



<u>Decision Ref:</u>	2022-0255
<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

Background

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

The loan amount was €232,200.00 and the term of the loan was 25 years. The **Letter of Approval**, which was accepted and signed by the Complainants on **02 June 2005**, outlined that the interest rate applicable to the loan was the Provider's "*Residential Investment Loan 1 Year Fixed New Business Rate*" of 2.74%.

The Complainants' Case

The Complainants submit that they applied for a tracker mortgage with the Provider through a broker in **May 2005**. The Complainants note that the Provider issued a **Letter of Approval** dated **11 May 2005** for mortgage loan account ending **3931**, which provided for a tracker interest rate. The Complainants assert that the "*broker said [the Complainants] could get a better deal on a interest only tracker mortgage which was why [they] drew down a interest only one year loan with [the Provider]*". The Complainants submit that they

requested a period of interest only repayments however the Complainants explain that they could only be offered this if they accepted a fixed interest rate.

The Complainants state that the Provider subsequently issued an **Amended Letter of Approval** dated **19 May 2005** which detailed that the interest rate applicable was a “*1 Year Fixed New Business Rate*” at 2.74%. The Complainants state that they accepted this loan offer on the understanding that they would be able to convert to “*tracker capital and interest*” repayments on the expiry of the fixed rate period.

Prior to the expiry of the fixed interest rate period, the Complainants detail that the Provider issued an interest rate options form to them which included variable and fixed interest rate options. The Complainants state that they were not offered a tracker interest rate at the end of the fixed interest rate period. The Complainants submit that the interest rate converted to a standard variable interest rate at the end of the fixed rate period. The Complainants note that this rate “*has increased over the years and has proven to be very costly*”. In addition, the Complainants contend that the mortgage product was “*mis-sold*” to them and that the Provider had a duty of care to ensure that they received the mortgage loan product best suited to them.

The Complainants submit that due to the high interest repayments on their mortgage loan account, the mortgage property has been in negative equity over the past six years. The Complainants explain that in **2014**, the Provider “*gave a short restructure on the loan to clear up arrears but no restructure to a tracker or a reduction in interest rate*”. In addition, the Complainants assert that the Provider has been uncooperative in relation to their concerns and unwilling to help them to move forward in any way to agree on an affordable resolution. The Complainants further detail that they have requested a tracker interest rate from the Provider numerous times over the years, as per the Provider’s original loan offer, but were informed that the terms and conditions of their loan documentation do not entitle them to a tracker interest rate on their mortgage loan.

The Complainants are seeking for their “*original requests for a Tracker Mortgage to be put in place*”.

The Provider’s Case

The Provider submits that it received a mortgage loan application form in **March 2005** from the Complainants through their broker. The Provider notes that the Complainants applied for a mortgage in the amount of €234,000.00 on a tracker rate of interest, repayable over a term of 30 years.

The Provider submits that it did not have *“any direct contact with the Complainants during the loan application process as they elected to apply for the loan through their chosen broker”*.

The Provider notes that it issued a **Letter of Approval** in respect of *“a tracker mortgage investment loan with an interest rate of ECB+1.40% repayable over 25 years”*, on foot of the Complainants' mortgage loan application.

The Provider details that on **13 May 2005**, it received a request from the Complainants' broker to amend the terms of the original **Letter of Approval** by applying a 1-year fixed new business interest rate of 2.74%.

The Provider submits that it subsequently issued an **Amended Letter of Approval** to the Complainants on **19 May 2005**, which provided for a loan in the amount of €232,200.00, repayable over a term of 25 years. The Provider notes that the interest rate applicable to this loan was a *“Residential Investment Loan 1 Year Fixed New Business Rate of 2.74%”*.

The Provider outlines that the Complainants signed the **Letter of Acceptance** attached to the **Amended Letter of Approval** on **02 June 2005**. The Provider details that the Complainants' solicitor returned the **Letter of Acceptance** to the Provider with the Complainants acknowledging that *“the terms and conditions on which the loan was being advanced had been fully explained to them by their solicitor”*. In addition, the Provider asserts that *“there was no entitlement to a tracker rate in the Special Conditions of the Letter of Approval issued in May 2005”*. The Provider details that the Complainants drew down the mortgage loan on **21 July 2005**.

The Provider states that the **Amended Letter of Approval** clearly states that *“a variable rate or a fixed rate (if available)”* would apply at the end of the fixed interest rate period.

The Provider details that it issued a rate options letter and a rate options form to the Complainants prior to the expiry of the fixed interest rate period on **30 June 2006** detailing the interest rate options available for selection. The Provider submits that the rate options form contained both fixed and variable interest rate options. The Provider explains that the Complainants were not offered a tracker interest rate on the expiry of the fixed interest rate period because *“their contract did not contain an entitlement to be offered a tracker rate of interest”*.

The Provider submits that it rejects the Complainants' contention that it has a *“direct duty of care with all their 3rd party mortgage agents to ensure every customer signed up with their financial products is getting the right mortgage product”*. The Provider maintains that its role is to provide information in relation to its suite of mortgage products and if a

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customer decides to apply through a broker, it is the broker who is then responsible for informing the customer about the mortgage product, so that the customer can choose the best mortgage product that suits him/her/their needs.

The Provider states that it *“is satisfied that the content of the mortgage loan documentation was sufficiently clear and transparent that the Complainants did not have an entitlement to a tracker interest rate on their mortgage loan agreement”*.

The Complaints for Adjudication

The complaints are as follows:

- (a) the Provider *“mis-sold the Complainants the wrong mortgage”*; and
- (b) the Provider incorrectly failed to offer a tracker interest rate to the Complainants on the expiry of the fixed interest rate period in **June 2006**.

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 **07 July 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

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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 submissions from the parties indicate that the Complainants engaged the services of a third-party broker during the application process for the mortgage loan which is the subject of this complaint. As this complaint is made against the Respondent Provider only, it is the conduct of the Provider and not the broker which will be investigated and dealt with in this Decision. Therefore, the conduct of the third-party broker engaged by the Complainants, does not form part of this investigation and Decision.

In order to determine this complaint, it is necessary to review the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainants and the Provider from **2005** and **2018**.

The Complainants completed a mortgage loan application form with their broker on **15 March 2005**. Part 2 of the mortgage loan application form details the loan type required as "variable tracker" and the loan amount as €234,900.00. The Complainants signed the mortgage loan application form on the following terms:

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

The Provider subsequently issued a **Letter of Approval** dated **11 May 2005** to the Complainants which states as follows:

"Loan Type: Tracker Mortgage (ECB + max 1.40%) – Investment Loan

...

<i>Loan Amount:</i>	<i>EUR 232,200.00</i>
<i>Interest Rate:</i>	<i>3.40%</i>
<i>Term:</i>	<i>25 year(s)"</i>

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

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“D. THE INTEREST RATE APPLICABLE TO THIS TRACKER MORTGAGE LOAN MAY BE VARIED FROM TIME TO TIME BY [the Provider] PROVIDED THE INTEREST RATE WILL NOT EXCEED 1.40% OVER THE EUROPEAN CENTRAL BANK REFINANCING RATE (THE “ECB RATE”)

E. THE ECB RATE MAY BE VARIED FROM TIME TO TIME BY THE EUROPEAN CENTRAL BANK (THE “ECB”). IN THE EVENT OF ANY VARIATION OF THE ECB RATE, THE INTEREST RATE APPLICABLE TO THIS LOAN WILL BE NOT MORE THAN 1.40% OVER THE ECB RATE AS VARIED BY THE ECB AND THE REVISED INTEREST RATE FOR THE LOAN WILL APPLY NOT LATER THAN ONE CALENDER MONTH FROM THE DATE PROVIDED BY THE ECB AS THE DATE ON WHICH THE VARIATION TO THE ECB RATE WILL TAKE EFFECT.

...

H. PLEASE NOTE THAT WHERE THE APPLICANT SWITCHES THE RATE ON THIS LOAN TO A RATE WHICH IS FIXED FOR A CERTAIN PERIOD, THE APPLICANT MUST INFORM [the Provider], ON EXPIRY OF THE FIXED RATE PERIOD, WHETHER THE RATE ON THE LOAN IS TO SWITCH INTO A FURTHER FIXED RATE (IF AVAILABLE) OR WHETHER THE LOAN IS TO REVERT TO A TRACKER MORTGAGE LOAN AS DESCRIBED ABOVE. IN THE ABSENCE OF INSTRUCTIONS FROM THE APPLICANT AT THE EXPIRY OF THE FIXED RATE PERIOD, THE INTEREST RATE WILL SWITCH TO THE THEN CURRENT VARIABLE INTEREST RATE AND AS MAY BE VARIED FROM TIME TO TIME THEREAFTER.”

The **Letter of Approval** dated **11 May 2005** provided for a mortgage loan in the sum of €232,200.00, repayable over a term of 25 years, on a tracker interest rate of ECB + 1.40%. There is no evidence to suggest that the Complainants accepted and signed this **Letter of Approval**. Rather, the evidence shows Complainants contacted the Provider seeking to amend the details of the original **Letter of Approval**.

The Complainants submitted a signed **Amendment Request Form** dated **13 May 2005** to the Provider, through their broker, which details as follows:

“Dear Sir/Madam,

I wish to amend the following details of my [the Provider] loan offer:

Rate amended to a one year fixed new business @ 2.74%

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I/We should be obliged if you would issue me with an amended Approval in Principle/Loan Offer (delete as appropriate) taking into account the above changes."

The evidence shows that the Complainants elected to apply for a mortgage loan commencing on a 1-year fixed interest rate.

On foot of this request, the Provider issued an **Amended Letter of Approval** to the Complainants dated **19 May 2005**, which details as follows:

"Loan Type: Residential Investment Loan 1 Year Fixed New Business Rate

...

Loan Amount: EUR 232,200.00

Interest Rate: 2.74%

Term: 25 year(s)"

Special Condition A of the **Amended Letter of Approval** dated **19 May 2005** states as follows:

"A. GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 "CONDITIONS RELATING TO FIXED RATE LOANS" APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE."

The **General Mortgage Loan Approval Conditions** attached to the **Amended Letter of Approval** dated **19 May 2005** detail as follows:

5. CONDITIONS RELATING TO FIXED RATE LOANS

5.1 *The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*

5.2 *The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*

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- 5.4** *Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee.*

...

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** section of the **Amended Letter of Approval** dated **19 May 2005**, was signed by the Complainants on **02 June 2005** on the following terms:

- "1. I/we the undersigned accept the within offer on the terms and conditions set out in*
- Letter of Approval*
 - The general Mortgage Loan Approval conditions*
 - 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."*

The **Amended Letter of Approval** dated **19 May 2005** provides that a fixed interest rate of 2.74% would apply for the first year of the term of the mortgage loan, with a variable interest rate to apply thereafter. The variable interest rate made no reference to varying in accordance with fluctuations in the ECB main refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted and signed the **Acceptance of Loan Offer** on **02 June 2005** having confirmed that their solicitor fully explained the terms and condition of the mortgage loan agreement to them. The Complainants subsequently drew down mortgage loan account ending **3931** on a fixed interest rate of 4.10% on **21 July 2005**.

Prior to the expiry of the fixed interest rate period on **21 July 2005**, the Provider issued a letter to the Complainants dated **30 June 2006** which states as follows:

"Dear Mortgage Customer(s),

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I am writing to inform you that the fixed rate period on your mortgage account is due to expire on 21/07/2006.

In keeping with the terms of your loan, you now have the option to convert your loan to a variable interest rate loan at a current rate of 4.10%. [the Provider] also offers you the opportunity of fixing your interest rate again and I enclose details of the fixed rates currently available.

Please complete and return the attached form before the expiry date to your local branch or Mortgage Services, [address redacted].

It is important to note that if we do not receive a written instruction from you in relation to the above on or before the 21/07/2006, your loan will automatically be switched to the current variable rate and interest will be calculated on a monthly basis..."

A **Rate Options Form** was enclosed with the letter dated **30 June 2006** which detailed the following rates available for selection by the Complainants:

<i>"Variable Rate</i>	<i>- Currently;</i>	<i>4.10%</i>
<i>1 year fixed rate</i>	<i>- Currently;</i>	<i>4.45%</i>
<i>3 year fixed rate</i>	<i>- Currently;</i>	<i>4.85%</i>
<i>5 year fixed rate</i>	<i>- Currently;</i>	<i>4.99%"</i>

The Rate Options Form also detailed as follows:

"Contact [Provider] at [redacted telephone number] if you would like to hear about [Provider's] competitive range of ECB Tracker Mortgages".

In circumstances where the Complainants did not complete and sign the **Rate Options Form**, mortgage loan account ending **3931** converted to the Provider's variable interest rate of 4.10% on **21 July 2006**.

It is clear to me that in circumstances where the Complainants engaged the service of a broker with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly with the Complainants in relation to the application form or the interest rate options for the mortgage loan. The documentary evidence shows that the Complainants initially applied for a tracker interest rate mortgage loan and the Provider issued a **Letter of Approval** dated **11 May 2005** offering the Complainants a tracker interest rate of ECB + 1.40%. The Complainants however chose not to accept this

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loan offer from the Provider and instead requested a mortgage loan on a fixed interest rate. The Provider subsequently issued an **Amended Letter of Approval** dated **19 May 2005** which provided for a 1-year fixed interest rate of 2.74%, on foot of this request. The Complainants then accepted and signed the terms and conditions of the **Amended Letter of Approval** on **02 June 2005**. It was ultimately a matter for the Complainants to decide what type of mortgage loan and interest rate best suited their individual needs and circumstances. If it was the case that the Complainants were of the view that a fixed interest rate loan was not suitable for them, then the Complainants could have decided not to sign the **Acceptance of Loan Offer** and instead, seek an alternative interest rate with the Provider or indeed with another mortgage provider. However, the Complainants did not do so and proceeded to draw down mortgage loan account ending **3931** on a fixed interest rate of 4.10% on **21 July 2005**. The evidence therefore does not support the Complainants' assertion that they were mis-sold a fixed interest rate mortgage product as that is what they applied for and were offered by the Provider, and which they duly accepted having had the benefit of advice from their solicitor and broker.

The Complainants also maintain that they should have been offered a tracker interest rate on the expiry of the 1-year fixed interest rate period in **June 2006**. In order for the Complainants to have a contractual right to a tracker interest rate on expiry of the fixed interest rate period in **July 2006**, that right would need to be specifically provided for in the Complainants' mortgage loan documentation. However, no such right was set out in writing in the **Amended Letter of Approval** dated **19 May 2005**, which was accepted and signed by the Complainants on **02 June 2005**. In accordance with the terms and conditions of the mortgage loan agreement, the Complainants were contractually entitled to a variable interest rate on the expiry of the fixed interest rate period. The Provider therefore offered the Complainants the option of a variable interest rate of 4.10% together with a number of fixed interest rate options on the expiry of the fixed interest rate period in **2006**.

It was also open to the Complainants to contact the Provider to discuss the availability of ECB tracker mortgages. However, I have not been provided with any evidence to suggest that the Complainants contacted the Provider to explore such an interest rate. Even if the Complainants had contacted the Provider, it would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan.

For the reasons set out above, I do not uphold the complaint.

Conclusion

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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

29 July 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

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

