



<u>Decision Ref:</u>	2022-0261
<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
<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 was secured on the Complainants' private dwelling house.

The loan amount was €324,000.00 and the term of the loan was for 22 years. The particulars of the **Mortgage Loan Offer Letter** dated **24 September 2008** provided for a standard variable interest rate of 5.65% to apply for the term of the loan. A loan amount of €108,000.00 was drawn down on **19 December 2008** and the remaining amount of €216,000.00 was drawn down on a phased basis between **17 July 2009** and **18 November 2010**.

The Complainants' Case

The Complainants submit that they were not offered the option of a tracker interest rate during the mortgage loan application process in **2008**, nor were they shown any *"calculations or examples to compare"* the interest rate options available to them. The Complainants detail that the Provider was *"pushing [them] to borrow an additional 70k to add to [their] mortgage for the purchase of 2 cars and for [their] children's education."*

The Complainants submit that the option of a tracker mortgage loan was never mentioned by the Provider or discussed with them. The Complainants maintain that they were *“denied the option of a tracker because [they] were not given the option to avail of a tracker.”*

The Complainants are of the view that all available interest rate options *“should have been outlined in writing”* to them and that they should have been given the opportunity to consider the available interest rate options.

The Complainants detail that the Provider *“now relies”* on the letter it sent to the Complainants dated **24 September 2008** as *“the key piece of evidence”*. The Complainants submit that *“the Statement of Suitably (sic) is at the heart of this complaint and in fact this letter now shines a light on the lack of basic administration processes, coupled with the bank’s departure from the requirements [of the] CPC 2006”*. The Complainants submit that the *“letter of the 24th is misleading and clearly is a departure from both the letter and spirit of the Code.”*

The Complainants maintain that the Provider *“did not act fairly or professionally in the best interests of [them] the Customer.”*

The Complainants contend that in **2018**, they asked the Provider to disclose copies of the *“applicable rates shown to [the Complainants] in 2008”* which the Provider did not provide. The Complainants submit that the Provider does not meet the minimum standard of record keeping and refers to **Provision 49** of the **Consumer Protection Code 2006** in that regard.

The Complainants are seeking compensation of €60,000.00 in respect of their *“financial loss”*.

The Provider’s Case

The Provider submits that it offered the Complainants a loan amount of €324,000.00 repayable over a term of 22 years by way of **Mortgage Loan Offer Letter** dated **24 September 2008**. The Provider notes that the Complainants accepted and signed the terms of the loan offer on **02 October 2008**. The Provider submits that the interest rate applicable to the mortgage loan was a standard variable interest rate of 5.65%.

The Provider notes that the Complainants drew down the initial stage of their mortgage loan account in the amount of €108,000.00 on **18 December 2008** and the remaining

amount of €216,000.00 drew down on a phased basis between **17 July 2009** and **18 November 2010**.

The Provider submits that there was no contractual entitlement to a tracker interest rate contained in the **Mortgage Loan Offer Letter** dated **24 September 2008**.

The Provider explains that by way of **Mortgage Form of Authorisation** (“MFA”) which was signed and accepted by the Complainants on **07 April 2010**, the mortgage loan account switched to a 2-year fixed interest rate of 3.15%.

The Provider states that on **10 April 2012**, the mortgage loan account converted to a variable interest rate of 3.85% *“in line with the terms and conditions of the Offer Letter and in the absence of an alternative rate being selected by the Complainants prior to the expiry of the fixed rate period.”*

The Provider submits that by way of an **MFA** which was signed and accepted by the Complainants on **20 April 2016**, the mortgage loan account switched to a 5-year fixed interest rate of 3.45% which was implemented on **25 April 2016**. The Provider notes that the mortgage loan account remains on this interest rate to date.

The Provider submits that it is *“satisfied that a number of rate options, including a tracker rate, were discussed and offered as potential interest rate options on which the mortgage loan account might drawdown.”* The Provider maintains that it is entirely for the Complainants to decide what interest rate is the most appropriate for their specific circumstances, and also having regard for their financial needs at any point in time. The Provider submits that the Complainants were given the opportunity to avail of a tracker interest rate during the course of the mortgage application, as evidenced in the cover letter to the **Mortgage Loan Offer Letter**.

The Provider outlines that whilst it does not have contemporaneous records detailing the rationale for the Complainants’ choice of a standard variable interest rate, it notes *“that the relevant applicable tracker rate available in September 2008 was 5.85%, whereas the standard variable rate which the Complainants chose was 5.65%.”* The Provider submits that *“the lower rate on the standard variable rate may well have been a factor that guided the Complainants to their ultimate choice.”*

The Provider submits that tracker interest rates were introduced as a product by the Provider in **mid-2001** and were available to customers until **late 2008**, which is when the product was withdrawn from the market by the Provider.

The Provider states that the Complainants had been offered tracker rates on previous mortgage applications and *“chose not to proceed with these applications.”* The Provider maintains that *“it is clear that the Complainants were aware of the availability of a tracker rate of interest at draw down, as per these previous applications.”*

The Provider submits that the Complainants could have requested for the Mortgage Loan Offer Letter to be issued with a tracker interest rate at any point prior to **late 2008**. The Provider submits that it *“has no record of any such request.”*

The Provider details that the Complainants have referred to Section 31 of the Consumer Protection Code 2006 (recast as clause 5.19 of Consumer Protection Code 2012) which outlines the requirements of a Statement of Suitability. The Provider submits that it is *“satisfied that the letter of 24 September 2008 clearly satisfies the obligations required under clause 5.19 of CPC 2012.”*

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker interest rate during the application and drawdown of their mortgage loan account in or around **December 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 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

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Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties **14 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 days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this Office is set out below.

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

I note that the Provider has submitted copies of its internal system notes which were taken when the Complainants were applying for the mortgage loan with the Provider in **September 2008**. One of the internal system notes details as follows:

"BACKGROUND

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Please note that within the past year [the Provider] approved three new facilities for client (refs: [mortgage loan account ending 7078], [mortgage loan account 7694] & [mortgage loan account 6788]) which he did not proceed with and now wish to borrow as per this application instead."

The Provider has submitted copies of the three **Mortgage Loan Offer Letters** that it issued to the Complainants into evidence. Having reviewed and considered each loan offer, I note that all three loan facilities contained a contractual entitlement to a tracker interest rate on expiry of a fixed interest rate period. I have not been provided with any evidence to suggest that the Complainants signed and accepted any of these loan offers, nor has this been suggested by the Complainants.

On foot of a further application for a mortgage loan by the Complainants as outlined above, the Provider issued a **Mortgage Loan Offer Letter** dated **24 September 2008** to the Complainants under cover of letter dated **24 September 2008**. The Provider's letter to the Complainants dated **24 September 2008** enclosing the **Mortgage Loan Offer Letter** details as follows:

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“Dear [Complainants],

I am delighted to let you know that the [Provider] has approved your mortgage application. This approval is subject to the terms and conditions contained in the enclosed Mortgage Loan Offer (“Offer Letter”).

Based on the information you provided to us, we believe that the enclosed loan offer will meet your requirements and is suited to your needs as a customer who is moving house.

While details of fixed, variable and tracker rate options were discussed with you, we note that you have chosen the variable rate option as you are satisfied to accept that your repayments may change in line with market interest rate movement. A number of repayment options were also discussed with you and you have chosen a repayment mortgage where both interest and capital are paid over the term of the loan, thus reducing the capital balance outstanding.

You have selected to pay your mortgage over 22 years, as this is the term that suits your requirements.

Could I ask you to refer to the information in Part 1 (Statutory Loan Details) Section 1, 3 & 4 and Part 2 (Additional Loan Details) Section 11 and 12 of the enclosed Letter of Offer which detail your chosen options.

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Step 1 – WHAT SHOULD BE DONE NOW

(a) Please make sure that all Applicants sign and date one copy of the Offer Letter and return it to your mortgage adviser. You should retain the other copy for your records. This is an important legal document, which forms the legal basis for the loan. It also sets out the security required by the Bank. You are strongly recommended to seek legal advice prior to accepting the Offer Letter.

(b) Make sure that all attached documents are fully completed and returned to your mortgage adviser.

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If you have any questions, please do not hesitate to contact us. Please have your application number handy to help us identify your specific application. You can find this number at the top of this letter.”

The cover letter dated **24 September 2008** details that various available interest rate options were discussed with the Complainants during the mortgage loan application stage to include fixed, variable and tracker interest rate options. However, the Complainants had a preference for a variable interest rate option.

Part 1 – The Statutory Loan Details of the Mortgage Loan Offer Letter dated 24 September 2008 details the following:

“1. Amount of credit advanced:	€324,000
2. Period of Agreement:	22 Years
3. Number of	4. Amount
<u>Repayment Instalment</u>	<u>of each</u>
<u>Instalments</u> <u>Type</u>	<u>Instalments</u>
264 Variable at 5.650%	€2,141.65 ...”

Part 2 –The Additional Details of the Mortgage Loan Offer Letter details as follows:

“11. Type of Loan:	Repayment
12. Interest Rate:	5.650% Variable”

The notice at the end of the page containing **Part 4 – The Special Conditions** details as follows:

“This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the Notices set out on the last page of this Offer Letter.”

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.*

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- (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 **Acceptance and Consents** section of the **Mortgage Loan Offer Letter** was accepted and signed by the Complainants on **02 October 2008** 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."

The Complainants accepted the **Mortgage Loan Offer**, having confirmed that they had read and fully understood the terms and conditions attaching to the **Mortgage Loan Offer Letter** dated **24 September 2008**. The **mortgage loan account statements** submitted in evidence show that €108,000.00 was drawn down on **19 December 2008**. The remaining amount of €216,000.00 drew down on a phased basis between **17 July 2009** and **18 November 2010**.

The **Mortgage Loan Offer Letter** envisaged a standard variable interest rate of 5.65% to apply for the term of the loan. The variable rate, in the Complainants' mortgage loan documentation, made no reference to varying in accordance with variations in the European Central Bank refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainants accepted the **Mortgage Loan Offer Letter** on those terms.

The Complainants submit that the Provider has failed to comply with a number of provisions of the **Consumer Protection Code 2006**. In particular, the Complainants refer to **Provision 12, Provision 23, Provision 31, and Provision 49** of **Chapter 2** of the **Consumer Protection Code 2006** as well as **Provisions 16 – 18** in relation to lifetime mortgages under **Chapter 4** of the **Consumer Protection Code 2006**.

In accordance with the **Consumer Protection Code 2006**, "lifetime mortgage" means a loan secured on a borrower's home where: a) interest payments are rolled up on top of

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the capital throughout the term of the loan; b) the loan is repaid from the proceeds of the sale of the property; and c) the borrower retains ownership of their home whilst living in it. Having reviewed the provisions of the **Consumer Protection Code 2006** together with the Complainants' mortgage loan agreement with the Provider, this Office is satisfied that the nature of the Complainants' mortgage loan is not a "lifetime mortgage". Therefore, **Provisions 16- 18** of the **Consumer Protection Code 2006** are not applicable to the Complainants' mortgage loan.

Further, the mortgage loan documentation provided in evidence is clear and comprehensible and details clearly the nature of the applicable variable interest rate. It is important to note that the decision as to which interest rate best suited the Complainants' needs and circumstances was ultimately a matter for the Complainants. The Provider, having considered and assessed the Complainants' mortgage loan application, issued a loan offer to the Complainants that provided for a variable interest rate. If the Complainants were of the view that the nature of the interest rate provided for in the **Mortgage Loan Offer** dated **24 September 2008** was not suitable for them, the Complainants could have decided not to accept the offer made by the Provider or sought to have a different interest rate applied such as a fixed interest rate or a tracker interest rate. However, the Complainants accepted and signed the **Mortgage Loan Offer** on **02 October 2008** acknowledging that they fully understood the terms and conditions attaching to the loan offer.

It is important to note that although tracker interest rates were on offer generally by the Provider as part of its suite of products when the Complainants applied for the mortgage loan in **2008**, there was no obligation on the Provider to offer a tracker interest rate to the Complainants at that time or indeed any time up to which the Provider decided to withdraw tracker interest rate products. It was open to the Complainants to approach to Provider at any stage from drawdown of the loan up until **late 2008**, when the Provider withdrew tracker interest rates, to apply to switch their standard variable interest rate loan to a tracker interest rate loan. However, no evidence has been provided to suggest that the Complainants were proactive in taking any steps to change the interest rate applicable to their loan during this time.

For the reasons outlined above, I do not uphold the complaint.

Conclusion

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

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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

5 August 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.