



<u>Decision Ref:</u>	2022-0300
<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 three mortgage loan accounts held by the Complainants with the Provider. The mortgage loan accounts which are the subject of this complaint were secured on the Complainants' principal private residence.

The details of these mortgage loan accounts are as follows:

- The loan amount for mortgage loan account ending **4903** was £85,000.00 and the term of the loan was 20 years. The **Letter of Approval** dated **09 November 1998**, outlines that the interest rate applicable to the loan was a variable interest rate for the term of the loan.
- The loan amount for mortgage loan account ending **2244** was €30,000.00 and the term of the loan was 15 years. The **Letter of Approval** dated **02 May 2003**, outlines that the interest rate applicable to the loan was a variable interest rate for the term of the loan.
- The loan amount for mortgage loan account ending **4530** was €40,000.00 and the term of the loan was 13 years. The **Letter of Approval** dated **09 March 2006**, outlines that the interest rate applicable to the loan was a variable interest rate for the term of the loan.

The Complainants' Case

The Complainants state that their mortgage loan account was originally taken out with the Provider in **1998**, *"after which [they] got two equity releases to complete work on [their] house"*. The Complainants submit that the Provider *"put"* them on a variable rate of interest. The Complainants assert *"that [they] should have been offered a tracker mortgage as they were available at that time"*.

The Complainants are seeking the following:

- (a) A tracker interest rate to be applied to their mortgage loan accounts; and
- (b) A refund of any overpayment in interest on their mortgage loan accounts backdated to **March 2006**.

The Provider's Case

The Provider states that the Complainants hold three mortgage loan accounts with the Provider and refer to each mortgage loan account separately as follows:

1. Mortgage loan account ending 4903

The Provider outlines that the Letter of Approval in relation to mortgage loan account ending **4903** was issued in **1998**, which was *"over 5 years in advance of [the Provider] launching its tracker interest rate products for new customers"*. The Provider notes that mortgage loan account ending **4903** did not contain any entitlement for the Complainants *"to be offered a tracker interest rate at any stage during the term of their loan"*.

The Provider details that mortgage loan account ending **4903** was on a variable rate of interest in accordance with the terms of the mortgage loan documentation and *"therefore the Complainants would not have been offered any interest rates unless they had enquired about changing [the] interest rate"*.

2. Mortgage loan account ending 2244

The Provider submits that mortgage loan account ending **2244** was drawn down by the Complainants in **2003**. The Provider states this mortgage loan was an *"equity release secured personal loan"*. The Provider explains that the security for this mortgage loan was

the mortgage deed which was originally executed as security for mortgage loan account ending **4903**.

The Provider states that, when it first introduced tracker interest rates in **2004**, it *“decided that tracker mortgage rates would not be applied to certain loan types”*, including equity release loans.

The Provider outlines that in **March 2006**, mortgage loan account ending **2244** *“was on a variable rate in accordance with their loan contract”*. The Provider states that the Complainants therefore *“would not have been offered any interest rates unless they requested this and the [Provider] had then decided in response to a request from them, to offer them an alternative rate”*. The Provider notes that in circumstances where it made a *“business decision not to offer tracker rates”* on equity release loans and given mortgage loan account ending **2244** was an equity release loan, a tracker interest rate option was not available.

3. Mortgage loan account ending 4530

The Provider submits that mortgage loan account ending **4530** was drawn down in **March 2006**. The Provider states that this mortgage was an *“equity release secured personal loan”* and therefore tracker mortgage rates were not available for this type of loan.

The Provider details that when a mortgage loan applicant approaches the Provider to apply for a mortgage, its staff members outline all available interest rate options to the applicant(s). The Provider states that it is then for an applicant, based on their individual personal circumstances, to determine the type of interest rate for which they wish to apply.

The Provider details that both fixed and variable interest rates were available for equity release loans at the time of the Complainants' mortgage loan application. The Provider submits that as the Complainants were applying for an equity release loan, *“they would not have been offered the option of a tracker rate as the [Provider] made a decision not to apply tracker rates to its equity release loans”*.

The Provider details that an equity release loan is *“a personal loan which is secured by an existing mortgage property previously mortgaged by an existing mortgage loan customer when a mortgage loan was drawn down previously which was secured by the same mortgage property”*. The Provider explains that as there is an existing mortgage at the time of the mortgage loan application, there was no requirement to complete a new mortgage process when the loan was drawn down *“as the security is already in place since the previous loan”*.

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The Provider states that the Complainants' mortgage loan accounts ending **4903, 2244** and **4530** are still active with the Provider.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainants a tracker rate on their mortgage loan accounts in **March 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 **09 August 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.

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In order to determine this complaint, it is necessary to review and set out the relevant provisions of the Complainants' mortgage loan documentation in relation to mortgage loan accounts ending **4903, 2244** and **4530** and certain interactions between the Provider and the Complainants from **1998** up until **2006**.

I will now consider each mortgage loan account in turn.

1) Mortgage loan account ending 4903

The Provider issued a **Letter of Approval** to the Complainants dated **09 November 1998** in relation to mortgage loan account ending **4903**, which provides as follows:

"IMPORTANT INFORMATION
(as at 9 November 1998)

...

- | | | |
|--------------------------------|-----|-------------|
| 1. Amount of credit advanced : | IR£ | 85000.00 |
| 2. Period of Agreement : | | 240 Months" |

The **Schedule** section of this **Letter of Approval** states as follows:

"Amount of Loan:	IR£	85000.00
Type of Loan		Variable Rate Annuity Loan
...		
Interest rate applicable at date of offer		6.650% pa"

The **Statutory Warnings** contained in the **Letter of Approval** provide as follows:

"WARNING: THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE BANK FROM TIME TO TIME".

General Condition 7 of the **General Conditions (Annuity Loans)** details as follows:

"Interest and Repayment:

The interest and repayment provisions applicable to the Loan depend on the type of the Loan as shown in the Schedule. The provisions applicable to the different types of loan are as follows:-

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7.1 Variable Rate Annuity Loan: *If the Loan is a variable rate annuity loan the rate of interest applicable to the Loan will be our variable annuity loan rate applicable to a facility of this nature as varied from time to time at our absolute discretion..."*

The Complainants accepted and signed the **Acceptance** section of the **Letter of Approval** on **13 November 1998**, on the following terms:

*"...
I/We have been advised by my/our solicitor in relation to this Letter of Offer
..."*

It is clear that the **Letter of Approval** dated **09 November 1998** envisaged a mortgage loan in the amount of £85,000.00, repayable over a term of 20 years, on a variable rate of interest. The nature of the variable interest rate was not one that tracked the variations in the ECB main refinancing rate. The Provider did not offer a tracker interest rate product until **early 2004**. There was no entitlement to a tracker interest rate as part of the mortgage loan terms and conditions. Consequently, the Provider was not obliged to offer the Complainants a tracker interest rate on mortgage loan account ending **4903** at any time during the term of the loan even after it introduced tracker mortgage products to the market.

Even if the Complainants had proactively sought a tracker interest rate from the Provider when such rates were available from **early 2004** until **late 2008**, it would have ultimately been within the Provider's commercial discretion to accede to such a request.

2) Mortgage loan account ending 2244

The Provider issued a **Letter of Approval** to the Complainants dated **02 May 2003** in relation to mortgage loan account ending **2244**, which details as follows:

"...

<i>Loan Type :</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
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Purchase Price / Estimated Value : EUR 300,000.00

Loan Amount : EUR 30,000.00

Interest Rate : 4.05%

Term : 15 year(s)

..."

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IMPORTANT INFORMATION AS AT 02.05.2003

1. Amount of credit advanced	EUR 30,000.00
2. Period of Agreement	15 years(s)
3. Number of Repayment Instalments	180
4. Amount of each Instalment	EUR 222.65
5. Total Amount Repayable	EUR 40,079.17
..."	

The relevant sections of the **Special Conditions** of the **Letter of Approval** provide as follows:

"C. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGE LOAN APPROVAL CONDITIONS."

The relevant sections of the **General Mortgage Loan Approval Conditions** provide 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"**
..."*

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the conditions relating to "[Name of Product]" **Equity Release Loans**. There was no specific condition in the **Conditions relating to "[Name of Product]" Equity Release Loans** in relation to the interest rate applicable to the loan.

The Complainants signed the **Acceptance of Loan Approval** on **12 May 2003**, on the following terms:

"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] Mortgage Conditions"*

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It is clear that the **Letter of Approval** dated **02 May 2003** envisaged a variable interest rate to apply for the term of the loan. The nature of the variable interest rate was not one that tracked the variations in the ECB main refinancing rate. As detailed above, the Provider did not make a tracker interest rate product available until **early 2004**. Rather, the nature of the variable interest rate was one which could be adjusted at the discretion of the Provider.

It is important to note that the Provider made a commercial decision when it introduced tracker interest rates in **early 2004**, that such rates would not be applied to “*equity release secured personal loans*” which was the loan type offered to the Complainants under the **Letter of Approval** dated **02 May 2003**. In this regard, this Office accepts that the Provider was entitled to make a commercial decision to not offer tracker interest rates on equity release loans. It is therefore clear that tracker interest rates would not have been available on this type of loan even if the Complainants had requested a tracker interest rate at any time after such rates were introduced by the Provider in **2004**. Consequently, there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate in respect of mortgage loan account ending **2244** at any time during the term of the loan.

3) Mortgage loan account ending 4530

The Complainants completed an **Application for Credit** dated **13 March 2006**, which provides as follows:

“2. Details of Mortgage Required

Type of Loan:

Amount of Loan required *EUR 40,000.00*

...

Loan Type *Equity Release Variable Rate Secured Personal Loan*

Repayment Term required *13 Years”*

The Complainants also signed the **Signature & Declaration** to the **Application for Credit** on the following terms:

“I/We declare that I/we am/are of full age and I/we hereby make application for an advance with [the Provider] upon mortgage of the property described above. I/We declare that the foregoing statements and particulars and any other information we have given to [the Provider] to be strictly true, to the best of my/our knowledge and belief.”

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The Provider subsequently issued a **Letter of Approval** to the Complainants dated **09 March 2006**, which details as follows:

“...

<i>Loan Type</i>	<i>Equity Release Variable Rate Secured Personal Loan</i>
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Purchase Price / Estimated Value : €300,000.00
Loan Amount : €40,000.00
Interest Rate : 3.70%
Term : 13 year(s)

...

IMPORTANT INFORMATION AS AT 09.03.2006

1) *Amount of credit advanced* €40,000.00
2) *Period of Agreement* 13 years(s)
3) *Number of Repayment Instalments* 156
4) *Amount of each Instalment* EUR 323.38
5) *Total Amount Repayable* EUR 50,451.03

...”

The relevant sections of the **Special Conditions** of the **Letter of Approval** provided as follows:

“C. PLEASE NOTE THE EQUITY RELEASE LOAN CONDITIONS CONTAINED IN THE GENERAL MORTGAGE LOAN APPROVAL CONDITIONS.

...

E. THIS ADDITIONAL LOAN WILL BE SECURED BY WAY OF AN EXTENSION OF THE [Provider’s] EXISTING LEGAL MORTGAGE OVER THE SECURITY REFERRED TO IN THE LETTER OF APPROVAL AND NO SEPARATE MORTGAGE DEED IS REQUIRED TO BE EXECUTED IN RESPECT OF THIS ADDITIONAL LOAN.”

The relevant sections of the **General Mortgage Loan Approval Conditions** provide as follows:

“...

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**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”
...”**

General Condition 11 of the **General Mortgage Loan Approval Conditions** outlines the conditions relating to “[Name of Product]” **Equity Release Loans**. There was no specific condition in the **Conditions relating to “[Name of Product]” Equity Release Loans** in relation to the interest rate applicable to the loan.

The Complainants signed the **Acceptance of Offer of an Additional Loan on 10 March 2006**, on the following terms:

“1. I/We the undersigned accept the above offer of an additional loan on the terms and conditions set out in

(iv) The above Letter of Approval

(v) The General Mortgage Loan Approval Conditions sent to me/us with the above Letter of Approval, a copy of which I/we have received; and

...

5. I/We confirm that I/we have obtained or been given an opportunity to obtain independent legal advice prior to accepting this offer of an additional loan.

6. We further acknowledge that where we have been approved an Equity Release Loan in our joint names and all or part of the loan will be transferred to a Holding Account, withdrawals may be made by us from the Holding Account on any one signature in accordance with Condition 11.10 of the General Mortgage Loan Approval Conditions.”

It is clear that the **Letter of Approval** dated **09 March 2006** envisaged a variable interest rate to apply for the term of the loan. The nature of the variable interest rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted at the discretion of the Provider. The **mortgage loan account statements** that have been submitted in evidence show that this mortgage loan account was drawn down on **30 March 2006**.

The Complainants contend that the Provider did not offer them a tracker interest rate on their mortgage loan accounts in **2006**. However, having considered the mortgage loan documentation which governs mortgage loan accounts ending **4903, 2244** and **4530**, it is clear to me that the Complainants did not have a contractual or any other entitlement for

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a tracker interest rate to be applied to any of their mortgage loan accounts in **2006** or indeed at any time during the term of each of their respective mortgage loans.

It is important to highlight that the loan offers in respect of mortgage loan accounts ending **4903** and **2244** were made by the Provider to the Complainants prior to the Provider offering a tracker interest rate as part of its suite of products. Therefore, the mortgage loan agreements did not contain any contractual entitlement to a tracker interest rate or an expectation that a tracker interest rate would be offered to the Complainants at a future date.

Although tracker interest rates were available generally from the Provider when the Complainants applied for and drew down mortgage loan account **4530** in **March 2006**, the Provider did not offer tracker interest rates in respect of equity release loans, as a matter of policy. It is important to note that the Provider was under no obligation to offer the Complainants any mortgage or any particular type of mortgage in **2006**. It was a matter for the Provider to decide firstly, if it was willing to offer the Complainants any additional borrowings at the time and secondly, how that offer would be structured.

The evidence shows that the Complainants completed an Application Form in relation to mortgage loan account ending **4530** to apply for the Provider's equity release mortgage loan product. The Provider subsequently issued a **Letter of Approval** dated **09 March 2006** to the Complainants offering an equity release mortgage loan product on a variable interest rate. If the Complainants did not want to pursue this option because they were unhappy with the rate applicable to the equity release mortgage, they could have decided not to accept the Provider's offer of the equity release product. Instead, the Complainants accepted the Provider's offer by signing the **Acceptance of Offer of an additional loan** on **10 March 2006** and an equity release mortgage loan was subsequently drawn down by the Complainants on a variable interest rate.

The Provider's decision to not offer tracker interest rates on equity release products in **2006** or at any other time, was a commercial decision which the Provider was entitled to make. The Provider was therefore under no obligation to offer the Complainants a tracker interest rate option on the equity release loan drawn down in **March 2006** under mortgage loan account ending **4530**.

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.



Handwritten signature of Jacqueline O'Malley in black ink.

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

31 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

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

