



<b><u>Decision Ref:</u></b>	2022-0333
<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 at point of sale Application of interest rate
<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 which is the subject of this complaint was secured on the Complainants' residential business property.

The loan amount was €380,000.00 and the term of the loan was 25 years. The Letter of Approval which was signed by the Complainants on **15 July 2004** outlined the loan type as "*Residential Business Loan*" at an interest rate of 3.25%.

The mortgage loan account was redeemed in full on **22 June 2015**.

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

The Complainants submit that in **May 2004**, they purchased a new property as their principal private residence and applied for a tracker interest rate mortgage loan.

The Complainants state that it appears that only one loan application signed by them on **16 April 2004** was submitted at the time of purchase although that application states "*Application 1 of 2 – New PDH purchase in joint names (raising 300k in separate appn on*

*existing PDH in [First Complainant's] name only) PP €411k; Loan 80K over 25 yrs @ 1 yr fixed @ 2.54%."*

The Complainants maintain *"the original requested amount is specified at €80,000 at a fixed rate marked in the application form at 2.54%".* The Complainants are of the view that there is *"different handwriting"* on the application form and the figure of €80,000.00 *"has been crossed out and changed to €300,000"*. The Complainants further state that *"in a second instance the €80,000 has been crossed out and changed to €308,000."*

The Complainants detail that the loan type outlined in the Letter of Approval that issued from the Provider is a *"Residential Business Loan"*. The Complainants submit that the Letter of Approval *"doesn't specifically state that the rate is variable."* The Complainants assert that *"the effect of an increase is specified so this would imply that it is variable although there is no indication as to the basis of variation, be it ECB or otherwise."* The Complainants further assert that the Provider is relying on its *"general catch all conditions to charge whatever rate they might choose."*

The Complainants submit that they *"reasonably believed that [they] applied for and contracted for a Residential Tracker Mortgage Loan."* The Complainants state that they have copies of email correspondence between the Provider and their broker *"confirming an offer from [the Provider] of a 25 year tracker mortgage at a rate of 3.2%."*

The Complainants state that the *"actual loan offer didn't specify that it was a tracker and neither did it specify on what basis interest rates might increase or decrease."* The Complainants contend that *"the lender offered and intended to charge [a] tracker rate and then used the lack of clarity in the offer letter to overcharge" them.*

The Complainants assert that it is *"unfair and unreasonable"* for the Provider to suggest that by trawling through the many pages of mortgage conditions, they could see that, in fact, they were signing up to a rate of interest that may be varied to whatever rate the Provider considered desirable.

The Complainants maintain that the loan offer from the Provider was for a tracker mortgage loan and that the documentation, which was presented to, and signed by them was unclear. The Complainants state that it appears that the Provider is suggesting that *"having firstly considered the documentation for signing, and then having considered the 80 clauses and subclauses of General Mortgage Loan Approval Conditions, [they] should then have read through the 30 pages with hundreds of clauses and sub clauses of "Mortgage Conditions" until they came to Condition 4.13 and then they should have referenced this back to the Appropriate Rate definition in Clause 1.10 to see that [the Provider] could, in fact, charge them whatever rate it considered desirable"*. The Complainants assert that this is *"a preposterous suggestion."*

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The Complainants detail that they wrote to the Provider and were advised in a letter dated **24 April 2012** by the Provider that the *“loan facility was issued and continues to operate as a Commercial Variable rate loan.”*

The Complainants outline that there was a *“subsequent loan application”* which was signed by them on **29 August 2005** for a loan amount of €40,000.00 for the purposes of carrying out home improvements. The Complainants further outline that *“on page 5, the box marked tracker was ticked and the words ‘same as existing’ were entered on the form.”* The Complainants assert that this would *“seem to validate the assertion that the applicants and the broker believed that the original loan was indeed a tracker mortgage.”*

The First Complainant has submitted that the Provider’s conduct has caused significant stress which has *“negatively affected [her] physical and mental health and led to the breakdown of [her] marriage in 2013.”* The First Complainant further submits that the *“marriage breakdown and subsequent divorce also had and continues to have a significant negative impact on [their] two children”*. The First Complainant details that all of this has impacted her physically and also resulted in her having to take a significant amount of sick leave from her job.

The Complainants are seeking compensation in the amount of €245,915.00 for the following:

- €117,005.00 - for the *“financial damage”* which is *“related to the failure by [the Provider] to honour the tracker rate offered to [the First Complainant]”*;
- €58,000.00 - for the *“Additional cost of replacement mortgage with [another provider] from mid 2015, for 15 years, at 2.4%”*;
- €50,000.00 - in *“Compensation for distress and illness, as fully detailed by [the First Complainant]”*;
- €18,450.00 - in *“Fees for advice from [the Complainants’ representative]”*; and
- €2,460.00 - for *“Legal fees”*.

### **The Provider’s Case**

The Provider details that on **16 April 2004**, the Complainants completed a Loan Application with their broker. The Provider further details that *“In the overview notes of the Loan Application, the broker noted two loan applications.”*

The Provider outlines that the Complainants *“were planning to purchase a new principal dwelling house (PDH) in their joint names for a purchase price of €411,000 which would be*

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*paid in part with a mortgage loan of €80,000 over 25 years with a 1 year fixed rate of 2.54%.”*

The Provider submits that the Complainants proposed a further loan in the amount of €300,000.00 through a mortgage on their existing private dwelling house. The Provider states that the purpose of the proposed mortgage loan was to purchase a new property which would become their private dwelling house and retain their existing private dwelling house which would become a residential investment property.

The Provider notes that a Heads of Terms document was prepared by the Provider’s commercial division in or around **30 April 2004** which contained reference to a tracker interest rate. In response to the Complainants’ assertions that the Provider’s documentation contains references to *“tracker rates”*, the Provider states that the *“Heads of Terms document dated 30 April 2004 is not relevant to the contract between the Bank and the Complainants.”* The Provider details that the Heads and Terms document is *“akin to an approval in principle”* and that *“this document served only as an initial approval in principle at a point in time early in the loan application process and prior to much of the assessment of and changes to the Complainants’ application.”*

The Provider details that over the following month, *“the Complainants’ proposal changed a number of times.”* The Provider submits that the Complainants ultimately decided that their new property that they intended to purchase would be categorised as an investment property and not as their new private dwelling house. The Provider explains that the investment property that the Complainants intended to purchase was a business letting as it was a multi-unit letting property. The Provider states that the property was *“already divided into four letting units which was yielding and was expected to continue to yield an annual income of €30,000.”* The Provider outlines that *“mortgage loans offered by it for multi-let properties were residential business loans”* and tracker interest rates were not available in respect of residential business loans.

The Provider explains that the Complainants’ final mortgage loan application was for a single loan application in an amount of €380,000.00 for the acquisition of a multi-unit letting property. The Provider states that the proposed security was a first fixed charge over the proposed new investment property, as well as a cross-charge over the Complainants’ existing private dwelling house.

The Provider states that after having reviewed the documentation submitted as part of the Complainants’ application, the Provider’s commercial division prepared a Proposal Summary for approval by management on **11 May 2004**. The Provider states that the Proposal Summary contained a proposed tracker interest rate of ECB +1.25% (3.25%). The Provider outlines that *“It is possible that the reference to a tracker rate of 3.25% may have*

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*been included as it had initially been discussed by the Complainants' broker as a possible rate option in relation to the initial proposal" whereby the Complainants intended to use the new property as their private dwelling house. However, the Provider explains that the nature of the Complainants' loan application subsequently changed in that they then applied for "a Residential Business Loan and, the Bank was not offering tracker rates on Residential Business Loans."*

The Provider submits that once the loan application was fully approved, it issued a Letter of Approval dated **18 May 2004** to the Complainants offering a loan amount of €380,000.00 repayable over a term of 25 years. The Provider states that the *"Special Conditions of the Letter of Approval do not contain an entitlement to a tracker rate, nor is a tracker rate of interest specified in any of the loan documentation."*

The Provider submits that General Conditions 1.10 and 4.13 contained in the General Mortgage Loan Approval Conditions *"provide that the Bank may vary the rate of interest applying to the loan."* The Provider further submits that it is *"satisfied that the term 'variable rate' in the Complainants' mortgage loan documentation was sufficiently clear and transparent in its meaning."*

The Provider details that the Complainants accepted the terms and conditions of the Letter of Approval dated **18 May 2004** on **15 July 2004**. In doing so, the Provider states that the Complainants confirmed *"that their solicitor had fully explained the Bank's terms and conditions to them."* The Provider notes that mortgage loan account ending **4728** was subsequently drawn down on **03 August 2004**.

The Provider *"strongly refutes"* the Complainants' submissions that the mortgage loan documentation issued was ambiguous in nature and did not clearly set out the applicable interest rate or that the Provider has exploited such ambiguity in its favour in order to increase the interest rate.

The Provider states that it *"did not offer tracker interest rates on this product at the time of the Complainants' loan application and therefore the Complainants were not offered a tracker interest rate on their Residential Business Loan."* The Provider details that it is therefore satisfied that the Complainants were correctly offered a variable interest rate on their residential business loan and states that *"this product was appropriate to their circumstances at the time."*

The Provider refers to correspondence dated **17 May 2004** in which the Bank agreed to reduce the interest rate on the Complainants' residential business loan *"from 3.25% to 3.20% following drawdown."* However, the Provider notes that this reduction was never applied. The Provider states that it is not clear if this correspondence was issued to the

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Complainants, however the Provider notes that it was its intention to reduce the Complainants' interest rate at that time by 0.05%. In light of this, the Provider has stated in its formal response to this Office that it would like to amend the interest rate on the Complainants' residential business loan and *“back date the reduction of 0.05% from the date of drawdown on 3 August 2004 to the date of redemption on 22 June 2015”*. The Provider states that this amounts to a refund, to include time value of money, of €2,562.71.

The Provider details that that the Complainants completed a subsequent loan application dated **29 August 2005** for an additional loan amount of €40,000.00 for the purposes of *“home improvements.”* The Provider states that the *“mortgage details”* section of the loan application form details the required loan amount as €40,000.00 and the words *“same as existing”* appear next to the *“Rate Type”* section while there is also a tick in a box underneath beside *“tracker”*. The Provider asserts that *“It is again important to note that this application form was completed at the beginning of the loan application process and does not form part of the mortgage contract.”*

The Provider outlines that its commercial division completed a mortgage proposal on or around **21 September 2005** for the additional loan which shows a revised loan amount of €50,000.00 and that the loan type is noted as an equity release loan. The Provider states that *“further discussions had taken place after the completion of the loan application between the Complainants and their broker and/or between the broker and the Bank.”*

The Provider details that it issued a Letter of Approval to the Complainants dated **21 September 2005** for a residential investment property loan in the amount of €50,000.00 at a variable interest rate of 3.25%.

The Provider submits that the Complainants signed the Acceptance of Loan Offer of the Letter of Approval on **21 October 2005**, in the presence of their solicitor, indicating that they understood and accepted the terms and conditions of the additional mortgage loan. The Provider states that mortgage loan account ending **4636** was drawn down on **08 December 2005**.

### **The Complaint for Adjudication**

The complaint for adjudication is that the Provider incorrectly failed to apply a tracker interest rate to the Complainants' mortgage loan account ending **4728** at drawdown in **July 2004**.

## 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.

Before dealing with the substance of the complaint, I note that 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 this 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 way of letter issued to their nominated third-party representative dated **01 February 2019**, which outlined as follows:

*"In the interests of clarity, the complaint that you are maintaining on your client's behalf under this complaint reference number is against [the Provider] and this*

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*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 provisions of the Complainants' mortgage loan documentation. It is also necessary to consider the details of certain interactions between the Complainants and the Provider between **2004** and **2005**.

The Provider has submitted a copy of the **Loan Application** that was signed and accepted by the Complainants on **16 April 2004** in evidence. The “*Case Summary*” section of the **Loan Application** details as follows:

*“→Application 1 of 2 → New PDH purchase in joint names (raising €300k in separate APPN on existing PDH in [First Complainant’s] name only)  
→PP€411k; Loan €80k over 25 years @1 yr FXE @2.45%”*

The section labelled “*Mortgage Details*” outlined that the “*TYPE OF LOAN*” selected by the Complainants was a “*Home Loan*”, the “*TYPE OF PRODUCT*” selected was “*Annuity*” and the “*TYPE OF RATE*” selected by the Complainants was “*Fixed*” for 1 year at 2.54%.

It appears that the Complainants applied for the mortgage loan with the Provider, through a third-party broker, in the amount of €80,000.00 in respect of a new private dwelling house with a purchase price of €411,000.00. The Complainants applied for a fixed rate mortgage loan commencing on a 1-year fixed interest rate of 2.54%. I note that the loan amount of €80,000.00 is crossed out in the application form and replaced with €300,000.00. The “*Case Summary*” notes suggest that the Complainants were seeking a further loan amount of €300,000.00 through a mortgage of their existing private dwelling house. The section of the **Loan Application** titled **Application for Credit** details the purchase price as €411,00.00 and the amount of loan required as €80,000.00 however this this crossed out and replaced with €308,000.00. The loan type selected is “*annuity*” and the repayment term required is 25 years. The **Application for Credit** section of the **Loan Application** was signed by the Complainants on **16 April 2004**.

A copy of the Provider’s **Business Banking Heads of Terms** dated **30 April 2004** that was prepared by the Provider’s commercial division details as follows:

*“Date: 30 April 2004  
Facility: Business Residential*

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...

**Amount:** €308,000

**Purpose:** To purchase [address of new private dwelling house]

**Term:** 20 years

**Interest Rate:** 3.25% - (1.25% Tracker)

...

**Security:** First legal charge over:  
[address of new private dwelling house]

**Drawdown:** Subject to approval. On receipt of satisfactory valuation & completion of all legal requirements.

...

{Note: This document does not constitute an offer of facilities/  
Terms & Conditions are subject to formal credit approval by the Bank.}

Following a consideration of the supporting documentation submitted as part of the Complainants' mortgage loan application, the Provider's commercial division prepared a **Proposal Summary** as part of the **Business Banking Credit Application** dated **04 May 2004** which was signed by representatives of the Provider on **11 May 2004**. It appears that the Complainants decided to retain their existing property as their existing private dwelling house and purchase the new property as a residential investment property. The **Proposal Summary** details as follows:

“... **SECURITY**

<u>Proposed Security</u>	<u>Estimated Market Value</u>
<b>Facility 1-</b> <u>[Address of existing private dwelling house]</u>	€400,000
<b>Facility 2-</b> <u>[Address of new residential investment property]</u>	€411,000

Description- This property is a multi-unit (4 separate units) property yielding €30,000 p.a.

...

**PROPOSAL SUMMARY**

> The applicants are seeking an advance of €308,000 to assist in the purchase of a residential investment property at [address of new residential investment property].

> As security for the proposed advance the borrowers are offering the Bank a First Legal Mortgage over the property being purchased at [address of new residential investment property].

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> It will be a condition of loan offer that the Bank receives a valuation from a Bank panel valuer confirming a minimum valuation of €411,000 and rental income of €30,000 p.a.

> The proposed facility will be repaid by principal and interest over a term of 20 years.

> The rate charged will be 3.25% (1.25% tracker rate).

> The LTV is calculated at 75%.

> The borrowers own input will be in the amount of €135,000. [First Complainant] has a credit balance of c. €87k with the Credit Union. Her PDH is presently unencumbered. She is raising funds in the amount of €90,000 against this property. An application for these funds was submitted to [the Provider] broker centre today (04/05/04) and has been approved.

> This loan was originally approved by the intermediary broker centre as a RI, but was referred to commercial, as the property is a multi-unit."

There is a handwritten note beside "The rate charged will be 3.25% (1.25% tracker rate)" which states, "Can we?" and "3.2%".

The Provider has submitted an undated handwritten note in evidence which details as follows:

*"Applicants have now requested*  
€380k      -primary security      €414k  
                 -cross charge PDH      €400k  
                                                      €811k

LTV 47%

*Cross charge on PDH to be reviewed, subject to LTV equalling 75% on primary charge".*

The Provider has submitted a copy of the email correspondence exchange between the Provider and the Complainants' broker. An email from the Complainants' broker to the Provider dated **12 May 2004** details as follows:

*"Hi guys*

*Spoke to client to advise of recent offer from [Provider employee] as follows;*

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AMOUNT      EUR380.000 - one LO -  
TERM          25YRS  
Rate          3 23% TRACKER  
SPL TERMS    X – CHARGE ON [address]

*He appreciates the time and favourable amendments that we have put into it and he will revert tomorrow to me.  
..."*

A representative of the Provider responded to the Complainants' broker by way of email on **12 May 2004** as follows:

*"Thats noted [name of Complainants' broker],  
Thank you.  
..."*

The Complainants' broker emailed the Provider on **14 May 2004** and stated as follows:

*"Morning [Provider employee]*

*We got the gig! Client advised last night that he wants to do the business with us - so thanks for your help - so far!*

*What next? Valuation I assume? Any preferred valuer? Then LO?*

*A few questions to clarify also if you please?*

- 1. Is facility in joint names? Does it matter to you if only in her name?? Reason for question - for Life cover costs to them -1 need to arrange it asap*
- 2. Any particular level of R/Inc required? Salary sufficient as EUR63.000?*

*You might respond if you can today or give me a call on [phone number].*

*Thanks  
..."*

The Provider has submitted a copy of its **internal note** dated **17 May 2004** in evidence, which details as follows:

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*"[the Complainants] were approved a facility of €308,000 @ 3.25% over 20 years on 11 May 04 by [Provider's representative].*

*The term was subsequently amended and approved @ 25 years @ 3.20%.*

*The applicants were originally intending to avail of a Home Loan facility of €90,000, which was approved with the intermediary broker mortgage centre on 5 May 04.*

*The Broker has now contacted us and requested that we do a total loan in the amount of €380,000 taking a First Legal Mortgage over the property being purchased at [Address of new residential investment property] and over the Family Home at [Address of existing private dwelling house].*

...

➤ *The LTV reduces from 75% to 47%*

...

➤ *It is noted that this is outside credit guidelines, however the applicants have combined income of c. €67k..*

*Approval is recommended as sought."*

The further **internal note** dated **17 May 2004** details as follows:

*"[The Complainants] were approved a facility of €308,000 @ 3.25 over 20 years on 11 May 04 by [Provider's representative].*

*[Name of broker representative] of [name of brokerage] has contacted commercial division to request we reduce the rate to 3.20% and increase the term to 25 years.*

...

*Approval is recommended as sought."*

A further **Proposal Summary** as part of the **Business Banking Credit Application** dated **17 May 2004** was prepared by the Provider's commercial division and details as follows:

"

<b>PROPOSED EXPOSURE</b>						
<b>Facility Type</b>	...	...	...	<b>Proposed Term</b>	<b>Rate</b>	<b>LTV</b>
...						
<i>Business Residential</i>				€380,000	240	3.20% 52%
...						
<b>SECURITY</b>						
<b><u>Proposed Security</u></b>	<b><u>Estimated Market Value</u></b>					

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*[Address of existing private dwelling house]* €320,000  
Description- Family Home

*[Address of new residential investment property]* €415,000  
Description

Description- This property is a multi-unit (4 separate units) property yielding €30,000 p.a.

### **PROPOSAL SUMMARY**

- > The applicants are seeking an advance of €380,000 to assist in the purchase of a residential investment property at *[Address of new residential investment property]*.
- > As security for the proposed advance the borrowers are offering the Bank a First Legal Mortgage over the property being purchased at *[Address of new residential investment property]* and a First Legal Mortgage over their Family Home at *[Address of existing private dwelling house]*.
- > It will be a condition of loan offer that the Bank receives a valuation from a Bank panel valuer confirming a minimum valuation on the property at *[Address of new residential investment property]* confirming a minimum valuation of €415,000 and rental income of €24,000 p.a. and a valuation on the property at *[Address of existing private dwelling house]* confirming a minimum valuation of €320,000.
- > The proposed facility will be repaid by principal and interest over a term of 20 years.
- > The rate charged will be 3.20% (1.20% tracker rate).
- > The LTV is calculated at 52%.
- > The borrowers own input will be in the amount of €63,000. *[First Complainant]* has a credit balance of c. €87k with the Credit Union.
- > This loan was originally approved by the intermediary broker centre as a RIP, but was referred to commercial, as the property is a multi-unit.

### **SUMMARY**

#### **" Positive Aspects**

- Good LTV of 52%

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- Nets within guidelines @ 11.4% & 21.0%.
- Good independent income
- Experienced in letting market
- Good savings record

**Negative Aspects**

- No track record with [Provider].
- 100% finance
- The rate is low as the loan was originally approved as a 1% tracker RIP”.

The Provider was submitted what appears to be an internal document titled “COMMERCIAL LOAN INPUT DETAILS” in evidence which details as follows:

“TABS BUS RESIDENTIAL  RIP  CPS COMMERCIAL MTG   
....  
AMOUNT 308,000 VALUE 411,000 TERM 240  
Rate 3.25% VARIABLE  FIXED  FXD TERM   
(1.25% tracker)

It appears that the Provider recorded the loan type as a Business Residential Loan and the interest rate was recorded as a variable interest rate of 3.25%. The “tracker” rate is crossed out.

A letter issued from the Provider’s commercial division to the Complainants’ broker dated **17 May 2004**, which detailed as follows:

*“I refer to the above and now enclose a copy of the letter of offer as promised.*

*The lowest rate we can apply to a loan of this type on our system is 3.25%.*

***The actual rate applicable to this facility is 3.20%.***

*We undertake to amend the rate to 3.20% from the inception date of the loan.”*

The evidence shows that a **Letter of Approval** dated **17 May 2004** was issued from the Provider’s Business Banking division to the Complainants’ broker offering the Complainants a residential business loan for a loan amount of €380,000.00, repayable over a term of 25 years on an interest rate of 3.25%. There is no reference to a tracker interest

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rate in the **Letter of Approval** dated **17 May 2004**. In any event, the Complainants did not accept and sign the **Letter of Approval** dated **17 May 2004**.

The Provider's Business Banking division subsequently issued a **Letter of Approval** dated **18 May 2004** to the Complainants, through their broker by fax and by post. The Provider also sent a copy of the **Letter of Approval** together with the terms and conditions attaching to the **Letter of Approval** to the Complainants' solicitor under cover of letter dated **18 May 2004**. The **Letter of Approval** dated **18 May 2004** details as follows:

<i>Loan Type:</i>	<i>Residential Business Loan</i>
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*Purchase Price / Estimated Value: EUR 811,000.00*  
*Loan Amount: EUR 380,000.00*  
*Interest Rate: 3.25%*  
*Term: 25 year(s)*  
*..."*

The **Special Conditions** attaching to the **Letter of Approval** dated **18 May 2004** detail as follows:

*"...*  
*D. FIRST CHARGE OVER a) [ADDRESS OF NEW PROPERTY] b) [ADDRESS OF EXISTING PRIVATE DWELLING HOUSE]...*  
*F. THIS APPROVAL IS SUBJECT TO A SATISFACTORY SURVEY AND VALUATION BY A [PROVIDER] APPOINTED VALUER ON THE PROPERTY AT [ADDRESS OF NEW PROPERTY] CONFIRMING A MINIMUM VALUATION OF EUR 411,000 AND RENTAL INCOME OF EUR 30,000 AND [ADDRESS OF EXISTING PRIVATE DWELLING HOUSE] CONFIRMING A MINIMUM VALUATION OF EUR 400,000."*

The **European Standardised Information Sheet** ("ESIS"), details as follows:

*"...*  
*Nominal Rate The interest rate is 3.25 percent.*

*The interest rate may vary from time to time. Notice will be given in respect of rate increases. No notice will be given for decreases in rate.*

*The option to apply for a fixed rate product (if available) may be exercised by you at any time otherwise the rate will*

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*remain a variable rate. An administration fee of EUR100 is payable when switching from a variable to a fixed rate product. The option to pay for a fixed rate product does not apply in respect of [Provider product] loans.*

*There are no lock-in periods or penalties associated with this product,*

*This rate is not subject to indexation.*

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

**General Condition 1** of the **General Mortgage Loan Approval Conditions** details as follows:

***"1. STANDARD CONDITIONS RELATING TO ALL LOAN APPROVALS***

*...*

*1.10 Whenever the Directors of [the Provider] in their absolute discretion consider it desirable the interest rate payable under this advance may be varied.*

*1.11 Interest will be charged on the advance from date of the advance cheque or date of issue of the advance where made by other means."*

**General Condition 10** of the **General Mortgage Loan Approval Conditions** details as follows:

*"10.13 Nothing herein shall affect the rights of [the Provider] to vary the interest rate in accordance with the Mortgage Conditions."*

The **General Mortgage Loan Approval Conditions** also outline:

***"IF THE LOAN IS A VARIABLE RATE LOAN THE FOLLOWING APPLIES:  
"THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME."***

**Condition 1.10** of the **Provider's Mortgage Conditions** details as follows:

*""The Appropriate rate" means the rate or rates of interest per centum per annum for the Advance as specified in the Letter of Approval, or such increased or reduced*

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*rate or rates of interest as may from time to time be payable on the Advance and any Additional Advance under the terms hereof."*

**Condition 4.13** of the **Provider's Mortgage Conditions** details as follows:

*"[The Provider] may from time to time increase or reduce the Appropriate Rate (and may do so where the Appropriate Rate includes a differential by increasing or reducing either or both of the relevant Basic Rate and the differential). A reduction in the Appropriate Rate may be made without notice or formality and so as to take effect from such date [the Provider] may determine but [the Provider] reserves the right not to permit a reduction in the Monthly Repayment."*

The **Acceptance of Loan Offer** was signed by the Complainants and witnessed by their solicitor on **15 July 2004** on the following terms:

*"1. I/we the undersigned accept the within offer on the terms and conditions set out in*

- i. Letter of Approval*
- ii. the General Mortgage Loan Approval conditions*
- iii. the [Provider] Mortgage Conditions*

*copies of the above which I/we have received, and agree to mortgage the property to [the Provider] as security for the mortgage loan.*

*...*

*4. My/our Solicitor has fully explained the said terms and conditions to me/us."*

The evidence shows that the application process began with the Complainants engaging with a third-party broker to facilitate the mortgage loan application with the Provider. Consequently, in circumstances where the Complainants were engaging with a broker with respect to their mortgage loan options, there was no requirement for the Provider to communicate directly with the Complainants in relation to the completion of the application form or to discuss interest rate options, with respect to the loan application.

The documentation submitted in evidence, which forms part of the application process, shows that the Complainants were seeking to purchase a property that would become their new private dwelling house while their existing private dwelling house would become their residential investment property. It appears that the Complainants' application then changed, in that, the new property would become their residential investment property while their existing property would remain as their private dwelling house. In this regard,

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Provider's **Heads of Terms** document and the **Proposal Summary** document refer to the proposed interest rate as being a tracker interest rate. However, it transpired that the new property was in fact categorised as a commercial property as it was a multi-let property divided into four letting units which was yielding, and was expected to continue to yield, an annual income of €30,000. In circumstances where it transpired that the mortgaged property was not the Complainants' private dwelling home or a residential investment property, the Provider ultimately offered the Complainants a residential business loan by way of the **Letter of Approval** dated **18 May 2004**. This was a mortgage product offered by the Provider as part of its suite of commercial mortgage products.

The Provider began to offer tracker rates to new home loan and new residential investment loan customers in **early 2004**, subject to certain eligibility and lending criteria. However, the Provider did not offer tracker interest rates on commercial loans, to include commercial residential investment property loans and residential business loans, until **late 2007**. Therefore, the Provider, as a matter of policy, could not offer the Complainants a tracker interest rate on their residential business loan in **May 2004**. I accept that the Provider operates as a business, and this was a commercial decision that the Provider was entitled to make.

The **Letter of Approval** dated **18 May 2004** provided for an interest rate of 3.25% to apply to the loan. However, it appears from the Provider's letter to the broker dated **17 May 2004**, as detailed above, that the Provider intended to amend the rate to 3.20% from the inception date of the mortgage loan. While the nature of the applicable interest rate is not evident on the face of the **Letter of Approval**, the **General Mortgage Loan Approval Conditions** and the **Provider's Mortgage Conditions** describe the applicable interest rate as one that the Provider may increase or decrease from time to time. The **ESIS**, although not a legally binding document, also describes the applicable interest rate as one that may vary from time to time. While I acknowledge that a tracker interest formed part of the discussions between the Provider and the Complainants' broker during the application stage for the mortgage loan when the new property was considered a private dwelling house or a residential investment property, there is no reference whatsoever to a tracker interest rate in the formal loan offer that ultimately issued to the Complainants in the form of the **Letter of Approval**. It is important to highlight that while the **Heads of Terms** document and the **Proposal Summary** document refer to a tracker interest rate, these documents do not constitute a formal loan offer from the Provider and were always subject to formal credit approval by the Provider. Rather, it is the **Letter of Approval** dated **18 May 2004**, the **General Mortgage Loan Approval Conditions** and the **Provider's Mortgage Conditions** that form the basis of the contractual relationship between the parties and which govern the Complainants' mortgage loan. In order for the Complainants to have a contractual right to a tracker interest rate at the time of drawdown or at any time during the term of the mortgage loan, that right would need to be specifically

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provided for in the Complainants' mortgage loan agreement. However, the **Letter of Approval** dated **18 May 2004** did not contain an offer of a tracker interest rate (comprising the ECB main refinancing rate and a percentage margin set by the Provider) or an expectation that a tracker interest rate would apply at any stage during the term of the mortgage loan.

The Complainants signed the **Acceptance of Loan Offer** section of the **Letter of Approval** dated **18 May 2004**, some two months later on **15 July 2004**, indicating that their solicitor had fully explained the contract terms to them. The evidence shows that the Complainants were afforded sufficient time to consider the terms and conditions of the mortgage loan agreement with their solicitor and third-party broker. If it was the case that the Complainants were unsure of the terms and conditions of the **Letter of Approval**, the Complainants and/or their broker and/or their solicitor could have sought clarification from the Provider. Equally, if the Complainants were not happy with the terms and conditions of the **Letter of Approval** dated **18 May 2004**, including the type of interest rate offered, the Complainants could have decided not to accept the offer made by the Provider. Instead, the Complainants signed the **Letter of Approval** confirming their acceptance of the mortgage loan on the terms and conditions offered by the Provider and proceeded to draw down the mortgage loan under mortgage loan account ending **4728**.

The Provider has submitted a table of the variable interest rates that applied to the Complainants' mortgage loan account ending **4728** from inception of the mortgage loan on **03 August 2004** to **10 June 2014** together with **mortgage loan account statements** from **25 April 2006** to **22 June 2015** which show all the rate changes that occurred on the mortgage loan account. There is no indication that a tracker interest rate was applied to the mortgage loan at any time. There is also no evidence to suggest that the Complainants and/or the Complainants' broker followed up with the Provider to query the applicable interest rate or to explore the option of applying a tracker interest rate to the mortgage loan account in **late 2007**, when the Provider began offering tracker interest rates on residential business loans, subject to certain eligibility and lending criteria. Even if the Complainants did apply for a tracker interest rate in **late 2007**, it was entirely within the Provider's commercial discretion as to whether it wished to accede to the Complainants' request and offer the Complainants a tracker interest rate on their residential business loan.

I note that the Complainants submitted a further **Loan Application** to the Provider in **2005** to apply for additional borrowings in the amount of €40,000.00 for the purposes of "*home improvements*". The Complainants again completed this application with their chosen third-party broker. In circumstances where the Complainants were engaging with a broker with respect to their application for an additional advance of funds, there was no

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requirement for the Provider to communicate directly with the Complainants in relation to the completion of the application form or to discuss interest rate options.

The Provider has submitted a copy of the **Loan Application** that was signed and accepted by the Complainants on **29 August 2005**. The section labelled "*Mortgage Details*" outlined that the "*type of loan*" selected by the Complainants was for "*further advances*" and the "*rate type*" selected by the Complainants was "*tracker*". Written above the Complainants' selection of "*tracker*" is "*same as existing*". The Complainants submit that this would "*seem to validate the assertion that the applicants and the broker believed that the original loan was indeed a tracker mortgage.*"

While it may be that the Complainants believed their original mortgage loan had drawn down on a tracker interest rate, it is important to highlight that the Complainants' original mortgage loan under mortgage loan account ending **4728** never operated on a tracker interest rate but rather operated on a variable interest rate.

I have not been provided with any evidence of any communications that took place between the Provider and the Complainants' broker and/or the Complainants in relation to the mortgage loan application for additional borrowings. The evidence shows that the Provider's commercial division completed a **Mortgage Proposal** in relation to the additional borrowings on or around **21 September 2005**. The **Mortgage Proposal** shows a revised loan amount of €50,000.00 and the "*Proposal Summary Requirement*" is noted as an "*Equity Release*". Therefore, it appears that certain discussions may have taken place between the Complainants and their broker given the request for additional borrowings changed from a loan amount of €40,000.00 to €50,000.00. The Provider's commercial division issued a **Letter of Approval** dated **21 September 2005** to the Complainants for a loan amount of €50,000.00 on a variable interest rate of 3.25% repayable over a term of 24 years. The "*loan type*" is described as a residential investment property loan. The Complainants accepted and signed the terms and conditions of the **Letter of Approval** dated **21 September 2005** on **21 October 2005** in the presence of their solicitor and proceeded to draw down mortgage loan account ending **4636** on a variable interest rate of 3.25% on **08 December 2005**. On **08 December 2005**, mortgage loan account ending **4728** was also operating on a variable interest rate of 3.25%.

While the Complainants may have "*believed*" that their original mortgage loan account ending **4728** was operating on a tracker interest rate, this did not confer a contractual entitlement on the Complainant to a tracker interest rate on that mortgage loan account or indeed their new mortgage loan account ending **4636**. I note that mortgage loan account ending **4728** was redeemed on **22 June 2015**.

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In light of the foregoing and having carefully considered the Complainants' mortgage loan documentation and the submissions made by the parties to the complaint, I am satisfied that the Complainants did not have any contractual entitlement to a tracker interest rate in respect of mortgage loan account ending **4728**.

In addition, it is to be noted that by way of letter dated **17 May 2004** to the Complainants' broker, the Provider undertook to amend the applicable interest of 3.25% to 3.20% from the inception date of mortgage loan account ending **4728**. However, it appears that the Provider did not action this as the mortgage loan drew down on a variable interest rate of 3.25%. In this regard, the Provider, in its **Formal Response** to this Office dated **20 April 2020**, details as follows:

*"On review of the Complainants' file, the Bank notes correspondence dated 17 May 2004 in which the Bank agreed to reduce the interest rate on the Complainants' loan from 3.25% to 3.20% following drawdown. It is not clear if this correspondence was issued by the Bank to the Complainants, however the Bank notes it was its intention to reduce the Complainants' interest rate at that time by 0.05%. In light of this, the Bank would like to amend the interest rate on the Complainants' loan in this manner and back date the reduction of 0.05% from the date of drawdown on 3 August 2004 to the date of redemption on 22 June 2015. This amounts to a refund, to include time value of money, of €2,562.71, which the Bank would now like to offer the Complainants as part of this submission."*

It is understood that the Provider has identified that it did not reduce the applicable interest rate by 0.05% at the inception of mortgage loan account ending **4728** as promised. Therefore, the Provider is seeking to rectify its oversight in this regard by backdating the reduction of 0.05% from the date of drawdown on **03 August 2004** to the date of redemption on **22 June 2015** which results in a refund of interest overpaid and time value of money of €2,562.71. I consider this to be a reasonable attempt by the Provider to rectify this error, which appears to have been identified by the Provider during its investigation of this complaint. It is understood that this offer of €2,562.71 remains available for the Complainants to accept at any time.

For the reasons set out above, I do not uphold the complaint.

## **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**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

(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,

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- (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.

