



<u>Decision Ref:</u>	2020-0312
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to one a number of mortgage loan accounts held by the Complainant with the Provider. The mortgage loan that is the subject of this complaint is secured on a residential investment property.

The loan amount was €220,000 and the term of the loan was 25 years. The Letter of Approval which was signed on **24 May 2006** outlined the loan type as a “*Residential Investment Loan 1 Year Fixed New Business Rate*”.

The Complainant’s Case

In **June 2006** the Complainant’s mortgage loan account was issued on a one-year fixed interest rate of 3.45%.

The Complainant submits that when the initial fixed rate period expired in **June 2007**, the mortgage loan account automatically defaulted to the tracker interest rate of ECB + 1.10%. He states that at that time he decided to apply a fixed interest rate to the mortgage loan account for a period of five years.

The Complainant states that he opted to break from the fixed interest rate period early in **February 2009**, and the mortgage loan account was switched to the standard variable rate.

The Complainant details that he contacted the Provider in **August 2015** to query why he had not been offered the option of reverting to the tracker interest rate when he broke from the fixed interest rate period in **February 2009**, and the Provider *“flatly denied”* that a tracker rate of interest had ever applied to the mortgage loan account. The Complainant submits that the Provider *“not only failed to advise me that I was entitled to revert to a tracker rate mortgage but completely denied that I was ever on a tracker rate”*. The Complainant states that the Provider’s failure to acknowledge that a tracker interest rate had applied to his mortgage loan account was *“completely disingenuous”*.

The Complainant submits that the Provider *“finally”* acknowledged in **June 2018** that a tracker rate had in fact previously applied to the mortgage loan account, however, it now claims that the Complainant does not have a contractual right to revert to a tracker rate.

The Complainant submits that the Provider’s failure to offer him a tracker interest rate when he exited the fixed rate period in **February 2009** was *“completely deceitful”*. He states that he has been *“severely affected by [the Provider’s] failure to inform me that I was entitled to return to my tracker rate mortgage of 1.1% above the ECB rate once the term of my fixed rate had ended, and as a result I am currently paying a rate of 5.8% (even higher than the standard variable rate).”*

The Complainant is seeking the reinstatement of the tracker interest rate on his mortgage loan account. He also seeks *“full redress and compensation in line with what has been offered to all Tracker mortgage customers”*.

The Provider’s Case

The Provider states that a **Letter of Approval** was issued to the Complainant on **17 May 2006** which provided for an initial rate of 3.45% fixed for one year. The Provider states that the terms and conditions of the Complainant’s mortgage did not include an entitlement to be offered a tracker rate of interest, either on expiry of a fixed rate period, or at any time during the mortgage term. It relies on **Condition A** of the **Special Conditions** and **General Mortgage Loan Approval Condition 5** in support of this.

The Provider submits that this loan offer was accepted by the Complainant with the benefit of independent legal advice on **24 May 2006** and in accepting the offer, the Complainant confirmed that the terms and conditions had been fully explained to him by his legal advisor.

The Provider states that in **mid-2006** it began including a tracker rate option in the rate options offered to its existing customers who were maturing from a fixed interest rate period, although their mortgage loan agreement did not specify an entitlement to be offered a tracker rate. The Provider submits that this initiative was taken against the backdrop of the competitive mortgage market at that time. From **mid-2006** until **mid-2009**, the Provider submits that in the absence of signed instructions from a customer, a tracker interest rate was applied to a mortgage loan account as the default interest rate. The Provider submits that furthermore, it also included a tracker rate in the rate options offered to customers who enquired about changing the interest rate applicable to their mortgage loan account between **mid-2006** and **mid-2008**.

The Provider submits that it issued a letter to the Complainant on **25 May 2007** in advance of the expiry of the initial fixed rate period on **14 June 2007**. It details that the letter outlined the interest rate options available to the Complainant, and stated that in the absence of signed instructions from the Complainant, the Provider would apply a tracker rate of 4.85% (ECB + 1.10%) to the account. The Provider states that the options form issued to the Complainant clearly outlined that the options available at that time were the then current rate options and did not refer, expressly or by implication, to any interest rate that may apply at any future date.

The Provider submits that the Complainant contacted it on **11 June 2007** to state that he had been offered a more attractive tracker rate and fixed rate from another financial service provider. The Provider states that on **14 June 2007**, as it had not received a signed options form from the Complainant, the mortgage loan account defaulted to a tracker rate of 4.85% (ECB + 1.10%). It states that by letter dated **15 June 2007**, it furnished a new rate options form to the Complainant. It details that the Complainant returned the signed options form confirming his preference for a five-year fixed interest rate of 5.05%, which was applied to the mortgage loan account on **26 June 2007**.

The Provider details that on **20 January 2009**, the Complainant wrote to the Provider stating that he wished to exit the fixed rate and transfer to a standard variable rate of 4.55%. The Provider submits that on receipt of the Complainant's written request, his mortgage loan account was transferred to the prevailing variable rate of 4.65% with effect from **1 February 2009**.

The Provider submits that on **16 February 2009**, the Complainant wrote and called the Provider to query why a variable interest rate of 4.65% had been applied to his mortgage loan account, instead of the rate of 4.55% which he stated had previously been agreed by him with the Provider's Business Retention team.

/Cont'd...

The Provider details that it reviewed the account and the mortgage department reverted to the telephone agent to confirm that a rate of 4.65% had been agreed for the Complainant's mortgage loan. However in accordance with the variable rate changes the rate would be decreased to 4.15% from **13 February 2009**.

It states that the Complainant contacted the Provider again by telephone on **24 February 2009** and informed an agent that he had come to an agreement with the Provider's Retention Department that the rate on both of his mortgage accounts would be 4.05%. The Provider states that an agent returned a call to the Complainant on **03 March 2009** to outline the rates then available for residential investment properties and for home loans. The Provider details that the rate change to the variable rate of 4.15% was notified to the Complainant by letter dated **03 March 2009**. The Provider outlines that the Complainant's mortgage loan account has remained on a variable rate since that date.

The Complaint for Adjudication

The complaint for adjudication is that the Provider failed to offer the Complainant the option to apply a tracker interest rate of ECB + 1.1% to his mortgage loan account when he broke the fixed interest rate period applicable to the mortgage loan in **February 2009**.

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 Complainant was 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.

A Preliminary Decision was issued to the parties on **26 August 2020**, 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 review and set out the relevant provisions of the Complainant's mortgage loan documentation. It is also necessary to consider the details of the interactions between the Complainant and the Provider in and around **February 2009**.

The **Letter of Approval** dated **17 May 2006** details as follows;

"Loan Type:	<i>Residential Investment Loan 1 Year Fixed New Business Rate</i>
--------------------	-------------------------------------------------------------------

<i>Purchase Price / Estimated Value:</i>	<i>EUR 371,000.00</i>
<i>Loan Amount:</i>	<i>EUR 220,000.00</i>
<i>Interest Rate:</i>	<i>3.45%</i>
<i>Term:</i>	<i>25 year(s)"</i>

The **Special Conditions** to the Letter of Approval detail as follows;

"Special Conditions

- A. *GENERAL MORTGAGE LOAN APPROVAL CONDITION 5 "CONDITIONS RELATING TO FIXED RATE LOANS" APPLIES IN THIS CASE. THE INTEREST RATE SPECIFIED ABOVE MAY VARY BEFORE THE DATE OF COMPLETION OF THE MORTGAGE."*

General Condition 5 of the **General Mortgage Loan Approval Conditions** outline;

- "5.1 The interest rate applicable to this advance shall be fixed from the date of the advance for the period as specified on the Letter of Approval, and thereafter will not be changed at intervals of less than one year.*
- 5.2 The interest rate specified in the Letter of Approval may vary before the date of completion of the Mortgage.*
- 5.3 Whenever repayment of a loan in full or in part is made before the expiration of the Fixed Rate Period the applicant shall, in addition to all other sums payable, as a condition of, and at the time of such repayment, pay whichever is the lesser of the following two sums:*
- (a) A sum equal to one half of the amount of interest (calculated on a reducing balance basis) which would have been payable on the principal sum desired to be repaid for the remainder of the Fixed Rate Period, or*

/Cont'd...

(b) A sum equal to [the Provider's] estimate of the loss (if any) occasioned by such early repayment, calculated as the difference between on the one hand the total amount of interest (calculated on a reducing balance basis) which the applicant would have paid on the principal sum to that being repaid to the end of the Fixed Rate Period at the fixed rate of interest, and on the other hand the sum (if lower) which [the Provider] could earn on a similar principal sum to that being repaid if [the Provider] loaned such sum to a Borrower at its then current New Business Fixed Rate with a maturity date next nearest to the end of the Fixed Rate period of the loan, or part thereof, being repaid.

5.4 Notwithstanding Clause 5.1 [the Provider] and the applicant shall each have the option at the end of each fixed rate period to convert to a variable rate loan agreement which will carry no such redemption fee."

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."

The **Acceptance of Loan Offer** was signed by the Complainant and witnessed by a solicitor on **24 May 2006**. The Acceptance of Loan Offer states as follows:

"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 Condition*
- iii. [the Provider's] 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."

It is clear to me that the Letter of Approval envisaged a one-year fixed rate of 3.45% and thereafter the option of a variable rate. The variable rate, in the Complainant's mortgage loan documentation, made no reference to varying in accordance with variations in the

/Cont'd...

ECB refinancing rate, rather it was a variable rate which could be adjusted by the Provider. The Complainant accepted the Letter of Offer, having confirmed that the Loan Offer had been explained to him by his solicitor.

The Provider issued a **rate options letter** and **rate instructions form** to the Complainant prior to the expiry of the one-year fixed rate period in **May 2007**.

The Provider's letter dated **25 May 2007** details as follows;

"I am writing to remind you that the current rate option on your mortgage account will end on 14 Jun 2007.

Please find attached the current options available to you, including our competitive tracker variable rate. In calculating the new tracker rate we use the original loan amount to calculate your balance band and we use your current balance and the original valuation of your home to calculate the loan to value.

If we do not receive a written instruction from you in relation to the above on or before the 14 Jun 2007, we will automatically default your loan to the tracker variable rate."

I am disappointed to note that the Provider has not furnished a copy of the rate instruction form which was enclosed with the rate options letter of **25 May 2007**. However I understand that it is not in dispute between the parties that a tracker interest rate of ECB + 1.10% was included as a rate option at that time.

The Provider has furnished internal email correspondence into evidence. This correspondence shows the following interactions between the Provider's representatives:

- Email on **11 June 2007** at **17:43PM** details as follows;

"I understand the customer has been in touch with your Dept.

I think he was dealing with [Provider's representative name].

He has the following loans

[Account ending] 9412-Family Home-He advises that [third party Provider] have offered Tracker plus .55% or 5 Year Fixed 4.89 %- Legal Fees of €1 k plus € 150 for Valuation-LTV CIRCA .55%

/Cont'd...

[Account ending] 8750-Rip Property Plus .75 % over Tracker RATE-LTV .58 %

Can you do anything for him-his contact number is [phone number]"

- Email on **11 June 2007** at **19:07PM** details as follows;

"Got back to this guy, confirming that [third party Provider] are offering 0.55% on the HL and 0.75% on the RIP and 4.89% on the 5 year.

[Account ending] 875-0

[Account ending] 941-2

On this basis, can we get offer 5.05% on both of these?"

- Email on **14 June 2007** states as follows;

"Can you please arrange a rate letter for 5.05% discount 5 year fixed."

I understand that the tracker interest rate of 4.85% (ECB + 1.1%) was applied to the mortgage loan account on the expiry of the fixed interest rate period in **14 June 2007**.

The Provider wrote to the Complainant on **15 June 2007** as follows;

"Further to our recent communication, I am attaching a list of our current fixed rate options. You indicated that you are interested in availing of our five year fixed rate of 5.05%. Please tick the rate you would like and return it to: [Provider's address]"

The enclosed **rate instruction form** outlined as follows;

"Please tick the option you want.

Account Number: XXXXXXXXXXXX

Approximate repayment		eur €
Current Rate	4.85%	€1,284.95
1 Year fixed rate Mortgage currently	4.99%	€1,302.19
2 Year fixed rate Mortgage currently	5.15%	€1,322.04
3 Year fixed rate Mortgage currently	5.10%	€1,315.82
5 Year fixed rate Mortgage currently	5.05%	€1,309.61

...

- *The above figures only give you an idea of your revised monthly repayment, and may change.*
- *We will send you details of your actual repayment shortly.*
- *If you choose a fixed rate, the standard fixed rate conditions will apply.*
- *The above fixed rates are valid for 7 working days”*

The Complainant signed the rate instruction form selecting the five year fixed rate of 5.05% which was stamped as received by the Provider on **26 May 2007**. It appears that the date on the stamp was incorrect and should rightly have been **26 June 2007**.

The Provider wrote to the Complainant by letter dated **27 June 2007** detailing as follows;

“I acknowledge receipt of your acceptance of [the Provider’s] loan offer and confirm that the rate of interest applicable to your loan account has been switched from a tracker rate to a fixed rate for 5 year(s) at 5.150%.”

On the basis of the above it appears that the tracker rate of 4.85% (ECB + 1.10%) was applied to the Complainant’s mortgage loan account from **14 June 2007** to **26 June 2007**. It is understood that on **26 June 2007**, the 5 year fixed interest rate of 5.15% was applied to the mortgage loan. This was amended to the fixed interest rate of 5.05% to reflect the actual rate that was offered to and accepted by the Complainant.

The Provider has summarised its policy on its tracker interest rate offerings as follows;

“...[in mid] 2006, the [Provider] introduced a policy of offering a tracker rate of interest to its existing customers who were maturing from a period of a fixed rate of interest although their loan contract did not specify an entitlement to be offered a tracker rate at maturity (this initiative was taken against the backdrop of the competitive mortgage market at that time). Therefore, a Tracker mortgage rate was included in the list of options in the automated options letter issued to a customer in the month prior to the date of maturity of the fixed rate period. Between [...] 2006 and [...] 2006 while the options letter included the offer of a tracker interest rate, in the absence of a customer selection, the variable rate was applied to the mortgage as the default interest rate. From [mid] 2006 until [mid] 2009, in the absence of a customer selection the tracker interest rate was applied to the mortgage as the default interest rate.

While the [Provider] commenced the withdrawal of its tracker mortgage interest rate offering in [mid] 2008 (it continued until [mid] 2009 its policy of offering a tracker interest rate maturity option to existing fixed rate customers whose contracts did not contain an entitlement to be offered a tracker rate at maturity of an existing fixed rate period.

After [mid] 2009, the [Provider] continued to offer and / or apply Tracker rates to maturing loans where customers had a contractual right to same."

Having considered the mortgage loan documentation, it is my view that the Complainant did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed rate period which applied from drawdown in **June 2006** to **June 2007**. It appears that the Provider, in line with its own policy at the time, offered the Complainant a tracker interest rate and applied the tracker interest rate of 4.85% (ECB + 1.10%) as the default rate on **14 June 2007**. That tracker interest rate was only applied to the mortgage loan for 12 days between **14 June 2007** and **26 June 2007** while the Complainant was finalising his negotiations with the Provider with respect to the interest rate to be applied to the mortgage loan on the expiry of the initial fixed interest rate period. The Complainant negotiated a five year fixed interest rate of 5.05% and that interest rate was applied to the mortgage loan in accordance with the Complainant's instructions on **27 June 2007**.

It appears that the Complainant called the Provider on **16 January 2009**. I have not been provided in evidence with a recording of the telephone call, however the notes of the call with the Business Retention Unit record as follows:

"Dissatisfied with rates – believes they are very high – didn't disclose if offered different by other institution."

The Provider has furnished internal email correspondence into evidence. This correspondence shows the following interactions between the Provider's representatives:

- Email on **19 January 2009** at 13:31

"[account ending] 8750 is eligible for an LTV variable rate of 4.65% which is going to be reduced down to 4.15% on the 13/02/2009

[account ending] 9412 is eligible for an LTV variable rate of 4.55% which is going to be reduced down to 4.05% on the 13/02/2009

I just rang the customer to inform him of the above but for future notice it is important to note that this information is available to you on the intranet."

/Cont'd...

The Complainant wrote to the Provider by letter dated **20 January 2009** as follows;

"From today, I wish to exit out of my current fixed rate of 5.05% onto the standard variable rate currently 4.55%."

The Provider issued a letter dated **04 February 2009** which detailed that the mortgage loan had been amended to the variable rate of 4.65%. The Complainant responded by letter dated **16 February 2009** and detailed as follows:

"Recently, I requested a conversion from fixed rate (5.05%) to variable rate (4.55%)."

In the letter of confirmation dated 04/02/2009 (see attached) from [the Provider](your ref: [redacted]) I noticed an error in the interest rate applicable which read 4.65% when in-fact it should have read 4.55% (Confirmed by the Business Retention Team, so long as the LTV was <=80%).

I would be grateful if this could be rectified as soon as possible and a letter of confirmation sent to the above address outlining all the account details to date."

The Provider issued a letter dated **24 February 2009** which detailed that the mortgage loan had been amended to the variable rate of 4.15%.

It appears that the Complainant called the Provider on **24 February 2009**. I have not been provided in evidence with a recording of the telephone call, however an internal email from the Mortgage Servicing Unit after the call records as follows:

"Customer has two accounts, he says that he came to a[n] agreement with our former retention department that the rate on both accounts would be 4.05%, I do know that the RIP loans were 4.65% across the board, is there any chance of the rate be[ing] amended?"

The Provider wrote to the Complainant by letter dated **03 March 2009** which outlined as follows:

"Please note that as your account is a residential investment loan the variable rate available to you is 4.65% (now 4.15% as above) for accounts above and below the LTV of 80%. The rate of 4.55% (now 4.05%) is only available on Home loans."

The Complainant details that the Provider failed to advise him that he was entitled to revert to a tracker interest rate mortgage in or around **February 2009**. The Complainant's mortgage loan documentation does not provide for an entitlement to any particular

/Cont'd...

interest rate type when a break in a fixed interest rate period was effected by the Complainant in **February 2009**. It is important for the Complainant to be aware that there was no contractual or other entitlement to a tracker interest rate on the Complainant's mortgage loan at any point in time. The fact that the Provider offered the Complainant a tracker interest rate of ECB + 1.1%, which he did not accept, when the initial fixed interest rate period ended in **June 2007**, as a matter of policy, and applied the tracker interest rate for 12 days while the ongoing interest rate negotiations were concluding, did not create an entitlement to the tracker interest rate at a later point in time.

The Complainant also submits that the Provider completely denied that his mortgage loan was ever on a tracker interest rate. In this regard the Complainant refers to correspondence and a telephone call with the Provider in **August 2015** where the Provider "omitted" and "flatly denied" that the mortgage loan was ever on a tracker rate.

The Provider's letter to the Complainant dated **25 August 2015** details as follows:

"I can confirm that your mortgage issued on 14th June 2006 on a one year fixed rate of 3.45%. On 14th June 2007 your loan switched to a five year fixed rate of 5.05% as per your signed options letter enclosed. On 1st February 2009 your loan switched to the standard variable rate at the time as per your written request dated 20th January 2009 copy also enclosed."

I have been provided with a recording of a telephone call between the Complainant and the Provider which took place on **26 August 2015**, wherein the Complainant queries the letter dated **25 August 2015** and the absence of the tracker rate being recorded as having been applied from **14 June 2007** to **26 June 2007**.

With respect to the correspondence on **25 August 2015**, the Provider in response to the complaint to this Office details as follows:

"Entirely due to an oversight, the Bank did not include in its letter to the Complainant of 25 August 2015 a period of five days in 2007 when a tracker rate of interest was applied to the account. The Bank regrets any inconvenience caused as a result of this oversight and would like to offer the Complainant a gesture of goodwill in the sum of €300 in recognition of this service issue."

For the avoidance of doubt, the evidence shows that the Complainant's mortgage loan account was on a tracker interest rate for a period of 12 days and not the 5 days as indicated by the Provider. In this regard the Complainant's mortgage loan statements for **2007**, shows the following entries:

/Cont'd...

14 June 2007	New Product 4.85%
19 June 2007	Rate Change 5.10%
26 June 2007	New Product 5.15%
26 June 2007	Rate Change 5.05%

It is understood that the ECB Base Rate was amended on **13 June 2007** from 3.75% to 4.00%. This would explain the rate change on **19 June 2007** to the higher tracker interest rate.

I accept that the Provider should have ensured complete accuracy in the products and rate changes that were outlined in the letter dated **25 August 2015**. However I accept that errors can occur and I note that the Provider has offered the sum of €300 as a goodwill gesture for this error to the Complainant in the Provider's submission dated **10 May 2019**. In the course of responding to this complaint the Provider in its submission dated **03 April 2019** has offered the Complainants a further gesture of goodwill of €250 for the delay in responding to the Complainant's queries during his communication with the Provider in **January 2018** and for the delay in issuing the subsequent Final Response Letter of **12 June 2018**. I understand that this sum of €550 remains available to the Complainant to accept. I am of the view that these are reasonable offers for the Provider's delays and errors in responding to the Complainant during this dealings with the Provider. The Complainant, in his e-mail to this Office dated **26 August 2020**, outlined that he accepted the Ombudsman's decision and would like to accept the Provider's offer of €550 compensation. I trust that the parties will make arrangements for prompt payment.

Having considered the mortgage loan documentation and the entirety of the communications between the parties, it is my view that that the Complainant did not have a contractual or other entitlement to a tracker interest rate at any point in time, including the expiry of the fixed interest rate period in **June 2007** and when the Complainant broke out of the fixed interest rate period in **February 2009**. The fact that the Provider offered the Complainant a tracker interest rate of ECB + 1.1% when the initial fixed interest rate period ended in **June 2007**, as a matter of policy, and applied the tracker interest rate for 12 days while the ongoing interest rate negotiations were concluding, did not create an entitlement to the tracker interest rate at a later point in time.

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

Conclusion

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

/Cont'd...

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.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

22 September 2020

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.