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| <u>Decision Ref:</u> | 2022-0328 |
| <u>Sector:</u> | Banking |
| <u>Product / Service:</u> | Tracker Mortgage |
| <u>Conduct(s) complained of:</u> | Refusal to move existing tracker to a new mortgage product Failure to offer a tracker rate at point of sale |
| <u>Outcome:</u> | Rejected |

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account ending **4734** held by the Complainants with the Provider. This mortgage loan is secured on the Complainants' principal private residence.

The loan amount was for €372,000.00 and the term of the loan was 34 years. The **Amended Loan Offer Letter**, which was accepted and signed by the Complainants on **02 August 2010**, outlined that the interest rate applicable to the mortgage loan was a variable interest rate of 2.85%.

The Complainants previously held mortgage loan account ending **1724** with the Provider, which was redeemed in full on **10 August 2010** as a condition for the drawdown of mortgage loan account ending **4734**.

The Complainants' Case

The Complainants submit that they approached the Provider in **2010** requesting additional funds to facilitate the purchase of a larger home. The Complainants outline that they held

an existing mortgage loan account ending **1724** with the Provider, which was operating on a tracker rate of interest.

The Complainants detail that they requested to *“retain the tracker on [their] previous loan amount and that the additional could be at market rate”*. The Complainants assert that they were *“not listened to”* and that the Provider refused this request and advised the Complainants that *“if [the Complainants] wanted to move (and borrow more money) [they] would lose [their] tracker.”*

The Complainants submit that they were *“quite simply pressured to take or leave the deal on offer”*. The Complainants outline that they told the Provider that they thought this was *“unfair”* as the new mortgage loan would be larger than the existing one. The Complainants maintain that they had to move house in the end and believe that they were *“unfairly penalised for moving house”* despite *“giving extra business”* to the Provider.

The Complainants also outline that they made a verbal complaint to the Provider in **2010** and they state that it *“suits the [Provider] to say they have no record of this”*.

The Complainants are seeking a refund of all overpaid interest on mortgage loan account ending **4734** and would like this to be backdated to **August 2010**.

The Provider’s Case

The Provider outlines that the Complainants approached the Provider in **April 2002** to apply for a mortgage loan in respect of a private dwelling house. The Provider submits that the Complainants completed a mortgage loan application form on **26 April 2002**, seeking approval for a loan in the amount of €190,460.00.

The Provider details that it issued a Loan Offer Letter to the Complainants on **28 May 2002** for a home loan in the amount of €190,460.00 which was repayable over a term of 20 years. The Provider notes that the interest rate stipulated in the Loan Offer Letter was a discounted variable base rate for the first year of the loan, with the Provider’s variable base rate to apply thereafter.

The Provider notes that it issued an Amended Loan Offer Letter to the Complainants on **25 June 2002**, approving an increased home loan in the amount of €200,460.00 which was repayable over a term of 20 years. The Provider notes that the Amended Loan Offer Letter states that the interest rate applicable to the loan was a discounted variable interest rate for the first year of the loan, with the Provider’s variable base interest rate to apply

thereafter. The Provider submits that the Complainants drew down mortgage loan account ending **1724** on **09 August 2002**.

The Provider outlines that the Complainants telephoned the Provider on **21 November 2005**, requesting that a tracker interest rate of 3.25% be applied to their mortgage loan account ending **1724**. The Provider notes that the Complainants' mortgage loan account statements confirm that a tracker interest rate of 3.25% was applied to mortgage loan account ending **1724** on **30 November 2005**.

The Provider details that the Complainants approached the Provider again in **April 2010**, "*to apply for a Private Dwelling Home mortgage loan*". The Provider submits that the Complainants completed a Home Loan Application Form on **16 April 2010** wherein they sought approval for a mortgage loan in the amount of €372,000.00. The Provider explains that the two types of interest rate options available to the Complainants at the time of the mortgage loan application were fixed and variable interest rate options. The Provider asserts that these rates were "*publicly advertised and available*". The Provider states that it removed tracker mortgage rates from its suite of mortgage products in **late 2008** and therefore a tracker interest rate product was not available to the Complainants in **2010**.

The Provider outlines that it issued a Loan Offer Letter to the Complainants on **19 July 2010**, approving a mortgage in the amount of €372,000.00 repayable over a term of 34 years on the Provider's variable interest rate of 2.85%.

The Provider submits that it issued a Suitability Statement to the Complainants on **19 July 2010**, which "*described the principle (sic.) features of the mortgage that the Complainants chose and outlined the reasons why the Variable interest rate noted in the Suitability Statement was deemed suitable*". The Provider states that the Complainants' solicitor sent a letter to the Provider dated **26 July 2010**, which confirmed "*that the Complainants were selling their existing property and the letter also confirmed the sale price of the existing property*".

The Provider details that it subsequently issued an Amended Loan Offer Letter to the Complainants on **28 July 2010**, which provided for a home loan in the amount of €372,000.00 which was repayable over a term of 34 years. The Provider submits that the interest rate applicable to this mortgage loan was the Provider's variable interest rate of 2.85%. The Provider submits that the Complainants signed the Acceptance Form for the Amended Loan Offer Letter for mortgage loan account ending **4734** on **02 August 2010**. The Provider asserts that, by signing the Acceptance Form, "*the Complainants expressly accepted the [Provider's] Amended Loan Offer Letter and the terms and conditions set out in the mortgage documentation*". The Provider notes that this Acceptance Form also contained a declaration stating that the Complainants had been advised on the terms and

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conditions of their mortgage loan offer by their solicitor. The Provider details that the Complainants drew down mortgage loan account ending **4734** on **09 August 2010**.

The Provider states that the Complainants *“had no contractual right or entitlement to a Tracker interest rate”* on their mortgage loan account ending **4734**, *“nor did they have any contractual entitlement to transfer a Tracker interest rate to a new mortgage loan after the sale of the property which was held as security”* for their mortgage loan account ending **1724**.

The Provider asserts that *“all mortgage loan documentation received by the Complainants for the Mortgage Loan Account ending 4734, along with the applicable terms and conditions, made clear that the Complainants were offered a Variable rate of interest and not a Tracker rate”*. The Provider also submits that the Complainants entered the mortgage loan agreement freely and *“at all stages had the option of obtaining independent legal advice on the terms of this agreement”*.

The Provider details that it subsequently introduced a new tracker retention product in **July 2014** for existing customers who were already availing of a tracker interest rate and looking to purchase a new private dwelling home. The Provider submits however that when the Complainants applied for their new mortgage loan in **2010**, tracker interest rates were no longer available, and the tracker retention product did not yet exist.

The Provider states that it *“refutes the Complainants’ assertion”* that they were *“not listened to”* and were *“unfairly penalised for moving house”*. The Provider contends that it *“could not offer the Complainants”* the option of a tracker interest rate on their new mortgage loan account ending **4734**, as tracker interest rate products were not available in **2010** and there was no option to transfer the tracker interest rate from mortgage loan account ending **1724** to the new mortgage loan account.

The Provider asserts that it *“has acted in good faith”* throughout the term of the Complainants’ mortgage loan and has also acted *“in compliance with its contractual*

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to allow the Complainants to retain the tracker interest rate that they held under mortgage loan account ending **1724** when they purchased a new private dwelling house in **2010** and applied for a new mortgage loan under mortgage loan account ending **4734**.

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 September 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.

The issue to be determined is whether the Provider failed to allow the Complainants to retain the tracker interest rate that they previously held under mortgage loan account ending **1724** when they purchased a new private dwelling house in **2010** and applied for a new mortgage loan.

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainants' mortgage loan documentation in respect of mortgage loan account ending **4734**. While the Complainants' original mortgage loan account ending **1724** is not the subject of this complaint, it is also helpful to consider the particulars of that mortgage loan which had a tracker interest rate applied to it. In addition, I will consider any interactions between the Complainants and the Provider in **2010** when the

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Complainants redeemed mortgage loan account ending **1724** and drew down their new mortgage loan under mortgage loan account ending **4734**.

The Provider issued an **Amended Loan Offer Letter** dated **25 June 2002** to the Complainants in respect of mortgage loan account ending **1724** which provides as follows:

“Property to be Mortgaged [redacted address of Complainants former private dwelling home]...

I am pleased to inform you that [the Provider] has approved a Repayment Home Loan of €200,460.00 (£157,875.08) towards the purchase of the above property at a cost of €292,001.00 (£229,969.48) subject to the following terms and the attached General Conditions.

| | |
|---------------------------------------|----------------------------------|
| <i>Type of Loan:</i> | <i>Repayment</i> |
| <i>Amount of Loan:</i> | <i>€200,460.00 (£157,875.08)</i> |
| <i>...</i> | |
| <i>Interest Rate: Discount Year 1</i> | <i>3.70 %</i> |
| <i>After 1 year :</i> | <i>Variable Base Rate</i> |
| <i>Repayment Period (Years):</i> | <i>20 Approx.</i> |

*... **There are a few special conditions – set out below – to be met beforehand. If these are not completed, unfortunately your cheque will not be issued.** To avoid delays, please read them carefully, discuss with your solicitor and ensure everything required is done in good time.”*

I note that a copy of the **Acceptance Form** and the **General Conditions** to the **Amended Loan Offer Letter** for mortgage loan account ending **1724** have not been submitted in evidence, however, the particulars of this mortgage loan agreement are not in dispute between the parties. The **mortgage loan account statements** for mortgage loan account ending **1724** show that the Complainants drew down this mortgage loan on a discounted variable interest rate of 3.70% on **09 August 2002**.

A copy of the Provider’s **internal notes** dated **21 November 2005** have been submitted in evidence which detail that the Complainants made a request to apply a tracker interest rate on their mortgage loan account ending **1724**. The Provider subsequently confirmed the change in interest rate to the Complainants by way of a telephone call on **23 November 2005**. The **mortgage loan account statements** in respect of mortgage loan account ending **1724** show that a tracker interest rate was applied to mortgage loan account ending **1724** on **30 November 2005**.

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The Provider submits that it withdrew from the tracker mortgage market in **late 2008** and ceased offering tracker interest rates at that time to customers who were not contractually entitled to avail of such rates.

The Complainants approached the Provider in **2010** to seek additional borrowings as they wished to purchase, and move to a larger home. The Complainants submit that they wished to retain that tracker interest rate in respect of the new property that they intended to purchase. The Complainants assert that the Provider informed them that if they moved house, they would be required to take out a new mortgage loan and consequently, they would not be able to retain the tracker interest rate applicable to mortgage loan account ending **1724**.

The Complainants completed a **Home Loan Application Form** dated **16 April 2010**, which details that the Complainants were seeking to apply for a mortgage loan in the amount of €372,000.00, repayable over a term of 35 years. The interest rate options listed on the application form were “fixed” and “variable”. I note however that the Complainants did not select an interest rate on the **Home Loan Application Form**.

The Provider subsequently issued a **Suitability Statement** to the Complainants on **19 July 2010**, which states as follows:

“ ...

This loan has been individually assessed for affordability and the repayments have been deemed to be sustainable based on the information you have provided and you believe that you will be able to meet these requirements based on your circumstances.

Loan Type

Annuity

You have opted to pay for an Annuity loan as you have stated that you want to make capital and interest repayments each month in order to repay your loan in full within the selected loan term.

Loan Term

You have opted to pay your loan over a term of 34 years as the monthly repayment amounts over this loan term based on current rates are the most suitable for your circumstances.

...

Interest Rate Type

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Variable Rate

You have opted to borrow at a variable rate of interest as you have stated that you wish to avail of prevailing market rates and do not require certainty of repayments. You also wish to have the flexibility to make overpayments without penalty.

Please sign the enclosed Acceptance Form in order to accept your loan offer, and to acknowledge and accept the terms of this suitability statement.

...”

The Provider issued a **Loan Offer Letter** dated **19 July 2010** to the Complainants, which provides as follows:

“ ...

| | |
|----------------------------------|----------------------|
| <i>Type of Loan:</i> | <i>Repayment</i> |
| <i>Total Amount of Loan:</i> | <i>€372,000.00</i> |
| <i>...</i> | |
| <i>Interest Rate (Variable):</i> | <i>2.85%</i> |
| <i>Interest Rate Basis:</i> | <i>Variable Rate</i> |
| <i>Repayment Period (Years):</i> | <i>34 Approx.</i> |

...”

I note that the **Loan Offer Letter** dated **19 July 2010** was not accepted and signed by the Complainants and the Provider issued an **Amended Loan Offer Letter** dated **28 July 2010** to the Complainants. The Provider outlines that it issued the **Amended Loan Offer Letter** as the address of the secured property was incorrectly quoted on the **Loan Offer Letter** dated **19 July 2010**.

The **Amended Loan Offer Letter** dated **28 July 2010** details as follows:

“Property to be Mortgaged [redacted]...

I am pleased to inform you that [the Provider] has approved a Repayment Home Loan of €372,000.00 towards the purchase of the above property at a cost of €470,000.00 subject to the following terms and the attached [Provider] Homeloan Conditions. This Homeloan must be secured by a charge or mortgage over the Property to be Mortgaged.

| | |
|----------------------------------|----------------------|
| <i>Type of Loan:</i> | <i>Repayment</i> |
| <i>Total Amount of Loan:</i> | <i>€372,000.00</i> |
| <i>...</i> | |
| <i>Interest Rate (Variable):</i> | <i>2.85%</i> |
| <i>Interest Rate Basis:</i> | <i>Variable Rate</i> |

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Repayment Period (Years): 34 Approx.

...

There are a few special conditions – set out below – that must be met before the loan can be completed. If these conditions are not fulfilled, we can unfortunately not issue your loan cheque. To avoid delays, please read the conditions very carefully, discuss with your solicitor and ensure everything required is done in good time.

...

Conditions:

- Subject to this Offer Letter, dated 28/07/10 13:24, being signed by the borrower(s) in the Acceptance Form and the full signed Offer Letter being returned to [the Provider].

-Your existing mortgage [account ending 1724] and any related accounts being paid off prior to or on execution of the mortgage deed.”

The **General Conditions** to the **Amended Loan Offer Letter** provide as follows:

“3. Acceptance of terms and conditions: By taking the Loan from [the Provider], the Borrower is deemed to have accepted all the terms and conditions set out in the application form, Offer Letter, these conditions, the General Housing Loan Mortgage Conditions and the Rules. These conditions form part of the Offer Letter.

4. *Interest on the Loan:*

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

4.2 *The interest rate on the Loan may be increased or reduced by [the Provider] from time to time...”*

Condition 5 of the **[Provider] Homeloan Conditions** states as follows:

“This Mortgage incorporates the Offer Letter and the [Provider] Mortgage Conditions and the Borrower and the Spouse agree to be bound by all the obligations on them and the conditions which arise under those documents. A copy of the [Provider] Mortgage Conditions has been received by the Borrower and the Spouse”.

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The **Acceptance Form** section of the **Amended Loan Offer Letter** states as follows:

"1. I/We, the undersigned, accept the offer of an advance made to me/us, by [the Provider] on the terms and conditions set out in:

- (i) This Offer Letter in replacement of all previous offer letters;*
- (ii) The [Provider] Homeloan Conditions;*
- (iii) The Irish Banking Federations Housing loan Mortgage and the General Housing Loan Mortgage Conditions, referred to therein;*
- (iv) The Rules of [the Provider].*

Copies of which I/we have received and in respect of which I/we have been advised upon by my/our solicitor.

...

7. I/We confirm that I/we have read the suitability letter which I/we received with the original loan offer. I/we agree that the options outlined in that letter were appropriate for me/us at that time. I/We also confirm that I/we have decided to revise my/our options without seeking or receiving further advice from [the Provider] as to the suitability of these new options."

It is clear that the **Amended Loan Offer Letter** envisaged that a variable interest rate would apply to the mortgage loan account ending **4734**. The variable interest rate in this case made no reference to varying in accordance with variations in the ECB main refinancing rate. Rather it was a variable rate which could be adjusted at the discretion of the Provider. The Complainants proceeded to accept the terms of the **Amended Loan Offer Letter** by signing the **Acceptance Form** on **02 August 2010**. The **mortgage loan account statements** show that the Complainants subsequently drew down mortgage loan account ending **4734** on **09 August 2010** on a variable interest rate of 2.85%.

The **mortgage loan account statements** show that the Complainants' original mortgage loan account ending **1724** was redeemed on **10 August 2010**.

The Complainants take issue with the fact that the Provider did not offer them the option to transfer their tracker interest rate from mortgage loan account ending **1724** to their new mortgage loan account ending **4734** when they purchased their new private dwelling home.

Having considered the documentation provided in evidence, it is clear to me that the **Amended Loan Offer Letter** dated **25 June 2002** in respect of mortgage loan account

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ending **1724** provided for a first legal charge or mortgage over the specific property named in the **Amended Loan Offer Letter**. There was no provision under the terms of the Complainants' original mortgage loan which entitled the Complainants or the Provider to substitute this property or amend the details of the property which secured the mortgage facility.

In this regard, I would highlight that it is usual banking practice, where a person seeks to sell a property, which is security for a mortgage loan, that that mortgage loan is redeemed, and the proceeds are used to discharge that mortgage loan. It is then at the discretion of the parties whether to seek to enter into a new mortgage loan agreement with respect to the purchase of any subsequent property.

There is also no evidence to suggest that the Provider "*pressurised*" the Complainants in any way to redeem the original mortgage loan and take out a new mortgage loan. It appears to me that the Complainants voluntarily chose to redeem mortgage loan account ending **1724** which was on a tracker rate in order to sell the property that was held as security for that mortgage loan. By doing so, the Complainants opted to terminate their original mortgage contract with the Provider.

The Complainants applied for a new mortgage in **2010** to facilitate the purchase of the new property and signed and accepted the **Amended Loan Offer Letter** dated **28 July 2010**, which provided for a variable interest rate.

At the time of the application for the new mortgage loan in **2010**, the Provider was no longer offering tracker rates for new mortgage lending and the Provider had not yet introduced its tracker retention product. Furthermore, the Provider's tracker retention product did not become available as part of the Provider's product offering until some four years later in **July 2014**.

It is clear from the evidence before me that the Complainants chose to redeem their tracker mortgage loan and were offered a new mortgage in respect of the new property that they purchased by way of **Amended Loan Offer Letter** dated **28 July 2010** which provided for a variable interest rate. The Provider was under no obligation to offer the Complainants a tracker interest rate on their new mortgage loan because their previous loan was on a tracker rate. Further, tracker interest rates were no longer an option available on new mortgages from the Provider when the Complainants applied for the new mortgage loan. If Complainants were not satisfied with the interest rate applicable to the new mortgage loan, they could have decided not to accept the Provider's offer. Instead, the Complainants accepted the Provider's offer by signing the **Acceptance Form** on **02 August 2010**, having confirmed that a variable interest rate was a suitable option for them.

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In light of all the foregoing, I accept that the Provider acted correctly in its dealings with the Complainants and there was no obligation on the Provider to offer the Complainants a tracker interest rate on their new borrowings under mortgage loan account ending **4734**.

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**

04 October 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

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(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.