



<b><u>Decision Ref:</u></b>	2022-0144
<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 which is the subject of this complaint is secured on the Complainant's principal private residence.

The loan amount was €275,000.00 and the term of the loan was for 35 years. The particulars of the **Mortgage Loan Offer** dated **03 February 2006** detailed that the interest type was "*Variable at 2.900%*", with a discount of 0.85% applicable for the initial 24 months of the term of the loan.

**The Complainant's Case**

The Complainant submits that he drew down a mortgage loan with the Provider in **March 2006** and a discounted variable interest rate applied for the first 24 months of the term of the loan. The Complainant submits that on **25 February 2008**, he received correspondence from the Provider informing him that the applicable interest rate was due to expire. The Complainant details that the Provider offered him two alternative rates, being a home loan variable interest rate or a tracker variable interest rate of ECB + 1.25%.

The Complainant maintains that he “*fully complied with the instructions set out in the letter*” and chose the tracker variable interest rate. The Complainant submits that he posted his response to the Provider. The Complainant states that he “*scanned this letter and [his] subsequent response to this letter for [his] own files before [he] posted it back to the bank*”.

The Complainant submits that during a review of his mortgage loan documents, he discovered that he “*was never actually moved to this Tracker Variable ECB + 1.25%*” despite his instruction to the Provider. The Complainant notes that he subsequently followed up with the Provider by way of letter dated **09 January 2018**. The Complainant asserts that he “*received no correspondence that specifically stated the rate that the Provider had moved*” his mortgage loan account to following his selection of the tracker variable interest rate of ECB + 1.25%.

The Complainant is of the view that the “*proxy*” letter which the Provider refers to in its submission “*does not detail the full description of the rate chosen.*” The Complainant states that, in terms of the general correspondence received from the Provider between **2008** and **2018**, this correspondence “*states only the actual interest rate (e.g. 4.34%) and not a description of the rate.*”

The Complainant refutes the Provider’s submission that the Complainant would have been aware that the interest rate charged to the mortgage loan account was not the “*low*” tracker interest rate which was “*widely publicised in the media*”. The Complainant asserts that he was abroad during the term of the mortgage due to “*work commitments*” and was therefore not aware of what was being published in the media. The Complainant is of the view that the Provider is trying to “*provide any excuse*” it can think of to avoid complying with the Complainant’s request to apply the tracker interest rate to the mortgage loan account. The Complainant asserts that he fully adhered to the Provider’s instructions in terms of his selection of the tracker interest rate and notes that the Provider’s letter dated **25 February 2008** did not stipulate that the Complainant should follow up with the Provider to determine if the correct interest rate was applied to the mortgage loan account.

The Complainant submits that it is “*fundamentally untrue*” that the interest rate being charged to the mortgage loan account was brought to the Complainant’s attention during the period of arrears. The Complainant maintains that this is a further attempt of the Provider to “*discredit*” his complaint.

The Complainant maintains that, in terms of the “*notable difference*” referred to by the Provider in its submissions regarding the interest rates applied to the mortgage loan account, the difference was €32.39 “*on rates that were both essentially variable in nature.*”

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The Complainant states that he is *“extremely regretful”* that he only noticed the error in terms of the interest rate being applied to the mortgage account in **2018**. The Complainant is of the view that he *“put too much trust in the Provider”* to follow his instructions and he has suffered *“deep stress and anxiety”* as a result.

The Complainant asserts that he is *“astounded”* that the Provider would think of him as disingenuous and notes that it is the Provider *“who has proven to have been disingenuous to customers on numerous occasions in the past.”*

The Complainant refutes the Provider’s submission that he would have a certain knowledge of interest rates due to his career in finance and notes that his career *“is of no relevance”*.

The Complainant is seeking the following:

- a) A tracker interest rate of ECB +1.25% to be applied to his mortgage loan account;  
and
- b) Compensation for the Provider’s error.

### **The Provider’s Case**

The Provider submits that the Complainant signed and accepted a **Mortgage Loan Offer** on **8 February 2006**, which provided for a home loan variable rate discounted by 0.85% for a period of 24 months. The Provider relies on **Special Condition (a) (iv)** in this regard, which details the interest rate applicable to the mortgage loan account and what would happen at the expiration of the 24-month period. The Provider submits that **Special Condition (a) (iv)** detailed that the Provider’s prevailing variable interest rate would apply on the expiry of the discounted variable rate period. The Provider states that the Complainant subsequently drew down mortgage loan account ending **8724** on **24 March 2006**.

The Provider notes that it issued a **Product Review Notice** to the Complainant on **25 February 2008**, which offered the Complainant the choice of the Provider’s home loan variable interest rate or a tracker rate of interest. The Provider submits that it *“did not receive any response to the Product Review Notice such that on 25 March 2008, the mortgage loan account rolled to the Provider’s prevailing Home Loan Variable Rate, then priced at 5.44%.”* The Provider submits that this is a *“key point”*.

The Provider notes that it cannot produce an exact copy of the correspondence that issued on **25 March 2008** but can provide a *“proxy”*. The Provider is of the view that while the

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correspondence dated **25 February 2008** did not stipulate that the Complainant should follow up with the Provider to check if the Provider carried out the Complainant's instructions, *"it is the Provider's position that as no correspondence was received from the Complainant, the mortgage loan account moved to the default standard variable rate."* The Provider submits that it is *"disingenuous"* of the Complainant to submit that he did not receive the letter dated **25 March 2008** while confirming that he received the letter dated **25 February 2008**.

The Provider submits that the Complainant was *"on notice of the fact that a variable interest rate that could be amended at the Provider's discretion, rather than a tracker interest rate, would apply to the mortgage loan account in default of an alternative interest rate being offered and/or selected upon the expiry of the initial discounted variable rate period."*

The Provider details that the Complainant *"continued to make scheduled repayments to the mortgage loan account pursuant to the Provider's Standard Variable Rate"*. The Provider notes that repayments pursuant to the standard variable interest rate were €1,456.52 and repayments pursuant to the tracker interest rate of ECB + 1.25% would have been €1,424.13, which the Provider states was a *"notable difference"*. The Provider details that the Complainant *"did not raise any issue with regard to such difference in repayments at any point."* The Provider details that the Complainant was made aware of the interest rate applicable to the mortgage loan account *"on numerous occasions"* and that it was also apparent that the interest rate charged to the mortgage loan account was not the *"low tracker interest rates which were widely publicised in the media."* The Provider relies on various correspondence that issued to the Complainant between **2008** and **2018**, and details that that these letters *"clearly set out the interest rate being charged to the Complainant's mortgage loan account."*

The Provider outlines that at no point, throughout the period of arrears, *"did the Complainant raise any issue in respect of a tracker interest rate."* The Provider notes that the Complainant and the Provider were in *"constant and consistent"* contact. The Provider submits that *"over 40 letters issued to the Complainant between 25 February 2008 and January 2018"*.

The Provider is of the view that the Complainant *"would have had an acute knowledge of mortgage interest rates and the "low" tracker interest rates"* considering the Complainant's career and area of expertise.

The Provider maintains that this puts the Complainant *"in a more informed position than a regular customer with regard to the understanding of interest rates and mortgages."* The

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Provider states that the Complainant should therefore have been aware that he was not on the low tracker mortgage interest rate. The Provider details that despite the widespread media attention, *“no issue was raised by the Complainant until January 2018.”*

The Provider asserts that tracker rates were withdrawn from the market in **late 2008** and that existing customers *“could only avail of tracker rates where they had a contractual entitlement to a tracker rate contained in their offer letter.”* The Provider submits that the Complainant *“has no contractual entitlement to a tracker rate”*.

The Provider details that the type of interest rate being charged to the Complainant’s mortgage loan account was clear and that there is no doubt that the Complainant was fully aware of the interest rate that applied to the loan.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider wrongfully failed to apply a tracker interest rate to the Complainant’s mortgage loan account as per his instructions in **February 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 29 March 2022, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that

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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 the complaint, it is necessary to review and set out the relevant provisions of the Complainant's mortgage loan documentation and to consider the interactions between the Provider and the Complainant in or around **February 2008**.

The Provider issued a **Mortgage Loan Offer** dated **03 February 2006** to the Complainant, which details as follows:

"...

**PART 1 – THE STATUTORY LOAN DETAILS**

**IMPORTANT INFORMATION AS AT 03 February 2006**

1. Amount of Credit Advanced		€275,000
2. Period of Agreement		35 Years
3. Number of Repayment Instalments	Instalment Type	4. Amount of each Instalment
24	Variable at 2.900%	€1,041.98
396	Variable at 3.750%	€1,168.51

..."

**Part 2 – The Additional Loan Details** describes the loan type as "*Repayment*" and the interest rate as "*2.900% Variable*".

**Part 4 – The Special Conditions (a) (iv)** outlines as follows:

*"(iv) The interest rate applicable to the loan has been discounted by 0.85% per annum on the amount of the loan for a period of 24 months from the date of drawdown of the loan.*



*At the end of the said discount period the reduction shall cease and the interest rate applicable to the loan shall revert to the then prevailing Home Loan variable rate."*

**General Condition 6 of Part 5 – The General Conditions** details as follows:

**"6. Variable Interest Rates**

- (a) *Subject to clause 6(c), at all times when a variable interest rate applies to the Loan the interest rate chargeable will vary at the Lender's discretion upwards or downwards. If at any time a variable rate of interest applies, repayments in excess of those agreed may be made at any time during the term of the Loan without penalty.*
- (b) *The Lender shall give notice to the Borrower of any variation of the interest rate applicable to the Loan, either by notice in writing served on the Borrower in accordance with clause 1(c) above, or by advertisement published in at least one national daily newspaper. Such notice or advertisement shall state the varied interest rate and the date from which the varied interest rate will be charged.*
- (c) *Notwithstanding anything else provided in this Offer Letter, the varied applicable interest rate shall never, in any circumstances, be less than 0.1% over one month's money at the Euro Inter Bank Offered Rate (EURIBOR)."*

The **Consumer Credit Act Notices** section on **page 5** of the **Mortgage Loan Offer** details as follows:

*"If your mortgage loan is at any time at a variable rate, please note:*  
**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."**

The Complainant signed the **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer** on **08 February 2006** on the following terms:

*"I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions."*

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The Complainant accepted the **Mortgage Loan Offer**, having confirmed that he had read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer** dated **03 February 2006**.

The **Mortgage Loan Account Statements** indicate that the Complainant's mortgage loan account drew down on **27 March 2006** at which point in time the applicable discounted variable interest rate was 3.14%.

It is clear to me that the **Mortgage Loan Offer** provided for a discounted variable interest rate for the first 24 months of the term of the loan, which represented a discount of 0.85% from the Provider's variable interest rate, with the Provider's prevailing home loan variable interest rate to apply thereafter. The variable rate in this case made no reference to varying in accordance with variations in the European Central Bank main refinancing rate. Rather, it was a variable interest rate which could "vary at the Lender's discretion upwards or downwards" as set out in **General Condition 6 (a)** of the **Mortgage Loan Offer**.

The Provider's internal system which records the letter history in relation to the Complainant's mortgage loan account shows that a "Product Review Notice" issued on **25 February 2008**. The **Product Review Notice** to the Complainant, which details as follows:

"...

*I am writing to let you know that your current rate of 4.590% will expire on 24/03/2008.*

*We have a number of attractive mortgage products and I am pleased to offer you the following range of options: -*

<b>Description</b>	<b>Rate</b>	<b>*Projected Standard Repayment</b>
HOMELoAN VARIABLE RATE	5.440%	€1,456.52
TRACKER VARIABLE ECB + 1.25%	5.250%	€1,424.13

***\*This is an estimated figure only and may be higher on the actual date that the rate is changed on your account.***

*To avail of your selected option, please tick the relevant rate on the enclosed Mortgage Form of Authorisation. Please sign and date this form and return it to us at [the Provider's address] before 24/03/2008. Unfortunately, we cannot hold the above choice of rates open after this date.*

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***If you would like to discuss the best option for you, please do not hesitate to contact me or any member of my branch team. I would be more than happy to discuss the various options available to you.***

*If I do not hear from you by 24/03/2008, your homeloan will, in accordance with your loan offer, automatically move to the variable rate of 5.440%.”*

The Complainant has furnished a copy of a **Mortgage Form of Authorisation** that was enclosed with the letter dated **25 February 2008**. The Complainant states that he completed the **Mortgage Form of Authorisation** by selecting the tracker variable interest rate of ECB + 1.25% and signing the **Mortgage Form of Authorisation** on **03 March 2008**. The Complainant explains that he made a copy of the **Mortgage Form of Authorisation** before returning it to the Provider and this is the copy that has been submitted in evidence. The **Mortgage Form of Authorisation** details as follows:

“ ...

*I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate. (Please Note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)*

<b>Selected Rate</b>	<b>Description</b>	<b>Rate</b>
<input type="checkbox"/>	HOMELoAN VARIABLE RATE	5.440%
<input checked="" type="checkbox"/>	TRACKER VARIABLE ECB +1.25%	5.250%

...”

The **Acknowledgement and Agreement** section of the **Mortgage Form of Authorisation** details as follows:

*“I acknowledge that following acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. I acknowledge and agree that:-*

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3. *If I have applied to convert to a tracker variable rate, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo rate”) for the term of the Loan. Any variation in interest shall be implemented by the Lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank. Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason, the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.*
- ...”

The Provider submits that it has no record of receiving the completed **Mortgage Form of Authorisation** from the Complainant and, as such, the mortgage loan converted to the Provider’s home loan variable interest rate in accordance with the **Special Conditions** of the **Mortgage Loan Offer**. The **Mortgage Loan Account Statements** detail that the mortgage loan account moved to the variable interest rate of 5.44% on **25 March 2008**.

The Provider’s internal system which records the letter history in relation to the Complainant’s mortgage loan account shows that a “*Product Rollover*” letter issued to the Complainant on **25 March 2008**. The Provider submits that it issued a letter to the Complainant on **25 March 2008** to notify the Complainant that the interest rate on his mortgage loan account had changed to 5.44%, which was the Provider’s prevailing home loan variable interest rate at that time. The Provider has submitted in evidence what it describes as a “*proxy*” letter from the Provider to the Complainant dated **25 March 2008**, which the Provider states is a “*replica*” of the letter that issued to the Complainant. This letter dated **25 March 2008** details as follows:

*“Further to our previous letter regarding your [the Provider] Homeloan we are writing to inform you that your rate is now 5.44%.*

*The amount of your revised repayment is €1,456.04 falling due on 01/04/2008.*

*The payment rates on this Homeloan may be adjusted by the lender from time to time. If there are any further changes in Mortgage Interest Rates we will advise you.*

...”

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The Complainant accepts that he received the **Product Review Notice** and **Mortgage Form of Authorisation** dated **25 February 2008**, which were system generated documents from the Provider. The Complainant maintains that he did not receive the letter dated **25 March 2008**, which was another system generated letter sent to the same postal address as the correspondence of **25 February 2008**. The Complainant submits that he did not appreciate that the Provider had not actioned his request to apply a tracker interest rate of ECB + 1.25% to his mortgage loan account in **March 2008**, and did not become aware of this until **January 2018** when he was reviewing his mortgage loan.

The Complainant's mortgage loan account entered into arrears in **June 2013** and remained in arrears until **November 2015**. The Provider has submitted a number of letters that it issued to the Complainant from **April 2013** to **September 2015** which contain details of outstanding arrears on the Complainant's mortgage loan account. I note that the letters detailed the interest rate percentage and did not list the type of interest rate.

The Provider issued a letter to the Complainant dated **17 November 2015** which details as follows:

*"Dear [Complainant],*

*With reference to your recent request, I confirm that the amendments to the above account have been processed and the revised details relating to your account are outlined below.*

<i>Mortgage Product Type:</i>	<i>HOMELoAN STD VARIABLE RATE</i>
<i>Mortgage Type:</i>	<i>Repayment</i>
<i>Interest Rate:</i>	<i>4.340%</i>
<i>Repayment Frequency:</i>	<i>Monthly</i>
<i>Maturity Date:</i>	<i>5/04/2041</i>
<i>Next Repayment Date:</i>	<i>5/12/2015</i>
<i>Mortgage Repayment:</i>	<i>€1,291.47</i>

*The payment rates on this HomeLoan may be adjusted by the Lender from time to time. If there are any further changes in Mortgage Interest Rates we will advise you.*

*..."*

This document clearly indicates that the Provider's home loan standard variable interest rate product was being applied to the Complainant's mortgage loan account at that time.

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The evidence shows that **Mortgage Loan Account Statements** were issued to the Complainant on a regular basis since the inception of the mortgage loan. The mortgage loan account statements show all the rate changes that occurred from **25 March 2008**, when the interest rate of 5.44% was applied to the Complainant's mortgage loan account.

I accept the Complainant's submission that he did not become aware until a later point in time that the tracker interest rate had not been applied to his mortgage loan. Certainly, it was reasonable for him to have become aware from the content of the letter of **17 November 2015** which clearly details the interest rate type. While many submissions have been made by the parties on the content of certain documentation and when the Complainant should or did know that a tracker interest rate was not applied to the mortgage loan, those details are of limited relevance to the complaint at issue.

The content of the **Mortgage Form of Authorisation** is most relevant to this complaint. This details "*following acceptance by the Lender of this application*". In the circumstances of this complaint, the Provider did not accept the application. The Complainant submits that he sent the completed **Mortgage Form of Authorisation**. The Provider submits that it did not receive it.

However, regardless of these details, and whether the **Mortgage Form of Authorisation** was sent by the Complainant and received by the Provider and not actioned or sent by the Complainant and not received by the Provider, it was clear that the Lender had to accept the application before the terms and conditions of the loan would be amended or varied. This step was not taken and there was consequently no obligation on the Provider to amend the terms and conditions as set out in the **Mortgage Form of Authorisation**.

The terms of the **Mortgage Form of Authorisation** make clear that this was an application to the Provider which required action on the part of the Provider for it to be effected. It was not an instruction of such a nature that the Provider was obliged to act on it, as has been submitted by the Complainant.

I have considered the Complainant's mortgage loan documentation in its entirety and it appears to this office that the Provider was under no obligation to offer the Complainant a tracker interest rate on the expiry of the discounted variable interest rate period. The Complainant was contractually entitled to the Provider's prevailing variable interest rate in **2008**, however the Provider also offered the Complainant the choice of a tracker interest rate. In order for the Provider to be in a position to consider the Complainant's application to apply a tracker interest rate to the Complainant's mortgage loan account in **March 2008**, the Provider required the signed **Mortgage Form of Authorisation** from the Complainant.

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In circumstances where the Provider either did not receive the **Mortgage Form of Authorisation** or received it and did not accept it, the Complainant's mortgage loan account defaulted to the Provider's standard variable interest rate of 5.44% on **25 March 2008**, in accordance with the **Special Conditions** of the **Mortgage Loan Offer**.

For the reasons outlined in this Decision, I do not uphold this complaint.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**



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

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

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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.