



<u>Decision Ref:</u>	2022-0271
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	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 Complainant with the Provider. The mortgage loan that is the subject of this complaint was secured on the Complainant's private dwelling house.

The loan amount was €140,000.00 and the term of the loan was 25 years. The Loan Offer dated **20 January 2003** provided for a 1-year discounted variable interest rate to apply to the mortgage loan account.

The mortgage loan account was drawn down in full on **13 March 2003**.

The Complainant's Case

The Complainant submits that the Provider approved his application for a mortgage loan, subject to the Provider's variable interest rate on **20 January 2003**.

The Complainant submits that he requested a tracker interest rate to be applied to his mortgage loan account in **2006**, however the Provider informed him that his mortgage loan "*would not qualify*".

The Complainant submits that his income was often not sufficient to meet the monthly mortgage loan repayments and that his parents had to provide him with financial assistance to keep the mortgage loan repayments up to date.

The Complainant states that he received letters from the Provider which included interest rate options however there was never any mention of a tracker interest rate option.

The Complainant maintains that he has no record of receiving a telephone call, or any voicemail message from the Provider on **02 September 2008** or **07 October 2008**.

The Complainant is seeking for a tracker interest rate to be applied to his mortgage loan account which he would like backdated to the "*appropriate period*" and the repayment of any overpaid interest.

The Provider's Case

The Provider details that the Complainant's mortgage loan account drew down on **13 March 2003** on a 1- year discounted variable interest rate of 3.60%. The Provider further details that on the expiry of the 1-year discounted variable interest rate period, the Complainant's mortgage loan account converted to the Provider's standard variable interest rate of 3.25% and has since remained on a standard variable interest rate.

The Provider submits that the Complainant's interest rate entitlements were clearly outlined in the Loan Offer dated **20 January 2003** and in the accompanying mortgage loan conditions. The Provider states that the Complainant did not have a contractual entitlement to be offered a tracker interest rate at any stage during the term of the mortgage loan.

The Provider submits that it has no record of any discussion or contact between the Provider and the Complainant in relation to a request for a tracker interest rate in **2006**.

The Provider outlines that it has always been the Provider's practice to provide information to customers of all the interest rates available, when requested to do so, to enable customers to make an informed decision. The Provider details that its staff do not offer advice in relation to interest rates, however, they do provide information to customers on all available interest rate options at the time of the application and on foot of a request. The Provider maintains that the "*decision on which interest rate option to choose, from the rates available, remains the decision of the customer alone*".

The Provider submits that interest rates were widely advertised and publicly available through the Provider's website and on display in the Provider's branches. The Provider

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details that tracker interest rates were widely available to new and existing customers from **early 2004 to late 2008** and the Complainant could have sought for a tracker interest rate at any time during this period.

The Provider submits that its records indicate that on **02 September 2008**, following a request from the Provider's branch, the Provider offered the Complainant the option to avail of tracker or fixed interest rate options. The Provider submits that a follow up telephone call was made to the Complainant on **07 October 2008** however the Provider received no answer and left a voicemail for the Complainant. The Provider states that it has no record of any subsequent communications from the Complainant. The Provider submits that there was no obligation on the Provider at that time to record telephone calls and therefore it does not have any recording of the telephone calls which took place on **02 September 2008** and **07 October 2008**.

The Complaints for Adjudication

The complaints are as follows:

- (a) The Provider incorrectly failed to permit the Complainant to apply a tracker interest rate to his mortgage loan account in **2006**; and
- (b) The Provider incorrectly failed to formally offer the Complainant a tracker interest rate in **September 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

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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 on **22 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 Complainant's mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainant and the Provider between **2006** and **2008**.

The Complainant completed and signed a **Home Loan Application Form** on **30 December 2002**. Section E – Loan Details of the **Home Loan Application Form** details as follows under the heading "*interest rate*":

*****Variable ✓ or **Fixed or Split***

**Variable interest rates increase and decrease with changes in market rates.*

***If choosing a fixed rate, please complete the section below which outlines terms of conditions associated with fixed rate loans."*

The evidence shows that the Complainant selected the variable interest rate option. I note that the Provider only introduced tracker rates in **2004** and as such, it was not possible for the Complainant to choose a tracker interest rate when he applied for his mortgage loan in **2002**.

The Provider subsequently issued a **Loan Offer** dated **20 January 2003** to the Complainant which details as follows:

"...

<i>Type of Loan:</i>	<i>Repayment</i>
<i>Total Amount of Loan:</i>	<i>€140,000.00</i>
<i>Cheque Issue Amount:</i>	<i>€140,000.00</i>

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Monthly Repayment	€708.40
Interest Rate: Discount Year 1	3.60% (See Important Note)
After 1 year:	Variable Base Rate
Repayment Period (Years)	25 Approx.

Important Note On Variable Discount Rate:

The discount rate shown is the current discount rate. In the event of an interest rate change prior to the completion of this loan (i.e. advance of funds via your homeloan cheque) the rate will be altered to the variable discount rate on offer on the date of completion. If no discount variable rate is available at that time, the prevailing variable rate will apply.

...”

General Condition 3 of the **General Conditions for [Provider] Home Loans** provides as follows:

“3. Acceptance of terms and conditions: *By taking the loan from [Provider], the borrower accepts all the terms and conditions set out in the application form, offer letter, these general conditions and the mortgage.”*

Mortgage Condition 2 of the **Provider’s Mortgage Conditions** details as follows:

“2. How interest on the Loan is calculated and charged.

2.1 *The basis on which the interest rate in the Loan is calculated is stated in the Offer Letter.*

2.2 *The interest rate on the Loan may be increased or reduced by [the Provider] from time to time, however no change in the interest rate will be applied to the Loan during any period when the interest rate is a fixed rate.*

...”

This Office has not been furnished with the signed **Acceptance Form** attached to the **Loan Offer**. However, I have reviewed the **mortgage account statements** and I note that mortgage loan account ending **0583** was drawn down on **13 March 2003**. There is no dispute between the parties in that regard.

The **Loan Offer** dated **20 January 2003** envisaged that a 1-year variable discount interest rate of 3.60% would apply to the Complainant’s mortgage loan account with a “*variable base*” interest rate to apply thereafter. The nature of the “*variable base*” interest rate in

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the Complainant's mortgage loan documentation made no reference to varying in accordance with variations in the European Central Bank refinancing rate. The variable interest rate offered to the Complainant was not a tracker interest rate as tracker interest rate products were only introduced as a product offered by the Provider in **2004**.

The **mortgage account statements** show that the interest rate converted to the "variable base" interest rate on **31 March 2004** on the expiry of the 1-year discounted variable interest rate period.

The Complainant submits that he made a request to the Provider in **2006** to apply a tracker interest rate to his mortgage loan account, however the Provider did not permit him to apply a tracker interest rate. The Provider has no record of receiving any such request from the Complainant. The Complainant has also not provided any evidence to this Office that he made a request of this nature to the Provider in **2006**.

Nevertheless, it is important to note that the Complainant did not have a contractual or other entitlement to elect to apply a tracker interest rate on his mortgage loan account, and accordingly, there was no contractual or other obligation on the Provider to offer the Complainant a tracker interest rate on the mortgage loan account in **2006**, even if he had contacted the Provider and requested that a tracker interest rate be applied to the mortgage loan account.

The Complainant further submits that the Provider failed to formally offer him the option of a tracker interest rate in **2008**. There was no contractual obligation on the Provider to formally offer the Complainant a tracker interest rate on his mortgage loan account in **2008**. It appears that there was some contact with respect to the application of a tracker interest rate on this mortgage loan in **September 2008**.

The Provider has submitted a copy of its **contact summary log** in evidence which details the following entry for **02 September 2008**:

"Re call from [redacted] offered tracker rate of 1.50% - rate valid for 14 days. Also quote current fixed rates 3 yrs @ 6.24%, 5 yrs @ 6.05% and 10 yrs @ 5.79% - waiting on decision".

The **contact summary log** submitted in evidence also shows the following entry for **07 October 2008**:

"Re follow up on rates offered – phoned a left message".

The Provider submits that its records indicate that the request for interest rate options came through the Complainants' Branch and that options were provided on **02 September 2008**. The Provider further submits that it followed up directly with the Complainant and left a voicemail on **07 October 2008**.

The Provider has not provided the telephone call recordings of the telephone calls that took place on **02 September 2008** and **07 October 2008** which is disappointing, however I accept that the Provider was under no obligation to retain telephone recordings at that time.

The Complainant disputes that there was never any offer of a tracker interest rate. The Complainant's representative submits that "*I had almost all dealings with the [Provider] regarding the mortgage. [Complainant] states that he had no conversation with any representative of the Provider of being offered a tracker at any stage*". In the circumstances of this matter, and on the basis of the contemporaneous evidence available, I accept that the Provider did offer a tracker interest rate to the Complainant for his mortgage loan.

The offer of a tracker interest rate was made by the Provider in **September 2008** in accordance with the Provider's own retention policy at the time and the offer appears to have only been valid for 14 days. Making this offer was a commercial decision that the Provider was entitled to make. The offer of a tracker interest rate was not made on foot of any contractual obligation on the part of the Provider to apply a tracker interest rate to the Complainant's mortgage loan account pursuant to the terms and conditions of the **Loan Offer** dated **20 January 2003**. Consequently, I do not accept that there was regulatory or contractual obligation on the Provider to set out the offer of a tracker interest rate in writing to the Complainant.

If the Complainant was interested in applying a tracker interest rate to his mortgage loan account at that time, the Complainant could have proactively followed up with the Provider on foot of the verbal offer made by the Provider. However, this Office has not been provided with any evidence to suggest that the Complainant did so.

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

JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES

16 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—

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- (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.

