



<u>Decision Ref:</u>	2022-0319
<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 Complainants with the Provider. The mortgage loan account was secured on the Complainants' principal private residence.

Mortgage loan account ending **9310** was drawn down on **27 June 2005**. The loan amount was €220,800.00 and the term of the loan was 30 years. The mortgage loan account commenced on a 24-month discounted variable interest rate with the "*then prevailing Home Loan variable rate*" to apply thereafter.

The Complainants' Case

The Complainants submit that they were "*ill-advised and not correctly informed by [the Provider] with regard to [their] mortgage options*". The Complainants submit that they were not made aware of the tracker interest rate option during the mortgage loan application stage in **2005** or upon expiry of the discounted variable interest rate period in **2007**, when they applied a 5-year fixed interest rate to their mortgage loan account.

The Complainants state that there was no communication from the Provider from the period between **2007** and **2012** to inform them of the withdrawal of the tracker interest rates.

The Complainants submit that two separate Mortgage Forms of Authorisation, with different interest rate options, were presented to them at the end of the discounted variable interest rate period in **2007**. The Complainants detail that on receipt of a Mortgage Form of Authorisation, they attended the Provider's branch to discuss interest rate options with an employee of the Provider. The Complainants note that a different Mortgage Form of Authorisation was presented to them in the branch, which did not include a tracker interest rate option. The Complainants state that they relied upon the information being given as "*sound advice and accurate information*". The Complainants maintain that they could not have rejected the tracker interest rate option when the Mortgage Form of Authorisation that was produced in the branch did not contain such an option.

The Complainants submit that they were reassured by the Provider, when discussing interest rate options with the employee of the Provider, that "*the full range of options, including tracker rates, would still be available to [the Complainants] at the end of the five years*".

The Complainants are of the view that they should have been informed that tracker interest rates were being withdrawn in **late 2008**. The Complainants outline that a variable interest rate of 4.35% was applied to their mortgage loan account in **2012**.

The Complainants submit that they should have been offered the range of options available at the time when they fixed their interest rate in **June 2007** and not just those available when the fixed interest rate expired in **June 2012**. The Complainants assert that fixing the interest rate at 5.19% was "*a calamitous decision which left [their] family with very high mortgage repayments at a time of falling income*".

The Complainants are seeking the following:

- (i) An apology from the Provider;
- (ii) Financial compensation from the Provider for paying a higher than necessary mortgage interest rate; and
- (iii) Compensation for stress, anxiety and hardship.

The Provider's Case

The Provider submits that the Mortgage Loan Offer Letter in relation to mortgage loan account ending **9310** provided for a mortgage loan in the sum of €220,800.00, repayable over a term of 30 years. The Provider notes that an initial discounted variable interest rate applied for the first 24 months of the term of the loan.

The Provider submits that the default interest rate applicable to mortgage loan account ending **9310** on expiry of the initial discounted variable interest rate period was a standard variable rate. The Provider states that, at its discretion, it could offer various other interest rate options to the Complainants upon the expiry of the initial discounted period.

The Provider submits that the Mortgage Loan Offer Letter contained no provision for a tracker interest rate. The Provider submits that it is satisfied that the information contained in Special Condition 4 (a) (iv) is sufficiently clear and transparent as to what interest rate, namely a standard variable rate, would apply upon the expiry of the initial discounted period in **June 2007**.

The Provider submits that prior to the expiry of the initial discounted variable interest rate period, the Provider wrote to the Complainants on **28 May 2007** to notify them of the various interest rate options available to them, to include a tracker interest rate of ECB + 1.25%. The Provider states that it is unable to provide this Office with an exact copy of the Product Review Notice which issued to the Complainants at that time.

The Provider outlines that a Mortgage Form of Authorisation was also provided to the Complainants in **June 2007** which offered a range of interest rate options for the mortgage loan account to switch to upon the expiry of the initial discounted interest rate period in **July 2007**. The Provider maintains that it had no contractual obligation to offer a range of interest rate options to the Complainants. The Provider states that the Complainants were free to select one of the interest rate options offered or not. The Provider explains that if a customer does not choose from one of the interest rate options made available, the interest rate on the mortgage loan account will switch to an interest rate to be determined by the terms and conditions of the mortgage loan agreement.

The Provider submits that the Complainants did not complete the Mortgage Form of Authorisation and instead, they completed a separate Mortgage Form of Authorisation "*which is a branch only MFA which could only be used for non-tracker rate*" and opted to apply a five-year fixed interest rate of 5.19% to their mortgage loan account. The Provider states that having reviewed its records, it can find no evidence of a meeting between the Complainants and a representative of the Provider during which the Complainants were "*assured in 2007*" that the full range of options available to them would still be available at the end of the five-year fixed interest rate period.

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The Provider submits that if such advice was given, as submitted by the Complainants, namely that, upon the expiry of a fixed interest rate period, a tracker rate of interest would be included in the suite of options provided as part of a rate options letter, this advice would have been accurate at the time the alleged advice was given. The Provider refutes the Complainants' contention that the provision of such advice would in any circumstances constitute a contractual agreement between the Provider and the Complainants. The Provider asserts that a conversation between a customer and an advisor does not constitute a contract under any circumstances.

The Provider submits that by completing the Mortgage Form of Authorisation in **June 2007**, the Complainants chose to move the mortgage loan account to a fixed rate for a period of five years.

The Provider submits that it is satisfied that the Mortgage Form of Authorisation "*clearly states that outside of the terms explicitly being amended, namely that the mortgage loan account would move to a 5 years fixed term period, no other terms were amended by the completion of the 2007 MFA.*" The Provider states that the Mortgage Form of Authorisation did not suggest that the Provider was obliged to provide the Complainants with a tracker interest rate of any sort at the end of the five-year fixed interest rate period.

The Provider submits that prior to the expiry of the five-year fixed interest rate period, it issued a rate options letter in **May 2012**. The Provider details that it offered the Complainants a range of interest rate options and the Complainants signed a Mortgage Form of Authorisation "*to revert to the existing standard variable rate of 3.85%*". The Provider explains that when the fixed rate period expired in **2012**, tracker interest rates were no longer offered by the Provider.

The Provider maintains that the Complainants were not "*placed*" on any particular interest rate by the Provider but rather chose to switch the interest rate on their mortgage loan account to the Provider's standard variable rate of their own volition. The Provider submits that there is "*no ambiguity, lack of clarity or vagueness, contained in the 2012 MFA when read in conjunction with the Offer Letter*".

The Provider submits that it was under no obligation to advise the Complainants, who did not have an entitlement to a tracker interest rate, of the Provider removing such interest rates as part of its product offering.

The Complaints for Adjudication

The complaints for adjudication are as follows:

- (a) The Provider failed to offer the Complainants a tracker rate of interest in **June 2007** when they applied a five-year fixed interest rate to their mortgage loan account;
and
- (b) The Provider did not contact the Complainants to inform them of the withdrawal of the tracker interest rate option during the period from **2007 to 2012**.

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 **26 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 the relevant provisions of the Complainants' mortgage loan documentation and to consider certain interactions between the Complainants and the Provider between **2007** and **2012**

The Provider issued a **Mortgage Loan Offer Letter** dated **13 June 2005** to the Complainants which provided as follows:

Part 1 – The Statutory Loan Details of the **Mortgage Loan Offer Letter** details as follows:

“1. Amount of credit advanced:	€220,800
2. Period of Agreement:	30 Years
3. Number of Repayment <u>Instalments</u>	4. Amount of each <u>Instalment</u>
18	Variable at 2.750% €923.10
336	Variable at 3.60 0% €1,021.42”

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

“11. Type of Loan:	Repayment
12. Interest Rate:	2.750% Variable”

Part 4- The Special Conditions of the **Mortgage Loan Offer Letter** details as follows:

“(a) The following Special Conditions apply to the Loan:

....

- (iv) The interest rate applicable to the loan has been discounted by 0.85% per annum on the amount of the Loan for a period of 24 months from the date of drawdown of the Loan. At the end of the said discount period the reduction shall cease and the interest rate applicable to the Loan shall revert to the then prevailing Home Loan variable rate.”

The **Mortgage Loan Offer Letter** also details the following:

“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.”

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General Conditions 6 and 7 of Part 5 – The General Conditions of the Mortgage Loan Offer Letter detail 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.*
- (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), 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).”*

7. Fixed Interest Rates

- (a) The Lender may at its absolute discretion permit the Borrower to avail of a fixed interest rate in respect of all or any part of the Loan. In the case of a fixed rate loan, the interest rate shall, subject to these Conditions, be fixed from the date of draw down for the fixed period stated in this Offer Letter. The fixed rate of interest set out in this Offer Letter is the fixed rate which would apply were the Loan drawn down today. There is no guarantee that the fixed rate so stated will be available when the Loan is in fact drawn down. The actual fixed rate that shall apply shall be the Lender’s fixed rate available for the fixed period selected by the Borrower at the date of draw down.*
- (b) The Lender shall have sole discretion to provide any further or subsequent fixed rate period. If the Lender does not provide such a further or subsequent fixed rate period or if the Lender offers the Borrower a choice of interest rate at the end of any fixed rate period and the Borrower fails to exercise that*

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choice, then in either case the interest rate applicable to the Loan will be a variable interest rate."

The **Consumer Credit Act Notices** included on the last page of the **Mortgage Loan Offer Letter** detail as follows:

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

The Complainants signed the **Borrower's Acceptance and Consents** section of the **Mortgage Loan Offer Letter** on **13 June 2005** 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 **mortgage loan account statements** submitted in evidence show that mortgage loan account ending **9310** was drawn down on **27 June 2005** on a discounted variable interest rate of 2.750%.

It is clear to me that the **Mortgage Loan Offer Letter** provided for an initial 24-month discounted variable interest rate of 2.750%, with the Provider's home loan variable interest rate to apply thereafter. The nature of the variable interest rate was one that could be adjusted by the Provider at any time.

There is no reference in the **Mortgage Loan Offer Letter** to an entitlement to a tracker interest rate at the end of the 24-month discounted variable interest rate period. In order for the Complainants to have a contractual right to a tracker interest rate at any time during the term of the loan, that right would need to have been specifically outlined in the mortgage loan documentation, that was signed by the parties. However, no such right was set out in writing in the **Mortgage Loan Offer Letter** which was signed by the Complainants on **13 June 2005**.

Prior to the expiry of the initial discounted variable interest rate period in **2007**, the Provider submits that it issued a **Product Review Notice** to the Complainants on **28 May 2007**. The Provider explains that it is unable to produce a copy of the exact **Product Review Notice** that issued to the Complainants in evidence. However, the Provider has submitted a screenshot of its internal system in evidence showing the "*letter history*" in relation to the Complainants' mortgage loan account. The internal notes show that a "*Product Review Notice*" issued on **28 May 2007**. The Provider has submitted a "*proxy*" **Product Review Notice** that issued to customers who were coming to the end of a fixed

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interest rate period at the same time as the Complainants. The Provider has not submitted any explanation as to why it does not hold an exact copy of the **Product Review Notice** which issued to the Complainants.

Provision 49 of the **Consumer Protection Code 2006** governs retention of records and was not effective until **01 July 2007**. In these circumstances, while I am disappointed that the Provider has failed to retain records, there was no breach of the **Consumer Protection Code 2006**.

I note that the “*proxy*” **Product Review Notice** includes the option of a home loan variable interest rate of 5.090% or a tracker interest rate of ECB + 1.25%. The Complainants explain in their submissions that on receipt of the **Product Review Notice** from the Provider, they decided to attend a branch of the Provider in order discuss the interest rate options with a representative of the Provider.

I have been provided with a **Mortgage Form of Authorisation** which was completed by the Complainants in the branch and which details as follows:

“1. I wish to apply for the interest rate indicated below for my Mortgage Loan. I understand this rate will apply to my Mortgage Loan from the expiry date of my current fixed rate period (if applicable)

<i>Standard variable</i>	<i>Rate</i>	<input checked="" type="checkbox"/>	<i>5 year fixed</i>	<i>Rate 5.19%</i>
<i>3 year fixed</i>	<i>Rate</i>		<i>10 year fixed</i>	<i>Rate</i>
<i>Other</i>	<i>Rate</i>			<i>”</i>

This **Mortgage Form of Authorisation** does not contain the option of a tracker interest rate. I note that both the “*proxy*” **Product Review Notice** and **Mortgage Form of Authorisation** contained variable interest rate options which the Provider was contractually obliged to offer the Complainants in line with the terms and conditions of the mortgage loan agreement. The Complainants completed and signed the **Mortgage Form of Authorisation** on **8 June 2007** on the following terms:

“I agree to the following terms:

- (i) *The interest rate I have chosen on this form will apply to my Mortgage loan from the expiry of my current fixed rate (if applicable)*

...

These terms replace similar terms in my Homeloan Letter of Offer

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I confirm that my Home Loan Letter of Offer as amended by this Authorisation remains in force.”

The **Mortgage Form of Authorisation** provided in evidence shows that the Complainants selected a five-year fixed interest rate of 5.190%. The **mortgage loan account statements** furnished in evidence show that a fixed interest rate of 5.190% was applied to the Complainants’ mortgage loan account on **11 June 2007**.

On the expiry of the five-year fixed interest rate period, the Complainants completed and signed a **Mortgage Form of Authorisation** on **30 May 2012** wherein they selected to apply an LTV variable interest rate to their mortgage loan. The **Mortgage Form of Authorisation** details as follows:

“...

SECTION A: ABOUT THIS FORM

This form allows you to select a new interest rate for your Loan. We have sent you this form because (a) you fixed the rate of interest on you Loan for a period which is due to end shortly.; OR (b) you have asked us for a new interest rate for the Loan.

...

SECTION B: THE SELECTION OF INTEREST RATES

...

✓	Existing Variable LTV Rate PDH	3.850%
	2 Year Fixed (PDH)	4.690%
	3 Year Fixed (PDH)	4.890%
	5 Year Fixed (PDH)	5.290%
	10 Year Fixed Rate	6.190%”

The above **Mortgage Form of Authorisation** included the option of various fixed interest rates or a variable interest rate. The evidence shows that the Complainants chose to apply the existing variable LTV interest rate of 3.850%.

The Complainants contend that they were assured at a meeting with a representative of the Provider that all available interest rates that were offered to them in **2007**, to include a tracker interest rate, would be available to them on the expiry of the five-year fixed interest rate period in **2012**. It appears from the Complainants’ submissions that they are

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of the view that they would not have proceeded to apply a five-year fixed interest rate period in **2007** if not for the assurances that they purportedly received from the Provider. However, I have not been provided with any evidence to support the Complainants' submission that they were given any such assurances or guarantee from the Provider in **2007** that they would be offered a tracker interest rate some five years later.

Having considered the mortgage loan documentation, it is clear to me that the Complainants did not have a contractual entitlement to a tracker interest rate at the end of the initial discounted variable interest rate period in **2007** however the Provider, in line with its own commercial discretion and policy at the time, offered the Complainants the option to apply a tracker interest rate to their mortgage loan. In this regard, I accept that the **Mortgage Form of Authorisation** which was issued and received by the Complainants in **June 2007**, contained sufficient detail about the availability of tracker interest rates at that time, such that the Complainants could make an informed decision as to which interest rate to choose from at the end of the initial discounted interest rate period.

It appears that the Complainants decided to meet with a representative of the Provider to discuss their interest rate options in **2007**. While I have not been provided with any details of what was discussed during this meeting, it is clear that the Complainants ultimately decided to apply a five-year fixed interest rate to their mortgage loan account in **2007**. It is important to note that if the Complainants wanted independent advice about interest rates available in the market or the market generally in **2007**, the Complainants could only get that advice from an independent third-party advisor.

It was ultimately a matter for the Complainants to decide which interest rate best suited their needs in **2007**.

The evidence shows that despite being offered a tracker interest rate, at the Provider's discretion, in **2007**, the Complainants chose to apply a five-year fixed interest rate to their mortgage loan account. **General Condition 7** of the **Mortgage Loan Offer Letter** clearly provided that on the expiry of a fixed interest rate period, the Provider could offer the Complainants a further fixed interest rate, and if a fixed interest rate was not available or if the Complainants chose not to apply a fixed interest rate, a variable interest rate would apply. It is clear to me therefore that the terms of the mortgage loan documentation, to include the **Mortgage Form of Authorisation** that was completed by the Complainants in **June 2007**, did not create any expectation, or provide any guarantee that a tracker interest rate would be available at the end of the fixed interest rate period.

While the Complainants submit that they were assured that a tracker interest rate would be available in **2012** during the course of their discussions, in order to have an entitlement to the tracker interest rate this would have to be specifically outlined in the **Mortgage**

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Form of Authorisation. No such assurance was reduced to writing by the parties. It is important to note that the Complainants did not obtain a contractual right to be offered a tracker interest rate in **2012** just because a tracker interest rate was offered to them in **2007** at the discretion of the Provider.

The Complainants also submit that the Provider should have informed them of its intention to withdraw tracker interest rates from the market before the five-year fixed interest rate period expired in **2012**. I note that the Provider issued a statement in **late 2008** notifying customers that it would be withdrawing tracker interest rate options from the market, and I accept that this was a commercial decision that the Provider was entitled to make. In addition, I am satisfied that there was no obligation on the Provider to inform the Complainants specifically that such interest rates were being withdrawn from the market in circumstances where the Complainants had no contractual entitlement to a tracker interest rate.

For the reasons set out 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**

20 September 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.