



<u>Decision Ref:</u>	2022-0132
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale
<u>Outcome:</u>	Rejected

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

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

The loan amount was €230,000.00 and the term of the loan was 19 years. The **Letter of Approval**, which was signed by the Complainants on **29 September 2004**, outlined that the applicable interest rate for the term of the loan was the Provider's variable interest rate, of 3.55%. The Complainants drew down the mortgage loan on **21 October 2004**.

The Complainants' Case

The Complainants outline that they held a mortgage loan account with the Provider in the "1990's" which was secured on their principal private residence. The Complainants submit that they approached the Provider in **2004** seeking finance to purchase a second property which was not intended to be their principal private residence.

The Complainants submit that they discussed interest rate options with a manager of the Provider who informed them of a tracker interest rate option. The Complainants state that they agreed that a tracker interest rate was the most suitable product for them. The Complainants outline that, as the Provider's representative advised them that a tracker mortgage best suited their circumstances, they "*had, of course, a reasonable expectation that this would be the situation*" and a tracker interest rate would be offered to them.

The Complainants assert that “[t]here should be considerable documentation in relation to this” exchange and that the obligation to keep records “rests with the [Provider]”.

The Complainants submit that “[i]t is unacceptable” that the Provider “failed to keep adequate notes, memos and records” of their meetings with the Provider’s representative, in relation to their mortgage application.

The Complainants submit that when they attended the Provider’s branch to finalise the mortgage loan documentation, they were informed by a representative of the Provider that a “new rule has been introduced whereby only mortgages of 250,000 and over could avail of a Tracker Mortgage.” The Complainants explain that in circumstances where they were seeking mortgage loan finance in the sum of €230,000.00, they were informed that they could only avail of the Provider’s standard variable interest rate. The Complainants maintain that there “was no rule that precluded mortgages” under €250,000.00 from availing of a tracker rate of interest. The Complainants contend that they had been informed of this “rule” in error due to an “incorrect legal interpretation of contractual terms and conditions” by the Provider’s representative.

The Complainants detail that the Provider “understood that [they] already had surveys done and a deposit had been paid” and at that stage they “could not withdraw from the sale”. The Complainants submit that they had “no option but to accept what [they] were told re 250,000 being the minimum amount to avail of a tracker mortgage”. The Complainants further outline that they had “no option but to accept the Equity Release Mortgage”. In this regard, the Complainants contend that the Provider “failed to warn [them] of the consequences of the decision [they] made relating to [their] mortgage”.

The Complainants detail that “following recent research, [they] discovered that no such rule applied at the time and in fact tracker mortgages were given for mortgages for amounts considerably less than 230,000”. The Complainants state that the Provider’s assertion that tracker rates of interest were never available for equity release loans is “false”. Furthermore, the Complainants assert that their mortgage statement refers to a “mortgage Home Loan” and not “a secured personal loan”.

The Complainants submit that although they had never missed a mortgage payment, they had to restructure their mortgage loan in **2013/2014**. The Complainants detail that despite the fact their mortgage “had never been in arrears”, the Provider “wrongly sold” their mortgage loan account to another financial services provider. The Complainants outline they could not avail of the Provider’s reduced interest rates that were introduced following the sale of their mortgage loan.

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The Complainants state that they were offered the option to switch the interest rate that applied to their mortgage loan to a managed variable interest rate in **2016**. The Complainants detail that they *“returned the completed application”* for this product, but a managed variable interest rate was never applied to their mortgage loan account. The Complainants states that this has had a *“negative financial impact”* on them.

The Complainants maintain that they were *“misled”* by the Provider and *“wrongly denied the tracker mortgage”*.

The Complainants are seeking the following:

- (a) For a tracker interest rate to be applied to their mortgage loan account; and
- (b) Redress and compensation.

The Provider’s Case

The Provider details that the Complainants submitted an application form to the Provider on **14 August 2004** *“requesting approval for an Equity Release Variable Rate Secured Personal Loan of €230,000 over a 19 year term”* for the purpose of clearing an existing mortgage loan and to purchase a holiday home.

The Provider submits that it issued a Letter of Approval to the Complainants on **27 September 2004**, for an equity release variable loan on an interest rate of 3.55%. The Provider details that the Complainants acknowledged that they accepted this rate of interest by signing the Acceptance of Loan Offer on **29 September 2004**. The Provider notes that the Complainants subsequently drew down mortgage loan account ending **6314** on **21 October 2004**. The Provider asserts that the mortgage loan agreement *“makes no reference to any entitlement to a tracker interest rate”*.

The Provider submits that it does not hold any documentation or records of a meeting between a representative of the Provider and the Complainants in **2004**, *“in which the Complainants allege that they were offered a tracker interest rate during the application process.”* The Provider explains that when it introduced tracker interest rates in **early 2004**, it made a commercial decision to not make tracker interest rates available on equity release loans. The Provider refers to diary notes in relation to communications between the Provider and the Complainants in **2004**, and notes there is no mention of any discussions relating to a tracker mortgage. The Provider maintains that *“there is nothing to suggest that the diary notes relating to the Complainants’ loan application in 2004 are incomplete”*.

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The Provider details that its staff are *“trained to provide information on available rates to customers, both at application stage and during the lifetime of the mortgage, as requested”*. The Provider contends that this allows customers to examine the available interest rate options and *“ultimately select an interest rate which is suitable to their needs”*. The Provider submits that the decision *“as to which interest rate to select is for each individual customer to make”*.

The Provider asserts that it does not hold any documentation or records *“of the alleged discussion between an employee of the [Provider] and the Complainants”* on the day that the Complainants signed the Letter of Approval. The Provider submits that there was no *“new rule”* introduced whereby the Complainants were deemed not eligible for a tracker mortgage based on their loan application for an amount less than €250,000.00. The Provider also states that it has no record of any of its representatives having informed the Complainants at any stage of this alleged *“new rule”*. The Provider is of the view that the Complainants’ submissions are inconsistent in this regard given the loan application for an equity release loan was completed in **August 2004** which was in prior to the meeting that purportedly took place in **September 2004**.

The Provider explains that an equity release loan *“is a secured personal loan provided by the [Provider] to a customer for any purpose, other than a commercial or business purpose”*. The Provider outlines that the loan is secured by way of an *“existing equitable interest in a home, other premises or land owned by the borrower which has not been transferred as security for any other loan”*. The Provider submits that the *“Equity Release loan product was designed to enable existing customers to obtain additional borrowings from the [Provider] using as collateral an existing interest held by them which could be released without necessity of a new mortgage deed”*. The Provider submits the offer of an equity release loan to the Complainants was *“standard for the Complainants’ circumstances in 2004, given they had a pre-existing mortgage at the time of their loan application”*.

The Provider asserts that the Complainants *“were aware that a tracker interest rate was not available to them and they nevertheless proceeded to enter into the Loan Agreement in 2004 about which they made no complaint until fourteen years later in 2018”*. The Provider *“refutes that, at the time of the loan application, the Complainants had been given an “expectation” of being offered a tracker mortgage”*. The Provider details that the manager of the Provider is no longer working with the Provider and therefore unable to comment on the Complainants’ allegations that they were initially offered a tracker mortgage in or around **2004**.

The Provider submits that it “acted at all times in good faith and in full compliance with the terms and conditions governing the Complainants’ mortgage loan account”. The Provider further submits that the Complainants “have not provided any evidence” to substantiate their claim that they are entitled to a tracker rate of interest on their mortgage loan account.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to permit the Complainants to draw down their mortgage loan account on a tracker interest rate in **October 2004**.

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 24 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 set out and review the relevant provisions of the Complainants’ mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainants and the Provider in **2004**.

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The Complainants completed and signed an **Application for Credit** on **19 August 2004**. **Part 2** of the **Application for Credit** is titled “*Details of Mortgage Required*” and details that the “*Amount of Loan required*” was “*EUR 230,000.00*”, the loan type selected was an “*Equity Release Variable Rate Secured Personal Loan*” and the term of the loan required was “*19 Years*”.

Part 6 – Signature & Declaration of the **Application for Credit** details as follows:

“I/We declare and I/we am/are of full age and I/we hereby make application for an advance with [the Provider] upon mortgage of the property described above. I/We declare that the foregoing statements and particulars and any other information we have given to [the Provider] to be strictly true, to the best of my/our knowledge and belief.

...

I/We note that if I/we are approved by [the Provider] for a loan at any time before the completion of the mortgage transaction [the Provider] has the right to withdraw or vary the approval. In the event that I/we wish to change any of the detail on Part 1 or 2 of the application the changes will be recorded on the loan approval without the necessity of re-signing a further application form.

...

“I/We hereby consent to the transfer of the benefit of the mortgage to any person”.

The Provider’s internal notes recorded during the loan application process detail as follows:

“..

CLEARING EX [redacted] MTG AND TERM LOAN AND OD WITH OURSELVES, BUYING A HOUSE IN [location] AS HOLIDAY HOME.... 19.08.2004”

The Complainants maintain that they met and discussed interest rate options with a manager of the Provider in **2004** and on foot of those discussions, they decided that a tracker interest rate was the most suitable rate option for them. The Provider maintains that it does not have any record of any discussions of this nature with the Complainants during the application stage for mortgage loan account ending **6314**.

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It is important to note that the Provider was under no obligation to offer the Complainants any particular type of mortgage in **2004**. 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 evidence shows the Complainants sought an advance of funds from the Provider in **August 2004** to clear an existing mortgage loan and to facilitate the purchase of a second property which the Complainants intended to use as a holiday home. The **Application for Credit** shows that the Complainants applied for an equity release loan on a variable interest rate which meant that the additional borrowings would be secured against the equity in the Complainants' existing principal private residence.

Upon considering the Complainants' **Application for Credit**, the Provider subsequently issued a **Letter of Approval** dated **27 September 2004** to the Complainants which provides as follows:

"Loan Type: Equity Release Variable Rate Secured Personal Loan

...

Loan Amount: EUR 230,000.00
Interest Rate: 3.55%
Term: 19 years(s)"

The relevant **Special Conditions** of the **Letter of Approval** detail as follows:

"...

B. PRIOR TO THE DRAWDOWN OF THE LOAN, THE APPLICANT WILL COMPLETE A VARIABLE DIRECT DEBIT MANDATE WITH A BANK OR [THE PROVIDER] OR A STANDING ORDER DRAWN ON A [PROVIDER] ACCOUNT TO AUTHORISE [THE PROVIDER] TO COLLECT THE AGREED MONTHLY INSTALMENT DUE ON THE MORTGAGE LOAN AND ANY INSURANCE OR ASSURANCE INSTALMENTS WHICH HAVE BEEN ARRANGED OR WILL BE ARRANGED BY [THE PROVIDER] AT THE REQUEST OF THE APPLICANT.

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

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*F. TERM LOAN ACCOUNT [ending 9013] AND MORTGAGE ACCOUNT [ending 9012]
TO BE CLEARED FROM PROCEEDS OF THIS ADVANCE.*

..."

The **General Mortgage Loan Approval Conditions** also provide as follows:

"1.15 [the Provider] may at any time transfer the benefit of the Mortgage to any person or company in accordance with the Mortgage Conditions."

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the **Conditions relating to "[Name of Product]" Equity Release Loans**. 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 **Acceptance of Loan Approval** details as follows:

*"I/We the undersigned accept the within offer on the terms and conditions set out
in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. the [Provider's] Mortgage Conditions"*

The Complainants accepted and signed the **Acceptance of Loan Approval** on **29 September 2004**. The **mortgage loan account statements** submitted in evidence show that the Complainants drew down the mortgage loan in full on **21 October 2004**.

It is clear to me that the **Letter of Approval** provided for an equity release loan at a variable rate of interest for the term of the loan. The variable rate made no reference to varying in accordance with variations in the ECB refinancing rate, rather the nature of variable rate appears to be one which could be adjusted by the Provider. There is no reference whatsoever to an ECB tracker rate of interest being applicable to the equity release loan.

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I note that arrears began to accrue on the Complainants' mortgage loan account in **December 2013** and that the Complainants subsequently entered restructure arrangements with the Provider in **February 2014** and **October 2014**.

The Complainants were notified by letter dated **19 February 2018**, that the beneficial interest in their mortgage had been transferred to another financial service provider. On **24 May 2019**, the legal title of the Complainants' mortgage account was transferred to another financial services provider. It should be noted that this transfer was executed pursuant to **Condition 1.15** of the **General Mortgage Loan Approval Conditions**, which permits the Provider to transfer any beneficial interest in the Complainants mortgage to any person or company.

The Provider has furnished a copy of its **Lending Interest Rates** effective from **July 2004**, in evidence which shows the interest rates on offer by the Provider at the time of the Complainants' mortgage loan application. The Lending Interest Rates available in **August** and **September 2004** were as follows:

<i>"Equity Release / Secured Personal Loans</i>	<i>Rate</i>
<i>[Equity Release] Variable Rate</i>	<i>3.55%</i>
<i>Secured Personal Loan Variable Rate</i>	<i>5.05%</i>
<i>Secured Personal Loan 1 Year Fixed Rate (for new business)</i>	<i>4.24%</i>
<i>Secured Personal Loan 1 Year Fixed Rate (for existing business)</i>	<i>5.10%</i>
<i>Secured Personal Loan 5 Year Fixed Rate</i>	<i>6.18%</i>
<i>Secured Personal Loan 10 Year Fixed Rate</i>	<i>6.90%</i>

The **Lending Interest Rates** document also details the following in relation to the tracker interest rates available on repayment home loans and residential investment properties:

<i>"Tracker Mortgage (Home Loan and Residential Investment Property)</i>	<i>Rate</i>
<i>Loan Amount €150,000-€249,999</i>	<i>3.40%</i>
<i>Loan Amount of €250,000 or more</i>	<i>3.10%</i>

The **Lending Interest Rates** document therefore indicates that tracker interest rates were available on repayment home loans for a loan amount of €150,000.00 or more. However, the Complainants did not apply for a repayment home loan in **2004**. The Complainants applied for an equity release loan. The **Lending Interest Rates** document shows that the Provider only offered fixed interest rates and variable interest rates in respect of equity release loans. The Provider states that it made a commercial decision not to offer tracker interest rates in respect of equity release loans. On the basis of the evidence before me, it is clear that an equity release loan product which the Complainants applied for was not available.

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Having considered the Complainants' mortgage loan documentation, it is clear to me that the Complainants applied for an equity release loan on a variable interest rate by completing an **Application for Credit** and selecting that particular loan product.

The Provider subsequently offered the Complainants an equity release variable interest rate loan by way of **Letter of Approval** dated **27 September 2004**, the terms and conditions of which the Complainants duly accepted.

It is evident that the Complainants were not entitled as a matter of policy or contract to be offered a tracker interest rate when they applied for an equity release loan or when they ultimately drew down the loan in **2004**.

The Provider was not offering tracker interest rates on equity release products to new customers in **August 2004** or at any other time. The Provider has submitted a statement in relation to its equity release loan product offerings which details that a customer could only avail of a standard variable interest rate and fixed interest rates on an equity release loan. In this regard, I accept that the Provider operates as a business and is entitled to set interest rate options for products at its absolute discretion.

If the Complainants did not want to pursue the option of an equity release 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. However, the Complainants did not do so and proceeded to draw down their equity release loan on a variable rate of interest.

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

19 April 2022

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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.