



|   |   |
|---|---|
| <b><u>Decision Ref:</u></b>             | 2022-0111   |
| <b><u>Sector:</u></b>                   | Banking   |
| <b><u>Product / Service:</u></b>        | Tracker Mortgage  |
| <b><u>Conduct(s) complained of:</u></b> | Failure to offer a tracker rate throughout the life of the mortgage |
| <b><u>Outcome:</u></b>                  | 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 €291,640 and the term of the loan was 35 years. The particulars of the mortgage loan offer accepted by the Complainants on **15 August 2006** detailed that the interest rate was "*Fixed For 36 months*".

**The Complainants' Case**

The Complainants submit that they were advised by their broker that the mortgage loan was approved on the basis of a three-year fixed interest rate in the event that "*the ECB rate rose and [the Complainants were] unable to manage the repayments*". The Complainants state that they were not provided with a Statement of Suitability during the application process for their mortgage loan.

The Complainants explain that in **2006**, when they drew down on the mortgage loan account, the Provider was offering mortgage loans with initial fixed interest rates which were "*followed by a tracker*". The Complainants submit that their loan initiated on a fixed rate but they were only offered the Provider's standard variable rate upon expiry of the fixed interest rate period in **2009**.

The Complainants submit that the terms of the mortgage loan account state that on expiry of the fixed interest rate period, the interest rate would change to a variable rate, but it was *“unclear that this would not be a tracker rate”*. In this regard, the Complainants assert that the letter of offer is *“vague”*. The Complainants submit that the mortgage information booklet which accompanied the mortgage letter of offer defines a tracker rate as a type of variable rate. In this manner the Complainants submit that it is not clear that the term *“variable rate”* was not a tracker interest rate.

The Complainants detail that they chose to fix the interest rate on their mortgage loan in **2009** *“having been denied a tracker and considering the fixed rate at this time was .75% higher than the standard variable rate the account was being put on to at 3.24%”* and that *“At this time the ECB rate was 1%”*.

The Complainants further detail that the Provider issued a communication to brokers in **November 2006** advising that all fixed interest rate products would revert to tracker interest rates. The Complainants submit that they contacted the Provider in this regard and were advised that a number of mortgage loan accounts had been deemed impacted under the Central Bank of Ireland directed Tracker Mortgage Examination and were given redress and compensation. The Complainants submit that the impacted mortgage loan accounts were drawn down between **November 2006** and **February 2008**. The Complainants state that it is *“unfair”* that their mortgage loan account was not considered impacted in circumstances where the terms and conditions of their mortgage loan did not define a *“standard variable rate”*.

The Complainants are seeking the following:

- (a) That a tracker interest rate is applied to their mortgage loan account; and
- (b) A refund of the interest that has been overpaid on the mortgage loan account since the expiry of the fixed interest rate period in **2009**.

### **The Provider’s Case**

The Provider details that the Complainants’ mortgage loan was facilitated and issued through a broker, therefore *“it was not the [Provider’s] practice to engage directly with the applicant with the exception of where documentation was required to be issued directly to the borrower”*. The Provider states that it can confirm that all of its dealings were through the Complainants’ broker prior to the issue of the loan approval to the Complainants.

The Provider submits that the broker indicated that it had *“placed the business”* with the Provider as it was *“in a position to accommodate the requirement for the mortgage to be provided on the basis of two parties to the mortgage but with the title to the property held by one party only”*.

The Provider states that it issued a Letter of Offer dated **12 October 2006** offering a mortgage loan on a fixed interest rate. The Provider says this was in accordance with the mortgage loan application that it received from the Complainants’ broker seeking a mortgage loan commencing on a three-year fixed interest rate. The Provider details that it issued a copy of the Letter of Offer to the Complainants’ broker, their solicitor, and to the Complainants themselves. The Provider submits that the Complainants *“had the benefit of advices from both their Broker and Solicitor in relation to the letter of offer”* and it *“received no query in relation to the interest rate offered”*.

The Provider states that the Complainants were not offered a tracker interest rate on expiration of the fixed interest rate period in **2009** as *“there was no default or contractual entitlement established for the Bank to do so”*. The Provider asserts that **General Condition 7** of the Letter of Offer provided that on expiration of the fixed interest rate period, the Provider’s prevailing variable rate would apply.

The Provider details that it withdrew tracker interest rates in **mid-2008** therefore tracker interest rates were no longer available in **2009**.

The Provider states that on expiration of the fixed interest rate period on **01 October 2009**, a standard variable interest rate of 3.24% was applied to the mortgage loan account. The Provider submits however that the Complainants opted to apply a three-year fixed interest rate of 3.99% from **November 2009**, after which a standard variable rate was applied.

In response to the Complainants’ assertion that the description of a *“tracker rate”* in the Provider's rate brochure meant that the nature of the variable rate applicable at the end of the fixed interest period was *“unclear”*. The Provider details that the brochure included an explanation of the various interest rate types available, including both a variable rate and a tracker rate. The Provider states that the details of *“a Tracker Rate clearly explain that this type of variable rate has a defined relationship to the ECB rate and provides a guarantee to track the ECB rate”* and that *“No such guarantee or assurance was provided in the Complainants’ loan documentation where the default to a variable rate on expiry of the initial fixed rate is outlined”*.

In response to the Complainants' submission that it was "*unfair*" that their mortgage loan account was not found to be impacted, the Provider states that the Complainants "*cannot have been provided with any expectation that [their] August 2006 account would default to a tracker rate on expiry of the initial fixed rate period*" as the Provider did not offer such a product when the Complainants applied for their mortgage loan.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate upon expiry of the fixed interest rate period in **2009**.

### **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 4 March 2022, outlining the preliminary determination of this office 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, the final determination of this office is set out below.

/Cont'd...

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainants to the Provider through a third-party broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this Decision. The Complainants were informed of the parameters of the investigation by this office, by letter dated **7 December 2018**, which outlined as follows:

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

Therefore, the conduct of the third-party broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainants’ mortgage loan. It is also necessary to consider the details of certain interactions between the Complainants and the Provider in **2009** on the expiration of the fixed interest rate period.

The Complainants completed a **Homeloan Application Form** on **29 May 2006** with a third-party broker. Under the heading ‘*Type of Loan required*’, the Complainants selected “*Repayment-Fixed*”. In circumstances where the Complainants were engaging with a broker with respect to their mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainants in relation to the completion of the application form or to discuss their preferred interest rate option at that time.

The Provider subsequently issued a **Letter of Offer** dated **7 June 2006** to the Complainants.

The **Particulars of Advance** contained in the **Letter of Offer** detail as follows:

***“IMPORTANT INFORMATION AS AT 7th June 2006***

|   |                    |
|---|--------------------|
| <i>Amount of Credit Advanced</i>            | <i>€291,640.00</i> |
| <i>Period of Agreement (Years – Months)</i> | <i>35 – 0</i>      |
| <i>...</i>                                  |                    |

The **Additional Particulars of Advance** detail as follows:

“ ...  
Type of Advance ANNUITY HOMELOAN  
Interest Rate 4.49  
Fixed For  
36 months”

**General Condition 5** of the **Loan General Conditions** attached to the **Letter of Offer** details as follows:

*“The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of Principal and Interest type Mortgages) and the interest accruing on the advance (in the case of Investment Linked Mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the first day of the calendar month immediately following the date of the making of the advance to the Applicant’s Solicitor and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the Lender.*

*However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with the fluctuations in the applicable interest rate. Payment of the monthly instalments must be made by Direct Debit Mandate.  
...”*

**General Condition 7** of the **Loan General Conditions** attached to the **Letter of Offer** details as follows:

*“The rate of interest applicable to this loan will be fixed for 36 months from date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant(s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply.”*

/Cont’d...

**General Condition 17** of the **Loan General Conditions** details as follows:

***“THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER, THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED ...”***

The **Loan General Conditions** also detail as follows:

***“WARNING:***

***...***

***“THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME.”***

The **Form of Acceptance** was signed by the Complainants and witnessed by a solicitor on **15 August 2006** on the following terms:

*“I/We the, undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-*

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender’s General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender’s standard Form of Mortgage*
- (vi) the Assignment of Life Policy*

*copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s).”*

It is clear to me that the **Letter of Offer** dated **07 June 2006** provided for a fixed interest rate of 4.49% to apply to the Complainants’ mortgage loan for a period of 36 months with the Provider’s prevailing variable interest rate to apply thereafter. The Provider’s prevailing variable interest rate in this case made no reference to varying in accordance with variations in the European Central Bank main refinancing rate.

/Cont’d...

The mortgage loan account statements provided in evidence show that the Complainants' mortgage loan was drawn down on **31 August 2006** on a fixed interest rate of 4.79%.

The Provider's internal file note dated **28 July 2009** indicates that the Provider advised the First Complainant that the mortgage loan account "*will roll to variable*" on expiry of the fixed interest rate.

The mortgage loan statements which have been provided in evidence indicate that on expiry of the fixed rate period the Provider's standard variable interest rate of 3.24% was applied on **1 September 2009**.

The Provider's internal note dated **10 September 2009** indicates that the First Complainant sought to apply a fixed interest rate. The file note from **10 September 2009** details as follows:

*"quoted ms on 27 yr term and fixed rate, posted out flexi and fixed form"*

The Provider submits that a **Fixed Rate Instruction form** subsequently issued to the Complainants. The Provider is not in a position to provide a copy of the **Fixed Rate Instruction form** that issued to the Complainants however, it has furnished "*a sample of the Fixed rate Instruction Form provided to the borrowers showing rates available*". It is disappointing that a copy of the **Fixed Rate Instruction form** that purportedly issued to the Complainants has not been furnished in evidence to this office. The Provider has not submitted a reason why this document was not provided in evidence.

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows:

*"A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer's contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

/Cont'd...



*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”*

The Complainants’ mortgage loan is for a term of **35 years** commencing from **August 2006** and the Fixed Rate Instruction form purportedly issued to the Complainants in or around **September 2009**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It appears that the mortgage loan account is still active with the Provider. It is therefore unclear to me why this documentation has not been retained by the Provider. This is most disappointing.

The sample Fixed Rate Instruction form submitted in evidence details as follows:

*“Fixed Rate Instruction (valid until Thursday 22<sup>nd</sup> October 2009)..*

*Please amend the interest rate on my/our homeloan account as outlined below*

*Fixed until 1<sup>st</sup> October 2011 at 3.99% (3.45% Typical APR)*

*Fixed until 1<sup>st</sup> October 2012 at 3.99% (3.53% Typical APR)*

The Provider’s internal file note dated **20 October 2009** details that a completed Fixed Rate Instruction form was received by the Provider on **20 October 2009**.

The Provider’s internal file note dated **21 October 2009** indicates that the Complainants selected a further three-year fixed rate as follows:

*“three year fixed rate 3.99% applied until October 2012...”*

The **Rate Report** provided in evidence indicates that a fixed interest rate of 3.99% was applied to the Complainants’ mortgage loan account on **21 October 2009** and repayments commenced on this rate from **01 December 2009**.

The Complainants have submitted a document in evidence titled *“Rates Explained”* which they state they received with their mortgage loan documentation. This document details the following with respect to variable interest rates and tracker rates:

**“VARIABLE RATE**

*With a variable rate, your monthly repayments may rise or fall from time to time, in line with general market interest rates. If rates fall, your monthly repayment reduces, but if rates rise you pay more.*

/Cont’d...

*A variable rate may suit you if you are in a financial position where an increase in interest rates would not adversely affect your ability to repay. You may also benefit from the fact that unlike fixed rate mortgages a fee will not be applicable if you wish to change to another mortgage type or voluntarily increase your repayments.*

**TRACKER RATE**

*'LOCK IN' TO CURRENT MARKET RATES With a Tracker Mortgage, movements in the European Central Bank (ECB) rate are fully transmitted in a defined timeline to the customer. In effect, from the customer's perspective this is a 'lock in' to current market rates.*

*This is a 'variable rate' type mortgage which guarantees to track the ECB reference rate within a specified margin (percentage points)."*

The Complainants are of the view that it is not clear that the term "variable rate" in their mortgage loan documentation does not relate to a tracker interest rate given a tracker rate is a variable rate type mortgage.

It is important to note that **General Condition 7** of the **Letter of Offer** dated **7 June 2006** is the relevant contractual provision that stipulates the applicable interest rate on expiry of the initial fixed interest period in **2009**. **General Condition 7** provided that the Provider's "prevailing variable rate will apply".

The nature of the applicable variable rate was not specified as one that tracked another rate of interest such as the ECB main refinancing rate. Furthermore, the **Letter of Offer** did not provide for a specific margin within which the ECB rate would be tracked as described in the "Rates Explained" document. In order for the Complainants to have a contractual right to a tracker interest rate on expiry of the initial fixed 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 **Letter of Offer** dated **07 June 2006**, which was signed by the Complainants on **15 August 2006**.

In this regard, I accept that the **Letter of Offer** dated **07 June 2006** 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 on the expiry of the fixed interest rate period.

I note that the Complainants are seeking to rely on a communication that they submit issued to brokers in **November 2006**. This document post dates the Complainants' mortgage loan agreement which was accepted by the Complainants on **15 August 2006**.

/Cont'd...

The Complainants' mortgage loan agreement does not refer to this document in any way such that it forms part of the agreement entered into between the parties.

The evidence shows that the decision to take out the mortgage loan on the terms and conditions offered by the Provider in the **Letter of Offer** dated **07 June 2006** was a choice that was freely made by the Complainants. It was open to the Complainants to decline that offer if they were dissatisfied that the terms and conditions did not specifically provide for a tracker interest rate at the end of the initial fixed interest rate period in **2009**. However, the Complainants signed the **Letter of Offer** having confirmed that their solicitor had advised them on the terms and conditions of the mortgage loan agreement.

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.**



**JACQUELINE O'MALLEY  
HEAD OF LEGAL SERVICES**

30 March 2022

### **PUBLICATION**

#### **Complaints about the conduct of financial service providers**

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

(a) ensures that—

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

/Cont'd...

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

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

**Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.