



<b><u>Decision Ref:</u></b>	2022-0315
<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**

##### **Background**

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

The loan amount was €356,150.00 and the term of the loan was 25 years. The particulars of the **Amended Letter of Offer** dated **28 March 2007** provided for a 36-month fixed interest rate of 5.09% with the Provider's prevailing variable interest rate to apply thereafter.

The mortgage loan was sold to another loan provider in **November 2018**.

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

The Complainants submit they applied for a mortgage loan with the Provider through a third-party broker. The Complainants state that they drew down mortgage loan account ending **686/2** in the amount of €356,150.00 in **March 2007** on a 3-year fixed interest rate. The Complainants detail that they requested an initial 3-year interest only repayment period which was granted by the Provider.

The Complainants detail that upon expiry of the fixed interest rate period in **2010**, the mortgage loan account was due to roll on to a variable interest rate. The Complainants state that since **2010** *“with the recession & collapse of rents”*, they made numerous requests to extend the interest only repayment periods which were granted by the Provider *“on the basis that [they] are unable to meet Capital and Interest repayments”*.

The Complainants further detail that they also made numerous requests to the Provider to review the nature of the interest rate that applied to their mortgage loan account since **2010**. The Complainants assert that they *“were never offered a tracker rate for this facility.”* The Complainants submit that they believe the Provider *“to be negligent in not offering [them] a tracker rate option particularly when [the Provider] w[as] aware of [their] financial distress.”* The Complainants further submit that the Provider has *“always declined [their] request for any rate reduction and [they] view this as blatant profiteering.”*

The Complainants maintain that the Provider has advised them that *“tracker rates were not available for buy to let facilities”* but the Complainants submit that they are *“aware of other [Provider] clients who were offered tracker rates.”*

The Complainants are seeking the following:

- (a) A tracker interest rate be applied to their mortgage loan account ending **686/2**, backdated to **2010**, and
- (b) A refund of any overpaid interest if a tracker interest rate had applied to the mortgage loan instead of a variable interest rate and that this amount *“be applied against the facility”*.

### **The Provider’s Case**

The Provider submits that while it understands that the Complainants had indicated a preference for a tracker interest rate on their mortgage loan application form, *“there was no obligation on the Bank to accede to the request and offer a tracker rate”*. The Provider details that by way of letter dated **13 March 2007**, the Complainants’ broker requested that the loan offer issue on a 3-year fixed interest rate.

The Provider asserts that it was *“under no obligation to offer the Complainants any type of mortgage at the time and it was within the Banks commercial discretion to determine as part of the underwriting process firstly if it was willing to make an offer of finance and secondly how any such offer would be structured.”*

The Provider details that the *“terms on which the Bank was prepared to offer finance were set out in the letter of offer, which the Complainants duly accepted and which did not offer a tracker rate.”* The Provider states that it recommended that the Complainants seek independent legal advice before accepting the terms of the loan offer. The Provider also states that a copy of the Letter of Offer was sent to the Complainants’ broker and to their solicitor. The Provider states that the Complainants subsequently signed the Letter of Offer in the presence of their solicitor.

The Provider details that the Letter of Offer stated that a variable interest rate would apply at the end of the 3-year fixed interest rate period. The Provider states that that the variable interest rate made no reference to *“being linked in any way to the ECB rate”* and there was *“no commitment that the prevailing variable rate referenced would track the ECB rate or any other quoted rate”*. The Provider states that there is *“no commitment to provide interest rate options to the Complainant on the expiry of the fixed rate period or indeed at any other time.”*

The Provider asserts that it did not offer the Complainants a tracker interest rate on the expiry of the fixed interest rate period in **2010** *“as they had no default or contractual entitlement to a tracker rate and there was no obligation on the Bank to offer a tracker rate.”* The Provider also states that *“there were no tracker rates available from the Bank after [mid-2008].”*

The Provider outlines that it is *“satisfied that the documentation for the Complainants mortgage account was sufficiently clear and transparent in addition to which the first named Complainant was the [named job title] providing independent financial advice and the Complainants had the benefit of independent legal advice in the event that they required any further clarification in this respect.”*

The Provider details that it did not say that *“tracker rates were not available for buy to let facilities”*. Rather, the Provider submits that *“in the Bank’s email of 3 May 2017 and final response letter of 30 July 2019 the Bank clarified that a particular product that had existed in 2006 – 2008 was not relevant to residential investment properties and had been available for private dwelling homes only.”*

The Provider *“strenuously denies”* the Complainants’ submission that the Provider has *“always declined [their] request for any rate reduction.”* The Provider outlines that given *“the loan account is in respect of a residential investment property, and not a private dwelling house, the Bank does not have an interest rate reduction restructure option available and was not in a position to provide same for the Complainants.”* The Provider states that it has *“provided a number of repayment arrangements to the Complainants over a ten year period.”*

The Provider states that the Complainants' mortgage loan account was not found to be within the scope of the Central Bank directed Tracker Mortgage Examination. The Provider submits that the *"loan account did not fall within the Framework for Conducting the Tracker Mortgage Examination as stipulated by the Central Bank of Ireland."* The Provider further submits that *"the case has been reviewed by the Tracker Mortgage Examination Dedicated Unit and no impact or detriment was identified."*

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider failed to offer the Complainants a tracker interest rate on the expiry of the 36-month fixed interest rate period in **2010** or at any subsequent time during the term of the mortgage loan.

### **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 **18 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.

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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 the application for the mortgage loan was submitted by the Complainants to the Provider through a third-party broker. 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.

The Complainants were informed of the parameters of the investigation by this Office, by letter dated **01 May 2020**, which outlined as follows:

*“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [The Provider] and this office will not be investigating any conduct of the named Broker in the course of investigating and adjudicating on this complaint.”*

Therefore, the conduct of the third-party broker engaged by the Complainants, does not form part of this investigation and decision for the reasons set out above.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainants’ mortgage loan. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between from **2010**.

The Complainants signed a **Mortgage Application Form** on **23 February 2007** which detailed a number of interest rate options under the section titled *“Please tick your choice of interest rate”*. The interest rate options available for selection were *“Variable”*, *“Discount”*, *“Tracker”*, *“Fixed”* or *“Fixed Term”*. The Complainants selected the *“Tracker”* option by ticking the appropriate box. The Complainants sought a loan amount of €356,150.00 and a term of 25 years.

In circumstances where the Complainants were engaging with a broker in relation to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainants during the application stage.

The evidence shows that the Complainants’ broker contacted the Provider by way of letter dated **13 March 2007** to request that a loan offer issue with a 3-year fixed interest rate as follows:

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*"We refer to the above matter and enclose herewith the following for your attention in this regard:*

- *Valuation, Can you please issue this loan offer with a 3yr fixed rate."*

The Provider issued an **Approval in Principle** letter to the Complainants' broker dated **14 March 2007** which details as follows:

*"Thank you for your recent application in relation to loan facilities for the above client(s). We are delighted to advise that facilities of up to €356,150.00 will be considered subject to:*

- 1. Evidence of Balance of Funds*
- 2. Loan subject to 3yr fixed rate.*
- 3. Satisfactory valuation report carried out by a [Provider] panel valuer..."*

On foot of receipt of the Complainants' **Mortgage Application Form**, the Provider issued a **Letter of Offer** dated **14 March 2007** to the Complainants for a loan amount of €356,150.00 repayable over a term of 25 years commencing on fixed interest rate of 5.09% for the first 36 months of the term of the mortgage loan. However, the Complainants did not accept and sign the **Letter of Offer** dated **14 March 2007**.

The Provider subsequently issued an **Amended Letter of Offer** dated **20 March 2007** to the Complainants which again provided for a loan amount of €356,150.00 repayable over a term of 25 years commencing on fixed interest rate of 5.09% for the first 36 months of the term of the mortgage loan. The Complainants accepted and signed the **Amended Letter of Offer** dated **20 March 2007**.

The evidence shows that the Complainants' broker contacted the Provider by way of email on **23 March 2007** as follows:

*"...  
The Loan Offer for the above Clients was originally sanctioned by [alternate Provider] in Jan 2006. The Clients just reapplied through us as the House just got ready..."*

The Provider subsequently issued a further **Amended Letter of Offer** dated **28 March 2007** to the Complainants which detailed as follows:

<i>"1. Amount of credit advanced</i>	<i>€356,150.00</i>
<i>2. Period of Agreement (Years – Months)</i>	<i>25 – 0</i>

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3. Number of Repayment Instalments	300
4. Amount of Each Instalment	€2,100.74
...	
18. Type of Advance	FLEXI RESLET ANNUITY
19. Interest Rate	5.09
	Fixed For 36 months."

**General Condition 3** of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **28 March 2007** details as follows:

*"In the case of Principal and Interest Mortgages, the advance together with interest at the interest rate (varying) will be repayable by monthly instalments (consisting of principal and interest) (varying in accordance with variations in the interest rate) over the term in accordance with the provisions of the draft Deed of Mortgage".*

**General Condition 7** of the **Loan General Conditions** attached to the **Amended Letter of Offer** dated **28 March 2007** details as follows:

*"The rate of interest applicable to this loan will be fixed for 36 months from date of drawdown. The interest rate and fixed rate term specified may vary on or before the date of drawdown of the mortgage and in such event, the prevailing fixed rate and fixed rate term at the date of drawdown will be notified to the Applicant(s) Solicitor. If during the fixed rate period, the Applicant (s) fully or partially redeem the advance or convert it to variable interest rate or another fixed interest rate loan, a break funding fee may be payable to the Lender ... At the expiry of the fixed rate period the Lenders prevailing variable rate will apply."*

**General Condition 17** of the **Loan General Conditions** details as follows:

*"THE LENDER RECOMMENDS THAT APPLICANT(S) SEEK(S) HIS/HER/THEIR SOLICITORS ADVICE IN RELATION TO THE LETTER OF OFFER THESE CONDITIONS AND THE ATTACHED DOCUMENTS. THE ACCEPTANCE SHOULD BE SIGNED IN THE PRESENCE OF THE SOLICITOR(S) CONCERNED WHO SHOULD BE A PRINCIPAL OR PARTNER IN THE FIRM(S) CONCERNED..."*

The **Loan General Conditions** also detail as follows:

**"WARNING:**

...

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

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The **Special Conditions** attaching to **Amended Letter of Offer** dated **28 March 2007** detail as follows:

*“This Letter of Offer replaces the Letter of Offer dated 14/03/2007 which is hereby cancelled*

*...*

*Repayment of this Advance is to be by way of a capital and interest (repayment) mortgage. The Applicant(s) may elect at any time to pay interest only (Interest Only Period) on the advance during the term of the mortgage for minimum periods of 3 months and up to a maximum period of 36 months. Unless otherwise advised, the maximum interest only period will apply from commencement of the Loan. In the event of the account falling into arrears, continuation of the Interest Only Period will be at the sole discretion of the Lender. Mortgage protection life cover must be put in place for a sum of not less than 110% of the loan amount or if the policy is an assignable level term policy it must cover the amount and term of the loan.”*

The Complainants accepted and signed the **Amended Letter of Offer** dated **28 March 2007** on **30 March 2007** on the following terms:

*“I/We the undersigned, accept the offer of an advance made to me/us by [the Provider] on foot of the Loan Application Form signed by me/us and on the terms and conditions set out in:-*

- (i) the Letter of Offer;*
- (ii) the Particulars;*
- (iii) the Lender's General Conditions for Home Loans;*
- (iv) the Special Conditions (if any);*
- (v) the Lender's standard Form of Mortgage;*
- (vi) the Assignment of Life Policy;*

*copies of which I/We have received and in respect of which I/We have been advised upon by my/our solicitor(s).”*

The mortgage loan account was drawn down on **15 May 2007** on a fixed interest rate of 5.09%.

It is clear that the **Amended Letter of Offer** dated **28 March 2007** provided for a fixed interest rate of 5.09% for a period of 36 months. **General Condition 7** details that the Provider's prevailing variable interest rate will apply on the expiry of the fixed interest rate period. The nature of the prevailing variable interest rate in this case made no reference to

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varying in accordance with variations in the ECB main refinancing rate. In order for the Complainants to have a contractual right to a tracker interest rate on the expiry of the initial fixed interest rate period, 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 Offer** dated **28 March 2007**. The Provider's variable interest rate was one that could be adjusted by the Provider from time to time as opposed to one that comprised the ECB base rate and a specific margin over the ECB base rate as set by the Provider.

The Provider has submitted a copy of its "*Rate Matrix*" for residential investment loans in evidence which shows that tracker interest rates were available subject to certain eligibility and lending criteria in respect of loan amounts over €250,000.00. However, the evidence shows that while the Complainants initially applied for a tracker interest rate, they decided to subsequently apply for a 3-year fixed interest rate through their broker and a loan offer was issued to that effect. The Complainants duly accepted and signed the terms of the **Amended Letter of Offer** dated **28 March 2007** noting that they had been advised by their solicitor in relation to the terms and conditions set out in the mortgage loan documentation.

Prior to the expiry of the 36-month fixed interest rate period in **May 2010**, the Provider does not appear to have issued a letter to the Complainants setting out the interest rate options available at the time. However, the Provider was under no obligation to do so as the **Amended Letter of Offer** dated **28 March 2007** clearly stipulated that the Provider's prevailing variable interest rate would apply on the expiry of the fixed interest rate period. The evidence shows that the Provider's investment variable interest rate of 4.19% was applied to the Complainants' mortgage loan account on **02 May 2010**. As the property the subject of the Complainants' mortgage loan was a residential investment property, the Provider's investment variable interest rate was applied to the loan.

The Provider has furnished a detailed outline of the interest rate history in respect of the Complainants' mortgage loan account since draw down as follows:

Effective Date	Reflected in Repayment Date	Interest Rate	Notes
Drawdown	01/06/2007	5.09%	3 Year Fixed Rate
02/05/2010	N/A	4.29%	Investment Variable Rate
03/05/2010	01/06/2010	4.50%	Investment Variable Rate
31/05/2011	01/07/2011	4.90%	Investment Variable Rate
04/09/2011	01/10/2011	5.15%	Investment Variable Rate
04/12/2011	01/01/2012	4.90%	Investment Variable Rate

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03/03/2013	01/04/2013	5.15%	Investment Variable Rate
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The **mortgage loan account statements** submitted in evidence show that an interest rate of 5.15% applied to the Complainants' mortgage loan account from March 2013 up until **30 November 2018**, when the mortgage loan was sold to another entity.

The Complainants wrote to the Provider by way of letter dated **25 November 2011** to request that the applicable interest rate be reviewed and to request an extension to the interest only repayment period that was in place at the time. The letter states as follows:

“ ...

*I note the interest rate on the account is 5.15% which is obviously restricting our capacity for capital reductions. Would the Bank be in a position to review our interest rate to allow more capital to be applied to our loan repayments.*

*In the interim we wish to apply for a further extension of interest only and look forward to hearing from you in due course.*

“ ...”

An email exchange subsequently took place between the First Complainant and the Provider. By way of e-mail on **06 January 2012**, the Provider requested the Complainants to complete two separate standard financial statements so that the Provider could get a complete overview of their financial situation. By way of e-mail on **12 January 2012**, the Provider's representative indicated that it had “*applied for an interest only facility on the account and am awaiting a decision on same*”. By way of e-mail on **13 January 2012**, the First Complainant queried “*what the proposed interest only repayment will be and also what rate it is based on?*”. The Provider's representative informed the First Complainant by way of e-mail on **13 January 2012** that the “*current interest repayments on the account are 1445.18 this is based on the investment variable rate of 4.9%*”. The First Complainant raised a concern with the Provider's representative by return e-mail on **13 January 2012** as he believed that 6 months was not “*long enough for our finances to improve significantly to allow for any increased repayments and accordingly we cant commit to any capital repayments at this stage*”.

By way of email on **13 January 2012** to the First Complainant, the Provider's representative noted as follows:

“ ...

*I have discussed this case again and I can propose the interest only for 6 months subject to review again at the end of this period, however it will only be reviewed for interest & a level of capital repayment. Please advise how you want to proceed:*

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*6 month interest only facility from Dec '11*

*Or*

*6 month interest only facility from Dec '11 followed by 6 months interest and a fixed capital repayment of EUR 400 per month.*

*...”.*

The First Complainant replied on **16 January 2012** as follows:

*“Go for the 6 months interest only option followed by review.*

*I note intention to go to capital repayments and if finances allow we will comply. We cannot commit to capital repayments at this stage but subject to a review in 6 months we can see where we stand..”*

The Complainants appear to submit that the Provider was “*negligent*” in not offering the Complainants a tracker interest rate despite the Provider being aware of the Complainants financial difficulties from **2010**. The Complainants also contend that the Provider declined their requests for a reduction in their interest rate. However, it is important to highlight that the Complainants had repayment obligations under **General Condition 7** of the **Loan General Conditions** to make monthly principal and interest repayments. While I appreciate that the Complainants made it clear that they could not afford full capital and interest repayments, the evidence shows that the Provider communicated with and worked with the Complainants to come to a sustainable solution based on their financial circumstances by facilitating interest only repayment periods. The Provider was under no obligation to offer the Complainants a tracker interest rate or a reduction in the applicable interest rate generally.

It is important to note that the Complainants mortgage loan was governed by the **Amended Letter of Offer** dated **28 March 2007** and terms and conditions attaching to the **Amended Letter of Offer** that were accepted by the Complainants, none of which contained a contractual entitlement to a tracker interest rate at any stage during the term of the loan. If the Complainants were not happy with the terms of the **Amended Letter of Offer** dated **28 March 2007**, including the terms with respect to the applicable interest on the expiry of the fixed interest rate period, the Complainants could have decided not to accept the offer made by the Provider, or they could have sought clarification from their broker about the type of variable rate applicable to the mortgage upon the expiry of the fixed interest rate. In circumstances where the Complainants were engaging with a broker

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with respect to the mortgage loan application, there was no requirement for the Provider to communicate directly to the Complainants during the application stage.

It is important to highlight that the fact that other customers of the Provider, or indeed other customers of any other financial service providers, had a tracker interest rate applied to their mortgage loans, did not in any way create an obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan with the Provider, as the Complainants have submitted. The evidence shows that the choice to take out the mortgage loan on the terms and conditions offered by the Provider in **2007** was a choice that was freely made by the Complainants.

The Complainants' mortgage loan drew down on a 36-month fixed interest rate and on the expiry of the fixed interest rate period, the Provider's prevailing variable interest rate applied. I am satisfied that the Provider acted in accordance with the terms and conditions of the **Amended Letter of Offer** dated **28 March 2007** in terms of the interest rate applicable to the loan.

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

### **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**  
**HEAD OF LEGAL SERVICES**

9 September 2022

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## **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.