



<u>Decision Ref:</u>	2022-0137
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate at point of sale Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

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

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

The **Letter of Approval** dated **15 June 2006** in respect of mortgage loan account ending **8098** detailed that the loan type was an *"Equity Release Variable Rate Secured personal Loan"* to be drawn down on a standard variable interest rate of 3.85%. The loan amount was for €115,000 and the term of the loan was 15 years.

The Complainants' Case

The Complainants submit that they applied for mortgage loan account ending **8098** with the Provider in **2006** and, during the application process, a representative of the Provider *"offered the tracker mortgage initially via telephone"*. The Complainants outline that they subsequently completed paperwork which *"confirm[ed] the tracker"* rate of interest on their mortgage loan account.

At the time of the application, the Complainants detail that they were seeking to re-mortgage their primary mortgage loan account ending **3648**, which was on a tracker interest rate. The Complainants assert that they were instructed by the Provider to drawdown the new mortgage loan account ending **8098** on the Provider's standard variable rate in order for a tracker interest rate to applied at a later date.

The Complainants submit that they drew down mortgage loan account ending **8098** on **28 June 2006** and thereafter requested that a tracker interest rate be applied, however their request was denied. The Complainants maintain that they were “*promised*” a tracker mortgage on the equity release loan.

The Complainants submit that when contacting the Provider “*over the years*”, they “*always mentioned*” their “*dissatisfaction*” that they were not able to avail of a tracker rate of interest. The Complainants submit that after raising “*this issue*” with a representative of the Provider, they were “*told it would be noted and investigated*”. The Complainants state however that they “*heard nothing*” from the Provider.

The Complainants are seeking a refund of all overpayments on mortgage loan account ending **8098**, being the difference between the variable interest rate that applied and the tracker interest rate that should have applied from **2006** to present.

The Provider’s Case

The Provider details that the Complainants completed a credit application for an Equity Release loan with the Provider on **07 June 2006**. The Provider submits that it “*holds records in respect of one application only completed by the Complainants on 07 June 2006 for the mortgage loan account ending 8098*”.

The Provider notes that that it was “*proposed to use the funds from this equity release loan to clear two existing mortgage accounts*”, one being a home loan (account ending **4626**) and the other being an equity release secured personal loan (account ending **5693**). The Provider details that the balance of funds was being used to finance home improvements. The Provider further notes that the property to be secured against the Equity Release loan was already held as security by the Provider in respect of the Complainants’ primary mortgage loan account ending **3648**.

The Provider submits that it issued a **Letter of Approval** to the Complainants on **15 June 2006**, for a variable equity release loan in the amount of €115,000 repayable over a term of 15 years. The Provider notes that the Complainants drew down mortgage loan account ending **8098** in full on **28 June 2006**. The Provider asserts that the Complainants were not offered a tracker interest rate on mortgage loan account ending **8098** because it was an equity release loan and it “*has never offered tracker rates on Equity Release Loans*”.

The Provider details that, when it introduced tracker rates in **2004**, it made a commercial decision that tracker rates would not be available for certain types of loans, including equity release loans.

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The Provider also submits that “[t]his information was widely and publicly available”. The Provider further details that its equity release products were “shown separately on its published lending rate sheets and were shown with fixed and variable rates only”. In addition, the Provider explains that its staff who handled mortgage loan applications were aware that an equity release loan could not be provided on a tracker rate of interest. The Provider explains that interest rates on the Provider’s equity release loans “were/are based on mortgage lending rates.”

The Provider notes that it “does not accept that the Complainants were informed that, once they had fully drawn down account ending **8098**, a tracker rate would be available to them on that account”.

The Provider explains that if a new mortgage loan in the sum of €115,000 with a new mortgage deed had been successfully applied for, the Complainants would have been obliged to complete an application process, vacate the existing legal mortgage and put in place a new legal mortgage. The Provider details that an equity release loan is secured through an existing legal mortgage. The Provider submits that if “an additional personal loan were successfully applied for, with consequent additional repayments, the Complainants’ total monthly repayments would increase rather than decrease as they did when account ending **8098** was offered and accepted.” The Provider notes that the Complainants decided to apply for an equity release home loan in the full amount of their consolidated borrowings and made this decision based on their personal needs and circumstances.

The Provider asserts that the Complainants were in fact first offered a tracker interest rate for mortgage loan account ending **3648** on expiry of the fixed interest rate period in **August 2006**. The Provider notes however that the Complainants chose to apply a 1-year fixed interest rate to mortgage loan account ending **3648** until **September 2007** rather than choosing a tracker interest rate option. The Provider notes that by this time, loan account ending **8098** had already been in existence for almost 15 months. The Provider submits that the Complainants could not have obtained a tracker interest rate on either of their mortgage loans in **June 2006**, as “one of them was an equity release loan” and “the other remained on a fixed rate period until **September 2006**”.

The Provider submits that it is unable to retrieve the telephone calls from **2006** and **2007** which were requested by the Complainants.

The Provider maintains that it never offered tracker rates on equity release loans and therefore does not accept that the Complainants were “promised a tracker mortgage”.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly refused to offer the Complainants a tracker interest rate for mortgage loan account ending **8098** in **2006**, or at any point thereafter.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 25 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 outline details of the Complainants' original mortgage loan account ending **3648** and to also review and set out the relevant provisions of the Complainants' mortgage loan documentation in relation to the equity release loan under mortgage loan account ending **8098**. It is important to also consider the interactions between the Provider and the Complainants in **2006**.

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The Provider issued a **Letter of Approval** dated **28 July 2003** to the Complainants in respect of mortgage loan account ending **3648**. This **Letter of Approval** provided for a *“Residential Investment Loan”* in the amount of €160,000 repayable over a term 25 years commencing on a 1-year fixed interest rate of 2.35%, after which the Complainants had the option to convert to a variable rate loan. This **Letter of Approval** was accepted and signed by the Complainants on **25 August 2003**. Mortgage loan account ending **3648** was subsequently drawn down on **17 September 2003**.

The Complainants decided to apply a further 1-year fixed interest rate of 3.60% to mortgage loan account ending **3648** by signing a rate options form on **24 August 2004**. The Complainants applied another 1-year fixed interest rate of 3.25% to mortgage loan account ending **3648** by signing a rate options form on **29 August 2005**. Prior to the expiry of the fixed interest period in **September 2006**, the Provider offered the Complainants a range of interest rate options to include a tracker interest rate. The Complainants however opted for a further 1-year fixed interest rate of 4.45% by signing a rate options form on **9 September 2006**. Prior to the expiry of the fixed interest period in **September 2007**, the Complainants opted for a tracker interest rate of ECB + 0.80% (4.80%).

The Complainants applied for additional borrowings from the Provider and completed an **Application for Credit** on **07 June 2006**, which details as follows:

“2. Details of Mortgage Required

Type of Loan:

Amount of Loan required	EUR 115,000.00
Purchase price / Value of property	EUR 340,000.00
Loan type	Equity Release Variable Rate Secured Personal Loan
Repayment Term required	15 Years

The evidence shows that in **June 2006**, the Complainants were seeking a further advance of funds from the Provider and that advance of funds would be secured against the equity in the Complainants’ private dwelling house.

The Complainants maintain that the Provider offered them a tracker interest rate in respect of the equity release loan in **2006** during a telephone call. I note however that the Provider is unable to retrieve any telephone recordings with the Complainants in **2006**.

In earlier submissions, the Complainants maintain that they completed paperwork which “confirm[ed] the tracker” rate of interest on their mortgage loan account however, in later submissions to this office, the Complainants submit that “[n]o paperwork ever issued in relation to a tracker for this account”.

I have not been furnished with any evidence of any discussions in relation to interest rate options that may have taken place between the Provider and the Complainants during the application stage for mortgage loan account ending **8098**. Notwithstanding this, it is important to note that the Provider was under no obligation to offer the Complainants 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 subsequently issued a **Letter of Approval** dated **07 June 2006** to the Complainants, which details as follows:

“

Loan Type:	<i>Equity Release Variable Rate Secured Personal Loan</i>
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Purchase Price/Estimated Value: EUR 340,000.00
Loan Amount: EUR 115,000.00
Interest Rate: 3.85%
Term: 15 year(s)”

The **Special Conditions** attached to 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. 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.

G. THAT EXISTING MORTGAGE LOAN [account ending 4626] AND [account ending 5693] BE CLEARED ON DRAW DOWN OF THIS FACILITY"

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.

General Condition 12 of the **General Mortgage Loan Approval Conditions** provides as follows:

"12. CONDITIONS APPLICABLE TO ADDITIONAL LOANS

12.1 *The terms and conditions contained in this clause 12 apply to any loan that is an additional loan. A loan is an additional loan where the Applicant has previously executed a mortgage (the "Existing Mortgage") over a property in favour of [the Provider] (or either its predecessors [names redacted]) and its is intended that the Existing mortgage will secure that loan.*

...

12.4 *Where the Existing Mortgage is a [name of previous entity] form of Mortgage, then the following additional terms and conditions will apply to the additional loan:*

...

12.4.2 *Where the additional loan is a variable rate loan, the rate of interest will be the applicable variable home loan rate as varied from time to time at the absolute discretion of [the Provider] and the Applicant(s) will repay the additional loan with interest at such a rate by monthly or other periodic instalments at the intervals specified in the Letter of Approval (or, if no such interval is specified, monthly) in amounts which, over the terms of the additional loan, will be sufficient to discharge in full the additional loan together with such interest. The Applicant will commence payment for the first instalment at the end of the first such period.*

...

12.4.12 *[the Provider] may from time to time increase or reduce the interest rate (and may do so where the interest rate includes a differential by increasing or reducing either or both the relevant Basic Rate and the differential).*

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Where the interest rate includes the differential, 'Basic Rate' means the rate at which interest would be charged if no differential applied and where more than one type of advance is secured where the context so required it refers to the Basic Rate for each type of advance."

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 Offer of an Additional Loan** was signed by the Complainants on **21 June 2006** on the following terms:

"1. I/we the undersigned accept the within 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 [the Provider] form of Mortgage ... the mortgage conditions applicable to that mortgage as amended by the General Mortgage Loan Approval Conditions referred to at (ii) above.*

...

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 an additional loan.

*6. We further acknowledge that where we have been approved an Equity Release Loan in our joint names and all or 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**

**Only applicable if the additional loan is an Equity Release Loan in Joint names and where all or part of the loan is transferred to a Holding Account."*

The equity release mortgage loan was drawn down by the Complainants on **28 June 2006**, on a variable rate of interest.

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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 and interest rate margin being applicable to the equity release loan.

The Provider explains that it made a “*commercial decision*” not to offer a tracker rate on the equity release product. 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.

The Provider was not offering tracker interest rates on equity release products in **June 2006** 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 (from **November 2006**) on an equity release loan. The Provider was not under any obligation to offer the Complainants a tracker interest rate option on the equity release product option.

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. Instead, the Complainants accepted the Provider’s offer by signing the **Acceptance of Offer of an Additional Loan on 21 June 2006**.

In accordance with the Provider’s internal notes, the First Complainant contacted the Provider on **16 August 2007** to explore the possibility of a rate reduction on the equity release loan. The Provider subsequently issued a letter to the Complainants dated **21 August 2007**, which states as follows:

“Dear [the Complainants],

The following outlines the details of your loan which have been put in place based on the information you provided in our discussion, as at 16th August 2007, regarding your personal circumstances, financial needs and plans.

Mortgage details

You have instructed us to change your mortgage based on your needs and circumstances which is in line with our lending policy. Your loan details are as follows:

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- *Product Type* *Equity Release Variable Rate Secured Personal Loan*
- *Term remaining:* *167 Months*
- *Due date:* *02/09/2007*
- *New repayment:* *€897.81*
- **Balance outstanding* *€108,150.97*
- ***Loan type:* *Annuity*
- *Interest rate* *5.00%*

Please review the information in this letter and ensure the mortgage details meet your requirements and wished, given our discussion and the information your provided. You should take the necessary time to consider and query any information provided to you in relation to your loan. If you have chosen a fixed interest rate loan and you feel your personal circumstances may potentially change soon, then a fixed interest rate loan term may not be the best option for you and you should contact your branch to discuss.

...”

The Provider issued a letter to the Complainants dated **02 September 2015** inviting them to avail of the Provider’s managed variable rate. The letter dated **02 September 2015** details as follows:

“Dear [Complainants],

Important: An invitation to you to switch to one of our competitive Managed Variable Rate (MVR) mortgages

We are delighted to invite you and other existing customers of [the Provider] to apply to have the interest rate which you pay on your mortgage switched to an MVR. The exact rate that will apply will vary depending on what percentage of the current value of your home is accounted for by your outstanding mortgage (referred to as “Loan to Value” (LTV) ratio).

For those who avail of this offer and if approved, based on current rates will lead to a reduction in the rate of interest charged and lower monthly mortgage repayments compared to the Bank’s current Variable Rates.

This letter is being issued to you following the announcement by [the Provider] of plans to extend its range of MVR mortgages to existing customers. MVR mortgages offer a lower rate of interest to customers whose mortgage borrowings represent a smaller percentage of the value of the property.

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For instance where the outstanding amount on the mortgage represents 50% of the current value of the home, the interest rate will be lower than where the outstanding amount represents 90% of the current value if the home...

...

We look forward to receiving your completed Mortgage Rate Switch application...

To see how your interest rate might change with an MVR mortgage, this table sets out the different rates which currently apply.

Loan to Value Ratio (LTV)	Managed Variable Rate
Less than or equal to 50% LTV	3.70%
Greater than 50% and less than or equal to 60% LTV	3.80%
Greater than 60% and less than or equal to 70% LTV	3.90%
Greater than 70% and less than or equal to 80% LTV	4.00%
Greater than 80% and less than or equal to 90% LTV	4.20%
Greater than 90% LTV (includes negative equity)	4.30%

Information correct as at 31st August 2015.

Note: This letter is for information purposes only and does not constitute a formal offer. The Bank may decide at its discretion to amend or terminate the Mortgage Rate Switch Offer at any time in the future."

The Complainants completed and signed a **Mortgage Rate Switch Application Form** on **11 September 2015** to avail of the managed variable rate and returned it to the Provider with a copy of a valuation of the secured property.

The Provider subsequently issued a letter to the Complainants dated **17 September 2015** which states as follows:

" ...

I write to confirm that the rate of interest applicable to your account has been switched from a Standard Variable Rate to a Mgd Var Rate LTV <=50% at 3.700%

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We will shortly write to you confirming your revised repayments and the date from which they are applicable.

...”

The **mortgage loan statements** submitted in evidence show that mortgage loan account ending **8098** was redeemed in full on **17 October 2017**.

While I note that the Provider has not been able to retrieve audio recordings of telephone calls between the Provider and the Complainants in **2006** or **2007**, the Provider has submitted audio recordings of telephone calls between the Provider and the Complainants between **2012** and **2018**. Having considered the content of those recordings, I am of the view that they do not have any bearing on the determination of this complaint in circumstances where they relate to conversations in respect of the Complainants' life assurance policy, enquiries as to reductions in variable interest rates and the Complainants' requests for redemption figures, none of which relate to the complaint for adjudication.

The Complainants submit that they were “*promised*” a tracker mortgage on the equity release loan during a telephone call with the Provider in **2006**, however I have been provided with no evidence to support this assertion by the Complainants. Nevertheless, it is the terms and conditions of the **Letter of Approval** dated **7 June 2006** that form the basis of the mortgage loan agreement between the parties.

Having reviewed the mortgage loan documentation and submissions made by both parties, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate on their equity release mortgage loan under mortgage loan account ending **8098** in **2006**, or at any point thereafter.

The evidence shows that the Complainants applied for an equity release mortgage loan on a variable interest rate in **June 2006**. The Complainants subsequently accepted and signed the **Letter of Approval** on **21 June 2006** which provided for a variable interest rate to apply for the term of the loan. If it was the case that the Complainants were of the view that a variable interest rate loan was not suitable for them, then the Complainants could have decided not to sign the **Acceptance of Offer of an Additional Loan** and ultimately draw down the equity release loan.

I have been provided with no evidence that the Complainants had a contractual or other entitlement to a tracker interest rate on mortgage loan account ending **8098**. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider was a choice that was freely made by the Complainants.

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The Provider was not offering tracker interest rates on equity release products, and this was a commercial decision the Provider was entitled to make.

For the reasons set out in this Decision, I do not uphold the 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

21 April 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

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(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.