



<b><u>Decision Ref:</u></b>	2022-0143
<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 Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's principal private residence.

The loan amount was €165,000.00 and the term of the loan was 30 years. The particulars of the mortgage loan offer accepted by the Complainant on **25 June 2006** detailed that the interest rate was "*Fixed For 24 months*".

The mortgage loan account was redeemed on **24 August 2015**.

**The Complainant's Case**

The Complainant submits that he drew down the first stage payment of his mortgage loan account with the Provider in **July 2006**. He states that the mortgage loan amount was €165,000.00 repayable over a 30-year term on a 2-year fixed interest rate of 4.39%, with the Provider's prevailing variable interest rate to apply thereafter.

The Complainant submits that when his fixed rate period expired in **July 2008**, the mortgage loan account switched to a standard variable rate of interest, and he was not offered the option of switching to a tracker interest rate. The Complainant states that he should have been offered a tracker interest rate in **July 2008** on the basis that a tracker rate is "*classified as a variable rate*".

The Complainant details that “[n]owhere in [his] Letter of offer has specified that [he] would revert to the prevailing SVR or Standard Variable Rate” on the expiry of the initial fixed rate period. The Complainant states that the “Default Variable Rate” detailed in the Letter of Offer was “never defined as the Prevailing Variable rate anywhere in [his] Letter of Offer or mortgage handbook” and that “Both Variable Rate and Tracker Rate are both defined as variable rate type interest rates in the mortgage handbook.” The Complainant asserts that the term “Prevailing Variable Rate” as stated in the Letter of Offer is “ambiguous”.

The Complainant submits that he chose to apply a 3-year fixed interest rate of 3.99% to his mortgage loan account in **April 2010**. The Complainant states that “before choosing the 3 year Fixed rate” he asked the Provider if he should have been offered a tracker interest rate at the end of the fixed rate period in **July 2008**. He details that the Provider stated that he was not entitled to a tracker interest rate in **July 2008** and that tracker rates were no longer available.

The Complainant refers to a document published by the Provider in **November 2006**, which stated that all “home loans will now roll onto tracker upon expiry”. He submits that his “understanding of this document is a customer who was on a fixed rate mortgage greater than €150k at that time would automatically Roll onto a tracker type 1.25 plus the ECB rate”.

The Complainant asserts that he would not have “switched” his mortgage from the Provider and redeemed the mortgage loan in **August 2015** “if [he] was on the appropriate tracker rate”.

The Complainant is seeking the following:

- (a) Confirmation that he should have been offered a tracker interest rate on expiry of the fixed interest rate period in **July 2008**;
- (b) A refund of any interest overpaid between **July 2008** and **August 2015**;
- (c) Compensation for the distress caused; and
- (d) The option to “switch back” his mortgage from his current Provider to the Respondent Provider with a tracker interest rate to be applied.

### **The Provider's Case**

The Provider submits that the Complainant engaged with a third-party broker to complete his mortgage loan application. The Provider explains that *"it was not the Banks practice to engage directly with the applicant"* when the applicant was dealing with a broker. The Provider states that the Complainant did not select a preference for a particular interest rate in the mortgage loan application form.

The Provider details that it contacted the Complainant's broker on **31 March 2006** and **13 June 2006** to confirm the interest rate selected by the Complainant. The Provider submits that the Complainant's broker responded indicating that the *"Rate Required is 4.39% 2 yrs Fixed"*. The Provider asserts that it is *"unable to comment on whether [the Complainant] was further informed as to the future availability of tracker rates or otherwise at that time by his financial adviser"*.

The Provider submits that **General Condition 7** of the mortgage loan agreement details that the Provider's prevailing variable interest rate will apply on the expiry of the initial fixed interest rate period. The Provider asserts that there is no reference *"to the variable rate referenced being linked in any way to the ECB rate and no commitment that the prevailing variable rate referenced would track the ECB rate or any other quoted rate."*

The Provider states that it is satisfied that the Complainant's mortgage loan documentation was clear and transparent. The Provider notes that *"the Complainant had the benefit of both independent financial advice and independent legal advice in the event that the Complainant required any further clarification in this respect"*. The Provider further details that *"the Handbook provided by the Bank clearly detailed that a defined relationship to the ECB rate applied in the case of a Tracker Rate but not in the case of any other variable rate"*.

The Provider states that the Complainant's mortgage loan account was drawn down on **21 July 2006**.

The Provider details that when the Complainant's fixed interest rate term expired on **1 August 2008**, the Provider's standard variable interest rate was applied to the mortgage loan account. The Provider states that this interest rate applied until the Complainant opted to fix the interest rate in **October 2010**.

The Provider states that the Complainant applied for his mortgage loan in **March 2006**, and it was drawn down on **21 July 2006**. In response to the Complainant's submission that the Provider's communication of **7 November 2006** stated that all home loans on a fixed interest rate would roll onto tracker interest rates, the Provider explains that this communication related to a product that "*existed in the period November 2006 to February 2008 for new private dwelling home mortgage applications*". The Provider details that the communication was "*issued to Brokers only*" with "*the circulation email inviting Brokers to contact their Mortgage Manager with any queries.*"

The Provider submits that it was contacted by the Complainant's solicitor on **29 July 2015** seeking the release of the title deeds and the Complainant subsequently redeemed the mortgage loan on **24 August 2015**.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainant a tracker interest rate on his mortgage loan account on the expiry of the 2-year fixed interest rate period in **July 2008**.

### **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 Complainant was 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 29 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.

Before dealing with the substance of the complaint, I note that the application for the mortgage loan was submitted by the Complainant to the Provider through a third-party broker. As this complaint is made against the respondent Provider only, it is the conduct of the Provider and not the broker which will be dealt with in this Decision. The Complainant was informed of the parameters of the investigation by this Office, by letter dated **19 December 2019**, 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.”*

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainant’s mortgage loan. It is also necessary to consider the details of certain interactions between the Complainant and the Provider in **2008**.

An **Application Form** was completed and signed by the Complainant on **13 March 2006** with a third-party broker. Under the “*Your mortgage type, rate and term details*” section of the **Application Form**, the Complainant was given the choice of a variable interest rate, fixed interest rate or a discount rate. It does not appear that the Complainant selected a an interest rate on the **Application Form**. In circumstances where the Complainant was engaging with a broker with respect to his mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainant at that time in relation to the completion of the application form or to discuss his preferred interest rate option.

The Provider sent an email to the Complainant's broker on **31 March 2006**, detailing as follows:

*"Dear [Complainant's broker],*

*We acknowledge receipt of a loan application for the above. To enable us to process it further we would be obliged if you would forward the following information.*

- 1. Please confirm rate, term & solicitors details*
- 2. Satisfactory valuation report carried out by an [Provider's] panel valuer*

*On receipt of the above, we will contact you to progress the application."*

The Complainant's broker sent a response to the Provider on **13 June 2006** detailing the following:

*"Dear Sirs*

*Please note that Term Required is 30yrs*

*Rate Required is 4.39% 2 yrs Fixed*

*...*

*Trusting this is the required information."*

The Provider subsequently issued a **Letter of Offer** dated **13 June 2006** to the Complainant.

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

***"IMPORTANT INFORMATION AS AT 13th June 2006***

*Amount of Credit Advanced* €165,000.00

*Period of Agreement (Years – Months)* 30 – 0

*..."*

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

*"...*

*Type of Advance* ANNUITY HOMELOAN

*Interest Rate* 4.39

*Fixed For*

*24 months"*

/Cont'd...

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

*“The rate of interest applicable to this loan will be fixed for 24 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.”*

**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 ...”***

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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 **Special Conditions** attaching to the **Letter of Offer** dated **13 June 2006** detail as follows:

*“The Advance will be released in stage payments on receipt of satisfactory Architects Certificates in the attached form (up to a maximum of 100% at each stage and a maximum of 3 stages and final stage). The final payment of €5000 will be released on receipt of a satisfactory Certificate of Compliance and Valuer’s Report.”*

The **Form of Acceptance** was signed by the Complainant on **20 June 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).”*

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The mortgage loan statements provided in evidence indicate that the mortgage loan was advanced in stages on the following dates:

<b>21 July 2006</b>	€40,000.00
<b>3 October 2006</b>	€40,000.00
<b>7 February 2007</b>	€40,000.00
<b>1 June 2007</b>	€25,000.00
<b>19 September 2007</b>	€20,000.00

The Provider has submitted a copy of its **Mortgage Handbook** in evidence which details as follows:

*“This handbook is intended to assist our customers in understanding detailed aspects of the mortgage they have taken with [the Provider] and aims to provide in plain English a clear understanding of how mortgages work”.*

**Section 3** of the **Mortgage Handbook** details as follows:

### **“3. Rates Explained**

#### **FIXED RATE**

*With a fixed rate loan, the repayment you make is fixed for an initial term, (such as 1, 2, 3, or 5 years).*

*When you choose a fixed rate, it’s often easier to budget because you will know exactly how much the mortgage repayment will be for some time ahead. A fixed rate is not affected by changes in general market interest rates. When the fixed rate you chose comes to an end you can agree another fixed rate, or you can switch to the variable rate at the time. The choice is yours.*

#### **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. 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.*

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**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), which means you will not be subject to any rate increases in the fixed period or any rate reductions that may be passed to variable rate customers.*

**PRICE GUARANTEE**

*Our Tracker Mortgage is a variable rate product that guarantees full European Central Bank (ECB) rate changes will be passed on to customers within 30 working days. This product gives a price guarantee to customers locking them in at various rates above the ECB rate, dependent on other factors, such as loan amount, loan-to-value, and the type of securities against which the loan is held (i.e. primary residence or residential investment property).*

*..."*

**Page 17** of the **Mortgage Handbook** details as follows:

***"IMPORTANT INFORMATION***

*NO LEGALLY BINDING LOAN AGREEMENT SHALL COME INTO EXISTENCE UNTIL SUCH TIME AS A FORMAL LETTER (WHICH INCLUDES [THE PROVIDER'S] STANDARD TERMS AND CONDITIONS) HAS BEEN SIGNED BY BOTH THE CUSTOMER AND [THE PROVIDER].*

*..."*

I note that the parties have made submissions relating to the contents of the **Mortgage Handbook** and the Provider states that a copy was furnished to the Complainant together with the **Letter of Offer** in **June 2006**.

The **Mortgage Handbook** does not form part of the mortgage loan agreement between the parties in circumstances where there is no reference to the Mortgage Handbook forming part of the terms and conditions of the **Letter of Offer** signed in **2006**.

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I accept however that the Mortgage Handbook was provided to the Complainant by way of information and the Complainant, as stated in his submissions, appears to have considered its contents during the application stage. I note that the definitions of “*variable rate*” and “*tracker rate*” contained in the **Mortgage Handbook** show the difference between these two types of rates.

The particulars of the **Letter of Offer** dated **13 June 2006** are sufficiently clear as to the type of mortgage offered to the Complainant and clearly set out that the applicable interest rate was a 2-year/ 24-month fixed interest rate with the Provider’s “*prevailing variable rate*” to apply thereafter. The “*prevailing variable rate*” made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. There was no basis for the Complainant to expect that the term “*variable rate*” would relate to a tracker interest rate, given that there is no reference to a tracker or the ECB rate in the **Letter of Offer** dated **13 June 2006**.

In order for the Complainant to have a contractual right to a tracker interest rate either at the inception of the mortgage loan or at any stage during the term of the mortgage loan, that right would need to be specifically provided for in the Complainant’s mortgage loan documentation. However, no such right was set out in writing in the **Letter of Offer** dated **13 June 2006**, which was accepted and signed by the Complainant on **20 June 2006**.

The Complainant had the benefit of seeking advice from his broker and solicitor at the time of the mortgage loan application.

Following the expiration of the Complainant’s fixed interest rate period on **1 July 2008**, the interest rate on the Complainant’s mortgage loan account switched to a standard variable rate of 5.65% in line with **General Condition 7** of the **Loan General Conditions**.

I have not been provided with a copy of the standard rate change notifications letter that purportedly issued to the Complainant from the Provider prior to the expiration of the fixed interest rate period in **July 2008**, which is most disappointing. The Provider explains that the reason for this is that it “*does not retain, in its records, copies of the individual standard rate change notifications letters that have issued to particular customers.*”

In any event, it is not disputed between the parties that when the 2-year fixed interest rate period expired in **July 2008**, the Complainant was not offered the option to apply a tracker interest rate to the mortgage loan account.

The Complainant completed and signed a **Fixed Rate Instructions form** on **19 April 2010**, where he selected a 2-year fixed interest rate of 3.99% to apply to the mortgage loan account as follows:

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

*Fixed until 1<sup>st</sup> April 2012 at 3.99% (3.45% Typical APR)*

*Fixed until 1<sup>st</sup> April 2013 at 3.99% (3.53% Typical APR)*

*I/We hereby agree once a letter is Issued by [the Provider] to me/us, confirming that the interest rate on my/our Home Loan account has been fixed for the period requested by me/us then the terms below shall be binding on me/us and shall amend the existing interest rate terms and conditions of my/our mortgage.*

**Terms**

*Fixed rate repayments from **1st May 2010** for the term as indicated above. From the date of expiry of this fixed rate term the Lenders prevailing Standard Variable Rate will apply.*

*If, during the fixed rate period, the Applicant redeems in whole or in part or converts the loan into a variable interest rate or to another fixed rate loan, on that date, (the redemption date) a “break funding fee” will be payable to the Lender. The break funding fee will be calculated by reference to the wholesale cost then prevailing for the unexpired portion of the fixed rate period and the wholesale rate prevailing at the date of drawdown.*

...

***You are advised to seek independent advice in relation to this arrangement”***

The Provider issued correspondence to the Complainant on **21 April 2010** confirming that a fixed interest rate of 3.99% had been applied to the mortgage loan account. This fixed interest rate applied to the mortgage loan account until **1 April 2013**.

The **mortgage loan statements** provided in evidence indicate that a cheque payment of €136,666.73 was applied to the mortgage loan account and the mortgage loan was redeemed on **24 August 2015**.

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The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider in the **Letter of Offer** dated **13 June 2006** was a choice that was freely made by the Complainant. It was open to the Complainant to decline that offer if he was dissatisfied that the terms and conditions did not provide for a tracker interest at the end of the initial fixed interest rate period. However, the Complainant signed the **Letter of Offer** having confirmed that his solicitor had advised him on the terms and conditions of the mortgage loan.

Having considered the Complainant's mortgage loan documentation, I am of the view that there was no contractual or other entitlement to a tracker interest rate on the part of the Complainant when the fixed interest rate period expired in **July 2008** or at any other time during the term of the loan.

If the Complainant wished to pursue the potential option of applying a tracker interest rate on the mortgage loan account at any stage before tracker interest rates were withdrawn by the Provider in **mid-2008**, the Complainant could have contacted the Provider. However, I have not been provided with any evidence to suggest that the Complainant contacted the Provider to explore tracker interest rates. Even if the Complainant had contacted the Provider, it would have been a matter of commercial discretion on the part of the Provider as to whether it wished to accede to any such request made by the Complainant to apply a tracker interest rate to the mortgage loan in circumstances where the Complainant had no contractual entitlement to a tracker interest rate.

The Complainant's mortgage loan documentation is sufficiently clear and transparent regarding the Complainant's interest rate entitlements. The Provider acted in accordance with the terms and conditions of the **Letter of Offer** dated **13 June 2006** in its dealings with the Complainant.

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.

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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**

22 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

(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,

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(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.

