“not unwilling to accept [the First Complainant’s] complaint by telephone, as claimed, but [the First Complainant] appeared to require details of how to make a complaint in writing with which the agents assisted him.”*

The Provider *“denies that it has breached the Complainants’ statutory rights as alleged at all.”* It does not accept the Complainants’ submission that it has breached **section 47** of the **Consumer Protection Code 2006**. It further states that it is satisfied that no breach has occurred under **Article 8, 9(d)** and Annex 1 to **Directive 2005/29/EC of the European Parliament and of the Council** of 11 May 2005.

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The Complaints for Adjudication

The complaints for adjudication are as follows:

- a) That the Provider failed to apply a tracker interest rate to the Complainants' mortgage loan account ending **3425** in **2009**; and
- b) That the Provider failed to accept the Complainants' verbal complaints in **2008**, **2009** and on **13 November 2013**, and **13 May 2014**.

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 do 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 are sufficient to enable a Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **14 September 2021**, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the parties made further submissions, copies of which were exchanged between the parties.

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I note that the parties have repeated previous submissions made to this office in relation to the merits of the complaint as outlined in my Preliminary Decision however, having carefully considered these additional submissions and all of the submissions and evidence furnished by both parties to this Office, I set out my final determination below.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation in relation to both mortgage loan accounts ending **8852** and **3425**. It is also necessary to consider the interactions between the Complainants and the Provider between **2006** and **2009**.

Mortgage loan account ending 8852

A **Letter of Approval** dated **31 October 1997** was issued to the Complainants for mortgage loan account ending **8852**. The Schedule on page 2 of the **Letter of Approval** details as follows:

<i>"Amount of Loan:</i>	<i>IR£ 40,000</i>
<i>Type of Loan:</i>	<i>Variable Rate Annuity Loan</i>
...	
<i>Term of Loan:</i>	<i>240 months</i>
...	
<i>Interest rate applicable at date of offer:</i>	<i>7.400% p.a."</i>

The **Statutory Warnings** section on page 2 of the **Letter of Approval** details as follows:

"WARNING: "THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE BANK FROM TIME TO TIME."

Section 7.1 of the **General Conditions** on page 3 of the **Letter of Approval** details as follows:

"7.1 Variable Rate Annuity Loan: If the Loan is a variable rate annuity loan the rate of interest applicable to the Loan will be our variable annuity loan rate applicable to a facility of this nature as varied from time to time at our absolute discretion, and you will repay the Loan with interest thereon at such rate by periodic instalments at the intervals specified in the schedule (or, if no such interval is specified, monthly) in amounts which, over the Term of the Loan, will be sufficient to discharge in full the Loan together with such interest. You will commence payment of such instalments at the end of the first such period."

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The Complainants signed and accepted the **Letter of Approval** for mortgage loan account ending **8852** on **1 December 1997**. The Acceptance of Loan Offer states as follows:

- “1 I/We have been advised by my/our solicitor in relation to this Letter of Offer.
- 2 I/We hereby irrevocably authorise and direct my/our solicitor to give the undertaking referred to in paragraph 4 of the General Conditions and to do all things necessary to comply with the undertaking.
- 3 I/We hereby irrevocably authorise you to pay the loan cheque through my/our solicitor.
- 4 I/We enclose a cheque for the arrangement fee specified in the Schedule, if applicable.”

It is clear that the **Letter of Approval** envisaged a variable interest rate to be applied to the loan. The variable rate in this case was a variable rate which could be adjusted by the Provider.

Mortgage loan account ending 3425

It appears from the evidence that in **March 2006**, the Complainants sought a further advance of funds from the Provider for the purposes of personal expenditure including home improvements.

I have not been furnished with any documentary evidence of any discussions which may have taken place between the Provider and the Complainants during the application stage in relation to interest rate options. Notwithstanding this, it is important for the Complainants to be aware that the Provider was under no obligation to offer them any mortgage or any particular type of mortgage in **2006**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowings at the time and secondly, how that offer would be structured.

The Provider has furnished in evidence a copy of its **booklet** relating to its various mortgage loan products which is time-stamped **2 November 2006**.

Page 7 of the booklet details as follows;

“...

Release equity – to extend or spend

With the increase in house prices over the past few years, your home may now be worth much more than you paid for it. [Provider product] is a revolutionary way to borrow money against this increased equity (or value) of your home.

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[Provider product] - the mortgage account with a chequebook

Once you have set up your [Provider product] mortgage account, you can use a [Provider product] chequebook to withdraw at least €3,000 at any one time. You are free to spend this money on anything you like, except business-related purposes. What's more, you can withdraw funds straightaway or on different occasions in the future, without the need to reapply/ For more information, speak to one of our mortgage advisors or pick up a copy of our [Provider product] booklet."

Page 11 of the booklet details as follows:

"Interest-rate options

We provide a choice of interest rates. This is the interest that you pay on the amount you borrow from us.

Fixed interest rate

...

At the end of the fixed term, you can choose another fixed-rate term or switch to our variable rate...

Variable interest rate

A variable interest rate means that the rate can go down or up. This usually happens as a result of interest changes by the European Central Bank (ECB) ...

Tracker mortgage

A tracker mortgage is a variable rate mortgage that tracks the European Central Bank (ECB) rate. We guarantee that your mortgage rate will never be more than a set amount above the ECB rate ...

Split interest rate

..."

It is not clear whether the Complainants were furnished with a copy of this booklet at the time of the loan application in **2006**. In any event, it is not clear from the booklet which of the above interest rates were open to customers hoping to avail of the equity release mortgage loan product.

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The Provider's internal diary entry dated **16 March 2006** details:

"EQUITY RELEASE – AMOUNT TO BE DECIDED – MAY CLEAR EXISTING MORTGAGE – PURCHASING MOBILE HOME ..."

The Provider's internal diary entry dated **27 March 2006** states:

"EXISTING MORTGAGE CUSTOMERS WITH CURRENT ACCOUNT BANKING WITH [THE PROVIDER] ... MOST MONTHS CURRENT ACCOUNT IS IN CREDIT SHOWING ABILITY TO REPAY. GOOD RECORD ON MORTGAGE. LTV WILL BE APROX [SIC] 30% - 35% DEPENDING ON VALUE – AND NETS ARE 28%. CLIENTS LOOKING TO DRAW 50K NOW AND BALANCE IN HOLDING ACCOUNT FOR FURTHER HOME IMPROVEMENTS"

The Provider's diary entry of **3 April 2006** states *"Application fully approved"*.

The **Letter of Approval** for mortgage loan account ending **3425** dated **3 April 2006** details as follows:

<i>"Loan Type:</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
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<i>Purchase Price / Estimated Value:</i>	<i>EUR 450,000.00</i>
<i>Loan Amount:</i>	<i>EUR 104,000.00</i>
<i>Interest Rate:</i>	<i>3.88%</i>
<i>Term:</i>	<i>14 year(s)</i>
<i>..."</i>	

The **Special Conditions** attaching to the Letter of Approval dated **3 April 2006** detail as follows:

"Special Conditions

...

C. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGE LOAN APPROVAL CONDITIONS.

...

E. THIS ADDITIONAL LOAN WILL BE SECURED BY WAY OF AN EXTENSION OF THE BANK'S EXISTING LEGAL MORTGAGE OVER THE SECURITY REFERRED TO IN THE LETTER OF APPROVAL AND NO SEPARATE MORTGAGE DEED IS REQUIRED TO BE EXECUTED IN RESPECT OF THIS ADDITIONAL LOAN.

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...”

General Condition 5 of the **General Mortgage Loan Approval Conditions** details as follows:

“CONDITIONS RELATING TO FIXED RATE LOANS

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

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

5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period, the applicant shall, in addition to all other sums payable, as a condition of and at the time of such repayment, pay whichever is the lesser of the following two sums:

- (a) a sum equal to one half of the amount of interest (calculated on a reducing basis) which would have been payable on the principal sum desired to be repaid, for the remainder of the Fixed Rate Period, or*
- (b) a sum equal to [the Provider’s] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing basis) which the applicant would have paid on the principal sum being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid, if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate Period of the loan, or part thereof being repaid.*

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

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the **Conditions relating to “[Name of Product]” Equity Release Loans** and details the following regarding the calculation of interest;

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“...

11.4 For the purposes of the calculation of interest, the daily balance of the [Name of Product] Equity Release Loan shall be reduced by the then credit balance (if any) in the Holding Account. The credit balance in the Holding Account shall be reduced by the amount of withdrawals on the date of the withdrawal irrespective of when the withdrawal cheque is cashed. No interest will be payable to the Applicant on the balance held in the Holding Account.

...”

However, there was no specific condition in the **Conditions relating to “[Name of Product]” Equity Release Loans** in relation to the interest rate applicable to the loan.

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

*IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:
“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.”*

The **European Standardised Information Sheet (ESIS)** which accompanied the Complainants’ Letter of Approval dated **3 April 2006** detailed as follows:

“...

This document does not constitute a legally binding offer.

The figures are provided in good faith and are an accurate representation of the offer that the lender would make under current market conditions based on the information that has been provided. It should be noted, however, that the figures could fluctuate with market conditions.

...

Description of Product

...

This is a repayment home loan where the capital is repaid over the term of the loan.

Nominal Rate

The interest rate is 3.85%.

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The interest rate may vary from time to time. Notice will be given in respect of rate increases. No notice will be given for decreases in rate.

The option to apply for a fixed rate period (if available) may be exercised by you at any time otherwise the rate will remain a variable rate. An administration fee of EUR100 is payable when switching from a variable to a fixed rate product. The option to apply for a fixed rate product does not apply in respect of [Provider product] loans.

...

PLEASE NOTE THAT THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.

..."

The **Acceptance of Offer of an Additional Loan** attaching to the **Letter of Approval** dated **3 April 2006** was signed by the Complainants on **6 April 2006** on the following terms:

"1. I/We the undersigned accept the above offer of an additional loan on the terms and conditions set out in:

- (i) the above Letter of Approval;*
- (ii) the General Mortgage Loan Approval Conditions sent to me/us with the above Letter of Approval, a copy of which I/we have received; and*
- (iii) where my/our existing loan is secured by an [the Provider] form of Mortgage (as opposed to a [alternate Provider] form of Mortgage), the mortgage conditions applicable to that mortgage as amended by the General Mortgage Loan Approval Conditions referred to in (ii) above.*

2. I/We agree that the existing mortgage over the property will secure this additional loan.

3. I/We hereby state no third party (whether a person or persons or body or bodies) has or claims any financial, equitable or beneficial estate or interest in the Property.

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4. I/We hereby declare that all the statements and particulars and any other information which we have given to [the Provider] in respect of my/our application for the additional loan to be strictly true, to the best of my/our knowledge, information and belief.

5. I/We confirm that I/We have obtained or been given an opportunity to obtain independent legal advice prior to accepting this offer of additional loan.

6. We further acknowledge that where we have been approved an Equity Release Loan in our joint names and all part of the loan will be transferred to a Holding Account, withdrawals may be made by us from the Holding Account on any one signature in accordance with Condition 11.10 of the General Mortgage Loan Approval Conditions*”.

It is clear to me from the Letter of Approval dated **3 April 2006** that the loan envisioned was an equity release mortgage loan on a fixed interest rate, with a variable rate to apply on the expiry of the fixed rate period.

The variable rate to be applied on the expiry of the fixed rate period in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider.

There is no evidence before me which supports the Complainants’ submission that in **March 2006** the Provider “assured us that once we had drawn down the loan our request would be met, i.e. that the add on mortgage would be incorporated into the original loan.” In addition, I do not accept the Complainants’ vague assertion that this was their “right under consumer protection law.” The Complainants, in their post Preliminary Decision submissions dated **05 October 2021**, refers to **Chapter 2, provision 30** of the **Consumer Protection Code 2006** which relates to suitability. **Provision 30** of the **Consumer Protection Code 2006** provides as follows:

“A regulated entity must ensure that, having regard to the facts disclosed by the consumer and other relevant facts about that consumer of which the regulated entity is aware:

- a) any product or service offered to a consumer is suitable to that consumer;*
- b) where it offers a selection of product options to the consumer, the product options contained in the selection represent the most suitable from the range available to the regulated entity; or*

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c) where it recommends a product to a consumer, the recommended product is the most suitable product for that consumer”

It is important to note that this provision of the **Consumer Protection Code** was not effective until **01 July 2007**, therefore it was not applicable when the Complainants applied for additional borrowings in **March /April 2006**. That said, I am satisfied that upon a review of the Complainants’ application for additional borrowings, the Provider offered the Complainants an *“Equity Release Variable Rate Secured Personal Loan”* which it considered to be suitable for the Complainants given their individual circumstances.

If the Complainants did not want to pursue the option of an equity release variable rate loan because they were unhappy with the applicable interest rate, they could have decided not to accept the Provider’s offer of the equity release product. Instead, the Complainants accepted the Provider’s offer by signing the **Acceptance of Offer of an additional loan on 6 April 2006**.

The Complainants, in their post Preliminary Decision submissions dated **05 October 2021**, appear to submit that the Provider was in breach of consumer protection legislation because it did not offer the Complainants a tracker interest rate in respect of mortgage loan account ending **3425**. It is important to recognise that consumer protection legislation does not bestow a right to a particular interest rate or indeed the lowest interest rate on a consumer. It is important for the Complainants to note that in **April 2006** they were seeking additional lending from the Provider, secured against the equity in the Complainants’ property the subject of mortgage loan account ending **8852**. There was no obligation on the Provider to offer the Complainants the amount that they sought to borrow or to structure the lending arrangement as an addition or *“add on”* to their existing home loan under mortgage loan account ending **8852**.

It is clear from the loan documentation that the type of loan that the Complainants were offered by the Provider in **April 2006** was an equity release loan and this loan, which was drawn down under mortgage loan account ending **3425**, was an entirely separate loan to the Complainants’ original mortgage loan account ending **8852**. Therefore, I am of the view that whether or not a tracker interest rate applied to mortgage loan account ending **8852** was irrelevant to the interest rate applicable to mortgage loan account ending **3425**. In any event, the evidence shows that in **2006** the Complainants’ mortgage loan account ending **8852** in **2006** was not operating on a tracker interest rate. The variable interest rate applicable to mortgage loan account ending **3425** following the expiry of the initial fixed interest rate period was clearly outlined in the mortgage loan documentation to be a variable rate which could be adjusted by the Provider.

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The two mortgage loans held by the Complainants with the Provider were clearly two separate mortgage loans. Each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The evidence shows that the choice to take out both mortgage loans on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

The Complainants have further submitted that they are entitled to rely on the description of the mortgage loan product used in the **European Standardised Information Sheet** as a “*repayment home loan*”. Under the **European Voluntary Code of Conduct on Pre-Contractual Information for Home Loans**, the Provider must provide certain standard pre-contractual information to borrowers by means of a personalised European Standardised Information Sheet. The purpose of a European Standardised Information Sheet is to enable a borrower to make an informed decision on whether or not to accept a loan offer from the Provider, by comparing the credit available from the Provider to what is available in the market.

Having considered the content of this documentation, I note that it is specifically detailed on **page 1** of the European Standardised Information Sheet that the document is not a legally binding offer. I am of the view that the Complainants do not have a contractual entitlement to a tracker interest rate on the basis of the information contained in the European Standardised Information Sheet.

The Provider’s internal diary entry dated **3 May 2006** states:

“RING CLIENT AS SOON AS A CHEQUE ISSUE DATE RECEIVED AS HE IS HOPPING MAD THAT THINGS HAVE TAKEN SO LONG HE URGENTLY NOW REQUIRES THE FUNDS AND HE HAS WRITTEN A CHEQUE AGAINST THEM FOR THE PURCHASE OF A CARAVAN...”

The Provider’s internal diary entry dated **9 May 2006** states:

“...CLIENT IS UP IN ARMS AS HE HAS PURCHASED A CARAVAN AND HAS WRITTEN A CHEQUE TO PAY THE DEPOSIT ON SAME – NO FUNDS TO MEET CHEQUE AND HE IS PAYING OVERDRAFT AND REFERRAL FEES ... cheque to be lodged to his current account ... I have re-credited the fees and interest on the o.d.”

The equity release mortgage loan was subsequently drawn down by the Complainants on **09 May 2006**.

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I note that the Provider has offered the Complainants a goodwill gesture of €100.00 in relation to the refund of charges of €48.88 applied to the Complainants' current account in **May 2006**, on the basis that it is unable to confirm the computation of €48.88 due to the passage of time. This matter does not form part of the conduct that was complained of, to this office. Nonetheless it appears that this offer remains open to the Complainants to accept.

The Complainants submit that in **2008** *"As per entitlement under Consumer Protection legislation, we instructed the Bank to apply tracker rates to each inextricably linked element of our home loan accounts, [ending] 8852 and [ending] 3425"*.

I note that the Provider wrote to the Complainants on **27 March 2008** in relation to mortgage loan account ending **8852** as follows:

"I acknowledge receipt of your acceptance of [the Provider's] loan offer and confirm that the rate of interest applicable to your loan account has been switched from a variable rate to a tracker rate currently 4.950% (ECB + max 0.950%)."

Confirmation of your revised monthly payment calculated at the new rate of interest will be forwarded to you shortly.

I trust the above is to your satisfaction and should you have any query please contact [the Provider] at [phone number]"

The Provider has informed this Office that its rationale for offering a tracker interest rate of 4.95% (ECB + 0.95%) to the Complainants on mortgage loan account ending **8852** on **27 March 2008** was because at that time, the Provider *"at its discretion, was extending tracker interest rate options to home loan accounts such as account ending 8852. This was not offered as an option due to any contractual entitlement of the Complainants in the 1998 contract relating to account ending 8852. The Bank did not at any time offer a tracker rate option in respect of equity release personal loans."* Therefore, the Provider, as a matter of policy and using its commercial discretion, offered the Complainants a tracker interest rate of 4.95% (ECB + 0.95%) on mortgage loan account ending **8852** in **March 2008**. The Provider was under no contractual or other obligation to make this offer to the Complainants.

The Complainants, in their post Preliminary Decision submission dated **5 October 2021**, provided this Office with a letter from the Provider dated **31 January 2008** in respect of mortgage loan account ending **8852** which is a notification in relation to the change in the amount of tax relief deducted at source.

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The letter sets out the *“new scheduled mortgage payment”*. The Complainants have also submitted mortgage summary statements from **February** and **April 2008** in relation to mortgage loan accounts ending **8852** and **3425**. The Complainants outline that *“This is prima facie evidence of The First Complainants engagement with The Provider on the issues that are in dispute. Categorically, The Provider’s Official did not disallow the application for a tracker mortgage on a/c ending 3425 at that time”*. The Complainants, in their post Preliminary Decision submission dated **12 October 2021**, state that these *“contemporaneous records”* were prepared in advance of a meeting with the Provider and are evidence of *“both the agenda and request to apply tracker rates to both home loan mortgages”*. The additional documentation submitted by the Complainants to this Office do not support the Complainants’ assertion that a tracker interest should have been applied to mortgage loan account ending **3425** in **2008** or indeed that a request was made by the Complainants to apply a tracker interest rate to the equity release mortgage loan.

In any event, there was no contractual right or obligation on the Provider to apply a tracker interest rate to the mortgage loan account ending **3425** at that time. The Provider has submitted that at no point did it offer tracker interest rates on equity release products. In this regard, it is important for the Complainants to understand that the Provider operates as a business and is entitled to offer products and set interest rate options based on its own commercial discretion. The Provider was not under any obligation to offer the Complainants a tracker interest rate option on the equity release product option in **2008**, or indeed at any other time. There is no evidence before me which supports the Complainants’ submission that *“the bank undertook to apply the tracker rate to the additional loan at the end of the 2008 financial year.”*

I have considered the audio recordings and the accompanying transcripts of the telephone calls of **5 November 2013**, **13 November 2013** and **13 May 2014** furnished in evidence by the Provider.

I also have considered the transcripts of the audio recordings furnished in evidence by the Provider and I accept that the transcripts provide an accurate account of the conversations. Based on the evidence before me I cannot accept the Complainants’ submission that the Provider *“manipulated”* the content of the audio recordings by *“omitting crucial tracts”* of the telephone calls.

Provision 47 of Chapter 2 of the Consumer Protection Code 2006 states as follows:

“When a regulated entity receives a verbal complaint, it must offer the consumer the opportunity to have the complaint treated as a written complaint.”

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Having considered the audio recording dated **5 November 2013**, I note that the First Complainant queried with the Provider's agent how he should go about lodging a "grievance" with the Provider. The Provider's agent responded that the Complainants should write to the Provider's "mortgage services" section and provided an address to which the Complainants could send their complaint.

Having considered the audio recording dated **13 November 2013**, I note that the First Complainant stated that he had a "grievance" but that he did not intend to discuss it with the Provider's agent.

Having considered the audio recording dated **13 May 2014**, I note that the First Complainant stated that he wished to go through the process of making a formal complaint to the Provider and asked who he should address the complaint to "because they never responded". The Provider's agent stated that if the First Complainant wished to make a formal complaint he would need to "get on to" the "Customer Relations department". She further advised that the Customer Relations department "normally accept phone calls" and provided an address and telephone number for the Provider's Customer Relations Department.

The Complainants, in their post Preliminary Decision submissions dated **05 October 2021** and **12 October 2021**, refer to a second call that was made by the First Complainant to the Provider on **13 May 2014**. During this second call, the Complainants submit that the First Complainant sought to "register a verbal complaint" with the Provider however the Provider's agent "refused to take the complaint". The Complainants, in their post Preliminary Decision submissions dated **01 December 2021**, maintain that the Provider was in breach of **provision 10.8** of the **Consumer Protection Code 2012** which provides that when "a regulated entity receives an oral complaint, it must offer the consumer the opportunity to have this handled in accordance with the regulated entity's complaints process".

The Provider, in its post Preliminary Decision submission dated **16 November 2021**, explains that its records show that it received another incoming call from the Complainants' telephone number at **16.24** on **13 May 2014** however "the system failed to store the call in the automated back-up location". The Provider, in its post Preliminary Decision submission dated **16 December 2021**, apologises that the recording is no longer available and further explains that the telephone system failed to store the call in the automated back-up location to which it ought to have been saved but, instead, attempted to save it to another location, and in doing so, failed to save the recording.

The Complainants, in their post Preliminary Decision submissions, maintain that the calls *“were deleted by agents acting on behalf of the Provider”* and that this amounts to a *“manipulation”* and *“breach of rights”*.

While it is disappointing that the Provider cannot produce a copy of this audio recording, I acknowledge that Provider receives several hundred incoming calls each day and on occasion technology and systems can fail. I have no evidence to support the assertion that the Provider’s system failure to have been deliberate or underhand in nature, as suggested by the Complainants. During the first telephone call on **13 May 2014**, the Provider’s agent gave the First Complainant details of the Provider’s Customer Relations Department and the complaints procedure, therefore I have no reason to assume that the agents working in the Provider’s Customer Relations Department would refuse to follow the Provider’s standard complaint procedures. It is difficult to understand how it would have been of benefit to the Provider’s agent working in the Customer Relations Department to seek to refuse to register the First Complainant’s complaint.

I note that the Complainants ultimately made a complaint in writing to the Provider in or around **February 2015**.

Upon considering the post Preliminary Decision submissions from the parties, I accept that in its engagements with the Complainants, the Provider complied with its obligations under consumer protection legislation. The evidence shows that the appropriate information was given to allow the Complainants to submit a written complaint to the Provider if they so wished.

As outlined above, there was no contractual entitlement to a tracker interest rate on either of the mortgage loan accounts. The fact that the Provider offered the Complainants a tracker interest rate for the mortgage loan account ending **8852** in **March 2008**, did not create an obligation (contractual or otherwise) on the Provider to offer or provide a tracker rate to the Complainants on mortgage loan account ending **3425**.

It was a matter that was within the Provider’s commercial discretion as to whether to offer a tracker interest rate on mortgage loan ending **3425**. I accept that the Provider did not do so because the Provider had made the commercial decision not to offer a tracker interest rates on its equity release mortgage loan product. This was a decision that the Provider was entitled to make.

Furthermore, the evidence does not support the Complainants' position that the terms for both mortgage loans are the same. They very clearly are not. It is important for the Complainants to understand that each mortgage loan is governed by the terms and conditions applicable to that particular mortgage loan. The fact that both of the Complainants' mortgage loans were secured on the same property does not entitle the Complainants to the same interest rates or terms and conditions on both accounts. The Complainants' two mortgage loan accounts were drawn down at two different points in time (**1998** and **2006**), they commenced on different interest rates (fixed rate and variable rate) and were subject to different terms and conditions. The evidence shows that the choice to take out the mortgage loan account ending **3425** on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

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**

17 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,

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and

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

