



<u>Decision Ref:</u>	2022-0332
<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
<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 that is the subject of this complaint was secured on the Complainants' private dwelling house.

The loan amount was €250,000.00 and the term of the loan was 30 years. The **Loan Offer** dated **16 April 2007** detailed that the interest rate applicable to the loan was a fixed interest rate of 5.06%.

The Complainants' Case

The Complainants submit that they met with a representative of the Provider on **30 March 2007** and applied for a tracker mortgage with the Provider. The Complainants explain that they *"had a number of tracker mortgages already with the bank and they had all been acquired in the same manner, i.e. a meeting to fill out the Mortgage Application form."* The Complainants state that *"[h]aving filled out the application form with [the representative of the Provider] at the meeting and having verbally requested a tracker mortgage we fully expected that we would be successful in our application for a tracker similar to our previous experiences."*

The Complainants state that *"it is clear from our Mortgage Application Form completed on the 30/3/07 that there is no reference therein to the "rate" chosen by us."* The Complainants outline at the time they *"did not choose a Fixed rate in our signed and completed Mortgage Application Form."*

The Complainants acknowledge that *"the term "fixed rate" is contained in the mortgage letter of offer"* that issued from the Provider dated **16 April 2007**. The Complainants assert that the interest rates offered in this letter of offer were contrary to what the representative of the Provider led them to believe on **30 March 2007** *"and contrary to our application"*. The Complainants submit that the representative of the Provider *"created a reasonable expectation to [the First Complainant] that he was to receive a tracker mortgage."*

The Complainants maintain that on that basis the First Complainant *"proceeded to engage contractors, purchase materials and begin construction of the house in the expectation that the tracker mortgage would be approved and available for draw down without delay."*

The Complainants submit that when the mortgage loan was being drawn down, the Provider informed them that they were *"high risk"* and they had to take out a fixed rate mortgage at 5.00%. The Complainants submit that they *"were in urgent need of the funds as the builders had been on site 2 weeks at that stage."* The Complainants state that in circumstances where they had already incurred significant expense with the house build, they felt that they *"had no choice but to sign to access the funds."* The Complainants outline that on this basis they drew down the mortgage loan account on **17 May 2007**.

The Complainants submit that they are of the view that the Provider *"has committed a breach of trust and did not act in good faith and deal with us fairly."* The Complainants state that *"[n]ot only did they deprive us of a tracker mortgage, they also prevented us from potentially acquiring a tracker mortgage from another Financial Institution as we had trust that we had acquired a tracker mortgage from [the Provider]."*

The Complainants outline that *"on the one hand the Bank is clear that the specific interest rate type or specific rate option was not part of our Mortgage Application Form but on the other hand it goes on to state that the mortgage application was based on the rate, amount and term chosen by us and that this was subsequently assessed by the Bank's Underwriting Team."*

The Complainants state that *"the Bank did not communicate to us that we were not getting a tracker mortgage as if they had it would have given us the opportunity to go elsewhere to another Financial Institution, instead in an under-handed way at the latest of*

stages presented us with the option of a Fixed Rate mortgage knowing that we needed the money to pay significant expenses already accrued with the house build."

The Complainants are seeking the following:

- (a) Compensation for the Provider's alleged failure on their mortgage loan account;
and
- (b) The Provider to put in place a *"long term solution"* for their mortgage loan account.

The Provider's Case

The Provider submits that the Complainants applied for a mortgage loan in the amount of €250,000.00 repayable over a term of 30 years, by completing and signing a mortgage application form on **30 March 2007**. The Provider submits that the Complainants' application form did not specify a specific interest rate type or specific interest rate option.

The Provider states that there is no evidence of any offer of a tracker interest rate being made to the Complainants nor any evidence of a promise of same. The Provider submits that the purpose of the meeting on **30 March 2007** *"was with regard to [the Complainant's] mortgage application and provision of information in relation to their request for a mortgage"*. The Provider asserts that while a customer may request a certain type of mortgage, *"it is at the Bank's discretion as to what type of mortgage is offered to customers"* and *"[i]t was open to the customers to decide to whether or not to accept that offer."*

The Provider submits that it issued a Loan Offer dated **16 April 2007** for the loan amount of €250,000.00 repayable over a term of 30 years based on a fixed interest rate of 5.06% until **31 March 2012**, with a variable interest rate to apply thereafter.

The Provider submits that the Complainants signed the Loan Acceptance on **26 April 2007**. The Provider submits that the Loan Offer did not provide a contractual entitlement to a tracker interest rate at the end of the initial fixed interest rate period, or at another future date. The Provider submits that it *"considers it reasonable to conclude that the customers were fully aware that their mortgage had been approved on and would draw down on a fixed interest rate and not a tracker interest rate, when the first stage of the customers' mortgage drew down on 17 May 2007."*

The Provider submits that in the intervening period between when the Complainants' Loan Offer was issued in **April 2007** and when the mortgage loan was drawn down on **17 May 2007**, the fixed interest rate of 5.06% was withdrawn by the Bank. The Provider explains

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that the first stage of the Complainants' mortgage loan drew down on **17 May 2007** on the next available 2-year fixed interest rate which was 4.95%, which was fixed until **31 August 2012**.

The Provider submits that it has been unable to locate any evidence to support the Complainants' assertion that they were deemed "*high risk*" and that they would have had to draw down their mortgage on a fixed interest rate of 5.00%, or any other fixed rate. The Provider explains that the mortgage application was based on the interest rate, amount and term chosen by the Complainants and was suitable for their mortgage requirements at the time. The Provider notes that the fixed interest rate of 5.06% was "*commercially attractive at that time, when variable and tracker interest rates were trending upwards*".

The Provider submits that tracker interest rate products were available from the Provider from **late 2001** until **late 2008** when they were withdrawn from the market.

The Provider submits that its staff were not authorised to provide advice or recommendations to customers as to what interest rate option or product to select. The Provider submits that it provided information in relation to the various interest rate options that were available when such information was requested. The Provider submits that the decision as to which interest rate to select rested solely with the Complainants based on what suited their individual circumstances.

The Provider maintains that a verbal request by a customer to avail of a specific interest rate, "*is simply a request and not a formal offer of a mortgage.*" The Provider refutes the Complainants' assertion that it did not deal with the Complainants fairly. The Provider contends that "*there was no obligation, contractual or otherwise, on the part of the Bank to offer a tracker interest rate to the customers in respect of their mortgage application.*"

The Provider submits that the "*reference to a "Tracker Mortgage"*" in the Complainants' loan documentation was a "*typographical error*". The Provider details that the "*typographical error was not capable of transforming the entire basis of the loan to a tracker facility, when there was no other reference to a tracker interest rate in the documents evidencing the agreement.*" In light of this issue, the Provider has offered the Complainants a goodwill gesture of €1,250.00.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to permit the Complainants to drawdown the mortgage loan on a tracker interest rate and instead, only offered the Complainants a fixed interest rate as they were considered to be "*high risk*".

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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.

In order to determine this complaint, it is necessary to set out and review the relevant provisions of the Complainants' mortgage loan documentation. It is also necessary to consider details of certain interactions between the Complainants and the Provider in **2007**.

The Complainants applied for a mortgage loan with the Provider by signing a **General Mortgage Application Form** on **30 March 2007**. **Part C** of the **General Mortgage Application Form** is titled "*Your Mortgage Requirements*" and notes the repayment period as 30 years and the amount of loan as €250,000.00. I note that there is no reference to

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interest rate type in the **General Mortgage Application Form** and it does not appear that the Complainants' specified what interest rate type they were seeking to select. The Complainants' signed the **General Mortgage Application Form** on the following terms:

"The information given in this application is true to the best of my/our knowledge and belief. If [the Provider] ("the Company") accepts this application and loan approval is given, I/We agree that this application and declaration shall form part of the loan contract between me/us and [the Provider] as if all terms and conditions, declarations and consents contained herein were incorporated into such contract in full."

The Provider issued a **Loan Offer** dated **16 April 2007** to the Complainants which detailed as follows:

"Loan Type Fixed Rate 5.06% until 30/03/12 100% Capital and Interest

...

Interest Type Fixed

Term 30 years

..."

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

The Provider has furnished into evidence two sets of mortgage conditions, **General Terms and Conditions** and **Standard Mortgage General Terms and Conditions**.

Condition 14 of the **Standard Mortgage General Terms and Conditions** attached to the **Loan Offer** details as follows:

"14. Interest Rate

(a) Subject to Sub-Clause 14(b), all Loans are subject to the Bank's Mortgage Rate at the date the Loan is drawn down.

(b) In the case of a Tracker Mortgage the conditions of this Sub-Clause shall apply:-

(i) The Loan is subject to the Tracker Mortgage variable interest rate at the date of payment of the Loan. This rate will depend on the Loan to Value set out in the Specific Loan Offer Conditions. In the event of a movement in the

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European Central Bank (“ECB”) rate the Lender will adjust the Tracker Mortgage variable interest rate within 30 days of the ECB rate movement;

(ii) There will no reduction in the Tracker Mortgage interest rate as a result of the Loan to Value reducing during the term of the Loan.

(c) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

(i) The rate of interest applicable to the Loan will be fixed at the rate and for the period specific in the Loan Offer;

(ii) The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to the Lender, opt to choose a fixed interest rate for a further Fixed Rate Period if such an option is made available by the Lender and on terms and conditions as may be specified by the Lender. Where such an option is not made available by the Lender or, if available, where the Borrower fails to exercise the option, the interest rate applicable will be a variable interest rate which may be increased or decreased by the Lender at any time, and in this respect, the decision of the Lender will be final and conclusively binding on the Borrower...”

The Complainants signed the **Loan Acceptance** attached to the **Loan Offer** on **26 April 2007**, in the presence of their solicitor, on the following terms:

“(a) I/We acknowledge receipt of the General Terms and Conditions and Specific Conditions attached to the Loan offer. I/We have had the Loan Offer, the Specific Loan Offer Conditions and the General Terms and Conditions explained to me/us by my/our Solicitor and I/we fully understand them. I/We hereby accept the Loan Offer on the terms and conditions specified...”

I/We fully understand and accept the specific nature of this Purchase Mortgage. I/We further understand that any outstanding debt owing (whether owing now or in the future) to [the Provider] by me/us at any given time is secured on the Property the subject of the Tracker Mortgage and must be repaid in full before the relevant title deeds can be returned or the relevant mortgage deed released.”

The **Loan Offer** dated **16 April 2007** envisaged that a 5-year fixed interest rate of 5.06% would apply to the Complainants’ mortgage loan account until **31 March 2012**. **Condition 14 (c)** of the **Standard Mortgage General Terms and Conditions** attaching to the **Loan Offer** dated **16 April 2007** provides that, on the expiry of the fixed interest rate period on the Complainants’ mortgage loan account, a variable interest rate would apply, or a

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further fixed rate if it was made available by the Provider and selected by the Complainants. The nature of the variable interest rate set out in **Condition 14 (c)** was one which could be increased or decreased by the Provider at any time. **Condition 14 (c)** does not stipulate that a tracker interest rate will apply to the Complainant's mortgage loan at any stage.

There is no evidence to suggest that the Complainants contacted the Provider prior to the drawdown of the first tranche of the mortgage loan on **16 May 2007**, seeking to amend the fixed interest rate and apply a tracker interest rate instead.

The Complainants maintain that at a meeting with the Provider on **30 March 2007**, it was agreed that they would be offered a tracker interest rate. However, there is no evidence to support the Complainants' submission in this regard. While no details of the meeting which took place have been furnished it evidence, such details will not impact on my determination of this complaint as such discussions cannot be said to amount to a formal offer. In this regard, it is important to note that the Complainants' mortgage loan account is governed by the terms and conditions of the **Loan Offer** dated **16 April 2007**, which contained no entitlement to a tracker interest rate on inception and contained no expectation that the tracker interest would apply at any time during the term of the loan.

The Complainants also submit that they were informed by the Provider that they were considered "*high risk*" and therefore had to take out the mortgage loan on a fixed interest rate. While I appreciate that the Complainants may have been under to pressure to draw down mortgage funds in order to continue the building works on their new home, which they had commenced, there is no evidence to suggest that the Complainants were informed that they were considered "*high risk*" or that they were forced to apply a fixed interest rate to their mortgage loan instead of a tracker interest rate. 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.

Having considered the mortgage loan documentation in respect of the mortgage loan account, I do not accept that the Provider failed to permit the Complainants to draw down on a tracker interest rate. Tracker interest rates were available from the Provider in **2007** subject to certain lending and eligibility criteria, however there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate at that time. It was a matter of commercial discretion on the Provider as to what interest rate to offer the Complainants and it was open to the Complainants to accept or reject the Provider's offer. The evidence shows that the Provider offered the Complainants a mortgage loan on a fixed interest rate, which was freely accepted by the Complainants. If it was the case that the Complainants were of the view that the fixed interest rate offered to them by way of the **Loan Offer** dated **16 April 2007** was not suitable for them, then the

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Complainants could have decided not to accept the **Loan Offer** and instead seek an alternative rate with the Provider or indeed another lender. However, there is no evidence that the Complainants did so.

Nevertheless, I note that there is a reference to “*Tracker Mortgage*” in the second paragraph of the **Loan Acceptance** pertaining to the **Loan Offer** dated **16 April 2007**, which was signed by the Complainants on **26 April 2007**. This appears to be an error on the part of the Provider as the sentence that contains this erroneous reference to “*Tracker Mortgage*” is in relation to potential outstanding debt being secured on the property which was the subject of the mortgage loan and confirming that the Complainants understood this had to be repaid before the deeds of the property could be released and returned. Whilst this error on the part of the Provider is entirely unsatisfactory, I am satisfied that the particulars of the **Loan Offer** dated **16 April 2007** are sufficiently clear as to the type of mortgage offered to the Complainants and confirms that the Complainants were offered a mortgage loan on a fixed interest rate.

There is no other mention of “*Tracker Mortgage*” in the **Loan Offer** apart from **Condition 14 (b)** of the **Provider’s Standard Mortgage General Terms & Conditions**, as outlined above. However, I am of the view that **Condition 14(b)** did not apply to the Complainants’ mortgage loan given the interest rate applicable was a fixed interest rate as opposed to a tracker interest rate. If the Complainants’ mortgage loan was a tracker mortgage, then I would expect the particulars of the **Loan Offer** and **Specific Loan Offer Conditions** to contain details of the loan to value applicable to the tracker interest rate, in accordance with **Condition 14(b)**, however, there is no reference to a fixed rate margin or an ECB rate in the Complainants’ mortgage loan documentation.

However, while I am of the view that there was no contractual entitlement to a tracker interest rate on the Complainants’ mortgage loan account, I am also of the view that the information provided in the Complainants’ mortgage loan documentation was inaccurate.

The standards expected of the Provider in all its dealings with the Complainants are set out in **Chapter 1** of the **Consumer Protection Code 2006**, which came into force on **01 August 2006**, and provides that:

“A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it acts with due skill, care and diligence in the best interests of its customers”

I am of the view that the Provider did not act with due skill, care and diligence in its dealings with the Complainants. Whilst I accept that typographical errors can occur and in this circumstance that error did not affect the Complainants’ underlying contractual

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entitlements, I am of the view that the Provider should have been proactive and brought the error in the **Loan Acceptance** to the Complainants' attention.

I note that by way of letter dated **10 November 2020** addressed to the Complainants, the Provider offered the Complainants a goodwill payment of €1,250.00 with a view to resolving their complaint and noted that the offer "*remains open to [the Complainants] to accept at any time up until the FSPO makes a final decision on [their] complaint*". A copy of this letter was furnished to the Complainants, and they responded by way of email on **03 March 2021** detailing they "*will not be accepting [the Provider's] offer*". By way of letter to this Office dated **26 May 2021**, the Provider clarified to this Office that the goodwill offer "*remains open to the customers to accept at any time, and it remains open should the Ombudsman wish to take it into consideration in terms of reaching a decision on the complaint*". A copy of this letter was furnished to the Complainants.

In light of all the foregoing and on the basis that the Provider was under no regulatory or contractual obligation to offer the Complainants a tracker interest rate in **May 2007**, I consider the Provider's offer of €1,250.00 to be a reasonable attempt to resolve this complaint and therefore 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

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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.