



<u>Decision Ref:</u>	2022-0113
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

This complaint relates to a mortgage loan account held by the Complainants with the Provider. The mortgage loan that is the subject of this complaint is secured on the Complainants' private dwelling house.

The loan amount is €300,000 and the term of the loan is 30 years. The Letter of Offer signed by the Complainants on **28 November 2003** provided for a 3-year fixed interest rate of 4.25%.

The Complainants' Case

The Complainants detail that they took out a mortgage with the Provider in **September 2002** to purchase their family home. The Complainants explain that the mortgage comprised two separate loans, the first of which was on a staff business interest rate and the second loan was on a standard variable interest rate.

The Complainants submit that they began engaging with a relationship manager of the Provider in **May 2003** as the First Complainant was planning to end her employment with the Provider and therefore wanted to secure a non-staff mortgage. The Complainants explain that they redeemed the two loans drawn down in **2002** on **19 December 2003**, and they secured a new non-staff mortgage in the sum €300,000. The Complainants note that mortgage loan account ending **5026** was subsequently drawn down on a 3-year fixed

interest rate. The Complainants maintain that it was their intention to *“fix this mortgage for a period, and fully review the rates at the end of the fixed duration.”*

Prior to the expiry of the fixed interest rate period, the Complainants submit that they received a letter dated **14 December 2006** *“advising us that our fixed term was nearing an end and we needed to take action”*. The Complainants submit that they subsequently scheduled a meeting with the relationship manager of the Provider’s branch in **December 2006** as they were interested in the Provider’s tracker interest rate offering. The Complainants state however that they *“did not have our meeting with [the Provider’s relationship manager] as arranged”* and instead another representative of the Provider conducted the meeting.

The Complainants assert that they were informed at the meeting that they could not avail of a tracker interest rate as the Provider was no longer offering those rates.

The Complainants state that it is *“public knowledge that [the Provider] continued to offer tracker Mortgages to customers beyond 2008.”* The Complainants submit that they left this meeting *“with a signed copy of the sample rates letter, despite the fact that this letter was not an accurate representation of the financial vehicles that were offered to us at the meeting”*.

The Complainants refute the Provider’s submission that they did not respond to the Provider’s options letter in **December 2006**. The Complainants maintain that *“efforts were made by [them] to secure [their] chosen financial vehicle”* which they state was a *“Tracker Home Mortgage Ln >60% 4.35% APR 4.42%”* however the offer of a tracker interest rate was withdrawn by the Provider. The Complainants state that they *“were left with no choice”* and felt that they had to accept the standard variable rate on offer.

The Complainants maintain that *“the Bank began the withdrawal process of Tracker Mortgages at a much earlier date, which precedes [sic] the date of our Meeting in December 2006”*. The Complainants submit that they *“feel that the Bank were already targeting customers and ensuring that no new Trackers were given to customers which included us”*.

The Complainants further submit that given the Provider had offered them a *“Tracker Rate on paper, that financial vehicle should have been on offer to us in the arranged meeting in the [Provider branch] in December 2006.”* The Complainants assert that they *“feel that the Bank had an obligation to honour the offers that they communicated to us.”*

The Complainants submit that they were not treated “fairly” at that meeting and the tracker interest rate was something they had “considered and chosen” but was “ultimately denied to us, which had huge cost implications for our family over the years.”

The Complainants are seeking the following:

- (a) A tracker interest rate is applied to their mortgage loan account;
- (b) A refund of the overpaid amount of interest on their mortgage loan account backdated to **December 2006**; and
- (c) Compensation for the financial loss suffered.

The Provider’s Case

The Provider outlines that the Complainants signed and accepted a Letter of Offer on **28 November 2003** which provided for a loan in the sum of €300,000. The Provider states that the loan was drawn down on **22 December 2003** on a 3-year fixed interest rate of 4.25%. The Provider submits that “*there was no contractual obligation within the Letter of Offer which entitled the Complainants to a Tracker rate on the expiry of the fixed interest rate period in December 2006.*” The Provider relies on **Condition 3.2** of the Letter of Approval which outlines what would transpire on expiry of the fixed interest rate period.

The Provider details that prior to the expiry of the 3-year fixed rate period, a letter dated **14 December 2006** was issued to the Complainants informing them that the fixed interest rate period was due to expire and listed sample rate options which were available for selection, to include tracker interest rate options. The Provider submits that this letter also stated that “*in the absence of any reply [the Provider’s] current standard variable rate will be applied*”.

The Provider submits that it carried out a review of its records and states that it has “*no record of a meeting taking place between the Complainants and their Relationship Manager or indeed any member of staff in December 2006 or of advice being provided to the Complainants that a tracker rate was not available to them at that time or at any time before tracker rates were withdrawn.*” The Provider asserts that “*there would be no reason for any member of the Bank’s staff to have informed the Complainants, in December 2006, that they would have not been able to avail of a Tracker Interest Rate on expiry of the fixed interest rate period given that Tracker Interest Rates were still on offer.*”

The Provider submits that “*it would not have been, and continues not to be normal practice for a staff member from the Bank’s Home Mortgage Department to meet directly*

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with customers.” The Provider further states that there is “no indication on file of any information being given to the Complainants on Tracker interest rates”.

The Provider refers to the Complainants’ letter to this Office dated **20 June 2019** in which the Complainants state “*We signed pre-prepared documents pertaining to a standard variable mortgage*”. The Provider submits that it has “*no record of receiving such documents nor have we received any evidence of copies of these documents from the Complainants.*”

The Provider submits the Complainants’ mortgage loan account “*converted to the Bank’s Standard Variable Rate (SVR) of 4.6% on 29 December 2006*” in the absence of a rate selection by them. The Provider details that the standard variable rate that was ultimately applied to the Complainants’ mortgage loan account is different to the variable rate quoted in the letter dated **14 December 2006**, as the Provider’s standard variable rate increased on **20 December 2006**.

The Provider confirms that tracker interest rates were available as an option to new and existing customers until **late 2008** when these rates were withdrawn from the market by the Provider. The Provider maintains that the final decision as to which interest rate to avail of rests exclusively with the customer and that it has “*no record of having received a request to apply a tracker rate*” to the Complainants’ mortgage loan account in **December 2006**. The Provider outlines that it has only one document in the Provider’s records which indicates that the Complainants may have discussed tracker interest rates and refers to internal notes from **May 2008** in that regard.

The Provider notes the Complainants’ mortgage loan account remains active.

The Complaint for Adjudication

The complaint for adjudication is that the Provider refused to allow the Complainants to apply a tracker rate of interest to their mortgage loan account in **December 2006**.

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.

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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.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to set out the details of certain interactions between the Provider and the Complainants between **2003** and **2006**.

On foot of a **Home Mortgage Loan Application** signed by the Complainants on **13 November 2003**, the Provider issued a **Letter of Offer of Mortgage Loan** dated **19 November 2003** which details as follows:

"IMPORTANT INFORMATION AS AT 19 November 2003

- | | |
|------------------------------------|---------------------|
| 1. Amount of Credit Advanced | €300,000.00 |
| 2. Period of Agreement | 30 years/360 months |
| 3. Number of Repayment Instalments | 360 |

...

LEGAL ADVICE SHOULD BE TAKEN BEFORE THIS DOCUMENT IS SIGNED."

PART 1 - Particulars of Offer of Mortgage Loan details as follows:

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<i>“Offer Date</i>	<i>19 December 2003</i>
...	
<i>Mortgage Loan Amount</i>	<i>€300,000.00</i>
<i>Loan Term</i>	<i>30 years/360 months</i>
<i>Loan Type</i>	<i>Annuity</i>
<i>Applicable Interest Rate (at Offer Date)</i>	<i>4.25% Fixed, for 3 years after which the rate will revert to the Bank’s Variable Interest Rate, unless borrower(s) avail(s) of another interest rate option then on offer by the Bank. (Rates includes margin of 0.00%). APR 3.56%.</i>

PART 2 – Special Conditions, details as follows:

“The following borrowings must be cleared on drawdown of this facility: Staff Business Mortgages

It is a condition of sanction that the borrower(s) own funds are available and utilised prior to/in tandem with the proceeds of this loan.

Where a Borrower(s) opts for an ‘Interest Only’ loan repayment interest will be debited to accounts, in arrears, on or about the working day following 15th of each month and up to date on closure of loan account. Any revisions in these arrangements will be advised to customers.

...”

The relevant sections of **PART 4 - General Terms and Conditions of the Offer of Mortgage Loan** detail as follows:

“3. INTEREST RATES

3.1 RATE NOT GUARANTEED TO DRAWDOWN

The Applicable Interest Rate specified in the Particulars is the prevailing interest rate at the date of this Offer. Due to fluctuations in interest rates the Bank does not warrant or guarantee that the rate so specified (including a fixed rate if not draw down within 45 days of the date of Offer) will apply on drawdown. In respect of an

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Offer at fixed interest rate, if a different fixed interest rate prevails at drawdown the Customer may accept this rate or opt for the variable rate prevailing at that time.

3.2 FURTHER FIXED INTEREST RATE OPTIONS/CHOICE

The Bank in its sole discretion, at the end of any fixed interest rate period, may provide any further fixed interest rate period, but if it elects not to do so or the Bank offers the Customer a fixed interest rate choice at the end of any fixed interest rate period and the Customer fails to exercise this choice then the Mortgage Loan will convert to a variable interest rate Mortgage Loan.

3.3 FIXED INTEREST RATE BREAKAGE COSTS PAYABLE BY CUSTOMER

The Customer will be entitled, subject to prior advice to the Bank, to withdraw from a fixed interest rate agreement either:

- a) By repayment in full of the mortgage loan and interest accrued to the date of repayment or*
- b) by conversion to a variable interest rate or another fixed interest rate, or*
- c) by making a partial out-of-course payment.*

In any of the foregoing events, subject to the provisions of Section 121(2) of the Consumer Credit Act, 1995, a redemption fee (breakage costs) is usually payable to the Bank in addition to an administration fee. The breakage costs shall be fairly and conclusively determined by the Bank on the basis of the formula contained in Part 5.

3.4 FIXED INTEREST RATE MORTGAGE LOAN

In the case of a fixed interest rate Mortgage Loan, the interest rate is fixed for the period of time stated in the Particulars, subject to these conditions.

3.5 VARIABLE INTEREST RATE MORTGAGE LOAN

In the case of a variable interest rate Mortgage Loan the interest rate applicable, at any time, will vary according to the prevailing rates set generally by the Bank from time to time, subject to these conditions."

PART 5 - Statutory Notices and Other Notices provides as follows:

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“WARNING

...

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

Note: The above notice in respect of adjustments to payment rates will not apply during any period when the Mortgage Loan is at a fixed interest rate.

...”

I note that **PART 7 - Acceptance and Consent** of the **Letter of Offer of Mortgage Loan** was signed by the Complainants and witnessed by their solicitor on **28 November 2003** on the following terms:

“I/We accept the conditions of this Offer and agree to mortgage the property to the Bank as Security for the Mortgage Loan.

...

I/We note that I/We will not at any time or in any circumstances be entitled to apply by way of set off any amount due from the Bank to me/us, including any amount due under any account, such as a deposit account or otherwise, that I/we may at any time have with the Bank against any amount due from me/us to the Bank under this agreement or under my/our Mortgage of the property when executed by me/us.

I/We hereby irrevocably authorise and direct my/our Solicitor to give the undertaking referred to in the Pre-Draw down Requirements (Part 3(a)) of this Offer.”

The Provider wrote a letter to the Complainants dated **23 December 2003**, which detailed as follows:

“...

I refer to your above Home Mortgage and confirm that this has been drawn down in full. The details of the Mortgage are as follows: -

- *Term is 30 years/360 months; Final Payment due on 22/12/2033,*

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- *Interest rate, 3 Year Fixed, to 28/12/2006, is 4.25% (APR 3.561%) including interest adjustment of 0.00%.*

...

Interest calculated on the daily outstanding balance of your loan, is debited to your mortgage quarterly, in arrears, on about 15th March, June, September and December on Annuity Mortgagees and monthly, in arrears, on/about 15th of each month on "Interest Only" Mortgages. Your account statement and interest certification for the tax year to the 31st of December will be furnished to you in January of each year.

You will be advised of your interest rate options before 28/12/2006 and interest instruction will be required prior to that date.

..."

It is clear to me that the **Letter of Offer** envisaged a fixed interest rate of 4.25% for a period of 3 years, with the Provider's variable interest rate to apply on expiry of the fixed interest rate period unless the Complainants chose another available interest rate option then on offer by the Provider. The **General Terms and Conditions of the Offer of Mortgage Loan** did not contain any specific contractual entitlement to a tracker interest at the end of the 3-year fixed interest rate period. For the Complainants to have a contractual right to apply a tracker interest rate to the mortgage, that right would have to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However, no such right was set out in writing in the **Letter of Offer** dated **19 November 2003**. General Condition 3.2 gave the Provider discretion to offer a further fixed interest rate choice at the end of the fixed rate period that had applied. However, if the Provider elected not to make such an offer or the Complainants did not exercise the choice, then Clause 3.2 provided that the Provider's variable interest rate would apply to the loan.

I note from the mortgage loan account statements submitted in evidence that the loan was drawn down on **22 December 2003**.

The Complainants subsequently submitted a request to the Provider by way of an undated handwritten letter to amend the scheduled repayment date on their mortgage loan account. The Provider issued a letter dated **17 July 2004** in response to the Complainants which provides as follows:

"...

I refer to your recent correspondence regarding the above home loan account.

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I confirm I have amended the repayment date to the 31st of the month, as requested. Your revised repayments are €1,475,28, based on the 3 year fixed rate of 4.25%. Your next repayment is on the 31st July 2004. Your loan is due to expire on 3rd January 2034.

..."

Prior to the expiry of the 3-year fixed interest rate period, the Provider wrote a letter to the Complainants dated **14 December 2006**, which details as follows:

"...

The fixed rate period on your above mortgage loan expires on 28/12/2006 and I should be obliged for your further instructions as to the rate you wish to avail of from that date.

In the absence of any reply [the Provider's] current standard Variable rate (plus the existing agreed adjustment of 0.00%) will be applied but may subsequently be revised at your request to any fixed rate option available in the future. The payments quoted below do not include any PPP cover which you may have taken out upon drawdown of the mortgage loan.

*Here is a **sample** of the rates currently on offer from [the Provider]. To avail of a fixed rate please complete the attached tear-off section below and return it to [the Provider] at the above address, immediately. **Please note that the rates quoted are valid as of to-days date, and are subject to variation prior to the rollover date above.***

<u>RATE</u>	<u>%</u>	<u>APR%</u>	<u>REPAYMENT</u>
Tracker Home Mortgage Ln>60%	4.350	4.4230	1488.82
Tracker3 (sic)Home Mortgage <60%LTV	4.200	4.2690	1464.78
Variable Rate	4.350	4.4230	1488.82
1 Year Fixed	4.710	4.4550	1547.30
3 Year Fixed	4.750	4.5260	1553.87
5 Year Fixed	4.890	4.6420	1576.95
10 Year Fixed	5.080	4.9310	1608.54

Important Information

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LTV means, "Loan to Value" i.e. the loan amount as a percentage of the value of the property, BTL means, "Buy to Let". To avail of the "Tracker \leq 60% LTV" rate, an up-to-date valuations report must be provided to the Bank.

> Means "Greater Than" and \geq means "Greater Than or Equal To". < Means "Less Than" and \leq "Less Than or Equal To"

..."

The Complainants submit that on receipt of the letter from the Provider dated **14 December 2006**, they contacted their Relationship Manager in the Provider's branch to enquire about availing of a tracker interest rate. The Complainants state that they met with another employee of the Provider who was not the Relationship Manager between **14 December 2006** and **22 December 2006**. The Complainants maintain that the employee of the Provider informed them that a tracker interest rate was no longer available. The Complainants have not provided any evidence of any notes or emails with the Provider with respect to this meeting.

The Provider submits that it has checked its system notes, files and all correspondence with the Complainants and there is no record of a meeting or telephone call taking place between the Complainants and any agent of the Provider in **December 2006**. The Provider explains that it would not have been, and continues not to be, normal practice for a staff member from the Provider's Home Mortgage Department to meet directly with customers. The Provider asserts that if the Complainants did discuss tracker interest rates with a member of staff in **December 2006**, they would not have been refused a tracker interest rate as tracker interest rate options were available to new and existing customers at that time.

The Provider states however that it is likely that the Complainants may have requested to switch their mortgage loan account to a tracker interest rate in **May 2008**. The Provider has submitted a copy of an internal note dated **2 May 2008** that was recorded on foot of a telephone call with the First Complainant on the same day. The internal note details as follows:

"Adv [First Complainant] to get MV from valuer and send in re from her & [Second Complainant] to amend rate"

The Provider explains that it does not have a recording of this telephone call as telephone calls to the Provider's Home Mortgage Department were not recorded in **2008**. The Complainants submit that they made enquiries in relation to tracker interest rates during this telephone call but were informed that the Provider was no longer offering tracker mortgages and such rates were not available to them. The Provider submits however that

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that tracker interest rates were available at that time as part of the Provider's Loan to Value interest rate offerings.

It appears from the Provider's internal note that a valuation and a request from both parties to the loan was required to amend the interest rate. I have not been provided with any evidence that a valuation, together with a request to amend the applicable interest to a tracker interest rate, was received by the Provider from the Complainants.

I have been provided with a copy of the Provider's Press Release dated **late 2008**, which details as follows in relation to the withdrawal of its tracker interest rate offering in **late 2008**:

"[The Provider] today announces that it will no longer offer Tracker Mortgages to new mortgage applicants, effective from close of business today, [late] 2008.

For some time now the Tracker Mortgage product has been under review because of the continuing high costs of funds in the market. Tracker Mortgages are priced off the ECB rate but funded at money market rates which given current market conditions is unsustainable.

Existing customers with Tracker Mortgages are not affected. Customers who currently have an offer of a Tracker Mortgage, but which is not yet drawn, will still be able to avail of the Tracker Mortgage within the terms of their loan agreement. [The Provider] continues to offer a very attractive Standard Variable Rate Mortgage, in addition to a range of very competitive Fixed Rate options."

Tracker interest rates were being offered by the Provider to customers up until **late 2008** at which point the Provider decided to withdraw tracker interest rates from its product offering.

The evidence shows that the Provider wrote to the Complainants on **14 December 2006** prior to the expiry of the 3-year fixed interest rate period and provided sample interest rates options which included tracker, variable and fixed interest rates. It is important to note that there was no contractual obligation on the Provider to offer the Complainants a tracker interest rate on the expiry of the fixed interest rate period in **December 2006**. It appears that the Provider decided to offer the Complainants a tracker interest rate option in line with its own policy at the time. In the absence of an instruction from the Complainants, the Provider switched the Complainants' mortgage loan account to a standard variable interest rate of 4.6% on **29 December 2006**, in accordance with the terms and conditions of the **Letter of Offer of Mortgage Loan** dated **19 November 2003**.

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This Office has not been furnished with any evidence that the Provider's agent denied the Complainants the option of a tracker rate of interest between **14 December 2006** and **22 December 2006**. A tracker interest rate was clearly offered to the Complainants in the rate options letter that was issued by the Provider on **14 December 2006**. While the Complainants may have made enquires as to a tracker interest rate in **2006** and **2008**, I have not been provided with any evidence that the Complainants took action by completing and signing the necessary documentation to implement a change to the interest rate on their mortgage loan account.

It is important to note that the decision as to which interest rate option is most suitable for the Complainants rests solely with the Complainants. If it was the Complainants' intention to apply a tracker interest rate to their mortgage loan account upon expiry of the 3-year fixed interest rate, they could have responded in writing to the letter from the Provider dated **14 December 2006**.

However, there is no evidence to suggest that the Complainants did so. It appears to me that the Complainants could have approached the Provider to discuss the potential of applying a tracker interest rate to their mortgage loan account up until **late 2008**, when the Provider withdrew tracker interest rate options from the market. While it appears that the Complainants contacted the Provider in **May 2008**, there is no evidence to suggest that they took any further steps to change the rate from a standard variable rate to a tracker interest rate.

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.



JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

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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,
 - (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.