



<u>Decision Ref:</u>	2020-0392
<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 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**

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 is secured on the Complainants' former principal private residence.

The loan amount was £63,214.00 and the term of the loan was 25 years. The particulars of the mortgage loan offer signed by the Complainants on **25 January 1999** detailed that the interest rate was "*Fixed @4.500% until 3 April 2000*".

The Complainants' Case

The Complainants drew down their mortgage loan account with the Provider on a fixed interest rate in **January 1999**.

The Complainants submit that the Provider has treated them "*unfairly in regard to access to tracker mortgages*" and they were "*not given fair access to the tracker mortgage product*" while it was still available.

The Complainants submit that in the **Mortgage Form of Authorisation (MFA)** issued to them in **2002** they were not offered a tracker interest rate option *“even though the bank state that this was an available product from [late] 2001 onwards.”*

The Complainants detail that they were offered a tracker interest rate option once in **October 2006**, *“but not on subsequent mortgage adjustment opportunities.”* They state that *“we did not know that by not taking the 2006 option, we would be excluded from being offered the tracker rate again or that we had the 'ability to approach the provider at any time' to renegotiate rates or products”.* They further submit that *“just because we elected not to take the tracker option in 2006, does not mean we would not have selected it at any other time as our decisions were based on our circumstances the time of each offer and these changed from year to year.”*

The Complainants submit that *“We take exception to the bank's new insistence [sic] that the range of 'rate options' were only a 'selection of a range of available products at that time' and the implication that we could have requested alternative options. This is an attempt to re-write history as it was never explained to us that we could choose other options that were not listed on the MFA's. Stating that it 'was fully open for [the Complainants] to seek to move to a tracker rate of interest at any point until [late] 2008' is ridiculous as this was not communicated to us at any time by the bank!”*

In response to the Provider's submission that it cannot provide a copy of the **product review notice** dated **25 September 2009** due to the lapse of time and because the Complainants did not accept and return it to the Provider, the Complainants have queried *“which is it? Is it because they did not receive a signed response or due to the 'lapse in time' - if it is the latter, we find this difficult to accept given the paperwork that could be reproduced from 1999, ten years prior.”*

The Complainants further submit that *“During this whole complaint, there is no mention, admission or acknowledgement [sic] of the rough treatment and aggressively worded correspondance [sic] from the bank to us which obviously caused a lot of stress in our relationship and family life”.*

The Complainants are seeking;

- a) Access to the tracker rate option.
- b) Compensation for the financial loss incurred.

The Provider's Case

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The Provider details that the Complainants drew down a mortgage of £63,214.00 (€79,993.50) for a term of 25 years on **03 March 1999** under a **Loan Offer Letter** dated **21 January 1999** signed and accepted by the Complainants on **25 January 1999**.

The Provider states that the **Offer Letter** outlined that the mortgage loan account would draw down on a fixed rate of 4.50% for the first 14 months, after which the loan would move to a standard variable rate. It relies on **Clause 3** of the Offer Letter which set out the nature of the variable rate. The Provider states that there is no provision whatsoever in the Offer Letter or the Mortgage Deed for a tracker rate of interest.

The Provider outlines that the following rate changes occurred on the mortgage loan account;

- The Complainants signed and accepted a **Mortgage Form of Authorisation (MFA)** on **11 March 2000** to move to a variable rate of 4.39%.
- The Complainants signed and accepted a further **MFA** on **6 February 2002** to move to a five-year fixed interest rate of 5.25%.
- By further **MFA** signed and accepted by the Complainants on **10 October 2006**, the Complainants availed of a further 3 year fixed rate at 4.79%. The Provider details that this MFA included the option of a tracker variable rate of 4.25% (ECB + 1.25%) but the Complainants did not choose that option.
- The Provider's records show that it issued a **Product Review Notice** on **25 September 2009** which was not returned by the Complainants. Therefore upon expiry of the fixed rate, the mortgage loan account reverted to a standard variable rate, as provided for in the terms and conditions of the Offer Letter.
- By further **MFA** signed and accepted by the Complainants on **10 February 2018**, the Complainants moved to a 5 year fixed rate of 3%.

The Provider submits that the Complainants have never had a contractual entitlement to a tracker rate and the Provider has never been contractually obligated to offer such a rate to the Complainants.

The Provider submits that *"The key terms and conditions were set out prior to the Complainants entering the 3 year fixed rate product, by way of the 2006 MFA"*. It states that it cannot forecast what rates will be available in the future and all customers are advised of available rates, at that time, prior to the expiry of the fixed rate term.

The Provider details that it did not have any specific policy in place in respect of tracker interest rate offerings in relation to existing customers in **2006**. It outlines that it was at all

times open in **2006** for a customer to approach the Provider with a request to move their mortgage loan account to a tracker interest rate.

The Provider details that tracker rates were withdrawn as a product by the Provider in **late 2008** following which only existing customers with a contractual entitlement to a tracker rate contained in their mortgage loan agreement would be offered a tracker rate.

The Provider *“entirely refutes the suggestion”* that the Complainants were treated unfairly in respect to *“access to tracker mortgages”* whilst they were still readily available to new and existing customers of the Provider. It submits that *“It was fully open for the Complainants to seek to move to a tracker rate of interest at any point until [late] 2008”*.

The Provider states that it cannot furnish a copy of the **Product Review Notice** issued to the Complainants on **25 September 2009** prior to the expiry of the fixed rate on **30 October 2009** *“owing to the lapse of time and because the Complainants did not accept and return it to the Provider.”* It submits that there was no obligation on the Provider in **2009** to retain copies of such correspondence and relies on its internal log to show that the **Product Review Notice** was issued to the Complainants. It details that variable and fixed rate options were offered to the Complainants in the **Product Review Notice** but not a tracker rate, as they had since been withdrawn and the Complainants did not have a contractual entitlement to a tracker rate. It states that as it did not receive any instruction from the Complainants, a variable interest rate was applied to the mortgage loan account.

The Complaints for Adjudication

The complaints for adjudication are the following;

- (a) The Provider failed to offer the Complainants an opportunity to apply a tracker interest rate to their mortgage loan account at any stage other than in **October 2006**; and
- (b) The Provider failed to advise the Complainants that they may not be offered a tracker rate in the future if they failed to avail of the tracker rate offered to them in **October 2006**.

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

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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 12 October 2020, outlining my preliminary determination 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, I set out below my final determination.

Before dealing with the substance of the complaint, I note 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 letter, which outlined as follows;

“In the interests of clarity, the complaint that you are maintaining under this complaint reference number is against [the Provider] and this 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 relevant provisions of the Complainants' loan documentation and to set out certain interactions

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between the Complainants and the Provider during the lifetime of the mortgage loan account.

The **Offer of Advance** dated **21 January 1999**, details as follows;

“1. Amount of credit advanced:	£63,214.00
2. Period of Agreement:	25 Years
3. & 4. Number of	Amount
Repayment Instalment	of each
<u>Instalments</u> <u>Type</u>	<u>Instalment</u>
14 Fixed @4.500% until 3 April 2000	£351.36
286 Variable @5.990%	£404.81 ...
...	

If at any time a variable rate of interest applies to the Loan, please note:

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

The **Acceptance and Consent** was signed and accepted by the Complainants on **25 January 1999** on the following terms;

“I/we accept this Offer of Advance on the within terms and conditions.”

It is clear to me that the Offer of Advance envisaged a fixed interest rate for the first 14 months and thereafter a variable rate of interest. The variable rate in this case made no reference to varying in accordance with variations in the ECB refinancing rate, rather it was a variable rate which could be adjusted at the discretion of the Provider. The Complainants accepted the Offer of Advance on those terms.

I note that the Complainants signed and accepted a **Mortgage Form of Authorisation (MFA)** dated **8 March 2020** on **11 March 2000** to apply a variable rate of 4.64% to the mortgage loan account.

The Provider has submitted that it commenced offering tracker interest rate products to customers in **late 2001**.

A **Mortgage Form of Authorisation** dated **04 February 2002** was issued to the Complainants and detailed as follows;

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"I accept your offer dated 4th February 2002 and apply for the interest rate indicated below for my mortgage.

- | | | | |
|----------|--------------------------|---------------------------------|-------|
| Option A | <input type="checkbox"/> | 1 Year Fixed to 1 November 2002 | 4.99% |
| Option B | <input type="checkbox"/> | 2 Year Fixed to 3 November 2003 | 4.99% |
| Option C | <input type="checkbox"/> | 3 Year Fixed to 1 November 2004 | 4.99% |
| Option D | <input type="checkbox"/> | 5 Year Fixed to 1 November 2006 | 5.25% |
| Option E | <input type="checkbox"/> | 10 Year Fixed to 2 August 2011 | 6.45% |

I agree to the following terms: -

- 1. In the event of early repayment of the loan in whole or in part, or switching to a variable interest rate or to another fixed interest rate during the initial or current fixed rate period as the case may be, there will be a funding fee. This fee will be the amount calculated by the Society of all losses, costs and expenses incurred by the Society arising from the early repayment or switching.*
- 2. If I choose a variable rate mortgage the payment rate on the Homeloan may be adjusted by the lender from time to time.*
- 3. These terms replace any similar terms in my mortgage letter of offer.*
- 4. I confirm that my mortgage letter of offer as amended by this authorisation remains in force."*

The Complainants signed and accepted the **Mortgage Form of Authorisation** on **11 March 2002** opting for the five year fixed interest rate of 5.25% at **Option D**.

Having considered the mortgage loan documentation, I accept that the Complainants did not have a contractual entitlement to a tracker interest rate in **March 2002**. If the Complainants wished to pursue the potential option of applying a tracker interest rate on the mortgage loan, they could have contacted the Provider to request it. It does not appear to me that the Complainants made any such request. However even if a request was made, it would then have been a matter of commercial discretion for the Provider as to whether it wished to accede to any such request made by the Complainants to apply a tracker interest rate to the mortgage loan. It was entirely within the Provider's rights not to accede to such a request, if it was made.

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A further **Mortgage Form of Authorisation** was issued to the Complainants in **October 2006** which detailed as follows;

"I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the "Loan") upon the expiry of my/our existing rate. (Please Note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	<i>Variable Rate</i>	<i>4.440%</i>
<input type="checkbox"/>	<i>Fixed to 31 October 2007</i>	<i>4.750%</i>
<input type="checkbox"/>	<i>Fixed to 31 October 2008</i>	<i>4.790%</i>
<input type="checkbox"/>	<i>Fixed to 30 October 2009</i>	<i>4.790%</i>
<input type="checkbox"/>	<i>Fixed to 31 October 2011</i>	<i>4.890%</i>
<input checked="" type="checkbox"/>	<i>Fixed to 31 October 2016</i>	<i>5.190%</i>
<input type="checkbox"/>	<i>Tracker Variable ECB + 1.25%</i>	<i>4.250%</i>

...

Acknowledgement and Agreement

...

*I acknowledge that following the acceptance by the Lender of this application, the terms and conditions applicable to the Loan shall be amended/ varied by the terms and conditions set out in this Form of Authorisation, and I accept the said conditions and agree to be bound by them. **I acknowledge and agree that:-***

- 1. If I have applied to convert to a fixed rate loan, the interest rate shall be fixed from the date of the expiry of my existing rate. The fixed rate of interest that shall apply shall be the Lender's fixed rate available for the fixed period selected by the Borrower at the date of the expiry of the existing interest rate.*

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2. *In the case of a fixed rate loan, in the event of early repayment of the Loan in whole or in part for any reason, or conversion to a variable interest rate, or other fixed rate within the initial fixed rate period or any further or subsequent fixed rate period, the Borrower shall pay a funding fee to be calculated in accordance with the formula set out above under "Early Repayment".*
3. *If I have applied to convert to a tracker variable rate, I agree that the interest rate applicable to the Loan is a variable interest rate and may vary upwards or downwards. The interest rate shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate ("Repo Rate") for the term of the Loan. Any variation in interest rate shall be implemented by the Lender not later than close of business on the 5th working day following a change in the Repo rate by the European Central Bank.*

Notification shall be given to the Borrower of any variation in interest rate either by notice in writing served on the Borrower, or first named borrower where there is more than one borrower, or by advertisement published in at least one national daily newspaper. In the event that, or at any time, the Repo rate is certified by the Lender to be unavailable for any reason, the interest rate applicable to the Loan shall be the prevailing Home Loan Variable Rate.

4. *If I have applied to convert to a Homeloan Variable rate the payment rate on the Loan may be adjusted by the Lender from time to time.*
5. *Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged."*

The Complainants did not opt to accept the tracker interest rate option and instead signed the MFA on **10 October 2006** electing to apply the 3 year fixed interest rate of 4.790%.

As set out above, it is my view that that the Complainants did not have a contractual or other entitlement to a tracker interest rate at the end of the fixed rate period which applied from **March 2002** to **October 2006**. It appears that the Provider offered the Complainants a tracker interest rate of 4.25% (ECB + 1.25%) by virtue of its own commercial discretion to do so.

The Complainants have submitted that the Provider did not inform them that by not selecting the tracker interest rate in **October 2006** it would not be offered again in the future.

The **Acknowledgement and Agreement section** of the MFA which the Complainants signed on **10 October 2006**, contained detail about the tracker interest rate offering, such that the Complainants could have made an informed decision as to which interest rate to choose at the time. The Provider had set out in a clear and comprehensible manner that the interest rate applicable to a tracker mortgage loan *“shall be no more than the percentage indicated on the previous page above the prevailing European Central Bank Main Refinancing Operations Minimum Bid Rate (“Repo Rate”) for the term of the Loan. “The European Central Bank Refinancing Rate (“the ECB Rate”) plus a percentage over the ECB Rate”*. As such, the Complainants ought to have been aware that, in circumstances where they opted for the tracker interest rate, the percentage of 1.25% would not be exceeded during the term of the loan and the ECB rate would fluctuate in accordance with the European Central Bank.

The Complainants of their own volition decided not to choose the option of a tracker interest rate of ECB + 1.25% (4.25%) at the time and instead selected the higher 3 year fixed interest rate offered (4.79%). The MFA clearly outlined that *“Save as set out in this Form of Authorisation, all the terms and conditions applicable to the Loan remain unchanged”*.

The Provider has submitted that its internal log shows that it issued a **Product Review Notice** to the Complainants on **25 September 2009**.

It is disappointing that the Provider has not furnished a copy of the Product Review Notice. The Provider has submitted that it cannot produce a copy of the Notice *“owing to the lapse of time and because the Complainants did not accept and return it to the Provider”*. It further submits that *“there was no obligation on the Provider at this time in 2009 to retain copies of such correspondence which issued by the Provider – hence the Provider cannot provide a copy of this.”* The Provider is incorrect in its assertion that there was no obligation on the Provider to retain a copy of this correspondence with the Complainant.

It is both surprising and disappointing that the Provider would make such a statement.

If correspondence issues by the Provider to a mortgage holder during the term of a loan and that loan remains active with the Provider, the Provider should retain that documentation on file for six years from the date the relationship with the mortgage holder ends.

In this regard, **Provision 49 of the Consumer Protection Code 2006 (“CPC 2006”)** and **Provision 11.4 and 11.5 of the Consumer Protection Code 2012**, outline as follows;

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“A regulated entity must maintain up-to-date consumer records containing at least the following

- a) a copy of all documents required for consumer identification and profile;*
- b) the consumer’s contact details;*
- c) all information and documents prepared in compliance with this Code;*
- d) details of products and services provided to the consumer;*
- e) all correspondence with the consumer and details of any other information provided to the consumer in relation to the product or service;*
- f) all documents or applications completed or signed by the consumer;*
- g) copies of all original documents submitted by the consumer in support of an application for the provision of a service or product; and*
- h) all other relevant information [and documentation] concerning the consumer.*

Details of individual transactions must be retained for 6 years after the date of the transaction. All other records required under a) to h), above, must be retained for 6 years from the date the relationship ends. Consumer records are not required to be kept in a single location but must be complete and readily accessible.”

In this regard, the Complainants’ mortgage loan was incepted for a term of **25 years** commencing from **March 1999** and the letter and form purportedly issued in **September 2009**. It is my understanding that the mortgage loan remains presently active with the Provider. The Provider is obliged to retain that documentation on file for six years from the date the relationship with the mortgage holder ends. It is therefore unclear to me why a copy of this letter has not been retained by the Provider. I am extremely disappointed that the Provider has submitted that there was no obligation on the Provider to retain this documentation in 2009, in circumstances where **provision 49** of the **CPC 2006**, had been in effect for some two years from **July 2007**.

A template **Mortgage Form of Authorisation** has been furnished in evidence and details as follows;

“I/we wish to apply for the interest rate indicated below for my/our Mortgage Loan (the “Loan”) upon the expiry of my/our existing rate. (Please Note: If you move out of a fixed rate before the expiry of the fixed rate period, you may be liable to pay a funding sum to the lender. See full conditions overleaf.)

<i>Selected Rate</i>	<i>Description</i>	<i>Rate</i>
<input type="checkbox"/>	<i>Existing Variable LTV Rate PDH</i>	<i>2.700%</i>

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<input type="checkbox"/>	<i>Fixed to 25/07/2011 (PDH)</i>	<i>3.150%</i>
<input type="checkbox"/>	<i>Fixed to 25/07/2012 (PDH)</i>	<i>3.600%</i>

It appears from the evidence submitted that the Complainants did not return the completed MFA and the variable rate of 2.70% was applied to the mortgage loan on **30 October 2009**.

As outlined above the Complainants did not have a contractual or other entitlement to a tracker interest rate on their mortgage loan account and accordingly there was no contractual or other obligation on the Provider to offer the Complainants a tracker interest rate on their mortgage loan account at the end of the fixed interest rate period in **September 2009** or at any other stage. The Complainants were given the option of a tracker interest rate in **October 2006** and did not pursue that option on that occasion.

For the reasons outlined in this Decision, 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.



**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

3 November 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.

