



<b><u>Decision Ref:</u></b>	2022-0197
<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**

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

The loan amount was €550,000.00 and the term of the loan was 29 years. The particulars of the **Letter of Approval** dated **13 November 2008** detailed that the loan type was "1 yr Disc Variable (<=80% LTV) Home Loan" and that the interest rate applicable was 5.25%.

The mortgage loan was drawn down on **25 November 2008**.

#### **The Complainants' Case**

The Complainants outline that they drew down mortgage loan account ending **3454** in **November 2008**. The Complainants state that they drew down the loan on a 12-month discounted variable interest rate. The Complainants maintain that it was a condition of the **Letter of Approval** dated **13 November 2008** that on the expiry of the discounted period, the Complainants could select an interest rate offered to them by the Provider at the time and in the absence of selection, a variable rate of interest would apply, which could be a tracker interest rate.

The Complainants assert that at the end of the discounted period, the Provider offered them *“a number of mortgage rates, none of which were a Tracker rate, despite the Tracker Variable rate being specifically, and the only rate, noted as an option in [their] Letter of Approval.”* The Complainants are of the view that the use of the word *“may”* contained in **Special Condition 7** of the **Letter of Approval** *“would suggest [they] have a choice of a tracker mortgage on the maturity of [their] one year discount rate”*.

The Complainants state that the possibility of a tracker not being an option *“is not addressed at all in the contract”*.

The Complainants submit that the **Letter of Approval** provided a *“reasonable and legitimate expectation”* of a tracker interest rate at the end of the discounted period. The Complainants assert that quoting only one rate type led them to believe that they *“have a legitimate expectation to a tracker rate”*.

The Complainants disagree with the Provider’s submission that **Special Condition 7** is clear and unambiguous. The Complainants submit that the Provider had *“at their disposal specialised and highly trained banking lawyers to draft this clause.”* The Complainants are of the view that **Special Condition 7** was *“drafted by design to prevent customers raising the issue of reversion to a tracker rate.”*

The Complainants dispute the Provider’s submissions that the loan documentation was sufficiently clear and transparent in its meaning of a variable rate. The Complainants maintain that the wording in **Special Condition 7** suggests that they *“have a choice of variable rate and the only variable rate mentioned in this statement is a tracker variable rate.”*

The Complainants maintain that the Provider is *“using incendiary logic”* in its submissions. The Complainants are of the view that they have been *“misled”* by the Provider as the **Letter of Approval** clearly states that they *“would be entitled to a Tracker variable rate.”* The Complainants state that they were never given this option and that the Provider has an *“obligation to fulfil this commitment”*. The Complainants assert that the Provider is not acting in the Complainants’ best interests as the customers.

The Complainants are seeking the following:

- a) That the mortgage loan account be switched to the tracker variable rate for the remainder of the lifetime of the mortgage.
- b) Reimbursement of the interest that they have overpaid on the mortgage loan account since **November 2009**.

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

The Provider details that the Complainants drew down mortgage loan account ending **3454** on **25 November 2008** on a 12-month discounted variable home loan rate of 5.25%.

The Provider submits that **Special Condition 7** of the **Letter of Approval** dated **13 November 2008** outlines that, at the end of the discounted interest rate period, it would offer the Complainants rates which they could choose from and if no selection is made by the Complainants, it would apply a variable rate to the loan account "*which may be a tracker rate*".

The Provider details that the Complainants' discounted interest rate period was due to expire on **25 November 2009** and were therefore scheduled to receive a list of interest rate options on or around **5 November 2009**. The Provider submits that the Complainants were not offered a tracker interest rate in **November 2009** because they "*did not have a contractual entitlement to be offered a tracker interest rate.*"

The Provider outlines that it offered tracker interest rates in respect of certain types of new mortgages from **2004**. The Provider explains that from **mid-2006**, its automated mortgage loan processing system added a tracker interest rate option to the rate options provided to certain existing customers "*whose accounts were nearing expiry of a fixed or discount rate period and who had no contractual entitlement to a tracker rate option*". The Provider states that it ceased offering tracker rates to existing customers who did not have a contractual entitlement to a tracker rate from **mid-2009**. The Provider states that it did not specifically inform the Complainants of its withdrawal of tracker interest rates from **mid-2009** and states that the withdrawal of tracker interest rates from the market did not affect the Complainants' mortgage loan account "*as they were then in the ninth month of the twelve months discount period*". The Provider is of the view that the appropriate time to inform the Complainants of rate options was in **November 2009**.

The Provider is of the view that the Complainants' mortgage loan documentation is "*sufficiently clear and transparent in its meaning of a variable rate*" and is also sufficiently clear and transparent regarding "*the Complainants' entitlements with respect to a tracker interest rate on their mortgage loan agreement.*" The Provider submits that the availability of the tracker rate "*was only a possibility and that there was no guarantee of or entitlement to a tracker rate.*"

The Provider states that it does not agree with the Complainants' interpretation of **Special Condition 7** and states that **Special Condition 7** has been "*misconstrued*" by the Complainants in their submissions. The Provider disagrees with the Complainants' contention that the possibility of a tracker interest rate not being an option at the end of the discounted interest rate period is not addressed in the mortgage loan documentation. The Provider asserts that **Special Condition 7** is "*clear that the possibility that a tracker rate option may be available includes a possibility that it may not.*"

The Provider notes that in accepting the **Letter of Approval**, with the benefit of legal advice, the Complainants confirmed "*that their solicitor had fully explained the terms and conditions of the loan offer to them.*" The Provider submits that neither the Complainants nor their solicitor "*expressed confusion to the Bank prior to the Complainants' acceptance of the Bank's offer.*"

The Provider refutes the Complainants' submission that it has not acted in the best interests of the Complainants. The Provider is also of the view that the **Letter of Approval** did not "*give rise to a reasonable expectation of a tracker rate at the end of their discount period in November 2009*". The Provider notes that it was not its "*intention*" to create a reasonable expectation of a tracker interest rate as alleged by the Complainants. The Provider submits that the only certainty provided by the **Letter of Approval** is that the Provider would switch the mortgage loan account to a variable interest rate in the absence of a rate selection by the Complainants.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate at the end of the 12-month discounted LTV variable interest rate period in **November 2009**.

### **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.

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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.

Following the issue of the Preliminary Decision, the Complainants made a further submission on **14 April 2022**, a copy of which was exchanged with the Provider.

Having considered the additional submission of the Complainants and all submissions and evidence furnished by both parties to this Office, I set out below the final determination of this Office.

In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' loan documentation and to consider certain interactions between the Provider and the Complainants between **November 2008** and **November 2009**.

The Provider has submitted into evidence a **Letter of Suitability** which issued to the Complainants on **13 November 2008**. The letter provides as follows:

“...

*The following outlines our proposal based on the information you have given us regarding your personal circumstances, financial needs and plans.*

...

*You have been advised that at the end of any discounted / fixed rate period you will receive a maturity options letter. This letter will provide you with a list of all products available to you at the time. This list may or may not include your original product selection.*

*Please review the information in this letter and ensure the mortgage features and details best suit your requirements and wishes...”*

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The Provider also issued a **Letter of Approval** dated **13 November 2008** to the Complainants, which details as follows:

“ ...

<i>Loan Type</i>	<i>1yr Disc Variable (&lt;=80% LTV) Home Loan</i>
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*Purchase Price/Estimated Value:* €1,010,000.00  
*Loan Amount:* €550,000.00  
*Interest Rate:* 5.25%  
*Term:* 29 year(s)

...

**IMPORTANT INFORMATION AS AT November 13<sup>th</sup>, 2008**

- 1. Amount of Credit Advanced* €550,000
- 2. Period of Agreement* 29 years(s)
- 3. Number of Repayment Instalments* 348
- 4. Amount of each Instalment* €3,080.56
- 5. Total Amount Repayable* €1,077,513.50

...”

I note that the warning on **page 2** of the **Letter of Approval** sets out the following:

“ ...

**VARIABLE RATE LOANS**

**THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME**

...”

**Special Condition 7** of the **Letter of Approval** details as follows:

“ ...

- 7. The interest rate specified in the Letter of Approval is a discounted LTV variable rate and will apply for a period of 12 months from the date of the advance (“the Discount Period”) but may be varied within the Discount Period (and /or at any time prior to drawdown of the advance) without regard to variations in [the Provider] standard variable rate or the European Central Bank Refinancing Rate.*

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*On expiry of the Discount Period, the interest rate will be such rate as may be selected by the Applicant(s) from [the Provider] interest rates then offered by [the Provider] to the Applicant(s) for selection by the Applicant(s) or such variable interest rate (which may be a tracker variable rate) as will apply in the absence of such selection.*

*..."*

**Page 2** of the **General Mortgage Loan Approval Conditions** states as follows:

*"...*

***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 Offer** was signed by the Complainants and witnessed by a solicitor. It was dated **4 November 2008**. The **Acceptance of Loan Offer** states as follows:

*"1. 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.*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us.*

*..."*

A copy of the **European Standardised Information Sheet ("ESIS")** which was enclosed with the cover letter dated **13 November 2008** and the **Letter of Approval** has been submitted in evidence. The ESIS does not constitute a legally binding offer, however it does outline the following by way of information:

*"...*

*The interest rate applicable to this loan is a discounted variable rate, discounted for the first 12 months from the date of issue of the loan ("the Discount Period").*

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*On expiry of the Discount Period you may exercise the option to contract for a fixed rate period (if available) or move to a variable rate which you may select from the then current [the Provider] variable rates offered to you by [the Provider].  
..."*

I note that **page 4** of the **ESIS** details as follows:

" ...

*Note: Where the loan is a variable rate loan, the payment rates on the loan may be adjusted by the lender from time to time.*

..."

I further note that **page 5** of the **ESIS** states as follows:

" ...

*The rate will be discounted for the first 12 months from the date of drawdown. The above table assumes that the loan will roll over into the appropriate LTV variable rate loan at the end of the discount period but the interest rate may be a variable rate other than a LTV variable rate loan depending on the choice of rates offered to you by [the Provider] at the end of the discount period.*

..."

It is clear to me that the **Letter of Approval** provided for a 12-month discounted variable interest rate of 5.25%. The Complainants signed the **Letter of Approval** which included confirmation that the terms and conditions had been explained to them by their solicitor. The variable rate in the terms and conditions makes no reference to varying in line with the European Central Bank main refinancing rate, but rather it was a variable rate which could be adjusted at the discretion of the Provider. If the Complainants were not happy with the interest rate being offered, they could have discussed their options with the Provider at the time.

It would appear the Complainants signed the **Acceptance of Loan Offer** on **4 November 2008** which pre-dates the **Letter of Approval** dated **13 November 2008**. However, I do not believe that there is any dispute between the parties that the **Letter of Approval** dated **13 November 2008** was accepted and properly executed by the Complainants. I note from the **mortgage loan accounts statements** furnished in evidence that the mortgage loan was drawn down on **25 November 2008** on a discounted variable interest rate of 5.25%.

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Prior to the expiry of the 12-month discounted period, the Provider submits that a **rate options letter** and **form** issued to the Complainants on or around **5 November 2009**. While it is not disputed between the parties that such documentation was issued by the Provider, I am disappointed to note that the Provider has not furnished this Office with a copy of the **rate options letter** and **form** that issued in **November 2009** and has not provided a reason for this omission.

**Provision 49 of the Consumer Protection Code 2006** (which was fully effective from **01 July 2007**) outlines as follows:

*“A regulated entity must maintain up-to-date consumer records containing at least the following*

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

*Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”*

The Complainants’ mortgage loan was incepted for a term of 29 years commencing from **November 2008** and the **rate options letter** and **form** purportedly issued in or around **November 2009**. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. No evidence has been submitted to this Office to show that the mortgage loan account has been redeemed. It is therefore unclear to me why the Provider failed to retain a copy of the documentation.

The Provider has however outlined the following rate options which were offered to the Complainants in **November 2009**:

1. Variable rate LTV <80% 3.05%;
2. 2 year fixed rate 5.25%;
3. 5 year fixed rate 5.75%;
4. 7 year fixed rate 6.10%; and
5. 10 year fixed rate 6.10%

From a review of the **mortgage loan account statements** submitted in evidence, I note that the interest rate on the Complainants' mortgage loan account ending **3454** switched to a variable interest rate of 3.05% on **25 November 2009**. This appears to have been in the absence of a selection of an alternative interest rate by the Complainants.

I have been furnished with email correspondence which took place between the First Complainant and the Provider in **December 2009**. The First Complainant requested the Provider to send the available fixed rate options to him by way of email dated **14 December 2009**.

The email dated **14 December 2009** details as follows:

" ...

*One other thing is how easy would it be for me to switch to fixed terms for either or mortgages? What rates are available at the moment? And what are you advising customers?*

" ..."

The Provider subsequently issued a **fixed rate options letter** dated **17 December 2009**, to the Complainants as requested, which details as follows:

" ...

*Current Rate 3.05% €2,537.45*

*Please tick the option you want below*

**Approximate repayment**

**eur €**

*2 Year fixed rate Mortgage currently - currently 5.25% €3,216.43*

*5 Year fixed rate Mortgage currently - currently 5.75% €3,382.63*

*7 Year fixed rate Mortgage currently - currently 6.10% €3,501.39*

*10 Year fixed rate Mortgage currently - currently 6.10% €3,501.39"*

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I note that the **rate options form** was not completed by the Complainants and, as such, the mortgage loan remained on the variable interest rate.

I note that by the time the discounted interest rate period that had applied to the mortgage loan had ended in **November 2009**, the Provider had already withdrawn its general tracker interest rate offering. The Complainants were not offered the option of a tracker interest rate in the rate options letter and form. There is also no evidence to suggest that the Complainants requested that the Provider apply a tracker interest rate to their mortgage loan account at any stage from inception of the loan in **November 2008** up to the time tracker interest rates were withdrawn from the market, as a product option on offer by the Provider.

Moreover, the Provider was under no obligation to offer the Complainants a tracker interest rate option in circumstances where they had no specific contractual entitlement to a tracker interest rate at the end of the discounted interest rate period.

The Complainants, in their post Preliminary Decision submission dated **14 April 2022**, question *“why the tracker rate was mentioned at all in [their] letter of offer?”* The Complainants state that its inclusion *“formed the basis for [their] legitimate expectation as a consumer that [they were] entitled to a tracker variable rate.”*

While I acknowledge that reference is made to a *“tracker variable rate”* in **Special Condition 7** of the **Letter of Approval**, having considered the language used by the Provider in **Special Condition 7**, I am satisfied that **Special Condition 7** did not confer a contractual entitlement to a tracker interest rate on the part of the Provider. **Special Condition 7** provides that on expiry of the discount period, the interest rate will be such rate as may be offered by the Provider and selected by the Complainants or in the absence of a selection, a variable interest rate will apply. It was detailed that the variable rate may be a tracker variable rate. However, it was not detailed that the variable rate will be a tracker variable rate, such that an obligation to apply a tracker interest rate arose.

In light of all the foregoing, it is clear to me that the Complainants did not have a contractual entitlement to the specific application of a tracker interest rate at the end of the discounted variable interest rate period in **November 2009**, or at any stage during the term of the loan. The Provider however offered the Complainants a variable interest rate and various fixed interest rates in accordance with the terms and conditions of the **Letter of Approval** dated **13 November 2008**.

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

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## 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

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

16 June 2022

## **PUBLICATION**

### **Complaints about the conduct of financial service providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish legally binding decisions** in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

### **Complaints about the conduct of pension providers**

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
- (ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

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